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and the language of instruction, these community people play key roles not only in translating language, but in interpreting behavior and facilitating the transition from home modes of interaction to the interactional styles that are accepted at schools (e.g., Watson-Gegeo and Boggs, 1977). These positive, facilitative effects on language arts performance can be found in monolingual classrooms as well, where the English language may be shared, but the style of speaking varies from home to school. Micheals and Cook-Gumperz (1979), reporting on an urban Black primary classroom and Cooley and Ballenger (1982) reporting on a public speaking course for Indian college freshmen, found that members from the students' home cultures were able to intervene with explanations and assistance to teachers who were not able to follow the oral structures their students had brought from their homes.

E. SCHOOL AND DISTRICT STRUCTURES AND PRACTICES

1. Direction setting. As in the private sector, we know high performing schools and school districts have strong leadership in setting directions. These directions focus on student performance and take the form of well-defined mission statements, goals and objectives, and clear standards for student performance. The schools and districts that produce extraordinary student performance keep everyone focused on these targets for improvement.

The real leadership challenge in schools and districts with high concentrations of low income and minority students is to instill the belief that *all* students can learn well. In effective schools for minority and poor youth, there is consistent priority placed on narrowing the gap between minority and majority performance. In districts such as Pittsburgh, Minneapolis, and Portland, Oregon, where this leadership focus has been established, we are seeing significant movements toward "closing the gap."

2. Early Intervention. A very key finding of recent research has been the long-term positive outcomes of early education for poor and minority students. Early childhood education is an area in which Alaska has led the nation; its positive effects have led to its expansion as a priority item in your Governor's Interim Commission on Children and Youth report. Long-term studies of early childhood education for disadvantaged children indicate that social and economic benefits outweigh the school achievement gains that have too often been the sole focus of our concern. Early childhood education programs yield cost benefits for the society as a whole as well as for the individuals who attend them. One study, for example, documents a $7 public cost savings for every $1 invested in early childhood education (Berrueta-Clement, 1984).

Our staff recently completed an extensive review of the research on the effects of early childhood education on disadvantaged children. Major findings include the following:

- Children from educationally disadvantaged families benefit greatly from early education, as do the handicapped.
- Prekindergartners are more prepared for first grade and do better in the critical primary years, based on teacher assessments.
- Studies show positive impact on achievement in one or more subjects, most lasting through primary grades. Longer term achievement effects are more mixed.
- Special education referrals and grade retentions are significantly reduced among students who participate in early childhood education.
- Prekindergartners are more positive about school and their scholastic ability through early adulthood than are their counterparts.
- Early education results in greater economic self sufficiency, self-esteem, and aspirations as well as reduced delinquent behavior.
- Adult:child ratio is critical and should not exceed 1:16 or 2:20.

- Effective parent involvement is clearly needed.
- Many effective programs build their instruction from a child development perspective and provide health and social services to the children and their families.
- Early childhood education narrows the gap in school readiness between disadvantaged and advantaged youngsters.
- The lower the income of the family, the greater the benefits of early childhood education, academically and socially.

3. **Curriculum and instruction.** The curriculum the school offers is critically important to improved student performance. In studying schools with high concentrations of poor, minority and underachieving students, researchers have found the following curriculum characteristics related to improved performance, both achievement and retention in school:

- Language-based approach with emphasis on reading, writing, speaking, and listening across all subjects in the curriculum.
- Emphasis on generic learning-to-learn skills as well as on the subject matter content in the curriculum.
- Alignment of the curriculum objectives, instructional materials, and testing program. Such approaches help focus on essential skills to be taught, eliminate underplacing and underpacing, and establish priorities for management and use of instructional time.
- Emphasis on cultural materials consistent with the students' cultural backgrounds and culturally conditioned learning styles. For example, studies of instruction of both Native Hawaiian and Native American students find direct correlation between these factors and improved student achievement. This is particularly key in transition from home to school in the early grades and in the language arts areas.
- Curriculum content that is appropriate to the life expectations and interests of the students. For example, vocational, rather than purely academic curricula have higher rates of student retention in populations of poor students. As with cultural appropriateness, economic appropriateness of curriculum is critical to students' engagement in the school. It further provides motivation for continuing in school. Studies have shown, for example, that among low income students, vocational graduates can expect to have a lifetime wage advantage of 9-11 percent over their academic counterparts.

These curriculum characteristics need to be considered in light of the tremendous influence of textbooks on instruction. Studies indicate that 80-90 percent of the total instruction in our schools is dominated by the content of textbooks. Such studies indicate that the instructional quality of textbooks is seriously lacking. The content may be poorly organized, over-generalized, and neglectful of the cultural contributions of various minority groups. Further, publishers' tests are often misaligned with the content of the texts. This indicates a serious need to examine and augment existing curricula in our schools.

4. **Standardized testing.** When standardized tests are used on a schoolwide or districtwide basis, the research tells us that high performing schools:

- Coordinate and summarize results of their testing.
- Take care to make assessments regular, routine, and with minimum classroom disruption.

- Check the alignment between the tests and the curriculum and materials, and make improvements where necessary.
- Openly review and use assessment results for setting priorities for improvement of student performance.

5. Monitoring student performance and school improvement efforts. The effective schooling studies have revealed that careful schoolwide monitoring of student performance is a significant characteristic of high performing schools. Monitoring such performance results (in the classroom and schoolwide) and making mid-course corrections, keeps attention focused on the "bottom line" learning goals of the school.

Equally important is regular, careful, and evaluative monitoring of educational improvement efforts by school and district staff. Studies of various educational innovations in the 1970s revealed a serious lack of such monitoring. And where such a lack existed, the innovation failed to last. As in any change movement, in school improvement efforts reinforcement and reflection are necessary to sustain the momentum and keep up enthusiasm and involvement.

6. School climate. The effective schooling research reveals the need for a safe, orderly, schoolwide environment, one in which discipline policy is well known and consistently enforced. As in the classroom climate studies, effective schools have also discovered the importance of students and teachers sharing a view of high performance as a critical element, along with incentives and rewards for such performance. Researchers at the University of Texas found that this type of climate can be created within the first two weeks at the opening of the school year by *teaching* the rules and norms as if they are subject matter (as opposed to "handing out a list of do's and don'ts").

Researchers (Stockard & Mayberry, 1988) who reviewed the studies on school climate paint the following picture of schoolwide characteristics associated with high student performance:

- A supportive environment (safe, orderly, democratic, respectful of individual rights).
- Teachers' warmth and responsiveness to students.
- Staff expecting high achievement from students.
- Students valuing academic excellence and believing that they can achieve it.
- An instructional leader who takes responsibility for students' learning.
- Low achievers positively associated with high ability peers.
- Staff and student agreement on norms supporting high achievement.
- High level of involvement and sense of belonging among students and staff.
- Community involvement and/or identification with school.

7. School size. There is some evidence that suggests smaller schools offer greater potential than larger ones for achieving high student performance. However, school size as an isolated factor is meaningless. Yet there are those who have identified the small school's closeness, individual attention, and group cohesiveness as factors which can influence improved student performance. One team of researchers (Stockard & Mayberry, 1988) reviewed the evidence and stated:

> "Besides giving students greater involvement in school activities, it is possible that smaller schools can more easily develop consensus on curricular and disciplinary policies among teachers and students than large schools can. Such consensus has been found to be related to more cohesive school climates, student attendance, and academic achievement."

8. Staffing practices. Staffing practices include recruitment and selection, retention, and inservice training of qualified staff. While there are no research studies which tie recruitment, selection, and retention practices to student performance, we realize that coping with teacher turnover is a major challenge for schools in rural areas.

Some implications for improving staffing decisions in Alaska schools may be drawn from a recent study of teacher turnover in reservation schools conducted by our R&D Program on Indian Education. This study discovered that there are some common characteristics of teachers who tend not to stay in reservation schools: they are likely to be relatively young and inexperienced (four or fewer years of teaching); they are likely to be single, and they are likely to be from cities or prefer city life.

Teachers who left these schools identified lack of support for teachers by administrators, low academic standards, lack of professional development, and geographic isolation. The study revealed that in recruiting teachers there are some common "warning signals" of personal or professional characteristics which warrant the attention of a hiring committee for a rural, minority school. Long tenure and success is unlikely if the candidate is: rigid and inflexible; overly concerned with discipline and structure; "full of him/herself," i.e, thinks he or she has all the answers; burned out; heavily oriented to and reliant on commercial textbooks; lacking in self-confidence; a "job hopper" who has made frequent job changes; or negative in his/her reaction to the geographic setting.

Rural schools are not the appropriate place for refuge from the "real world" by escapist individuals, nor are staff with a missionary attitude toward their isolated constituents well placed in the schools. Avoiding teacher candidates with these negative traits and looking for those with solid instructional skills (see below) can be a major factor in turning around student performance in a school.

Once selected, an "induction" program for new teachers should be conducted. This program pairs the new teacher with an experienced one to help the novice get acclimated and work on developing and improving the necessary teaching skills. Finally, a well-planned long-range professional inservice training program is an essential ingredient in any effective school. We will have more to say about this when we discuss policy implications.

F. CLASSROOM STRUCTURE AND PRACTICES

1. Classroom teaching. The research suggests specific teaching practices which lead to high performance of poor, minority students. We know teachers must:

- Hold high expectations for all students regardless of socioeconomic status. These expectations include high achievement of both basic and higher order skills by *all* students.
- Teach to an objective-based, preplanned curriculum.
- Make effective and efficient use of class time through clear directions and instruction, equitable questioning of all students, minimal interruptions for discipline, checking for student understanding and reteaching as necessary, and maintaining a brisk instructional pace.
- Demonstrate personal warmth while demanding high performance.
- Respect and incorporate the students' home cultures into the classroom work.
- Adjust instructional techniques to culturally conditioned learning styles (e.g., use of cooperative learning for students from backgrounds such as Native Hawaiian and Native American).
- Monitor students' work regularly and provide constructive feedback.

- Assure that all levels of thinking are required on the part of all students, integrating types of tasks demanded.
- Maintain a task orientation.
- Relate current learning to past learning.

This list of effective teaching practices may seem "old hat" to many. For years, good teachers have practiced them. But several points need to be made about the list which suggest it is worth revisiting from the point of view of improving education for rural disadvantaged students.

First, our research knowledge now makes these effective practices unarguable. This was not the case ten years ago. We can all recall hearing a few teachers say that if we just let kids "do their own thing" and "explore their own interests" that was all the structure they needed. We now can reject this argument as an indication of bad teaching practice.

Second, there are some features in the preceding list which do not often get attention in generalized lists of effective teaching behaviors. For example, the notion of skillful combining of basic skills instruction with the teaching of higher order thinking skills is a particular requirement of effective teaching of disadvantaged students that is often unmentioned--and even debated by some. Yet researchers have documented that disadvantaged students particularly have often suffered from, and been bored by, endless repetition of low order drill and practice in the basic skills. This poor practice derives from failure of teachers to hold equally high expectations for such students. Similarly, decoding skills in reading to the exclusion of helping kids with ways to improve comprehension and simple arithmetic operations to the exclusion of experiences in math problem solving all have the effect of creating meaningless experiences. These in turn negate disadvantaged children's views of school and themselves. Researchers are now documenting the effectiveness of teaching higher order skills to disadvantaged and underachieving students. Increasingly, we are realizing that the often well intentioned approaches to basic skills remediation have been misguided. Beyond the basic skills, the disadvantaged need learning-to-learn skills, content thinking skills, basic reasoning skills, and communication skills.

Third, this list of effective teaching practices makes reference to ensuring cultural relevance. A growing body of research knowledge now documents the fact that the extent to which this happens in the classroom is one major predictor of academic success on the part of minorities and students with limited English speaking abilities. As one research team (Garcia & Noble, 1988) puts it: "Students are more likely to feel that what they do is significant when their personal and family characteristics, their ethnicity, language, and way of life are respected by the school." Increasingly, this sense of "efficacy" on the part of the students is linked in teaching research to high achievement.

Of particular importance in classrooms with minority students is the finding that how children interact is very much structured by the conversation rules and modes of parent-child communication. For example, direct questioning of Native American children often evokes silence. Such silence does not necessarily mean that the child does not understand or know the answer. Rather, the home culture regards active demonstration of knowledge as unseemly. The same is true when a teacher wants the student to debate a proposition. Many tribes favor a less direct and nonpersuasive way of expressing dissent. Thus, minority students often must tread a confusing line of trying to understand the teacher's expectations and ways that the teacher assesses the child's performance, and to resolve the differences between home and teacher expectations.

Finally, the list contains some affective items, too often overlooked in summaries of effective teaching techniques. Yet, in the bicultural classroom, the quality and sincerity of the interaction between teacher and students is a key element in engaging and encouraging, rather than alienating and discouraging, the students. The concept of "warmth" of the teacher is one which is seldom found in general lists of effective teaching practices. Researchers have discovered that this trait of personal warmth is particularly important in working with Native American students. It is most effectively combined with consistent high expectations, yielding what one Alaskan researcher (Kleinfeld, 1972) calls "active demandingness."

2. Grouping for instruction. Research tells us that the way students are grouped can often have a major effect on student performance. Among key findings on grouping:

- Both high- and low-ability students do better academically in classes where the total group includes students with a wide range of academic ability. The impact is most positive for low-ability students.
- By contrast, only high-ability students benefit from homogenous "ability" grouping where students at a similar ability level are kept together for long periods of time. In addition, there are harmful effects for low-ability students. Their engagement decreases when they are kept together for long periods of time.

Two grouping practices that are showing particularly significant performance results are "peer tutoring" and "cooperative learning" strategies. In peer tutoring, students are paired in a one-on-one relationship to reteach one another, to extend instruction, or to assist each other with tasks emerging from the instruction. In cooperative learning, small groups of four to six students with a cross-section of characteristics are formed to teach information and skills. The tasks they work on emphasize material already taught by teachers. Students assist one another with the task. Then each group receives a single grade for its performance, as well as an individual assessment of each student's contribution to the group.

In peer tutoring and cooperative learning, the individual student is judged in part by his/her contribution to the total team effort. Study after study has documented both improved achievement and improved classroom climate related to these strategies. One researcher (Levin, 1987) cites the peer tutoring approach, properly carried out, as one of the most cost-effective ways for improving the performance of disadvantaged students. Further, such cooperative student-on-student and team-structured groupings take advantage of many minority students' cultural backgrounds. Where "performance" by an individual may be construed as showing off or self-aggrandizement, group work supports striving for excellence.

