

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10608 SENATE JUDICIARY

Alaska might extend into U.S. water.⁴ The Alaska ferry only goes through Canadian waters in getting to Alaska after leaving Bellingham and Washington waters. Absent treaty or usage and custom unknown to this court the statute cited in Corbin would not apply in Canadian waters.

The Alaska legislature has made clear that the only criminal offenses in Alaska are those defined by statute.⁵ The courts have said that there are no common-law crimes in Alaska.⁶

The appellate court decisions are replete with avowals that the

⁴ AS 11.03.010. provides:
Offshore water and land.

The jurisdiction of the state extends to water offshore from the coast of the state as follows:

(1) the marginal sea to its outermost limits as those limits are from time to time defined or recognized by the United States of America by international treaty or otherwise;

(2) the high seas to the extent that jurisdiction is claimed by the United States of America, or to the extent recognized by the usages and customs of international law or by agreement to which the United States of America or the state is a party;

(3) submerged land including the subsurface of submerged land, lying under the water mentioned in this section.

⁵ AS 11.81.220. provides:

No conduct constitutes an offense unless it is made an offense

(1) by this title;

(2) by a statute outside this title; or

(3) by a regulation authorized by and lawfully adopted under a statute.

⁶ Old v. State. 738 P.2d 1117 (Alaska App. 1987)

V.S'

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only criminal sanctions are those allowed by statute.⁷ Numerous citations on the limitations of the court's power are given in R.I.⁸ Other cases say the court's powers are defined by statute.⁹

The negative implication of AS 12.05.010 is that the only punishable crimes committed outside the state are those consummated

⁷ R.I. v. State, 894 P.2d 683 (Alaska App. 1995).

⁸ The legislature sets the maximum, minimum, and presumptive terms of imprisonment for crimes. Nell v. State, 642 P.2d 1361, 1368 (Alaska App. 1982). The legislature decides whether a defendant's sentence may be suspended in whole or in part. Fete v. State, 379 P.2d 625, 626 (Alaska 1963) (a court has no inherent power to suspend a sentence of imprisonment and place a defendant on probation; such authority must be granted by the legislature). The legislature determines what length of probation may be imposed. Gonzalez v. State, 608 P.2d 23, 25-26 (Alaska 1980); Jackson v. State, 541 P.2d 23, 25 (Alaska 1975) (when a defendant's sentence of imprisonment is suspended and the defendant is placed on probation, the defendant's total period of probation may not exceed the period specified in statute; Friedman v. State, 576 P.2d 114, 116 n. 11 (Alaska 1978)). And, while a court has wide discretion in setting the conditions of a defendant's probation, a court must have legislative authorization before imposing conditions that fundamentally alter a defendant's status as a "probationer" (that is, someone who is released from custody upon his or her promise to abide by certain conditions). Whittlesey v. State, 626 P.2d 1066, 1067 (Alaska 1980); Bovyn v. State, 586 P.2d 1250, 1251 (Alaska 1978) (absent explicit legislative authorization, a court may not impose imprisonment as a condition of probation). See Brown v. State, 559 P.2d 107, 110 (Alaska 1977) (because a statute authorizes a court to impose a fine as a condition of probation, a sentencing court can order a defendant to pay a fine as a condition of probation even when the underlying crime is punishable by imprisonment only)."

...
"The Superior Court's authority to impose particular types of disposition in a juvenile case is granted by and governed by legislation. In re E.M.D., 490 P.2d 658 (Alaska 1971)."

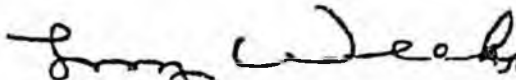
⁹ State v. T.M. & J.B., 860 P.2d 1286 (Alaska App. 1993) and Davenport v. State, 543 P.2d 1204, at 1211 (Alaska 1975)

inside the state. That, and the lack of any explicit statutory authority allowing for prosecutions on an Alaskan Ferry in Canadian waters causes this court to find that it does not have jurisdiction in the case.

Conclusion

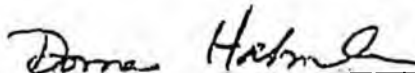
The indictment is dismissed. The State has seven days to apply to the appellate courts for relief from this order. Bail shall continue at the present state for seven days.¹⁰ Unless a stay of the order is entered by the appellate court before that time the defendant shall be released.

Dated July 12, 2001



Larry Weeks
Superior Court Judge

I certify that I served Daniel Schally and Barbara Kissner the above pleading on this 12th day of July 2001 by faxing it to them.



Donna Hahnlen
Professional Assistant

¹⁰ A.S. 12.25.030

SEP 04 2001

CRIMINAL DIVISION

* Bellingham-Ketchikan
on the ferry
(Same for all counts) JS

THE GRAND JURY CHARGES:

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COUNT I

That on or about the 12th day of May, 2001, aboard the M/V Matanuska at or near Ketchikan,* in the First Judicial District, State of Alaska, VERNON G. JACK, V, did unlawfully and knowingly engage in sexual contact with S.N.F, without the consent of S.N.F., and recklessly disregard that lack of consent.

All of which is a Class B felony offense being contrary to and in violation of AS 11.41.420(a)(1), and against the peace and dignity of the State of Alaska.

COUNT II

That on or about the 12th day of May, 2001, aboard the M/V Matanuska at or near Ketchikan,* in the First Judicial District, State of Alaska, VERNON G. JACK, V did unlawfully and knowingly engage in sexual penetration with S.N.F., without the consent of S.N.F., and recklessly disregarded that lack of consent.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

INDICTMENT - Page 2 of 5

State of Alaska vs. VERNON G. JACK, V
Case No. 1KE-S01-551 CR

Office of the District Attorney
415 Main Street, Room 304
Ketchikan, Alaska 99901
(907) 225-6126 FAX (907) 225-3917

COUNT III

1 That on or about the 12th day of May, 2001, aboard the
 2 M/V Matanuska at or near Ketchikan, in the First Judicial
 3 District, State of Alaska, VERNON G. JACK, V did unlawfully and
 4 recklessly cause physical injury to S.N.F.
 5

6 All of which is a Class A misdemeanor offense being
 7 contrary to and in violation of AS 11.41.230(a)(1), and against
 8 the peace and dignity of the State of Alaska.
 9

COUNT IV

10 That on or about the 12th day of May, 2001, aboard the
 11 M/V Matanuska at or near Ketchikan, in the First Judicial
 12 District, State of Alaska, VERNON G. JACK, V did unlawfully and
 13 recklessly cause physical injury to S.N.F.
 14
 15

16 All of which is a Class A misdemeanor offense being
 17 contrary to and in violation of AS 11.41.230(a)(1), and against
 18 the peace and dignity of the State of Alaska.
 19

COUNT V

20 That on or about the 12th day of May, 2001, aboard the
 21 M/V Matanuska at or near Ketchikan, in the First Judicial
 22 District, State of Alaska, VERNON G. JACK, V did unlawfully, by
 23 words or other conduct did recklessly place S.N.F. in fear of
 24 imminent physical injury.
 25

26 INDICTMENT - Page 3 of 5

State of Alaska vs. VERNON G. JACK, V
Case No. 1KF-S01-551 CR

Office of the District Attorney
 416 Main Street, Room 304
 Ketchikan, Alaska 99901
 (907) 225-6128 FAX (907) 225-3917

All of which is a Class A misdemeanor offense being
contrary to and in violation of AS 11.41.230(a)(3), and against
the peace and dignity of the State of Alaska.

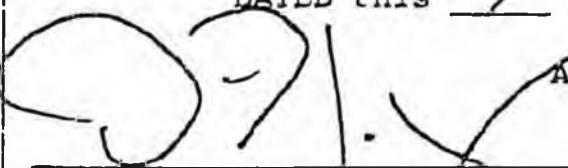
COUNT VI


That on or about the 12th day of May, 2001, aboard the
M/V Matanuska at or near Ketchikan* in the First Judicial
District, State of Alaska, VERNON G. JACK, V did unlawfully, by
words or other conduct did recklessly place S.N.F. in fear of
imminent physical injury.

All of which is a Class A misdemeanor offense being
contrary to and in violation of AS 11.41.230(a)(3), and against
the peace and dignity of the State of Alaska.

DATED this 12th day of June, 2001.

A TRUE BILL


DANIEL J.M. SCHALLY
ASSISTANT DISTRICT ATTORNEY
Alaska Bar No. 9711075


GRAND JURY FOREPERSON

Witnesses: *trooper*
~~Officer Marvin Randall~~ *DS*
S.N.F.
Malika Farham
Sandra Thompson
Cheryl Fisher
Yvette Fountain

NOTE: The full name of the victim is located within the
Ketchikan District Attorneys' Office.

INDICTMENT - Page 4 of 5

State of Alaska vs. VERNON G. JACK, V
Case No. 1KF-S01-551 CR

STATE OF ALASKA DEPARTMENT OF LAW
Office of the District Attorney
415 Main Street, Room 304
Ketchikan, Alaska 99901
(907) 225-6128 FAX (907) 225-3917

HB

489

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 489(JUD)
 (H) Publish Date: 4/23/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Corrections
 Title "An Act relating to cruelty to animals. BRU Administration and Operation
 Component All
 Sponsor Rep. Chenault
 Requester House Judiciary Committee Component No. 694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Typo--Do not abbreviate)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation elevates cruelty to animals from an A misdemeanor to a C felony. It also broadens the elements of the crime to include "failure to provide the necessary standard of care" but removes "and as a result, causes the death of the animal or cause severe physical pain or prolonged suffering to the animal". Finally, this legislation would make the observation and knowing failure to report a violation to a law enforcement agency a C level felony also.

The Department of Law reports that in 2000 there were 8 convictions of cruelty to animals with an average sentence of about 10 days. It difficult to estimate what an average sentence would be if this becomes a felony. There will undoubtedly be additional imprisonment as well as probation supervision imposed. While the impact to the Department is difficult to quantify, there will be an impact. Most

Prepared by: Candace Brower Phone _____
 Division Commissioner's Office Date/Time 3/14/02 1:41 PM
 Approved by: Margaret Pugh, Commisssioner Date 3/14/02
 Agency Department of Corrections

FISCAL NOTE - FN#1

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CSHB 489(JUD)

ANALYSIS CONTINUATION

troubling is the creation of a new felony for failure to report. The Department of Corrections has been experiencing an overcrowding crisis for a number of years. Each year, our population increases due to increased sentences, new crimes and converting misdemeanors into felons. This legislation represents all of those things. We are also facing significant budget cuts. Although we cannot quantify the impact, serious consideration needs to be given to amending the current statutes to add to the serious burden that already exists on the criminal justice system.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 489(JUD)
 (H) Publish Date: 4/23/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to cruelty to animals." BRU Criminal Division
 Component All
 Sponsor Representative Chenault
 Requester House Judiciary Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*****	*****	*****	*****	*****	*****
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 HB 489 adds seeing someone commit animal cruelty, and then knowingly fail to report the crime to law enforcement, to the definition of cruelty to animals. The bill further increases the penalty for cruelty to animals from a misdemeanor to a class C felony.

 During 2000, the Department of Law got convictions in eight cruelty to animal cases. Due to the relatively low number of these cases, increasing the penalty for animal cruelty to a felony as defined in current law is expected to have a negligible fiscal impact on the agency. However, making failure to report animal cruelty a felony is expected to cause many new referrals for prosecution, which will need to be investigated and reviewed, even if the state cannot ultimately prosecute. While we believe passage of section 2 of HB 489 will increase the department's workload, we have no way of reliably estimating the impact.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 3/8/02 8:30 AM
 Approved by: Kathryn Daughhettee for Bruce M. Botelho, Attorney General Date 3/8/2002
 Agency Department of Law

**REPRESENTATIVE
MIKE CHENAULT**

Interim:
145 Main St. Loop, Second Floor
Kenai, Alaska 99611
(907) 283-7223
Fax: (907) 283-3075



HOUSE OF REPRESENTATIVES

Official Business

Session:
Capitol Building, Room 432
Juneau, Alaska 99801-1182
(907) 465-3779
Toll Free: (800) 469-3779
Fax: (907) 465-2833

May 6, 2002

TO: Senator Robin Taylor, Chair
Senate Judiciary

FROM: Representative Mike Chenault 

RE: House Bill 489

Please consider this a request to schedule for hearing in Senate Judiciary House Bill 489 as soon as possible. If you have any questions please contact Sue in my office.

Representative_Mike_Chenault@legis.state.ak.us

**REQUEST FOR
HEARING**

STATE OF ALASKA

REPRESENTATIVE
MIKE CHENAULT

Interim:
145 Main St. Loop, Second Floor
Kenai, Alaska 99611
(907) 283-7223
Fax: (907) 283-3075



HOUSE OF REPRESENTATIVES

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Session:
Capitol Building, Room 432
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(907) 465-3779
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Sponsor Statement House Bill 489

It is a well documented that animal abuse is a precursor to child abuse. In fact studies by the American Humane Society and the American Psychiatric Association strongly suggest that if animal cruelty is identified and treated as a juvenile problem, we could avoid a good deal of adult domestic abuse.

House Bill 489 simply allows a prosecutor to charge a person with cruelty to each animal found to be neglected or abused. It also strongly suggests that the courts mandate behavior counseling.

The Bill allows for "duty to report" abuse to authorities and holds a person harmless who in good faith reports animal abuse to the authorities.

Faith White * (907)561-5551
4020 Dale Street, Anchorage, Alaska 99508

December 12, 2001

Representative Mike Chennult
145 Main St. Loop, Ste. 211
Kenai, AK 99611

Re: Legislation to Deter Animal Abuse

Dear Representative Chennult:

The recent animal abuse case involving Caroline Boughton in Sterling, Alaska has caused great outrage. She was allowed to continue running her "puppy mill" despite a prior record of abuse. When she was caught this time the live dog body count was 49 dogs. Some were barely alive. The frozen carcasses of other dogs and cats who died of neglect or were eaten by the others to survive were horribly evident. The animals were packed into a filthy bus living in their own feces and urine. The animals outside had no food, shelter and water. The images from the media coverage will cause many of us anguish for a long time. Amazingly, she was allowed to keep five of the dogs.

