ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7865 HOUSE JUDICIARY

proceedings if the trial judge finds that the defendant's rights would be prejudiced by use of the system.

(c) Facsimile telecopy orders issued in proceedings conducted under this rule are acceptable as originals for the purposes of release or detention by correctional officers.

(d) Nothing in this rule diminishes any other existing right of a criminal defendant.

(Added by SCO 719 effective August 1, 1986; amended by SCO 863 effective July 15, 1988).

Rule 39. Appointment of Counsel.

(a) **Informing Defendant of Right to Counsel.** The court shall advise a defendant who appears without counsel for arraignment, change of plea, or trial of the right to be represented by counsel, and ask if defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) **Appointment of Counsel for Persons Financially Unable to Employ Counsel.**

(1) If defendant desires the aid of counsel but claims a financial inability to employ counsel, the court or its designee shall determine whether defendant is an "indigent person," as defined by statute, by placing defendant under oath and asking about defendant's financial status, or by requiring defendant to complete a signed sworn financial statement. The court shall order defendant to execute a general waiver authorizing release of income information to the court. The court may require defendant to attempt to arrange private representation before the court makes a final determination on indigency.

(2) Before the court appoints counsel for an indigent defendant at public expense, the court shall advise defendant that defendant will be ordered to repay the prosecuting authority for the cost of appointed counsel, in accordance with paragraph (d) of this rule, if the defendant is convicted of an offense. The court shall order defendant to execute assignments of defendant's permanent fund dividends to the prosecuting authority for a sufficient number of years to ensure that the maximum judgment that may be entered against the defendant under the schedules in paragraph (d) is paid in full. If defendant refuses to execute the assignments, the court shall direct the clerk to execute the assignments pursuant Civil Rule 70. The court may enter such orders as appear reasonably necessary to prevent defendant from dissipating assets to avoid payment of the judgment.

(3) If the court or its designee determines that the defendant is an "indigent person," the court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies defendant's request for appointed counsel, defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days after the date of notice, as defined in the Criminal Rule 32.3(c), of the denial. The trial court shall forward the motion, relevant materials from the court file, and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) **Costs of Appointed Counsel.**

(1) *Entry of Judgment.*

(A) Upon conviction of an offense, revocation of probation, denial of a motion to withdraw plea, and denial of a motion brought under Criminal Rule 35.1, the court shall prepare a notice of intent to enter judgment for the cost of appointed counsel in accordance with paragraph (d) of this rule, provide a copy of the notice to defendant, and order defendant to

(i) execute assignments of defendant's permanent fund dividends to the prosecuting attorney for a sufficient number of years to ensure that the judgment is paid in full; and

(ii) apply for permanent fund dividends every year in which the defendant qualifies for a divided until the judgment is paid in full.

If defendant refuses to execute assignments of defendant's permanent fund dividends, the court shall direct the clerk to execute assignments pursuant to Civil Rule 70.

(B) Defendant may oppose entry of judgment by filing a written opposition within 10 days after the date of notice, as defined in Criminal Rule 32.3(c), of the court's intent to enter judgment. The opposition shall specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition within the same deadline.

(C) If no opposition is filed within the time specified in section 39(c)(1)(B), the clerk shall enter judgment against defendant for the amount shown in the notice. If a timely opposition is filed, the court may set the matter for a hearing and shall have authority to enter the judgment.

(D) The judgment must be in writing. A copy of the judgment shall be mailed to defendant's address of record. The judgment shall bear interest at the rate specified in AS 09.30.070(a) from the date judgment is entered.

(2) *Collection.*

(A) The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution, except that no action may be taken to enforce the judgment for three years after the defendant is released from incarceration unless, for good cause shown, the court considers it appropriate to enforce the judgment earlier.

(B) All proceedings to enforce the judgment shall be in accordance with the statutes and court rules applicable to civil judgments. The judgment is not enforceable by contempt. Payment of the judgment may not be made a condition of a defendant's probation. Default or failure to pay the judgment may not affect or reduce the rendering of services on appeal or any other phase of a defendant's case in any way. A defendant does not have a right to be represented by appointed counsel in connection with proceedings under subparagraph 39(c) or any proceedings to collect the judgment.

(C) Upon showing of financial hardship, the court shall allow a defendant subject to a judgment under this rule to make payments under a repayment schedule. A defendant may petition the court at any time for remission, reduction or deferral of the unpaid portion of the judgment. The court may remit or reduce the balance owing on the judgment or change the method of payment if the payment would impose manifest hardship on the defendant or defendant's immediate family.

(D) Notwithstanding section 39(c)(2)(B), a defendant may be held in contempt for failing to comply with an order under this rule to apply for a permanent fund dividend.

(3) *Appeal.*

(A) If defendant appeals the conviction, enforcement of the judgment may be stayed by the trial court or the appellate court upon such terms as the court deems proper.

(B) If defendant's conviction is reversed, the clerk shall vacate the judgment and order the prosecuting authority to repay all sums paid in satisfaction of the judgment, plus interest at the rate specified in AS 09.30.070(a).

(d) **Schedule of Costs.** The following schedules govern the assessment of costs of appointed counsel under paragraph 39(c). If a defendant is convicted of more than one offense in a single dispositive court proceeding, costs shall be based on the most serious offense of which the defendant is convicted. If a defendant is otherwise convicted of more than one offense, costs shall be separately assessed for each conviction. For good cause shown, the court may waive the schedule of costs and assess fees up to the actual cost of appointed counsel, including actual expenses.

Misdemeanors

Trial	$500.00
Change of plea	200.00
Post-conviction relief or contested probation revocation proceedings in the trial court	250.00

Felonies

	Class B & C	Class A and Unclassified (Except (Murder)	Murder in the 1st and 2nd Degrees
Trial	$1,500.00	$2,500.00	$5,000.00
Change of plea after substantive motion work and hearing and before trial commences	1,000.00	1,500.00	2,500.00
Change of plea post-indictment but prior to substantive motion work and hearing	500.00	1,000.00	2,000.00
Change of plea prior to indictment	250.00	500.00	750.00
Post-conviction relief or probation revocation proceeding in trial court	250.00	500.00	750.00

(e) **Review of Defendant's Financial Condition.**

(1) The court may review defendant's financial status at any time after appointmetn of counsel to determine (A) whether defendant continues to be an "indigent person," as defined by statute; or (B) whether defendant was an indigent person at the time counsel was appointed.

(2) If the court determines that defendant is no longer an indigent person, the court may

(A) terminate the appointment; or

(B) continue the appointment and, at the conclusion of the criminal proceedings against defendant in the trial court, enter judgment against the defendant for the actual cost of appointed counsel, including actual expenses, from the date of the change in the defendant's financial status through the conclusion of the trial court proceedings.

(3) If the court determines that defendant was not an indigent person at the time counsel was appointed, the court may

(A) terminate the appointment and enter judgment against defendant for the actual costs of appointed counsel, including actual expenses, from the date of appointment through the date of termination; or

(B) continue the appointment and, at the conclusion of the criminal proceedings against defendant in the trial court, enter judgment against defendant for the actual cost of appointed counsel from the date of the appointment through the conclusion of the trial court proceedings.

(4) A defendant may request review of the court's decision to terminate the appointment according to the procedure set out in subparagraph 39(b)(5).

(5) Judgment may be entered against a defendant under this paragraph regardless of whether the defendant is convicted of an offense.

(6) Action may be taken at any time to enforce a judgment entered under this paragraph.

(Adopted by SCO 4 October 4, 1959; amended by SCO 90 Effective July 24, 1967: by SCO 157 effective February 15, 1973; by Amendment No. 4 to SCO 157 dated March 12. 1973; by SCO 187 effective July 2, 1974; by SCO 328 effective January 1, 1979; by SCO 448 effective November 24 1980; by SCO 677 effective June 15, 1986; and by SCO 888 effective July 15, 1988; rescinded and re-promulgated by SCO 1088 effective July 1, 1992)

Annotations

Cases

I. Right to Counsel

A. In General

A defendant in a criminal proceeding has a constitutional right to court appointed counsel at a preliminary hearing only when the preliminary hearing is in the nature of a critical stage of the proceedings. Merrill v. State, Op. No. 392, 423 P2d 686 (Alaska 1967).

Where the court over defendant's explicit protest, dismisses counsel from a public defender agency on the belief that the agency has exhibited a lack of preparation and then appoints unwanted counsel to represent the defendant, the court deprives the defendant of his right to counsel of his choice. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Where a defendant has been denied the right to be represented by his chosen counsel, the subsequent entry of a plea of guilty or nolo contendere does not shield a conviction from challenge on appeal, since the voluntariness and reliability of such a plea is inherently suspect. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

The advice given to a nonindigent defendant concerning the right to counsel must include at least a brief explanation of the benefits of counsel. Swensen v. Municipality of Anchorage, Op. No. 2179, 616 P2d 874 (Alaska 1980).

It is within the court's discretion to allow both defendant and counsel to participate actively in the trial, so that a defendant may represent himself and also have the assistance of counsel. Cano v. Municipality of Anchorage, Op. No. 20, 627 P2d 660 (Alaska 1980).

B. Indigents

Even when read in relation to recent United States Supreme Court decisions, AS 12.25.150(b) does not require the appointment of counsel for an indigent immediately after his arrest. Martinez v. State, Op. No. 389, 423 P2d 700 (Alaska 1967).

Mere speculation as to what might have been done by a defense counsel during an interval between arrest and appearance for arraignment when counsel was assigned cannot be a basis for inferring that indigent defendant in a criminal case was deprived of counsel during a critical stage of the proceedings. Martinez v. State, Op. No. 389, 423 P2d 700 (Alaska 1967).

Where the direct penalty for conviction of an offense may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, such offense is a "serious crime" within the public defender statute. A defendant who is charged with any such misdemeanor and who cannot afford to hire his own lawyer is eligible for representation by a public defender. Alexander v. City of Anchorage, Op. No. 738, 490 P2d 910 (Alaska 1971).

A indigent defendant is not entitled to representation by any particular attorney. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Once counsel is appointed to represent an indigent defendant, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

II. Waiver of Right to Counsel

To be valid, a waiver of the right to counsel must be made with an apprehension of the nature of the charges, the offenses included within them, the range of punishments, possible

defenses, mitigating circumstances and all other facts essential to a broad understanding of the whole matter. **Gregory v. State**, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Magistrate must ascertain whether defendant understands benefits of counsel by recorded colloquy with defendant before right to counsel may be waived. **Gregory v. State**, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant is unable to make an intelligent choice as to waiver of right to counsel it is the duty of the court to assign counsel. **Gregory v. State**, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant pleads guilty without the assistance of counsel, the plea is invalid unless defendant waived his right to counsel. **Gregory v. State**, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Failure of arraignment or trial record to demonstrate that defendant understood what he was giving up by declining the assistance of counsel was cause for reversal even though record showed that defendant had been advised of his right to counsel. **O'Dell v. Municipality of Anchorage**, Op. No. 1588, 576 P2d 104 (Alaska 1978).

Failure of court to ask questions of defendant to assure that he understood precisely what rights he was giving up by declining legal representation at sentencing hearing required vacation of sentence. **Smith v. State**, Op. No. 134, 651 P2d 1191 (Alaska App. 1982).

Trial judge committed reversible error in not allowing defendant, charged with drunk driving in 1984, to have a 1975 drunk driving conviction set aside on the ground that, although informed by the magistrate taking his guilty plea in 1975 of his right to an attorney, he was not informed of what an attorney could do for him. **Petranovich v. State**, Op. No. 547, 709 P2d 867 (Alaska App. 1985).

Failure of the trial court to assure by an on-the-record inquiry that the accused understood the benefits of counsel and the dangers of self-representation prior to waiving his right to counsel was reversible error notwithstanding the accused's previous contacts with the criminal justice system. **James v. State**, Op. No. 669, 730 P2d 811 (Alaska App. 1987).

Defendant's waiver of his right to counsel prior to pleading guilty to a DWI charge was valid where the magistrate advised him of the maximum and minimum penalties for the offense and after he responded affirmatively to the question: "Do you know what a lawyer is?". **Tobuk v. State**, Op. No. 683, 732 P2d 1099 (Alaska App. 1987).

III. Effective Assistance of Counsel

A defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. **Risher v. State**, Op. No. 1053, 523 P2d 421 (Alaska 1974).

All that is required of counsel in rendering effective assistance of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions. **Risher v. State**, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant does not suffer an unconstitutional deprivation of effective assistance of counsel because of an error committed by his attorney which in no manner contributes to the conviction. **Risher v. State**, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant who has not demonstrated that he understands the benefits of counsel cannot be said to have waived counsel. **Gregory v. State**, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Rule 40. Time.

(a) **Computation.** Except as otherwise specifically provided in these rules, in computing any period of time, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When a period of the prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) Upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35 except as otherwise provided in those rules, or the period for taking an appeal.

(c) **Unaffected by Expiration of Term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(d) **For Motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown, such an order may be made on ex parte application. Copies of all photographs, affidavits, other documentary evidence and a brief, complete written statement in support of the motion, shall be served with the motion. The opposing party shall serve either

No VRA Screening Necessary

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT _____

( ) STATE OF ALASKA)
( ))
)
Plaintiff,)
)
vs.)
)
)
) CASE NO. _____ CR
Defendant.)
DOB: _____) JUDGMENT FOR COSTS OF
COURT APPOINTED ATTORNEY

The court appointed an attorney to represent the defendant in this case.

The court has held a hearing in conformity with Criminal Rule 39(c). Based thereon, it is ordered that defendant pay for services of appointed counsel in the amount of $_____, which shall be paid in the following manner:_____

_____

_____

_____

_____

_____.

This order shall have the same force and effect as a judgment in a civil case and may be enforced by execution against defendant's property.

_____ _____
Date Judge

_____
Type or Print Name

I certify that on _____,
a copy of this judgment was sent
or given to:
Defendant
Defense Attorney:_____
Prosecutor:_____

Clerk:_____

CR-211 (12/91) (cs)
JUDGMENT FOR COSTS OF
COURT APPOINTED ATTORNEY

Crim. R. 39
AS 18.85.100-.120

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT _____

( ) STATE OF ALASKA)
( ))
)
Plaintiff,)
)
vs.)
)
)
)
Defendant.)
_____)

CASE NO. _____ CR

REQUEST FOR APPOINTED COUNSEL

I wish to have a lawyer and cannot afford to pay for one. I request that the court appoint a lawyer to represent me.

