

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

8672

6323 SENATE JUDICIARY

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The listing of property which is subject to forfeiture is similar to that found in federal law, (see 21 U.S.C. §881(a)(1)-(6), as amended in 1979) with the addition of subsection (7), which provides for the forfeiture of firearms which are visible, carried during, or used in furtherance of a violation of this chapter or AS 11.71.

A vehicle used in the commission of an offense involving a controlled substance is subject to forfeiture under subsection (a)(4) only when the offense is a felony. The person, for example, who is arrested for a misdemeanor, such as possession of marijuana while operating a propelled vehicle (sec. 11.71.060(a)(2)) does not face forfeiture of the vehicle involved.

Subsection (a)(4) specifically protects innocent owners of or holders of secured interests in conveyances such as automobiles and airplanes. For example, under subparagraph (a)(4)(A), if an uncle loans his car to his nephew without knowledge that the nephew intends to use the vehicle to violate AS 11.71, and the uncle (owner) did not consent to the illegal use of the vehicle and would not have consented had he known of the intended use of the vehicle for the illegal purpose, the vehicle may not be forfeited under this section. This paragraph also applies to rental car agencies which may innocently rent an automobile to a person who violates AS 11.71. Once the state has met its burden of proving by a preponderance of the evidence that the conveyance was used during or in aid of

a violation of AS 17.30 or 11.71, the burden then shifts to the innocent owner to establish by a preponderance of the evidence that he did not commit the unlawful act and did not consent to or know of the act. Subparagraph (a)(4)(A) thus establishes the right to "remission" by an innocent, non-negligent owner. See the commentary accompanying subsections (n) and (o).

Under subparagraph (a)(4)(B), once the state has proven by a preponderance of the evidence that the conveyance was used during or in aid of a violation of AS 17.30 or 11.71, a person who holds a valid security interest in the conveyance at the time of the seizure must then establish, by a preponderance of the evidence, that he was not a party to the violation, and did not consent to or know of the violation. This subparagraph does not prevent the ultimate forfeiture of the conveyance if the state has met its burden of proof. However, it and other subsections, including (n) and (o), do provide a means by which the secured party can recover his interest in the conveyance.

Subsection (b) sets out the burden of proof applicable to forfeiture proceedings under this chapter. Property may be forfeited after the defendant is convicted of a criminal offense under AS 17.30 or 11.71. Property may also be forfeited in a separate in rem civil proceeding against the property. The Rules of Civil Procedure would apply, and the state, as plaintiff, would be required to prove by a preponderance of the evidence, that

the property was used during or in aid of a violation of AS 17.30 or 11.71.

Forfeiture can take place without regard to the institution or outcome of a criminal proceeding under subsection (c). So long as the state can prove by a preponderance of the evidence that the property was used during or in aid of a violation of one of the applicable chapters, the property can be forfeited.

Subsection (c) specifically provides that a criminal conviction is not a defense in an in rem proceeding brought against the property under this chapter. Federal case law provides that a dismissal of a criminal case is not a bar to an in rem proceeding; United States v. One (1) 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); nor is an acquittal a bar to an in rem proceeding. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972); United States v. Kismetoglu, 476 F.2d 269 (9th Cir. 1973).

Property subject to forfeiture may be seized with or without a court order under subsection (d). Officers may seize property without a court order if: (1) the seizure is made pursuant to a valid search warrant or incident to a valid arrest; (2) the property has been the subject of an earlier judgment in favor of the state; or (3) there are exigent circumstances including probable cause that the property was used, is being used, or is intended for use in violation of AS 11.71 or 17.30, and

the property is easily movable. When it is seized without a court order, property may not be held for more than 48 hours unless an extension is obtained from the court. To obtain a court order, a peace officer must show there is probable cause that the property may be forfeited under (a) of this section.

Once property has been seized or detained, the commissioner of public safety or a local law enforcement agency shall take custody of the property, under subsection (e). Only the court with jurisdiction over the property can cause a subsequent movement of the property out of the agency's custody. The agency with custody of the seized property may seal the property, or remove it to a place which is designated by the court or is otherwise an appropriate location for it.

Subsection (f) provides that the property must be inventoried within 10 days after it is seized, and that the value of any items, other than controlled substances, must be appraised.

Under subsection (g), formal forfeiture proceedings must be instituted within 20 days after seizure, beginning with notification to any persons known to have an interest in the property. Where property has a value of \$500 or more, notice of the forfeiture action is to be published in a local newspaper. Since controlled substances are summarily forfeited to the state under sub-

section (p), these formal proceedings do not apply to such substances.

Subsection (h) requires any person claiming an interest in the property to file an answer within 30 days after service or publication of notice. If no answer is filed, the property is forfeited without further proceedings.

The issue of forfeiture is tried before a judge, without a jury, according to subsection (i). The proceeding may be postponed until after the determination of guilt or innocence on any pending criminal charge against any person or claimant, and without regard to whether an appeal is taken in any criminal proceeding. The burden of proof is set forth in subsection (b), and has been discussed previously.

Under certain circumstances, property may be released prior to the court's decision on forfeiture, under subsections (j)-(l). A party may petition the court for its release. The property can be released only where it will remain subject to the court's jurisdiction and where release is found to be in the best interest of the state or where a bond is posted equal to twice the value of the property. Additionally, the claimant can request sale of the property prior to the decision on forfeiture. This may occur in instances, for example, where the property is perishable. The proceeds of the sale are then treated as the property which is subject to forfeiture.

Once the property is forfeited, the commissioner of administration determines the disposition of the property. Various options are listed under subsection (m): the commissioner may destroy the property, sell it and use the proceeds to cover expenses incident to the forfeiture, use the property to enforce the controlled substances laws, or forward it to the United States Drug Enforcement Administration.

Under subsection (n), a claimant who had a valid, good-faith interest in the property at the time of the illegal use, and who is innocent and ignorant of the illegal use or intended use, and not negligent in lending or leasing his property, can later obtain either the item itself (if he is entitled to it under (a)(4)(A)), the value of his interest, or the item (if he is entitled to it under (a)(4)(B)), if he pays the difference between the value of the property and his interest in it. If the conveyance is forfeited under (a)(4)(B), the state can reimburse the secured party under subsection (n)(2).

Federal statutory and case law has established that only innocent parties, who are ignorant of the illegal use or intended use of the property, and who are non-negligent in lending or leasing their property, can qualify as claimants entitled to "remission" or "remittance." See, e.g., 18 U.S.C. § 3617(b), which codifies case law from the Prohibition Era. "Remission" is a form of "pardon" of the forfeited property. The Laura, 114 U.S.

147, 5 S. Ct. 881 (1885). The burden is upon the claimant to prove by a preponderance of the evidence that he deserves relief under the remission standards. See, e.g., Wilson Motor Co. v. United States, 96 F.2d 29 (9th Cir. 1938); United States v. C.I.T. Corp., 93 F.2d 469 (2d Cir. 1937); United States v. One 1933 Ford V-8 Coach, 14 F. Supp. 243 (E.D. Ill. 1936).

The claimant must secondly prove he had a good faith property interest in the item at the time of the illegal use. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); United States v. One 1936 Model Ford Coach, 58 F. Supp. 802 (M.D. Ga. 1944). Thirdly, the claimant must show he was ignorant of the illegal use or intended use and was not negligent in lending or leasing his property. See, e.g., 18 U.S.C. § 3617(b)(2); One 1941 Ford 1/2 Ton Pickup Truck v. United States, 140 F.2d 255 (6th Cir. 1944); Federal Credit Co. v. United States, 109 F.2d 121 (5th Cir. 1940), reh. den. Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), reh. den. 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148. See also State v. Rice and Cessna Finance Corp., 626 P.2d 104 (Alaska 1981), which establishes a state constitutional right in Alaska of a secured party to protect its interest in forfeiture proceedings under the Fish and Game laws.

Subsection (o) provides that where the conveyance is subject to another's financial interest, the person who

used the conveyance, in violation of any chapter on controlled substances, shall be assessed a fine at least equal to the cost of any lien payment or remittance made by the state to the secured interest, plus the reasonable costs of the seizure. This may include impound costs or special storage costs which may have been incurred, such as refrigeration of perishable chemicals.

Controlled substances, including plants, are summarily forfeited to the state without any formal proceedings under subsections (p) and (q). These subsections do not prevent a law enforcement agency from retaining controlled substances as evidence.

Sec. 17.30.130. JUDICIAL REVIEW.

This section provides for review by the superior court of administrative decisions made under the Controlled Substances Act in accordance with the provisions of the Alaska Administrative Procedure Act (AS 44.62).

Sec. 17.30.140. EDUCATION AND RESEARCH.

This section requires the commissioner of health and social services to encourage education and research in the field of drug abuse, and empowers the commissioner to establish research projects and educational programs.

Sec. 17.30.150. CONFIDENTIALITY.

This section provides that information supplied by the Drug Enforcement Administration of the United States Department of Justice may be presumed to be valid by the Board of Pharmacy when it exercises its regulatory powers under AS 17.30. Additionally, this section prohibits the disclosure of either the names or identities of patients who are participating in drug research programs.

Sec. 17.30.160. DEFINITIONS.

This section provides that the definitions set out in AS 11.71.900 apply to the Controlled Substances Act (AS 17.30).

Section 5. CHAPTER 35. ALASKA THERAPEUTIC RESEARCH ACT.

The purpose of this act is to create an experimental research program for the treatment of some cancer patients and glaucoma patients to permit them to use a capsulized form of the active ingredient found in marijuana, delta-9-tetrahydrocannabinol. See National Institute on Drug Abuse, Research Monograph 31, Marijuana Research Findings: 1980, at 33-36, 199-214. Many states, including New York, California and Washington, have enacted similar legislation permitting the therapeutic use of marijuana for these patients. Stringent guidelines have been established by the Drug Enforcement Administration for the acceptance of a patient, registration of a

practitioner, and the dispensing of THC. At the time of the passage of this legislation in 1982, the Drug Enforcement Administration permitted only the use of federally grown, harvested and prepared THC, in capsule form. It is the intent of this research act to comply fully with all regulations and requirements of the Drug Enforcement Administration, the federal Food and Drug Administration, the National Institute on Drug Abuse, and the National Cancer Institute.

This legislation specifically does not include confiscated marijuana as a source of marijuana for use by patients in this therapeutic research program. One of the main reasons for this decision is a lack of quality control over both the potency and the additives of marijuana which has been confiscated by law enforcement officers. The THC capsules which are produced by the federal government are uniform in potency of THC for each dosage unit.

Sec. 17.35.010. LEGISLATIVE PURPOSE.

The intent of this chapter is to enable cancer patients who are undergoing chemotherapy and radiology to receive marijuana to alleviate nausea associated with chemotherapy and radiology. Glaucoma patients are also eligible for treatment by the use of marijuana. This section establishes that there is a need for further research regarding the use of marijuana under strictly controlled conditions, and this chapter is enacted for that purpose.

Sec. 17.35.020. THERAPEUTIC RESEARCH PROGRAM.

This section establishes the research program within the Board of Pharmacy, and provides that the board shall administer the program. It provides for regulations of federal agencies to be taken into consideration, that only persons suffering from certain diseases and undergoing particular types of treatment are eligible, and that they must be certified by the Patient Qualification Review Committee. Full disclosure of the risks must be made to the patient.

Sec. 17.35.030. PATIENT QUALIFICATION REVIEW COMMITTEE.

This section establishes the Patient Qualification Review Committee and provides for its membership and duties. It provides for confidentiality of persons participating in the program. It also provides for expansion of the program to other disease groups, after approval by the Board of Pharmacy and consistent with applicable federal regulations.

Sec. 17.35.040. SOURCES AND DISTRIBUTION OF MARIJUANA.

This section provides that a patient who is certified to participate in the program may lawfully obtain and possess marijuana, as it is distributed by federal agencies. The definition of marijuana used in this chapter, found in sec. 11.71.900(14), may be too narrow to encompass the form of the active ingredient made

available by the federal government. Thus, language has been incorporated to include marijuana derivatives, or active ingredients, whether natural or synthetic, to ensure that this Act permits the use of the drug in the form in which it is made available by the federal government.

Subsection (b) is intended to ensure that a state agency, the Board of Pharmacy, is not to go into the business of supplying marijuana to certified patients. Instead, it is intended and anticipated that the regulations adopted by the board under this chapter will enable certified patients, as well as the pharmacies or hospitals which supply them, to obtain the marijuana, without going through as much red tape in order to do so.

Sec. 17.35.050. REPORT TO THE GOVERNOR AND LEGISLATURE.

This section provides for the board to make findings and recommendations to the governor and the legislature regarding the effectiveness of the program by March 1, 1984.

Sec. 17.35.060. DEFINITIONS.

This section defines words and phrases used in AS 17.35.

MISCELLANEOUS PROVISIONS  
(Only Substantive Changes are Noted)

Section 15. AS 12.30.040, 5) RELEASE AFTER CONVICTION.

This amendment expands the list of crimes for which a defendant cannot be released on bail after conviction and pending sentencing or appeal to include all unclassified and class A felonies (including Misconduct Involving a Controlled Substance in the First and Second Degrees). In doing so it addresses an equal protection infirmity in the existing statute which limits bail after conviction for some offenders, but not all, who have committed extremely dangerous crimes. See, Walker v. Huston, No. A79-395 Civil, Opinion rendered on record (D. Alaska, May 29, 1980); Griffith v. State, \_\_\_\_\_ P.2d \_\_\_\_\_, Opin. No. 71 (Alaska App. March 4, 1982).

Section 16. AS 12.45.155. LABORATORY REPORT OF CONTROLLED SUBSTANCES.

This section is intended to facilitate criminal trials of persons charged with controlled substances offenses and to diminish the amount of time which expert laboratory analysts, usually chemists, must spend in court. Similar provisions are found in laws of other states. See, e.g., Annotated Code of Maryland, §§10-1001-13; Ohio Revised Code §2925.51; Washington Criminal Rule 6.13(b), effective January 1, 1975, and Justice Court Criminal Rule 4.09, Criminalist's Report, effective January 1, 1975. The section changes the con-

tent of laboratory reports of controlled substances so that more detail is required regarding the controlled substance; the report must be notarized after being signed by the analyst; it must contain information including the duties of the analyst, his education, training and experience for performing an analysis; it must state that scientifically accepted tests were performed with due caution and whether the evidence was handled in accordance with established and accepted procedures within the laboratory.

Procedures are established under this section for service of a copy of the report upon the defendant or his attorney. There is a provision that the accused or his attorney may demand the testimony of the person signing the report, and the procedures for demanding such testimony are set out.

Section 19. Sec. 12.55.155(c). AGGRAVATING FACTORS.

This section adds four aggravating factors to the list included in AS 12.55.155(c) which can be considered at sentencing. The factors are intended to enhance the penalty of a person who engages in illegal acts involving delivery of a controlled substance for financial benefit as part of a commercial enterprise; a person who smuggles controlled substances into the state; a person who is convicted of an offense involving large quantities of controlled substances; or a person involved in the distribu-

tion of a controlled substance which has been adulterated with a toxic substance, making the substance even more dangerous.

Section 20. Sec. 12.55.155(d). MITIGATING FACTORS.

This section adds three mitigating factors to the list included in AS 12.55.155(d) which can be considered at sentencing. Primarily, they involve the converse of the acts or circumstances considered as new aggravating factors: the involvement with small amounts of controlled substances; distribution of a controlled substance, other than a schedule IA substance, to an adult acquaintance for no profit; and possession of any controlled substance for personal use in the defendant's home.

Section 22. Sec. 33.15.190. RELEASE ON PAROLE AND TERMS AND CONDITIONS OF RELEASE.

This section provides that a person who has been convicted of a felony or misdemeanor offense involving a controlled substance, who has been incarcerated, and who is a drug abuser, may not be released on parole unless he has participated in a treatment program for drug abusers, if one is available. As a condition of his parole, he may be required to continue participation in a drug abuse treatment program. This section is an extension of the holding of Rust v. State, 582 P.2d 134 (Alaska 1978), on reh. 584 P.2d 38, which held that a prisoner had a right to treatment for a medical disability while the prisoner

was incarcerated, and Good v. State, 590 P.2d 420 (Alaska 1979), which held that a sentencing judge should recommend to the Division of Corrections that a defendant receive rehabilitative treatment while incarcerated for an offense committed as a result of a drug addiction. This section is applicable where it is shown the defendant has a drug abuse problem and has recognized that he will only be helped if he commits himself to a treatment program. This provision is in no way intended to affect a mandatory sentence, a presumptive sentence, or any other sentence imposed by a judge, and does not confer any right to parole.