3. Classroom testing and assessment. The decade of the 1980s has seen great public interest in testing students. While the reform movement of the early 1980s led to heightened schoolwide achievement testing of students across the country, researchers at the Laboratory (Stiggins, Conklin, & Bridgeford, 1986) focused a great deal of attention on the kind of testing that happens in the classroom. They found teachers assess students' behavioral and interactional styles almost as much as they assess academic performance. For example, some research found that teachers tend to use cues such as the ways children sit, talk, listen, and respond to instructions to develop a framework for assessing students. For minority students, whose interactional expectations differ from those of the teacher, these assessments can be especially inappropriate or unfair.

Our researchers advocate expanded training of teachers to assess students appropriately and to be sensitive to the different styles of interaction conditioned by their home environments. As students are assessed much more often by their teachers in the classroom than they are by standardized tests, these research findings are particularly important for improving student performance.

4. Classroom climate. The climate of the classroom has an important relationship to student learning. Researchers have documented that a "safe and orderly" environment is a key feature of effective classrooms. We have already cited the necessity for the classroom to contain an atmosphere that respects the students' cultural backgrounds and heritage. Also important is a classroom environment where the students as well as the teacher respect and demonstrate "high academic expectations, warmth, concern for others, and respect of others." These features have been shown to enhance student achievement, particularly in classrooms with significant numbers of minorities and disadvantaged students.

5. Class size. The issue of class size has been debated for years. It continues to be a major topic in collective bargaining discussions as well as in state legislatures and state education departments. Researchers have reached general consensus on the following statements about class size:

- Reducing class size will not, by itself, raise student achievement. High quality teaching that takes advantage of the smaller group of students must accompany such reductions.
- The most beneficial effects of smaller classes are noted in the area of reading followed, in descending order, by mathematics, language arts, and the natural sciences.
- Ethnic minority students and economically disadvantaged students have higher achievement in smaller classes with high quality teaching than in similar classes of larger size.
- Students of lesser ability benefit relatively more from smaller classes.
- Smaller classes are related to higher achievement in the primary grades of kindergarten through grade three but less related in grades four through eight. The most beneficial effects at all grade levels are noted when the class size is 16 to 22.

In most cases, the issue of class size in rural Alaska is irrelevant. The schools already have very low class size. On the other hand, it is good to recognize that this is a strength in rural Alaska which can be built upon.

IV. POLICY ISSUES AND OPTIONS

A. THE NEED FOR POLICY INITIATIVES

The research findings discussed in the preceding raise several key public policy issues. The "rising underclass" demands heightened attention to effective education for poor, minority students. As we know from national projections, without some form of intervention the number of poor, minority, low-skilled citizens is expected to increase dramatically in the foreseeable future. We know that the consequences are getting worse faster than in any other era of our history. Henry Levin (1987) has detailed the consequences of avoiding the issue of better education for the disadvantaged. Economic deterioration, rising costs of welfare and other public services, and the creation of a "dual society" are all clearly on the horizon unless public policy sets a different direction.

These consequences will have major effects on the economic and social climate. And, equally important, the lack of action will have a major influence on our higher education systems. We are already feeling the impact of declining enrollments of poor, minority citizens in higher education. We applaud the Carnegie Foundation and Massachusetts Institute of Technology for addressing this issue.

B. INTEGRATING POLICY FOR EQUITY AND EXCELLENCE

We have historically viewed the issues of "equity" and "excellence" as two separate sets of concerns. We have tended to assume that if you enhance one, the other must, of necessity, suffer. We now know that the assumption of "tradeoffs" between the two goals is unnecessary and counterproductive. The research on culturally sensitive curriculum and instruction shows us that the "remedial" mentality of "dumbing down" and slowing the pace of instruction is a fruitless way to achieve either equity or excellence. Conversely, sensitive adjustment of curriculum and instruction to cultural conditions, while maintaining the same high expectations for all children, is truly possible. The vision public policy makers can now create is one of hope and belief--the belief that all children, regardless of ethnicity or socioeconomic status, can learn well.

C. EDUCATIONAL POLICY SUGGESTED BY THE RESEARCH

Three major features of the research findings require the attention of those at the local level who must implement improved educational strategies. First, the skillful combination of basic and higher order thinking and learning skills is a major new focus. Second, the need for cultural relevance in curriculum materials and teaching techniques is now well documented. But more than the need, we now have evidence which correlates such relevance with improved student performance for minority and bilingual students. Finally, the requirements that teachers and administrators be highly skilled in planning and initiating new instructional strategies such as cooperative learning, peer tutoring, and mastery learning is coupled with the need for warmth, sensitivity, and commitment to the needs of parents as full partners in the education of children.

Obviously, most of this must happen at the local level. State policy makers are therefore left wondering what their role might be to stimulate this new vision of education and the related solutions. The need for a major initiative in professional development to learn more about these solutions and to gain skills and perspectives in implementing them is probably the single most important support policy makers can give.

D. POLICY ON IMPLEMENTING SOLUTIONS

Another key state policy question centers on the best strategy for creating a new vision and stimulating implementation of the solutions we have discussed. Should the state adopt an "incentive" strategy, rewarding school districts that demonstrate major gains? Should the state provide developmental support to all school districts to improve education of the disadvantaged? Should the state adopt curriculum standards, requiring a common core of learning outcomes for all students? Or should the state adopt a requirement that all districts implement a planning and evaluation process which involves the community in specifying the local outcomes, reviews research findings, implements solutions, and measures and reports how well those outcomes are achieved? There is no research evidence suggesting a preferred policy position on these options. Clearly, however, state policy makers must resolve which of the options should be implemented. We do know from the research on change and improvement in schools that policy makers must orchestrate a constant balance of "pressure" and "support."

E. POLICY PARTNERSHIPS

In setting new directions to reverse the trend of the rising underclass, public policy makers need partnership support from business, industry, and labor as well as a renewed sense of purpose from the educational community. We need to begin detailing the necessary commitments and roles of other health and welfare agencies in dealing with dysfunctional families, drug and alcohol abuse, and the debilitating effects of poverty.

New kinds of partnerships and commitments are clearly called for. In the case of drug and alcohol abuse, for example, we know that schools cannot overcome a community context that is either ambivalent about drugs or alcohol abuse or worse yet, promotes it. Only effective community partnerships can reverse these trends.

F. ACCOUNTABILITY POLICY

As state and local policy makers seek to create a new vision and provide the necessary support to make it a reality, we are shifting our assumptions about the nature and contributions of schooling in our society. For the last few generations, we have held the view that the schools' basic responsibilities were to provide opportunities. We now see the possibility of schools as "obligation centers." The "opportunity" view says, "Judge our schools on the range and scope of the opportunities we provide." The "obligation" vision says, "Judge the schools on how well they deliver on student performance for *all* students."

As we move to this new level of expectation for our schools, a key public policy question is, "How far should the public expectations of the schools' performance obligation go? To high test scores and positive social behavior? To successful graduation of all students? To possession of job skills?" This question of accountability is a major issue for policy makers to resolve.

G. LONG-RANGE VERSUS SHORT-RANGE POLICY

Another major policy question is, "How long are you willing to wait for major benefits?" Some states are beginning to make major investments in early childhood education. We know that, properly implemented, this is a highly cost-effective strategy, but the benefits will not be fully felt for almost two decades. Other states are choosing to seek quicker, but perhaps more narrow, benefits through dropout prevention programs at the junior and senior high school levels. This latter approach, properly implemented, can have major and more immediate benefits, but may well neglect the next generation of students. Resolving this issue is a major public policy challenge.

H. POLICY REQUIRES A RESEARCH BASE

Finally, we need to return to our early qualifying statement about the nature of the research we have been discussing. Most of the research has not been carried out in Alaska. We encourage your consideration of support for additional research of the kind that Bill Demmert and Bob Silverman recently conducted. In a report presented at the American Educational Research Association 1988 Annual Meeting, Demmert and Silverman disussed the characteristics of successful Alaska Native students. This focus on "success" characteristics, rather than "deficits" is the direction research on education of poor, minority students needs to take. But studies like this one in Alaska are in short supply. More are needed.

I. IMPLEMENTING RESEARCH IN POOR, MINORITY, RURAL AREAS

Since relatively little of the research on education of the disadvantaged has been conducted in Alaska, you are likely to hear from some that, because of your unique cultural conditions, the research findings simply will not apply here. We have some experience with this kind of challenge to the relevance of the research findings on effective schooling. Several years ago, our R&D Program for Indian Education launched an effort to help schools with high concentrations of Indian children in the Northwest. The basic approach was to provide the evidence about general effective schooling to local planning groups. There were many, Indian and non-Indian alike, who said that the effective schooling research findings would never work due to cultural conflict. However, after several years of experience in culturally sensitive application of the effective schooling research we can now quote the following illustrative success stories reported by the school people who have implemented the effective schooling practices:

> "We raised composite SRA scores for Native American students (so that) combined scores of Native students are 50 percent or better in each grade for grades one through four."
>
> "We reduced incomplete student assignments by 61 percent. We have a workable process for achieving school improvement now."
>
> "Last year we had 15 Native American students being considered for retention. This year we have 5. That's significant!"
>
> "We went from a homework completion rate of only 53 percent to an 88 percent completion rate."
>
> "Our PTA meetings had three people showing up in September. At our last meeting for parents of Native American students, we had 60 people attend."
>
> "Our volunteer program for parents includes 20 percent Native parents (up from 0 percent last year). For the first time we have a Native as a PTA officer."
>
> "We increased our attendance to the best in the district (94 percent)."
>
> "Our post test results showed ... that Native American responses in classroom discussions increased to 22 percent of the total students. The Native population is only 12 percent. An interesting side benefit was that the total number of responses in the same period of time increased 60 percent. All students were responding more!"

These kinds of comments suggest to us that the research findings have direct relevance for minorities. Strong state support for implementing these new solutions in Alaska settings will be critical.

J. POLICY AS THE CONTEXT FOR IMPROVEMENT

Almost equally important, policy makers' commitment to, and patience with, a long-range educational improvement effort is absolutely essential. Our schools are one of the most complex, yet stable of our social institutions. Creating change and improvement therefore demands a long-range viewpoint and long-range strategies. The "quick fix" is not an option. Lasting solutions suggested by a growing body of research evidence are available for us to use.

Thank you for asking us to participate in this, the most important public policy issue of the next decade.

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HB

367

Alaska State Legislature

425
503

MEMBER
RESOURCES COMMITTEE
LABOR AND COMMERCE COMMITTEE
OIL AND GAS COMMITTEE
FINANCE SUB COMMITTEE
NATURAL RESOURCES

Representative Jim Zawacki

M E M O R A N D U M

TO: ALL LEGISLATORS

FROM: Representative Jim Zawacki

DATE: January 27, 1992

RE: HB367

==========

Attached is a copy of HB367 for your consideration and review. I introduced this legislation to eliminate a loophole that currently exists in AS 11.71.040 (a)(3)(A).

Under current law, a person who has recently or immediately ingested a controlled substance cannot be charged with possession of a controlled substance.

Also attached is page 17 of the Legislative Affairs Agency's report to the Legislature "Examining Court Decisions and Opinions of the Attorney General Construing Alaska Statutes."

The report recommends "legislative review" and describes the current statute as "illogical."

I firmly believe that this loophole should be corrected in order to aid our law enforcement agencies and personnel and to correct an unfortunate error contained in AS 11.71.040.

Please contact Portia in my office (2724) if you would like to Co-Sponsor HB367 or if you have any questions or would like additional information.

Thank you very much and I look forward to hearing from you.

Sponsor Statement

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Alaska State Legislature

3111 "C" STREET, SUITE 425
ANCHORAGE, ALASKA 99503
(907) 561-2037

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-2719/2693

MEMBER
RESOURCES COMMITTEE
LABOR AND COMMERCE COMMITTEE
OIL AND GAS COMMITTEE
FINANCE SUB COMMITTEE
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Sponsor Statement

XU

ANCHORAGE DISTRICT ATTORNEY'S OFFICE *Memorandum*
Alaska Department of Law/Criminal Division

TO: The Hon. Charles E. Cole
Attorney General

FROM: Edward E. McNally
Anchorage District Attorney

DATE: February 28, 1992

RE: Comments for Representative Zawacki on House Bill No. 367

You have asked that the Anchorage District Attorney's Office provide comments concerning House Bill No. 367, a commendable piece of legislation recently submitted by Representative Zawacki.

As is stated on the face of the Bill, the proposals in HB 367 are based on a very sound premise: the need to close a loophole in Alaska's drug possession laws that has resulted from the Alaska Court of Appeals decision in State v. Thronsen, 809 P.2d 941 (Alaska App. 1991). Representative Zawacki is entirely correct that this is a matter that needs to be addressed during this legislative session.

However, as you will recall, when you assembled a team of the State's leading prosecutors last fall in order to prepare the Governor's Crime Bill, you asked that the Department of Law draft language to address this very same loophole. As with HB 367, Section 6 of the Governor's Crime Bill (HB 554) would also have the effect of reversing the Thronsen decision, which held, in essence, that a person cannot be prosecuted for "possession by consumption." As the Legislative Affairs Committee noted in its recent report to the Legislature in Juneau, "It seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it." Legislative Affairs Agency Report to the 17th State Legislature (October 1991) at p. 17.

In essence, then, Section 6 of the Governor's Crime Bill defines "possession" for drug offenses so that persons who have ingested drugs are subject to prosecution to the same extent as those who are found with drugs in the pockets of their clothing or at their house.

D.O.L. Correspondence

I have reviewed the language in Representative Zawacki's proposed change, and discussed this question with Dean Guaneli. We share the view that as a practical matter, the language drafted at your direction for the Governor's Crime Bill would be somewhat more effective and useful to Alaska's prosecutors in closing the loophole created by the Thronsen decision.

ACTION: It would be our recommendation that you authorize Assistant Attorney General Margo Knuth of the Criminal Division Central Office to work in cooperation with Representative Zawacki's staff in an effort to reach a mutually supported position. Although it is our view that the language in HB 554 would be more effective than that in HB 367, it is clear that we are trying to achieve the same objective.