STATEMENT OF FINANCIAL RESPONSIBILITY

I understand that if the court decides I am able to pay for part of the costs of my defense (lawyer's services and other costs), the court may order me to pay for these items.

FINANCIAL STATEMENT

Name _____ Phone _____
Address _____ Date of Birth _____
_____ Soc. Sec. No. _____
Present employer _____
(If not now employed, state last employer and date terminated.)
Employer
Address _____ Phone _____

Member of Union ☐ yes ☐ no Which One? _____

I. DEPENDENTS

Name	Age	Relationship

II. INCOME INFORMATION (after taxes, but before other deductions)

		Yourself	Your Spouse
a.	Current Monthly Income		
b.	Income during last 12 months:		
	Wages		
	Public Assistance		
	Unemployment		
	Other _____ (specify)		
	TOTAL YEARLY INCOME		

III. FAMILY ASSETS - Present Value

Cash on hand or in bank	_____
Land, buildings, or trailers	_____
Motor vehicles	_____
Securities: stocks, bonds, notes	_____
Businesses	_____
Snow machines, boats, airplanes	_____
TOTAL ASSETS	_____

IV. FAMILY DEBTS

Mortgages	_____
Loans	_____
IRS	_____
Child support arrearages	_____
Others (charge cards, bills, etc.)	_____
TOTAL DEBT	_____

V. MONTHLY EXPENSES

Food	_____
Rent	_____
Utilities	_____
Car payments	_____
Furniture & TV payments	_____
Child support or alimony	_____
Mortgages	_____
Loans	_____
IRS back taxes	_____
Others (charge card, bills, etc.)	_____
TOTAL EXPENSES:	_____

GENERAL WAIVER

I authorize anyone, including my past employers, to release to the Alaska Court System all information concerning any income source I have had for a period of three years immediately preceding my first court appearance in which an appointed lawyer is representing me.

OATH

I declare, under oath, that I have read or have had read to me the state of Financial Responsibility on page one and the above General Waiver, and I understand them. I further declare, under oath, that the above Financial Statement is true.

I understand that this Financial Statement may be made available to the Attorney General after the conclusion of this case, and that if I give false information in this statement, the false information may be used to prosecute me for perjury under Alaska Statute 11.56.200.

_____ _____

Date Defendant's Signature

Subscribed and sworn to or affirmed before me on _____, 19 ____, at _____, Alaska.

(SEAL)

_____

Clerk of Court, Notary Public or other person authorized to administer Oaths.

My commission expires: _____

HB

152

8-LS0617\J
Luckhaupt
3/9/93

CS FOR HOUSE BILL NO. 152(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to magistrate jurisdiction."

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

* **Section 1.** AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows:

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or

forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty **or no contest** by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors **that are not minor offenses**, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try, and enter judgments in all cases involving **minor offenses** [INFRACTIONS UNDER AS 28, VIOLATIONS UNDER AS 05.25 AND AS 11,] and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70;

(9) to provide post-conviction relief under the Alaska Rules of Criminal Procedure for any of the cases specified in (5), (6), or (7) of this section if the conviction occurred in the district court.

* **Sec. 2.** AS 22.15.120 is amended by adding a new subsection to read:

(b) In this section, "minor offense" means

(1) an offense classified by statute as an infraction or a violation;

(2) an offense for which a bail forfeiture amount has been authorized by statute and established by supreme court order; or

(3) a statutory offense for which a conviction cannot result in incarceration, a fine greater than $300, or the loss of a valuable license.

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 1, 1993 FURTHER REFERRALS:

Date of Committee Action: 3-12-93

The JUDICIARY Committee considered: HB 152

HOUSE BILL NO. 152 JURISDICTION OF MAGISTRATES

"An Act relating to magistrate jurisdiction."

RECOMMENDATIONS: [X] the same title
be replaced with CSHB152 (JUD) [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [X] zero fiscal note(s) Court System 3/1/93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	✓	City Juridiction		✓	
Gail L. Phillips	✓				
Kim Rocklund	✓				
Jeannette James	✓				
Ken Lamb	✓				
Joseph Green	✓				

Brian D. Porter
CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

House Judiciary Committee

*HB 86 Sanctions for Property-Related Offenses
HB 79 Damage of Property by Minors

Date: March 12, 1993
Place: Capitol Room 120

Subject of Meeting: HB 152 Magistrate Jurisdiction
HB 58 Admin. of Budget Reserve Fund

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Margot Knuth	Laws-Crim	Box 110300 99811			5-4049	(Y) N	HB 86
Jay Frank	State Farm Allstate	431 N. Franklin St Juneau			586-5777	(Y) N	HB 79
C.S CHRISTENSEN	COURT SYSTEM	303 K ST ANCH	99501		264-8228	(Y) N	HB 152
Randall Harris	DHSS	Box 110630 Juneau	99811		465-3187	Y (N)	HB 86
Jim Baldwin						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

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Rep. Brian Porter, Chairman

House Judiciary Committee

Date: March 10, 1993
Place: Capitol Room 120

Subject of Meeting: HJR 3 Limitation of Legislative Terms; HB 152 Jurisdiction of Magistrates; HB 62 Employee's Use of Legal Products; HB 147 Liability for Reference Info.

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
C.S. CHRISTENSEN	COURT SYSTEM	303 K ST NORTH	99501		264-8228	(Y) N	HB 152
Resa Jerrel	NFIB	9159 Skywood	99801		789-4278	(Y) N	HJR 3
Doug Rickey	Rep-Gussenhorf	State Cap.				(Y) N	HB 62 - if needed
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

Page __ of__

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 15, 1993 FURTHER REFERRALS: Judiciary

Date of Committee Action: 2/25/93

The STATE AFFAIRS Committee considered: HB 152

HOUSE BILL NO. 152 JURISDICTION OF MAGISTRATES

"An Act relating to magistrate jurisdiction."

RECOMMENDATIONS: [X] the same title
be replaced with CSHB 152 [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[1] zero fiscal note Alaska Court System [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
	✓				
	✓				
	✓				
	✓				
	✓				
	✓				
	✓				

CHAIRMAN'S SIGNATURE

STATE AFFAIRS REPORT

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

CHARLES S. CHRISTENSEN III
Staff Counsel

303 K Street
Anchorage, AK 99501
(907) 264-8228

March 4, 1993

The Honorable Brian Porter
Chairman, House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Porter:

Thank you for scheduling House Bill 15a, relating to magistrate jurisdiction. As you will recall, this bill was introduced by the Judiciary Committee at the request of the supreme court.

Magistrates preside over certain district court matters in areas of the state where the services of a full-time district court judge are not required. Magistrates are the highest ranking judicial officer in approximately 40 district court locations. Magistrates also serve in metropolitan areas to handle routine matters and to ease the workload of the district court. Unlike other types of judicial officers, magistrates are not appointed by the governor; instead, they serve at the pleasure of the presiding judge of their judicial district.

CSHB 15a (STA) proposes two changes to AS 22.15.120, the statute which sets forth magistrate jurisdiction. The first change modifies magistrate jurisdiction with respect to "minor offenses." A minor offense is a non-criminal offense such as a speeding ticket. An offense is deemed minor and non-criminal if it cannot be punished by a jail sentence, by an excessive fine, or by the loss of a valuable license. Because a minor offense is classified as non-criminal, a person who is charged with a minor offense is not entitled to a jury trial or to a public defender.

Currently, magistrates are authorized to hear minor offense cases if the minor offense is contained in Title 11 (Criminal Law), Title 05 (Amusements and Sports), or Title 28 (Motor Vehicles). However,

COURT SYSTEM LETTER

over the years many minor offenses have been added to other titles, such as Title 16 (Fish and Game). CSHB 151 (STA) would authorize magistrates to hear any minor offense case, regardless of its placement in the Alaska Statutes. This change will result in operating efficiencies for the court system.

The second change modifies magistrate jurisdiction with respect to post-conviction relief. It corrects an oversight in court system legislation which was enacted in 1990.

Grounds for post-conviction relief are set forth in Criminal Rule 35.1, a copy of which is attached. This rule codifies the common law right of an offender to petition the convicting court to reconsider his case. For example, if new evidence is discovered several years after a person is convicted, the person can request the convicting court to reconsider the conviction in light of the new evidence.

Until 1990, jurisdiction to hear petitions for post-conviction relief rested with the superior court, even if the conviction had been entered in the district court. In that year, legislation was enacted which provided that district judges would have jurisdiction in post-conviction relief cases, if the conviction took place in the district court. Through an oversight, this change only applied to district judges, and not to magistrates, who also hear cases in district court. CSHB 151 (STA) rectifies this oversight, by providing that magistrates may provide post-conviction relief, if the underlying conviction was within the magistrate jurisdiction.

Thank you for your courtesy. Please feel free to contact me if you have any questions or comments.

Very truly yours,

C. S. Christensen III
Staff Counsel

enclosure

imposed under this rule. Rollefson v. Municipality of Anchorage, Op. No. 983, 782 P2d 305 (Alaska App. 1989).

Where request for reduction of sentence came almost three years after defendant's conviction was affirmed on appeal, and there was nothing in the record to suggest that he intended to make the request within 120-days permitted by the rule or was somehow frustrated by his attorney or the court system in taking action, the trial court did not err in refusing to relax the 120-day time limit. S.B. v. State, Op. No. 997, 785 P2d 900 (Alaska App. 1989).

If a defendant intends to bring a motion within the 120-day period but negligently calculates the time, or if defense counsel refuses to bring the motion or discourages defendant from bringing the motion, it might be an abuse of discretion to refuse to relax the 120-day time limit of this rule. Cook v. State, Op. No. 1052, 792 P2d 682 (Alaska App. 1990).

Although convicted sex offender's motion to reduce sentence would have failed if made within the 120-day time limit of this rule because his completion of an institutional sex-offender program, upon which the motion was based, did not occur until after the time limit, the trial court did not err in refusing to relax the time limit. Cook v. State, Op. No. 1052, 792 P2d 682 (Alaska App. 1990).

Rule 35.1. Post-conviction Procedure.

(a) Scope. Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of Alaska;

(2) that the court was without jurisdiction to impose sentence;

(3) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release have been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; or

(7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards; may institute a proceeding under this rule to secure relief.

(b) Not a Substitute for Remedies in Trial Court — Replaces All Other Remedies for Challenging the Validity of a Sentence. This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. It is intended to provide a standard procedure for accomplishing the objectives of all of the constitutional, statutory or common law writs.

(c) Commencement of Proceedings — Filing — Service. A proceeding is commenced by filing an application with the clerk of the court in which the conviction occurred. Application forms will be furnished by the clerk of court. An application may be filed at any time. The clerk shall open a new file for the application, promptly bring it to the attention of the court and give a copy to the district attorney.

(d) Application — Contents. The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

(e) Indigent Applicant. If the applicant is indigent, filing fees, transcript and other court costs shall be borne by the state. Where the court determines that the application shall not be summarily disposed of on the pleadings and record pursuant to subdivision (f) of this rule, but that the issues raised by the application require an evidentiary hearing, counsel shall be appointed to assist indigent applicants.

(f) Pleadings and Judgment on Pleadings.

(1) Within 30 days after the filing of the application, or within such further time as the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering

the application the court shall consider substance and disregard defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

(2) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record shall not be made when a material issue of fact exists.

(3) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

(g) **Hearing — Evidence — Order.** The application shall be heard in, and before any judge of, the court in which the conviction took place. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. The court may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.

(h) **Waiver of or Failure to Assert Claims.** All grounds for relief available to an applicant under this rule must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

(Added by SCO 822, effective August 1, 1987)

Annotations

Cases

I. In General

Appellate Rule 46 was invoked where strict adherence to the 40-day time limit for appeal under Criminal Rule 35 would have prevented consideration of appellant's contentions that his conditions of imprisonment deprived him of his right to rehabilitation and reformation and to be free of cruel and unusual punishment. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

Post-conviction relief proceeding is not another trial; it is separate from the original criminal proceeding and is governed primarily by rules of civil procedure. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

The Criminal Rules promulgated by the Alaska Supreme Court are part of the general "laws" of Alaska as the term is used in this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

An attorney, appointed to represent an indigent in bringing his first application for post-conviction relief based on alleged ineffective assistance of counsel, was not permitted to withdraw on the basis that there were no nonfrivolous issuance to be presented to the court where the indigent was unwilling to forego the application; the court, rather than counsel, had to determine the merits of petitioner's contention. Hertz v. State, Op. No. 806, 755 P2d 406 (Alaska App. 1988).

Res judicata applies in post-conviction relief proceedings; accordingly where a party thoroughly litigates an issue and has his appeal resolved on the merits, the trial court can dismiss a claim for post-conviction relief on that issue. Brown v. State, Op. No. 1099, 803 P2d 887 (Alaska App. 1990).

District court did not have jurisdiction to entertain applications for post-conviction relief made under this rule. State v. Danielson, Op. No. 1128, 809 P2d 937 (Alaska App. 1991).

II. Vacation of Conviction

A. In General

At a fact hearing upon a post-conviction petition which alleged that petitioner was coerced by appointed trial counsel to enter a guilty plea and also alleged that trial counsel had given the petitioner false assurance regarding probation, specific findings must be made in the record as to as many of the following matters that may be applicable in addition to others possibly raised, namely the court's jurisdiction, the adequacy of petitioner's representation, intelligent waiver of counsel if there was such, questions of suppression of evidence

or knowing use of perjured testimony, use of involuntary confessions, competency of petitioner to understand the proceedings and statutory range of sentence. Thompson v. State, Op. No. 334, 412 P2d 628 (Alaska 1966).

Order denying petition to vacate on ground that plea of guilty was coerced by threats and promises of probation officer was reversed and remanded directing the court below to place the probation officer under oath, to afford full opportunity for cross-examination at a full fact hearing on petitioner's charges, to weigh the testimony and to file written findings and decision. Nichols v. State, Op. No. 398, 425 P2d 247 (Alaska 1967).