**CLASSIFICATION SCHEME AND PENALTIES**  
**UNDER CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 190**

Offense in AS 11.71	IA	IIA	IIIA	IVA	VA	VIA (Marijuana)
Delivery to a Minor (under 19 and 3 years younger than Deliveror)	Unclassified felony	Unclassified felony	Unclassified felony	B felony	B felony	B felony
Continuing Criminal Enterprise	Involving any substance in Schedules IA through VIA; Unclassified Felony					
Delivery, Manufacture or Possession with Intent to Manufacture or Deliver	A felony	B felony	B felony	C felony	C felony	C felony: - one ounce or more A misdemeanor: - one-half ounce or more - less than one-half ounce for remuneration Violation (\$100 fine): - less than one-half ounce (for no remuneration)
Possession on School Grounds by an Adult (18 or over)	B felony	B felony	C felony	C felony	C felony	C felony
Possession	C felony	C felony	C felony: - 25 or more tablets - 3 grams or more A misdemeanor: - less than 25 tablets - less than 3 grams	C felony: - 25 or more tablets - 3 grams or more A misdemeanor: - less than 25 tablets - less than 3 grams	C felony: - 50 or more tablets - 6-grams or more A misdemeanor: - less than 50 tablets - less than 6 grams	C felony: - 1 lb. or more A misdemeanor: - 1/2 lb. or more B misdemeanor: - 4 ozs. or more - Use or display of any amount in public - Possession while operating a vehicle - Possession by Minor (under 19) - Possession of 1 oz. or more in Public, Violation: - Possession of less than 1 oz. in Public (\$100 fine)

**SENTENCES UNDER AS 12.55**

Unclassified Felony - 5-99 yrs/\$75,000  
A Felony - 0-20 years/\$50,000  
2nd offense - 10 years presumptive  
3rd offense - 15 years presumptive  
B Felony - 0-10 years/\$50,000  
2nd offense - 4 years presumptive  
3rd offense - 6 years presumptive  
C Felony - 0-5 years/\$50,000  
2nd offense - 2 years presumptive  
3rd offense - 3 years presumptive  
A Misdemeanor - 0-1 year/\$5,000  
B Misdemeanor - 0-90 days/\$1000  
Violation - \$300 fine  
(Under 11.71 - \$100 fine)

**SCHEDULING EXAMPLES**

Schedule IA - Opium, opiates, heroin, methadone, dilaudid, percodan, demerol  
Schedule IIA - LSD, cocaine, mescaline, PCP, amphetamines, methaqualone  
Schedule IIIA - Barbiturates, hashish  
Schedule IVA - Tranquilizers such as valium and librium; darvon  
Schedule VA - Small amounts of codeine or opium in non-narcotic mixtures having medicinal qualities  
Schedule VIA - Marijuana

CLASSIFICATIONS OF SOME SUBSTANCES  
CONTROLLED IN ALASKA SCHEDULES

SUBSECTION CLASS.	IA	IIA	IIIA	IVA	VA	VIA
Narcotics	Dilaudid (b)(1)(k) Percodan (b)(1)(H) Demerol (c)(47) heroin (d)(11) methadone (c)(39)		specified amounts as free anhydrous base or alkaloid	difenoxin + atropine sulfate	specified amounts combined with 1 or more non-narcotic active medicinal ingredients	
Hallucinogens		DMA, PMA, DET, DMT, LSD, mescaline, peyote, anulogs of PCP, psilocybin, psilocyn	hashish hash oil tetrahydrocannabinols			marijuana
Stimulants		amphetamine methamphetamine ritalin preludin (phen- metrazine)	benzphetamine chlorphentermine clortermine mazindol	diethylpropion phentermine pernoline		
Depressants		Amobarbital Pentobarbital Secobarbital Methaqualone (Quaaludes) PCP Mecloqualone	barbituric acid salts chlorhexadol glutethimide lysergic acid & acid amide methyprylon sulfondiethylmethane	numerous tran- quillizers Valium (b)(7) Librium (b)(4) Tranxene (b)(6) Equanil (b)(13) Serax (b)(16)		
Other		cocaine coca leaves  immediate pre- cursors to amph.; methamph.; & PCP	nalorphine	fenfluramine (c) Darvon (f)(1) talwin (f)(2)	loperamide (c)	

Alaska Criteria

Comparable  
Federal Law  
21 U.S.C. §

- |   |  |
|---|--|
| (1) The actual or probable abuse of the substance, including:   | 811(c) (1)   |
| (A) the history and current pattern of abuse both in this state and in other states;  | 811(c) (4)   |
| (B) the scope, duration, and significance of abuse;   | 811(c) (5)   |
| (C) the degree of actual or probable detriment which may result from abuse of the substance;  |  |
| (D) the probable physical and social impact of widespread abuse of the substance;   | 811(c) (6)   |
| (2) the biomedical hazard of the substance including  |  |
| (A) its pharmacology, the effects and modifiers of the effects of the substance;  | 811(c) (2)   |
| (B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence; | 811(c) (2)<br>811(c) (7)   |
| (C) the risk to public health and the particular susceptibility of segments of the population;  | 811(c) (6)   |
| (3) whether the substance is an immediate precursor of a substance already controlled under this chapter;   | 811(c) (8)   |
| (4) the current state of scientific knowledge regarding the substance, including whether there is an acceptable means to safely use the substance under medical supervision;                      | 811(c) (3)<br>812(b) (1) (C)   |
| (5) the relationship between the use of the substance and other criminal activity, including  | [Sec. Pub. L. 91-513, as amended by Pub. L. 92-13, May 14, 1971; §601(d) (1) (D), at 21 U.S.C. §801, page 170 (19__); re. duties of the Commission on Marihuana and Drug Abuse.] |
| (A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;  |  |
| (B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;   |  |
| (C) whether the commission of other crimes is one of the effects of abuse of the substance;   |  |
| (D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.   |  |

COMPARISON OF ALASKA AND FEDERAL SCHEDULING

OF CONTROLLED SUBSTANCES

New Drug Code Section	Alaska Schedule	Federal Schedule	Federal Law Provision
11.71.140	IA		
(b) substances veg. or chem.		(II)	21 CFR §1308.12(b) (1), (2); (3), +(5).
(c) opiates		(I & II)	21 CFR §1308.11(b) §1308.12(c)
(d) opium derivatives		(I)	21 CFR §1308.11(c)
11.71.150	IIA		
(b) hallucinogens		I	21 CFR §1308.11(d)
(c) cocaine		II	21 CFR §1308.12(b) (4)
(d) depressants except mecloqualone		II	21 CFR §1308.12(e)
(e) stimulants		I	21 CFR §1308.11(e)
(f) immediate precursors		II	21 CFR §1308.12(d)
		(II)	21 CFR §1308.12(f)
11.71.160	IIIA		
(b) stimulants		III	21 CFR §1308.13(b)
(c) depressants		III	21 CFR §1308.13(c)
(d) nalorphine		(III)	21 CFR §1308.13(d)
(e) narcotics & non-narcotics		III	21 CFR §1308.13(e)
(f) hallucinogens		I	21 CFR §1308.11(d) (20) (THC)

New Drug Code Section	Alaska Schedule	Federal Schedule	Federal Law Provision
11.71.170	IVA		
(b) depressants		IV	21 CFR §1308.14 (c)
(c) fenfluramine		IV	21 CFR §1308.14 (d)
(d) stimulants		IV	21 CFR §1308.14 (e)
(e) narcotics & non-narcotics		IV	21 CFR §1308.14 (b)
(f) others		IV	21 CFR §1308.14 (f)
11.71.180	VA		
(b) narcotics & non-narcotics		V	21 CFR §1308.15 (b)
(c) loperamide		V	21 CFR §1308.15 (c)
11.71.190	VIA		
(b) marijuana		I	21 CFR §1308.11 (d) (13)

tion) which is executed for transportation or exportation as required in §§ 1312.18(c) and 1312.27(b) of this chapter.

(c) Except as stated in paragraph (a) of this section, no applicant or registrant is required to use the Administrative Code for Controlled Substances Code for any purpose.

§ 1308.21, Mar. 30, 1973. Redesignated at § 1308.21, Sept. 24, 1973 and amended at § 1318, Apr. 23, 1986]

(1) Submission of information by manufacturers.

(a) Each person who manufactures, packages, repackages, labels, relabels, distributes under his own label any controlled substance (including any compound, salt, or preparation, diagnostic, reagent, buffer, or biological) containing a controlled substance (whether such product is itself controlled or is excepted, exempted, or derived from some or all controls pursuant to § 1308.21-24 or § 1308.31-33) shall submit information required in paragraph (b) of this section for such product being manufactured or sold on July 1, 1972. The information should be submitted by registered mail, return receipt requested,

to the Regulatory Support Section, Attention: Project Label, Drug Enforcement Administration, Department of Justice, Washington, D.C. 20535, by August 31, 1972. In the case of products manufactured after July 1, 1972, or new dosage forms or unit forms manufactured after July 1, 1972, or changes in information required by August 31, 1972, the registrant shall submit the information required in such item within 30 days of the date on which the manufacture commences or information is required to occur. In the case of products, the manufacture of which is discontinued after July 1, 1972, the registrant shall submit notice of such discontinuance within 30 days after the date on which the manufacture ceases. In the case of products the manufacture of which is discontinued before July 1, 1972, the registrant shall still be required to submit a notice of such discontinuance with his initial submission.

(b) Two labels or other documents reflecting the following information shall be submitted with reference to each dosage form or other unit form of each item containing any quantity of any controlled substance:

(1) The trade name, brand name, or other commercial name of the product;

(2) The generic or chemical name and quantity of each active ingredient, including both controlled and noncontrolled substances (if any of this information is a proprietary trade secret, please indicate those portions);

(3) The National Drug Code Number assigned to the product, if any; and

(4) The weight (in metric measure) of each dosage unit or the weight (in metric measure) of the controlled substance per 100 grams of finished product for all items containing any quantity of any narcotic controlled substance in solid dosage forms.

(21 U.S.C. 821 and 871(b))

[38 FR 8254, Mar. 30, 1973. Redesignated at 38 FR 26609, Sept. 24, 1973, and amended at 46 FR 28841, May 29, 1981]

## SCHEDULES

## § 1308.11 Schedule I.

(a) Schedule I shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Opiates*. Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation (for purposes of paragraph (b)(34) only, the term *isomer* includes the optical and geometric isomers):

(1) Acetyl-alpha-methylthioantanyll (N-[(1-(1-methyl-2-phenylethyl)-4-piperidinyl)-N-phenylacetamide].....	9815
(2) Acetylmeperidol.....	9601
(3) Allylprodine.....	9602
(4) Alphacetylmethadol.....	9603
(5) Alphameprodine.....	9604
(6) Alphamethadol.....	9605

(7) Alpha-methylthioantanyll (N-[(1-(alpha-methyl-benzyloxyethyl)-4-piperidinyl) propionamide; 1-(1-methyl-2-phenylethyl)-4-(N-propanido) piperidine].....	9814
(8) Alpha-methylthioantanyll (N-[(1-methyl-2-(2-thienylethyl)-4-piperidinyl)-N-phenylpropanamide].....	9832
(9) Benzethidine.....	9606
(10) Betacetylmethadol.....	9607
(11) Beta-hydroxyantanyll (N-[(1-(2-hydroxy-2-phenylethyl)-4-piperidinyl)-N-phenylpropanamide].....	9830
(12) Beta-hydroxy-3-methylthioantanyll (N-[(1-(2-hydroxy-2-phenylethyl)-3-methyl-4-piperidinyl)-N-phenylpropanamide].....	9831
(13) Belamprodone.....	9608
(14) Belamethadol.....	9609
(15) Belaprodine.....	9611
(16) Clonazepam.....	9612
(17) Dextromoramide.....	9613
(18) Diamprone.....	9615
(19) Diethylthiambutene.....	9616
(20) Difenoxin.....	9188
(21) Dimenoxadol.....	9617
(22) Dimethylthiambutene.....	9618
(23) Dimethylthiambutene.....	9619
(24) Dioxaphetyl butyrate.....	9621
(25) Dipipanone.....	9622
(26) Ethylmethylthioantanyll (N-[(1-(2-phenylethyl)-4-piperidinyl)-N-phenylpropanamide].....	9823
(27) Etioxyline.....	9624
(28) Etioverine.....	9625
(29) Furethidine.....	9626
(30) Hydroxypethidine.....	9627
(31) Ketobemidone.....	9628
(32) Levomoramide.....	9629
(33) Levophenacylmorphan.....	9631
(34) 3-Methylthioantanyll (N-[(3-methyl-1-(2-phenylethyl)-4-piperidinyl)-N-phenylpropanamide].....	9813
(35) 3-methylthioantanyll (N-[(3-methyl-1-(2-thienylethyl)-4-piperidinyl)-N-phenylpropanamide].....	9833
(36) Morphine.....	9632
(37) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine).....	9661
(38) Noracetylmethadol.....	9633
(39) Norlevorphanol.....	9634
(40) Normethadone.....	9635
(41) Norpipanone.....	9635
(42) Para-fluorolantanyll (N-[(4-fluorophenyl)-N-[(1-(2-phenylethyl)-4-piperidinyl) propanamide].....	9812
(43) PEPAP (1-(1-(2-phenylethyl)-4-phenyl-4-azetoxypiperidine).....	9663
(44) Phensedoxone.....	9637
(45) Phenampromide.....	9638
(46) Phenomorphan.....	9647
(47) Phenopendine.....	9641
(48) Pintramide.....	9642
(49) Proheptazine.....	9643
(50) Propendine.....	9644
(51) Propiram.....	9649
(52) Racemoramide.....	9645
(53) Thioantanyll (N-phenyl-N-[(1-(2-thienylethyl)-4-piperidinyl) propanamide].....	9835
(54) Tididine.....	9750
(55) Trimeperidine.....	9646

(c) *Opium derivatives*. Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.....	9319
(2) Acetyl dihydrocodeine.....	9051
(3) Benzylmorphine.....	9052
(4) Codeine methylbromide.....	9070
(5) Codeine-N-Oxide.....	9053
(6) Cyrenorphine.....	9054
(7) Desomorphine.....	9055
(8) Dihydrogenorphine.....	9145
(9) Drolobanol.....	9335
(10) Etorphine (except hydrochloride salt).....	9056
(11) Heroin.....	9200
(12) Hydromorphinol.....	9301
(13) Methyl desorphine.....	9302
(14) Methyl dihydromorphine.....	9304
(15) Morphine methylbromide.....	9305
(16) Morphine methylsulfonate.....	9306
(17) Morphine-N-Oxide.....	9307
(18) Myrophine.....	9308
(19) Nicocodine.....	9309
(20) Nicomorphine.....	9312
(21) Normorphine.....	9313
(22) Pholcodine.....	9314
(23) Thebacoil.....	9315

Some trade and other names: 7-Ethyl-6,8,8,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido [1', 2':1,2] azepino [5,4-b] indole; Tabernanthe iboga

(13) Lysergic acid diethylamide.....	7315
(14) Marijuana.....	7360
(15) Mescaline.....	7381
(16) Parahexyl—7374; some trade or other names: 3-Hoxy-1-hydroxy-7,8,9,10-tetrahydro-6,6,5-L-methyl-5H-dibenzol[b,d]pyran; Synhexyl.....	
(17) Peyote.....	7415

Meaning all parts of the plant presently classified botanically as *Lophophora williamsi* Lemare, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts

(Interprets 21 USC 812(c), Schedule I(c) (12))

(18) N-ethyl-3-piperidyl benzilate.....	7482
(19) N-methyl-3-piperidyl benzilate.....	7484
(20) Psilocybin.....	7437
(21) Psilocylin.....	7438
(22) Tetrahydrocannabinols.....	7370

(d) **Hallucinogenic substances.** Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxy amphetamine.....	7391
Some trade or other names: 4-bromo-2,5-dimethoxy- $\alpha$ -methylphenethylamine; 4-bromo-2,5-DMA	
(2) 2,5-dimethoxyamphetamine.....	7396
Some trade or other names: 2,5-dimethoxy- $\alpha$ -methylphenethylamine; 2,5-DMA	
(3) 4-methoxyamphetamine.....	7411
Some trade or other names: 4-methoxy- $\alpha$ -methylphenethylamine; paramethoxyamphetamine, PMA	
(4) 5-methoxy-3,4-methylenedioxy-amphetamine.....	7401
(5) 4-methyl-2,5-dimethoxy-amphetamine.....	7395
Some trade and other names: 4-methyl-2,5-dimethoxy- $\alpha$ -methylphenethylamine; "DOM"; and "STP"	
(6) 3,4-methylenedioxy amphetamine.....	7400
(7) 3,4-methylenedioxymethylamphetamine (MDMA).....	7405
(8) 3,4,5-trimethoxy amphetamine.....	7396
(9) Bufotenine.....	7433
Some trade and other names: 3-( $\beta$ -Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappone	
(10) Diethyltryptamine.....	7434
Some trade and other names: N,N-Diethyltryptamine; DET	
(11) Dimethyltryptamine.....	7435
Some trade or other names: DMT	
(12) Ibogaine.....	7260

Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of *Cannabis*, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

$\Delta^1$  cis or trans tetrahydrocannabinol, and their optical isomers

$\Delta^8$  cis or trans tetrahydrocannabinol, and their optical isomers

$\Delta^9$  cis or trans tetrahydrocannabinol, and its optical isomers

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(23) Ethylamine analog of phencyclidine.....	7455
Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl)ethylamine, N-(1-phenylcyclohexyl)ethylamine, cyclohexamine, PCE	
(24) Pyrrolidine analog of phencyclidine.....	7458
Some trade or other names: 1-(1-phenylcyclohexyl)pyrrolidine, PCPy, PHP	
(25) Thiophene analog of phencyclidine.....	7470
Some trade or other names: 1-[1-(2-thienyl)cyclohexyl]piperidine, 2-thienylanalog of phencyclidine, TPCP, TCP	

(e) **Depressants.** Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Mecloqualone.....	2572
(2) Methaqualone.....	2565

Trade and other names: 7-Ethyl-8,9,10,12,13-octahydro-2-methoxy-6,9-no-5H-pyrido [1, 2',1,2] azepino [5,4-b] Tabernanthe iboga

PC acid diethylamide..... 7315

..... 7360

..... 7381

..... 7374; some trade or other names: 3-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-2,6-dipyrrol; Synhexyl..... 7415

all parts of the plant presently classified solely as *Lophophora williamsii* Lemara, or growing or not, the seeds thereof, any part from any part of such plant, and every kind, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its

is 21 USC 812(c), Schedule I(c) (12))

..... 7482

..... 7484

..... 7437

..... 7438

..... 7370

equivalents of the substances contained in plant, or in the resinous extractives of the, sp. and/or synthetic substances, doses, and their isomers with similar chemical and pharmacological activity such as following:

or trans tetrahydrocannabinol, and their isomers

or trans tetrahydrocannabinol, and their isomers

is or trans tetrahydrocannabinol, and its isomers

nomenclature of these substances is not nationally standardized, compounds of these names, regardless of numerical designation of positions covered.)

mine analog of phencyclidine..... 7455

Trade or other names: N-ethyl-1-phenylcyclohexane, (1-phenylcyclohexyl)ethylamine, N-(1-cyclohexyl)ethylamine, cyclohexamine, PCE

dine analog of phencyclidine..... 7458

Trade or other names: 1-(1-phenylcyclohexyl)-dine, PCPy, PHP

ene analog of ..... 7470

Trade or other names: 1-(2-thienyl)-cyclo-pipendine

..... analog of phencyclidine

PCP, TC

(f) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

- (1) Fenethylline..... 1503
- (2) N-ethylamphetamine..... 1475

(g) *Temporary listing of substances subject to emergency scheduling.* Any material, compound, mixture or preparation which contains any quantity of the following substances:

- (1) N-[1-benzyl-4-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers..... 9818
- (2) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thienylfentanyl), its optical isomers, salts and salts of isomers..... 9834
- (3) 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA)..... 7404
- (4) N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA)..... 7402
- (5) 4-methylaminorex (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline)..... 1590

[39 FR 22141, June 20, 1974]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 1308.11, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.12 Schedule II.