This is the second time Caroline Boughton has done this. Shockingly the troopers are not pursuing this case. Apparently there is no State law or enforcement available to punish and deter such abuse. The D.A. in Kenai is "reviewing it". Nancy, a 25 year volunteer with the Alaska Society for the Prevention of Cruelty to Animals was working with Boughton. Is Caroline Boughton walking away after one of the most horrible crimes imaginable against animals? Where are the laws to protect and prevent this cruelty?

We are asking that you exercise your influence and authority to stop this inhumane treatment. The penalty for such despicable behavior should be considerable. Only this can deter its commission. There should never be second time offenders. Caroline Boughton should have been prohibited from ever owning or caring for any animal. The laws are woefully inadequate if such abuse cannot be prosecuted and stopped the first time. To allow a second offense to occur and not be able or willing to do anything must not be permitted. This conduct should be punishable with mandatory jail time; mandatory community service; and/or mandatory counseling. Only this will prevent such abuse and deter those causing innocent animals to suffer.

If you need further persuasion please let me send you the video made by the rescuers. I have attached a few of the signature pages I have collected. More signatures are coming in every day. As you can see there are many who are asking for your assistance to stop such abuse. Let's act now!

Sincerely,



Faith White

/faw
Enc.

**INFORMATION
STATEMENT**

HB

498

FISCAL NOTE

**STATE OF ALASKA
2002 LEGISLATIVE SESSION**

Fiscal Note Number: 4
 Bill Version: CSHB 498(FIN)
 (H) Publish Date: 4/22/02

Revision Date/Time (Note If correction): _____ Dept. Affected: Revenue
 Title Whittier Private Prison BRU Revenue Operations
 Component Treasury Division
 Sponsor House Finance Committee
 Requester House Finance Committee Component No. 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel		15.0				
Contractual		380.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Debt Service			1,712.1	1,710.1	1,711.1	1,712.3
TOTAL OPERATING	0.0	395.0	1,712.1	1,710.1	1,711.1	1,712.3

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
1002 Federal Receipts						
1003 GF Match						
1004 GF		15.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Bond Proceeds		380.0	1,712.1	1,710.1	1,711.1	1,712.3
TOTAL	0.0	395.0	1,712.1	1,710.1	1,711.1	1,712.3

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached.

Prepared by: Devon Mitchell, State Debt Manager Phone 465-3750
 Division Treasury Division Date/Time 4/17/02 3:49 PM
 Approved by: Larry Persily, Deputy Commissioner Date 4/17/2002
 Agency Department of Revenue

FISCAL NOTE #4

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CSHB 498(FIN)

ANALYSIS CONTINUATION

This legislation authorizes the Department of Corrections to enter into an agreement with the City of Whittier for the purposes of acquiring correctional facility space and services to house state prisoners. The Finance Committee substitute also allows that if such a facility is started in Whittier, the Department of Administration may also enter into a lease-financing agreement for a 96-bed expansion of the Yukon-Kuskokwim Correctional Center in Bethel.

CITY OF WHITTIER

The agreement would be for a minimum of 25 years and provide at least 1,000 prison beds. The lease must provide for an agreement between the City of Whittier and one or more private, third-party contractors to construct and operate the facility. The legislation provides no requirement that tax-exempt financing be used for the facility, no maximum lease term, no maximum annual lease payment amount, and no maximum project size in dollars or number of prisoners to be housed at the facility.

Although there is no specific provision in this legislation for the State Bond Committee to participate in structuring the financing, the Department of Revenue anticipates working with the City of Whittier to obtain the most favorable financing terms for the state — as the state's lease payments will be security for any bonds sold by the municipality. The state's credit must be represented, as the pledge that will be given to bond investors is that the state will make annual payments under the agreement entered into by the Department of Corrections. This "credit trail" quickly leads investors to the fact that the likelihood of repayment or credit risk involved with this transaction hinges on the appropriation of state general fund dollars. The foundation upon which the state has built its good credit rating has been the centralized control of the state's credit through the State Bond Committee, and the Bond Committee's involvement in this issuance is important to maintaining that credit strength. This position is further strengthened by the fact that the City of Whittier has no bonds currently outstanding, and has limited local resources available to develop this complex transaction. The State Bond Committee, and contractors of the Bond Committee, would work with the City of Whittier to structure and market the transaction. The anticipated travel costs in the fiscal note would be paid from the state general fund, with the additional \$50,000 to \$80,000 in contractual costs to be paid from bond proceeds of the transaction.

YUKON-KUSKOKWIM CORRECTIONAL FACILITY

The legislation also authorizes the issuance of up to \$17,895,000, plus costs of issuance, in certificates of participation (COPs) for the facility expansion in Bethel. The total estimated issuance amount authorized in this legislation is \$19,000,000. However, the numbers in this fiscal note are based on the assumption that the total issuance amount (project and cost of issuance) would be just \$17,895,000, which is what the departments of Revenue and Corrections estimate would be needed for the project. As these bonds would be sold using the competitive method of sale, the cost-of-issuance estimates do not include the underwriter's discount or bond insurance. Assuming an issuance October 2002, an interest rate of 4.7%, and a 15-year term, the annual debt service would be approximately \$1.7 million per year on a \$17,895,000 issuance. If the full \$19 million was issued under the same terms, annual debt service would be \$1.8 million.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 498(FIN)
(H) Publish Date: 4/22/02

Revision Date/Time (Note if correction): _____ Dep't. Affected: Corrections
Title An Act expressing legislative intent re BRU Administration and Operations
privately operated correctional facility space and services; Component All
Sponsor House Finance Component No. #0694
Requester State Affairs; Finance

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	71.0	144.7	645.1	989.3	941.3	897.4
Travel	3.0	6.0	22.0	172.0	169.0	166.0
Contractual	85.5	11.0	50.0	33,695.5	34,702.0	34,786.5
Supplies	3.0	6.0	14.0	18.0	15.0	12.0
Equipment	3.0	3.0	61.0	44.9	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous					5,682.0	5,682.0
TOTAL OPERATING	165.5	170.7	792.1	34,919.7	41,509.3	41,543.9

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	165.5	170.7	792.1	34,919.7	41,509.3	41,543.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	165.5	170.7	792.1	34,919.7	41,509.3	41,543.9

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	1	2	10	15	41	40
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Section 1 of this bill states the legislative intent to secure additional correctional facility space through a privately operated correctional facility in Alaska. The legislature expects the Department of Corrections to contract with the City of Whittier for privately operated correctional facility space and services similar to those currently acquired for medium-security Alaska prisoners in a privately operated prison outside the state. Legislature expects the initial per diem costs will be between \$89 to \$91 per day.

Section 2 authorizes a contract with the City of Whittier for correctional facility space and services with third-party contractor operation for a minimum of 25 years, a minimum of 1,000 beds and the contract must provide cultural relevant services.

(Continued on Page 2)

Prepared by: Joseph Reeves
Division: Administrative Services
Approved by: Margaret M. Pugh, Commissioner
Agency: Department of Corrections

Phone 465-3315
Date/Time 4/19/02 9:10 AM
Date 4/19/02

FISCAL NOTE #3

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CSHB 498(FIN)

ANALYSIS CONTINUATION

DOC will require 2 Long-term Project positions- Facilities Manager I's to interface with the Whittier (Start FY2003) and Bethel (Start FY2004) project during design and construction phases and through the 1st year of operations. Each of the position's initial salary and benefit costs are \$71.0 per year with 3.75% annual performance adjustments included per labor agreement. Each of the Facility Manager staff will also require an additional \$14.5 of support costs for FY2003 (\$3.0 Travel, \$5.5 contractual Services, \$3.0 Supplies, and \$3.0 Equipment (one-time) for their first year operation, and \$11.5 for subsequent years.

The Department of Corrections (DOC) requires funds to enable the Agency to hire a professional contractor to negotiate and execute necessary prisoner care and operational contracts with the City of Whittier and their third party Representative. These contracts are to ensure they provide a degree of custody, care, and discipline similar to that required by the laws of this state. Estimate approximately \$185 per hour X 430 hours = \$79,950 or \$80.0 (Shown in Contractual Line of FN). This is the same amount that the Municipality of Anchorage spent on their contract negotiations for the new 400-bed Anchorage Jail. Assume all necessary contracts would be completed in FY2003.

The DOC requires funds to enter into a professional service agreement for contract compliance monitoring services of the contracts for the new Whittier Prison. The DOC must be assured that the Third-Party Operator of the facility complies with all of its contractual requirements to prevent and defend against potential litigation and/or liability for the State of Alaska. Monitoring services would include development of the monitoring instrument to include all aspects of correctional practice, on-going monthly monitoring, and reporting requirements. Estimate approximately \$100 per hour X 1,000 hours per year = \$100.0 per year (Shown in Contractual Line of FN) beginning in FY2006 (operations begins).

State oversight of the new Whittier Prison will require the following additional 8 Permanent full-time state staff in the Department's budget for the life of the contract: (assume that staff will begin work in FY2005 preparing offenders for transition from existing out-of-state facilities and developing case management files, and also build in a 3.75% performance incentive adjustments to salary costs per labor agreements for FY2006-FY2008)

4 Adult Probation Officer II's (Case Managers) @ \$65.0 per year = \$260.0 per year personal services
2 Nurse II (Medical Coordination) @ \$65.0 = \$130.0 per year personal services
1 Internal Auditor II (Contract Compliance) @ \$60.0 per year personal services
1 Criminal Justice Technician (Clerical/Office Support) @ \$45.0 per year personal services
Leased Vehicles for Adult Probation Officers (2) = \$15.0 per year contractual services
Travel-Supply Support costs 8 Positions @ \$6.0 each/year(\$2.0 Travel, \$3.0 Contractual, \$1.0 Supplies) = \$48.0/year.
Equipment: \$2.0 each X 8 position to cover PC's, printers, office equipment = \$16.0 (One-time).

Data processing equipment will be needed to support DOC oversight staff and to interface with the new Whittier Prison with the Department's new Offender Tracking Information System. Data processing PC's, office equipment, miscellaneous equipment including the WAN/LAN connection. \$45.0 in FY2005 (shown in equipment line of FN).

Starting in FY06, the DOC Transportation Section will require: four (4) additional PFT Prisoner Transportation Officers based at the Whittier Prison (\$65.0 each X 4 = \$260.0 personal services with a 3.75% performance incentive adjustment per labor agreements in subsequent years) and one PFT Prisoner Transportation Officer in the Anchorage Central Office (\$60.0 P.S.); safety and operating equipment for the five officers (\$14.9 Total Equipment one-time); a new Van to transport prisoners back and forth from the Whittier Prison (\$30.0 Total Equipment one-time); travel and transportation funds to move prisoners from out of state to Whittier (one-time contractual expenses of \$638.0 in FY06); travel and transportation costs to handle routine needs at the facility (annual expenses estimated at \$12,500 per month X 12 months = \$150.0 travel); and contractual services funds (\$7.5) and supply funds (\$4.0) to support the new transportation officers.

The annual operating costs to cover the contracting costs of housing prisons under this bill will be approximately \$32,850.0 (shown in contractual services line of FN) each fiscal year beginning in FY2006. (1,000 beds times \$90 per day times 365 days). Note that FY2008 leap year will require an additional \$90.0 of contractual funds. Contractual services amount assumes that all Architectural and Engineering will be completed in the first year (FY2003) and Construction will take approximately 2 years (FY2004 and FY2005) for this multi-story 1,000 bed facility. Prison operations at the new Whittier Prison is assumed to begin FY2006. Assuming 25 year contract with City of Whittier for prison services, at the \$90 per day rate per prisoner, the total 25 year contract will be cost \$821,790 000.

(Continued on Page 3 of 3)

FISCAL NOTE #3

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. CSHB 498(FIN)

ANALYSIS CONTINUATION

The \$32,850.0 annual contractual costs of incarceration at Whittier may be offset by moving offenders housed at the Out of State Contract facility (Central Arizona Detention Center) back to Alaska and housing them in the new Whittier Prison, if any remain at CADC when the new in-state facility is completed. If the CADC were to still have 585 (current FY03 population) Alaska offenders there by the time the Whittier Prison is completed, moving those prisoners back in-state could offset the \$32,850.0 contract costs at Whittier by \$13,879.1 (585 X \$65 per day X 365 days).

Section 3 states that the provisions of AS 33.30.031 (a) do not apply to an agreement for correctional space and services in accordance with the provisions of sec. 2 of this Act.

Section 4 authorizes the department to enter into a lease-financing agreement for the expansion of the Yukon-Kuskokwim Correctional Center (YKCC) in Bethel for up to 96 new beds as costs not to exceed: 1) \$183,300 per bed; 2) \$17,593,700 in capital costs; and 3) \$5,882,000 in increased operating expenditures. The estimated total cost of construction, acquisition, and equipping the project is \$19,000,000, which shall be paid from proceeds of the certificates of participation issued. The estimated aggregate annual amount of rental obligations under the lease-financing agreements is \$1,700,000. The total payments for the full term of certificates of participation are estimated to be \$25,500,000. Estimate that Architectural and Engineering will begin in FY2004 with construction to occur FY2005-FY2006, and expanded operations to begin in FY2007. Estimate that the expansion of 96 offender beds at YKCC will require 27 new staff (or 3.5 offenders per staff).

Section 5 Repeals Section 1-3, ch.32, SLA 2001, relating to contracting with the Kani Peninsula Borough for private prison services.