If the record of a post-conviction hearing is silent with regard to an issue and the witnesses are unable to remember, the State has not failed to substantiate its case. Instead, the prisoner has failed in his collateral attack on the judgment of conviction. Merrill v. State, Op. No. 568, 457 P2d 231 (Alaska 1969).

To secure relief in a habeas corpus proceeding, the petitioner has the burden of alleging and proving by a preponderance of the evidence all facts necessary to overturn the prior judgment of conviction. Merrill v. State, Op. No. 568, 457 P2d 231 (Alaska 1969).

Where the counsel for a prisoner seeking post-conviction relief is unable to find witnesses having information to substantiate a jury-tampering claim, the trial court may dismiss the claim. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

A defendant is precluded from raising on application for post-conviction relief the contention that the jury was improperly constituted where no challenge to the composition of the jury panel was made at the trial. Fajeriak v. State, Op. No. 761, 520 P2d 795 (Alaska 1974).

A genuine issue of material fact, precluding summary disposition of an application for post-conviction relief, is presented where it is alleged that the district attorney, by resort to threats and intimidation, prevented potential defense witnesses from testifying. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Vacation of conviction for failure to comply with Criminal Rule 11 will only be granted when noncompliance affected substantial rights of defendant. Lewis v. State, Op. No. 1447, 565 P2d 846 (Alaska 1977).

A defendant seeking to set aside a conviction on grounds of newly discovered evidence must prove by a preponderance of the evidence those facts which entitle him to have the conviction set aside. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Defendant has the burden of proving by a preponderance of the evidence that newly discovered evidence would be likely to change the result of the trial, that is, that the evidence would be sufficient to create a reasonable doubt as to his guilt. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Defendant had burden of proving by a preponderance of evidence that newly discovered evidence of diminished capacity would be sufficient to create a reasonable doubt in a new trial. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Defendant's new evidence did not require a new trial since it was cumulative of information which he could have presented trial and since there was not reasonable possibility that the new evidence would produce an acquittal in a new trial. Charles v. State, Op. No. 963, 780 P2d 377 (Alaska App. 1989).

B. Specific Grounds

Conviction set aside under this rule and case remanded for new trial, because trial court's exclusion from evidence of tape recorded inconsistent statements of state witness had resulted in keeping from jury relevant and important facts on the trustworthiness of crucial testimony even though witness had admitted making the statements. Bentley v. State, Op. No. 270, 397 P2d 976 (Alaska 1965).

Motion to vacate judgment of conviction under this provision based on the ground that plea of guilty made in 1952 was not voluntary in the meaning of federal criminal rule 11, was properly denied where records showed that the petitioner had discussed the plea with counsel of his own choice and that the judge had made a determination that the plea was not improvidently made. Oughton v. State, Op. No. 377, 420 P2d 452 (Alaska 1966).

Record of post-conviction hearing on remand disclosed sufficient basis for superior court's finding that appellant's change of plea to guilty was made voluntarily and with understanding of the nature of the charge. Thompson v. State, Op. No. 408, 426 P2d 995 (Alaska 1967).

The allegations of a petitioner for post-conviction relief that he had taken drugs some 12 hours prior to time he changed his plea to guilty and that at the time he appeared in court to enter his change of plea he was under the influence of drugs, and thus rendered incompetent, were sufficient to require an evidentiary hearing. Despite the apparent regularity of the competency hearing, the change of plea and the sentencing proceedings, the possibility still exists that the petitioner did not knowingly and understandingly plead to the offense as charged. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

Where a prisoner seeking post-conviction relief refuses to waive the attorney-client privilege so that his trial counsel can testify on the question of the adequacy of representation, and the prisoner thus forestalls further inquiry into such ground for relief, the claim of inadequate representation by trial counsel is deemed to have been abandoned. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

A defendant is not deprived of a public trial merely because a newspaper reporter is unable to enter the building in which the courtroom is located, where such exclusion is unintentional, is for less than one hour and takes place at a time after submission of the case to the jury, while the jury is listening to a replay of certain recorded testimony. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

Proof that the State intimidated potential material defense witnesses and prevented them from testifying requires the granting of a new trial. A defendant, seeking post-conviction relief, will not have to demonstrate prejudice. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Where a defendant successfully proves on application for post-conviction relief that his confidential communications with his attorney were electronically monitored, he ordinarily

must be granted a new trial, even without demonstrating that he was prejudiced by such action. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

After conviction as accomplice to burglary not in a dwelling and malicious destruction of property, evidence of diminished capacity was admissible to negate showing by state that defendant had knowledge of the criminal enterprise and that defendant specifically intended, by his conduct, to aid, abet, assist or participate in the criminal enterprise. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Where attorney did not inform his client of the possibility of a diminished capacity defense, but did himself consider it in preparing for trial, his failure to explain the possible defense did not render his legal assistance ineffective when the chances of acquittal or conviction on a lesser offense due to the use of the diminished capacity defense were improbable. Larson v. State, Op. No. 2128, 614 P2d 776 (Alaska 1980).

In order to obtain post-conviction relief for ineffective assistance of counsel, defendant must first show that his lawyer's skill fell below that of a lawyer with ordinary training and skill in the criminal law, and second, that the lawyer's defective performance contributed in some way to defendant's conviction. Larson v. State, Op. No. 2128, 614 P2d 776 (Alaska 1980).

In attempting to eliminate consideration of the nature of the offense from its consideration of relevant factors at sentencing, the superior court committed reversible error. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

III. Procedure

A. In General

A petitioner seeking post-conviction relief on the grounds that she was transported out of the state for purposes of out-of-state incarceration prior to the expiration of the ten-day period within which she is required to file a notice of appeal, should attempt to show what impact her physical removal from the state has had on her ability to file a timely notice of appeal. She should further show what attempt she has made during the period between the imposition of sentence and the alleged removal from the state to engage services of trial counsel. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

An appeal from the denial of a petition for writ of habeas corpus is characterized as one from the denial of a motion for post-conviction relief. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

If the trial court determines conclusively that a petitioner is entitled to no post-conviction relief after an examination of the files and records of a case, it may properly deny the petition without hearing. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

A trial judge in acting upon a motion for post-conviction relief is entitled to rely upon his recollection of the proceedings during the trial. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

It is not necessary to hold an evidentiary hearing concerning an alleged deprivation of the right to appeal where petitioner alleges she requested her trial defense counsel to file an appeal from her conviction, but fails to indicate time, location, manner and circumstances under which she had requested her counsel to make such appeal. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

The determination that a petition for post-conviction relief alleging the deprivation of the right to appeal does not require the holding of an evidentiary hearing does not preclude the petitioner from making a second application for post-conviction relief and presenting evidence supporting the assertion, first presented on appeal from a denial of the first post-conviction motion, that she was transported out of the state for purposes of out-of-state incarceration prior to the expiration of the ten-day period within which she was required to file her notice of appeal. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

If the trial court can determine conclusively that the petitioner is not entitled to post-conviction relief after examining the files and records of the case, it may properly deny the petition without hearing. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

Post-conviction relief is an appropriate vehicle for the effectuation of the right of appeal where counsel has failed to file a timely notice of appeal. McCracken v. State, Op. No. 677, 482 P2d 269 (Alaska 1971).

Where a convicted defendant presents important questions of substantive criminal law never before decided in the state, the court will consider the merits of the issues, even though the petitioner had not asserted his claims in prior motions. Mead v. State, Op. No. 731, 489 P2d 738 (Alaska 1971).

If an applicant for post-conviction relief is represented by counsel in the first application, there will be no presumption in his favor in a second application, and he will incur the burden of showing sufficient reason for any failure to raise grounds for relief in the first application. Thompson v. State, Op. No. 792, 496 P2d 651 (Alaska 1972).

Indigent prisoners seeking relief under this rule must be provided with counsel at the time their application is filed. Donnelly v. State, Op. No. 965, 516 P2d 396 (Alaska 1973).

Generally, a petitioner for post-conviction relief has a right to represent himself without counsel in criminal proceedings. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

The right to self-representation on a petition for post-conviction relief is not absolute. In order to prevent a perversion of the judicial process, the trial judge should first ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner before allowing him to proceed pro se, and the trial judge should satisfy himself that the prisoner understands precisely what he is giving up by declining assistance of counsel. The advantages of legal representation should be explained to the prisoner in some detail, and in the event of an evidentiary hearing at which the prisoner is present he should be given the option of having legal counsel available for consultation. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Where a petitioner for post-conviction relief desires to represent himself, the trial judge should determine whether the prisoner is willing to conduct himself with at least a modicum of courtroom decorum, but the hearing judge must bear in mind that prisoners are not experienced trial lawyers, and are not practiced in the formalities of courtroom etiquette. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Where pleadings filed by a petitioner seeking post-conviction relief demonstrate a certain knowledge of the merits of his allegations, and indicate at least to some extent that he might have the ability to represent himself, his rights might best be vindicated by an order permitting him to represent himself with the assistance of counsel from the public defender's office appointed by the court. If it should be determined that the prisoner's presence would be necessary at a hearing, a more thorough inquiry into the propriety of permitting him to represent himself could be undertaken at that time. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Even though post-conviction applications are assigned to the original trial judge, he is not chargeable with knowledge of the entire original trial record, where the transcript and record is extremely lengthy and the trial took place several years earlier. Portions of the record relied on for post-conviction relief should be specifically indicated to the judge. Fajerlak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

All post-conviction challenges other than by direct appeal or motion after trial must be initiated in the trial court in which the conviction occurred. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

A sentence is imposed at the time it is first announced upon the record by the court. State v. Trunnel, Op. No. 1260, 549 P2d 550 (Alaska 1976).

Rule 35(b) proceeding is separate from original criminal proceeding, is governed by civil procedure, results in a final judgment and may be appealed by either state or applicant. State v. Hannagan, Op. No. 1374, 559 P2d 1059 (Alaska 1977).

When a criminal appeal has been dismissed, though no mandate has been issued, the appellant may seek relief in superior court under Criminal Rule 35(a). Singletary v. State, Op. No. 1711, 583 P2d 847 (Alaska 1978).

Criminal Rule 35(a) is not the appropriate procedural vehicle to seek relief as to conditions within custodial institutions or the civil rights of inmates. Rust v. State, Op. No. 1668, 584 P2d 38 (Alaska 1978).

An appeal from denial of a supplemental application for correction of sentence presents only the question of whether the denial of reconsideration of the original application was proper and does not bring up for review the decision denying the original application for correction of sentence. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

The provisions of Criminal Rule 35(g)(2) [now 35(h)(2)] are applicable only to post-conviction proceedings under Criminal Rule 35(b) and are not applicable to requests for relief under Criminal Rule 35(a). Winslow v. State, Op. No. 1767, 587 P2d 738 (Alaska 1978).

Where defendant in probation revocation proceeding did not file motion for post-conviction relief on form provided by court, or file the motion in the court where the original conviction occurred, he did substantially comply with requirements of Criminal Rule 35 by filing separate "Motion to Dismiss Probation Revocation Proceeding, or in the Alternative, to Strike Felony Conviction" and by sending copy of the motion to judge who presided in the original case, where judge by special arrangement ruled on the motion while in the jurisdiction where probation revocation hearing was held. Holton v. State, Op. No. 1967, 602 P2d 1228 (Alaska 1979).

Post-conviction relief proceeding is not another trial; it is separate from the original criminal proceeding and is governed primarily by rules of civil procedure. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

An error need not be of constitutional magnitude in order to be attacked under this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

Errors in jury instructions which render a criminal trial fundamentally unfair warrant relief under this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

Defendant's failure to object at trial to jury instruction forfeited his right to challenge the instruction in a post-conviction proceeding where the instruction did not significantly change the law so as to excuse a timely failure to object, and defendant did not show either good cause for failing to object or substantial prejudice. Marrone v. State, Op. No. 156, 653 P2d 672 (Alaska App. 1982).

Trial court is not obligated to dismiss an application for post-conviction relief sua sponte even if it is convinced it has no merit. Hampton v. Huston, Op. No. 155, 653 P2d 1058 (Alaska App. 1982).

Trial court erred in ruling on pro se appellant's motion for post-conviction relief without a knowing, intelligent and voluntary waiver of counsel by appellant and without determining whether or not appellant was competent to represent himself. Hampton v. Huston, Op. No. 155, 653 P2d 1058 (Alaska App. 1982).

Summarily dismissing defendant's motion for post-conviction relief which alleged ineffective assistance of counsel, without advance notice to defendant indicating the court's intention to dismiss the motion or its reasons for the proposed dismissal, was reversible error, even though the motion itself did not establish a prima facie case of ineffective assistance of counsel. Wood v. Endell, Op. No. 488, 702 P2d 248 (Alaska App. 1985).

In post-conviction relief actions, particularly in cases involving pro se applicants who are incarcerated and do not have ready access to court documents, the court's discretion to relax technical pleading requirements should be liberally exercised. State v. Jones, Op. No. 832, 759 P2d 558 (Alaska App. 1988).

Sentenced prisoners may avail themselves of the rule recognizing extraordinary potential for rehabilitation as a nonstatutory mitigating factor permitting referral to a three-judge panel to avoid manifest injustice if they can make a prima facie case for referral based upon the original sentencing record. S.B. v. State, Op. No. 997, 785 P2d 900 (Alaska App. 1989).

Defendant did not waive claim that his confession should have been suppressed by not raising the issue in his original application for post-conviction relief where his court-appointed counsel had been appointed only to investigate ineffective assistance of counsel claims. Billingsley v. State, Op. No. 1117, 807 P2d 1102 (Alaska App. 1991).

B. Hearing on Motion

On his first application to vacate or set aside sentence and to withdraw plea of guilty on ground of coercion, an indigent prisoner had a constitutional right to have counsel appointed by the court to represent him at such hearing. Nichols v. State, Op. No. 398, 425 P2d 247 (Alaska 1967).