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

(b) Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding apomorphine, dextrorphan, nalbuphine, nalmeferene, naloxone, and naltrexone, and their respective salts, but including the following:

- (1) Raw opium..... 9600
- (2) Opium extracts..... 9610
- (3) Opium fluid..... 9620
- (4) Powdered opium..... 9630
- (5) Granulated opium..... 9640
- (6) Tincture of opium..... 9630
- (7) Codeine..... 9050
- (8) Ethylmorphine..... 9190
- (9) Etorphine hydrochloride..... 9059
- (10) Hydrocodone..... 9193
- (11) Hydromorphone..... 9150
- (12) Meperon..... 9260
- (13) Morphine..... 9300
- (14) Oxycodone..... 9143
- (15) Oxymorphone..... 9652
- (16) Thebaine..... 9333

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b) (1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy), 9670.

(c) *Opiates.* Unless specifically excepted or unless in another schedule any of the following opiates, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

Unless specifically listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers, whenever the existence of such isomers, and salts of isomers is possible within the specific chemical designation:

- ..... 2572
- ..... 2565

nation, dextrophan and levopropoxyphene excepted:

(1) Alfentanil.....	9737
(2) Alphaprodine.....	9010
(3) Anilidine.....	9020
(4) Bezitramide.....	9800
(5) Bulk dextropropoxyphene (non-dosage forms).....	9273
(6) Dihydrocodeine.....	9120
(7) Diphenoxylate.....	9170
(8) Fentanyl.....	9801
(9) Isomethadone.....	9236
(10) Levomethorphan.....	9210
(11) Levorphanol.....	9220
(12) Metazocine.....	9240
(13) Methadone.....	9250
(14) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane.....	9254
(15) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenylpropano-carboxylic acid.....	9802
(16) Pethidine (mependine).....	9230
(17) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.....	9232
(18) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.....	9233
(19) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.....	9234
(20) Phenazocine.....	8715
(21) Pimodine.....	9730
(22) Racemethorphan.....	9732
(23) Racemorphan.....	9733
(24) Sufentanil.....	9740

(d) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.....	1100
(2) Methamphetamine, its salts, isomers, and salts of its isomers.....	1105
(3) Phenmetrazine and its salts.....	1631
(4) Methylphenidate.....	1724

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital.....	2125
(2) Pentobarbital.....	2270
(3) Phencyclidine.....	7471
(4) Secobarbital.....	2315

(f) *Hallucinogenic substances.*

- (1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product..... 7369  
[Some other names for dronabinol: (8a*R*-*trans*-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pyridyl-8H-dibenzo[*b,d*]pyran-1-yl, or (-)-delta-9-(*trans*)-tetrahydrocannabinol]
- (2) Nabilone..... 7379  
(Another name for nabilone: (±)-*trans*-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[*b,d*]pyran-9-one]

(g) *Immediate precursors.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

- (i) Phenylacetone..... 8501  
Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone;

(2) Immediate precursors to phencyclidine (PCP):

- (i) 1-phenylcyclohexylamine..... 7460
- (ii) 1-piperidinocyclohexanecarbonitrile (PCC)..... 8603

[39 FR 22142, June 20, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1308.12, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.15 Schedule III.

(a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence

**hallucinogenic substances.**

ol (synthetic) in sesame oil and encapsu-  
a soft gelatin capsule in a U.S. Food and  
Administration approved drug product..... 7389  
Other names for dronabinol: (6*R*,*R*-*trans*-  
8,10*a*-tetrahydro-6,6,9-trimethyl-3-pentyl-  
benzo[*b,d*]pyran-1-ol, or (-)-delta-9-  
-tetrahydrocannabinol]..... 7379  
Other name for nabiline: (±)-*trans*-3-(1,1-di-  
tylheptyl)-6,8*a*,7,8,10,10*a*-hexahydro-1-  
oxy-6,6-dimethyl-9*H*-dibenzo[*b,d*]pyran-9-  
].....

**Immediate precursors.** Unless  
specially excepted or unless listed in  
another schedule, any material, com-  
pound, mixture, or preparation which  
contains any quantity of the following  
substances:  
Immediate precursor to amphetam-  
ine and methamphetamine:

acetone..... 8591  
Other trade or other names: phenyl-2-propanone;  
phenyl methyl ketone; methyl benzyl  
ketone;

**Immediate precursors to phenacyl-  
(PCP):**

cyclohexylamine..... 7460  
dicyclohexanecarbonitrile (PCC)..... 8603

22142, June 20, 1974]

**REMARKS:** NOTE FOR FEDERAL REGISTER CL-  
assifying § 1308.12, see the List of  
Actions Affected in the Finding Aids  
of this volume.

**3 Schedule III.**

Schedule III shall consist of the  
and other substances, by what-  
ever official name, common or usual  
chemical name, or brand name  
designated, listed in this section. Each  
drug or substance has been assigned  
a DEA Controlled Substances Code  
number set forth opposite it.

**Stimulants.** Unless specifically  
excepted or unless listed in another  
schedule, any material, compound,  
mixture, or preparation which con-  
tains any quantity of the following  
substances having a stimulant effect  
on the central nervous system, includ-  
ing salts, isomers (whether optical,  
geometric, or geometric), and salts of  
isomers whenever the existence

of such salts, isomers, and salts of iso-  
mers is possible within the specific  
chemical designation:

- (1) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances listed in schedule II which compounds, mixtures, or preparations were listed on August 25, 1971, as excepted compounds under § 308.32, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances..... 1405
- (2) Benzphetamine..... 1228
- (3) Chlorphentermine..... 1645
- (4) Clortermine..... 1347
- (5) Phendimetrazine..... 1815

(c) **Depressants.** Unless specifically  
excepted or unless listed in another  
schedule, any material, compound,  
mixture, or preparation which con-  
tains any quantity of the following  
substances having a depressant effect  
on the central nervous system:

- (1) Any compound, mixture or preparation containing:
    - (i) Amobarbital..... 2128
    - (ii) Secobarbital..... 2318
    - (iii) Pentobarbital..... 2271
 or any salt thereof and one or more other active medicinal ingredients which are not listed in any schedule.
  - (2) Any suppository dosage form containing:
    - (i) Amobarbital..... 2128
    - (ii) Secobarbital..... 2318
    - (iii) Pentobarbital..... 2271
 or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository.
  - (3) Any substance which contains any quantity of a derivative of barbituric acid or any salt thereof..... 2100
  - (4) Chlormexadol..... 2510
  - (5) Glutethimide..... 2550
  - (6) Lysergic acid..... 7300
  - (7) Lysergic acid amide..... 7310
  - (8) Methyprylon..... 2575
  - (9) Sulfondiethylmethane..... 2600
  - (10) Sulfonethylmethane..... 2605
  - (11) Sulfonmethane..... 2610
  - (12) Tiletamine and zolazepam or any salt thereof..... 7295
- Some trade or other names for a tiletamine-zolazepam combination product:  
TelaZol.....  
Some trade or other names for tiletamine:  
2-(ethylamino)-2-(2-phenyl)-cyclohexanone.....  
Some trade or other names for zolazepam:  
4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-[3,4-*e*] [1,4]-diazepin-7(1*H*)-one, fluprazepam.....

(d) Nalorphine 9400.  
(e) **Narcotic Drugs.** Unless specifically  
excepted or unless listed in another  
schedule, any material, compound,  
mixture, or preparation containing  
any of the following narcotic drugs, or  
their salts calculated as the free anhy-

drous base or alkaloid, in limited quan-  
tities as set forth below:

- (1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium..... 9803
- (2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts..... 9804
- (3) Not more than 300 milligrams of dihydrocodemone (hydrocodone) per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium..... 9805
- (4) Not more than 300 milligrams of dihydrocodeinone (hydrocodone) per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts..... 9806
- (5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts..... 9807
- (6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts..... 9808
- (7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts..... 9809
- (8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts..... 9810

[39 FR 22142, June 20, 1974, as amended at 41 FR 43401, Oct. 1, 1976; 43 FR 3359, Jan. 25, 1978; 44 FR 40888, July 13, 1979; 46 FR 52334, Oct. 27, 1981; 51 FR 5320, Feb. 13, 1986; 52 FR 2222, Jan. 21, 1987; 52 FR 5952, Feb. 27, 1987]

§ 1308.14 Schedule IV.

(a) Schedule IV shall consist of the  
drugs and other substances, by what-  
ever official name, common or usual  
name, chemical name, or brand name  
designated, listed in this section. Each  
drug or substance has been assigned  
the DEA Controlled Substances Code  
Number set forth opposite it.

(b) **Narcotic drugs.** Unless specifical-  
ly excepted or unless listed in another  
schedule, any material, compound,  
mixture, or preparation containing  
any of the following narcotic drugs, or  
their salts calculated as the free anhy-  
drous base or alkaloid, in limited quan-  
tities as set forth below:

- (1) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit..... 9167

(2) Dextropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane)..... 9278

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Alprazolam.....	2882
(2) Barbitol.....	2145
(3) Bromazepam.....	2748
(4) Camazepam.....	2749
(5) Chloral betane.....	2460
(6) Chloral hydrate.....	2465
(7) Chloridazepoxide.....	2744
(8) Clonazepam.....	2751
(9) Clonazepam.....	2737
(10) Clonazepam.....	2768
(11) Clonazepam.....	2752
(12) Cloxazolam.....	2753
(13) Delorazepam.....	2754
(14) Diazepam.....	2765
(15) Estazolam.....	2756
(16) Ethchlorvynol.....	2540
(17) Ethinamate.....	2545
(18) Ethyl loflazepam.....	2758
(19) Fludiazepam.....	2759
(20) Flunitrazepam.....	2763
(21) Flurazepam.....	2767
(22) Halazepam.....	2762
(23) Haloxazolam.....	2771
(24) Ketazolam.....	2772
(25) Loprazolam.....	2773
(26) Lorazepam.....	2885
(27) Lormetazepam.....	2774
(28) Mebutamate.....	2800
(29) Medazepam.....	2636
(30) Meorobamate.....	2820
(31) Methohexital.....	2264
(32) Methylphenobarbital (mephobarbital).....	2250
(33) Midazolam.....	2884
(34) Nimetazepam.....	2837
(35) Nitrazepam.....	2834
(36) Nordiazepam.....	2838
(37) Oxazepam.....	2835
(38) Oxazolam.....	2839
(39) Paraldehyde.....	2585
(40) Petrichloral.....	2591
(41) Phenobarbital.....	2285
(42) Pinazepam.....	2883
(43) Prazepam.....	2764
(44) Quazepam.....	2881
(45) Temazepam.....	2925
(46) Tetrazepam.....	2886
(47) Triazolam.....	2887

(d) *Fenfluramine.* Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of

such salts, isomers, and salts of isomers is possible:

(1) Fenfluramine..... 1670

(e) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

(1) Diethylpropion.....	161C
(2) Mazindol.....	16C5
(3) Pemoline (including organometallic complexes and chelates thereof).....	1530
(4) Phentermine.....	1640
(5) Pipradrol.....	1750
(6) SPA ((-)-1-dimethylamino-1,2-diphenylethane).....	1635

(f) *Other substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

(1) Pentazocine..... 9709

[39 FR 22143, June 20, 1974]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 1308.14, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.15 Schedule V.

(a) Schedule V shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) *Narcotic drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs and their salts, as set forth below:

(1) Buprenorphine..... 9064

(c) Narcotic drugs containing non-narcotic active medicinal ingredients. Any compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculat-

salts, isomers, and salts of isomers possible:

Amphetamine..... 1670

**Stimulants.** Unless specifically excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

Propylhexedrine..... 1610  
 Pseudoephedrine..... 1605  
 Ephedrine (including organometallic complexes and salts thereof)..... 1530  
 Mephedrone..... 1540  
 Mephedrone..... 1750  
 (1-(1-dimethylamino-1,2-diphenylethane)..... 1635

**Other substances.** Unless specifically excluded or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

Cocaine..... 9709

22143, June 20, 1974]

**FORMAL NOTE:** For FEDERAL REGISTER citations affecting § 1308.14, see the List of Sections Affected in the Finding Aids of this volume.

**15 Schedule V.**

Schedule V shall consist of the following substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section:

**Narcotic drugs.** Unless specifically excluded or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts, as set forth below:

Morphine..... 9064

Narcotic drugs containing non-narcotic active medicinal ingredients, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated

as the free anhydrous base or alkaloid, in limited quantities as set forth below, which shall include one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by narcotic drugs alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

(6) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

[39 FR 22143, June 20, 1974, as amended at 43 FR 38383, Aug. 28, 1978; 44 FR 40868, July 13, 1979; 47 FR 49841, Nov. 3, 1982; 50 FR 81108, Feb. 28, 1985; 52 FR 5952, Feb. 27, 1987]

**EXCLUDED NONNARCOTIC SUBSTANCES**

§ 1308.21 Application for exclusion of a nonnarcotic substance.

(a) Any person seeking to have any nonnarcotic substance which may be sold under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301), be lawfully sold over the counter without a prescription, excluded from any schedule, pursuant to section 201(g) (1) of the Act (21 U.S.C. 811 (g) (1)), may apply to the Administrator, Drug Enforcement Administration, Department of Justice, Washington, D.C. 20537.

(b) An application for an exclusion under this section shall contain the following information:

- (1) The name and address of the applicant;
- (2) The name of the substance for which exclusion is sought; and

(3) The complete quantitative composition of the substance.

(c) Within a reasonable period of time after the receipt of an application for an exclusion under this section, the Administrator shall notify the applicant of his acceptance or non-acceptance of his application, and if not accepted, the reason therefore. The Administrator need not accept an application for filing if any of the requirements prescribed in paragraph (b) of this section is lacking or is not set forth as to be readily understood. If the applicant desires, he may amend the application to meet the requirements of paragraph (b) of this section. If the application is accepted for filing, the Administrator shall issue and publish in the FEDERAL REGISTER his order on the application, which shall include a reference to the legal authority under which the order is issued and the findings of fact and conclusions of law upon which the order is based. This order shall specify the date on which it shall take effect. The Administrator shall permit any interested person to file written comments on or objections to the order within 60 days of the date of publication of his order in the FEDERAL REGISTER. If any such comments or objections raise significant issues regarding any finding of fact or conclusion of law upon which the order is based, the Administrator shall immediately suspend the effectiveness of the order until he may reconsider the application in light of the comments and objections filed. Thereafter, the Administrator shall reinstate, revoke, or amend his original order as he determines appropriate.

(d) The Administrator may at any time revoke any exclusion granted pursuant to section 201(g) of the Act (21 U.S.C. 811(g)) by following the procedures set forth in paragraph (c) of this section for handling an application for an exclusion which has been accepted for filing.

§ 1308.22 Excluded substances.

The following nonnarcotic substances which may, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301), be lawfully sold over the

FEDERAL BUREAU OF INVESTIGATION

Effect of amendments. — The 1986 amendment deleted "or AS 17.35" following "AS 17.30" in the introductory language of subsection (a).

**Sec. 11.71.070. Misconduct involving a controlled substance in the seventh degree.** (a) Except as authorized in AS 17.30, a person commits the offense of misconduct involving a controlled substance in the seventh degree if the person

(1) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one-half ounce of a schedule VIA controlled substance; or

(2) possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of less than one ounce containing a schedule VIA controlled substance on a public street or sidewalk or on the premises of a public carrier or business establishment or in any other public place.

(b) Misconduct involving a controlled substance in the seventh degree is a violation and is punishable as authorized in AS 12.55, except that if a fine is imposed it shall not be more than \$100. (§ 2 ch 45 SLA 1982; am § 12 ch 146 SLA 1986)

Effect of amendments. — The 1986 amendment deleted "or AS 17.35" following "AS 17.30" in the introductory language of subsection (a).