Thank you for this opportunity to comment, and for your continuing support for improved legislation to fight crime.

cc: Harry Davis
Fairbanks District Attorney

Dean Guaneli
Assistant Attorney General

STATE OF ALASKA
DEPARTMENT OF LAW

MEMORANDUM

TO: Charlie Cole
Attorney General

DATE: February 24, 1992

THRU:

PHONE: 452-1565

FROM: Harry L. Davis
District Attorney
Fairbanks DAO

RE: House Bill #67

House Bill 367 misses the mark in correcting the Thronsen decision. Under present law it is unlawful to knowingly use or ingest a controlled substance since one must possess it in order to use or ingest it. The problem with Thronsen is that it legalizes the possession of controlled substances in one's body. The practical problem of this is that we cannot prove when and where a person knowingly ingested the controlled substance. An example of this would be where a defendant ingests PCP in Seattle, gets on a plane and is arrested in Anchorage a few hours later. Even though the defendant would still have the controlled substance in his body and still be under its influence there would be no crime in Alaska since the ingestion and use occurred outside the jurisdiction of Alaska.

The way to correct this loophole is to amend A.S. 11.71.900 by adding a definition of possess to read as follows:

"possess means having physical possession or the exercise of dominion or control over a drug or having a drug in one's body, urine or blood."

The Supreme Court might declare the statute unconstitutional under Ravin but that is a risk we run every time we pass drug legislation.

HLD/rlr

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

March 9, 1992

Rep. Jim Zawacki
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 367

Dear Representative Zawacki:

This letter is to confirm the Department of Law's support for HB 367, "An Act relating to the use or ingestion of controlled substances." We are pleased with the concept of this legislation, which will have the effect of overruling the recent court of appeals opinion in State v. Thornsen, 809 P.2d 941 (Alaska App. 1991) (holding that a defendant who has ingested cocaine is not "in possession of" the drug under current law).

As we have noted in conversation with your staff, the same issue is addressed in one of the provisions of the Governor's crime bill, but in a much more direct, and in our opinion effective, manner. HB 367 amends three of the state's drug crimes to add "using or ingesting" any amount of a particular drug as one of the ways that the offense can be committed. The Governor's bill, HB 554/SB 444, instead simply amends the definition of "possession" for purposes of the drug laws to include "injecting, inhaling, swallowing, or otherwise introducing the substance into the person's body or bloodstream."

We prefer the language used in the Governor's bill and would be happy to assist your office in preparing a committee substitute for HB 367, using this language.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

DJG:jf
cc: Lori Nottingham
Office of the Governor

03-C31LH

Position Papers

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

WALTER J. HICKEL, GOVERNOR

REPLY TO:

P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE (907) 465-3376

February 4, 1992

The Honorable Jim Zawacki
Alaska State House of Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Representative Zawacki,

I have reviewed House Bill 367, which you introduced to eliminate a loophole in our statutes dealing with possession of controlled substances. I am responding to your letter dated January 24, 1992 requesting the Department's position on this bill.

The Department of Corrections fully supports this proposed legislation. The availability of urinalysis and other chemical testing to detect illegal drug use has been of immeasurable help to our Department in our efforts to detect and curtail drug use in institutions, as well as by probationers/parolees. It seems unreasonable to prevent law enforcement agencies from using such technology to detect illegal drug use. I concur that recent use or ingestion of a controlled substance should be treated the same as possession without intent to deliver.

Thank you for the opportunity to express the Department's position in support of your bill.

Sincerely,

Lloyd Hames
Commissioner

20-01LH

POSITION PAPER - Department of Public Safety

BILL NO: HB 367

DATE: February 3, 1992

TITLE: An Act relating to the use or ingestion of controlled substances.

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

HB 367 would amend the existing controlled substance laws to make it clear that a person who has ingested a controlled substance is guilty of misconduct involving a controlled substance. This would have the effect of setting aside the Alaska Court of Appeals decision in State v. Thronsen, 809 p. 2d 941 (Ak. App. 1991). In that case the court ruled that a person who injected cocaine into himself at a "crack house" in Fairbanks could not be found guilty of "possession" of that cocaine.

The Legislative Affairs Agency, after reviewing the Thronsen case, recommended that the Legislature consider addressing this anomaly. At page 17 of its report the agency states: "It seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it." The Department of Public Safety agrees with that statement, and supports HB 367.

Richard L. Burton
Commissioner

ALASKA STATE MEDICAL ASSOCIATION

4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662

February 6, 1992

Representative Jim Zawacki
Alaska State Legi ..ature
P. O. Box V (MS 3100)
Juneau, AK 99835

Dear Representative Zawacki:

At a recent meeting of the Alaska State Medical Association Legislative Affairs Committee, we reviewed your House Bill 367, an act relating to use of controlled substances. After review of the bill, we have given it our strong endorsement. This bill will close a rather large loophole in the present law and should make prosecution of drug abuse easier.

If I can be of any assistance to you in passing this bill, do not hesitate to call me.

Sincerely yours,

Donald R. Lehmann, M.D., A.B.F.P.
Chairman, Legislative Affairs Committee

DRL:bj

cc: Rick Urion

Misc. Support

Municipality of Anchorage

Tom Fink, Mayor

Department of Public Works

Girdwood Board of Supervisors

P.O. Box 345 • Girdwood, Alaska 99587

February 11, 1992

Representative Jim Zawacki
P.O. Box V
Juneau, AK 99811

Dear Representative Zawacki:

The Girdwood Board of Supervisors unanimously supports the passage of HB 367, an act relating to the use or ingestion of controlled substances. We join you in expressing a desire to see this legislation passed in the coming season.

Sincerely,

Mike Grandinetti
Chairman
Girdwood Board of Supervisors

Kenai Chamber of Commerce
402 Overland
Kenai, Alaska 99611
(907) 283-7989

KENAI CHAMBER OF COMMERCE

RESOLUTION 92 - 2

RESOLUTION IN SUPPORT OF HOUSE BILL 367

WHEREAS, The Kenai area is deemed by its citizens as a law abiding area, and

WHEREAS, drug usage degrades the way of life in any area where it exists, and

WHEREAS, strong anti drug laws are supported to suppress drug activity within Alaska, and

WHEREAS, House Bill 367 will address the closing of a loophole in the present day drug enforcement laws and

WHEREAS, the Kenai Chamber of Commerce represents a large number of businesses and organizations in the Kenai area.

NOW THEREFORE BE IT RESOLVED THAT THE KENAI CHAMBER OF COMMERCE supports House Bill 367.

Approved by the Board of Directors of the Greater Kenai Chamber of Commerce, Kenai. Alaska on this 21st Day of February 1992

Jeff Belluomini
President
Kenai Chamber of Commerce

Attest

Eleanor Thomson

UX

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

February 14, 1991

MEMORANDUM

TO: Representative Jim Zawacki

FROM: Christine M.Cheff
Legislative Analyst

RE: **Controlled Substances - Does Ingestion Equal Possession?**
Research Request 92.132

You asked if any states have laws which provide that a person who ingests a controlled substance may be criminally convicted for possession of that substance.

Although we conducted a computer search of the statutes for all 50 states and a random manual search of the statutes in approximately 15 states, we were unable to find any statutory provisions pertaining to this issue.[1] There is a Montana statute which states that a person commits the offense of criminal possession of a toxic substance if he or she inhales or ingests substances such as: glue, fingernail polish, chemical solvents, paint and paint thinners (Attachment A). This law does not apply to controlled substances however.

We also reviewed opinions for several court cases in which the key issue was possession of a controlled substance. In general the courts have found that possession of a controlled substance must be either actual or constructive to be considered a crime.[2] Actual possession means that a person has physical control of a substance, while a person who merely knows of the presence and nature of a controlled substance may be said to have constructive possession.[3],[4] In 1983 the Kansas Supreme Court (659 P2d 208) ruled that once ingested a controlled substance cannot be controlled, possessed, used, disposed

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[1]Research conducted in West Publishing Company's WESTLAW service and the statutes for: Alabama, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Massachusetts, Minnesota, Montana, Nevada, New Jersey, Oregon, South Dakota and Texas.

[2]*Words and Phrases*, West Publishing Co., Vol. 33, pp. 149 - 150.

[3]*Black's Law Dictionary*, 6th Edition (1990).

[4]*Words and Phrases*

Legislative Research

of or cause harm (Attachment B).[5] As you know, that opinion has been cited and affirmed in subsequent cases, including the 1991 Alaska Court of Appeals case State v. Thronsen (809 P2d 941).

Please let us know if we can be of further assistance on this or any other matter.

Attachments

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[5]*State v. Flinchpaugh*, 232 Kan. 831, 659 P2d 208 (1983).

ATTACHMENT A
Montana Statutes

MONTANA CODE ANNOTATED
1991

CONTENTS

9, 1991

45-9-116. Imitation dangerous drugs — exemptions — rules. (1) Sections 45-9-111 through 45-9-115 do not apply to:

(a) a person authorized by rules adopted by the board of pharmacy to possess with purpose to sell or sell imitation dangerous drugs;

(b) law enforcement personnel selling or possessing with purpose to sell imitation dangerous drugs while acting within the scope of their employment; and

(c) a person registered under the provisions of Title 50, chapter 32, part 3, who sells, or possesses with purpose to sell an imitation dangerous drug for use as a placebo, by that person or any other person so registered, in the course of professional practice or research.

(2) The board of pharmacy shall adopt, amend, or repeal rules in accordance with the Montana Administrative Procedure Act to authorize the possession with purpose to sell or sale of imitation dangerous drugs whenever it determines that there is a legitimate need and that the drugs will be used for a lawful purpose.

History: En. Sec. 6, Ch. 451, L. 1983; amd. Sec. 1, Ch. 247, L. 1983; amd. Sec. 20, Ch. 3, L. 1985.

45-9-117 through 45-9-120 reserved.

45-9-121. Criminal possession of toxic substances — penalty. (1) A person commits the offense of criminal possession of a toxic substance if he inhales or ingests or possesses with the purpose to inhale or ingest, for the purpose of altering his mental or physical state, any substance with toxic effects that is not manufactured for human consumption or inhalation, including but not limited to glue, fingernail polish, paint and paint thinners, petroleum products, aerosol propellants, and chemical solvents.

(2) The provisions of subsection (1) do not apply to a bona fide institution of higher education conducting research with human volunteers pursuant to guidelines adopted by the institution or any federal or state agency.

(3) A person convicted under this section shall be imprisoned in the county jail for a term not to exceed 6 months or be fined an amount not to exceed $500, or both.

(4) The youth court has jurisdiction of any violation of subsection (1) by a person under 18 years of age.

History: En. Sec. 1, Ch. 482, L. 1983.

45-9-122 through 45-9-124 reserved.

45-9-125. Continuing criminal enterprise — penalty. (1) A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and a fine not exceeding two times those authorized for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(a) the person violates any provision of this chapter that is a felony; and

(b) the violation is a part of a continuing series of two or more violations of this chapter on separate occasions:

ATTACHMENT B
Kansas Supreme Court (659 P2d 208)

232 Kan. 831

STATE of Kansas, Appellant,

v.

Janet P. FLINCHPAUGH, Appellee.

No. 54756.

Supreme Court of Kansas.

Feb. 19, 1983.

The defendant was charged with possession of cocaine and following a preliminary hearing where the magistrate found probable cause, defendant moved to dismiss. The District Court, Dickinson County, John F. Christner, J., sustained the defendant's motion to dismiss and the State appealed. The Supreme Court, Floyd H. Coffman, District Judge, Assigned, held that evidence of a controlled substance assimilated in defendant's blood did not establish possession of that substance, nor was it adequate circumstantial evidence to show prior possession by defendant.

Affirmed.

must be charged in Statute to prosecute.

1. Drugs and Narcotics ⇐63, 64

Possession of controlled substance requires having control over substance with knowledge of and intent to have such control; knowledge of the presence of controlled substance as embraced within the concept of physical control with intent to exercise such control is essential.

2. Drugs and Narcotics ⇐63

"Control," as used in statute making it unlawful for any person to possess or control any narcotic drug, is given its ordinary meaning, namely, to exercise restraining or directing influence over.

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

3. Drugs and Narcotics ⇐63

Once controlled substance is within a person's system, power of person to control, possess, use, dispose of, or cause harm is at an end, and thus presence of the substance in the blood is not "possession" or "control" of the substance within statutory prohibition. K.S.A. 65–4127a.

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

4. Criminal Law ⇐552(1)

"Circumstantial evidence" is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to common experience of mankind, are usually or always attended by the fact in issue, and therefore affords basis for reasonable inference by jury or court of the occurrence of fact in issue.

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

5. Criminal Law ⇐561(1)

In criminal prosecution, defendant must be proven guilty beyond reasonable doubt of each element of crime charged. U.S.C.A. Const.Amend. 14.

6. Drugs and Narcotics ⇐64

Knowledge is essential ingredient of crime of illegal possession of controlled substance; defendant must know of presence of controlled substance. K.S.A. 65–4107(b)(5), 65–4127a.

7. Drugs and Narcotics ⇐64

Intent to possess, to appropriate the drug to oneself, constitutes requisite mental attitude for conviction of possession of a controlled substance. K.S.A. 65–4127a.

8. Drugs and Narcotics ⇐117

Discovery of drug in person's blood is circumstantial evidence tending to prove prior possession of drug, but is not sufficient evidence to establish guilt beyond reasonable doubt, since the drug might have been injected involuntarily, or introduced by artifice, into defendant's system. K.S.A. 65–4127a.

9. Drugs and Narcotics ⇐117

Evidence of controlled substance assimilated in defendant's blood did not establish possession of that substance, as defined by statute making it unlawful for any person to possess or distribute any narcotic drug, nor was it adequate circumstantial evidence

to show prior possession by defendant, since prosecution failed to establish that defendant ever knowingly had control of controlled substance. K.S.A. 65–4127a.

10. Drugs and Narcotics ⇐117

In prosecution for possession of controlled substance based on evidence of controlled substance assimilated in defendant's blood, other corroborating evidence, combined with positive blood test could be sufficient evidence to prove guilt beyond reasonable doubt, depending on probative value of corroborating evidence. K.S.A. 65–4127a.

11. Drugs and Narcotics ⇐63

Purpose of Uniform Controlled Substances Act is to regulate drug traffic, and once controlled substance is in human system it is beyond control which the Act contemplated; therefore, without proof of person's knowledgeable prior possession of drug, punishment for presence of drug in person's system is not consistent with design of the Act. K.S.A. 65–4101 et seq.