The allegations of a petitioner for post-conviction relief that he had taken drugs some 12 hours prior to time he changed his plea to guilty and that at the time he appeared in court to enter his change of plea he was under the influence of drugs, and thus rendered incompetent, were sufficient to require an evidentiary hearing. Despite the apparent regularity of the competency hearing, the change of plea and the sentencing proceedings, the possibility still exists that the petitioner did not knowingly and understandingly plead to the offense as charged. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

A prisoner seeking post-conviction relief is not denied a fair determination of his motion merely because he is not present in person at hearings on the motion. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

In a post-conviction proceeding, the attorney who has served as trial counsel for the defendant properly refuses to testify on the question of the adequacy of his representation, in the absence of a waiver of the attorney-client privilege. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

Normally, whether to produce the prisoner is a decision left to the discretion of the court, but where the defendant's own testimony would be an essential prerequisite to proper adjudication of an issue raised on application for post-conviction relief, the defendant should be permitted to testify. Fajerlak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Where the court elects to consider a petition for post-conviction relief summarily, it must give advance warning of its decision to the parties in a written order spelling out in some detail its reasons for concluding that the petition warrants summary disposition. Hampton v. Huston, Op. No. 155, 653 P2d 1058 (Alaska App. 1982).

C. On Review

Where appellant claimed that he was coerced into a plea of guilty by court appointed counsel who had also given him alleged false assurances of probation, and upon a post-conviction petition under this rule the trial court had found that these charges were unsubstantiated basing its finding upon matter not contained in the record, the case was remanded to the trial court for further proceedings to create a record upon appropriate and specific findings. Thompson v. State, Op. No. 334, 412 P2d 628 (Alaska 1966).

The rule contemplates that the sentencing court should be initially called upon to review the sentence. State v. Pete, Op. No. 372, 420 P2d 338 (Alaska 1966).

The sole question before a reviewing court when confronted with an order denying, without hearing, a motion for post-conviction relief is whether the petitioner in his application for relief made such a showing as to require a hearing. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

On an appeal from a motion attacking a sentence, the factual findings of the lower court are judged by the same criterion as findings made in a judge-tried civil case. Merrill v. State, Op. No. 568, 457 P2d 231 (Alaska 1969).

Where the defendant does not move for an evidentiary hearing or base his motion for a new trial on misconduct by the bailiff, the issue of whether the trial court erred in failing to grant him an evidentiary hearing concerning an allegedly improper statement made by the bailiff to the jury during the course of their deliberations is not properly before the Supreme Court. The defendant is not precluded from raising the issue in a future proceeding on a motion for a new trial or through other means seeking post-conviction relief. Howard v. State, Op. No. 754, 491 P2d 154 (Alaska 1971).

Trial court's finding that new evidence, if presented at a new trial, would probably not create a reasonable doubt as to defendant's guilt will be upheld unless such finding constitutes an abuse of discretion. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Standard for review of trial court's denial of motion for post-conviction relief is one of abuse of discretion. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

An appellant should not be able to raise issues on appeal from the denial of an application for post-conviction relief that he would have been barred from raising on direct appeal from his original conviction. Marrone v. State, Op. No. 156, 653 P2d 672 (Alaska App. 1982).

Ad hoc procedural course followed by the trial court departed markedly from the orderly procedure for the expeditious disposition of non-meritorious applications for post-conviction relief contemplated by this rule, depriving the state of a fair opportunity to contest defendant's application for post-conviction relief and requiring reversal of the trial court order setting aside defendant's convictions. State v. Jones, Op. No. 832, 759 P2d 558 (Alaska App. 1988).

IV. Time Limits

Appellate Rule 46 was invoked where strict adherence to the 40-day time limit for appeal under Criminal Rule 35 would have prevented consideration of appellant's contentions that his conditions of imprisonment deprived him of his right to rehabilitation and reformation and to be free of cruel and unusual punishment. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

A person moving to withdraw a guilty plea under Criminal Rule 32(d) and moving for post-conviction relief under Criminal Rule 35(b) need not show that the former motion was made with "due diligence". Swensen v. Municipality of Anchorage, Op. No. 2179, 616 P2d 874 (Alaska 1980).

Rule 35.2. Discharge and Set-Aside of Conviction.

(a) Where the court has suspended imposition of sentence, the defendant has completed the probationary term without imposition of sentence and no petition to revoke probation is pending, the court shall discharge the defendant from probation. At the time discharge is entered, which shall occur 30 days after defendant's probationary term has expired, or at such later time as the court for cause may direct, the court shall consider whether the conviction should be set-aside. If the court determines that the conviction should be set-aside, it shall issue a certifi-

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 25, 1993

SUBJECT: Magistrate Jurisdiction (Work Order No. 8-LS0617\E)

TO: Representative Al Vezey

FROM: Jerry Luckhaupt
Legislative Counsel

Enclosed is the final committee substitute you requested. I have one comment about the committee substitute. The committee substitute removed the language "**that are not minor offenses**" from page 2, line 5 of the bill following "misdemeanors." The removal of this language creates a conflict between AS 22.15.120(6) and (7). In AS 22.15.120(6) magistrates are given the authority to hear, try, and enter judgments in misdemeanors with the consent of the defendant. In AS 22.15.120(7), as amended by the bill, magistrates are given the authority to hear, try, and enter judgments in all cases involving minor offenses. The definition of "minor offense" in section 2 of the bill includes "(3) a statutory offense for which a conviction cannot result in incarceration, a fine greater than $300, or the loss of a valuable license." There are any number of offenses labeled as misdemeanors that fit this category. See e.g., AS 03.40.060, 03.40.240, 03.40.260, AS 05.12.010, 05.30.110, and AS 18.50.900(c). While AS 22.15.120(7) would give a magistrate jurisdiction to hear these misdemeanor offense, AS 22.15.120(6) provides that the magistrate does not have jurisdiction unless the defendant consents in writing. The language that was removed in the committee substitute would remedy this conflict.

If you have any questions, please contact me at your convenience.

GPL:gc
93-164.glc

Enclosure

LEGAL SERVICES MEMO

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 24, 1993

SUBJECT: Sectional Summary of HB 152 (Work Order No. 8-LS0617\A)

TO: Representative Al Vezey

FEB 2 9

FROM: Jerry Luckhaupt JLR
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 22.15.120 by expanding the jurisdiction of magistrates. The bill would provide magistrates with the authority to hear, try, and enter judgments in all cases involving minor offenses, instead of the specific offenses currently listed in statute (see p. 2, lines 7 - 9, of the bill) and would further provide magistrates with the authority to entertain post-conviction relief proceedings for any of the criminal proceedings that magistrates are permitted to hear (see p.2, lines 11 - 13 of the bill).

Section 2 of the bill amends AS 22.15.120 by adding a new subsection which consists of a definition of "minor offense". The definition of "minor offense" includes "(3) a statutory offense for which a conviction cannot result in incarceration, a fine greater than $300, or the loss of a valuable license." This definition would include an offense that is classified by statute as a misdemeanor if it is not punishable by incarceration, a fine of greater than $300, or a loss of a valuable license. Since a magistrate currently may only hear a misdemeanor case with the consent of a defendant, regardless of the possible penalty, the addition of this definition and the corresponding expansion of the jurisdiction of a magistrate to all minor offenses, necessitates the addition of the language on p. 2, line 5 of the bill, so that the defendant's consent is not required for a magistrate to hear a case involving a misdemeanor that is a minor offense.

GPL:gc
93-144.glc

SECTIONAL

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

CHARLES S. CHRISTENSEN III
Staff Counsel

303 K Street
Anchorage, AK 99501
(907) 264-8228

January 28, 1993

Representative Brian Porter, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Porter:

Attached you will find three additional pieces of legislation prepared by the court system. We respectfully request that the Judiciary Committee introduce these bills on behalf of the supreme court.

Briefly, these bills propose the following changes to existing law:

1. "An Act relating to magistrate jurisdiction."

HB 152

This bill draft proposes two changes to the statute which sets out magistrate jurisdiction. The first change corrects an oversight in court system legislation which was passed in 1990. Prior to that time, only the superior court could grant post-conviction relief to a defendant, even if the conviction had occurred in the district court. An example of post-conviction relief would be a technical correction to modify an illegal sentence. The 1990 legislation gave district judges the authority to grant post-conviction relief in cases which had been tried in the district court. Through an oversight, the legislation only applied to district judges, and not to magistrates. This bill draft would authorize magistrates to grant post-conviction relief, if they had the authority to enter the original conviction.

The second change modifies magistrate jurisdiction with respect to non-criminal offenses (offenses for which a person

COURT SYSTEM BACK-UP

can get a fine but no jail sentence, such as a speeding ticket). Currently, magistrates are authorized to hear non-criminal offenses only if they are contained in Title 11 (Criminal Law), Title 05 (Amusements and Sports), or Title 28 (Motor Vehicles). The bill draft proposes to allow magistrates to hear all non-criminal offenses, such as those contained in Title 16 (Fish and Game).

2. "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency, the office of public advocacy, and court-appointed counsel; and providing for an effective date."

HB 151

In 1990, courts were authorized to enter civil judgments for the costs of defense against an indigent defendant who received free legal services from the state. The theory was that a defendant may be indigent and qualified for a public defender at the time of trial, but may come into money when the permanent fund dividend is mailed out six months later, or when he gets a job the following summer. Opponents of this bill inserted language which limits the ability of the state to recover its expenses from a defendant for three years after he is released from prison. The state is also prevented from recovering defense costs from a person who is not convicted. This bill draft proposes allowing the state to immediately recover defense costs from any person who receives free legal services.

3. "An Act relating to sentencing."

In 1992, the legislature passed an omnibus crime bill which made numerous changes to criminal law and procedure. This bill draft proposes to repeal one of those changes.

HB 153

The new law allows a three-judge sentencing panel to reduce a presumptive sentence if it finds that it would be "manifestly unjust" to impose the presumptive sentence. However, if the panel finds that it would be manifestly unjust to impose the presumptive sentence and that the defendant has an extraordinary potential for rehabilitation, the panel cannot reduce the term of years imposed. The supreme court believes that this distinction is inherently unworkable and does not allow courts to adequately consider the rehabilitative potential of certain defendants.

Thank you for your courtesy. Please contact me if I can provide you with any additional information.

Very truly yours,

C. S. Christensen III
Staff Counsel

BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY: THE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to magistrate jurisdiction."

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

*** Section 1.** AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATES MAY HEAR. (a) A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.1 as follows:

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not

exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try, and enter judgments in all cases involving minor offenses [INFRACTIONS UNDER AS 28, VIOLATIONS UNDER AS 05.25 AND AS 11,] and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70;

(9) to provide post-conviction relief under the Alaska Rules of Criminal Procedure for any of the cases specified in paragraphs (5), (6), or (7) of this section, if the conviction occurred in the district court.

(b) In this section, the term "minor offense" means

(1) an offense classified by statute as an infraction or a violation;

(2) any offense for which a bail forfeiture amount has been authorized by statute and established by supreme

court order; or

(3) any statutory offense for which a conviction cannot result in incarceration, a fine greater than $300, or the loss of a valuable license.

FISCAL NOTE No. 1

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: CSHB 152(STA)
(H) Publish Date: 3/1/93

'evision Date:
Title: An Act relating to magistrate jurisdiction
Sponsor: House Judiciary
Requestor:

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8228
Division: Alaska Court System Date: 02/18/93

Approved by: Arthur H. Snowden, II, Administrative Director BY
Agency: Alaska Court System Date: 02/18/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/93

COURT SYSTEM FISCAL NOTES

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. HB 152

Revision Date:
Title: An Act relating to magistrate jurisdiction
Sponsor: House Judiciary
Requestor:

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/18/93

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
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Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/93

HB

153

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 1, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 6 April 94

The JUDICIARY Committee considered: HB 153

HOUSE BILL NO. 153 REDUCTION OF PRESUMPTIVE SENTENCES

"An Act related to sentencing."

RECOMMENDATIONS: [ ] the same title
be replaced with CS HB 153 (Jud) [ ] 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) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[✓] zero fiscal note ~~Alt Court System~~ [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
	✓				
	✓				
	✓				
	✓				
	✓				
	✓				
		Cliff Davidson		✓	

Brian D. Porter
CHAIRMAN'S SIGNATURE

8-LS0619\J
Luckhaupt
4/5/94

CS FOR HOUSE BILL NO. 153( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act related to the awarding of special good time deductions for prisoners participating in the Point McKenzie Rehabilitation Project; and providing for an effective date."

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

* Section 1. AS 33.20 is amended by adding a new section to read:

Sec. 33.20.021. SPECIAL GOOD TIME. (a) Notwithstanding AS 12.55.125(f)(3) and 12.55.125(g)(3), the commissioner shall, upon the recommendation of the project manager of the Point McKenzie Rehabilitation Project, award a prisoner serving a sentence of at least 60 days and voluntarily participating in the Point McKenzie Rehabilitation Project three days special good time deduction from the prisoner's sentence for each complete month the prisoner successfully completes as a participant in the project. A prisoner may not be awarded a special good time deduction for any partial month the prisoner participates in the project. A prisoner is not entitled to a special good time deduction under this section until it is

actually awarded. If it is awarded, special good time shall be awarded during the month following the month for which the special good time is earned.

(b) Upon a review of the prisoner's behavior by the project manager of the Point McKenzie Rehabilitation Project, the recommendation of the project manager to the commissioner may be withheld in whole or in part.

(c) Special good time awarded under (a) of this section shall be forfeited in whole or in part if the prisoner is involuntarily removed from the Point McKenzie Rehabilitation Project because of inappropriate behavior. The project manager of the Point McKenzie Rehabilitation Project shall post for or distribute to the inmates participating in the project a description of appropriate or inappropriate behavior.

* **Sec. 2.** AS 33.20.030 is amended to read:

Sec. 33.20.030. DISCHARGE. A prisoner shall be released at the expiration of the term of sentence less the time deducted for good **time and special good time** [CONDUCT]. A certificate of deduction shall be entered on the commitment by the warden, keeper, or the commissioner.

* **Sec. 3.** TRANSITIONAL PROVISION. Notwithstanding sec. 5 of this Act, the commissioner of corrections may proceed to adopt regulations necessary to implement secs. 1 and 2 of this Act. The regulations may not take effect before July 1, 1994.

* **Sec. 4.** Section 3 of this Act takes effect immediately under AS 01.10.070(c).

* **Sec. 5.** Sections 1 - 2 of this Act take effect July 1, 1994.

Alaska State Legislature

House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

SPONSOR STATEMENT

CSHB 153 (JUD)

"An Act related to the awarding of special good time deductions for prisoners participating in the Point MacKenzie Rehabilitation Project; and providing for an effective date."