Section 6 establishes a "Condition Effect" that states Section 4 only takes effect if construction begins on the private prison in Whittier.

Section 7 says Sections 1-3 and 5 of this Act takes effect July 1, 2002.

Section 8 says Section 4 takes effect the day after the day that the revisor of statutes is notified by the commissioner of corrections that construction has begun on the private prison approved in secs 1-3 of this Act.

End.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 498
 (H) Publish Date: 3/13/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Corrections
 Title An Act expressing legislative intent re; BRU Administration and Operations
privately operated correctional facility space and services; Component All
 Sponsor House Finance
 Requester State Affairs; Finance Component No. #0694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	71.0	73.7	571.5	913.0	864.9	897.4
Travel	4.0	4.0	20.0	170.0	168.0	168.0
Contractual	85.5	5.5	44.5	26,380.9	25,687.4	25,757.4
Supplies	2.0	2.0	10.0	14.0	12.0	12.0
Equipment	3.0	0.0	61.0	44.9	0.0	0.0
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	165.5	85.2	707.0	27,522.8	26,730.3	26,832.8

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
1002 Federal Receipts						
1003 GF Match						
1004 GF	165.5	85.2	707.0	27,522.8	26,730.3	26,832.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	165.5	85.2	707.0	27,522.8	26,730.3	26,832.8

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

POSITIONS	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Full-time	1	1	9	14	13	13
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill allows the Commissioner of the Department of Corrections to enter into a contract with the City of Whittier for privately operated correctional space and services similar to those currently acquired for medium-security Alaska prisoners in a privately operated prison outside the state. The agreement must be for a minimum of 25 years. An operating component must be sufficient to support 1,200 prison beds for a period of five years from initial operation. Section 1 expresses Legislative intent that per diem costs will be between \$89 to \$91 per day.

DOC will require a Long-term Project position- Facilities Manager I to interface with the local government project during design and construction phases and through the 1st year of operations. Position's initial costs are \$71.0 per year with 3.75% annual performance adjustments included per labor agreement through FY2006. Also requires an additional \$14.5 of support costs for FY2003 and \$11.5 for FY2004-2006.

(Continued on Page 2)

Prepared by: Joseph Reeves
 Division: Administrative Services
 Approved by: Margaret M. Pugh, Commissioner
 Agency: Department of Corrections

Phone 465-3315
 Date/Time 2/27/02 2:24 PM
 Date 2/27/02

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 498 - FN#2

ANALYSIS CONTINUATION

This legislation would authorize the single largest contract in the State of Alaska's history, nearly 1 billion dollars over 25 years.

The Department of Corrections (DOC) requires funds to enable the Agency to hire a professional contractor to negotiate and execute necessary prisoner care and operational contracts with the City of Whittier and their third party Representative. Those contracts are to ensure they provide a degree of custody, care, and discipline similar to that required by the laws of this state. Estimate approximately \$185 per hour X 430 hours = \$79,950 or \$80.0 (Shown in Contractual Line of FN). This is the same amount that the Municipality of Anchorage spent on their contract negotiations for the new 400-bed Anchorage Jail. Assume all necessary contracts would be completed in FY2003.

The DOC requires funds to enter into a professional service agreement for contract compliance monitoring services of the contracts for the new Whittier Prison. The DOC must be assured that the Third-Party Operator of the facility complies with all of its contractual requirements to prevent and defend against potential litigation and/or liability for the State of Alaska. Monitoring services would include development of the monitoring instrument to include all aspects of correctional practice, on-going monthly monitoring, and reporting requirements. Estimate approximately \$100 per hour X 1,000 hours per year = \$100.0 per year (Shown in Contractual Line of FN) beginning in FY2006 (operations begins).

State oversight of the new Whittier Prison will require the following additional 8 Permanent full-time state staff in the Department's budget for the life of the contract: (assume that staff will begin work in FY2005 preparing offenders for transition from existing out-of-state facilities and developing case management files and also build in a 3.75% performance incentive adjustments per labor agreements for FY2006-FY2008)

4 Adult Probation Officer II's (Case Managers) @ \$65.0 per year = \$260.0 per year personal services
2 Nurse II (Medical Coordination) @ \$65.0 = \$130.0 per year personal services
1 Internal Auditor II (Contract Compliance) @ \$80.0 per year personal services
1 Criminal Justice Technician (Clerical/Office Support) @ \$45.0 per year personal services
Leased Vehicles for Adult Probation Officers (2) = \$15.0 per year contractual services
Travel-Supply Support costs 8 Positions @ \$6.0 per year (\$2.0 Travel, \$3.0 Contractual, \$1.0 Supplies) = \$48.0 per year.
Equipment: \$2.0 each position to cover PC's, printers, office equipment = \$18.0 (One-time).

Data processing equipment will be needed to support DOC oversight staff and to interface with the new Whittier Prison with the Department's new Offender Tracking Information System. Data processing PC's, office equipment, miscellaneous equipment including the WAN/LAN connection. \$45.0 in FY2005 (shown in equipment line of FN).

The DOC Transportation Section will require: four (4) additional PFT Prisoner Transportation Officers based at the Whittier Prison (\$85.0 each X 4 = \$260.0 personal services with a 3.75% performance incentive adjustment per labor agreements FY2007 and FY2008) and one PFT Prisoner Transportation Officer in the Anchorage Central Office (\$60.0 P.S.); safety and operating equipment for the five officers (\$14.9 Total Equipment one-time); a new Van to transport prisoners back and forth from the Whittier Prison (\$30.0 Total Equipment one-time); travel and transportation funds to move prisoners from out of state to Whittier (one-time contractual expense of \$688.0); travel and transportation costs to handle routine needs at the facility (annual expenses estimated at \$12,500 per month X 12 months = \$150.0 travel); and contractual services funds (\$7.5) and supply funds (\$4.0) to support the new transportation officers.

The annual operating costs to cover the contracting costs of housing prisoners under this bill will be approximately \$39,420.0 (shown in contractual services line of FN) each fiscal year beginning in FY2006. (1,200 beds times \$90 per day times 365 days). Note that FY2008 leap year will require an additional \$108.0 of contractual funds. Contractual services need assumes that all Architectural and Engineering will be completed in the first year (FY2003) and Construction will take approximately 2.0 years (FY2004 and FY2005) for this multi-story 1,200 bed facility. Prison operations at the new Whittier Prison is assumed to begin in FY2006.

The \$39,420.0 annual costs of incarceration will be offset by moving the remaining 585 offenders housed at the Out of State Contract facility (Central Arizona Detention Center) back to Alaska and housing them in the new Whittier Prison. 585 offenders times \$85 per day X 365 days = \$13,879.1 of savings that can be applied to the new Whittier Prison costs. An additional \$38.0 of savings will apply to leap year FY2008.

End

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 498
 (H) Publish Date: 3/13/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
 Title Whittier Private Prison BRU Revenue Operations
 Component Treasury Division
 Sponsor House Finance
 Requester House State Affairs Component No. 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel		15.0				
Contractual		80.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	95.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		15.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Bond Proceeds		80.0				
TOTAL	0.0	95.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached:

Prepared by: Deven Mitchell, State Debt Manager Phone 465-3750
 Division: Treasury Division Date/Time 2/22/02 2:46 PM
 Approved by: Larry Persily, Deputy Commissioner Date 2/22/2002
 Agency: Department of Revenue

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 498 - FN#1

ANALYSIS CONTINUATION

This legislation authorizes the Department of Corrections to enter into an agreement with the City of Whittier for the purposes of acquiring correctional facility space and services for state prisoners.

The agreement would be for a minimum of 25 years and provide at least 1,200 prison beds. The lease must provide for an agreement between the City of Whittier and one or more private, third-party contractors to construct and operate the facility. The legislation provides no requirement that tax-exempt financing be used for the facility, no maximum lease term, no maximum annual lease payment amount, and no maximum project size in either dollars or number of prisoners to be housed at the facility.

Although there is no specific provision in this legislation for the State Bond Committee to participate in structuring the financing, the Department of Revenue anticipates working with the City of Whittier to obtain the most favorable financing terms for the state – as the state's lease payments will be security for any bonds sold. The state's credit must be represented, as the pledge that will be given to bond investors is that the state will be making annual payments under the agreement entered into by the Department of Corrections. This "credit trail" quickly leads investors to the fact that the likelihood of repayment or credit risk involved with this transaction hinges on the appropriation of state general fund dollars. The foundation upon which the state has built its good credit rating has been the centralized control of the state's credit through the State Bond Committee, and the Bond Committee's involvement in this issuance is important to maintaining that credit strength. This position is further strengthened by the fact that the City of Whittier has no bonds currently outstanding, and has limited local resources available to develop this complex transaction.

The State Bond Committee, and contractors of the Bond Committee, would work with the City of Whittier to structure and market the transaction. The anticipated travel costs in the fiscal note would be paid from the state general fund, with the additional \$50,000 to \$80,000 in contractual costs to be paid from bond proceeds of the transaction.



ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 513, JUNEAU, ALASKA 99801-1182 (907) 465-4859

MEMORANDUM

April 30, 2002

To: Senator Robin Taylor, Chairman
Senate Judiciary Committee

From: Rep. John Harris *JH*

Subject: Request to schedule HB 498

CSHB 498(Fin)am, relating to a private prison in Whittier and authorizing expansion of the state's correctional facility in Bethel, has passed the House and been referred to the Senate Judiciary Committee. By this memo, I request that you schedule HB 498 for consideration by your committee as soon as your calendar will accommodate it.

Attached to this memo are background materials, including a copy of the House-passed version of the bill; fiscal notes from the departments of corrections and law; sponsor statement; sectional summary; and other supporting materials. If you require additional information, please contact John Manly of my staff at 465-4859. Thank you for your consideration of this request.

**REQUEST FOR
HEARING**



ALASKA STATE LEGISLATURE
HOUSE FINANCE COMMITTEE
STATE CAPITOL, JUNEAU, ALASKA

Sponsor Statement

CSHB 498(FIN)am - "An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space in the City of Whittier; giving notice of and approving the entry into and issuance of certificates of participation for the upgrade, expansion, and replacement of a certain correctional facility in the City of Bethel; giving notice of and approving the entry into lease-financing agreements for that project; and providing for an effective date."

CS for House Bill 498 (FIN)am authorizes the construction of a local government-financed, local government-owned, and privately managed 1000 bed, medium security prison in the City of Whittier, and authorizes the expansion of the Yukon-Kuskokwim Correctional Center in Bethel by up to 96 new beds.

Ten out of the state's 15 regional correctional facilities are currently operating over emergency capacity, the remainder approach emergency levels of prisoner overcrowding, and 600 Alaskan prisoners are housed in Arizona.

Prison overcrowding exposes inmates and staff to the risk of serious injury and death, and exposes the State to civil liability, as well as judicial intervention into the management prerogatives of the executive branch. With a total, all-time high prisoner population of 4,828, the current situation is grave and exceeds projections of the Dept. of Corrections.

This bill will create more than 500 direct and indirect, union scale construction jobs, and more than 500 permanent, direct and indirect, jobs for Alaskans associated with prison operations for the 25-year lease term authorized by the legislation. In addition, it will stimulate the Alaskan economy with the purchase of goods and services associated with an \$80-100 million construction project.

From a local perspective, a project of this magnitude will add value to the \$80 million Anton Anderson tunnel, reduce tolls and justify expanded hours of operation. Of greater importance, the prison will serve as an anchor economic engine in a community with limited economic stimulus opportunity.

Sponsor Statement

The State will benefit economically and socially by providing in-state prison beds at significantly less cost than State-operated beds; by returning Alaskan prisoners closer to the resources necessary for effective rehabilitation; by diminishing State liability for the effects of prison overcrowding; and by providing programs designed to break the cycle of Alaska Native recidivism.

With an average voter turnout of 110 residents, 88 adult residents have petitioned the Whittier City Council to adopt an ordinance authorizing the City to develop the prison in their community. The enabling ordinance passed with a unanimous vote.

The House of Representatives chose to add to the bill the Governor's number one priority for prison expansion, the Y-K Correctional Facility in Bethel. This expansion of up to 96 beds would relieve the chronic overcrowding at a critical regional facility. The CS authorizes this expansion through the use of certificates of participation for a total cost not to exceed \$17.6 million.

This sponsor statement prepared by the office of Representative John Harris (465-4859).



ALASKA STATE LEGISLATURE
HOUSE FINANCE COMMITTEE
STATE CAPITOL, JUNEAU, ALASKA

Sectional Summary for Finance CS

CSHB 498 (Fin) – “An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space in the City of Whittier; giving notice of and approving the entry into and the issuance of certificates of participation for the upgrade, expansion, and replacement of a certain correctional facility in the City of Bethel; giving notice of and approving the entry into lease-financing agreements for that project; and providing for an effective date.”

Section 1 expresses the Legislature’s intent that in Sec. 2-3 the Department of Corrections (DOC) secure additional prison space and services through a contract with the City of Whittier, similar to that currently contracted for outside the state. It further anticipates a privately-operated prison to bring competitive management styles and operations to Alaska. Finally, it expresses the intent that the initial per diem costs (excluding costs now excluded in the contract in Arizona, but including capital costs) should be in the \$89-\$91 range.

Section 2 in subsection (a) authorizes DOC to enter into a 25-year contract with Whittier for correctional space and services. Subsection (b) provides that the contract in (a) is predicated upon the City of Whittier having an agreement with one or more third-party contractors for construction and operation of the facility. It further requires that the City of Whittier procure the third-party contractors through a competitive procurement process. And it provides that the procurement requirements are satisfied if the City of Whittier follows its proscribed and lawful procedures under the general powers grant of the state municipal code (AS 29.35.010(15) (providing facilities for the confinement and care of prisoners).