Syllabus by the Court

1. Possession of a controlled substance requires having control over the substance with knowledge of and the intent to have such control. Knowledge of the presence of the controlled substance with the intent to exercise control is essential.

2. Control as used in K.S.A. 65–4127a means to exercise a restraining or directing influence over the controlled substance.

3. Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body and the ability to control the drug is beyond human capabilities. Presence of the substance in the blood is not possession or control of the substance within K.S.A. 65–4127a.

4. Circumstantial evidence is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are usually or always attended by the fact in issue, and therefore affords a basis for a reasonable inference by the jury or court of the occurrence of the fact in issue. *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, Syl. ¶ 6, 431 P.2d 518 (1967).

5. In a criminal prosecution, the defendant must be proven guilty beyond a reasonable doubt of each element of the crime charged. *State v. Douglas*, 230 Kan. 744, Syl. ¶ 1, 640 P.2d 1259 (1982).

6. Discovery of a controlled substance in a person's bloodstream is circumstantial evidence tending to prove prior possession of the substance, but it is not sufficient evidence to establish guilt beyond a reasonable doubt of possession or control of the substance. A blood test alone fails to establish knowledge of the presence of the substance and the intent to exercise control over the substance.

7. The purpose of the Uniform Controlled Substances Act is to control illicit and legitimate drug traffic. Once a controlled substance is in the bloodstream it is beyond the control which the uniform act contemplated.

Keith D. Hoffman, County Atty., argued the cause, and Robert T. Stephan, Atty. Gen., was with him on brief for appellant.

No appearance by appellee.

FLOYD H. COFFMAN, District Judge, Assigned:

The State of Kansas appeals the dismissal of its prosecution against Janet Flinchpaugh for possession of cocaine, its salts, isomers, and salts of isomers, pursuant to K.S.A. 65–4127a and K.S.A. 65–4107(*b*)(5). Possession of cocaine is a class C felony. The defendant was charged with involuntary manslaughter in a separate prosecution.

Following a preliminary hearing the magistrate found probable cause. The defendant moved to dismiss and the parties stipulated to these facts. Janet Flinchpaugh, while driving in Abilene, Kansas during the late evening hours of November 13, 1981, was involved in an automobile collision. As

a result of the impact, the driver of the other car died. Defendant suffered injuries and was taken to the hospital where she consented to the drawing of her blood. Samples of her blood were sent to the Kansas Department of Health and Environment in Topeka. Cocaine and/or benzoylecgonine was found in the blood samples. Benzoylecgonine is a metabolite of cocaine. In order for traces to be in the blood, cocaine must first have been present. The State had no direct evidence of how or when the chemicals were introduced into the defendant's system. The charge of possession is based solely on the result of the testing of the defendant's blood. The trial court, taking the case under advisement following oral argument, observed: "[A] controlled substance in the system controls the body and it is impossible to control the substance once in the bloodstream." Later, by memorandum decision, Judge Christner sustained the defendant's motion to dismiss stating "[a] human being does not possess a narcotic drug which is located in his bloodstream." The State appeals the dismissal through K.S.A. 22-3602(*b*)(1), and (*b*)(3). (Jurisdiction is taken under the former.)

The State's information charged the defendant with unlawfully, feloniously, and willfully possessing or having under her control cocaine, its salts, isomers; and salts of isomers. The relevant statutes are K.S.A. 65-4127a and K.S.A. 65-4107(*a*) and (*b*)(5):

> "Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture, possess, have under his control, possess with intent to sell, sell, prescribe, administer, deliver, distribute, dispense or compound any opiates, opium or narcotic drugs. Any person who violates this section shall be guilty of a class C felony, except that, upon conviction for the second offense, such person shall be guilty of a class B felony, and upon conviction for a third or subsequent offense, such person shall be guilty of a class A felony, and the punishment shall be life imprisonment."

> "(*a*) The controlled substances listed in this section are included in schedule II;

> "(*b*) any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by combination of extraction and chemical synthesis: . . . .

> . . . .

> (5) cocaine, its salts, isomers and salts of isomers."

[1] These statutes are similar to the Uniform Controlled Substances Act. This court in *State v. Faulkner*, 220 Kan. 153, 156, 551 P.2d 1247 (1976), in an opinion by Chief Justice Fatzer, observed:

> "The Uniform Controlled Substances Act, (K.S.A. 65-4101 et seq.) does not define 'possession.' (See K.S.A. 21-3102[1].) In *State v. Neal*, 215 Kan. 737, 529 P.2d 114, we defined 'possession,' citing PIK Criminal, Ch. 53.00, at p. 69 (1971):
>
> "'*Possession.* Having control over a place or thing with knowledge of and the intent to have such control.' *State v. Metz*, 107 Kan. 593, 193 P. 177 (1920); *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952). . . .'
>
> ". . . Knowledge signifies awareness and is a requirement for 'possession.'
>
> "'Knowledge of the presence of a narcotic or dangerous drug as embraced within the concept of physical control with the intent to exercise such control is essential. . . .' (28 C.J.S., Drugs and Narcotics Supplement, § 160 [1974], p. 235.)"

Justice Burch, in a case concerning alleged unlawful possession of liquor, wrote:

> "[C]orporeal possession is the continuing exercise of a claim to the exclusive use of a material thing. The elements of this possession are, first, the mental attitude of the claimant, the intent to possess, to appropriate to oneself; and second, the effective realization of this attitude." *State v. Metz*, 107 Kan. 593, 596, 193 P. 177 (1920).

The editors of PIK Crim.2d 64.06 in defining Unlawful Possession of a Firearm —Felony, added to the requirement in the statute (K.S.A. 21–4204) that the element of "possession of the firearm" be done "knowingly," commenting:

> "This construction of the word 'possession' is consistent with many Kansas cases which recognize that the elements of possession require a mental attitude that the possessor intended to possess the property in question and to appropriate it to himself." See *State v. Metz*, 107 Kan. 593, 193 P. 177, and *City of Hutchinson v. Weems*, 173 Kan. 452, 249 P.2d 633 (1952).

[2] "'Control,' as used in [the] statute making it unlawful for any person to possess or control any narcotic drug, is given its ordinary meaning, namely, to exercise restraining or directing influence over . . . *Speaks v. State*, 3 Md.App. 371, 239 A.2d 600, 604." Black's Law Dictionary 298 (5th ed. 1979).

[3] Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance. The Court of Special Appeals of Maryland has agreed:

> "Once a narcotic drug is injected into the vein, or swallowed orally, we think it apparent that it is no longer within 'one's control' or held at 'one's disposal.' And it would likewise be beyond the taker's ability to exercise any restraining or directing influence over it. Consequently, once the drug is ingested and assimilated into the taker's bodily system, it is no longer within his control and/or possession in the sense contemplated by Section 277." *Franklin v. State*, 8 Md.App. 134, 138, 258 A.2d 767 (1969), *cert. denied* 257 Md. 733 (1970).

See *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328 (1977); and *State v. Yanez*, 89 N.M. 397, 553 P.2d 252 (Ct.App.1976).

The State also contends the presence of a controlled substance in one's bloodstream is sufficient circumstantial evidence alone to prove possession of the substance at the time immediately before the substance was introduced into the person's system. In other words, the person must have possessed the drug before it was ingested.

In *Franklin v. State*, 8 Md.App. 134, 258 A.2d 767, the defendant was brought to a hospital in a semi-conscious state. Several hours later he acknowledged he had taken heroin; the treating doctor testified the defendant's condition was entirely compatible with having had an overdose of heroin; and this evidence was held sufficient to support a conviction for possession of heroin.

In *State v. Yanez*, 89 N.M. 397, 553 P.2d 252, the defendant was convicted of possession of morphine. The defendant was observed by police participating in what was thought to be a drug sale. After the occurrence, the defendant purchased two hypodermic needles and went to a service station restroom. There police found one of the needles which they believed the defendant had used. Marks on the defendant's arm were thought to be from use of the needle. Defendant was arrested for possession of heroin and transported to a hospital where a urine test revealed the presence of morphine. The court found the evidence sufficient to support the conviction.

In *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328, an undercover police officer saw a third person inject phencyclidine (PCP) into the defendant's arm. The Oregon Court of Appeals held this was use but not possession of the drug, noting Oregon had one criminal statute for "use," and another statute for "possession" of dangerous drugs.

[4] Circumstantial evidence is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are usually or always attended by the fact in issue, and therefore affords a basis for a reasonable inference by the jury

or court of the occurrence of the fact in issue. *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, Syl. ¶ 6, 431 P.2d 518 (1967).

[5] In a criminal prosecution, the defendant must be proven guilty beyond a reasonable doubt of each element of the crime charged. Fourteenth Amendment of the United States Constitution; *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *State v. Douglas*, 230 Kan. 744, 640 P.2d 1259 (1982).

[6, 7] Returning to the definition of possession, knowledge is an essential ingredient of the crime of illegal possession of a controlled substance. The defendant must know of the presence of the controlled substance. *State v. Faulkner*, 220 Kan. at 156, 551 P.2d 1247. The intent to possess, to appropriate the drug to oneself, constitutes the requisite mental attitude for conviction of possession. *State v. Metz*, 107 Kan. at 596, 193 P. 177.

[8–10] Discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of the drug, but it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily, or introduced by artifice, into the defendant's system. The prosecution did not establish that defendant ever knowingly had control of the cocaine. None of the courts in the three cases cited previously upheld possession convictions based on the physical condition of the defendant alone. In the narrow holding of this case, we find that evidence of a controlled substance assimilated in one's blood does not establish possession of that substance as defined by K.S.A. 65–4127a, nor is it adequate circumstantial evidence to show prior possession by that person. Other corroborating evidence combined with positive results of a blood test could be sufficient evidence to prove guilt beyond a reasonable doubt depending on the probative value of the corroborating evidence.

[11] The purpose of the Uniform Controlled Substances Act, 9 Uniform Laws Annotated, p. 197 (1979), is to regulate the drug traffic. The Commissioners on Uniform State Laws explained:

"The Uniform Controlled Substances Act is designed to supplant the Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform States Laws in 1933, and the Model State Drug Abuse Control Act, relating to depressant, stimulant, and hallucinogenic drugs, promulgated in 1966. With the enactment of the new Federal narcotic and dangerous drug law, the 'Comprehensive Drug Abuse Prevention and Control Act of 1970' (Public Law 91–513, short title 'Controlled Substances Act' [21 U.S.C.A. § 801 et seq.]), it is necessary that the States update and revise their narcotic, marihuana, and dangerous drug laws.

"This Uniform Act was drafted to achieve uniformity between the laws of the several States and those of the Federal government. It has been designed to complement the new Federal narcotic and dangerous drug legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem.

"The exploding drug abuse problem in the past ten years has reached epidemic proportions. No longer is the problem confined to a few major cities or to a particular economic group. Today it encompasses almost every nationality, race, and economic level. It has moved from the major urban areas into the suburban and even rural communities, and has manifested itself in every State in the Union.

"Much of this major increase in drug use and abuse is attributable to the increased mobility of our citizens and their affluence. As modern American society becomes increasingly mobile, drugs clandestinely manufactured or illegally diverted from legitimate channels in one part of a State are easily transported for sale to another part of that State or even to another State. Nowhere is this mobili-

ty manifested with greater impact than in the legitimate pharmaceutical industry. The lines of distribution of the products of this major national industry cross in and out of a State innumerable times during the manufacturing or distribution processes. To assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the State and local level on a uniform basis." 9 U.L.A. at 188.

Once a controlled substance is in the human system it is beyond the control which the uniform act contemplated. The deleterious effects of the drug are already in progress. What the act seeks to prevent has occurred. The "controlled substance" is no longer susceptible to the control the act seeks to regulate. Without proof of a person's knowledgeable prior possession of the drug, punishment for presence of the drug in a person's system is not consistent with the design of the Uniform Controlled Substances Act.

We affirm dismissal by the trial court.

232 Kan. 843

STATE of Kansas, ex rel., Robert T. STEPHAN, Attorney General, Appellant,

v.

PEPSI-COLA GENERAL BOTTLERS, INC., Appellee.

No. 54813.

Supreme Court of Kansas.

Feb. 19, 1983.

Appeal was taken from an order of the Shawnee District Court, James M. MacNish, J., denying State's motion for summary judgment against soft drink bottler for violation of Trading Stamp Act. The Supreme Court, Herd, J., held that: (1) appeal from trial court's order denying State's motion for summary judgment and entering judgment for soft drink bottler was not moot; (2) Act was applicable to promotion by soft drink bottler by which bottle caps were redeemed for prizes and/or money, where bottle caps were furnished to others at least in part in conjunction with sale of bottler's products; bottle caps constituted "other similar devices" within meaning of Act; and (3) promotion did not violate Act, under exception stating that Act would not apply to any bottle cap redeemed for "one specified and particular product not manufactured or packed by the manufacturer or packer."

Affirmed.

1. Appeal and Error ⇐843(1)

Supreme Court will not consider and decide questions when its decision would not be applicable to any actual controversy and where judgment itself would be unavailing; at same time, however, an appeal will only be dismissed when it clearly and convincingly appears actual controversy has ceased and only judgment which could be entered would be ineffectual for any purpose.

2. Injunction ⇐4

When properly applied; an injunction operates only in futuro, and not to provide relief for past or completed acts. K.S.A. 60–901.

3. Appeal and Error ⇐790(1)

Where need for an injunction has ceased Supreme Court will not review merits of issue on appeal. K.S.A. 60–901.

4. Injunction ⇐12, 16

To obtain injunctive relief from prospective injury it must be shown that there

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

February 14, 1992

TO: Representative Jim Zawacki

FROM: Christine M. Cheff
Legislative Analyst

RE: **Controlled Substances - Does Ingestion Equal Possession?**
Research Request 92.132

Please check the appropriate box and return to Mail Stop 3100 or the above mailing address.

( ) I approve the release of this information.

( ) I approve the release of this information, but remove my name.

( ) Keep confidential.

_____ _____

Date Signature

To assist us in improving the quality of our research services, we would appreciate your response to the following questions. Please be assured that we will take your comments seriously in performing future research for you.

Was the information objective?

Was it clearly written?

Did it provide answers to (or, at least, useful information on) all the questions you posed?

Was the research completed and delivered to you in a timely manner?

AS 11.71.040

DEFENDANT MAY NOT BE CONVICTED OF POSSESSION OF COCAINE WHEN COCAINE IS IN DEFENDANT'S BODY.