The Department of Corrections is currently experiencing a problem with overcrowding in our institutions. Committee Substitute for House Bill 153 (Judiciary) is introduced to address two issues. First, it will help alleviate the overcrowding problem and second, it will help attract volunteers for the Point MacKenzie Rehabilitation Project. Presently, inmates appear concerned that the "benefits" at Point MacKenzie are fewer than those in the conventional institutions, consequently, they are hesitant to volunteer. This proposed legislation will provide an incentive for inmates to participate in the program. By implementing a Special Good Time statute, we believe inmates will volunteer to serve their time at the Point MacKenzie Rehabilitation Project instead of in one of the conventional institutions.

At Point MacKenzie there are no fences, other than for the reindeer; there are no lock down facilities; and, all inmates must be minimum custody level or lower. Presently there are over 550 inmates in our system that are classified appropriately for placement at Point MacKenzie but some form of incentive is needed to entice volunteers.

Under this legislation, each inmate who participates in the Point MacKenzie Rehabilitation Project will be entitled to 3 days of Special Good Time for each full month served at Point MacKenzie. This good time will be irrevocable once credited against the inmates sentence unless the inmate is involuntarily removed from the project for inappropriate behavior. The inmate's record will be reviewed by the Project Manager to determine if a recommendation is forwarded to the Commissioner for crediting of the Good Time against the inmate's sentence.

Not all inmates who volunteer will be selected. Each inmate will be thoroughly screened by the Chief of Security at Point MacKenzie or his/her designee. If the Chief of Security feels that an inmate would not be a suitable candidate, the inmate will not be selected for placement at Point MacKenzie.

MEMORANDUM

State of Alaska

TO: Robert Spinde
Chief of Classification
Division of Institutions

DATE: February 25, 1994

THRU:

FILE NO:

PHONE NO:

FROM: Ken Brown KEB
Superintendent
Wildwood Correctional Center

SUBJ: Inmate Transfer to Pt. MacKenzie

I am responding to your recent request that we attempt to identify reasons that inmates are giving for declining the opportunity to volunteer for transfer to the Pt. MacKenzie farm rehabilitation program. Listed below are the various reasons that the probation officers have heard. By far the most frequent reason given, when any is given, is that they are more interested in furlough to a CRC. Many are awaiting bed space and others foresee being eligible in the relatively near future:

1. More interested in furlough, either now or later.

2. Too far away from friends and family, wouldn't get visits.

3. No substance abuse treatment.

4. More interested in educational programs.

5. Learning more in industries.

6. No programming activities such as library, gym, and hobbycraft.

If the Department would like to provide any additional information about the farm rehabilitation program, we would be happy to pass it along to the inmates for their consideration. We have made them aware of the criteria for acceptance as identified in your memo of February 10, 1994. If I may be of further help in this matter please contact me.

BACK UP MATERIALS

Article 1. Remission of Sentences.

Sec. 33.20.010. Computation generally. (a) Each prisoner convicted of an offense against the state and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence beginning with the day on which the sentence starts to run, as follows:

(1) five days for each month, if the sentence is not less than six months and not more than one year;

(2) six days for each month, if the sentence is more than one year and less than three years;

(3) seven days for each month, if the sentence is not less than three years and less than five years;

(4) eight days for each month, if the sentence is not less than five years and less than ten years;

(5) ten days for each month, if the sentence is ten years or more.

(b) When two or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of the several sentences. (§ 1 ch 107 SLA 1960)

Cited in Bear v. State, Sup. Ct. Op. No. 470 (File No. 813), 439 P.2d 432 (1968).

Am. Jur., ALR and C.J.S. references. — 15 Am. Jur., Criminal Law, §§ 443, 459, 520; 39 Am. Jur., Pardon, Reprieve and Amnesty, §§ 81 to 95.

Parole as suspending running of sentence, 27 ALR 947.

Withdrawal, modification or denial of good time allowance to prisoner, 127 ALR 1203.

24 C.J.S. Criminal Law § 1582.

Sec. 33.20.020. Good time. (a) A prisoner may, in the discretion of the commissioner of health and social services or his designee, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in a prison or camp project or activity for the first year or any part of it, and not to exceed five days for each month of any succeeding year or part of it.

(b) In the discretion of the commissioner the same allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

(c) The allowance is in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence. (§ 2 ch 107 SLA 1960; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "commissioner of health and social services" for "commissioner of health and welfare" in subsection (a).

Use of prisoners on public works projects. — A program authorizing the use of state prisoners on a voluntary basis on governmental public works projects is proper under the statutes. 1960 Op. Att'y Gen., No. 22.

ACTIVE INMATE PROFILES

DEPARTMENT OF CORRECTIONS

MARCH 28, 1994

ADMIN SERVICES
465-3376

ALL INSTITUTIONS
ACTIVE INMATES BY OFFENSE CODE

OFFENSE CODE	AND DESCRIPTION	#INMATES	PERCENTAGE
A-01	OMVI - ALCOHOL	135	4.814
A-02	OMVI - DRUGS	1	0.035
A-04	ILLEGAL LIQ - MAKE,POSS,SELL	2	0.071
A-07	FURNISHING	1	0.035
A-09	MINOR CONSUMING	3	0.106
A-12	REFUSE CHEMICAL TEST	2	0.071
A-13	IMPORTATION OF ALCOHOL	3	0.106
A-99	ALCOHOL - OTHER	1	0.035
COC	CONTEMPT OF COURT	17	0.606
CUSTOM	INTERSTATE CUSTODY COMPACT	1	0.035
ERASE	COURT-ORDERED ERASURE	1	0.035
FED	FEDERAL OFFENSE	41	1.462
FSJ	FAILURE SATISFY JUDGEMENT	23	0.820
FTA	FAILURE TO APPEAR	51	1.818
FTC	FAILURE TO COMPLY	8	0.285
FUGITIVE	FUGITIVE FROM JUSTICE	11	0.392
NONCRIM	NON CRIMINAL BOOKING	2	0.071
OTHER	NOT CT-FED-MIL-COMP BUT OTHERS	1	0.035
PAROLE	PAROLE VIOLATION	206	7.346
PROB	PROBATION VIOLATION	264	9.415
T-01	HIT AND RUN	2	0.071
T-02	RECKLESS DRIVING	3	0.106
T-04	DRIVING WHILE SUSP/REVKD	29	1.034
T-99	TRAFFIC-OTHER	4	0.142
T70-15.010	MURDER - 1ST DEGREE	17	0.606
T70-15.030	MURDER - 2ND DEGREE	8	0.285
T70-15.120	RAPE	1	0.035
T70-15.150	SHOOT,STAB OR CUT WITH INTENT	1	0.035
T70-15.260	KIDNAPPING	2	0.071
T70-30.090	ESCAPE	1	0.035
T92-61.200	MISCOND W WEAPNS - 1ST	1	0.035
12.30.060	VIOLATION OF CONDITIONS	2	0.071
28.35.060	FAILURE TO STOP & RENDER AID	1	0.035
31.100	ATTMPT TO COMMIT MISD	4	0.142
31.105	ATTMPT TO COMMIT FELONY	56	1.997
31.110	SOLICIT TO COMMIT CRIME	4	0.142
41.100	MURDER - 1ST	173	6.169
41.110	MURDER - 2ND	101	3.601
41.120	MANSLAUGHTER	33	1.176
41.130	CRIM NEGLIGENT HOMICIDE	5	0.178
41.135	MULTIPLE DEATHS	1	0.035
41.200	ASSAULT - 1ST	50	1.783
41.210	ASSAULT - 2ND	44	1.569
41.220	ASSAULT - 3RD	87	3.102
41.230	ASSAULT - 4TH	111	3.958
41.250	RECKLESS ENDANGERMENT	3	0.106
41.260	STALKING 1ST DEGREE	2	0.071
41.270	STALKING 2ND DEGREE	1	0.035
41.300	KIDNAPPING	30	1.069
41.320	CUSTODIAL INTERFER -1ST	1	0.035
41.410	SEXUAL ASSAULT - 1ST	161	5.741
41.420	SEXUAL ASSAULT - 2ND	50	1.783

ADMIN SERVICES
465-3376

ALL INSTITUTIONS
ACTIVE INMATES BY OFFENSE CODE

OFFENSE CODE AND DESCRIPTION		#INMATES	PERCENTAGE
41.425	SEXUAL ASSAULT - 3RD	4	0.142
41.434	SEX ABUSE MINOR-1ST	136	4.850
41.436	SEX ABUSE MINOR-2ND	142	5.064
41.438	SEX ABUSE MINOR-3RD	12	0.427
41.440	SEX ABUSE MINOR-4TH	3	0.106
41.450	INCEST	2	0.071
41.460	INDECENT EXPOSURE	4	0.142
41.500	ROBBERY - 1ST	101	3.601
41.510	ROBBERY - 2ND	29	1.034
41.530	COERCION	3	0.106
46.120	THEFT - 1ST	6	0.213
46.130	THEFT - 2ND	65	2.318
46.140	THEFT - 3RD	19	0.677
46.150	THEFT - 4TH	7	0.249
46.190	THEFT BY RECEIVING	1	0.035
46.210	FAILURE TO MAKE DISPO OF FUNDS	1	0.035
46.220	CONCEALMENT OF MERCHANDISE	17	0.606
46.280	ISSUING BAD CHECK	3	0.106
[illegible]	FRAUDULENT USE OF CREDIT CARD	3	0.106
46.300	BURGLARY - 1ST	63	2.246
46.310	BURGLARY - 2ND	56	1.997
46.320	TRESPASS - 1ST	15	0.534
46.330	TRESPASS - 2ND	12	0.427
46.400	ARSON - 1ST	5	0.178
46.410	ARSON - 2ND	4	0.142
46.430	NEGLIGENT BURNING	1	0.035
46.482	CRIMNAL MISCHIEF - 2ND	22	0.784
46.484	CRIMNAL MISCHIEF - 3RD	8	0.285
46.486	CRIMNAL MISCHIEF - 4TH	6	0.213
46.500	FORGERY - 1ST	3	0.106
46.505	FORGERY - 2ND	33	1.176
46.510	FORGERY - 3RD	2	0.071
46.600	SCHEME TO DEFRAUD	3	0.106
46.730	DEFRAUDING CREDITORS	1	0.035
56.200	PERJURY	1	0.035
56.300	ESCAPE 1ST DEGREE	1	0.035
56.310	ESCAPE - 2ND DEGREE	10	0.356
56.330	ESCAPE - 4TH DEGREE	3	0.106
56.340	UNLAWFUL EVASION - 1ST	6	0.213
56.375	PROMOTE CONTRABAND - 1ST	2	0.071
56.380	PROMOTE CONTRABAND - 2ND	2	0.071
56.510	INTERFER OFFICIAL PROCEEDINGS	2	0.071
56.540	TAMPERING WITH WITNESS-1ST	1	0.035
56.700	RESISTING/INTERFERING WITH ARR	4	0.142
56.740	VIOLATE DOM.VIO. RESTRAIN ORDR	4	0.142
56.800	MAKING FALSE REPORT	2	0.071
61.110	DISORDERLY CONDUCT	6	0.213
61.120	HARRASSMENT	1	0.035
61.190	MISCOND W WEAPNS - 1ST	14	0.499
61.195	MISCOND W WEAPNS - 2ND	3	0.106
61.200	MISCOND W WEAPNS - 3RD	19	0.677
61.210	MISCOND W WEAPNS - 4TH	2	0.071

ADMIN SERVICES
465-3376

ALL INSTITUTIONS
ACTIVE INMATES BY OFFENSE CODE

OFFENSE CODE AND DESCRIPTION		#INMATES	PERCENTAGE
61.220	MISCOND W WEAPNS - 5TH	2	0.071
66.100	PROSTITUTION	3	0.106
71.010	CNTRLD SUBSTNCES- 1ST	6	0.213
71.020	CNTRLD SUBSTNCES- 2ND	19	0.677
71.030	CNTRLD SUBSTNCES- 3RD	89	3.174
71.040	CNTRLD SUBSTNCES- 4TH	43	1.533
71.050	CNTRLD SUBSTNCES- 5TH	1	0.035
71.060	CNTRLD SUBSTNCES- 6TH	2	0.071
??????????	UNKNOWN OFFENSE CODE	1	0.035
TOTAL INMATES / PERCENTAGES :		2,804	99.933

AVE SENTENCE LENGTH-SENTENCED FELONS: 24.2 YEARS

****AVERAGE LENGTH OF SENTENCE CALCULATED FROM DATA ENTERED ON THE OBSCIS SYSTEM

ADMIN SERVICES
465-3376

ALL INSTITUTIONS

VIOLATIONS/MISDEMEANORS/FELONS

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
V VIOLATIONS	2	0.071
M MISDEMEANORS	514	18.330
F FELONIES	2,287	81.562
UNKNOWN OFFENSE CATEGORIES	1	81.562
TOTAL INMATES / PERCENTAGES :	2,804	181.526

SENTENCED AND UNSENTENCED

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
S SENTENCED	2,048	73.038
U UNSENTENCED	755	26.925
UNKNOWNS	1	0.035
TOTAL INMATES / PERCENTAGES :	2,804	99.999

MALES AND FEMALES

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
M MALE	2,643	94.258
F FEMALE	161	5.741
UNKNOWNS	0	0.000
TOTAL INMATES / PERCENTAGES :	2,804	99.999

CITY, STATE, OR FEDERAL CHARGE

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
C CITY	174	6.205
S STATE	2,582	92.082
F FEDERAL	47	1.676
UNKNOWNS	1	0.035
TOTAL INMATES / PERCENTAGES :	2,804	99.999

ALL INSTITUTIONS

CUSTODY LEVEL

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
MA MAXIMUM	44	1.569
CL CLOSE	765	27.282
ME MEDIUM	934	33.309
MI MINIMUM	481	17.154
CM COMMUNITY	96	3.423
UN UNCLASSIFIED	484	17.261
UNKNOWN	0	0.000
TOTAL INMATES / PERCENTAGES :	2,804	99.999