Subsection (c) stipulates that the agreement authorized in (a) must cover a minimum of 1000 bcds and the payment from DOC must cover the capital costs, including debt service, and operating costs for a period of five years from initial operation of the facility. The CS also includes a provision that the operating component must include a reasonable adjustment for costs not incurred until full occupancy.

Subsection (c) further provides that the payments under the agreement must be subject to annual appropriation by the legislature; that the agreement must contain a provision

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Central Microfilm Services
Department of Education & Early Development
State of Alaska



ALASKA STATE LEGISLATURE
HOUSE FINANCE COMMITTEE
STATE CAPITOL, JUNEAU, ALASKA

Sectional Summary for Finance CS

CSHB 498 (Fin) – “An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space in the City of Whittier: giving notice of and approving the entry into and the issuance of certificates of participation for the upgrade, expansion, and replacement of a certain correctional facility in the City of Bethel: giving notice of and approving the entry into lease-financing agreements for that project; and providing for an effective date.”

Section 1 expresses the Legislature’s intent that in Sec. 2-3 the Department of Corrections (DOC) secure additional prison space and services through a contract with the City of Whittier, similar to that currently contracted for outside the state. It further anticipates a privately-operated prison to bring competitive management styles and operations to Alaska. Finally, it expresses the intent that the initial per diem costs (excluding costs now excluded in the contract in Arizona, but including capital costs) should be in the \$89-\$91 range.

Section 2 in subsection (a) authorizes DOC to enter into a 25-year contract with Whittier for correctional space and services. Subsection (b) provides that the contract in (a) is predicated upon the City of Whittier having an agreement with one or more third-party contractors for construction and operation of the facility. It further requires that the City of Whittier procure the third-party contractors through a competitive procurement process. And it provides that the procurement requirements are satisfied if the City of Whittier follows its proscribed and lawful procedures under the general powers grant of the state municipal code (AS 29.35.010(15) (providing facilities for the confinement and care of prisoners).

Subsection (c) stipulates that the agreement authorized in (a) must cover a minimum of 1000 beds and the payment from DOC must cover the capital costs, including debt service, and operating costs for a period of five years from initial operation of the facility. The CS also includes a provision that the operating component must include a reasonable adjustment for costs not incurred until full occupancy.

Subsection (c) further provides that the payments under the agreement must be subject to annual appropriation by the legislature; that the agreement must contain a provision

allowing for termination with the third-party contractor and procurement of a replacement contractor; and that the agreement is subject to a requirement that the contractor provide culturally relevant counseling to incarcerated Alaska Natives.

Subsection (d) provides that the City of Whittier may issue bonds under its municipal powers and that the bonds may be secured by the revenues from the facility.

Section 3 adds a section of uncodified law to provide that AS 33.30.031(a) does not apply to the above-described agreement. AS 33.30.031(a) is a grant of authority to the commissioner of corrections that allows placement of prisoners in non-state facilities if the commissioner determines there is insufficient suitable space in-state.

The CS adds a new Section 4, authorizing Dept. of Administration to enter a lease-financing agreement for the expansion of the Y-K Correctional Facility in Bethel. Subsection (b) authorizes the state bond committee to issue certificates of participation of up to \$17,895,000, with estimated total costs for the expansion at Y-K of \$19 million. It further sets rent obligations at \$1.7 million and total payments over the term of the COPs at \$25.5 million. Subsection (b) also provides a definition of the phrase "cost of construction."

Subsection (c) sets forth the parameters for the state bond committee in financing the projects. Subsection (d) stipulates that the lease payments are subject to annual appropriation from the legislature, from the general fund or from any other valid source. Subsection (e) describes the project as expansion of the Y-K Correctional Facility by up to 96 beds and lays out costs. Subsection (f) states that the section constitutes required notice and approval of the project by the legislature.

Section 5 repeals unneeded portions of last year's legislation authorizing private prison in the Kenai Peninsula Borough.

Section 6 provides an effective date of July 1, 2002.

Section 7 ties the effective date for Sec. 4 to the day after the day the revisor of statutes is notified that construction has begun on the private prison authorized in Whittier.



THE CITY OF WHITTIER

Gateway to the Western Prince William Sound

P. O. Box 608 • Whittier, Alaska 99693 • (907) 472-2377 • Fax (907) 472-2404

March 22, 2002

Representative John Harris
Mailstop: 3100
State Capitol
Juneau, SK 99801-1182

FAX: 465-3799

Dear Representative Harris:

There are five prison bills before the Legislature this session that represent two different ways of managing correctional services in Alaska. Senate Bills 336, 231 and corresponding House Bills 497 and 388 implement the Administration's recently released master plan "Corrections & Community Partnerships: A New Way of Doing Business." There is nothing new about the plan, as these bills simply continue Alaska's cost prohibitive approach to managing the State's prisons and jails. HB 498 (the Whittier prison) represents a fundamental shift in policy that will return prisoners from Arizona, provide statewide relief to prison overcrowding and control Corrections' runaway budget.

When costs are compared, the difference in the two approaches is immediately apparent. *Attachments 1 and 2* summarize the Department's plan. It proposes to add 1,239 beds, to ten regional facilities, for a total capital cost of 239 million dollars. With an average daily operating rate, per bed, of \$111, this plan will increase the Department of Corrections annual operating budget by 50 million dollars. Further, the plan does not even presume to return prisoners from Arizona. It simply states that the expansion may "perhaps bring home some prisoners from out of state." (pg 25 Wildwood narrative) The Whittier prison adds the same number of beds (1200), for a total capital cost of 110 million dollars. This plan returns all 750 prisoners from Arizona and adds 450 medium security beds to satisfy the Department's reported in-state demand. Under the Whittier plan, the per diem rate is capped at \$89 to \$91 per bed, thereby delivering the same number of beds, for less than half the increase in operating cost under the Administration's plan, at only half the capital outlay.

Aside from the obvious economy of scale advantage of a single facility, what accounts for the huge difference? The difference is that the Administration's plan continues to expand the cost prohibitive policy of combining jail and prison services. This

**INFORMATION
STATEMENT**

practice, along with disproportionately high personnel costs, has propelled Alaska's prison and jail costs to double the national average.

Jails hold prisoners from the time of arrest until they are sentenced. 'The purpose of a jail is lock up...no fringe benefits, no programs, just lock up. After sentencing prisoners should be transferred to prisons that are built to provide security and rehabilitation programs.

Effective prison programs require access to health, education, training and other treatment resources that do not exist in many Alaska communities. Providing the same programs in facilities throughout the State is expensive and inefficient.

In *Attachment 3* you will see that the Department of Corrections is experiencing the worst facility overcrowding in State history. There is no question that there is a serious need for in-state beds. **The question is what kind of beds, and where?**

The Administration's master plan says that "the State now has an over abundance of medium custody inmates." (pg 2) The plan adds 217 medium security beds to the Palmer Correctional Center (Sutton) and 256 medium beds in Kenai. When the Arizona prisoners are factored into the demand, the State needs 1,223 prison beds.

The Department probably needs more beds at other facilities around the State, but *until jails are used as jails, and prisons are used as prisons, it is impossible to assess statewide regional demand.* For example, half of the prisoners in some regional facilities are sentenced, with the remainder awaiting trial or sentencing. Many of these facilities may not need to expand if the sentenced felons could be moved to a new prison facility. *Attachment 4* shows that this condition exists throughout the state.

Under the Administration's plan, the State will add only 473 medium security beds in Kenai and Palmer, for a capital cost of 94.5 million dollars. For the same money (\$110 million) the Whittier plan delivers 1200 beds. But the real cost savings is seen when the combined daily capital and operating costs, per bed, are compared.

Attachment 5 is an "apples to apples" comparison of private and State operated medium security beds. The State's daily average operating cost, per bed, in Palmer and Kenai is \$89. That cost includes the Department's reported daily cost, per bed, for those institutions, plus inmate programs, administration and statewide indirect costs. It omits major medical to fairly compare with the Whittier per diem. The capital cost for the 473 beds, amortized over twenty-five years, is \$36 per day, per bed. Thus, the total cost for a State medium security bed in South Central Alaska is \$125 per day, without major medical.

The Whittier prison's combined daily capital and operating cost, per bed, is capped at \$89 to \$91, without major medical. A local government owned, but privately built and managed, medium security prison bed saves the State \$35 per day, per bed, or 15.3 million dollars per year for 1200 beds.

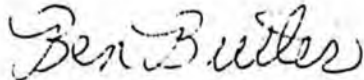
RECOMMENDATION

It is apparent that something must be done about the crisis in Corrections this session. The immediate need for 1,200 prison beds is obvious. But from the Department of Corrections' plan, it appears that the State has other legitimate prison and jail needs that may not be met by the Whittier prison.

After years of isolation in the backwaters of public policy, Whittier is sensitive to the needs of local communities throughout the State. Rather than piecemeal consideration of a variety of prison bills, perhaps there is a way to combine the Whittier plan with other obvious and compelling correctional needs.

Be that as it may, we deeply appreciate the Legislature's thoughtful consideration of the Whittier prison plan, as well as your advocacy on our behalf.

Sincerely,



Ben Butler
Mayor

enc: 6 Attachments

* Department of Corrections Master Plan
 "Corrections + Community Partnerships
 A New Way of Doing Business"
 February 2002

Summary

Location	# Beds	Type	Total Cost (Millions)
Bethel	96	Jail/Sentenced	\$18.594
Fairbanks	80	Jail/Sentenced	\$15.152
Palmer	217	Medium/Sentenced	\$44.494
Seward	150	Juvenile/Sentenced	\$28.130
Mat-Su	102	Jail	\$27.517
Anchorage	192	Jail/Special Need	\$26.428
Pt. Mac	88	Minimum/Sentenced	\$9.908
Kenai	256	Medium/Sentenced	\$50.050
Juneau	64	Jail/Sentenced	\$11.312
Ketchikan	24	Jail	\$7.478
Total Beds	1,269	Total Capital Costs	\$239.060
		For beds and Infrastructure	
\$111 Average Daily Cost Per Bed	1,269	Annual Operating Cost	\$50.1

"The State now has an overabundance of medium custody inmates"

Page 2, *Corrections + Community Partnerships - A New Way of Doing Business*, February 2002

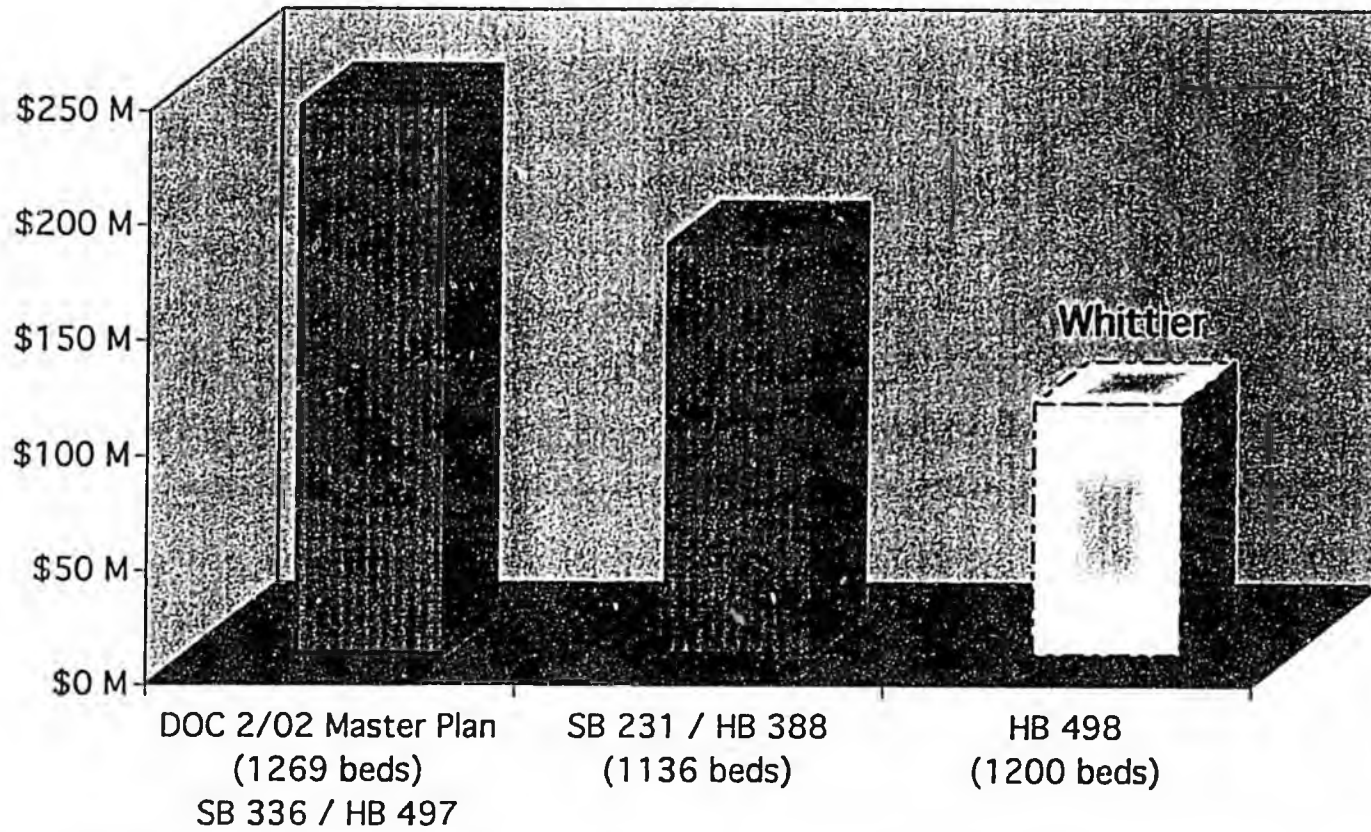
Medium Security Prison Space Demand

Palmer	217
Kenai	256
Arizona	750 (High Medium)