**Sec. 11.71.080. Aggregate weight of live marijuana plants.**

NOTES TO DECISIONS

Applicability of definition. — The definition in this section did not apply where the marijuana was already dried and processed. *Gibson v. State*, Ct. App. Op. No. 621 (File No. A-917), 719 P.2d 687 (1986).

Article 2. Standards and Schedules.

Section 120. Authority to schedule controlled substances	Section 160. Schedule IIIA 180. Schedule VA
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**Sec. 11.71.120. Authority to schedule controlled substances.**

(a) If, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 — 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.

(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

(c) In advising the governor of the need to add, delete, or reschedule a substance under AS 11.71.110(1), the committee shall assess the

danger or probable danger of the substance after considering the following:

(1) the actual or probable abuse of the substance including (A) the history and current pattern of abuse both in this state and in other states;

(B) the scope, duration, and significance of abuse;

(C) the degree of actual or probable detriment which may result from abuse of the substance;

(D) the probable physical and social impact of widespread abuse of the substance;

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;

(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;

(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;

(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;

(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;

(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;

(C) whether the commission of other crimes is one of the effects of abuse of the substance;

(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

(d) [Repealed. § 40 ch 6 SLA 1984.]

(e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080. (§ 2 ch 45 SLA 1982; am § 40 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment repealed former subsection (d), relating to a precursor of an immediate precursor. For statement of the purpose of the 1984 repeal of subsection (d) of this section, see the 1984 House Journal at p. 2287, in the paragraph captioned "Section 40."

Legislative history reports. — For

## Sec. 11.71.150. Schedule IIA.

## NOTES TO DECISIONS

Cited in *Williams v. State*, Ct. App. Op. No. 749 (File Nos. A-1783, A-1807), 743 P.2d 397 (1987).

Sec. 11.71.160. Schedule IIIA. (a) A substance shall be placed in schedule IIIA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public less than the substances listed in schedule IIA but higher than substances listed in schedule IVA.

(b) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers whether optical, position, or geometric, and salts of these isomers whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) benzphetamine;
- (2) chlorphentermine;
- (3) clortermine;
- (4) mazindol;
- (5) phendimetrazine;

(6) any compound, mixture, or preparation in dosage unit form containing any stimulant substance listed in schedule IIA, which compound, mixture, or preparation was listed on August 25, 1971, as an excepted compound under 21 C.F.R. § 1308.32, and any other drug of the quantitative composition shown in that list for those substances, or which is the same except that it contains a lesser quantity of any controlled substance.

(c) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) amobarbital, secobarbital, or pentobarbital or any salt of these substances, combined with one or more other active medicinal ingredients which are not listed in any other schedule;

(2) amobarbital, secobarbital, or pentobarbital or any salt of these substances, approved by the Federal Food and Drug Administration for marketing only as a suppository;

(3) any substance which contains any quantity of a derivative of barbituric acid or any salt of barbituric acid;

- (4) chlorhexadol;
- (5) glutethimide;
- (6) lysergic acid;

- (7) lysergic acid amide;
- (8) methyprylon;
- (9) sulfondiethylmethane;
- (10) sulfonethylmethane;
- (11) sulfonmethane.

(e) Schedule IIIA includes, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts calculated as the free anhydrous base or alkaloid, in the following quantities:

(1) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(3) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(5) not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(6) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(8) not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(f) Schedule IIIA includes

- (1) hashish;
- (2) hash oil or hashish oil; and
- (3) tetrahydrocannabinols. (§ 2 ch 45 S.L.A. 1982)

Editor's notes. — This section is set out to correct an error in enactment.

**Sec. 11.71.180. Schedule VA.** (a) A substance shall be placed in schedule VA if it is found under AS 11.71.120(c) to have a degree of danger or probable danger to a person or the public which is less than substances listed in schedule IVA, but higher than substances listed in schedule VIA.

(b) Schedule VA includes any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs or their salts, calculated as the free anhydrous base or alkaloid, in limited quantities as specified in (1) — (6) of this subsection, which includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by schedule IA substances alone:

(1) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(2) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(3) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(4) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) not more than 100 milligrams of opium per 100 milliliters or per 100 grams;

(6) not more than 0.5 milligrams of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(c) [Repealed. § 1 ch 66 SLA 1987.] (§ 2 ch 45 SLA 1982; am § 1 ch 66 SLA 1987)

Effect of amendments. — The 1987 amendment deleted subsection (c), which read "Schedule VA includes loperamide."

### Article 3. Miscellaneous Provisions.

#### Section 305. Rehabilitation

**Sec. 11.71.305. Rehabilitation.** A person convicted of violating a provision of this chapter may, when the violation relates to that person's own personal use of a controlled substance, be committed to the custody of the Department of Corrections for rehabilitative treatment for not to exceed one year. Such treatment may be imposed in place of a fine or imprisonment, but only where the imprisonment would not have exceeded one year. (§ 2 ch 45 SLA 1982; am E.O. No. 55, § 2 (1984))

Effect of amendments. — The 1984 "Health and Social Services" in the first amendment substituted "Corrections" for "sentence."

### Article 4. Definitions.

#### Section 900. Definitions

**Sec. 11.71.900. Definitions.** In this chapter, unless the context clearly requires otherwise,

(1) "administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means into the body of a patient or research subject by

(A) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

(B) the patient or research subject at the direction and in the presence of a practitioner;

(2) "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser, but does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman;

(3) "committee" means the Controlled Substances Advisory Committee established in AS 11.71.100;

(4) "controlled substance" means a drug, substance, or immediate precursor included in the schedules set out in AS 11.71.140 — 11.71.190;

(5) "counterfeit substance" means a controlled substance which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance and which falsely purports or is represented to be the product of, or to have been distributed by, the other manufacturer, distributor, or dispenser;

(6) "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship;

(7) "dispense" means to deliver a controlled substance to an ultimate user or research subject by or under the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery; "dispenser" means a practitioner who dispenses;

(8) "distribute" means to deliver other than by administering or dispensing a controlled substance, whether or not there is any money or other item of value exchanged; it includes sale, gift, or exchange; "distributor" means a person who distributes;

(9) "drug"

(A) means

(i) a substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to these publications;

(ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(iii) a substance, other than food, intended to affect the structure or any function of the body of humans or animals; and

(iv) a substance intended for use as a component of any article specified in (i), (ii), or (iii) of this subparagraph;

(B) does not include a device or its components, parts, or accessories;

(10) "hashish" means the dried, compressed, resinous product of the plant (genus) *Cannabis*;

(11) "hashish oil" means the viscous liquid concentrate of tetrahydrocannabinols extracted from the plant (genus) *Cannabis*;

(12) "immediate precursor" means a substance which is by statute or regulation designated as the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture of that controlled substance;

(13) "manufacture"

(A) means the production, preparation, propagation, compounding, conversion, growing, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; however, the growing of marijuana for personal use is not manufacturing;

(B) includes the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance or its container unless done in conformity with applicable federal law

(i) by a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(ii) by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

(14) "marijuana" means the seeds, and leaves, buds, and flowers of the plant (genus) *Cannabis*, whether growing or not; it does not include the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol; it does not include the stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mix-

ture, or preparation of the stalks, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination;

(15) "opiate" means

(A) a substance having an addiction-forming or addiction-sustaining capability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining capability; and

(B) includes its racemic and levorotatory forms; but

(C) does not include the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan);

(16) "opium poppy" means the plant of any species of *Papaver* containing the phenanthrine alkaloids of opium, except its seeds;

(17) "peyote" means any part of the plant classified botanically as *Lophophora Williamsii* Lemaire, whether growing or not, the seeds of the plant, any extract from any part of the plant, and a compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or extracts, including mescaline;

(18) "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing;

(19) "practitioner" means

(A) a physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in the state;

(B) a pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in the state;

(20) "sale" means to sell, barter, exchange, give, or dispose of to another, or an exchange for a thing of value;

(21) "schedule IA controlled substance" means a controlled substance included in the schedule in AS 11.71.140;

(22) "schedule IIA controlled substance" means a controlled substance included in the schedule in AS 11.71.150;

(23) "schedule IIIA controlled substance" means a controlled substance included in the schedule in AS 11.71.160;

(24) "schedule IVA controlled substance" means a controlled substance included in the schedule in AS 11.71.170;

(25) "schedule VA controlled substance" means a controlled substance included in the schedule in AS 11.71.180;

(26) "schedule VIA controlled substance" means a controlled substance included in the schedule in AS 11.71.190;

(27) "ultimate user" means a person who lawfully possesses a controlled substance for the person's own use or for the use of a member of the person's household or for administering to an animal owned by the

person or by a member of the person's household. (§ 2 ch 45 SLA 1982; am § 41 ch 6 SLA 1984)

**Effect of amendments.** — The 1984 amendment in paragraph (16), deleted "unless specifically designated as controlled under AS 11.71.120" following "in-

clude" in subparagraph (C) and made a series of technical changes in subparagraphs (A) and (B).

NOTES TO DECISIONS

**Purpose of definition of marijuana.** — The definition of marijuana in this section is for the purpose of determining whether or not a person could be charged with marijuana possession or delivery, but has nothing to do with determining aggregate weight. *Gibson v. State, Ct.*

App. Op. No. 621 (File No. A-917), 719 P.2d 687 (1986).

Applied in *Stuart v. State, Ct. App. Op. No. 461 (File No. A-276), 698 P.2d 1218 (1985); State v. Resek, Ct. App. Op. No. 573 (File Nos. A-591, A-631, A-680), 706 P.2d 706 (1985).*

**Chapter 73. Imitation Controlled Substances Act.**

**Sec. 11.73.010. Manufacture or delivery of an imitation controlled substance.**

NOTES TO DECISIONS

Applied in *Morrow v. State, Ct. App. Op. No. 499 (File No. A-510), 704 P.2d 226 (1985).*

**Sec. 11.73.099. Definitions.**

NOTES TO DECISIONS

This section, as interpreted, was not unconstitutionally vague. — See *Mor-*

*row v. State, Ct. App. Op. No. 499 (File No. A-510), 704 P.2d 226 (1985).*

**Chapter 76. Miscellaneous Offenses.**

**Section 105. Selling or giving tobacco to a minor**  
105. Purchase of tobacco by a minor

**Section 130. Interference with rights of disabled person**

**Sec. 11.76.100. Selling or giving tobacco to a minor.** (a) A person commits the offense of selling or giving tobacco to a minor if the person is 19 years of age or older and

- (1) knowingly sells, exchanges, or gives a cigarette, a cigar, tobacco, or a product containing tobacco to a person under 19 years of age; or
- (2) maintains a vending machine that dispenses cigarettes, cigars, tobacco, or products containing tobacco and that is accessible to persons under 19 years of age.

(b) Notwithstanding the provisions of (a) of this section, a person who maintains a vending machine is not in violation of (a)(2) of this section if

(1) the vending machine is in a location that is generally supervised by a person who maintains the vending machine, or an employee of the person, during the hours the machine is accessible;

(2) the vending machine is in a location where a person under 31 years of age, other than an employee of the owner of the premises, is not allowed entry by law unless accompanied by a parent, guardian, or spouse of the person who is 21 years of age or older; or

(3) the vending machine is in a location where a person under 19 years of age is not allowed entry by policy of the owner of the premises unless accompanied by a person 15 years of age or older.

(c) In this section, a person maintains a vending machine if the person owns the machine or owns or controls a facility in which the machine is located.

(d) Selling or giving tobacco to a minor is a violation. (§ 9 ch 166 SLA 1978; am § 2 ch 125 SLA 1988)

**Effect of amendments.** — The 1988 amendment rewrote this section to the extent that a detailed comparison is impracticable.

**Sec. 11.76.105. Purchase of tobacco by a minor.** (a) A person under 19 years of age may not purchase a cigarette, a cigar, tobacco, or a product containing tobacco in this state.

(b) Purchase of tobacco by a minor is a violation. (§ 3 ch 125 SLA 1988)

**Cross references.** — For statement of SLA 1988 in the Temporary and Special legislative purpose, see sec. 1, ch. 125, Acts.

**Sec. 11.76.130. Interference with rights of disabled person.** (a) A person commits the crime of interference with the rights of a disabled person if the person intentionally prevents or restricts

(1) a physically or mentally disabled person from having full and free pedestrian use of a street, highway, sidewalk, walkway, or other thoroughfare, to the same extent that any other person has a right to pedestrian use; or

(2) a physically disabled person from being accompanied or assisted by a certified service animal, without an extra charge for the service animal, in a common carrier, place of public accommodation, or other place to which the general public is invited, except as provided in (b) of this section.

(b) A physically disabled person who is accompanied or assisted by a certified service animal in a common carrier, place of public accommodation, or other place to which the general public is invited, is liable for property damage done by the animal.

Model Penal Code § 1.07(3) (Proposed Official Draft 1962).

I assume Judge Coats would recognize this principle as well since he says:

In this case the prosecution could have avoided any double jeopardy problems by charging the tampering offense before Williams was tried for murder. At least then Williams could have moved to consolidate the trial so that he would not be tried twice on essentially the same evidence.

*State v. Williams*, 704 P.2d at 222. I assume the converse would be true as well and that if the charges had been initially joined and Williams had moved for a severance, Judge Coats would find further prosecution permissible. See *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (plurality opinion: A defendant waives double jeopardy challenge to successive prosecution if charges originally joined and he successfully obtains a severance). While first-degree murder and tampering with evidence were not joined in a single charging document against Williams, the prosecution did seek to have the jury which considered the homicide charges also consider the tampering with evidence charges as a lesser-included offense, and Williams objected. Judge Rowland sustained Williams' objection and would not instruct on the charges subsequently brought against Williams. Despite the fact that all parties agreed at the time that tampering was not a lesser-included offense,<sup>4</sup> Williams' refusal to allow his first jury to consider these charges substantially undercuts his current claim that re-prosecution subjected him to unconstitutional harassment and mental suffering. I do not understand Williams' objection to have been based on a contention that time constraints made him unable to meet the tampering charge at his first trial. Nevertheless, the protection of the double jeopardy clause may be waived but it cannot be forfeited. See *Lemon v. State*, 654 P.2d 277, 280 (Alaska App.1982). While a per-

4. I assume tampering and murder in context address different societal concerns and there-

fore the former is not a lesser of the latter even under the cognate theory. suasive argument could be made that Williams waived the protection of the double jeopardy clause by objecting to jury instructions on hindering prosecution at his first trial on the basis of *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), the state has not made that argument either here or in the court below, and the trial court has not passed on it. It would be inappropriate to recognize it *sua sponte* in this appeal. I therefore join in the decision affirming Judge Moody's dismissal of the indictment against Williams.



Jo Ann MORROW, Appellant,

v.

STATE of Alaska, Appellee.

No. A-510.

Court of Appeals of Alaska.

Aug. 9, 1985.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Thomas B. Stewart, J., of possession with intent to deliver an imitation controlled substance, and she appealed. The Court of Appeals, Coats, J., held that: (1) juvenile informant's credibility was adequately supported, and thus, search warrant affidavit was not inadequate on that ground; (2) affidavit in support of search warrant was not based on stale information; (3) there was sufficient nexus between defendant's residence and items to be searched; (4) police had authority to seize telephone list which had on it informant's name and telephone number; (5) preliminary laboratory report that a substance which defendant was charged with

fore the former is not a lesser of the latter even under the cognate theory.

possessing contained ephedrine and caffeine was properly admitted into evidence; (6) imitation controlled substances statute was not unconstitutionally overbroad or vague; and (7) remand was necessary to determine whether defendant's conviction should stand in light of construction of statute under which she was convicted.

Case remanded.

#### 1. Drugs and Narcotics ⇨188

Juvenile who told police officer she had obtained pills from defendant, and that defendant told her the pills were "speed" and instructed her to sell each pill for one dollar, was sufficiently credible to support issuance of a search warrant for defendant's home.

#### 2. Drugs and Narcotics ⇨188

Magistrate who issued search warrant for defendant's home properly concluded that information on which search warrant was based was not stale, despite fact that informant's alleged transaction with defendant had occurred seven to nine days prior to issuance of warrant, where affidavit stated that money had been turned over to defendant within last few days, and that defendant had represented to informant that if informant sold all of the substances defendant could obtain more.

#### 3. Drugs and Narcotics ⇨188

Fact that juvenile informant indicated she obtained pills from defendant while defendant was in her car did not mean there was no nexus between defendant's residence and items to be searched for; rather, magistrate properly concluded from continuing contact between informant and defendant that defendant was engaged in ongoing business, and could logically assume that some of drugs would be stored at defendant's residence, establishing probable cause to search defendant's residence.

#### 4. Criminal Law ⇨394.4(13)

Fact that defendant had juvenile's name and telephone number on list in her purse showed her connection to juvenile and corroborated juvenile's story to police

that defendant had given her pills which were allegedly speed and had instructed juvenile to sell each pill for one dollar, giving police authority to seize the list; thus, trial judge properly refused to suppress use of the list as evidence.

#### 5. Indictment and Information ⇨10.2(8)

Preliminary laboratory report that substance which defendant was charged with possessing contained ephedrine and caffeine gave grand jury sufficient information to properly find that substance which defendant possessed fell within imitation controlled substances statute, AS 11.73.010(a), where police officer who introduced the report gave grand jury background information about chemist who performed the test, including fact she had testified as an expert in other drug cases, where police officer testified that he field-tested the suspected drugs and found that they were not amphetamines, and where chemist's testimony at trial was essentially the same as the preliminary report.

#### 6. Constitutional Law ⇨90.1(1), 91 Drugs and Narcotics ⇨43

Imitation controlled substances statute, AS 11.73.010(a), regulates conduct, the possession and sale of certain specified drugs, not speech or association, and thus is not overbroad. Const. Art. 1, § 7.