The Alaska Court of Appeals ruled that a defendant could not be convicted of possession of cocaine (misconduct involving controlled substances in the fourth degree, AS 11.71.040(a)(3)(A), a class C felony) based on the presence in the defendant's blood of cocaine that the defendant had ingested before arrest. It accordingly affirmed the trial court's dismissal of the count of an indictment alleging that Thronsen had possessed cocaine in his body. The appeals court relied on cases from other states holding that possession implies control, and that a person with a drug in his or her body no longer has the necessary control.

State v. Thronsen, 809 P.2d 941 (Alaska App. 1991)

The court's decision is not clearly contrary to the language of AS 11.71.040(a)(3)(A), which merely uses the term "possesses". The decision also does appear to be consistent with the case law from other states. Nevertheless, it seems illogical to punish a person possessing a drug for personal use before it is used, but not to punish that person when he or she has just used it. Legislative review is recommended.

Court of Appeals Decision

cretionary function or
of the state agency or
the state, whether or
retion involved is

hat Danielson's motion
should be viewed as a
the state. The state
v. Gettinger, 272 U.S.
L.Ed. 499 (1927), and
tates, 182 U.S. 516, 21
1210 (1901), cases in
States Supreme Court
ainst the United States
contracts were tort ac-
r federal courts did not
hear. In the state's
lson's motion is a tort
ate, it is barred by AS
ecause it is based upon
of an employee of the
care in the execution
ilation, or because it is
cise or performance of
tion or duty on the part
employee. *See Earth*
ks, Inc. v. State, 691
84); *Bridges v. Alaska*
, 375 P.2d 696 (Alaska

Danielson's Rule 35(a)
is a separate cause of
aptly be characterized
claim than a tort claim.[1]

osence of any agreement,
the acts of the parties and
d in the possession of one
its equivalent, under such
t in equity and good con-
not to retain it. It is what
wn as the contract implied
eference to the intentions or
parties. The obligation is
nd frequently in frustration

ary 293 (5th ed. 1979). *See*
erowitz, 61 Ill.2d 207, 335
which the court held that
d under a statute later de-
entitled to recover the fines
e court rejected the state's
state's Local Governmental
Employees Tort Immunity
y of the fines. The court

an even simpler answer to the state's argument is that the motion is not a separate cause of action at all. Rather, because Danielson's motion was properly filed under Criminal Rule 35(a), it is a component part of the original criminal case; as such, it seeks relief that is within the scope of the court's sentencing authority to give. We concur with the reasoning of the South Dakota Supreme Court in *State v. Piekkola*, 90 S.D. 335, 241 N.W.2d 563 (1976), a case in which the court ordered reimbursement of a fine paid pursuant to a conviction under an unconstitutional statute. The court stated:

> [T]he State contends that the doctrine of sovereign immunity bars this action. Sovereign immunity, however, is a doctrine properly invoked in questions of suit and liability for tort as in *Conway v. Humbert*, 1966, 82 S.D. 317, 145 N.W.2d 524, or in questions of contract (*see Mullen & Rouke v. Dwight*, 1919, 42 S.D. 171, 173 N.W. 645). It is not an issue in the case presently before us. To petition for the return of a fine and of costs imposed on the basis of unlawful authority is no more a suit against the state barred by sovereign immunity than to petition or file for the return of money paid to the government as income tax in excess of the amount due. To make more of the action than that offends common sense and severely distorts the image of justice as fairness.

Id. 241 N.W.2d at 564. Danielson's Rule 35(a) motion for return of his fine is not barred by sovereign immunity because it is not an action against the state.

The judgment of the district court is AFFIRMED.

MANNHEIMER, J., not participating.

[1] The State's Attorneys of Jackson and Cook Counties argue that a county cannot be held liable for fines and costs illegally collected. We do not agree. The Local Governmental and Governmental Employees Tort Immunity Act, as its title implies, applies to torts. An action to recover fine monies paid under an unconstitutional statute would more nearly resemble the common law action for money had and received.
Id. 335 N.E.2d at 7 (citation omitted).

STATE of Alaska, Appellant,

v.

Earl J. THRONSEN, Appellee.

No. A–3431.

Court of Appeals of Alaska.

April 26, 1991.

Defendant was convicted of possession of cocaine following a jury trial in the Superior Court, Fourth Judicial District, Fairbanks, Richard D. Savell, J., and he appealed. The Court of Appeals, Coats, J., held that defendant could not be convicted of possession of cocaine "in his body."

Affirmed.

Drugs and Narcotics ⇐63

A defendant may not be convicted of possession of cocaine "in his body"; a person who has cocaine in his body has no control over the cocaine and therefore does not have possession. AS 11.71.040(a)(3)(A).

Richard J. Ray, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Douglas B. Baily, Atty. Gen., Juneau, for appellant.

J. John Franich, Asst. Public Advocate, Fairbanks, and Brant McGee, Public Advocate, Anchorage, for appellee.

OPINION

Before BRYNER, C.J., COATS, J., and ANDREWS, Superior Court Judge.*

COATS, Judge.

On November 8, 1989, the police served a search warrant on a house in Fairbanks

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

which was rented by Earl J. Thronsen's brother. The police described the residence as a "crack house"—a place where people regularly go to congregate and use cocaine. The warrant authorized the police to look for cocaine, cocaine paraphernalia, and the ingredients for making the "crack" form of cocaine.

Thronsen was in the house when the search warrant was executed. He was lying face down on a couch in the living room; his hands were beneath him. It appeared to the police officer conducting the search that Thronsen was hiding something underneath his hands. When the police searched the couch, they found a syringe underneath a cushion where Thronsen had been lying. Thronsen's hands had been at the place where the cushions were separated. The syringe was the type used for intravenous drug use; that type of syringe usually leaves track marks on a person's arms. Thronsen had track marks on his arms. Later tests indicated that the syringe contained a trace residue of cocaine.

A sample of Thronsen's blood and urine was taken on November 9, 1989 at 6:39 p.m. and was sent to Anchorage for testing. The urine sample screened positive for the presence of cocaine and/or its metabolites. Expert testing established that Thronsen must have consumed cocaine within the previous 72 hours from the time the urine specimen was collected.

A grand jury indicted on two counts of misconduct involving a controlled substance in the fourth degree. AS 11.71.040(a)(3)(A). In Count I, the grand jury charged Thronsen with knowingly and unlawfully possessing a syringe which contained cocaine. In Count II, the grand jury charged that Thronsen "unlawfully possessed in his body ... cocaine." Thronsen was tried by a jury on these charges.

Thronsen testified at trial. He stated that he had, on previous occasions, taken cocaine with his brother at his brother's house. Although he denied possessing the syringe found in the couch, he stated that in the past, he had shot up cocaine in his brother's house with the type of syringe which was discovered under the couch. He said he had not consumed cocaine at his brother's house on November 8. However, he had smoked a little cocaine at his own house "way earlier" than the time that the search warrant was executed on his brother's house.

At the end of the state's presentation of its case, Thronsen moved for a judgment of acquittal on Count II, which charged Thronsen with possession of cocaine "in his body." Thronsen argued that he could not be convicted of possession of cocaine in his body because he no longer had control over the cocaine once he ingested or injected it. Superior Court Judge Richard D. Savell denied this motion without prejudice.

The jury found Thronsen not guilty on Count I, possession of cocaine in the syringe, and guilty of Count II, possession of cocaine "in his body." Following trial, Judge Savell reconsidered Thronsen's motion for judgment of acquittal on Count II, and then set aside and vacated the judgment of conviction. He reasoned that, although the state could use the presence of cocaine in Thronsen's blood or urine as circumstantial evidence that Thronsen had earlier possessed or used cocaine, the indictment did not charge Thronsen with prior possession of cocaine. The indictment only charged Thronsen with possession of cocaine "in his body." Judge Savell relied on *State v. Downes*, 31 Or.App. 1183, 572 P.2d 1328, 1330 (1977) and *State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208, 211 (1983). Judge Savell stated, "[t]hese cases hold that control is an essential element of possession and that because the host body cannot exercise control or dominion over a substance after it is ingested ... the mere presence in the body cannot support a criminal conviction for possession." Judge Savell went on to say:

> Plaintiff seeks to escape the effect of the cited cases by arguing that here "Mr. Thronsen clearly injected the cocaine into his own system...." This argument misses the mark. There was no evidence that defendant ingested the cocaine that was in his system. Nor may plaintiff rely upon defendant's presence in a

"crack house" or the presence of a cocaine soiled syringe nearby. Defendant was acquitted of knowing possession of the syringe. And, there was no evidence of when, where or how defendant possessed the cocaine that ended up in his system. Most importantly, defendant was not charged with possession of cocaine at the time and place of ingestion. Rather, he was only charged with possessing the drug in his body. This additional element, *i.e.*, possession *in the body*, is fatal to the state's case. (Emphasis in original.)

Judge Savell entered a judgment of acquittal on Count II. The state appeals from this order. We affirm.

We may not reverse a genuine verdict of acquittal on appeal without violating the constitutional provisions of the United States and the Alaska Constitutions which prohibit putting a defendant twice in jeopardy. *See United States v. Martin Linen Supply Company*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); *State v. Kott*, 636 P.2d 622, 623 (Alaska App.1981), *aff'd* 678 P.2d 386 (Alaska 1984). In addition, AS 22.07.020(d)(2) states that "the state has no right of appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient." Since Judge Savell's order purported to be a judgment of acquittal, we ordered the parties to brief whether this court had jurisdiction. The parties submitted supplemental briefs.

Where, "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged," the ruling constitutes a judgment of acquittal. *Martin Linen Supply Company*, 430 U.S. at 571, 97 S.Ct. at 1354-55. However, courts are not bound by the fact that a judge refers to his ruling as a "judgment of acquittal." In some cases, the judge's ruling can be classified as a motion dismissing the indictment. *See Selman v. State*, 406 P.2d 181, 186 (Alaska 1965). In this case, we might be able to properly classify Judge Savell's order as essentially dismissing the indictment against Thronsen. On the other hand, Judge Savell's order does appear to weigh some of the evidence which the state presented against Thronsen. This part of his order would support a conclusion that it was a genuine judgment of acquittal.

We find it unnecessary to resolve this issue. We conclude that Judge Savell was correct in concluding that, on its face, the indictment charged Thronsen with possession of cocaine "in his body." All of the cases we have reviewed support the conclusion that a defendant cannot be convicted for possession of cocaine in his or her body. These cases conclude that a person who has cocaine in his or her body has no control over the cocaine and therefore does not have possession. *Flinchpaugh*, 659 P.2d at 208; *Downes*, 572 P.2d at 1328. The state has cited us to cases from Georgia which hold that a defendant may be convicted of possession of cocaine based upon positive blood and urine tests for cocaine. *Green v. State*, 194 Ga.App. 343, 390 S.E.2d 285 (1990), *aff'd* 260 Ga. 625, 398 S.E.2d 360 (1990). However, these cases only stand for the proposition that a defendant may be convicted of possession of cocaine based upon this evidence. They do not appear to stand for the proposition that a defendant may be convicted of possession of cocaine "in his body." We accordingly affirm Judge Savell's order dismissing Count II of the indictment.

AFFIRMED.

MANNHEIMER, J., not participating.

HOUSE COMMITTEE REPORT

5-5-92
Judiciary
~~Finance~~

(7)
Date Referred: 1/13/92 FURTHER REFERRALS:

Date of Committee Action: 5/5/92

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 367

HOUSE BILL NO. 367 USE OR INGESTION OF CONTROLLED SUBST.

"An Act relating to the use or ingestion of controlled substances."

RECOMMENDATIONS: [ ] the same title
be replaced with CS HB 367 (HES) [✓] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[✓] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[✓] zero fiscal note Corrections

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Cheri Davis	✓	Betty Davis		X	
J. E. Sonyabe	✓				
Mary Miller	✓	Ralph Ivy CARNEY		✓	
		Lincoln		✓	

Ralph Ivy CARNEY
CHAIRMAN'S SIGNATURE

XU

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. H.B. 367

Revision Date: 02/21/92 Department Affected: Corrections

Title: "An Act relating to the use or ingestion of controlled substances." BRU: Statewide Operations

Component: Various

Sponsor: Rep. Zawacki

Requestor: House HESS COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	262.8	262.8	262.8	262.8	262.8	262.8
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	262.8	262.8	262.8	262.8	262.8	262.8
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	262.8	262.8	262.8	262.8	262.8	262.8
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	262.8	262.8	262.8	262.8	262.8	262.8

POSITIONS:

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

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

This revised fiscal analysis corrects an erroneous assumption made in the fiscal note dated 2/5/92, that the bill would restore past practice.

Prepared By: Diane Schenker, Legislative Liaison Phone: 465-3376

Division: Commissioner's Office Date: 02/20/92

Approved by Commissioner: Lloyd Hames, Commissioner

Agency: Department of Corrections Date: 02/20/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/CBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

FN 262.8 Corrections

CONTINUATION OF FISCAL ANALYSIS (REVISED 2/21/92)

This bill would reverse the recent Thronsen decision which held that a person cannot be prosecuted for "possession by consumption." In Thronsen, the police had a search warrant for a house which authorized them to look for drugs/paraphernalia. The defendant was present and appeared to have ingested drugs, so his blood and urine were tested and confirmed the presence of cocaine. He was charged with possession of paraphernalia as well as possession of cocaine in his blood system. The jury found him not guilty on the syringe charge and the possession by consumption charge was overturned by the courts. The circumstances of this case suggest that charges of "possession by consumption" will stengthen the State's ability to win convictions in drug cases. If this increases the number of felony drug offenders by ten percent, approximately 16 offenders per year will be incarcerated for an average of 12 additional months. If the Department contracted for additional community residential center beds to accomodate this increase, the cost would be 16 offenders X 365 days X $45.00 = $262,800.00.

This estimate is based on costs for contract community beds since it cannot be accurately predicted when the increases in incarceration days will actually result in adding new prison beds to the current correctional system, based on this bill alone. Therefor, using the daily cost of a prison bed for each additional bed-day would not accurately reflect budget increases, since the cost of each existing bed is already reflected in the Department's budget. However, any increase in the number or lengths of prison or probation sentences will accelerate the need for additional prison construction, additional correctional staff and additional probation officers. The probation population is currently growing at a rate of about 4% per year. The prison population is currently remaining fairly stable.