Total Beds Needed 1,223

* Senate Bills 336 and 231 and House Bills 497 and 398 are designed to implement this plan in whole or in phases

Proposed Capital Costs: 1200 Beds



Instate Inmate Count - Alaska Department of Corrections - February 2002

	104	403	211	233	58	170	85	78	214	176	108	486	255	113	92	Emergency Cap		2786
	102	397	200	225	52	164	82	78	207	176	104	466	249	112	88	Maximum Cap	2702	
Day	AMCC	CIPT	FCC	HMCC	KCC	LCCC	MSPT	MCCC	PCCmed	PCCmin	SIXTH	SCCC	WCC	WPT	YKCC	Totals	Over Max	
1			203	222	57			77		176				94	91	2859	106%	
2			206	224			85	77		176	108			106		2887	107%	
3			204	226				78		176				105		2907	107%	
4				226			85	75		178				104		2916	108%	
5			211	226			83	77		176				105		2921	108%	
6				226				77		176	107			104		2913	108%	
7				230			84	77		176	107			103		2917	108%	
8				231	55		82	77		175	108			111		2905	107%	
9			211				85	77		175	107			110		2920	108%	
10							85	77		175	108			109		2932	108%	
11				232		168	85	77		176	101			103		2916	108%	
12				229		169	84	77		176	100			104		2912	107%	
13			210	229			82	77		176	107			106		2915	107%	
14				227			78	77		175	104			97		2909	107%	
15				222			79	77		178				110		2928	108%	
16				223			75	77		176				111		2938	108%	
17				231			75	78		176				109		2944	108%	
18				230			81	78		175	106		253	108		2943	108%	
19				230			79	78		176	104		252	105		2946	108%	
20				226			80	78		176	106		253	109		2942	108%	
21				218	58		79	78		176	107			109		2939	108%	
22			204	216	57		79	76		176				107		2931	108%	
23				219			77	76		176				110		2951	108%	
24				218			81	75		176				110		2952	108%	
25				217			85	78		176				97		2961	109%	
26				215			82	78		176				102		2963	109%	
27				215			81	77		176	102			102		2917	107%	
28				212	57		82	77		176	102			99		2920	107%	
Avg.	113	437	214	225	61	177	82	77	228	176	110	541	261	105	104	2911	108%	104%

 = Over Maximum Capacity
 = Over Emergency Capacity

**Department of Corrections
Daily Totals**

Institution	MEN Sentenced	MEN Unsentenced	WOMEN Sentenced	WOMEN Unsentenced	Total
Anvil Mt. (Nome)	42	61	1	3	107
Cook Inlet PT	83	355	2	1	441
Fairbanks CC	47	141	10	12	210
Hiland Mt. CC	0	0	129	86	215
Ketchikan CC	15	43	3	3	64
Lemon Creek CC	101	59	3	10	173
MatSu Pre-Trial	7	72	0	1	80
Meadow Creek	78	0	0	0	78
Palmer Med. CC	100	130	0	0	230
Palmer Min. CC	173	3	0	0	176
6 th Avenue	28	68	0	4	100
Spring Creek CC	535	10	0	0	545
Wildwood CC	243	16	0	0	259
Wildwood PT	16	72	3	2	95
YKCC (Bethel)	26	87	1	7	121
Total	1496	1117	152	129	2,894

Percentages of Sentenced and Unsentenced

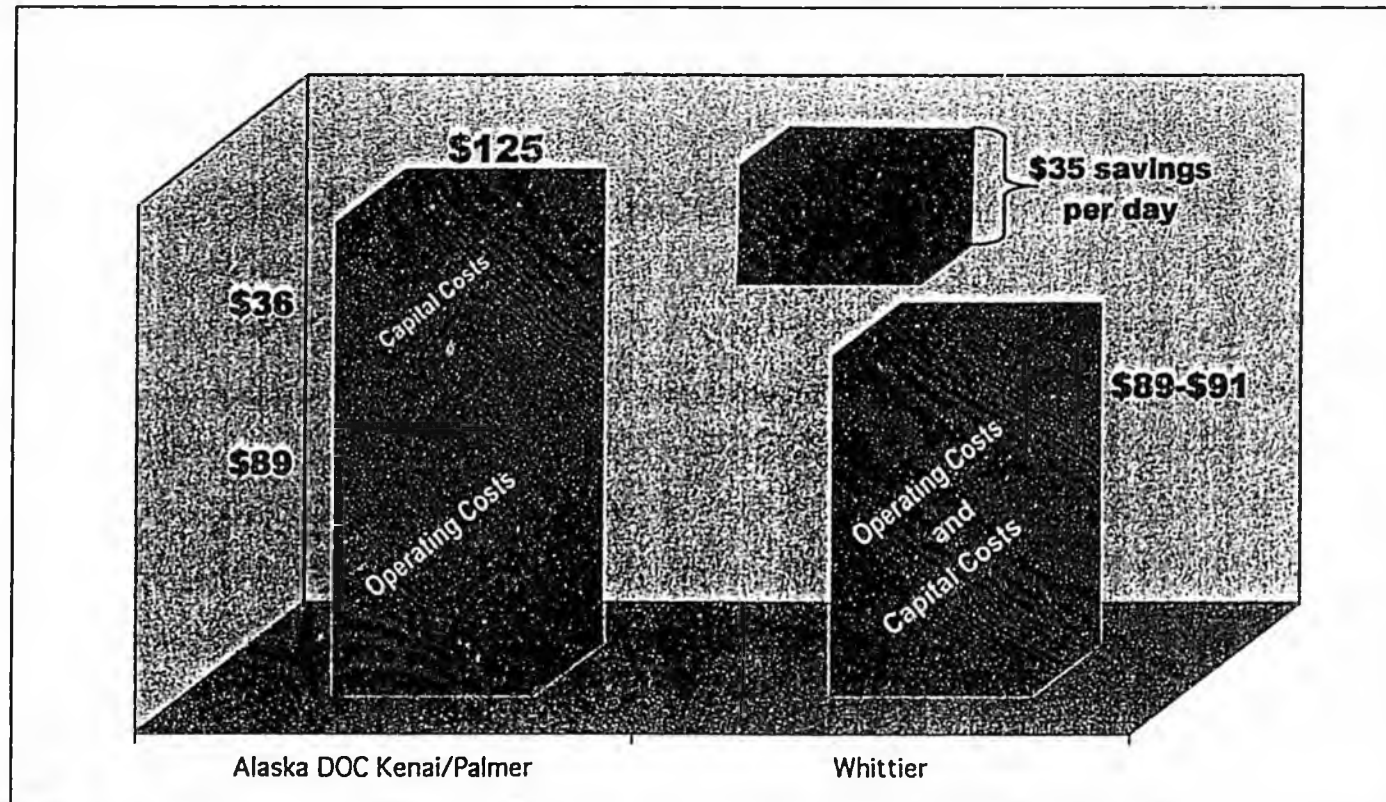
Unsentenced	Sentenced	Total
1246	1648	2,894
43%	57%	100%

Capitol and Operating Cost Comparison

Private vs. State Medium Security Beds

South Central Alaska

Attachment 5














Notes:

1. \$89 is the Wildwood and Palmer Average Daily Cost of Care, plus Inmate Programs, Admin and Support, and Statewide Indirect, less Major Medical.

2. \$36 is the Construction of the State's Planned Palmer and Kenai medium security prison additions (473 beds) amortized over 25 years.

Source: D.O.C. Daily Cost of Care (effective January 1, 2001) Published 12/7/00

Benefits to the State

-  Returns \$18 million per year to Alaska economy; economic multiplier effect benefits all of Alaska
-  325 Union construction jobs*
-  228 Indirect construction related jobs*
-  225-275 permanent prison jobs*
-  200 permanent indirect jobs*
-  Purchase of goods, materials and services associated with construction and operation over 25 years
-  35% less costly than State built and operated prison beds
-  Mitigates state liability for prison overcrowding
-  Returns Alaska prisoners nearer to Alaska rehabilitation resources and families
-  Only prison plan that focuses on Alaska Natives with programs *for* Natives *by* Natives
-  Adds value to \$90 million Anton Anderson Tunnel

* Adapted from Information by Scott Goldsmith, University of Alaska

BILL J. ALLEN
 Writer

Voice of the Times

A CONSERVATIVE VOICE FOR ALASKANS

WILLIAM J. TOBIN
 Senior editor

Time to break impasse on prisons

By **FRANK PREWITT**

ANWR, subsistence, the budget deficit, "all day long the noise of policy war rolls across the winter sea" muffling the sound of a lesser battle whose loss, rather than quality, of life is threatened. The engagement is over how best to manage Alaska's prisons and jails. Like other battles, the impasse from years of turf struggle weighs most heavily on the innocent and powerless. In Corrections' case, innocent staff and powerless offenders.

Twelve out of Alaska's 15 correctional facilities are, again, operating at emergency levels of overcrowding. Bad things happen when prisons and jails are overcrowded. Facilities and equipment break down, tempers flare, routine is disrupted, security is compromised and people get hurt, sometimes killed.

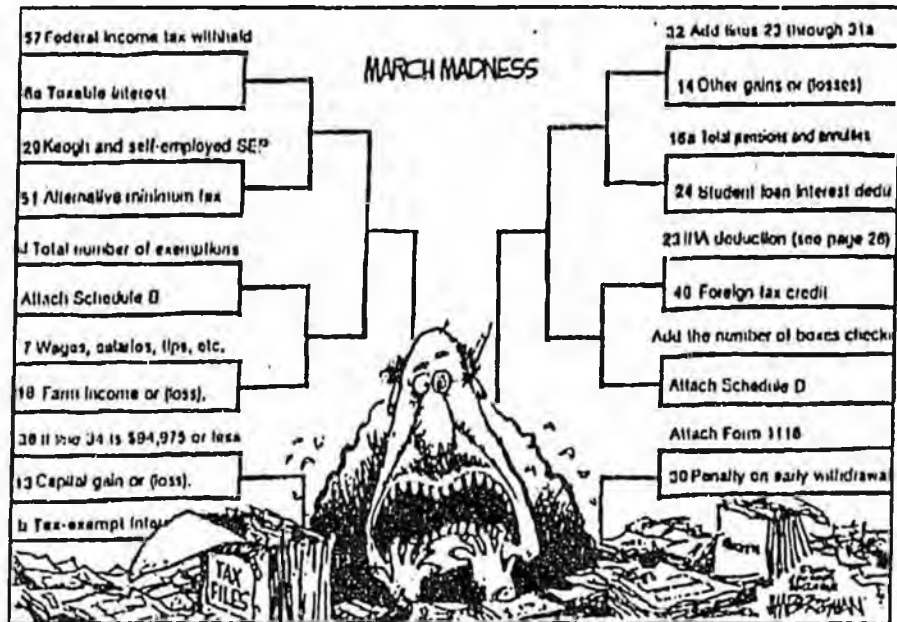
These life-threatening conditions are the result of a philosophical standoff between two legitimate, but distinctly different approaches to managing state resources.

One approach is the Department of Corrections' new master plan, "Corrections & Community Partnerships: A New Way of Doing Business." This session, four bills have been introduced to implement this plan. But rather than "a new way of doing business," the plan simply re-packages the old, increasingly impractical and cost-prohibitive approach to managing correctional services.

The other approach is the Whittier prison plan. The most obvious distinction between the two is the cost for the proposed beds. The department's plan adds 1,269 beds, to 10 facilities, for a construction cost of \$239 million. The Whittier private/public partnership adds the same number of beds, in one central facility, for a construction cost of \$110 million.

At an average daily operating cost, per bed, of \$111, the department's plan will increase the operating budget by nearly \$50 million, plus capital costs. The Whittier prison provides the same number of beds for a combined daily capital and operating cost of \$89 to \$91 per bed.

Both plans meet state and national



standards. The difference is that Corrections' plan continues the practice of housing prison and jail services under one roof, sacrificing economy of scale in favor of duplicating services throughout the state.

Jails are meant to hold prisoners from arrest to sentencing and through appeal. The mission of a jail is safe and secure confinement — no frills, no programs, just confinement. After sentencing, most convicted felons in other states and the federal system are transferred to central prisons designed to meet their security and program needs. Only prisoners with short sentences remain in local jails.

Prisons require access to mental health, adult education, vocational training and other resources that are in limited supply in many Alaska communities — resources like CIRI's Southcentral Foundation, the University of Alaska, the Alaska Native Medical Center and a host of other programs and practitioners committed to fostering behavioral change in people. Within a year or two of release, offenders should be transferred to halfway houses, close to family and the community support systems needed for successful reintegration.

Duplicating these services in facilities

throughout the state is inefficient, expensive and often ineffective because quality and continuity are difficult to maintain.

The department's plan adds 473 beds for sentenced felons in Palmer and Kenai. Add 760 Alaskan prisoners in Arizona and the state needs all 1,200 of the beds proposed by the Whittier plan. There is also a need for jail beds at other facilities around the state. But until jails are used as jails and prisons are used as prisons, it is difficult, if not impossible, to determine regional demand.

Edmund Burke said, "all government — indeed, every human benefit and enjoyment, every virtue and every prudent act — is founded on compromise and barter." It is time to compromise or barter through the impasse in Corrections by expanding state and municipal jails where there is a clear need, and by supporting private/public partnerships that can build and manage new prison beds at lower public expense.

The state simply cannot afford to become stuck fast in yesterday's way of doing business.