#### 7. Drugs and Narcotics ⇨43

Statute prohibiting manufacture, delivery, or possession with intent to deliver an imitation controlled substance, AS 11.73.010(a), could be interpreted to apply to situations involving an intentional misrepresentation that an imitation drug is a controlled drug, and thus, the statute is not vague. Const. Art. 1, § 7.

#### 8. Drugs and Narcotics ⇨43

Imitation controlled substances statute, AS 11.73.010(a), is not unconstitutionally vague on grounds of arbitrary enforcement. Const. Art. 1, § 7.

#### 9. Criminal Law ⇨1181.5(1)

Defendant's conviction for possession with intent to deliver an imitation controlled substance would be remanded in

light of Court of Appeals' construction of statute under which she was convicted. AS 11.73.010(a); Const. Art. 1, § 7.

Carl E. Forsberg, Birch, Horton, Bittner, Pestinger and Anderson, Anchorage, for appellant.

John A. Scukanec, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

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

#### OPINION

COATS, Judge.

On December 1, 1983, the mother of a sixteen-year-old juvenile, M.W., contacted Alaska State Trooper Geoffrey Engleman. M.W.'s mother informed Trooper Engleman that she believed her daughter was dealing drugs. Later that day, Trooper Engleman and another officer met with M.W.'s mother at her residence. There, she informed them that she had discovered plastic bags containing pills in M.W.'s purse. An officer then searched M.W.'s purse and discovered six plastic bags containing different colored pills.

Subsequently, Trooper Engleman interviewed M.W. At that time, M.W. informed the trooper that seven to nine days previously, Jo Ann Morrow had supplied her with 300 pills. She had obtained them from Morrow while in Morrow's car. At that time, Morrow told M.W. the pills were "speed" and instructed M.W. to sell each pill for \$1.00. Morrow told M.W. she would receive 1/3 of the money from the sales and if M.W. ran out of pills, Morrow could supply more. M.W. also stated that she had sold some of the pills and had given Morrow \$39 and Morrow had returned \$12 or \$14 to M.W. on November 30, 1983, as commission on the sales.

Trooper Engleman had the pills field-tested and determined that they were not "speed." However, because of their appearance, they could pass for "speed" on the street. Subsequent laboratory tests

disclosed that the pills contained caffeine and ephedrine.

Based on the information provided by M.W., and his own familiarity with "fake controlled substances," Trooper Engleman obtained a search warrant for Morrow's residence. The warrant authorized a search of the residence for: drugs which appeared to be amphetamine based; written records of the ordering of such drugs; and magazines or books from which such drugs could be ordered. A search of the residence on December 1, 1983, resulted in the seizure of: approximately 5,000 tablets and capsules, similar to those obtained from M.W.; brochures advertising diet pills and stimulants; various items of drug paraphernalia; and from Morrow's purse, a list of names and telephone numbers, including M.W.'s.

On December 6, 1983, a grand jury returned a two-count indictment charging Morrow with delivery of an imitation controlled substance to a minor and possession of an imitation controlled substance with intent to deliver. AS 11.73.030(a); AS 11.73.010(a). On March 10, 1984, a jury returned a verdict of guilty on the possession with intent to deliver charge only.

Morrow now appeals, raising the following issues: (1) that the trial court erred by denying her motion to suppress evidence because the search warrant for her residence was not supported by probable cause; (2) that the trial court erred in denying her motion to dismiss the indictment because hearsay evidence was presented to the grand jury in the form of a "telex" preliminary lab report; and (3) that AS 11.73.099, the statute defining "imitation controlled substances," is unconstitutional.

#### SEARCH WARRANT ISSUES

The standard of review regarding a magistrate's determination of probable cause was enunciated in *Rosa v. State*, 633 P.2d 1027, (Alaska App.1981), where this court said:

In reviewing a magistrate's determination of probable cause this court must

give great deference to the magistrate's decision and must resolve doubtful or marginal cases largely by the preference to be accorded warrants.... "The Fourth Amendment's requirements are practical and not abstract, and affidavits 'must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion....'" The burden of proof on questions pertaining to the sufficiency of the affidavit is on the defendant. [Citations and footnotes omitted.]

*Id.* at 1029-30, quoting *State v. Davenport*, 510 P.2d 78, 82 n. 8 (Alaska 1973). With these standards in mind, the question to be asked is "whether the issuing judge [or magistrate] was provided sufficient evidence to make an independent finding of probable cause" to issue a warrant. *Lockwood v. State*, 591 P.2d 969, 970 (Alaska 1979), quoting *Davis v. State*, 499 P.2d 1025, 1028 (Alaska 1972), *rev'd on other grounds*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Morrow argues that the affidavit in support of the search warrant was inadequate because there was no indication that M.W. was a credible informant. *See Kralick v. State*, 647 P.2d 1120, 1124-25 (Alaska App. 1982). Morrow argues that the affidavit does not make any allegation that M.W. had given reliable information in the past and the police did not conduct an independent investigation to corroborate her statements. Morrow also contends that this warrant is defective for the same reasons we articulated in *Jones v. State*, 681 P.2d 364 (Alaska App.1984). In *Jones* we held that an affidavit in support of a search warrant by a police detective was not sufficient where the detective relied on a report by a juvenile informant that he witnessed a sale of one-half gram of cocaine at Casey Jones's apartment. The juvenile also stated that he had been to the apartment several times when "he or his companions have purchased cocaine from Jones in the last few months." *Id.* at 365. The juvenile also pointed out an apartment which was confirmed by another police officer to be Jones's apartment. In noting that the

hearsay statement of the juvenile informant was not sufficient to support the warrant, we stated:

Moreover, B.V.'s statements that he had observed a friend purchase cocaine and that he had been to Jones's apartment ten to fifteen times when "he or his companions" had purchased cocaine do not qualify as the kind of declarations against penal interest which a court could find inherently credible. It is not a crime to be present when someone else is purchasing cocaine even though that someone else is a friend; nor would vague admissions about past purchases of cocaine support a criminal prosecution in the absence of evidence establishing a *corpus delicti* for a specific purchase. More significantly, the affidavit does not explain the circumstances under which B.V.'s statement was made. If B.V. was being prosecuted by juvenile authorities for drug transactions unrelated to Casey Jones, he would hardly view his statement that he had purchased cocaine in the past from Jones as increasing his exposure to criminal sanctions.

*Id.* at 365.

[1] We see the situation in this case as significantly different from that in *Jones*. M.W. had the imitation drugs in her possession and apparently believed that she was confessing to the police that she had been selling amphetamines. There was every reason for the magistrate to credit her story as a declaration against interest. 1 W. LaFave, *Search and Seizure*, § 3.3(c) (1978). We conclude that M.W.'s credibility was adequately supported.

Morrow next argues that the affidavit in support of the warrant did not establish probable cause because it was based on stale information. She argues this is true because M.W.'s alleged transaction with Morrow had occurred seven to nine days prior to the issuance of the warrant.

In *Snyder v. State*, 661 P.2d 638, 647 (Alaska App.1983), this court said:

The question of whether the information contained in the affidavit was "stale"

depends on an evaluation of the circumstances related by the affidavit and the length of time between the issuance of the search warrant and the time of the most recent incriminating activity described in the affidavit.

In evaluating "staleness," this court has chosen to evaluate the following four factors: (1) the type of crime; (2) the nature of the items sought; (3) the extent of the suspect's opportunity for concealment; and (4) normal inferences as to where a criminal would be likely to hide incriminating articles. *Id.* at 648.

[2] It appears that the magistrate could have properly concluded the information was not stale because the affidavit evidenced ongoing criminal activity. *See, e.g.,* 1 W. LaFave, *Search and Seizure* § 3.7(a), at 683-87 (1978); *State v. Ogden*, 391 So.2d 434 (La.1980) (probable cause found despite fact that drug sale took place five days prior to the issuance of the warrant where the informant's statements indicated continuous activity and drug transactions, supporting an inference that a continuing supply of cocaine would be available). On the present facts, the affidavit stated that although the actual capsules and tablets were obtained from Morrow seven to nine days previously, money had been turned over to Morrow "within the last few days." Also, Morrow had represented to M.W. that if M.W. "sold out" of the substances, Morrow could readily obtain more. We conclude that the magistrate could properly find that there was probable cause that Morrow was still in possession of the imitation drugs and related material.

[3] Next Morrow argues that because M.W. indicated she obtained the pills from Morrow while Morrow was in her car, there was no nexus between Morrow's residence and the items to be searched for.

In *Snyder*, 661 P.2d at 645, we said:

Probable cause to search requires sufficient information to permit the conclusion that criminal activity or evidence of crime will be found at the place to be searched. Put another way, there must

be a "nexus" between the place to be searched, criminal activity, and the items sought. 1 W. LaFave, *Search and Seizure* § 3.7(d), at 704 (1978).

*See also State v. Gutman*, 670 P.2d 1166 (Alaska App.1983). We believe that the magistrate could properly conclude from the continuing contacts between M.W. and Morrow that Morrow was engaged in an ongoing business and it is logical to assume that some of the drugs would be stored at her residence. We conclude there was probable cause to search Morrow's residence.

[4] Morrow next contends that the police should not have been permitted to seize the telephone list which had on it M.W.'s name and telephone number along with several other names and telephone numbers. Morrow concedes the police could search her purse to find the list, but argues that the incriminating nature of the list was not immediately apparent and therefore the police had no authority to seize it. We disagree. The fact that Morrow had M.W.'s name and telephone number on a list in her purse showed her connection to M.W. and corroborated M.W.'s version of the relationship. It was also probable that the other names and telephone numbers on the list were connected with Morrow's distribution of imitation controlled substances. We conclude the police had authority to seize the list and that the trial judge did not err in refusing to suppress the use of the list as evidence.

#### GRAND JURY

[5] Morrow argues that the indictment should have been dismissed since the state proved by means of a preliminary laboratory report that the substance which she was charged with possessing contained ephedrine and caffeine. Morrow claims that introduction of this report was inadmissible hearsay for which there was no compelling justification. Alaska R.Crim.P. 6(r). Morrow recognizes that in *McKinon v. State*, 526 P.2d 18 (Alaska 1974), the supreme court permitted the state to introduce the results of a laboratory report de-

spite the fact that the report was hearsay. Morrow specifically objects to the fact that the report presented to the grand jury was a telex which read: "Preliminary screening indicates presence of ephedrine and caffeine. Final report will be mailed upon completion of analysis." She argues that the situation in her case is more similar to that described by the supreme court in *Meller v. State*, 581 P.2d 669, 673-74 (Alaska 1978), where the court disapproved of introducing at grand jury the hearsay conclusion of handwriting experts. In *Meller* the court concluded that the grand jury was given insufficient information to evaluate the credibility of the experts and their methods. However in Morrow's case, Trooper Engleman, who introduced the report, did give the grand jury background information about the chemist who performed the test. He indicated that the chemist, Suzanne Feller, was a state chemist that he was personally acquainted with and that she had testified as an expert in other drug cases. Trooper Engleman also testified that he field-tested the suspected drugs and found they were not amphetamines. We also note that Suzanne Feller's testimony at trial was apparently essentially the same as her preliminary report, so it appears that we do not have a situation where later tests were inconsistent with the preliminary one. We conclude that under these circumstances the grand jury had sufficient information to evaluate Suzanne Feller's hearsay testimony and that the grand jury could properly find that the substances which Morrow possessed fell within the imitation controlled substances statute.

#### VAGUENESS AND OVERBREADTH

Morrow next challenges the statute under which she was convicted as being unconstitutionally overbroad and vague. U.S. Const. amend. XIV and Alaska Const. art. 1 § 7. Morrow was convicted of possession of imitation controlled substances with the intent to deliver in violation of AS 11.73.010(a). That statute provides in part that "a person may not manufacture, deliver, or possess with intent to deliver, an

imitation controlled substance." The definition of "imitation controlled substances" is found in AS 11.73.099(3) which provides:

(3) "imitation controlled substance" means a substance containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudoephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline, lidocaine, procaine, tetracaine, dyclonine, acetaminophen, salicylamide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or pryrilamine, or their salts, that is not a controlled substance, and that by dosage unit appearance (including color, shape, size, and markings) or by representations would lead a reasonable person to believe that the substance is a controlled substance; the term "representations", as used in this paragraph, includes

(A) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;

(B) statements made to the recipient that the substance may be resold for inordinate profit;

(C) whether the substance is packaged in a manner normally used for controlled substances;

(D) evasive tactics or actions used by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(E) the storage, packaging, presentation, display of or reference to a controlled substance with, near, or in connection with the activity involving the imitation controlled substance. [Emphasis provided.]

Morrow points out that this statute could reach some conduct which it is unlikely that the statute was intended to cover. Morrow proposes a hypothetical where someone, without any intent to deceive, gives caffeine diet pills, which are available as non-prescription medicine, to someone indicating that the pills are "as effective for weight loss as any prescription medicine." The state recognizes that the stat-

ute could be construed to reach conduct, such as that described by Morrow, which it is unlikely that the legislature intended to prohibit in promulgating the statute. The state urges us to interpret the statutory language defining an "imitation controlled substance" in such a manner that the meaning of the statute will be more clear to avoid any vagueness problems. As AS 11.73.099(3) now reads in part, an "imitation controlled substance" is a substance containing specific chemical components which "by dosage unit appearance . . . or by representations would lead a reasonable person to believe that the substance is a controlled substance." [Emphasis provided.] The state asks us to read the "or" in AS 11.73.099(3) as "and" in construing the statute. The state argues that as so construed, the statute would not reach innocent behavior.

In *Summers v. Anchorage*, 589 P.2d 863, 866-67 (Alaska 1979), the supreme court set out three factors which must be considered in determining whether a statute is unconstitutionally vague:

First, a statute may not be so imprecisely drawn and overbroad that it "chills" the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statutory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of its prohibitions. [Footnotes omitted.]

[6] The first question we need to answer is whether the statute is overbroad. The overbreadth doctrine was described in *Marks v. Anchorage*, 500 P.2d 644, 646 (Alaska 1972):

The overbreadth doctrine has evolved to give adequate breathing room to specific first amendment freedoms; a statute violates the doctrine when constitutionally-protected conduct as well as conduct

1. It appears to us that it may be argued that

which the state can legitimately regulate are included within the ambit of the statute's prohibition. [Footnote omitted.]

The statute in question regulates conduct, the possession and sale of certain specific drugs, not speech or association. See *Summers v. Anchorage*, 589 P.2d at 867; *McKenzie v. Anchorage*, 631 P.2d 514, 516-17 (Alaska App., 1981). We therefore conclude that the statute is not overbroad.

[7] The next question which we need to answer is whether the statute gives "adequate notice of the conduct that is prohibited." The state has conceded that the statute does have vagueness problems in this area and has asked us to construe the statute. In *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974), the supreme court stated the doctrine which allows a court to construe a statute which is vague on its face in such a way as to avoid constitutional vagueness problems:

A statute in its broad contours may be subject to criticism for failure to give adequate notice as to all types of conduct which are punishable, but, when not involved with the "overbreadth" problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [Footnotes omitted.]

In this case the state contends Morrow possessed certain imitation drugs with the intent to deliver those drugs. The state alleges that Morrow knew that the drugs were imitation drugs but intended to deliver them while intentionally misrepresenting that the imitation drugs were controlled drugs. Certainly the conduct which the state alleges is clearly covered by the statute. We believe that the statute can be interpreted by us to apply to those situations involving an intentional misrepresentation that an imitation drug is a controlled drug. As so interpreted we believe that the statute is not vague.<sup>1</sup>

certain other conduct falls within the statute.

[8] The third factor which we are to consider is the statute's potential for arbitrary enforcement. The record of this case does not reflect a history of arbitrary or selective enforcement of this statute. See *Summers v. Anchorage*, 589 P.2d at 868. We also do not find that the language of the ordinance is so vague that arbitrary enforcement is likely. See *Brown v. Anchorage*, 584 P.2d 35 (Alaska 1978). We therefore do not invalidate the ordinance for vagueness on this ground. We conclude that the statute, as interpreted, is not unconstitutionally vague.

[9] The state asks us to affirm Morrow's conviction even though the state concedes that the jury instructions which were given in the trial below vary from the interpretation of the imitation controlled drug statute which the state has argued on appeal. The state contends that it is clear that Morrow's defense did not turn on the particular jury instructions which were given in her trial and which might be modified in response to her vagueness claim. See *Stock v. State*, 526 P.2d at 11-12. Morrow did not file a reply brief and therefore has not responded to the state's argument that the statute can be construed so that it is not vague or whether, if the statute is so construed, Morrow's conviction should be affirmed. Furthermore, we have before us only a minimal record to decide this case, which does not include a transcript of the trial. We therefore do not decide whether Morrow has any claim that her conviction was improper because of a claim that might arise out of our post-trial construction of the statute. We remand the case to the trial court to determine whether Morrow's conviction should stand in light of our construction of the statute under which she was convicted.<sup>2</sup>

This case is REMANDED for proceedings not inconsistent with this opinion.

An example of conduct which might fall within the statute would be a person who delivers an imitation drug honestly believing that the imitation drug is a controlled substance. However, the case before us does not present this ques-

Michael E. ALLEY, Appellant,

v.

STATE of Alaska, Appellee.

No. A-368.

Court of Appeals of Alaska.