AGES

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
18 - 20	132	4.707
21 - 25	489	17.439
26 - 30	521	18.580
31 - 35	619	22.075
36 - 40	420	14.978
41 - 50	430	15.335
51 - 60	135	4.814
61 - 70	50	1.783
GREATER THAN 70	0	0.000
AGE OTHER THAN ABOVE	8	0.285
TOTAL INMATES / PERCENTAGES :	2,804	99.999
AVERAGE AGE - ALL INMATES :	33.8	
AVERAGE AGE - SENT FELONS :	34.9	

ETHNIC BACKGROUND

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
A ASIAN/PACIFIC ISLANDER	33	1.176
B BLACK/NON-HISPANIC	357	12.731
H HISPANIC	69	2.460
I INDIAN	89	3.174
N ALASKAN NATIVE	823	29.350
W WHITE/NON-HISPANIC	1,433	51.105
OTHERS	0	0.000
UNKNOWN	0	0.000
TOTAL INMATES / PERCENTAGES :	2,804	99.999

MARITAL STATUS

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
C COHABITATING	9	0.320
D DIVORCED	239	8.523
L SEPARATED/LIVING APART	31	1.105
M MARRIED	503	17.938
S SINGLE	1,718	61.269
W WIDOW/WIDOWER	27	0.962
UNKNOWN	277	9.878
TOTAL INMATES / PERCENTAGES :	2,804	99.999

LAST GRADE COMPLETED

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
21 G.E.D.	47	1.676
COMPLETED HIGH SCHOOL	1,073	38.266
LESS THAN HIGH SCHOOL	1,262	45.007
FOUR YEAR COLLEGE DEGREE	8	0.285
LESS THAN 4 YR COLLEGE DEGREE	266	9.486
MORE THAN 4 YR COLLEGE DEGREE	13	0.463
UNKNOWNS	135	4.814
TOTAL INMATES / PERCENTAGES :	2,804	99.999

AVERAGE EDUCATIONAL LEVEL - ALL INMATES : 8.8

AVERAGE EDUCATIONAL LEVEL - SENT FELONS : 9.5

CRIME CATEGORY

CODE AND DESCRIPTION	#INMATES	PERCENTAGE
V CRIMES OF VIOLENCE	1,414	50.427
P CRIMES AGAINST PROPERTY	283	10.092
S CRIMES OF SUBSTANCE ABUSE	314	11.198
O CRIMES OF OTHER CATEGORIES	793	28.281
TOTAL INMATES / PERCENTAGES :	2,804	99.999

CRIME CLASS

CODE	AND DESCRIPTION	#INMATES	PERCENTAGE
	UNCLASSIFIED FELONY	627	22.360
A	CLASS A FELONY	224	7.988
B	CLASS B FELONY	482	17.189
C	CLASS C FELONY	325	11.590
1	CLASS A MISDEMEANOR	319	11.376
2	CLASS B MISDEMEANOR	39	1.390
V	VIOLATION	2	0.071
U	UNKNOWN CRIME CLASS	786	28.031
TOTAL INMATES / PERCENTAGES :		2,804	99.999

**** AVERAGES CALCULATED FROM DATA ENTERED ON THE OBSCIS SYSTEM ****

HB

160

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: March 26, 1993
Place: Capitol Room 120

Subject of Meeting: HB 160 Liability of Design Professionals; SB 54 Offenses by Juveniles

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Rosemary Matt	A.D.O.T.+P.F.	MS 2500			465-6960	Y (N)	HB 192
Donna Schultz	DHSS / DFYS	P.O. Box 110630 / 99811-0630			465-2112	Y (N)	will answer questions SB54
Jim Galea	DHSS/DFYS	PO Box 110630 —			465-3208	Y (N)	Will answer Questions SB54
Deborah Wing	DHSS / DFYS	" "			465-3191	Y (N)	Available to ans. Quest.
Sharon Mackler	AK Prof. Design	315 5th St # 8	99801		586-7518	Y (N)	HB160
Russ Winner	AK Action Trust	900 W 5th Ave Ste 700, Anch.	99501		277-9522	(Y) N	HB 160
Charles E. Cole	Attorney General	Box K, JUNEAU			3600	(Y) N	SB 54
Dean Guaneli	Dept. of Law	Box EC, JUNEAU				(Y) N	SB 54
Ritch Ritter	AK. Prof. Design Council				586-1371	(Y) N	~~SB~~ HB160
Liz Dodd	ACLU	100 Parks St.	99801		463-2601	Y thanks N	SB 54
						Y N	
						Y N	

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 3, 1993 FURTHER REFERRALS:

Date of Committee Action: 3-26-93

The JUDICIARY Committee considered: HB 160

HOUSE BILL NO. 160 LIABILITY OF DESIGN/CONSTRUCTION PROS

"An Act relating to the time for filing certain civil actions; and providing for an effective date."

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [X] zero fiscal note(s) Law, Court 3/3/93

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Jeannette James	✓				
Pete Kott	✓				
Brian D. Porter	✓				
Gail Phillips	✓				

_____
CHAIRMAN'S SIGNATURE

8-LS0627\A.2
Ford
3/26/93

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE NORDLUND

TO: HB 160

Page 3, line 18:

Delete "gross"

8-LS0627\A.4
Ford
3/26/93

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE NORDLUND

TO: HB 160

Page 3, line 19, after ";":

Delete "or"

Page 3, line 21, after "contract":

Insert "; or

(4) if the defect is not discovered or could not reasonably be discovered within the period of time set out under (a) of this section"

8-LS0627\A.1
Ford
3/25/93

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE PHILLIPS

TO: HB 160

Page 2, line 19:

Delete "10"

Insert "eight"

Page 3, line 2:

Delete "10"

Insert "EIGHT"

Page 3, line 6:

Delete "10"

Insert "eight"

Page 3, line 9:

Delete "10th"

Insert "eighth"

Alaska State Legislature

WHILE IN SESSION:
CAPITOL BUILDING
JUNEAU, ALASKA 99801-1182
(907) 465-4931
(907) 465-4316 FAX

CHAIR, OIL & GAS COMMITTEE

INTERIM ADDRESS:
3111 C STREET, SUITE 150
ANCHORAGE, ALASKA 99503
(907) 561-7007

DISTRICT 10

Representative Joe Green

TO: Representative Brian Porter, Chair
House Judiciary Committee

FR: Representative Joe Green

RE: HB 160

DATE: March 10, 1993

I have introduced HB 160, an act relating to the liability of design and construction professionals. The bill was heard, and passed, by the Labor & Commerce Committee.

The next committee of referral is the Judiciary Committee. I would very much appreciate a hearing on this bill at your earliest convenience.

If you or your professional staff have any questions about this legislation, please feel free to speak with me.

REQUEST FOR SCHEDULING

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 17, 1993 FURTHER REFERRALS: Judiciary

Date of Committee Action: 3/02/93

The LABOR AND COMMERCE Committee considered: HB 160

HOUSE BILL NO. 160 LIABILITY OF DESIGN/CONSTRUCTION PROS

"An Act relating to the time for filing certain civil actions; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note Court System, Law [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	✓				
Bill Hudson	✓				
Dalton	✓				
[illegible]	✓				
[illegible]	✓				

Bill Hudson
CHAIRMAN'S SIGNATURE

LABOR & COMMERCE REPORT

Alaska State Legislature

WHILE IN SESSION
CAPITOL BUILDING
JUNEAU, ALASKA 99801-1182
(907) 465-4931
(907) 465-4316 FAX

[illegible] COMMITTEE

INTERIM ADDRESS:
3111 C STREET, SUITE 150
ANCHORAGE, ALASKA 99503
(907) 561-7007

DISTRICT 10

Representative Joe Green

Sponsor Statement for House Bill 160

HB 160 proposes a balance by amending the time period within which someone may bring legal action against design and construction professionals. This time period is known as the "Statute of Repose" (similar to a Statute of Limitations) and it has been established in 45 other states.

The 5th Alaska Legislature first enacted a statute of repose with a six year limitation. In 1988, the Alaska Supreme Court, in Turner Construction Co. v. Scales, found the statute to be in violation of Article 1 of the Alaska Constitution, and ruled it unconstitutional. HB 160 addresses the court's concerns in Turner by expanding the list of those involved in the design and contruction process.

The sponsor believes that without a time limit to file legal actions, design professionals and others in the construction trade are subject to an indefinite -- and unfair -- period of liability. After substantial completion of a project the integrity of a structure can be adversely affected by poor maintainence, improper operation or alteration, factors for which the designer or builder should not be held responsible. Within the 10 year period established in HB 160, the integrity of the structure should be well established.

HB 160 **does not** grant immunity -- at any time -- from injury or damage as the result of gross negligence.

A national study conducted in 1988 found that 96.8% of all claims addressed by HB 160 are filed within the 10 year time limit. Within 10 years after a project is completed even the most frivolous claim can still be filed. After the 10 year limit a plaintiff would have to establish gross negligence to have a case. The sponsor feels that cases filed 10 years or more after a project is completed are costing architects, engineers and contractors time, energy, productivity and financial resources beyond what is reasonable.

-SPONSOR STATEMENT-

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 160

Revision Date: February 26, 1993
Title: "An Act relating to the time for filing certain civil actions..."
Sponsor: Representative Green
Requestor: House Labor and Commerce

Department Affected: Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0
POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 26, 1993

Richard I. Pegues/FAX

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 26, 1993

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Rev 11/92

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 160

ANALYSIS: (continued)

This bill amends the statute of repose for architects and engineers, AS 09.10.055. This bill generally deals with private transactions and, for the most part, the state is not involved, except where it may be a plaintiff with a design claim of its own. The state usually relies on contract law when it has a claim of this nature. It is therefore not anticipated that the bill will have a fiscal impact of the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. HB 160

Revision Date:
Title: Liability of design/consturuction professionals
Sponsor: Green
Requestor:

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 03/01/93

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 03/01/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/93

FISCAL NOTE - COURT

NFIB Alaska

National Federation of
Independent Business

March 2, 1993

The Honorable Bill Hudson
Labor and Commerce Committee
Alaska State House
Pouch V
Juneau, Alaska 99811

RE: HB 160 Liability of Design/Construction Professionals

Dear Representative Hudson:

The NFIB/Alaska, National Federation of Independent Business of Alaska, membership is comprised of 5000 small and independent business owners. On behalf of our members I want to offer our support to HB 160.

During the year, the field staff of NFIB/Alaska visits literally thousand of small businesses in the state. One recurring theme our staff continues to hear is concern with the cost of insurance.

In response to our 1991 poll of members on liability insurance the members that wrote comments about Liability Insurance, expressed a sense of frustration. Although they had no claims or a few minor claims, their cost had increased. Several members commented they no longer carried liability insurance due to the cost. Anything, you can do to help lower their cost, I am sure would be greatly appreciated. We would urge you to move HB 160 on to the next committee of referral.

On the 1991 NFIB/Alaska ballot we conducted an extensive poll of our members about their Liability Insurance. We sought to determine the current extent of any problems.

9159 Skywood Lane
Juneau, AK 99801

The following is the result of the 1991 NFIB/Alaska ballot questions regarding liability insurance:

Are you having trouble obtaining liability insurance coverage for your business?

Yes 15.9% No 80.7 Undecided 3.3%

The Guardian of
Small Business

LETTERS OF SUPPORT

In recent years, have you experienced a rate increase in your liability insurance for the same amount of coverage?

Yes 72.7% No 20.8% Undecided 6.4%

If you answered "Yes" to question 8a how much did it increase?

Increase		Increase	
0 to 10%	25.7%	51 to 75%	3.8%
11 to 25%	41.0%	76 to 100%	3.3%
26 to 50%	19.1%	More than 100%	7.1%

Have you had to reduce your protection through increased deductibles or reduced coverage limits because of rising costs?

Yes 39.1% No 57.0% Undecided 3.9%

Have you ever had any claims against your general liability insurance?

Yes 11.3% No 88.3% Undecided 0.4%

NFIB/Alaska hopes this information regarding the views of small business owners on liability insurance will be useful to you. If you have any questions regarding this information, please do not hesitate to contact me.

I look forward to working with you on this and other issues of importance to the small business members of NFIB/Alaska.

Sincerely,

Rosa

Rosa Jerrel
NFIB/Alaska
State Director

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 26, 1993

SUBJECT: Limiting liability of certain construction professionals - (HB 160)

TO: Representative Joseph Green

FROM: Michael F. Ford
Legislative Counsel

I wanted to alert you to a constitutional equal protection issue raised by this work draft. As explained in this memo, the bill draft does appear to violate the constitutional provision guaranteeing everyone the equal protection of the law contained in Article I, section 1, of the Alaska constitution.

Section 2 of the draft repeals and reenacts AS 09.10.055. As repealed and reenacted, the statute would require that an action against a construction professional for personal injury resulting from a defect in construction be brought within ten years of the substantial completion of the construction, with certain exceptions. The existing version of AS 09.10.055 was held to be in violation of the state equal protection clause and struck down by the Alaska Supreme Court in Turner Const. Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988). A careful reading of the court's decision in that case reveals that AS 09.10.055 as repealed and reenacted in the draft still appears to violate the state equal protection clause. The key portion of the court's decision was that the apparent purpose of AS 09.10.055, that of encouraging construction, was not substantially related to the means used to achieve the purpose, exempting design professionals from liability. While AS 09.10.055 as repealed and reenacted in the draft has been improved in a constitutional sense by removing the distinction between types of design professionals that are exempt from liability, the significant constitutional problem identified by the court in Turner Const. Co. Inc. remains.

The right to bring a lawsuit against a particular person is a significant right that to be restricted, must pass the fair and substantial relationship test described in State v. Erickson, 574 P.2d 1 (Alaska 1978). The test generally requires that the state must show that the classification or in this case the exemption, bears a fair and substantial relationship to a legitimate governmental goal. The exemption from liability given to construction professionals in the draft is the means used to achieve the apparent goal of the bill, of encouraging construction. This method was specifically found by

MEMO FROM LEGAL SERVICES

the court to be a method that was not substantially related to the purpose of encouraging construction. Turner Const. Co. Inc. at 472. Therefore, unless another purpose exists, the draft appears to violate the state equal protection clause in the same manner as the existing language of AS 09.10.055 does.