Frank Prewitt, an Anchorage attorney, is former commissioner of Corrections and a consultant to the Whittier prison project

HB

499

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 499(JUD)
(H) Publish Date: 4/22/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Community & Econ. Dev.
Title: Disposition of Business Assets BRU: Banking, Securities & Corporations (115)
Component: Banking, Securities & Corporations
Sponsor: House Judiciary
Requester: House Judiciary Component No.: 1233

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 RSS						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill allows corporations and other types of business entities to dispose of all or substantially all of their property and assets without having the buyers assume responsibility for the sellers' liabilities, unless the buyers expressly assume those liabilities.

The division does not anticipate any fiscal impact with the proposed legislation.

Prepared by: Franklin T. Elder, Division Director
Division: Banking, Securities and Corporations
Approved by: Commissioner Deborah B. Sedwick
Agency: Department of Community & Economic Development

Phone 465-2521
Date/Time 3/8/02 2:31 PM
Date 3/8/2002

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Rep. Norman Rokeberg, Chairman
House Judiciary Committee

DATE: May 4, 2002

RE: Request to hear HB 499

A handwritten signature in black ink, appearing to read "Norman Rokeberg".

I respectfully request that HB 499, Successor Liability for Product Liability, be scheduled for a hearing. I have attached the following for your information:

1. Copy of the bill
2. Sponsor Statement
3. Sectional Analysis
4. Zero fiscal note
5. *Savage Arms, Inc. v. Western Auto Supply Co.*
6. Outline for HB 499
7. Alaska Bar Rag article
8. Restatement 3rd of Torts
9. Various briefs on retroactivity provision

**REQUEST FOR
HEARING**

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
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Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 499 (JUD)

It is vitally important to Alaska commerce and business that a corporation, partnership or other entity that purchases assets from another company or business not be held legally responsible for the liabilities of the selling business, unless expressly agreed to by the purchasing company. However, the Alaska Supreme Court, in an interim ruling last year in *Savage Arms, Inc v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001), held otherwise under the doctrine of successor liability as it relates to products liability, and remanded the case to trial consistent with its opinion.

Generally, when one company sells all its assets to another, the acquiring corporation or company is not liable for the debts and liabilities of the selling company. Contrary to this rule, the Alaska Supreme Court adopted two theories of successor liability in cases of products liability, "mere continuation" and "continuity of enterprise." These theories are exceptions to the general rule, and allow a purchasing company to be held responsible for the product liabilities of the selling company, including those that may have been unknown at the time of the sale. While the "mere continuation" theory is a commonly recognized exception, the Supreme Court acknowledged that "continuity of enterprise" has been rejected by the *American Law Institute: Restatement (Third) of Torts*, and a vast majority of courts that have decided the issue.

The Supreme Court stated it was deciding the issue of successor liability because "...neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case..." The *Savage Arms* case is set for trial in November 2002, and before the Supreme Court's ruling becomes final following trial and appeal, we seek to respond to the invitation of the Supreme Court and fill the legislative void and declare the law of Alaska on this subject.

HB 499 specifically addresses successor liability as it relates to products liability. The bill expressly rejects the continuity of enterprise exception adopted by the Supreme Court and adopts the generally recognized exceptions to the doctrine of successor liability as listed in the Restatement of Torts. Those four exceptions are: (1) the successor expressly assumed the liability; (2) the transfer was a fraudulent conveyance; (3) the transfer constituted a consolidation or merger; or (4) the transfer was a mere continuation of the predecessor.

We believe this legislation will prevent inequities that will otherwise occur to the purchaser of assets who would be exposed to liabilities they did not anticipate and to sellers of assets who may receive less than fair market value if the purchaser must discount the purchase price to factor in unknown and unwanted liabilities.

This bill is expressly made retroactive so there will be uniformity of application.

The committee urges your support

Sponsor Statement

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

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Representative Scott Ogan, Vice-Chairman
Representative John Coghill
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Heather M. Nobrega
Counsel to Committee

Sectional Analysis for HB 499 (JUD)

- Section 1:** Legislative intent section indicating the intent of the bill is to reject the continuity of enterprise theory adopted by the Alaska Supreme Court.
- Section 2:** Creates a new provision in the Code of Civil Procedure listing the only exceptions to the general rule of successor liability.
- Section 3:** The provisions of the bill are applied retroactively.

Savage Arms, Inc.
v.
Western Auto Supply Co.

**INFORMATION
STATEMENT**

statute of limitations has run, it is allowable if it "relates back" to the date of a timely original pleading.²⁴

Civil Rule 15(c) sets out the circumstances under which an amended pleading will relate back to the original pleading:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.²⁵

According to this standard, Hebert's second amended complaint will relate back to her timely November 1995 complaint against Honest Bingo if (1) the claim asserted against FDA arises out of the same transaction or occurrence set forth in the initial complaint; (2) FDA received sufficient notice such that it would not be prejudiced in maintaining its defense on the merits; (3) FDA knew or should have known that it would have been included as a party in the original complaint but for a mistake concerning its identity; and (4) FDA received notice and

24. See *Sieman v. Rumfelt*, 825 P.2d 896, 898-99 (Alaska 1992).

25. Alaska R. Civ. P. 15(c).

26. See generally *West v. Buchanan*, 981 P.2d 1065, 1068-71 (Alaska 1999). Several federal courts have held that amendments in which a plaintiff replaces a "John Doe" defendant with a named defendant are considered amendments to add new parties and will relate back only when the conditions of Rule 15(c) are satisfied. See 6A Wright & Miller, *supra* § 1496, at 105-06; see also *Craig v. United States*, 413 F.2d 854 (9th Cir.1969).

knew or should have known that, but for a mistake concerning its identity, it would have been included as a party within "the period provided by law for commencing the action against" it.²⁶

Given the fact-intensive nature of the Rule 15(c) "relation back" test, FDA can prevail on its Rule 12(c) motion only if the undisputed facts on the face of the pleadings clearly show that Hebert's second amended complaint cannot possibly relate back to her earlier timely complaint against Honest Bingo. But the relation back issue presents the following disputed fact questions, which prevent resolution on a motion for judgment on the pleadings: whether FDA received sufficient notice of Hebert's lawsuit within the limitations period and whether FDA knew or should have known that, but for a mistake concerning identity, it would have been included as a party within the applicable period.²⁷

It is not clear from the pleadings whether FDA did or did not receive sufficient notice of Hebert's claim within the limitations period. Hebert's complaint asserted that the nature of the named business entities was unknown. It also included the permittee of the bingo game as a John Doe defendant. Hebert's amended complaint states that FDA "is one of the three permittees jointly operating Honest Bingo" and that FDA "was in fact receiving the benefits of the operation of the bingo game at the time and place in question." This statement alleges the existence of a close business relationship between Honest Bingo and FDA, or possibly a joint venture or partnership.²⁸ While admitting that

27. The parties do not dispute that the first requirement—that the claim against FDA arise out of the same basic claim in the complaint against Honest Bingo—is satisfied.

28. Hebert may have available to her a second avenue for relief. If she can demonstrate that Honest Bingo was a partnership or a joint venture of which Monroe Foundation and FDA were partners or joint venturers, it may not be necessary for the second amended complaint to relate back to the original complaint since service of the timely original complaint on Honest Bingo or the Monroe Foundation may be found sufficient to constitute service on FDA. See Alaska R. Civ. P. 4(d)(5), *Coleman v. Lofgren*, 593 P.2d 632, 634 (Alaska 1979).

it is a permittee for bingo games, FDA denied the allegations of jointly operating Honest Bingo and of receipt of benefits of the operation. Viewing the facts in the light most favorable to the motion, as we must for the purposes of the motion, it is clear that the existence of some type of close business relationship is alleged.

A fact question also exists as to whether FDA knew or should have known that but for a mistake in identity, it would have been named as a party within the applicable limitations period. As an organization under whose permit the Honest Bingo game was run, FDA may have had notice of the complaint filed against Honest Bingo and the Monroe Foundation and consequently may or should have known that it was one of the "John Does" referred to in the initial complaint against Honest Bingo. Similarly, without further evidence, we are unable to determine whether FDA either knew or should have known that it was intended as a party in the suit prior to March 27, 1996, the one hundred twentieth day after filing of the original complaint.²⁹

The pleadings on their face cannot reveal whether Hebert's second amended complaint relates back to the initial timely complaint filed against Honest Bingo. And determining whether FDA meets the standard for relation back involves a triable issue of fact. We therefore cannot affirm the granting of FDA's Rule 12(c) motion.³⁰

[13] "The court either may consider a motion for judgment on the pleadings at a preliminary hearing as provided by Rule 12(d) or may postpone its determination until trial."³¹ We conclude that where appropriate and when a motion for judgment on the pleadings is brought on the basis of the affirmative defense of statute of limitations,

29. See Alaska R. Civ. P. 4(j) (allowing 120 days after filing for service of process). The record shows that by October 31, 1996, FDA had refused to participate in settlement negotiations, but the record is silent as to how long before that time FDA was aware of Hebert's claims.

30. A Civil Rule 12(c) motion can be converted into a Rule 56 motion for summary judgment when the trial judge considers materials outside the pleadings. See Alaska R. Civ. P. 12(c). However, here the superior court explicitly stated that

the interests of justice are best served if the trial court considers the motion at a preliminary hearing instead of waiting until trial.

V. CONCLUSION

Because fact questions exist as to whether Hebert's second amended complaint bringing FDA into the lawsuit related back to her initial complaint against Honest Bingo, FDA was not entitled to judgment on the pleadings under Rule 12(c). We therefore REVERSE the decision of the superior court and REMAND for proceedings consistent with this opinion.



SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY
CO., Respondent.

Nos. 8612, 8721, 8611.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Father brought products liability action against manufacturer and distributor of allegedly defective rifle, seeking recovery for injuries sustained by his minor son when rifle misfired. Distributor filed third-party complaint seeking indemnification from manufacturer's successor. The Superior Court, Third Judicial District, Kenai, Jonathan H. Link, J., concluded that law of Alaska governed suc-

it did not consider matters outside the pleadings. Even if this court were to consider the additional materials contained in the record, it is still unclear whether FDA had notice of Hebert's lawsuit and knew or should have known that it would have been initially included as a defendant if Hebert had been aware of its identity.

31. 5A Wright & Miller § 1367, at 517. See *Pedersen v. Zielski*, 822 P.2d 903, 907 n. 4 (Alaska 1991).

cessor liability issue, entered judgment in favor of distributor on its third-party claim, and denied successor's motion to substitute distributor's insurers for distributor as real parties in interest. Successor petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) law of Alaska governed issue of liability of rifle manufacturer's successor; (2) genuine issues of material fact existed as to whether successor was liable for injuries caused by rifle; and (3) distributor's insurers were proper parties to prosecute third-party indemnity claim.

Reversed and remanded.

1. Appeal and Error \S 842(1)

The appropriate choice of law is a legal question to which the Supreme Court applies its independent judgment.

2. Appeal and Error \S 842(1)

The Supreme Court answers legal question of first impression by adopting the rule of law that is most persuasive in light of precedent, reason, and policy.

3. Appeal and Error \S 863

The Supreme Court will affirm a grant of summary judgment only if the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

4. Appeal and Error \S 893(1), 919

Generally the Supreme Court will review rulings on joinder and ratification for abuse of discretion, but will review de novo the underlying legal questions, such as whether a party is a real party in interest.

5. Action \S 27(1)

In the context of a claim that a defective product has caused personal injury, successor liability is most appropriately characterized as a torts question.

6. Weapons \S 18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alas-

ka, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

7. Corporations \S 445.1

Generally, when one corporation sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.

8. Corporations \S 445.1, 590A.1

There are four exceptions to the general rule of non-liability of successor corporations: (1) the purchaser has expressly or implicitly agreed to assume liability; (2) the asset purchase amounts to a consolidation or merger; (3) the purchasing corporation is a "mere continuation" of the selling corporation; or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.

9. Corporations \S 445.1

Liability will be imposed on a successor corporation for the debts and liabilities of the selling company under the mere continuation exception where the successor continues to use the seller's name, location, and employees, and there exists a common identity of stockholders and directors.

10. Corporations \S 445.1

The "mere continuation" exception to successor nonliability is available to claimants seeking to impose liability on a successor corporation for defective products manufactured by the predecessor.

11. Corporations \S 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, a successor corporation may be held liable for injuries caused by its predecessor's defective products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.

12. Corporations \S 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, the successor corporation may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.

13. Corporations \S 445.1

The key factors under the "continuity of enterprise" exception are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity.

14. Judgment \S 181(15.1)

Genuine issues of material fact existed as to whether rifle manufacturer's successor was liable for injuries caused by misfire of allegedly defective rifle, precluding summary judgment on third party indemnification claim filed against successor by distributor in connection with underlying products liability action.

15. Evidence \S 244(7)

Statements attributed to successor corporation's chief executive officer that successor corporation held itself out to world as legal successor to rifle manufacturer whose assets it purchased were non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in connection with underlying products liability action against distributor and manufacturer. Rules of Evid., Rule 801(d)(2).

16. Evidence \S 244(7), 318(1)

To extent journal articles were offered to prove truth of assertion that statements attributed to chief executive officer, that corporation held itself out to world as legal successor to rifle manufacturer, were in fact made by officer, authors of articles were the declarants, and such articles could not qualify as non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in underlying products liability; if articles were offered for their truth on remand, trial court would have to address author-as-declarant issue. Rules of Evid., Rule 801(d)(2).

17. Indemnity \S 15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manu-

facturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

Theodore M. Pease, Jr., and Michael W. Sewright, Burr, Pease & Kurtz, Anchorage, for Petitioner.

James M. Powell and Kimberlee A. Colbo, Hughes, Thorsness, Powell, Huddleston & Bauman, LLC, Anchorage, for Respondent.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

EASTAUGH, Justice.

I. INTRODUCTION

Can a corporation that purchases assets of the manufacturer of a rifle sold in Alaska be held liable for personal injury caused in Alaska by a defect in the rifle? The superior court held that it could, and we agree. But we reverse and remand for application of the pertinent successor liability doctrines discussed below. We also hold that the indemnity claim brought by the rifle's distributor against the successor corporation must be prosecuted by the insurers which fully discharged the distributor's personal injury liability.