7-LS1617\D
Chenoweth
5/1/92

CS FOR HOUSE BILL NO. 367 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ZAWACKI, Taylor, Leman, Baker, Sharp, G.Phillips, C.Davis

A BILL

FOR AN ACT ENTITLED

"An Act relating to the possession of controlled substances."

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

* Section 1. PURPOSE. In its recent decision in State v. Thronsen, 809 P.2d 941, the Alaska Court of Appeals ruled that a defendant could not be convicted of misconduct involving a controlled substance in the fourth degree based on the presence in the defendant's blood of quantities of cocaine that the defendant had ingested. The appellate court affirmed the trial court's dismissal of the indictment alleging that the defendant had possessed cocaine in the defendant's body. The purpose of this Act is to set aside the ruling of that decision and its effect so that a person may be convicted on the basis of use or ingestion of a controlled substance on the same basis as the person's possession of the substance.

* Sec. 2. AS 11.71.900 is amended by adding a new paragraph to read:

(30) "possess" means exercising dominion or control over or having physical possession of a controlled substance, and includes injecting, inhaling, swallowing, or otherwise introducing the substance into the person's body or bloodstream.

HB

378

3111 C STREET
ANCHORAGE, ALASKA 99503
(907) 561-2034

WHILE IN SESSION
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4843

ALASKA STATE HOUSE

LABOR & COMMERCE

STATE AFFAIRS

REPRESENTATIVE BETTY BRUCKMAN

House Bill No. 378

"An Act requiring certain employers to grant employees leave for medical purposes connected with the donation of bone marrow"

SPONSOR STATEMENT

I have introduced HB 378 to insure that every matched Alaskan donor is able to give the "gift of life" by requiring certain employers to grant paid leaves of absence to an employee who has been identified as a match by the National Marrow Donor Program. Oregon and Minnesota have already enacted comprehensive legislation that authorizes donor recruitment drives for state employees and requires certain businesses to guarantee employees time off in order to donate marrow.

The Bone Marrow Donor Program of Alaska, thanks to the efforts of this Legislature, has been able to successfully match six Alaskan donors with patients suffering from cancer or other fatal blood disorders. The statistics for marrow compatibility range from one in one hundred to one in one million for Caucasians and matches for Alaskan Natives and other minority populations are unfortunately much, much higher, due in part to the lack of registered donors, a crisis that is being remedied in part by the Alaska Blood Banks donor drives in rural Alaska. As a direct result of the special appropriation passed last

year, an additional 2200 potential donors have been typed and enrolled in the National Marrow Donor Program . There is still much that needs to be done to ensure that compatible donors are found for the estimated 1400 active searches being conducted nationally on any given day. This legislation is a positive step toward finding a miracle match for everyone who needs one.

Enclosed in your packet is an article about Ina Kristianson, a constituent who has just this week entered the UCLA Medical Center to receive her marrow transplant and late last year a 7 year old Fairbanks girl received her marrow transplant and is progressing well. There are still a number of Alaskans waiting for compatible donors, including Eileen Albert of Eagle River. Donor drives are currently scheduled for Kodiak and Dutch Harbor and I am very pleased to report that the Blood Bank has been able to reduce the logistical and administrative overhead costs of the Donor Grant Program and will be seeking a grant adjustment allowing them to shift grant dollars from overhead to direct services (tissue typing).

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 378

Revision Date: _____
Title: Requiring certain employers to grant leave for bone marrow donations
Sponsor: Bruckman
Requestor: _____

Department Affected: Administration
BRU: Personnel
Component: Personnel

COMPONENT SERIAL NO. _ _ 7 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
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	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	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 FUND SOURCE:	0	0	0	0	0	0
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

Estimate of current year impact: $0

ANALYSIS: (Attach a separate page if necessary.)
A small, but undetermined number of State employees can be expected to undergo procedures to donate bone marrow in any year. However, the total number and total time off with pay will be so small, even at a component level, that no additional appropriation will be required.

Prepared by: R. H. King, Director
Division: Personnel
Phone: 465-4430
Date: _____

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1-17-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
2/4/FN/0820.KP/1

SUMMARY OF KNOWN STATE ACTIVITIES
PROMOTING PUBLIC AWARENESS AND RECRUITMENT OF
MARROW DONOR VOLUNTEERS

July 15, 1991

ALASKA

Passed Senate Bill No. 177 (1991) which gave the Blood Bank of Alaska, Inc. $222,000 to help it increase the enrollment of Alaskans as marrow donor volunteers in the national bone marrow donor registry.

Alaska also passed Senate Resolution No. 17 (1991) which designated April 14-20, 1991 as "Bone Marrow Donor Week."

CALIFORNIA

Created Chapter 889 (1990) of the Health and Safety code which required the office of statewide Health and Planning and Development to promote the awareness of the need for potential bone marrow donors from the ethnic minority communities. It also allocated the sum of $145,000 to help fund this project.

Among other pending legislation, two bills are currently being reviewed in the California legislature:

A) Assembly Bill No. 2209 (1991) would establish rules in the California Health and Safety Code which would regulate organ and tissue transplant centers.

B) Assembly Bill No. 136 (1991) which would establish an office of Minority Health Affairs which would, among other responsibilities, help to increase the awareness of the need for potential marrow donors within minority groups.

COLORADO

Passed House Bill No. 1055 (1989) which encouraged donations of anatomical gifts for transplants. In order to do this it made a rule providing two days of paid leave per year for employees in the state personnel system for the purpose of donating organs, tissue or bone marrow for a transplant.

CONNECTICUT

Passed Substitute Senate Bill No. 112 (1988) which allocated $25,000 to The Department of Health Services to study the feasibility of a pilot program for a bone marrow registry in the Stamford Health Department.

In 1990, the Connecticut legislature considered bill No. 5947 which would have allocated $50,000 to the Department of Health Services. This bill died in the appropriations committee.

In 1991, the Governor designated the month of April 1991 as "Bone Marrow Donor Registration Month" in Connecticut. During this month, a blood and marrow testing drive was held for legislators and others in the capitol, using some of the $115,500 which was allocated from the state for this purpose.

FLORIDA

Passed House Bill 1027 (1991), which allocated $25,000 to type marrow donor volunteers in Florida for the National Marrow Donor Program.

GEORGIA

Passed House resolution 492 (1991) which encouraged the citizens of Georgia to donate their tissues and body organs.

HAWAII

Allocated $50,000 in 1989 for tissue typing. Further funding legislation is pending.

The governor proclaimed one week in 1990 as "Bone Marrow Awareness Week."

MAINE

Passed Legislative Document 1719 (1991) which initiated and funded a bone marrow donor education program ($40,000) and a bone marrow donor drive ($20,000 for typing of state employees). The bill also protects the jobs of employees who need time off in order to donate marrow.

MARYLAND

Senate Bill 446 (1991) died in the finance committee. The bill would have expanded the duties of the Organ Donation and Transplantation "clearinghouse" established in 1990.

WEST VIRGINIA

Introduced Senate Bill 17 (1991). This bill was similar to the one that was passed in Minnesota in that it would have established a State Bone Marrow Donor Program, including a donor education program, job protection for donors, and a drive for state employees. This bill died in committee.

MASSACHUSETTS

Introduced House Bill No. 5058 (1990) which would have established a bone marrow donor program in the department of public health. This program would encourage the recruitment programs for prospective donors of bone marrow, to maintain lists of volunteers for marrow transplants, seek funds and facilities for blood tests for prospective donors, establish and maintain (in cooperation with the National Marrow Donor Program) a registry and data bank of persons who need a marrow transplant and prospective compatible donors for the harvesting of said marrow. This bill did not pass.

House Bill No. 5106 (1990) is pending which would establish a bone marrow donor fund from certain revenues received from voluntary contributions through state income tax forms which would be used to type potential bone marrow donors.

MINNESOTA

Passed S.F. 1093 (1991) which established and funded a Bone Marrow Donor Education Program ($40,000) through the Department of Health and a bone marrow donor drive ($15,000 for the typing of state employees). The bill also mandates employers give employees time off in order to donate marrow (up to 40 hours of paid leave).

The governor signed a proclamation declaring the week of March 4-10, 1990, to be "Bone Marrow Donor Week."

NEW JERSEY

Passed Assembly Resolution 3101 (1990), which required insurers to pay for bone marrow transplants in the treatment of certain types of cancer.

Is considering Senate Resolution 2811 (1991), which would provide for a checkoff on state income tax returns to permit taxpayers to contribute a portion of their refund to a "Bone Marrow Donor Typing Fund."

Is considering Assembly Joint Resolution 86 (1991), which would designate a "Bone Marrow Donor Week."

NEW YORK

A packet of bills was introduced into the New York State Senate and the State Assembly (1991). The package:

A) Implements a bone marrow donor education and gift program.

B) Requires certain health insurance policies to cover bone marrow transplants.

C) Requires employers to grant a paid leave of absence (not to exceed 40 work hours) to employees for the purpose of donating their marrow.

D) Provides for tax credits for employers who sponsor marrow tissue typing programs.

Passed a legislative Resolution (Senate No. 1087 and Assembly No. 1056) in 1991 which designated May 13-17, 1991 as Bone Marrow Donor Awareness Week in New York State.

OREGON

Passed Senate Bill 813 (1991) which establishes a bone marrow transplant program in the state of Oregon. The bone marrow transplant program will:

A) Educate the residents of Oregon about the need for bone marrow donors; the procedures required to become registered as a potential bone marrow donor; and the medical procedures required for the actual removal of bone marrow.

B) Make special efforts to educate and recruit minorities as potential donors.

C) Guarantee any employee up to 40 hours of paid leave for the purpose of donating bone marrow.

D) Endorse a marrow testing drive for any state employees, the funds for which will be collected by tax deductible donations to the National Marrow Donor Program through the state of Oregon Employee Bone Marrow Drive Account.

E) Authorize a business tax credit which will be 25% of the cost incurred by the business because of bone marrow typing or donation by its employees.

TEXAS

Introduced Senate Bill 84 (1991) which encouraged the HLA tissue typing of the state's employees. It would have paid the laboratory fees for the state employees, and would have guaranteed the paid leave of absence for these employees if they were determined to be a match. This bill did not pass.

House Concurrent Resolution No. 11 (1991) was signed by the Governor which designated April 20, 1991 as "Because I Care Bone Marrow Awareness Day."

Presented to the governor April 24, 1990

Signed by the governor April 26, 1990, 10:51 p.m.

CHAPTER 536—S.F.No. 1903

An act relating to health; providing programs and incentives for persons to volunteer as bone marrow donors; requiring the commissioner of health to educate residents about the need for volunteer bone marrow donors; requiring paid leave for employees to donate bone marrow; requiring a bone marrow donor drive to encourage state employees to volunteer as bone marrow donors; appropriating money; proposing coding for new law in Minnesota Statutes, chapters 145 and 181.

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

Section 1. [145.927] BONE MARROW DONOR EDUCATION.

The commissioner of health shall educate residents of the state about:

(1) the need for bone marrow donors;

(2) the procedures required to become registered as a potential bone marrow donor, including the procedures for determining the person's tissue type; and

(3) the medical procedures a donor must undergo to donate bone marrow and the attendant risks of the procedure.

The commissioner shall make special efforts to educate and recruit minority populations to volunteer as potential bone marrow donors. Means of communication may include use of press, radio, and television, and placement of educational materials in appropriate health care facilities, blood banks, and state and local agencies. The commissioner of health, in conjunction with the commissioner of public safety, shall make educational materials available at all places where drivers' licenses are issued or renewed.

Sec. 2. [181.945] LEAVE FOR BONE MARROW DONATIONS.

Subdivision 1. DEFINITIONS. (a) For the purposes of this section, the following terms have the meanings given to them in this subdivision.

(b) "Employee" means a person who performs services for hire for an employer, for an average of 20 or more hours per week, and includes all individuals employed at any site owned or operated by an employer. Employee does not include an independent contractor.

(c) "Employer" means a person or entity that employs 20 or more employees at at least one site and includes an individual, corporation, partnership, association, nonprofit organization, group of persons, state, county, town, city, school district, or other governmental subdivision.

Subd. 2. LEAVE. An employer must grant paid leaves of absence to a employee who seeks to undergo a medical procedure to donate bone marrow The combined length of the leaves shall be determined by the employee, bu may not exceed 40 work hours, unless agreed to by the employer. The employe may require verification by a physician of the purpose and length of each leav requested by the employee to donate bone marrow. If there is a medica determination that the employee does not qualify as a bone marrow donor, th paid leave of absence granted to the employee prior to that medical determina tion is not forfeited.

Subd. 3. NO EMPLOYER SANCTIONS. An employer shall not retalia against an employee for requesting or obtaining a leave of absence as provide by this section.

Subd. 4. RELATIONSHIP TO OTHER LEAVE. This section does no prevent an employer from providing leave for bone marrow donations in add tion to leave allowed under this section. This section does not affect an employ ee's rights with respect to any other employment benefit.

Sec. 3. BONE MARROW DONOR DRIVE.

The commissioner of health shall conduct a bone marrow donor drive t encourage state employees to volunteer to be potential bone marrow donor The drive shall include educational materials and presentations that explain th need for bone marrow donors, and the procedures for becoming registered as potential bone marrow donor. The commissioner of employee relations sha provide assistance as needed to organize and conduct the drive. The bon marrow donor drive must be completed by June 30, 1991.

Sec. 4. APPROPRIATIONS.

Subdivision 1. BONE MARROW DONOR EDUCATION. $40,000 appropriated from the general fund to the commissioner of health for the bon marrow donor education required in section 1. The funds are available unt June 30, 1991.

Subd. 2. BONE MARROW DONOR DRIVE. $15,000 is appropriate from the general fund to the commissioner of employee relations to pay th costs of typing the tissue of the first 200 state employees who are recruited unde the bone marrow drive in section 3 to be potential bone marrow donors. Th funds are available until June 30, 1991.

Presented to the governor April 24, 1990

Signed by the governor April 26, 1990, 9:30 p.m.

By registering as a marrow donor, you could save a stranger's life.

Marrow transplants are not possible for many people because there are not enough volunteer donors available.

There is a special need for donors of African, Asian, Hispanic and Native American descent. Although fatal blood diseases strike people of all races, more than 85% of the registered volunteer donors are Caucasian.