Two additional points deserve to be mentioned, however. A significant portion of the court's analysis in Turner Const. Co. Inc. focused on the fact that by exempting construction professionals from liability, that liability was being shifted to unprotected parties, such as the property owner. It is unclear if the court's equal protection analysis would change if the court were to consider the changes in the law of civil liability made in 1988 that prevent liability from being shifted to another party. See AS 09.17.080(d). However, given the fact that the property owner is still not exempted from liability under the draft, I don't believe that this would change the court's conclusion that the exemption given to construction professionals is not substantially related to the goal of encouraging construction. It should also be pointed out that the Colorado Supreme Court did reach the opposite conclusion in deciding this issue. In Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982), the court upheld a statute providing an exemption from liability to certain construction professionals against lawsuits filed more than 10 years after substantial completion of the project.

Please contact me if you have further questions.

MFF:gc
93-170.glc

Alaska Professional Design Council

P.O. Box 10-3115
Anchorage, Alaska 99510-3115

Senator Tim Kelly
Chairman, Labor and Commerce Committee
Capitol Building, Room 107
Juneau, Alaska 99801

February 3, 1993

RE: Senate Bill No. 73

Dear Senator Kelly:

You have requested the Alaska Professional Design Council's (APDC) position on the current Senate Bill 73, dealing with the Statute of Repose. As a group of 1400 licensed design professionals statewide, APDC represents 10 professional architectural, engineering and surveying societies.

We have been working since the old statute was declared unconstitutional in 1987, to put in force a new statute of repose. Our position is that the new statute will address the following points:

- Encourage Construction in Alaska
- Provide Equal Access to the Courts
- Provide Protection where Protection is Due
- Aid in Limiting Insurance Rates

Encourage Construction in Alaska
The statute will encourage design professionals to continue to design projects which are new and innovative without the worry of long term liability. This does not mean that we will have construction projects with any less quality than we do now, it simply will allow the design professional to reasonably limit his risk. Having a statute of repose will decrease operating costs for design professionals in the state.
It is a fact that time spent in defense against any kind of a claim whether it be true or meritless, is borne by the design professional solely. Lack of statute of repose would be unfair to the vast majority of those involved in the design and construction of improvements to real property, many of whom are forced to pay for defense against unfounded charges and are brought into suits solely to increase the potential pool of money for payment to claimants. Nationally it was found by Victor O. Schinnerer Insurance Co., that for every hour spent by a lawyer defending a case, a design professional will spend 3 to 6 hours. This expenditure of time and energy reduces productivity, drains operating resources, and affects the future positive outlook of a firm. This results in a hesitancy towards innovation, a defensive orientation towards clients, higher design fees and an overall increased cost to the public. The design professional wants to provide the best possible service to protect the public utilizing current codes and a professional standard of care.

Provide Equal Access to the Courts
The statute does not restrict access to the courts. Plaintiffs can still bring action against others including design professionals. In the case of design professionals though, they must prove "gross negligence" in order to have a case. Otherwise the statute will bar action after 10 years. Any type of action can be brought without proof of "gross negligence" prior to 10 years. This is consistent with 45 other states in the United States.
The statute of repose is fair to all parties involved with design projects. A study done by Victor O. Schinnerer states that 96.8 % of all claims against design professional's are brought within 10 years of substantial completion of a project. The statute will protect the public from extensive, meritless cases tying up their court system. It will also protect the public from spending their money on claims which, as proven in national statistics, result in no monetary payment to them 70% of the time. The statute does not protect design professional's who intentionally or as a result of gross negligence, fraud, fraudulent concealment, fraudulent misrepresentation or breach of an express warranty design projects which are a hazard.

Provide Protection where Protection is Due
A design project is more of a process than an end product. Due to the complexity of the construction process a project is not like a manufactured product. It continues to evolve and change up to and after the substantial completion date. The design professional brings it to the point of being built, the contractor builds the project with the oversight of the design professional periodically and the owner then takes over control of the project and maintains, improves or neglects it. The project never stays the same during it's life. The initial designer or contractor should not be responsible for everything that happens to the project or around the project site for an unlimited period of time. It is therefore reasonable that after 10 years of changes or neglect the design professionals and contractors are not held responsible for all claims.

Aid in Limiting Insurance Rates
Victor O. Schinnerer, the only liability insurance carrier in the State of Alaska, has stated that having a statute of repose will neither increase or decrease our insurance in the short term. They indicated that insurance rates are not directly tied to this item, hence not affecting them initially. If over time, many suits are brought against design professionals, especially meritless ones, the costs of insurance, design work and construction will go up. A statute of repose would help limit this and thus limit insurance rate increases over time, which will help to keep all insurance rates down.

45 states have passed statute of repose legislation since 1961. Alaska is one of 10 states that has ruled it unconstitutional. Currently Alaska is one of 5 states that are in the process of passing new legislation. Senate Bill 73 with it's new findings section, inclusion of licensed General Contractors and an extended ten year time period will have a broader basis for passing constitutional scrutiny.

Respectfully Submitted,

Doug Green, AIA
Chairman
Legislative Liaison Committee
Alaska Professional Design Council

Alaska Designs

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In this Issue
ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS AND LAND SURVEYORS
Special Supplement

Impacts of Statutes of Limitation and Repose

by Willy Van Hemert, P.E.

Almost thirty years have passed since the 1961 enactment of the first special statute of limitation for lawsuits against architects, engineers and others who design and build construction projects. During this period, much interest has been focused on the legislative programs that led to the enactment of such statutes and their interpretation by the courts once enacted.

It is the purpose of this article to provide basic information regarding statutes of limitation and repose and their impact on the design professional.

Statute of Repose vs. Statute of Limitation

The statute of limitation refers to a limited period of time during which a plaintiff must file an action after the cause of action accrues; that is, from the time the injury or damage was first discovered or reasonably should have been discovered. This limited period of time is usually in the two to three year range.

A statute of repose, on the other hand, bars an action for injury or damage after a stated period of time following substantial completion of the project.

Thus, injury or damage flowing from a constructed facility more than the number of years stated in the law (on the average between seven and eight years) is barred and the question of the alleged negligence of the design professional is not subject to legal procedures.

Why is there a statute of repose dealing with construction activities such as buildings, roadways and so forth? Without such a statute, builders, designers, architects and others in the building trades are subject to an almost indefinite period of liability.

However, we all understand that physical improvements become increasingly affected by operation and maintenance activities, as well as modifications and improvements to the original facilities with the passage of time. It would seem reasonable to assume that once a facility has been used safely for a number of years, the facility itself should be deemed safe.

It is under this general premise that legislators have enacted legislation that strikes a balance between the interests of potential plaintiffs and the interests of potential defendants who have a right to be free from suit after the passage of a reasonable period of time. The plaintiff is still free to pursue a claim against the owner or tenant in possession of the building or facility; and therefore, the plaintiff is not left without a remedy.

Historical Perspective

Since 1961, 47 states, as well as the District of Columbia and Puerto Rico, have passed legislation dealing with the statute of repose. Of the original 49 laws, 44 were taken to court. Thirty three have been ruled constitutional and nine have been ruled unconstitutional. Alaska is included in the latter group.

Currently, 40 states have a statute of repose specifically for design professionals of which 33 have been successfully tested in court.

The time period of the various statutes of repose are tabulated in Figure 1.

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•REPOSE

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		Length of Liability		
		4-6 years	7-10 years	11-15 years
Number of States	Constitutional	9	22	2
	Unconstitutional	4	5	0
	Untested in Court	0	6	1

Figure 1. Status of Current Statutes of Repose

It is interesting to note that the ength of time for legal action to take lace does not appear to be a prima- y reason for ruling the statute nconstitutional. In fact, Victor 'Shinner, a major insurer of archi- ects and engineers, has indicated nat 89.3% of all cases are brought orward in the first six years after ubstantial completion. This increas- s only slightly to 96.8% after the)nth year.

The Constitutionality Issue

Why are the statutes of repose uled unconstitutional? The primary rgument is based on preserving the qual protection clause of the consti- ution. This was the argument used efore Alaska's supreme court in 988 in the consolidated cases of urner Construction vs. Robert cales and Iverson Construction vs. eWayne Carson.

In the first case, Robert Scales uffered property damage when a re occurred in the Winterbrook .partments. Turner Construction, ne prime contractor, was sued due o their alleged negligent construc- on and installation of a fireplace.

In the second case, DeWayne arson was injured while attempt- ng to install on automatic garage oor opener. Mr. Carson sued the uilder, Iverson Construction, and s subcontractor for faulty construc- on. Both cases were brought more than six years after substantial completion of the structures.

The Alaska supreme court was asked to determine if the statute of repose, under which both contractors sought protection, was constitutional. In its evaluation, the court recognized other parties including owners and tenants have continuing control over access to and maintenance of the properties. They recognized that design professionals are open to suit by a larger number of plaintiffs than are owners and tenants whom are given special common law defenses.

The court recognized the distinction between materialmen (suppliers of building components) and design professionals. That is, materialmen provide standard goods manufactured by standard processes. They may, therefore, be held to higher quality control standards than the design professional, whose work is often unique and cannot be completely tested. In other words, buildings are more complex than their component parts.

And lastly, the court recognized that design professionals have special expertise and they should be encouraged to experiment and advance new concepts and ideas rather then be stifled by the threat of unlimited liability.

However, after recognizing all these elements, which form the basis of the statute of repose, the supreme court rejected them as being unpersuasive. The only rational argument brought forward by the court for declaring the statute of repose unconstitutional was the fact that it went against the common law rule of joint and several liability (i.e. anyone whose negligence is in any way part of the cause of an injury is liable for all compensable damages attributable to that injury).

However, in 1988, the people of Alaska voted to repeal several liability to the extent that no one can ever be held financially responsible for more than twice their contributory negligence. On that fact alone, we believe the supreme court may be forced to reconsider the merits of the same statute, were it enacted by the legislature today.

Implications for Design Professionals

What consequences are in store for design professionals if Alaska does not re–enact a statute of repose? This is probably best explained by the case of the Mianus River Bridge collapse in Connecticut in 1988. The design engineer was named as a defendant in legal action although the design was performed over 25 years ago! The engineer had a long legal fight (also having to go to the supreme court) but was eventually relieved of any liability based on the statute of repose. Can you imagine defending a design you performed 25 years ago?

Suits against design professionals are not unusual. In fact, in the past decade, firms averaged over one claim every three years. Yet of the claims brought against design professionals, 80% were successfully defended with no payments to the plaintiff. Unfortunately, in all cases, the design professional was required to defend his actions at considerable cost.

Th[illegible] personal liability is not just lim[illegible] to private sector design

See REPOSE, *page 11*

Alaska Designs Correspondents

The deadline for the February issue of *Alaska Designs* is January 25. Mail articles to:

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STRUCTURAL ENGINEERS ASSOCIATION OF ALASKA

November Meeting Report

SEAA joined forces with EERI for a lunch meeting in November. The speaker was Dick Malle of the United States Geological Survey who talked about the location and data collection of strong motion accelograph instruments in the state.

January Meeting Announced

The next meeting is scheduled for Tuesday, January 22, 1991. The speakers will be Ron Watts and Will Abbott, both with the Municipality of Anchorage, who will discuss earthquake preparedness and disaster relief plans.

SEAA is trying to coordinate efforts with the Municipality to have response teams ready in the event of a major catastrophe to inspect structures starting with emergency shelters and continuing through public and private buildings.

Anyone wishing to attend should contact Tanya Bratslavsky at 348–5214 or Andy Stember at 561–1733.

•REPOSE
Continued from page 7

professionals. Public employees are also being named in suits and they are finding that they are not necessarily protected by the governmental agency by whom they are employed if negligence is involved.

And what happens when an individual leaves his employer, whether private or public? Insurance companies are very reluctant to provide prior acts insurance if there is no defined limit to their potential liability. This was evident several years ago when the majority of professional liability insurance carriers pulled out of Alaska. Those firms who had to find new insurance carriers found it cost prohibitive, if not impossible, to obtain prior acts coverage.

The statute of repose impacts all design professionals, as well as the general public, for it is the general public who eventually pays for higher insurance premiums, unnecessary litigation and the eventual loss of America's technical competence.

The statute of repose is not intended to protect design professionals who are negligent. It does, however, protect against unreasonable litigation and sets a distinct limit to potential liability.

We must all work together to insure re–enactment of this important statute.

•SURVEY
Continued from page 9

The activities, the products and the opportunities of (surveying and mapping) are not wisely managed on a statewide basis. Consider the following:

- *There is little, if any, interdepartmental coordination of surveying and mapping activities;*
- *Alaska is one of only a few states not providing annual recommendations to the U.S. Geological Survey regarding Alaska's priorities; hence Alaska is losing millions of dollars annually in benefit;*
- *There is no effort to establish data exchange standards so that multiple use can be achieved of Alaska's tremendous existing computerized survey, mapping and related data;*
- *Alaska has no requirement that valuable surveying and mapping information be preserved, nor even cataloged as to content and location, so that others may benefit from its existence.*

Since its inception, SMAB has operated without a budget. The voting private sector members have donated their time and personally paid for travel and expenses because they feel very strongly about their mission.

The Board, as presently structured, has regional representation plus ex–officio members from DNR, DEC, DCRA and DOT. Since the Board's mission crosses agency boundaries, it needs higher level authority. Creation of the "Alaska Surveying and Mapping Coordinating Council", at the Governor's level, will provide stability and continuity for the Board.

Having served as Secretary of the Interior and Alaska's Governor, we know you appreciate the value and importance of surveying and mapping. For the benefit of all Alaskans we urge you to issue an Executive Order creating the "Alaska Surveying and Mapping Coordinating Council".

The afternoon session dealt with an ongoing proposal to establish survey authority over the unorganized borough. A draft has been prepared for Senator Bettye Fahrenkamp by the Legislative Division of Legal Services using last year's SB 546 and language proposed by the DOT&PF to deal with right–of–way plats.

The Surveying and Mapping Advisory Board analyzed the draft line by line in a work session lasting nearly five hours. For the most part, differences between the private surveying sector, native landholding interests, DOT&PF and DEC were resolved.

It is hoped the resulting draft will become the basis for a new bill early in the upcoming legislative session.