Aug. 9, 1985.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., of forgery in the third degree and misconduct involving a controlled substance in the fourth degree and sentenced to 90 days' imprisonment for forgery and four years with all but 90 days suspended for misconduct involving a controlled substance. Defendant appealed. The Court of Appeals, Singleton, J., held that: (1) Alaska constitutional law does not preclude trial on a greater offense where the two offenses are charged together and an intervening plea to the lesser offense or mistrial on greater offense precludes state from having a jury pass on greater offense; (2) multiple punishment for a greater offense and a lesser included offense violates Alaska constitutional law; and (3) defendant violated but one societal interest by his two offenses, regulation of availability of dangerous drugs, and thus, only one conviction and punishment were authorized.

Remanded in part with instructions, affirmed in part.

#### 1. Criminal Law $\S$ 199

Alaska constitutional law does not preclude trial on a greater offense after con-

tion, and this matter has not been briefed on appeal. We reserve ruling on this issue.

#### 2. We retain jurisdiction of this appeal.

STATE OF ALASKA  
1989 LEGISLATIVE SESSION

BILL VERSION: SB 158  
PUBLISH DATE: 2/3/89

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Amending the controlled and  
imitation controlled substance laws  
Sponsor: Rules Committee  
Requestor: Governor

Agency Affected: Public Safety  
BRU: Alaska State Troopers  
Component: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

This bill revises the State's controlled substance laws. Any fiscal impact is expected to be small, and can be absorbed within the existing budget.

Prepared by: Gayle A. Horetski, Deputy Commissioner  
Division: Office of the Commissioner

Phone: 465-4322  
Date: 1/23/89

Approved by Commissioner: Don H. English  
Agency: Department of Public Safety

Date: 1-23-89

**S B**

**159**

February 2, 1998

Bill Parker  
Department of Corrections

Re: CS for SB 159 (Judiciary)

Dear Bill:

We have virtually no secretarial help today (60% sick), so I apologize for printing this directly from my computer. I thought I should point out some differences between the governor's bill, Chenoweth's draft CS, and the CS enclosed.

In the governor's bill (HB 417), we sought to immunize both the release and supervision of people in state custody, except in situations of gross negligence. This immunity would apply regardless of whether the release or the particular supervision is mandatory or discretionary.

In the Chenoweth draft CS for SB 159 (Judiciary), the only thing being partly immunized is mandatory, non-discretionary release. Under the terms of (a), there is no immunity for any type of discretionary release, and there is no mention of immunity for any kind of supervision. What limited immunity is provided by (a) is further reduced by (b), which says the bill does not immunize negligent release to parole, probation, furlough, or work release; negligent supervision for parole, probation, furlough, or work release; or gross negligence. (It is certainly questionable in my mind why the negligent supervision exception exists in (b), in light of the fact that the immunity provided in (a) does not even refer to supervision, only release.)

The CS I have drafted takes a middle course. It would immunize the release and supervision of anyone whose release was mandatory and not discretionary. The focus is on the nature of the release, regardless of whether discretion is involved in setting up any post-release supervision. In the event a prisoner whose release is mandatory is put on parole, probation, furlough, or work release, the post-release conditions would be immune under this draft (except for gross negligence). On the other hand, this bill does not affect actions regarding the release or the supervision of people whose release is discretionary.

There are several other options possible, involving different combinations of the release/supervision, mandatory/discretionary factors. Please let me know if you want another alternative drafted. Thanks for putting up with this very informal memo.

*[Handwritten signature]*

Enc.

DRAFT LANGUAGE FOR CS

BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 159 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to liability for release and supervision of persons in state custody; and providing for an effective date."

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

\* Section 1. AS 09.50 is amended by adding a new section to read:

Sec. 09.50.255. IMMUNITY; PERSONS IN STATE CUSTODY. (a) Except as provided in (b) of this section, the state, its employees, and state contractors and their employees are immune from liability for negligence in release and supervision of a person from confinement under state custody if the person's release is required by operation of law or is not the result of an exercise of discretion by a state official, employee, board, or commission.

(b) This section does not affect the liability of the state, its employees, and state contractors and their employees for gross negligence in the supervision of a person in state custody.

(c) In this section,

(1) "confinement" means detention, incarceration, hospitalization, involuntary restraint, or similar restriction of movement;

(2) "gross negligence" means reckless disregard for the safety of individual, identifiable victims.

\* Sec. 2. This Act takes effect immediately under AS 01.10.070.

Original sponsor(s): Rules/Governor

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 159 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to liability for release and super-  
7 vision of persons in state custody; and providing for  
8 an effective date."

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

10 \* Section 1. AS 09.50 is amended by adding a new section to read:

11 Sec. 09.50.255. IMMUNITY; PERSONS IN STATE CUSTODY. (a) Except  
12 as provided in (b) of this section, the state, its employees, and  
13 state contractors and their employees are immune from liability for  
14 negligence in the release of a person from confinement under state  
15 custody and the post-release supervision of the person if the person's  
16 release is required by operation of law or is not the result of an  
17 exercise of discretion by a state official, employee, board, or com-  
18 mission.

19 (b) This section does not affect the liability of the state, its  
20 employees, and state contractors and their employees for gross negli-  
21 gence in the supervision of a person on parole, probation, furlough,  
22 or work release.

23 (c) In this section,

24 (1) "confinement" means detention, hospitalization, invol-  
25 untary restraint, or similar restriction of movement;

26 (2) "gross negligence" means reckless disregard for the  
27 safety of individual, identifiable victims.

28 \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).  
29

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Chenoweth  
1/27/90

Original sponsor(s): RULES/GOVERNOR

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 159 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

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16 not the result of an exercise of discretion by a state official,  
17 employee, board, or commission.

18 (b) This section does not affect the liability of the state, its  
19 employees, and state contractors and their employees

20 (1) for negligence in the release of a person from confine-  
21 ment under state custody to parole, probation, furlough, or work  
22 release or for negligence in supervision of a person on parole, pro-  
23 bation, furlough, or work release; or

24 (2) for gross negligence.

25 (c) In this section,

26 (1) "confinement" means detention, hospitalization, invol-  
27 untary restraint, or similar restriction of movement;

28 (2) "gross negligence" means reckless disregard for the  
29 safety of individual, identifiable victims.

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\* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

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Negligent Supervision of Offenders

**"SPECIAL RELATIONSHIPS" ARE KEYS TO LIABILITY - BUT WHEN DO THEY EXIST?**

Lawsuits brought by victims of crimes committed by offenders under some form of community supervision which claim negligent supervision by agency personnel are *potentially* the single greatest liability threat facing community programs today. If courts entertain such claims (and not all courts do), their cost in both monetary terms and in terms of public support far exceeds any liabilities costs created by violations of rights of offenders.

But the law in this area is far from clear. Confusion comes from mixing state court tort law and various immunity concepts. To demonstrate the variation, take the following short quiz, and identify the cases in which liability, or at least a duty leading to potential liability, was found.

A CLR QUIZ:  
**Negligent Supervision**

1. Maud Sterling was driving a motorcycle when struck by a car driven by a probationer, Bloom. At the time of the accident, Bloom's blood alcohol level was .23.

Bloom was on probation for a driving under the influence conviction and had two prior DUI convictions. The plaintiff claimed probation officials allowed Bloom to violate several probation conditions involving driving, and had failed to initiate revocation proceedings despite several failures or refusals by Bloom to comply with the conditions. The plaintiff claimed that had the officials revoked the probation instead of negligently allowing Bloom to remain free, the accident would not have occurred.

2. Newcomer, on probation following an armed robbery conviction, while driving drunk, hit the car in which the five-year old plaintiff was riding, rendering her a quadriplegic. Newcomer had been through one revocation hearing for two drunk driving incidents, but was reinstated.

Within a month of the reinstatement, Newcomer picked up convictions for DWI and a driving with a suspended license but the probation officer didn't report these to the original convicting court. Two later convictions (one involving discharging a firearm) also weren't reported by the officer.

The plaintiff alleged negligence on the basis of the officer's failure to request a revocation in light of the numerous violations of the original probation.

3. Mason was paroled after serving time for arson and grand larceny. Allegedly, parole officials had knowledge of Mason's mental instability, a general reputation for arson, sexual aberrations, recidivist behavior and other violent antisocial tendencies.

While on parole, Mason was convicted of defrauding an innkeeper, he drank to excess, and made improper sexual advances on women. Plaintiffs claimed the defendants suspected Mason of another arson.

The innkeeper conviction led to a warning from the parole officer, but no revocation. Less than a week later, Mason set fire to a woman's house, abducted, raped and set on fire another woman, and

shot and stabbed a third woman. The three women sued.

4. The parolee, Nukapigak, had a history of violence associated with drinking bouts. His institution record contained more than one comment from staff expressing concern about the danger Nukapigak posed to the community.

Nukapigak was paroled to a remote village in Alaska on general conditions. No alcohol related conditions were imposed. Policy required a parole plan to be prepared by the institution and approved by the parole officer, but this wasn't done in this case. Also contrary to policy, the Board did not receive relevant information about Nukapigak from the institution prior to parole. Although both the prison counselor and the parole officer had the power to impose additional conditions of parole, neither exercised this power because neither realized they had the power.

No parole officer was assigned to the village where Nukapigak went and he reported by mail. No official in the village knew Nukapigak was on parole or anything about his background. After several months of apparently successful parole, Nukapigak's marriage began to break down, he began to drink heavily, and within a couple of weeks of these problems beginning, he killed three people.

**ANSWERS**

1. Liability. The probation officer owed a duty to the motorists and the facts, if proven, would be sufficient to establish negligence and liability, *Sterling v. Bloom*, 723 P.2d 755 (Idaho, 1986).

2. No liability. The probation officer owed no duty to the public and hence there could be no liability, *Lamb v. Hopkins*, 492 A.2d 1297 (Md., 1985).

3. No liability. Defendants had no duty to protect the victims since they had no "control" over Mason. *Fox v. Custis*, 372 S.E.2d 373 (Va., 1986).

See SUPERVISION, p. 8

**SUPERVISION, from p. 7**

4. Liability. The state had a duty to control Nukapigak and a duty to protect foreseeable victims from him, even where the "foreseeable" victims cannot be identified before they are victimized. Under the specific facts of this case, there may also have been a duty to warn the community of the parolee's presence. *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska, 1986).

(If you answered all four questions correctly, you may skip the rest of this article. Otherwise, read on.)

It doesn't take a legal genius to see the inconsistency in these cases. Indeed, it may take a legal genius, splitting hairs too fine to be seen by the human eye, to find the consistencies in them.

The question of when, if at all, persons victimized by an offender under supervision may sue the supervising officer or agency is being addressed frequently by courts: While the same fundamental legal principles typically are applied in these cases, the results are dramatically different.

Most of the legal action is occurring in state courts, applying and interpreting individual state tort law doctrines,<sup>1</sup> contributing to the variation in the case results.

Another complicating factor is the presence of state immunity statutes which vary dramatically from state to state, sometimes providing complete protection for the officer and agency, sometimes providing no protection.

Is there a duty to protect the public? Some courts say "yes" and some say "no." Despite the confusion of results, there are some consistencies in the cases. The

threshold question in virtually all the cases is whether the officer has any legal duty toward the potential victim. If no duty exists, then there can be no liability.

In deciding the duty question, courts consistently rely on the Restatement of Torts<sup>2</sup> which says that while normally a person has no duty to control the actions of another person, there is an exception to this rule where a "special relationship" exists. Such a special relationship can exist where someone takes charge of another person who has dangerous propensities as, perhaps, in the case of supervising a dangerous offender. The Restatement says:

"One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm," Restatement, § 319.

At this point, the courts part company, usually differing over the meaning of "take charge" and "custody." One approach requires actual physical custody but another sees the ability to regulate an offender's movements, limit his actions through special conditions, and other common sorts of probation or parole controls as creating a custody or control status for Restatement purposes.

These different approaches explain the different results in the Neakok and Lamb cases in the quiz. In Neakok, the court felt the parole status put the offender under the "control" of the defendants. But to the Lamb court, the supervision status was not enough to put the offender under the "control" of the defendants.

Similarly, the Virginia Supreme Court took the physical custody approach in affirming the dismissal of a case in which the probationer ran up a series of violations before committing arson, rape, and assault on three women in Fox, *supra*. Without physical custody, there was no "special relationship" and hence no basis for liability.

The alternative, expansive approach was taken recently in Massachusetts. There, the probationer was a teacher thrice convicted of child molesting who returned to teaching in a middle school, in violation of a probation condition. He told the probation officer he was working as a salesman. The officer's failure to try to verify the offender's employment in any way was upheld as negligence supporting a jury verdict against the officer, *A.L. v. Commonwealth*, 521 N.E.2d 720 (Mass., 1988).

The result of the expansive approach is a duty to protect virtually any foreseeable victim, even though there is no way to identify an individual victim. A middle ground finds a duty only when the victim is readily identifiable and the threat is fairly specific.<sup>3</sup>

"But why should I be liable since the offender assaulted the victim, not me. . ."

is a logical question for the field officer to ask. For those courts which take the expansive approach, the actions of the offender do not protect the officer if the officer's negligence allowed the offender to

**See SUPERVISION, p. 9**

1 - Inadequate supervision is raised in case brought pursuant to 42 USC 1983. These cases tend to follow the more conservative "special relationship" approach discussed in this article. See *Jones v. Phyfer*, 761 F.2d 642 (11th Cir., 1985), *Martinez v. California*, 100 S.Ct. 553 (1980).

2 - A Restatement of the law in a given area (torts, contracts, etc.), is a detailed and highly respected summary of basic principles in that area which have developed in American law over the years. While not binding, Restatement principles carry great weight with courts since they represent the general consensus of judicial thought on the subject.

3 - *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal., 1976), *Thompson v. County of Alameda*, 614 P. 2d 728 (Cal., 1980). These cases create a duty to warn. In a recent case, the fact that the victim already knew of the danger relieved the probation officer of liability for allegedly failing to warn her. *Garcia v. Superior Court*, 249 Cal. Rptr. 449 (Cal. App. 6 Dist. 1988).

**SUPERVISION, from p. 8**

be in a place to do the damage which is the subject of the lawsuit. As the Idaho court in Sterling said, "it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm."<sup>4</sup>

**Precedent May Be Little Protection.** If the all that stands between supervising agencies and potential liability is a state's highest court and whatever interpretation it puts on the "control of third parties" language from the Restatement, liability protection may be very weak. This judicial protection can be discarded as easily as yesterday's newspaper.

A narrow interpretation, even though well entrenched in a state's caselaw, can be replaced with the expansive approach in a single case. Such a landmark decision can easily come in a case which may not even involve a state's major probation or parole agencies but does involve facts which the court decides warrant redress, even if a change in the law is needed to do it. Therefore caselaw protection is of uncertain value.

**Statutory Immunity: the Best Defense.** A much surer form of protection is through statute which immunizes potential defendants from liability altogether. When the legislature says that "neither a public entity or public employee is liable for an injury caused by the failure to make an arrest or by releasing a person in custody," as the Illinois legislature has done, the question of whether a special relationship exists is moot.<sup>5</sup>

**COMMENTS.** If statutes and court decisions allow questions of whether a field officer was negligent in the way an offender was supervised to be decided by a jury, agencies can expect not only a

substantial number of negligent supervision suits but also sharply increased costs in settlements and judgments coming from such suits.

The sorts of facts which may support a negligence claim are not uncommon in the real world of oversized case loads comprised of increasingly violent offenders. While the following list is certainly not all-inclusive and the factors here would not necessarily show negligence in a given case, they nonetheless would probably be relevant to the negligence question.

-Failure to follow agency policy in some way, such as not making the required number of contacts with the offender, or failing to check employment status as policy may require or failing to file reports with a court or parole board.

-Failing to notify a court or board of possible violations, especially where statute or policy say suspected violations "shall" be reported.<sup>6</sup>

-Tolerating one or more violations, instead of virtually automatically revoking for any violation.

-Failing to respond (through revocation) to actions or words perceivable as threats to someone.

-Taking actions with regard to the victim (before the injuries occur) which allow the victim to claim he/she relied on the officer in some way for protection.

In general, what plaintiff's counsel will try to find is an act or omission by the officer which allows the lawyer to argue that but for the failure, the offender wouldn't have been able to injure the victim because the offender would have been (or even might have been) behind bars.

If negligent supervision lawsuits are alive and well in a jurisdiction, field officers will have to try to justify, to a probably hostile jury, virtually every decision

they made and action they took regarding an offender. The jury's sympathies will be running strongly in favor of the injured, sympathetic plaintiff, not in favor of the officer, the state, and the offender.

Jurisdictions which have statutory immunity protection should zealously protect it and oppose any attempts to reduce or eliminate such protections through statutory amendment.

Jurisdictions which do not have statutory protections should consider requesting legislation creating such protections. The Illinois statute quoted above is but one example of an immunity statute, which is easily drafted.

Agencies which aren't sure of the status of the law either in terms of the scope of any immunity protections they may have or the receptiveness of their courts to this type of case should have these questions researched thoroughly.

Even where caselaw would appear to be in an agency's favor, the defense of such cases should not underestimate their potential seriousness. A casually presented defense may make it easier for a court to abandon previous agency protective precedents and embark on a liability expanding course which will have the most serious implications for community corrections programs. BC

**THE LETTERS COLUMN ...**

We thought about writing ourselves a letter or two, just to have something to put here, but decided against it.

**THE LETTERS COLUMN** invites readers' letters on any subject relating to correctional law and CLR.

If you have an issue you would like to see addressed, pass it along and we will try to discuss it in a future issue of CLR.

But remember, we can't give legal advice, only general observations about an issue.

4 - 723 P. 2d at 767.

5 - In Re Estate of Vasconcelles, 524 N.E.2d 720 (Ill. App. 4 Dist., 1988), citing Ill. Rev. St. 1985, Ch. 85, Par. 4-107.