Hundreds, perhaps thousands, of lives could be saved if more people signed up – people like you.

What is the benefit to you as a donor?

"The benefit of giving marrow to this child and any other child or any other person, is that you get the gratitude in your heart of knowing that you have actually saved someone's life."

Mrs. Sheila Holladay,
mother of David,
a two-year-old with leukemia

Barbara Bush with children who were saved through bone marrow transplants.

Minnesota Department of Health
Minnesota Marrow Donor Program
717 S.E. Delaware Street
Box 9441
Minneapolis, MN 55440

National Marrow Donor Program
(800) 654-1247

Participating Organizations:

St. Paul Area Red Cross

Memorial Blood Center of Minneapolis

National Marrow Donor Program

Recycled Paper

Someone just like you saved Kellie's life.

You could save a person's life...

For two-year-old Kellie Shallert, a stranger was her only hope.

Doctors said Kellie had Combined Immune Deficiency Syndrome – a condition in which the immune system does not work properly. Without a bone marrow transplant, Kellie could die.

Her parents and brother were tested as possible marrow donors, but none of them matched her marrow type. Fortunately, the National Marrow Donor Program found a volunteer donor who did match. Today, thanks to that gift from a stranger, Kellie is doing fine.

Like Kellie, nearly 70 percent of the people with leukemia or other fatal blood diseases do not have a match within their families. These people need to find donors who aren't related to them – people willing to help someone they may never meet.

Many donors are needed.

Patients have between a 1-in-100 and 1-in-1,000,000 chance of matching an unrelated donor, so a large number of potential donors is needed. Even though most people who sign up to be donors will probably not be called to give marrow, just being registered increases the odds of finding a miracle match.

What does it take to become a donor?

- Marrow donors must be between the ages of 18 and 55 and be in good health.
- A simple blood test is done to identify the volunteer donor's Human Leukocyte Antigen (HLA) tissue type.
- The volunteer's tissue type is confidentially entered into the National Marrow Donor Program computer.
- If the volunteer is matched to a patient, the volunteer is given detailed information about the procedure.
- If the volunteer agrees to participate, about 5 percent of his or her marrow is removed in a simple surgical procedure. It takes the adult body about two weeks to replace the marrow.
- After the procedure, an overnight hospital stay is usually required. The donor can expect to feel some soreness for a week or two.

In Minnesota, employees who sign up to become donors are eligible for up to 40 hours of paid leave from their jobs for marrow testing and donation.

Please help now. Register to be a marrow donor.

For more information about how you can become a donor, complete this form and mail it to:

Minnesota Department of Health
Minnesota Marrow Donor Program
717 S.E. Delaware Street
Box 9441
Minneapolis, MN 55440

or call:
the National Marrow Donor Program
1-(800) 654-1247

Name _____

Address _____

City _____

County _____ **State** _____ **Zip** _____

Work Phone _____ **Home Phone** _____

Date of Birth _____

☐ *Check this box if you are interested in helping to promote marrow donation in your community.*

BACKGROUND ON THE NATIONAL MARROW DONOR PROGRAM

- Marrow transplantation, from unrelated donors, is a relatively new and viable medical therapy for patients with fatal blood diseases such as leukemia and aplastic anemia. While the National Marrow Donor Program (NMDP) now has almost 500,000 volunteer donors on its Registry, it is still only finding matches which result in transplant for 30% of the patients who search the Registry. NMDP still needs:
  1. More volunteers (especially non-Caucasians) willing to give the living gift of life;
  2. More funds to pay for the HLA typing test which identifies the antigens which must be matched; and
  3. More time to build an international registry (many developed countries are just beginning to set up their national registries).

- The National Marrow Donor Program is a network of Transplant Centers (which care for patients), Donor Centers (which guard NMDP's volunteer donors' safety and confidentiality), Collection Centers (medical centers which meet NMDP's standards for marrow collection) and Recruitment Groups (which assist the NMDP in recruiting new volunteers for the national registry; many NMDP Donor Centers also are aggressive recruitment arms of the NMDP).

- The NMDP Coordinating Center is located in Minneapolis, MN. The NMDP Registry is one of the most sophisticated biometric programs in the world. NMDP has a contractual relationship with the federal government, through the National Heart, Lung, and Blood Institute, to run a national regi[illegible].

- NMDP has only been in existence since 1987 (more than 1000 transplants between 12/15/87 and 12/15/91) and has experienced rapid growth. This has been made possible because of the generosity of hundreds of thousands of Americans willing to be the stranger who offers the living gift of life. NMDP now is facilitating about 40 transplants a month. Admiral Zumwalt, NMDP Chairman of the Board, has stated that the goal is 25 transplants a day.

- NMDP volunteers have offered two tablespoons of their blood for HLA or tissue typing and have signed a consent to have the typing tests results entered on the NMDP Registry, which is searched by patients from all over the world. If a volunteer is a preliminary match (odds of matching with someone outside your family range from one in 100 to one in 1 million), he or she is contacted by an NMDP local Donor Center. If the volunteer wishes to proceed and is a compatible match for a specific patient, the volunteer receives counseling and a physical exam before proceeding with the simple surgical procedure of marrow donation.

- Once the NMDP reaches its goal of one million volunteers of diverse racial backgrounds, it expects to lose at least 10% of its volunteers each year due to age and health requirements. NMDP hopes that many of the 100,000 new volunteer donors needed each year to offset losses will come from the generosity and responsiveness of U.S. corporations which pay for employee tissue typing and offer a model of hope and help to the world.

Winter, 1992

TEN COMMON QUESTIONS ABOUT THE NATIONAL MARROW DONOR PROGRAM

1. What is the National Marrow Donor Program (NMDP)?

The National Marrow Donor Program (NMDP) is a network of transplant centers (which care for patients), donor centers (which guard our volunteer donors' safety and confidentiality), collection centers (medical centers which meet our standards for marrow collection) and recruitment groups (which assist the NMDP in recruiting new volunteers for the national registry; many NMDP donor centers also are aggressive recruitment arms of the NMDP).

The NMDP Coordinating Center and Registry are located in Minneapolis, MN. The NMDP is Congressionally authorized and has a contractual relationship with the National Heart, Lung, and Blood Institute.

NMDP has only been in existence since 1987 and has experienced rapid growth, especially in the last twelve months. This has been made possible because of the generosity of hundreds of thousands of Americans, willing to be the stranger who offers the living gift of life. NMDP is now facilitating about 40 transplants per month, up from 20 per month one year ago.

NMDP is also a research organization, studying the effectiveness of marrow transplants and related treatments. NMDP has created a "bank" of cell samples which has the potential for offering exciting insights into blood diseases and genetic disorders and is on the cutting edge of laboratory testing technology and biostatistical support.

NMDP is funded, in part, by Congress and also solicits charitable contributions for assistance in typing volunteers and other recruitment efforts. The National Heart Lung and Blood Institute has contracted with the NMDP to run a national registry. NMDP has also received funding from the Naval Medical Research and Development Command.

2. How many donors are on the Registry?

Almost 500,000 Americans have volunteered and are included in the registry.

Volunteering to be a donor is not appropriate for everyone because of the psychological and physical commitment required. Anesthesia is used when aspirating the marrow from the back of the pelvic bone. The discomfort felt after the donation has not been a major issue with donors (for a few days, there's a soreness described as similar to the feeling after falling on ice, on your derriere). The donor's marrow completely regenerates itself in a few weeks. However, because of the use of anesthesia, NMDP insists that all of its volunteer donors are between 18 and 55 and in excellent health.

The donor's commitment must be firm. A reversal in the decision after the patient begins preparing for transplant is life threatening for the patient. Many donors also become emotionally involved in following the progress of their patient post-transplant. Many of NMDP's volunteer donors have become strong advocates for the program. This gift of a stranger is called the "living gift of life."

2A. How many donors do you need to match all the patients who request a marrow transplant?

We do not know. Yet.

Depending on how common a patient's Human Leukocyte Antigens (HLA) are, the chances of *finding* a *match* may range from one in 100 to one in 1 million. The odds of finding a match are better within a patient's own racial group.

NMDP has set a preliminary goal of 100,000 donors for the United States and met that goal ahead of schedule. It became clear as we moved toward that goal that we would need more donors to match certain types of patients, especially those from American minority populations. It also has become clear that unrelated marrow transplants are a global hope. Because of computer technology, it is possible to have a worldwide registry of volunteers. Marrow can -- and has been -- exchanged between countries. NMDP has a goal of one million volunteer donors who represent a diversity of racial backgrounds. Because of the efforts of people all around the world, NMDP believes that its goal can be reached by 1995.

While NMDP's goal continues to be to find a "miracle match" for everyone who needs a marrow transplant, medical science may prove this to be impossible. Even with a large pool of potential donors, patients who have a rare or unique "HLA typing" may never find a match, no matter how large the pool of volunteer donors.

3. How many transplants have been done?

By January 1, 1992, NMDP had facilitated more than 1000 transplants, half of them for people under the age of 25. Of the patients receiving transplants, 77% had some type of *leukemia*. *Other* transplant patients have had Myelodysplasia, Hodgkin's lymphoma, Non-Hodgkin's Lymphoma, Severe Aplastic Anemia, Fanconi's Anemia, Osteopetrosis, Severe Combined Immunologic Deficiency, or other malignancies or non-malignant diseases.

Marrow transplants are being considered for patients with other types of cancer and other blood diseases. For example, research is being conducted to determine the efficacy of using marrow transplants to treat patients with Sickle Cell Anemia, and other genetic blood disorders. It is too early to speculate about the potential success or failure of these research efforts. NMDP officials continue to monitor these medical developments.

4. What is the success rate?

The standard answer is not a concise one. Early data indicated that the success rate is between 15 and 80 percent, depending on the disease of the patient being treated, stage of disease and age and condition of the patient. Without a transplant, long term survival is zero to 15 percent, but not usually over five percent.

Initially, many patients who chose transplantation made that choice after all other options had been exhausted or they had to wait a long time before a donor was identified. This resulted in less than physically ideal circumstances for the patient who may have been weakened by many rounds of chemotherapy or the disease itself.

The rigorous pre-transplant conditioning can be fatal. As marrow transplantation has become a more common treatment, patients are being referred for transplant earlier. In general, early referral and a "quick match" assures a better outcome for the patient. Although the data is preliminary, in the future, unrelated donor transplants may have the same success rate as

sibling transplants. With related donors, the chance of success can be as high as 80%, depending on the patient's disease and stage of disease at the time of transplant.

If the patient is alive and well three to five years after transplantation, the probability of disease coming back is remote. There are patients currently alive and well 20 years post transplant. NMDP's first transplant was done on December 15, 1987.

5. Does everyone who needs a transplant receive one and how much does it cost?

No, many patients are not referred for transplantation, currently cannot find a matched donor or are too ill to undergo a transplant once a match is found. Other patients are not insured or underinsured and cannot afford or choose not to undertake the expensive and exhausting process. Currently, NMDP is finding matches which result in transplant for 30% of the patients who search the NMDP Registry.

The cost ranges from $150,000 to $300,000. From initial studies, marrow transplantation is more cost efficient than maintenance or "palliative" procedures which must be undertaken numerous times. Also, a marrow transplant can cure if successful. For a leukemia patient or an aplastic anemia patient, other treatment usually only temporarily treats the symptoms of the disease.

Increasingly, health insurers are providing coverage/benefits for the cost of unrelated transplants as their experts review data on the successes achieved from this treatment. There is continuing concern over the hesitation by some payers to cover the donor search process and by some state governments to cover transplantation of any kind for medical assistance recipients.

Most of the cost of a transplant is the extended hospital stay in isolation until it is determined there is sustained engraftment of the new marrow. About 10% of the overall expense is the cost involving the NMDP donor. The search includes extended tissue typing (HLA typing)/cultures/donor counseling and a thorough donor physical exam, marrow collection and transport. NMDP continues to work with health care insurers to educate them about the procedure and why this portion of the cost should also be paid by the company.

A long term objective of the NMDP, through the Marrow Foundation, is to build a sufficient fund which can be tapped by patients who lack resources but need a transplant and have an identified donor.

6. Does NMDP encourage the efforts of individual families to increase the size of the registry?

Yes, with some qualifications -- and hope for the future.

With the help of Congress, the NMDP was established. The Program is hailed as a model for transplantation coordination and has progressed rapidly, exceeding all of our preliminary goals and expectations. Because of this success, many American families who held no hope for a loved one have now placed their hope in finding a match for the special person in need.

To build a satisfactory donor pool, NMDP is in need of three basic elements;

A. More Americans willing to offer the "living gift of life" by volunteering to become a part of our Program. Currently, there is an especially critical need for minority volunteers.

B. The funds (private and/or public) to pay for the typing test. It costs approximately $75 to do partial typing of new recruits. Of all the challenges confronting NMDP, HLA test funding has been the toughest to surmount.

C. Time to allow other countries to establish their own registries. This worldwide effort offers the best hope for patients seeking a matched donor. NMDP is vigorously encouraging development of registries in other countries.

While NMDP continues to seek private source funding to cover the significant HLA typing costs and to expand the registry internationally to allow for more diversity of the donor pool, the organization is also sensitive to the urgency felt by patients waiting today. Many families have launched local recruitment efforts when a matched donor was not immediately available through the registry.

NMDP encourages families to contact the NMDP Coordinating Center where staff members are available to advise families about where to call for help and how best to proceed. NMDP officials also maintain a strong sense of concern for both the patient and donor. This concern is integrated in the counsel given to families.

Because of the efforts of some families for their own loved one, the registry's volunteer pool continues to grow and other lives continue to be saved. This wonderful registry would not be possible if not for many determined families. Volunteers recruited in patient-specific drives sign consent forms which make them available to any patient searching for a matched donor.

The NMDP board continues to identify recruitment avenues, such as corporations and service clubs, to lessen the recruitment burden currently shouldered, in large part, by the families.

7. How are searches done with other countries?

International developments are one of the most exciting efforts underway at NMDP. Currently, 30 countries are in some way working cooperatively. Many of these countries are members of the NMDP or exchange searches with the NMDP. The establishment of the World Marrow Donor Association (WMDA) in December of 1990, which is presided over by the Nobel Laureate Dr. Donnall Thomas, gives great hope that a worldwide registry of volunteers is possible in the near future. The gift of marrow currently crosses national borders about once a month.