Schinnerer
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Two Wisconsin Circle, Chevy Chase, Maryland 20815-7003 • 301/961-9800 • Fax 301/951-5444 • Telex 261829

Thomas H. Porterfield, Jr.
Vice President

Direct Dial: 301/961-9877

January 28, 1992

Mr. Art Jacobs
7060 Saturn Circle
Anchorage, Alaska 99504

RE: Alaska Statute of Response

Dear Mr. Jacobs:

Pursuant to our telephone conversation of last Friday, Victor O. Schinnerer and Company has conducted four special claim studies which measure when claims are brought against design professionals in relationship to project date of substantial completion. The studies cover a period of twenty-four years as follows:

- 1964 Study of 570 claim files
- 1983 Study of 159 claim files
- A New York State Specific Study covering claims filed in 1981, 1982 and 1983
- A New Hampshire State Specific Study covering claims filed in 1984 through 1988

As evidenced by all four studies the vast majority of claims filed against Design Professionals are brought within six years of substantial completion usually involving parties to the construction process. Claims filed more than six years after substantial completion almost always involves users of the project. The fact that design professionals may be sued in these instances in no way equates to negligence in their performance of professional services going back 5, 10, 20 and more years.

SCHINNERER CLAIMS' STUDY

Schinnerer
Management Services, Inc.

The studies also reinforce our belief that there is a legitimate argument to be made for a Statute of Repose. In view of the complexity of the construction process is unrealistic to expect parties involved in the design and construction of any project to defend stale claims brought many years after their involvement with the project has ended; and while normally defensible these claims represent a tremendous financial burden in terms of direct out of pocket cost, time and money.

A special statute does not impose an unfair burden on an injured party because it direct him or her to seek redress from the owner or occupier of the project, the party who is most likely to be responsible for the injury and the one in the best position to have prevented it.

If you have any questions regarding the enclosed material or if we can be of any further assistance, please let me know.

Cordially,

VOS/THP/zmc

Victor O. Schinnerer & Company Inc

March 16, 1983

VICTOR O. SCHINNERER & COMPANY INC.
SPECIAL CLAIM STUDY
DISTRIBUTION OF CLAIMS IN RELATIONSHIP TO SUBSTANTIAL COMPLETION

Years Brought Within	# of Claims	% of Claims	Cummulative Percentage
One	73*	45.9	45.9
Two	22	13.8	59.7
Three	13	8.2	67.9
Four	13	8.2	76.1
Five	12	7.5	83.6
Six	9	5.7	89.3
Seven	5	3.1	92.4
Eight	5	3.1	95.5
Nine	0	0	95.5
Ten	2	1.3	96.8
More Than Ten	5	3.1	99.9
	159	99.9	99.9

*Based on CNA's records, roughly 32.9% of these claims were brought prior to the date of substantial completion.

Study is based upon a review of 250 CNA files set up between December 1979 and October 1980.

The Date of Substantial Completion was established from information secured from CNA claim records.

159 files contained sufficient documentation which could be used for the purpose of this study.

BACKGROUND

The basis for this study is previous evidence that:

(1) Most claims against design professionals are initiated within a few years of a project's substantial completion.

(2) Claims made 10 years after a project's substantial completion are the result of inadequate maintenance by those responsible for a facility, at the time of the claim, not the result of inadequate service by the original design professionals.

(3) Claims made 10 years, or more, after substantial completion rarely result in damage payments by the design professionals.

(4) Yet, significant expenses are incurred by the courts, plaintiffs, defendants and insurance companies in processing claims occurring 10 or more years after a project's substantial completion.

(5) A statute of limitations based on empirical claims data would benefit the public and all involved professionals.

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March 19, 1993

Representative Brian Porter
Chair, House Judiciary
Alaska House of Representatives
Alaska State Capitol
Juneau, Alaska 99801-1182

re: HB 160, Liability of Design/Construction Professionals

Dear Representative Porter,

The Alaska trial lawyers oppose HB 160 which is currently in House Labor & Commerce.

HB 160 would impose a statute of repose for suits against architects and engineers for their negligence in the design and construction of buildings in Alaska. The bill is probably unconstitutional. See Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). Further, it is bad public policy: If for example an elementary school roof collapsed more than seven years after construction of the school, killing and injuring students and teachers, the architects, engineers and their insurers would be exempt from liability. This is special interest legislation, pure and simple, at the expense of public safety.

Enclosed is a copy of the Trust's summary position papers on HB 160. Enclosed as well is a more detailed analysis of HB 160 prepared by Russ Winner.

If you have any questions or want additional input from Alaskan trial lawyers on this bill or any other issue, please do not hesitate to call our office.

Sincerely,

Debra C. Gravo

Debra C. Gravo
Executive Director
dch/encl.

LETTERS OF OPPOSITION

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H.B. 160: LIABILITY OF DESIGN/CONSTRUCTION PROFESSIONALS

In 1967, the Alaska legislature enacted AS 09.10.055. This statute established a six year statute of repose for suits against architects, engineers and contractors concerning their negligence in the design or supervision of construction of a building in Alaska. It was widely criticized as unfair: If a building collapsed during the seventh year after its construction killing its inhabitants, no suit could be filed against the negligent architect, engineer or contractor. Accordingly, a number of superior court decisions in Alaska had ruled that the statute was unconstitutional. Each of these cases settled, however, before they were reviewed by the Alaska Supreme Court.

The matter finally came before the supreme court in Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). There, the court agreed with the superior courts and struck AS 09.10.055 as unconstitutional under the Alaska equal protection clause. Applying the sliding scale of judicial scrutiny, State v. Erickson, 574 P.2d 1, 12 (Alaska 1978), the court found that the right to bring a suit for damages was a significant right, and that legislation restricting that right must bear a "fair and substantial relationship" to a legitimate purpose. The court found that the purpose of the statute was to encourage the design and construction of buildings in Alaska.

The Turner court then found that this statute did not effectively further this purpose: Although it protected architects, engineers and contractors, it did not protect owners, tenants and materialmen. Thus, individuals in this latter group might be sued after the six year period. Under the law regarding joint and several liability in existence at that time, a defendant in that group might then be held liable for up to twice his percentage of fault. In light of this, the court viewed AS 09.10.055 as, in effect, a statutory shifting of liability from design and construction professionals to owners, tenants and materialmen. Since this latter group would continue to have a disincentive to construct buildings, the court reasoned, the purpose of the statute was not served by its provisions. Accordingly, the statute was found to violate the state constitution's equal protection clause.

Since Turner, the Alaska voters approved an initiative abolishing joint and several liability. Now, each defendant is liable only for his percentage of fault. There is no possibility of shifting of liability from architects, engineers and contractors to owners, tenants and materialmen. The narrow basis for the Turner court's rejection of AS 09.10.055 is arguably no longer present.

Seizing on this possibility, HB 160 has been introduced before the Alaska House by Representatives Green, Phillips, Larson, Hudson, Porter, Bunde and Vezey. In essence, it amounts to an effort to reenact AS 09.10.055, with slight modifications, and to overturn Turner. It replaces the six year limitation with a seven year limit. It makes it clear that contractors are protected. (AS 09.10.055 was somewhat unclear on this point, although the supreme court treated it as covering contractors as well as architects and engineers.) It makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

As was true earlier, this construction statue of repose is obviously unfair to innocent victims of negligently designed or constructed buildings. Other constitutional challenges to the validity of this bill, if enacted, could be presented. However, it is not a certainty that the Alaska Supreme Court would accept these arguments and again strike the bill, if it becomes enacted. Accordingly, the bill should be stopped now, and should not be enacted by the Alaska legislature.

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TO: **Representative Porter, Chair of House Judiciary**
Representative James, Vice-Chair of House Judiciary
Representative Kott
Representative Phillips
Representative Green
Representative Davidson
Representative Nordlund

FROM: **Russell Winner**

DATE: **March 19, 1993**

RE: **HB 160, Liability of Design/Construction Professionals**

****

On behalf of the Academy of Trial Lawyers, I have been asked to express our strong opposition to HB 160. This bill attempts to overturn a recent Alaska Supreme Court decision and to establish a seven year statute of repose for suits against construction design professionals. First, the bill is manifestly unfair to the innocent victims of negligently designed buildings. Second, it may well be stricken as unconstitutional by the Alaska Supreme Court. Third, enactment of HB 160 is unlikely to have any appreciable effect on the insurance premiums paid by design professionals. Finally, passage of this bill may result in significant additional social service costs to the State of Alaska.

In 1967, the Alaska legislature enacted AS 09 10.055. This statute established a six year statute of repose for suits against architects, planners and engineers concerning their negligence in the design or supervision of construction of a building in Alaska. It was widely criticized as unfair: If a building collapsed during the seventh year after its construction injuring or killing its inhabitants, no suit could be filed against the negligent design professional. Accordingly, a number of superior court decisions in Alaska had ruled that this statute was unconstitutional. Each of these cases settled, however, before they were reviewed by the Alaska Supreme Court.

The matter finally came before the supreme court in Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988). There, the court agreed with the superior courts and struck AS 09.10.055 as unconstitutional under the Alaska equal protection clause. Applying a sliding scale of judicial scrutiny, State v. Erickson, 574 P.2d 1, 12 (Alaska 1978), the court found that the right to bring a suit for damages was a "significant right," and that legislation restricting that right must bear a "fair and

substantial relationship" to a legitimate purpose. The court found that the purpose of the statute was to encourage the design and construction of buildings in Alaska, and that this was a legitimate purpose.

The Turner court, however, found that AS 09.10.055 did not effectively further this purpose: Although it protected design professionals, it did not protect owners, tenants and materialmen. Thus, individuals in this latter group, who were also necessary participants in the construction process, might be sued after the six year period. Further, under the law regarding joint and several liability in existence at that time, a defendant in that latter group might then be held liable for up to twice his percentage of fault. In light of this, the court viewed AS 09.10.055 as, in effect, a statutory shifting of liability from design professionals to owners, tenants and materialmen. Since this latter group would continue to have a disincentive to construct buildings, the court reasoned, the purposes of the statute were not served by its provisions. Accordingly, the statute was found to violate the state constitution's equal protection clause.

Since Turner, the Alaska voters approved an initiative abolishing joint and several liability. Now, each defendant is liable only for his percentage of fault. AS 09.17.080. There is no possibility of shifting of liability from design professionals to owners, tenants and materialmen. Arguably, under a narrow reading of Turner, the basis for the court's rejection of AS 09.10.055 is no longer present.

Seizing on this possibility, HB 160 attempts to reenact AS 09.10.055, with some modifications, and to overturn Turner. It replaces the six year limitation with a seven year limit. It appears to protect contractors as design professionals, at least insofar as they are involved in the design phase of a construction project.[1] Further, HB 160 can be read as expanding AS 09.10.055 by protecting contractors in their construction activities (as opposed to their design activities) as well: It applies inter alia to "negligence in the construction ... of an improvement to real property." Finally, HB 160 makes it clear that it is an absolute statute of repose, expressly overriding the discovery rule of AS 09.10.140.

HB 160 should not be passed. First, as was true earlier, this bill is obviously unfair to innocent victims of negligently designed or constructed buildings. By way of example, suppose the

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[1] AS 09.10.055 was somewhat unclear on this point. However, the supreme court in Turner treated it as covering contractors involved in the design process as well as architects and engineers. 752 P.2d at 471.

roof of an elementary school collapsed more than seven years after completion of construction due to an engineering firm's negligent calculation of the roof's ability to carry a snow load. Under HB 160, no recovery could be had against the responsible engineering firm or its insurer for the deaths or injuries of the school's children. Likewise, the school district could not recover from the engineering firm or its insurer for the cost of repairs to the school roof.

Second, HB 160 may well be found unconstitutional by the Alaska Supreme Court for the same reasons as AS 09.10.055. The court would likely apply the same equal protection analysis as it did in Turner. Since innocent victims of negligently designed buildings would be deprived of the "significant right" of access to the courts, HB 160 would survive judicial scrutiny under the Alaska equal protection clause only if it bears a "fair and substantial relationship" to its purpose of encouraging the design and construction of buildings in Alaska.

As was true under the prior statute, the statute of repose of HB 160 would not protect owners, tenants, and materialmen. As the supreme court noted in Turner, these are all essential participants in the construction of improvements on real estate. To exempt some but not all of the necessary participants in the construction process would not have the desired effect of encouraging the design and construction of buildings in Alaska. The unprotected participants could still be found liable, under the discovery rule, even after the seven year statute of repose of HB 160.

It is true that after the recent initiative, these unprotected participants can be found liable for only their percentage of fault, rather than double that amount. Thus HB 160 does not effect a partial shifting of liability from the protected to the unprotected participants, as did AS 09.10.055 before the initiative. Nonetheless, even after enactment of HB 160 the unprotected participants would still have a disincentive to engage in the construction process. Accordingly, the Supreme Court may well strike HB 160 for the same reason it struck AS 09.10.055 in Turner: it fails to bear a substantial relationship to encouraging the design and construction of buildings in Alaska. Owners, tenants, and materialmen would still be liable and might still balk at playing their roles in the construction process.

Construction statutes of repose have been struck as unconstitutional in a number of other states besides Alaska. These decisions rely on a variety of grounds, including equal protection, due process, or the prohibition against special legislation. The Alaska Supreme Court, when called upon to review HB 160, might well strike it under any of these provisions of the Alaska constitution. Accordingly, before considering passage of this bill, an opinion from the Attorney General should be sought regarding its constitutionality.

Third, HB 160 can be justified as encouraging the design and construction of buildings in Alaska only to the extent that it can be shown to reduce the liability insurance premiums for design professionals. However, no evidence has been presented, in Alaska or elsewhere, that enactment of "tort reform" has had much if any effect on insurance rates. Instead, insurance rates appear to be driven principally by insurance companies' investment strategies and their rates of return on investments. The legislature should collect further information, and hold further hearings if necessary, to examine what effect, if any, enactment of HB 160 would have on the liability insurance rates of design professionals.

Finally, HB 160 should be accompanied by a fiscal note. Enactment of this bill might well increase the costs of providing social services in Alaska. If the bill is enacted and withstands judicial scrutiny, it is inevitable that future catastrophically injured victims of the collapse of buildings will go uncompensated. The cost of their medical treatment, care and support will have to be borne by the social service agencies of the State of Alaska.