6 - Some courts hold such reporting duties run only from the officer to the court or board and thus do not provide any protection for the public. Lamb, supra. Other courts hold precisely the opposite. Sterling, supra.

STEVE COWPER  
GOVERNOR

159

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 3, 1989

The Honorable Tim Kelly  
President of the Senate  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

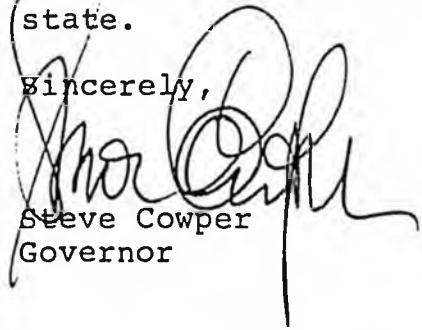
Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill reducing liability of the state, and those acting on behalf of the state, for damages relating to the release and supervision of persons in state custody who are on conditional release from confinement.

Proposed AS 09.50.255, in sec. 1 of the bill, provides for immunity of the state and its agents and contractors for negligence in release or supervision. However, the state and those acting on behalf of the state would still be liable in specific instances involving gross negligence, defined in proposed AS 09.50.255(b) as "reckless disregard for the safety of individual, identifiable victims." Guidance as to the meaning of "reckless" may be derived from AS 11.81.900(a)(3), which defines "recklessly" for the purposes of the Criminal Code.

Immunity is extended to state contractors because liability insurance is generally unavailable or prohibitively expensive for contractors. If a particular contractor is able to obtain insurance, it is expected that eliminating the necessity for the insurance would result in that cost saving being passed on to the state.

Sincerely,



Steve Cowper  
Governor

### FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: "An Act limiting liability relating to release."  
Sponsor: Rules Committee  
Requestor: Governor

Agency Affected: Department of Corrections  
BRU: \_\_\_\_\_  
Components: \_\_\_\_\_

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

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

**ANALYSIS :** (Attach a separate page if necessary)

Prepared by: Susan E. Knighton, Director Phone: 465-3376  
Division: Administrative Services Date: 1-20-89

Approved by Commissioner: Susan Thompson-Barnett Date: 1-20-89  
Agency: Department of Corrections

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management and Budget
  - Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Administration  
 Title: An act limiting liability for BRU: Risk Management  
persons in State custody.  
 Sponsor: Rules/by request of the Governor Components: Risk Management  
 Requestor: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	(80.0)	(171.0)	(307.0)	(470.0)	(654.0)
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	(80.0)	(171.0)	(307.0)	(470.0)	(654.0)
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	(80.0)	(171.0)	(307.0)	(470.0)	(654.0)
TOTAL	0	(80.0)	(171.0)	(307.0)	(470.0)	(654.0)


POSITIONS:

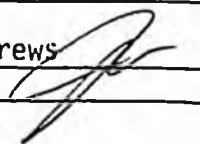
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Estimated cost reduction would be reflected through a reduction in allocated insurance costs to the State agencies involved.

Please see attached Analysis.

Prepared By: Don Hitchcock, Director  Phone: 465-2180  
 Division: Risk Management Date: \_\_\_\_\_

Approved by Commissioner: John M. Andrews  Date: 2/10/89  
 Agency: Department of Administration

Distribution (by preparer):  
 Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS  
For SB 159

If enacted, this bill will generate significant future savings to the State.

As it will only apply to liability claims not yet incurred, the future fiscal benefit is very difficult to accurately project. Based on the State's present claims experience we project a 10% reduction in ultimate loss and loss adjustment expense per fiscal year on general liability claims for bodily injury and property damage. Using projections of the State's actuarial experience, the following conservatively projected savings should occur.

CASH FLOW SAVINGS ESTIMATED BY FISCAL YEAR (000)

Year of Savings	Y E A R O F O C C U R R E N C E							TOTAL
	89	90	91	92	93	94	95	
89	0							0
90		80						80
91		71.25	100.0					171.25
92		93	89	125				307
93		87.5	116	111	156			470.5
94		65.75	109	145	139	195.2		653.95
95			82	136	182	173.8	224	817.80
96				102	171	227.2		
97					128	213.5		
98						160.1		
BALANCE		227	284	355	444	555.1		
TOTAL		625	781	976	1,220	1,525.0	1,906	

These payments are projected using the following payment pattern for general liability claims based on the State's past liability claims experience.

12 months	-	12.8%
24 months	-	11.4%
36 months	-	14.9%
48 months	-	14.0%
60 months	-	10.5%
Balance	-	36.4%

CONTINUATION of FISCAL NOTE ANALYSIS  
For SB 159

This projection does not reflect savings for unusually large claims, but rather a statistical trend of the average past claims. The State and its liability insurance carriers have paid several significantly large individual claims in the past that would be directly affected by this bill. The most notable individual claim being the Neakok case where \$5,000,000 was paid in settlement of that one individual case.

Therefore, the State could very easily realize substantially larger savings, but we are unable to predict them with certainty at this time.

## Article 6. Definitions.

### Section

#### 900. Definitions

**Sec. 11.81.900. Definitions.** (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

\* (3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

be submitted to the jury for determination. On the other hand, if the evidence is such that reasonable minds might reach only one conclusion, i. e., that from the facts presented there is no showing of gross negligence, then an instruction on such an issue is not justified.<sup>4</sup>

[3,4] In order for one to be guilty of gross negligence, the evidence must show that he had full knowledge of the hazards he was creating by his actions, such as to evidence a reckless disregard of possible consequences and indifference to the rights of others.<sup>5</sup> There must be facts which would lead a reasonable man to realize that the actor's conduct under the circumstances not only creates an unreasonable risk of physical harm to another, but also involves a high degree of probability that such harm will result.<sup>6</sup> Gross negligence differs from ordinary negligence in several important particulars. As stated in the Restatement of the Law of Torts, Second:

It [reckless misconduct or gross negligence] differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to

make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.<sup>7</sup>

[5] We do not believe that the evidence shows a conscious choice of a course of action by Gillaspie with full knowledge of a serious danger to others such as to evidence a reckless disregard of possible consequences and indifference to the rights of other persons. Gillaspie was shown to have drunk some beer and to have travelled at a high rate of speed between the Malemute Saloon and the University of Alaska. There is no evidence showing that he was incapable of driving because of the beer he drank; and since he made the first trip to the University and back to the Malemute Saloon without incident, there was no reason to believe that when he started on the fatal trip there was a high degree of probability that the car would fail to make a curve and turn over. We believe that there was no room for diversity of opinion among reasonable men as to whether Gillaspie was guilty of gross negligence, and that reasonable minds could come to only one conclusion, i. e., that Gillaspie was not grossly negligent. The court did not err in declining to give the jury an instruction concerning gross negligence.

During his testimony Gillaspie admitted having entered a plea of guilty to a charge of reckless driving. With respect to such a plea, Leavitt requested the court to instruct the jury that "A plea of guilty is a confession on the part of a defendant of the truth of the material facts of the charge." The court refused to give the

4. Rocky Mtn. Prod. Trucking Co. v. Johnson, 78 Nev. 44, 309 P.2d 198, 202 (1962).

5. McLemore v. Harris, 374 P.2d 410, 412 (Alaska 1962).

443 P.2d—5

6. Nichols v. Baker, 101 Ariz. 151, 410 P.2d 584, 586 (1966).

7. Restatement (Second) of Torts § 500 comment g at 590 (1965).

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THE SUPREME COURT OF THE STATE OF ALASKA

DIVISION OF CORRECTIONS, )  
DEPARTMENT OF HEALTH & SOCIAL )  
SERVICES; ALASKA BOARD OF PAROLE; )  
and STATE OF ALASKA, )

Petitioners, )

v. )

WARREN NEAKOK, and DORCUS NEAKOK, )  
as representative survivors, )  
guardians of any minors and/or )  
Personal Representatives of the )  
Estate of WARREN HARDY NEAKOK, JR., )  
and the Estate of WARREN HARDY )  
NEAKOK, JR.; AMY NUKAPIGAK, as )  
representative survivor, guardian )  
of any minor survivors, and/or )  
Personal Representative of the )  
Estate of JULIA TUKROOK, and the )  
Estate of JULIA TUKROOK; WALTER )  
TOORAK, as representative survivor, )  
guardian of any minor survivors, )  
and/or Personal Representative of )  
the Estate of VIRGINIA TOORAK, and )  
the Estate of VIRGINIA TCORAK, )

Respondents. )

FILE No. 7230

O P I N I O N

[No. 3070 - June 20, 1986]

Petition for Review from the Superior Court of  
the State of Alaska, Second Judicial District,  
Kotzebue,

Paul B. Jones, Judge.

Appearances: Robert L. Eastaugh, Delaney,  
Wiles, Hayes, Reitman & Brubaker, Anchorage,  
for Petitioners. Robert H. Wagstaff,  
Anchorage, for Respondents.

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murders he had the status of a supervised parolee,<sup>1</sup> and was reporting by mail to a parole officer.

This case involves a claim for damages against the State of Alaska, the Division of Corrections, Department of Health and Social Services, and the Alaska Parole Board, by relatives of the three persons whom Nukapigak murdered. The plaintiffs claim negligence in failing to impose special conditions of release at the time of Nukapigak's release, to supervise Nukapigak adequately while he was on parole, in allowing him to return to a small, isolated community without police officers or alcohol counseling and in failing to warn his victims of his dangerous propensities. This petition followed the trial court's denial of the state's

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A prisoner serving the term or terms for which the prisoner was sentenced less good time deductions shall be released unconditionally if there remains less than 180 days to serve under the sentence. If there remains more than 180 days to serve under the sentence, a prisoner, upon release, shall be considered as if released on parole until the expiration of the maximum term or terms for which the prisoner was sentenced less 180 days.

Nukapigak had accrued 707 days of good time.

# **CORRECTION**

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for Petitioners. Robert H. Wagstaff,  
Anchorage, for Respondents.

Before: Burke, Chief Justice, Rabinowitz,  
Matthews, Compton, Justices, and Shortell,  
Judge.\* [Moore, Justice, not participating]

COMPTON, Justice.  
MATTHEWS, Justice, with whom RABINOWITZ,  
Chief Justice, joins, dissenting in part.

On August 18, 1980, while highly intoxicated, Clifford Nukapigak shot and killed his teenaged stepdaughter and her boyfriend, and raped, beat and strangled to death another woman. Nukapigak v. State, 663 P.2d 943 (Alaska 1983). The murders took place in Point Lay, an isolated community of less than 100 residents and no resident law enforcement officers. Nukapigak had been mandatorily released from prison six months before the murders, having served a six-year sentence, less statutory good time, for an assault and rape committed in 1975. At the time of the

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

murders he had the status of a supervised parolee,<sup>1</sup> and was reporting by mail to a parole officer.

This case involves a claim for damages against the State of Alaska, the Division of Corrections, Department of Health and Social Services, and the Alaska Parole Board, by relatives of the three persons whom Nukapigak murdered. The plaintiffs claim negligence in failing to impose special conditions of release at the time of Nukapigak's release, to supervise Nukapigak adequately while he was on parole, in allowing him to return to a small, isolated community without police officers or alcohol counseling and in failing to warn his victims of his dangerous propensities. This petition followed the trial court's denial of the state's

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motion to dismiss or for summary judgment.<sup>2</sup> We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Clifford Nukapigak had a history of violence while intoxicated which had led to a series of convictions beginning in 1973. In 1973 and 1974, he was convicted twice for beating his wife. Both incidents occurred while he was so drunk that he did not remember them afterwards. He was convicted in 1975 for raping a woman and stabbing and cutting her vagina. Again, he had been drinking heavily and claimed to have no recollection of his actions. In imposing a six-year sentence for the rape, the trial court considered comments made to a probation officer by Point Lay residents indicating that he had raped other women, beat his wife, and tried to rape his stepdaughter while drunk. Nukapigak v. State, 562 P.2d 697 (Alaska 1977). A psychiatric evaluation completed at the time expressed concern that Nukapigak's repressed sadistic impulses made him especially dangerous.

While incarcerated, Nukapigak received four months of individual transactional therapy, and participated in an

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2. Since this petition is from a denial of the state's summary judgment motion, we must make all factual inferences in favor of Neakok.

alcohol treatment program and in Alcoholics Anonymous for some time. His therapist recommended that he receive additional alcohol treatment before he was released. In April and May of 1979, he wrote to Superior Court Judge Gerald J. Van Hoomissen, requesting an order to participate in a comprehensive alcohol program outside of the prison in Fairbanks. Despite Judge Van Hoomissen's approval, he was not allowed to enroll in the program, apparently because he had told prison personnel "that he pretty much had the situation whipped." His prison counselor testified that he saw the request as a ruse "just to get out of the confines of the institution for some periods of time."

Despite Nukapigak's claims to have conquered his alcohol problems, at least one prison counselor predicted that he would have trouble with drinking after his release. That counselor was concerned that Nukapigak would be a particular danger to his stepdaughters, whom he had apparently previously assaulted while drunk. She expressed her fears to both the Parole Board and other staff members.

Nukapigak applied for parole and for executive clemency while in prison. Both requests were denied. A 1977 progress report prepared for his parole hearing reported that he had been a good worker, had gotten along well with staff and inmates, and had become very religious. It noted that "there is a serious risk to society if he resumes his

drinking" and concluded that his success on parole depended entirely on whether he could refrain from using alcohol.

Nukapigak was released in February 1980 under general parole conditions which required that he obtain employment, obey the law, report to his parole office monthly by mail, and not handle or possess firearms or other weapons. Policy required that Nukapigak's prison counselor formulate a plan for his parole. Nukapigak's parole officer was required by that same policy to review and approve the plan. However, no such plan was developed. The parole officer did not read Nukapigak's prison file until after his release. Parole Board policy to the contrary, prison officials did not forward information regarding Nukapigak to the Parole Board for its use in considering imposition of special conditions of parole. Although both Nukapigak's prison counselor and his parole officer also were authorized to impose special conditions of parole, neither was aware of this authority. Neither imposed such conditions. Consequently, no special conditions of parole were established for Nukapigak, and he was not prohibited from drinking alcohol.

Nukapigak returned to Point Lay, where he had lived for two years prior to his arrest, and where his wife, child and five stepchildren were living. He obtained a job with the North Slope Borough, and apparently performed well

(his parole officer received a letter from his employer in June saying he was doing an outstanding job). He made reports by mail to his parole officer in which he claimed to be readjusting. His parole officer, Louis Gazay, met him only twice: once before his release from prison and once when both men happened to be in Barrow at the same time in July 1980. There was no parole officer assigned to Point Lay and no village resident was appointed as a parole liaison advisor. The Point Lay Village Council and residents of the village were not aware that Nukapigak was under supervision or subject to any conditions of parole.

Apparently Nukapigak did not drink alcohol from the time of his release until August 1980. At that time, in the face of a breakdown in his marriage and other personal problems, he began drinking heavily. On August 16 he traveled to Kotzebue with a friend, and apparently drank continuously during and after this trip. He spent most of August 17 drinking in the homes of various villagers. Late that night he committed the three murders.

The plaintiffs in this case (hereafter collectively referred to as Neakok) are the survivors and personal representatives of the estates of Nukapigak's three victims. They allege seventeen counts of negligence against the State of Alaska, the Division of Corrections of the Department of Health and Social Services (collectively referred to as the

state), and the Alaska Board of Parole. These counts fall into four general categories: (1) Failure to supervise Nukapigak adequately or to provide him with treatment and counseling while he was on parole; (2) Failure to consider or impose appropriate special conditions of parole; (3) Failure to warn the residents of Point Lay or Nukapigak's family of his dangerous propensity to violence; and (4) Failure to provide effective counseling and treatment before he was released.<sup>3</sup>

The defendants moved to dismiss or for summary judgment, claiming that (1) they were immune from Neakok's suit, (2) they owed Neakok no duty to protect him from Nukapigak's acts, (3) they did not proximately cause Nukapigak's acts, and (4) they could not legally have intervened with Nukapigak to the extent proposed by Neakok. The motion was denied, and this petition followed.

As the parties have recognized, the central questions in this case are (1) whether the defendants owed a duty to Nukapigak's victims, and (2) whether, even if such a duty was owed, the defendants are immune from liability for

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3. Neakok does not allege that the state was negligent in releasing Nukapigak. His release was mandated by AS 33.20.040.

any breach of that duty.<sup>4</sup> We conclude that the state did owe a duty to protect Nukapigak's foreseeable victims. We further conclude that the actions (and inactions) of the state's employees which form the basis for Neakok's claims were, in large part, ministerial acts for which the state may be held liable.

## II. DUTY

While the parties have treated the issue of the defendants' immunity as a threshold question, we agree with the California Supreme Court that "[c]onceptually, the

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4. Plaintiffs have sued defendants collectively, not segregating theories of liability between them. Defendant Alaska Parole Board has been sued as an entity, individual Board members have not been sued, and no theory of liability specifically addressed to the Board has been asserted. At the time of this incident, the Parole Board was a creature of AS 33.15.010, existing within the Department of Health and Social Services. The Administrative Procedures Act did not apply to the chapter. AS 33.15.250. Prison counselors and parole officers were employees of the Department.