II. FACTS AND PROCEEDINGS

The relevant facts are few. Jack Taylor's minor son suffered personal injuries when a defective .22 caliber rifle discharged during target shooting near Nikiski. Savage Industries, Inc. manufactured the rifle, and Western Auto Supply Company, which claimed to have acquired the rifle from the manufacturer, sold it to a retail store in Maine; the rifle was eventually resold to Jack Taylor in Alaska. Taylor sued Savage Industries in 1990 for his son's injuries; in an amended complaint, he also sought recovery from Western Auto.

Western Auto filed a third-party complaint in its name seeking indemnity from Savage

Arms, Inc., which had purchased assets from Savage Industries in 1989. Western Auto settled with the Taylors in May 1995, and its insurers paid the entire settlement amount.

At issue here are three superior court orders. The first held that Alaska law governs the issue of successor liability. The second granted Western Auto summary judgment against Savage Arms, holding Savage Arms liable as "the legal successor to Savage Industries, Inc." The third denied Savage Arms' motion to substitute Western Auto's insurers for Western Auto as the real parties in interest, but required the insurers to ratify the litigation.

The superior court denied Savage Arms' motions for reconsideration. We granted Savage Arms' petitions for review and ordered full briefing. We review the three orders under AS 22.05.010 and Alaska Rule of Appellate Procedure 402.

III. DISCUSSION

A. Standard of Review

[1-3] The appropriate choice of law is a legal question to which we apply our independent judgment.¹ The scope of successor liability in Alaska is a legal question of first impression, which we answer by adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."² In applying rules of successor liability to this case, we will affirm Western Auto's summary judgment only if the record presents no genuine issues of material fact and Western

Auto is entitled to judgment as a matter of law.³

[4] Although we generally review rulings on joinder and ratification for abuse of discretion,⁴ we review de novo the underlying legal questions,⁵ such as whether a party is a real party in interest under Alaska Civil Rule 17(a).

B. Choice of Law

Savage Arms challenges the superior court's ruling that Alaska law governs the issue of successor liability. It argues that Texas law should apply because all transactions relevant to its purchase of Savage Industries' assets occurred in Texas. In Savage Arms' view, the case before the court deals with the transaction between Savage Arms and Savage Industries, and the underlying tort does not bear on the choice of law question.⁶

Western Auto defends the superior court's decision, contending that Alaska law should apply because the underlying injury occurred in Alaska. Western Auto also reasons that successor liability is but an extension of products liability law, which is itself a tort doctrine.

Texas statutory and case law seems to disfavor both traditional and modern doctrines of successor liability,⁷ but neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case.

tion of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. See *id.* at 700-01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. See *id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

7. See Tex. Bus. Corp. Act Ann. art. 5.10(h)(2) (Vernon 1997); *Mudgett v. Payson Mach. Co.*, 707 S.W.2d 755, 758-59 (Tex. App. 1986); see also *McCoy v. American Transfer & Storage*, 946 F.Supp. 485-487 (N.D. Tex. 1996). But see *Western Resources Lp. Inv. Co. v. Garbath*, 553 S.W.2d 783, 786 (Tex. Civ. App. 1977) (making exceptions for merger, consolidation, and brand)

We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.⁸ The Second Restatement requires a separate choice-of-law analysis for each issue presented.⁹ We likewise follow this rule of *dépeçage*,¹⁰ and determine the proper choice of law on the issue of successor liability without regard to other issues in the case.

Before we can address which state's law should apply to this issue, we must first determine whether successor liability is better characterized in terms of contract or tort.¹¹ In one sense, successor liability derives from corporate and contract law, because it may require the interpretation of the contracts that governed the transfer of assets between corporations. But successor liability is also a creature of tort law when it is claimed that the successor is liable because a product defect has caused injury or death.

Other jurisdictions are split as to whether successor liability should be evaluated using the choice-of-law rules governing tort or corporate and contract law. The Fifth Circuit, for example, has held that the law of the

state with the most significant corporate contacts should apply to successor liability questions.¹² The Seventh Circuit held similarly in *Ruiz v. Blentech Corp.*¹³ But several federal district courts have explicitly applied the law of the state with the most significant torts contacts,¹⁴ and state courts have split on the question.¹⁵

[5] We decline to follow the Fifth and Seventh Circuits, because we believe that when a defective product causes personal injury, successor liability is most appropriately characterized as a torts question. Successor liability is essentially an expansion of products liability law, which derives from tort principles of negligence and strict liability, and rejects contract-derived requirements such as privity. The purpose of the modern strict liability regime "is to insure that the cost of injuries resulting from defective products [is] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."¹⁶ Treating a successor liability question solely as one of contract law would allow "the party who benefitted from

13. 89 F.3d 320, 326 (7th Cir. 1996).

14. See, e.g., *Ede v. Mueller Pump Co.*, 652 F.Supp. 656, 658 n.1 (D.Colo. 1987), *disagreed with on different grounds*, *Flouren v. Elliott Mfg.*, 867 F.2d 570, 579-80 (10th Cir. 1989); *Reed v. Armstrong Cook Co.*, 577 F.Supp. 246, 248 (E.D.Ark. 1983); *Kozet v. Amsted Indus.*, 472 F.Supp. 136, 141-42 (E.D.Mich. 1979), *declined to follow on other grounds*, *Johnson v. Ventura Group, Inc.*, 191 F.3d 732, 746 (10th Cir. 1999).

15. See, e.g., *In re Asbestos Litigation (Bell)*, 517 A.2d 697, 699 (Del. Super. 1986) (holding that corporate law should apply because key question was legal effect of contracts between corporations); *American Steamships, Inc. v. Sun Western Eng'g. S.R.L.*, 648 So.2d 565, 570 (Ala. 1994) (holding that conflict rule for tort cases should apply to corporate successor liability issue). See also David W. Pollak, *Successor Liability in Asset Acquisitions*, 1126 P.L.I. Corp. 85, 107-12 (1999) (discussing different jurisdictions' approaches to choice-of-law issues for successor liability claims).

16. *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 (Alaska 1979) (quoting *Clay v. Fifth Ave. Chrysler Co., Inc.*, 454 P.2d 244, 248 (Alaska 1969)); see also *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 697, 900-01 (1963).

8. See, e.g., *Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1227 (Alaska 1995) ("When choice of law issues arise, we commonly refer to the Restatement (Second) of Conflict of Law guidance.")

9. See Restatement (Second) of Conflict of Laws § 145, cmt. d (1971) ("The courts have long recognized that they are not bound to decide all issues under the local law of a single state."); *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996) (holding that under the Second Restatement test, "[a] court therefore conducts a separate choice of law analysis for each issue in a case, attempting to determine which state has the most significant contacts with that issue.")

10. See Black's Law Dictionary 448 (7th ed. 1997) (defining *dépeçage* as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); see also Bryan A. Garner, *A Dictionary of Modern Legal Usage* 2666 (2d ed. 1995).

11. See, e.g., *Ruiz*, 89 F.3d at 326 ("[T]he courts of several states have struggled to decide whether [successor liability law] is a part of corporate law or tort law.")

12. See *Wilde v. Blentech Mach. Mfg. Co.*, 750 F.2d 368, 374 (5th Cir. 1985).

1. See *Lynchon v. Champoux*, 752 P.2d 999, 1001 (Alaska 1988).

2. *Gunn v. Hu*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

3. See *Newton v. Magill*, 872 P.2d 1213, 1215 (Alaska 1994).

4. See *Fairbanks N. Star Barotach v. Knutik Garco, Inc. & Assoc.*, 795 P.2d 793, 802-03 (Alaska 1990), *vacated in part on other grounds*, 823 P.2d 632 (Alaska 1991).

5. See *Lynchon*, 752 P.2d at 1001.

6. Savage Arms invokes our opinion in *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968), in which we held that Alaska law governs the ques-

the bargain [to] escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated."¹⁷ Such a result would undermine the principles that govern our products liability law. And although Savage Arms argues that the public policy behind products liability law is of "little interest" here because Western Auto purchased liability insurance that fully protected it, Western Auto's suit does not pursue a commercial cause of action. Because Western Auto's insurers settled the personal injury suit, Western Auto now stands in the tort plaintiff's shoes.

Thus, in context of a claim that a defective product has caused personal injury, we think successor liability is more aptly treated as a matter of tort law.

[6] Having determined that successor liability in a products liability context is best characterized as part of the law of tort, we must now decide which state's laws should apply to the case at hand. The Second Restatement states that "with respect to an issue in tort," courts should look to the local law of the state with the "most significant relationship" to the parties and the occurrence.¹⁸ We conclude that Alaska has the most significant tort contacts with this legal issue. We look in particular to the underlying tort action that gave rise to this litigation. Jack Taylor and his son were both Alaska residents when the accident occurred. Taylor purchased the rifle in Alaska, and the rifle was being used here, where its defect injured his son. The defect that injured Taylor's son potentially endangered any person within a lethal vicinity while the rifle was being used in Alaska. Finally, Jack Taylor litigated his suit against Western Auto in Alaska's state courts. Because the relation-

ship between the tort litigants is centered in Alaska, Alaska law should govern.

We therefore conclude that the superior court did not err by concluding that Alaska law applies to the issue of successor tort liability.

C. Successor Liability

Savage Arms challenges Western Auto's summary judgment on the issue of successor liability. It argues that it should not be held liable even if Alaska law applies. This argument raises issues of first impression in Alaska.

[7, 8] Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.¹⁹ Courts have traditionally recognized four exceptions to this rule of non-liability, where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the asset purchase amounts to a consolidation or merger, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.²⁰ More recently, some courts have recognized three additional "modern" exceptions to the rule of non-liability: the "continuity of enterprise," "product line," and "duty-to-warn" exceptions.²¹

Western Auto argues that we should adopt any one of three different successor liability doctrines in this case: the traditional "mere continuation" exception and the modern "continuity of enterprise" and "product line" exceptions. We first identify which exceptions are available under Alaska law, and then remand for the factual analysis necessary to ascertain whether successor liability is proper in this case under any of the approved

(d) the place where the relationship, if any, between the parties is centered
Id. § 145(2). We evaluate these factors and contacts in light of their "relative importance" to the particular issues in each case. *Id.*

19. See Pollak, *supra* note 15, at 99, see also Richard A. Epstein, *Torts* 400-02 (1999).

20. See Pollak, *supra* note 15, at 100-03.

21. See *id.* at 103-08.

exceptions. The superior court did not specify which exception justified its imposition of successor liability against Savage Arms.

1. The traditional "mere continuation" exception

[9] Courts have traditionally imposed liability on successor corporations where the successor corporation is "merely a continuation" of the selling corporation.²² The primary elements of the "mere continuation" exception include use by the buyer of the seller's name, location, and employees, and a common identity of stockholders and directors.²³ This well-established exception stems from judicial refusal to honor a transaction which is "little more than a shuffling of corporate forms, lacking any fundamental change with independent significance."²⁴

[10] The "mere continuation" exception is available to claimants seeking to impose liability on a successor corporation for products manufactured by a predecessor. Although Savage Arms argues that we should not adopt this exception, we disagree, because this is a well-recognized exception, and we see no reason to reject its application here. We therefore hold that it is available under Alaska law.

2. The modern "continuity of enterprise" exception

Western Auto also asks us to adopt the modern "continuity of enterprise" and "prod-

22. See *id.* at 101.

23. See *id.*; see also Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996) ("The doctrine ... is applicable only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names.").

24. Blumberg, *supra* note 23, at 371.

25. Under the "product line" exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products. See *Ray v. Alad Corp.*, 19 Cal 3d 22, 136 Cal Rptr. 574, 560 P.2d 3, 5-11 (1977); 63 Am Jur.2d *Products Liability* § 133 (1997). Pollak, *supra* note 15, at 104-10. Be-

uct line" exceptions. We conclude that the facts in this case are ill-suited to the "product line" exception, and we therefore decline to consider it at this time.²⁵ We do, however, adopt the "continuity of enterprise" exception, for the reasons explained below.

[11, 12] The "continuity of enterprise" exception is an outgrowth of the traditional "mere continuation" theory of liability.²⁶ Under this exception, a successor corporation may be held liable for injuries caused by its predecessor's products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.²⁷ The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.²⁸

[13] Thus, whereas the traditional "mere continuation" exception depends on the existence of identical shareholders, the "continuity of enterprise" looks beyond that formal requirement and considers the substance of the underlying transaction.²⁹ The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*,³⁰ are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation

cause the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

26. See Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 848 & n 10 (1999).

27. See 63 Am Jur.2d *Products Liability* § 129.

28. See *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873, 883-84 (1976); Cupp, *supra* note 26, at 848-49.

29. See 63 Am Jur.2d *Products Liability* § 130.

30. 397 Mich. 406, 244 N.W.2d 873 (1976).

of corporate identity.³¹ This is a limited exception that looks past the identity of shareholders and directors, and focuses on whether the business itself has been transferred as an ongoing concern.

Only a minority of courts have thus far adopted the "continuity of enterprise" exception.³² And the American Law Institute recently declined to adopt both this exception and the "product line" exception for the Restatement (Third) of Torts.³³ The Third Restatement's commentary indicates that the vast majority of courts considering these modern exceptions have rejected them.³⁴ Although there is some dispute about exactly how many jurisdictions have decided the issue,³⁵ it is clear that a majority of jurisdictions have not adopted the "continuity of enterprise" exception.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.³⁶ For example, they assert that a buyer interested in purchasing substantially all of the assets of a corporation will, in some cases, decline to make the purchase if it will be forced to assume liability for past product defects as well. As a result,

31. See *id.* at 883-84; see also Pollak, *supra* note 15, at 103; 63 *Ain Jur 2d Products Liability* § 132.

32. See Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 215-19 (1998).

33. See *id.* § 12 cmt. b at 210 & Reporters' Note at 215-19.

34. See *id.* § 12, Reporters' Note at 217-18. The Restatement identifies only three states where courts have adopted the "continuity of enterprise" exception: Alabama, Michigan, and New Hampshire. See *id.* at 219.