8. How long has NMDP been doing searches?

Since September, 1987. The first transplant was done in December, 1987. The 100th transplant was done in February, 1989; the 300th in March, 1990; the 500th in October, 1990; the 700th in May, 1991; the 1000th in December, 1991.

9. Why are you targeting minority communities for donor recruitment?

In the same way that you inherit your skin color or your hair color, you inherit your tissue type. This tissue typing must match between patient and donor to allow the best chance of success of the transplant.

For this reason, patients go first to their relatives when they are seeking a matched donor. About 25 percent of patients needing a transplant find a sibling match, most of the rest must turn their hope to NMDP. Chances of finding a matched stranger are best within one's own racial group.

Currently, 85 percent of the NMDP volunteer donors are Caucasian. It is of critical importance that NMDP reach members of minority communities and stress the urgent need for volunteer donors so the same hope can be offered to all Americans in need. Congress has made available special funds specifically for minority volunteer tissue typing. This funding is helping increase the racial diversity of the registry. While great progress has been made, there is still a great amount to be done to assure that the NMDP is a racially diverse resource. Until that time, NMDP is expected to continue to place a high priority on minority recruitment.

10. How do I become a donor?

A. Give two tablespoons of blood and consent to be entered on the registry.
B. Your blood is HLA or tissue-typed.
C. Your HLA-type goes in the NMDP computer database where lab results are stored to be searched internationally by patients.
D. A preliminary match is identified.
E. Additional blood tests are requested to determine if you are a precise match for a specific patient in need.
F. The miracle match is identified.
G. After special counseling about donating marrow, you make the final decision to donate.

The NMDP has set up a network of NMDP donor centers (local blood bank organizations). Coordinators at these centers counsel potential donors and work with NMDP when someone is identified as a potential match. Only the donor center knows the name of a donor, assuring protection and anonymity of the donor. However, these donor centers are facing challenges and limitations of time, space and funding for typing. NMDP continues to assist these centers in overcoming these limitations.

Those who are interested in volunteering may contact their local donor center or call NMDP. In many communities, local drives are held, spearheaded by an individual family or one of NMDP's recruitment groups. Always, there is concern about raising the funds to pay for the HLA typing of those generous enough to volunteer as donors. Personal and corporate contributions and some funding from blood centers have been used in these efforts.

If a newspaper, television or radio station chooses to inform their audience about where to call for more information, NMDP's public toll-free number is 800/654-1247. For business-related calls to the NMDP, please call 800/526-7809.

Photo Courtesy SPENCER WEINER

Ina Kristiansen, right, and her mother, Virginia, wait in California for Ina's bone marrow transplant. Ina, a 22-year-old Anchorage woman who was diagnosed with acute myelitic leukemia in February, received her bone marrow from an anonymous donor.

Bone marrow donation is gift to Anchorage woman

By ANN CHANDONNET
TIMES WRITER

Ina Kristiansen will soon receive what could become a life-saving Christmas gift from a man she has never met.

Kristiansen, an Anchorage woman suffering from leukemia, learned on Christmas Eve that a donor had been found so that she can receive a bone marrow transplant at the UCLA Medical Center.

"This is the best Christmas present we ever got!" Ina's mother, Virginia Kristiansen, said Wednesday from her California hotel room.

Ina, 22, fell sick in February and was diagnosed with acute myelitic leukemia, a disease that disrupts the bone marrow's ability to produce normal blood cells.

Three possible donors who had Ina's Norwegian, Scot and Irish genetic background were found through the National Marrow Donor Program. Two were in England, the third, who will be the actual donor, was in the United States. Officials are withholding the name and other information about the donor until after the transplant.

> 'They're letting me stay in the hospital with her, sleeping in the same room. I'll be right there.'
>
> — Virginia Kristiansen
> patient's mother

Ina will enter the UCLA Medical Center this week for preliminary tests. The donor's marrow will be fed into her system beginning next week.

Meanwhile, her mother will be at her side. Virginia Kristiansen, a first-grade teacher at Tudor Elementary School, has taken a personal leave of absence from the Anchorage School District to be with her daughter.

"She needs someone to drive her from place to place because she is so weak," Kristiansen said. "They're letting me stay in the hospital with her, sleeping in the same room. I'll be right there."

Ina is a graduate of Service High School where she was a varsity soccer player. She plans to return to college as soon as she can. When she recovers from the transplant, she will come home — perhaps in April in May. In September, she wants to return to classes, her mother said.

"But she has been told to take it easy for six months after the transplant," she said.

Waiting and hoping has been hard on Virginia.

"I get my down moments, but we have to look at the positive. The positive is that Ina got this match. If she didn't have the match, things could be a lot worse."

HB

381

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-2101

M E M O R A N D U M December 12, 1991

SUBJECT: Midwifery Services - Medicaid Coverage
(Work Order No. 7-LS1633\D)

TO: Representative Niilo Koponen
ATTN: Shari Paul

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a new draft of your request relating to Medicaid coverage of lay midwifery services.

This draft takes a new approach to the issue. I have determined, based on further research, that it may not be necessary for the state to apply for coverage of these services through the waiver process. They could, instead, be covered as optional state services.

The optional coverage (rather than waiver coverage) of lay midwives might be possible because they are (or will be when the regulations are in place) registered by the state to perform services within a defined scope of practice. This is the way chiropractors' and clinical social workers' services are covered, for instance. They are licensed by the state to perform services within a specific scope of practice.

Coverage of licensed practitioners is allowed under a provision of federal law that allows a state to cover

> medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law. (42 U.S.C. 1396d(a)(6))

This provision of federal law is one that I thought existed at the time I did your earlier drafts but I could not at that time find it. I apologize for not finding it sooner; I realize that some confusion could have been avoided.

legal services memo

Alaska State Legislature

Representative Niilo Koponen

House District 21

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POSITION PAPER

HB 381 "An Act relating to the coverage of registered lay midwives' services under Medicaid..."

The intent of this legislation is to provide Medicaid reimbursement for registered lay midwives once regulations have been completed by the Department of Health and Social Services. These regulations would allow midwives to become registered in the State therefore being able to receive Medicaid funds. More important is the passage of HB 382 which would set up a licensing board for midwives which in turn would allow for Medicaid reimbursement. Coverage of licensed practitioners is allowed under a provision of federal law that allows a state to cover "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law." (42 U.S.C. 1396d(a)(6)).

New Mexico is one of the only states to provide Medicaid reimbursement for licensed midwives. The States Medicaid Advisory Committee approved this coverage bearing in mind that it would increase the availability of prenatal care. The Commission felt that it would also provide "access to care for women who may be willing to seek the services of a midwife and for women who live in areas of the state underserved by physicians and hospitals."

The State of Alaska meets a similar criteria. In many parts of the state there are shortages of obstetricians and gynecologists. Medicaid reimbursement would also offer an alternative for women who may be willing to seek midwifery services due to it being a more affordable type of licensed prenatal and postnatal care. The Medicaid program finances a limited amount of individuals, many of whom do not have any form of insurance coverage.

sponsor statement

New Mexico

New Mexico has a longstanding history of acceptance of midwifery care. In 1921 when the Bureau of Public Health was organized, midwives were encouraged to provide health care to mothers and babies. Public health nurses, responsible for midwifery education, traveled throughout the state teaching classes in asepsis, physiology of labor and birth, infant resuscitation, control of hemorrhage, and other obstetric-related topics. After the direct-entry midwife completed these classes, she was issued a diploma and a bag with the necessary tools for her work.

The original 1922 regulations governing midwifery practice were revised periodically to reflect changes in the standards of obstetric care. In 1922 midwives were required to use silver nitrate eye drops for the newborn. In 1944 midwives were required to secure physician assistance if the baby was not born within 18 hours for a first birth, and within 12 hours for a second or subsequent birth. In 1945 nurse-midwife and registered "lay" midwife regulations were defined, maintained, and revised separately. In 1960 recommendations were made for pregnant women to receive prenatal care from physicians. Additional instructions were added regarding babies in abnormal positions, prolonged ruptured membranes, bleeding, babies weighing less than five and a half pounds, and requisite postpartum care. This 1960 version of the regulations remained unchanged for 20 years.

Until the 1950s the majority of babies in New Mexico were born at home with midwives in attendance. Much of the state is rural, relatively poor, and sparsely populated. In addition, homebirth was customary within traditional Hispanic and Native American cultures. In 1937, 800 midwives were practicing. In the mid-1960s the nurse-midwife responsible for midwifery training retired, and training and registration of new midwives was discontinued.

In the mid-1970s midwifery re-emerged in New Mexico. In 1978, midwives approached the state to update the regulations and to reinstitute the registration process. Since the New Mexico Public Health Law had maintained midwifery regulation as a duty of the state health agency, midwives had legal support for their request. The Maternal Health section of the Department of Health and Environment was also supportive of the new regulations as a means to avert the potential problems of unregulated practice.

After public hearings, the new Regulations Governing the Practice of Lay Midwifery were instituted in 1980. Regulations called for an advisory board comprised of one physician, one CNM, one consumer, and two licensed midwives. Educational avenues include apprenticeships, self-study, and formal education. State regulations also govern standards of practice, approved and unapproved practice, recordkeeping, the nature of physician/midwife consultation, and emergency measures.

The regulations have been revised three times since 1980. In 1981, the use of pitocin and episiotomy as emergency measures was approved. In 1987, emergency use of IVs was approved. The continuing education requirement was increased to 30 hours every two years. Provisional status was deleted and senior apprentice status added.
The advisory board added an official from the health department. In recognition of midwives' substantial licensing requirements and their scope of practice, their title was changed from "Registered Lay Midwife" to "Licensed Midwife."

In 1981, insurance companies in New Mexico were required to offer third-party reimbursement to all licensed midwives. In 1989, licensed midwives also began receiving Medicaid reimbursement (currently $484.69 for total obstetric care, which is 77 percent of physician reimbursement).

New Mexico continues to license a significant number of midwives who practice in other states. In 1988, 120 midwives were registered with the state. Of this number, 35 practice in New Mexico.

New Mexico Midwives Association (NMMA) has yearly conferences and publishes a quarterly newsletter. Association meetings are held every two months. Because most of the tasks of regulation and certification of midwifery are handled through the state with the advice of the New Mexico State Midwifery Advisory Board, the NMMA is able to work on other projects such as the recent successful Medicaid reimbursement efforts. The climate of acceptance and respect for New Mexico midwives has fostered a thriving midwifery community that has made homebirth a viable option for families in this state.

Contacts

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The New Mexico Midwife
(NMMA newsletter)
Diana Holzer
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For a copy of state regulations:
Health and Environment Department
Public Health Division
PO Box 968
Santa Fe, NM 87504-0968

Sponsor's back-up

State of New Mexico
HUMAN SERVICES DEPARTMENT

HUMAN SERVICES REGISTER

I. DEPARTMENT
NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT
LICENSED MIDWIFE SERVICES

III. PROGRAM AFFECTED
(TITLE XIX) MEDICAID

IV. ACTION
FINAL REGULATIONS

V. BACKGROUND SUMMARY

The New Mexico Human Services Register Vol. 11, No. 69, November 17, 1988, proposed Medicaid reimbursement for licensed midwife services. Thirty-nine persons attended the public hearing on December 28, 1988. Of these, thirteen presented testimony. In addition, written comments were received prior to and following the public hearing.

Testimony at the public hearing was overwhelmingly in favor of Medicaid reimbursement to the licensed midwife. The only opposing testimony was from a representative of the New Mexico section of The American College of Obstetricians and Gynecologists (ACOG). They opposed Medicaid payment to licensed midwives, and supported in-hospital births. They also offered to work with the Human Services Department to support clinics throughout New Mexico for prenatal care with subsequent delivery in the hospital. In addition, they indicated support for extension of hospital privileges to the Certified Nurse Midwife.

The Department also requested its Medicaid Advisory Committee to review the issue and provide a recommendation. The Advisory Committee concluded that Medicaid reimbursement of licensed midwives would increase the availability of prenatal care. In particular, it would provide access to care for women who may be willing to seek the services of a midwife and for women who live in areas of the state underserved by physicians and hospitals. The Medicaid Advisory Committee also recommended that licensed midwives be required to obtain malpractice insurance and that the physician sponsoring the midwife must be a Medicaid provider. However, it is the opinion of the Department's General Counsel that we cannot require liability coverage for licensed

midwives when such coverage is not a requirement for other Medicaid providers. In addition it is the Department's position that the relationship between the midwife and the sponsoring physician should be designated in the licensing regulation, if appropriate, rather than in the reimbursement guidelines.

Based on the oral and written testimony provided the Department will reimburse licensed midwives for services, including home delivery, under the Medicaid program. Reimbursement will be on the bases of a fee schedule. Actual rates will be proposed in a future Human Services Department Register.

VI. REGULATIONS

The regulations are contained in Section 310.19, Midwife Services.

VII. EFFECTIVE DATE

These regulations are effective September 1, 1989.

VIII. PUBLICATION

Publication of these regulations approved on August 15, 1989
by:

Alex Valdez

ALEX VALDEZ, SECRETARY
HUMAN SERVICES DEPARTMENT

310.19 - MIDWIFE SERVICES

310.1901 - Legal Base 42 CFR 440.165

310.1902 - Eligible Providers

A. Individuals currently licensed by the Board of Nursing as registered nurses and registered with the Public Health Division of the Health and Environment Department as a certified nurse midwife.

B. A licensed midwife, registered as a licensed midwife by the New Mexico Health and Environment Department.

C. Licensed birth centers when the service is performed by an individual meeting the criteria under A. or B. above.

D. Physicians, physician groups, clinics, or professional groups associated with institutions will be subject to the policies of this section when the service is performed by a certified nurse-midwife or licensed midwife meeting the criteria or under A. or B., above.

A New Mexico Medical Assistance Program Provider Application must be properly completed and accepted by the Department.

310.1903 - Services

310.190301 - Covered Services

A. Routine prenatal care, delivery, and postnatal care to women with essentially normal pregnancies, may be provided by certified nurse midwives or licensed midwives within the scope of their practice as defined by state law and regulations.

B. Individual completed trimesters and/or the delivery may be covered when the patient has not been under the care of one provider for the entire prenatal, delivery, and postnatal periods.

C. Laboratory and radiological services related to essentially normal pregnancies are covered. These services may be billed separately, except for routine chemical urinalysis.

310.190302 - Non-Covered Services

Accommodation charges are not reimbursable for midwife services.