The legal status of the Board is unclear. However, it is undisputed that (1) prison officials did not forward material concerning Nukapigak to the Board prior to his release; (2) the Board did not become aware of Nukapigak's release until sometime after the fact; (3) the Board was never informed that Nukapigak was violating any term of his general conditions of release so that it might direct his arrest; and (4) the Board was never requested to act by anyone. Thus we conclude that reasonable minds could not differ regarding the absence of fault on the part of the Board, and accordingly summary judgment should have been entered in favor of the Board.

question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." Davidson v. City of Westminster, 649 P.2d 894, 896 (Cal. 1982). We therefore begin our analysis with an examination of the duty the state owed to Neakok.

"Duty," as the word is used in negligence law, "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." Prosser, Law of Torts (4th ed. 1971) at 325-26. In D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554, 555 (Alaska 1981), we adopted a list of "considerations" set forth by the California Supreme Court to aid in deciding when, as a matter of policy, a particular plaintiff is entitled to protection. These considerations include foreseeability of harm, the closeness of connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, the policy of preventing further harm, the extent of the burden to the defendant and consequences to the community of imposing a duty of care, and the availability, cost and prevalence of insurance for the risk involved.

A. Foreseeability.

The most important single criterion for imposing a duty of care is foreseeability. Tarasoff v. Regents of the University of California, 551 P.2d 334, 342 (Cal. 1976). The general rule of negligence law is that a defendant owes a duty of care "to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 680 (Cal. 1974). Traditionally, however, the common law has not required a defendant to prevent foreseeable harm when, to do so, he or she must control the conduct of another person or warn of such conduct. Tarasoff, 551 P.2d at 342-43. This rule has an important exception: When a defendant stands in a special relationship to either the dangerous person or the potential victim, the defendant is required to control the dangerous person or warn or otherwise protect the victim. Restatement (Second) of Torts Section 315 (1965).

The state contends that its relationship with Nukapigak was not sufficiently close to give rise to a duty to control him. It argues that a duty to control a third person should be limited to situations where a dangerous person is in the defendant's actual custody or negligently released from custody, or where the hazard is created by the defendant. See, e.g., Bradley Center v. Wesner, 296 S.E.2d

693 (Ga. 1982); Grimm v. Arizona Board of Prisons and Parole, 564 P.2d 1227 (Ariz. 1977); Morgan v. District of Columbia, 449 A.2d 1102 (D.C. App. 1982).

We do not believe that a duty to control or warn can be so narrowly limited. Although the state was required to release Nukapigak, he remained under state supervision as a parolee. It could regulate his movements within the state, require him to report to a parole officer under conditions set by that officer or a prison counselor, require him to undergo treatment for alcoholism, and impose and enforce special conditions of parole including requirements that he refrain from the use of alcohol, participate in an alcohol rehabilitation program, and that he consent to a search of his residence to see if he possessed firearms. It could revoke his parole and reincarcerate him if he violated these conditions.<sup>5</sup> While

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5. At the time of Nukapigak's release, there was apparently some confusion among parole officers and prison counselors as to whether special conditions of parole could be imposed on mandatory releasees. This confusion stemmed from dicta in a plurality opinion in Morton v. Hammond, 604 P.2d. 1 (Alaska 1979), which suggested that the parole of a mandatory releasee could be revoked for violation of statutory conditions of parole, but that special conditions could not be imposed. However, the Parole Board and the Division of Corrections did not change their policies in response to Morton and continued to treat mandatory releasees identically with other prisoners.

(Footnote Continued)

the state could not completely control Nukapigak's conduct, it was hardly in the position of a stranger who (at least according to the traditional rule) cannot be expected to interfere with the conduct of a third person.

Moreover, the special relationship between Nukapigak and the state was not solely defined by Nukapigak's status as a parolee. Prior to his release, Nukapigak was incarcerated for over four years. During that time, close observation had led at least one prison counselor to conclude that Nukapigak presented a special danger to his stepdaughters, and had caused other corrections personnel to suggest that he would be dangerous to society if he resumed drinking. The state's enhanced ability to observe the conditions under which a prisoner might be expected to be especially dangerous increases its potential ability to limit his dangerousness as a parolee.

The state thus stands in a special relationship with a parolee, both because of its increased ability to

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(Footnote Continued)

We agree with the concurring opinion of Rabinowitz, C. J. and Matthews, J. in Morton, 604 P.2d at 4, and with the more recent decision of the court on appeals (Braham v. Bierne, 675 P.2d 1297 (Alaska App. 1984)), that mandatory releasees, who are "considered as if released on parole" (AS 33.20.040) are subject to the same conditions of parole as any other parolee. We therefore conclude that the parole of a mandatory releasee may be revoked if he or she violates special conditions of parole.

foresee the dangers the parolee poses and because of its substantial ability to control the parolee. Given this special relationship, it is not unreasonable to impose a duty of care on the state to protect the victims of parolees.<sup>6</sup>

The courts of a number of other jurisdictions have imposed a duty to protect the potential victims of a third party on persons or institutions with a special relationship with that third party. In the landmark case of Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976), the California Supreme Court held that the special relationship between a psychotherapist and a patient imposes on the therapist a duty to act reasonably to protect the foreseeable victims of the patient. In Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977), modified on other grounds on hearing en banc, 580 F.2d 647 (D.C. Cir. 1978), the District of Columbia Circuit Court of Appeals held that the special relationship between a parole officer and a parolee imposed a duty on the parole officer to

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6. It is possible that the state could not have protected Neakok without exercising greater control than would have been permissible. Neakok's claim alleges, however, that the state failed to use due care in exercising whatever control it legitimately did have over Nukapigak. Whether the murders would have occurred but for this alleged failure is a question of causation rather than of duty. We cannot conclude that, as a matter of law, the state should be excused from a duty to exercise that limited control carefully merely because it was not unlimited.

protect the parolee's potential victims. In Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976), cert. denied 429 U.S. 827 (1976), it was held that a court probation order imposed on a state hospital a special relationship with a patient which required the hospital to protect the public from him. See also Johnson v. State, 447 P.2d 352 (Cal. 1968); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980); Peterson v. State, 671 P.2d 230 (Wash. 1983). The relationship between the state and a parolee is comparable to the relationship found sufficient in each of these cases to justify the imposition of a duty to control a third person.

Having decided that the state may be required to use due care to control the actions of a third party, we turn to the question of whether the injury to Neakok was a foreseeable hazard of its failure to use due care in supervising Nukapigak. As we noted at the outset, consideration of the foreseeability of injury is central to a determination of whether a duty of care exists. The state may be held liable for its failure to act reasonably and carefully only if it could have foreseen that its failure to do so might cause harm to Neakok.<sup>7</sup>

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7. While a specific case-by-case determination  
(Footnote Continued)

Article I, section 12 of the Alaska State Constitution requires that penal administration be "based upon the principle of reformation and upon the need for protecting the public." We have held that the public is an intended beneficiary of this article. Abraham v. State, 585 P.2d 526, 531 (Alaska 1978). The state is thus required to consider public safety in its administration of the parole system, and to supervise parolees in such a way that danger to the public is minimized. "Due care" in supervising parolees and in planning for their parole is defined in part by the need to protect the public from dangerous parolees. In light of this constitutional framework, it is difficult to accept the argument that harm to the public is not a foreseeable consequence of the failure to exercise due care.

The state regulations, policies and procedures governing the parole and supervision of mandatory releasees provide a number of avenues through which "due care" may be defined. At the time Nukapigak was released, state policy required that a release plan be formulated for each parolee,

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(Footnote Continued)

of foreseeability and causation lies within the province of a jury, the existence of a duty is a question of law. Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121, 124. In deciding whether Nukapigak's criminal acts were a "foreseeable" risk of a failure to use due care, we do not determine whether, under the specific facts of this case, state employees should have foreseen that the murders would occur.

and that his or her field officer investigate it for authenticity and to determine whether it was the best plan available. This investigation included verification of the parolee's proposed address and place of employment. A Parole Board directive also required that special conditions of parole be considered for all releasees who had been convicted of crimes of violence, who had physically injured their victims, or who had been sentenced to an effective sentence of more than five years. Under these special conditions, Nukapigak could have been required to refrain from drinking, participate in an alcohol rehabilitation program, or to live in a community with appropriate supervisory personnel. The evidence Neakok has submitted indicates that either Nukapigak's prison counselor or his parole officer could have imposed special conditions of parole. In addition, Parole Board regulations allowed the appointment of a local resident as a parole advisor to work with a parolee and report specific events to his parole officer.

It should not be difficult to foresee that the failure to use due care in following these procedures, and in supervising a parolee after his or her release, might result in harm to the public. In Nukapigak's case, the potential effects of a failure to use due care appear especially clear. Nukapigak had committed violent crimes

against both relatives and strangers while intoxicated. He had been identified by a number of sources as a potential danger to society if he resumed drinking. A psychological evaluation had cautioned that "because his explosive personality is so ingrained, Clifford is likely to have continuing problems maintaining [his] newly learned self-discipline and control in a non-structured environment if he continues drinking." In light of this information, it was not unforeseeable that if Nukapigak was not supervised or given counseling, and if he was allowed access to alcohol and firearms, he might act violently toward those around him.<sup>8</sup>

The state argues that, even if it could have foreseen that a failure to supervise Nukapigak carefully might have endangered the public at large, it owed no special duty to Neakok. It contends that it could not have identified

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8. We cannot accept the state's assertion that the murders were not foreseeable because Nukapigak has never killed before and because Nukapigak was convicted of intentional murder and could not therefore have acted in a drunken stupor. Neakok has submitted evidence that indicates that the state was on notice that Nukapigak was violent and uncontrollable when drunk. In light of this knowledge, it was not unforeseeable that, if he became drunk, he would commit violent crimes. The state's inability to predict the exact nature of these violent crimes or the exact degree of his intoxication while committing them does not absolve it of a duty to act reasonably to prevent them.

Nukapigak's specific victims and that it therefore owed them, as members of the public, no actionable duty.<sup>9</sup>

The question of whether a duty to control a dangerous person may be imposed when the dangerous person's victims cannot be specifically identified has divided the jurisdictions that have considered it. Although the Tarasoff court did not emphasize the identifiability of the

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9. To the extent that the state argues that it cannot be held liable to an individual for breach of a duty owed to the public at large, its argument must be rejected. We expressly disavowed the "duty to all, duty to no one" doctrine -- providing that the state may owe a duty only to persons with whom it has a special relationship -- in Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976):

[W]e consider that the "duty to all, duty to no one" doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed. Why should the establishment of duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.

(Footnote omitted).

victim, subsequent California cases have refused to impose a duty except to readily identifiable victims. See Thomas v. County of Alameda, 614 P.2d 728 (Cal. 1980). Other courts have held that a duty of care may be owed to anyone within a "class of persons" foreseeably put at risk.<sup>10</sup> Thus, in Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 195 (D. Neb. 1980), it was held that a psychiatric hospital owed a duty to protect anyone foreseeably endangered by a patient and could therefore be held liable for the deaths caused when the patient shot into a crowd in a nightclub. In Peerson v. State, 671 P.2d 230, 237 (Wash. 1983), the Washington Supreme Court held that a state psychiatric hospital could be held liable to a persons injured in a car crash by a patient it had negligently treated. In both cases the specific identify of the victim was wholly unforeseeable, even if the harm caused was not.

We agree with those courts which have held that the inability to predict the special victim of a dangerous person does not absolve a custodian from a duty to use due care to protect others who might foreseeably be endangered

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10. We note that the California cases that have limited a duty of care to identifiable victims have focused on the duty to warn. The special considerations surrounding imposition of a duty to warn may justify limiting its scope. See infra at 25.

by that person. Where the state, through its negligence, allows a parolee to cause foreseeable harm to a third person, we see no reason to predicate liability wholly on the state's ability to predict the victim's name. A victim may be "foreseeable" without being specifically identifiable.

The victims in this case, moreover, were foreseeable as more than simply members of the general public. All three were residents of an isolated community of fewer than 100 residents<sup>11</sup> into which Nukapigak was released. One of them was one of Nukapigak's stepdaughters; the others were her boyfriend and her aunt. Nukapigak's stepdaughters had been identified by at least one prison employee as particularly at risk. If they were foreseeably endangered, their close friends and relatives may also have been within a zone of especially foreseeable victims.<sup>12</sup>

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11. Point Lay had a total population in 1980 of from thirty to sixty-eight residents. Alaska, Description of Resources in the Cities and Villages [Criminal Justice Planning Agency, October 1981] sets the figure at thirty. Alaska's 1980 Population, a Preliminary Look, [Alaska Dept. of Labor, January 1, 1981] estimates the village's population at sixty-eight.

12. Cf. Hedlund v. Superior Court, 669 P.2d 41 (Cal. 1983). In that case, the California Supreme Court held that a psychotherapist was under a duty to protect the young son of a woman who had been identified as a potential victim of a mental patient. The court noted that it was not

(Footnote Continued)

We conclude that both Nukapigak's victims and his actions were within the zone of foreseeable hazards of the state's failure to use due care in supervising Nukapigak. A trier of fact may decide that, under the circumstances, state employees' use of care in supervising Nukapigak or in planning and administering his parole could not have prevented the murders, or that the state did, in fact, act reasonably. We cannot conclude as a matter of law, however, that the murders or the victims were sufficiently unforeseeable to relieve the state of liability for the consequences of its negligence.

B. Other Criteria.

The remaining D.S.W. criteria, on balance, also militate in favor of imposing a duty of due care on the state. There is no question that the plaintiffs suffered injury; the asserted failure to supervise Nukapigak adequately -- if proved at trial -- can be viewed as closely connected to that injury. The state's abrogation of its own responsibility for adequately supervising this particularly dangerous parolee -- if proved at trial -- cannot be

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(Footnote Continued)

"unreasonable to recognize the existence of a duty to persons in close relationship to the object of a patient's threat, for the therapist must consider the existence of such persons both in evaluating the seriousness of the danger posed by the patient and in determining the appropriate steps to be taken to protect the named victim."

characterized as anything but morally blameworthy. A rule imposing liability for such derelictions would, in all probability, aid in deterring such conduct in the future.

The state argues that the burdens and consequences of imposing financial liability for failure to supervise adequately would be severe and unwarranted. It claims that the imposition of such a duty would cause "intolerable judicial interference with judgmental corrections' decisions" and impose an economic burden, "reordering state priorities in allocating manpower and funds" and causing other socially desirable programs to suffer. We are not convinced by the generalized arguments the state has presented on this issue. By imposing a duty of due care on corrections personnel we are not requiring that the state spend limitless sums of money taking every conceivable precaution to prevent any possible violent action on the part of any parolee. We merely conclude that state officials have the duty, within the confines of existing policies and budgetary constraints, to exercise due care in supervising parolees. We do not believe that a rule imposing such a duty will significantly expand the responsibility of the state to the public and to its parolees; it might, however, convince state officials of a need to consider more carefully the decisions they make that might have potentially disastrous consequences.

We therefore hold that state corrections personnel have the duty to use due care in supervising parolees and in protecting the foreseeable victims of parolees they know, or reasonably should know, to be dangerous.<sup>13</sup> This duty requires that such officials take whatever precautions that a reasonable person with their knowledge and authority would take. We emphasize that the recognition of the duty does not make the state liable for all harm caused by parolees, but rather makes it liable only when its negligent supervision and administration of their parole causes the injury in question. See Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 192 (D. Neb. 1980).

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13. We recognize the difficulties inherent in a requirement that prison authorities accurately predict the potential dangerousness of released prisoners. Cf. Tarasoff, 551 P.2d at 344-45. See also Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Penn L. Rev. 439, 451 (1974). We do not intend to impose such a requirement. We do believe, however, that prison officials may be required to take into account the known characteristics of those they supervise when formulating plans for parole and in carrying out the actual supervision of parolees. In a similar context, the California Supreme Court noted that

Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

(Footnote Continued)

Neakok has alleged that the state was negligent, not solely in failing to supervise Nukapigak adequately, but also in failing to warn his victims and the residents of Point Lay that he was dangerous. The state contends that it had no duty to warn Nukapigak's potential victims, both because it could not predict who they were, and for policy reasons.

Ordinarily, the duty to use reasonable care to protect the foreseeable victims of a dangerous person may require a third party to take one or more of various steps, depending on the nature of the case. "Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." Tarasoff, 551 P.2d at 340. The cases that have held that warnings may be appropriate, however, have generally involved specifically identifiable victims. See, e.g., Tarasoff; Jablonski by Pahls v. United States, 712 F.2d 391 (9th Cir. 1983). These cases have concluded that the policy reasons against issuing warnings are overshadowed when they can be limited to, and substantially protect an identified potential victim.

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(Footnote Continued)

Tarasoff, 551 P.2d at 345.

We recognize that a requirement of warnings, unlike a requirement of careful supervision, carries with it the danger that a parolee will be stigmatized and rehabilitation thus seriously impaired. We have no interest in requiring, as a matter of law, that potentially dangerous parolees be emblazoned with scarlet letters<sup>14</sup> proclaiming their status and criminal history before they are released from prison. Therefore, if Nukapigak's victims were foreseeable only as members of a limitless class of unidentifiable victims of foreseeably dangerous behavior, we would not impose a duty to warn.

Nukapigak's victims were not unidentifiable, however. As we have already noted, their status as residents of this small, isolated community, and as the stepdaughter and the close friends and relatives of the stepdaughter of Nukapigak make them significantly more "identifiable" than members of the general public would be.<sup>15</sup> Moreover, as

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14. See N. Hawthorne, *The Scarlet Letter* (1850), in which the protagonist, Hester Prynne, was forced to wear a scarlet "A" on her clothing as punishment for having committed adultery.

15. Several courts have ruled that a duty to warn may be found where a third party has information which should have put it on notice that an identifiable potential victim was in danger. See *Jablonski by Pahls v. United States*, 712 F.2d at 398; *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. at 189, n.3.