35. The Third Restatement lists twenty-two states in which state courts (or federal courts applying state law) have rejected both the "continuity of enterprise" and "product line" exceptions. See *id.* § 12, Reporters' Note at 217-18. But one commentator estimates that only eighteen jurisdictions as of mid-1998 had actually rejected the modern exceptions, when considering those states whose highest courts had yet to rule on the issue. See Cupp, *supra* note 26, at 852-54. Pro-

some corporations will be unable to find purchasers, and will instead be forced to sell off the corporate assets on a piecemeal basis, squandering any accumulated goodwill.³⁷ Such a piecemeal sale would give a corporation certain economic advantages: the seller's shareholders would be able to receive full value for the remaining assets, and successor liability would not flow to the purchasers under any of the traditional or modern theories.³⁸ But a piecemeal sale would cause an ongoing business to be lost to society, and potential claimants would be no better off.

This argument, although compelling in theory, seems to paint an incomplete picture of the economic realities. If successor liability is expanded to include the "continuity of enterprise" exception, some companies indeed might be unable to find buyers for their ongoing businesses. But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales.³⁹ And our research has not disclosed studies that have so concluded.

We also note that permitting successor liability under the "continuity of enterprise"

lessor Cupp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. See Cupp, *supra* note 26, at 854 n. 44.

36. See Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211; Epstein, *supra* note 19, at 400-01; Michael D. Green, *Fairness and Successor Liability: The Limits of the Common Law Process*, 8 *Kan. J.L. & Pub. Pol'y* 119, 121 (1998).

37. See Epstein, *supra* note 19, at 401; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

38. See Epstein, *supra* note 19, at 401-02; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

39. See, e.g., Restatement (Third) of Torts: Products Liability § 12 cmt. b at 211 & Reporters' Note at 215-21; Epstein, *supra* note 19, at 400-02; Green, *supra* note 36, at 121.

exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.⁴⁰ When firms contract for an asset transfer where the basic enterprise is to be continued, they negotiate to a price that reflects the fair market value of the transfer, taking heed of the risk of future claims.⁴¹ The purchasing firm will value any potential successor liability claims at least at the incremental cost of obtaining insurance coverage against successor liability for them.⁴² Where that insurance is too expensive or is unavailable, negotiations could collapse, and the firm will either continue to exist (and be subject to liability claims) or liquidate (and future victims will receive no recovery). But in many cases, we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims. The posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects.⁴³

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."⁴⁴ In many cases, a predecessor manufacturing company will be purchased by a larger, more financially sound corporation. The rule we adopt here does not limit injured plaintiffs' recovery to the value of the assets

40. See Cupp, *supra* note 26, at 661-77.

41. See Michael D. Green, *Successor Liability: the Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 *Cornell L. Rev.* 17, 40 (1986).

42. See *id.* at 40; Cupp, *supra* note 26, at 662 n. 50.

43. See Epstein, *supra* note 19, at 402 (explaining that corporations are learning to navigate modern successor liability rules).

44. See Restatement (Third) of Torts: Products Liability § 12 cmt. b., at 210-11.

45. *Id.* at 210.

purchased by the successor corporation, so there could conceivably be situations in which product defect victims would receive a larger recovery than they conceivably could have received had the predecessor company remained an ongoing concern, and been bankrupted by the total claims. The Restatement authors view the added recovery potential as an "injustice" to the successor corporation.⁴⁵ But we think the Restatement analysis defeats the assumptions behind tort law. We assume that meritorious claims will be paid; that they are sometimes not paid due to insolvency does not change that underlying assumption. To characterize as a "windfall" full recovery for losses caused by product defects unjustly challenges the legitimacy of the injuries suffered. And once again, purchasing corporations can attempt to account for this risk of loss in the purchase price.

The other objections to expanded successor liability rules are also not dispositive. Successor liability potentially conflicts with maximizing the value received for bankrupt estates.⁴⁶ But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.⁴⁷ Also, some courts have argued that the modern exceptions impose liability on entities having no causal relationship with the harm.⁴⁸ But basic to the "continuity of enterprise" exception is the preservation of a substantial portion of the goodwill of the predecessor corporation; the successor is fundamentally the same enterprise as the predecessor. When a firm negotiates to purchase another corporation, keeping the

46. See Michelle M. Morgan, *The Demol of Future Tort Claims in In Re Piper Aircraft: Will the Court's Quick-Fix Solution Keep the Debtor Flying High or Bring it Crashing Down?*, 27 *Loy. U. Chi. L.J.* 27, 36-37 (1995).

47. Nonetheless, federal bankruptcy law may govern whether potential claims for injuries not yet incurred may be discharged in a bankruptcy proceeding. In this case, the First Circuit has ruled that there is no discharge of Western Auto's claims. See *infra* note 50.

48. See, e.g., *Polius v. Clark Equip. Co.*, 802 F.2d 75, 82-83 (3d Cir. 1986); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1144 (Colo. App. 1992); see also Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 210.

"enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Finally, this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally.⁴⁹ Corporations are currently motivated to correct defects to reduce their own exposure to liability, but the traditional successor liability regime undermines that incentive by giving the manufacturing corporation another option: offering itself for sale to a new investor. Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations' market value in event of sale.⁵⁰

Some commentators,⁵¹ including the Restatement authors,⁵² reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts.⁵³ For example, the four traditional exceptions were created by the courts.⁵⁴ There is also some suggestion that

legislation in other states has failed to address these problems.⁵⁵ We see no reason to await legislation before addressing this issue.

We therefore adopt the "continuity of enterprise" exception to the general rule of nonliability for corporate successors.

3. Propriety of the summary judgment order

[14] Although we here approve the "mere continuation" and "continuity of enterprise" exceptions, it is nonetheless necessary to reverse Western Auto's summary judgment order for two reasons. First, material factual disputes remain unresolved. Many key facts are uncontested, but certain important facts (such as the percentage of stock former shareholders in Savage Industries own in Savage Arms) are not established by the record. Second, the uncertainty regarding the proper legal standard governing successor liability appears to have prevented the parties from developing the record to address the applicable legal tests. We consequently remand for consideration of the "mere continuation" and "continuity of enterprise" exceptions in the context of this case.

We also note that Savage Arms is not shielded from liability by the fact that it purchased Savage Industries' assets through a bankruptcy proceeding. The First Circuit ruled in a related aspect of this case⁵⁶ that Western Auto and Taylor were not "afforded appropriate notice of the material terms of the all-asset transfer, nor of the chapter 11 plan" and therefore that the parties to the transfer, Savage Industries and Savage

Arms, "are not entitled to rely on the protective jurisdiction of the bankruptcy court."⁵⁷ The failure to give proper notice and to seek approval of the plan from the bankruptcy court "precluded a legitimate basis for enjoining the Alaska state court action."⁵⁸

D. Journal Articles as Inadmissible Hearsay

[15, 16] Savage Arms argues that the superior court abused its discretion by considering journal articles Western Auto submitted in support of its summary judgment motion. These articles included statements attributed to Savage Arms' chief executive officer supporting Western Auto's argument that Savage Arms holds itself out to the world as the legal successor to Savage Industries. Savage Arms asserts that the articles contain multiple levels of hearsay. Since we remand for other reasons, it is unnecessary to discuss this issue at length. But we address it briefly here because it may recur on remand. For purposes of our discussion, we assume that the CEO uttered the statements attributed to him.

In effect, the statements were uttered at least twice, first by Savage Arms' CEO and ultimately by the articles' authors upon publication. When the statements were first uttered, the declarant was Savage Arms' CEO and the statements were not hearsay, because they were admissions by a party-opponent.⁵⁹ But when the articles were offered to prove the truth of their assertions—that the CEO had made the statements the articles attributed to him—their authors became the declarants whose out-of-court statements were being offered into evidence. If the articles were offered for their truth, they normally would have been inadmissible hearsay.⁶⁰ The superior court rejected Savage

Arms' hearsay objection, but so far as we can tell from the record, did not address the author-as-declarant issue. Whether it must do so on remand depends on whether the articles are offered for the truth of the matters they assert.

E. Real Parties in Interest

[17] Western Auto's liability insurers, Allstate Insurance Company and Certain Underwriters at Lloyd's of London (Underwriters), fully paid the expenses of defending and settling the Taylor lawsuit against Western Auto. Savage Arms moved to substitute the insurers as the plaintiffs in Western Auto's indemnity action. Savage Arms claimed that the insurers were the only real plaintiffs in interest under Alaska Civil Rule 17(a).⁶¹ The superior court denied the motion, but at Western Auto's suggestion allowed the insurers to ratify the action or be subject to substitution.

We agree with Savage Arms that it was error not to substitute Western Auto's insurers as the real parties in interest. Western Auto admits that Allstate and the Underwriters are its fully subrogated insurers. Western Auto has identified no possible remaining interest it has in the indemnity claim. The superior court reasoned that Western Auto had an interest in the claim that was "difficult to define," and that joinder of the insurers might present an inaccurate picture to the jury. The court did not explain what Western Auto's interest was.

Although we have not previously addressed the proper procedural treatment of fully subrogated insurers, we held in *Municipality of Anchorage v. Baugh Construction & Engineering Co.*⁶² that ratification by partially subrogated insurers is an acceptable

whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.... [R]atification, joinder, or substitution [of the real party in interest] shall have the same effect as if the action had been commenced in the name of the real party in interest.

49. See Cupp, *supra* note 26, at 860-63 (arguing that greater successor liability will channel responsibility back to original product manufacturer).

50. See *id.* This incentive holds true until the firm knows that its liabilities will outstrip any goodwill available to be sold. But companies in that position would not be relevant to this successor liability issue, because no buyer would pay for an ongoing concern valued at less than its assets.

51. See, e.g., Green, *supra* note 41.

52. See Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 216-17.

53. See Cupp, *supra* note 26, at 877-78.

54. See Cupp, *supra* note 26, at 878.

55. See Cupp, *supra* note 26, at 879-81.

56. In April 1992 Western Auto filed a third-party complaint against Savage Arms for indemnification or apportionment of damages. Savage Arms contended that Western Auto's claims were barred by the terms of Savage Industries' bankruptcy. The First Circuit Court of Appeals ultimately resolved the issue in Western Auto's favor in December 1994. See *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 723 (1st Cir.1994).

57. *Id.*

58. *Id.* at 722.

59. See Alaska R. Evid. 801(d)(2) (defining statements by party opponents as non-hearsay).

60. Alaska R. Evid. 802.

61. Alaska Civil Rule 17(a) provides in relevant part:

Every action shall be prosecuted in the name of the real party in interest.... [A] party with

62. 722 P.2d 919 (Alaska 1986).

substitute for joinder.⁶³ We there reasoned that Rule 17(a) did not require joinder of a partially subrogated insurer because ratification satisfied the policy concerns underlying that rule.⁶⁴ We explained that ratification is generally adequate in cases involving partially subrogated insurers because it protects against multiple lawsuits, ensures that the interested party makes a formal appearance in court, ensures that the party is subject to any court orders concerning discovery or attorney's fees, and assures that all interested parties bear the burdens of claims litigated on their behalf.⁶⁵ Implicitly acknowledging the key distinction between partially and fully subrogated insurers, we noted that the insured party was not a sham plaintiff because its claim had not been paid in full by the insurer:

We further note that [the insurer's] absence as a named party in this case does not mean that the action would be prosecuted by a sham plaintiff. The municipality was a real party in interest as the amount of its claim had not been paid in full by [the insurer].⁶⁶

This language implies that where, as here, the insurer *has* paid the full amount, the insured would be a sham plaintiff.

We have relied before on a Montana Supreme Court case, *State ex rel. Naud's T.V. & Appliance Inc. v. District Court*,⁶⁷ in determining the proper procedural treatment of insurers.⁶⁸ The plaintiffs in *Naud's T.V.* had received varying levels of compensation from their partly and fully subrogated insurers.⁶⁹ Although the court held that partially subrogated insurers could opt for ratification rather than substitution or joinder, it effectively upheld a lower court's ruling requiring substitution of fully subrogated insurers.⁷⁰

Critical commentary bears out the significance of this distinction:

63. See *id.* at 926.

64. See *id.* at 925-26.

65. See *id.*

66. *Id.* at 926.

67. 168 Mont. 456, 543 P.2d 1336 (1975).

68. See *Baugh*, 722 P.2d at 926.

The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest. This seems sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.⁷¹

We find this reasoning persuasive, and conclude that it was error not to require the insurers to substitute for their insured.

IV. CONCLUSION

We REVERSE the order denying Savage Arms' motion to require Western Auto's insurers to substitute for Western Auto, VACATE the orders imposing successor liability on Savage Arms, and REMAND for application of the doctrines adopted today and for further proceedings.



Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, An-

69. See *Naud's T.V.*, 543 P.2d at 1337.

70. See *id.* at 1338-39.

71. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1546, at 355-56 (2d ed 1990) (footnotes omitted).

chorage, Eric T. Sanders, J., and wife appealed. The Supreme Court, Carpeneti, J., held that: (1) record supported finding that \$25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth \$10; (2) record supported assignment of 57% of marital property to wife; (3) wife was not entitled to have husband pay her future medical costs; (4) wife was not entitled to bifurcation of legal divorce; (5) wife was not entitled to travel and living expenses incurred by attending trial in Alaska; and (6) attorney fee award to wife of \$3,186 was sufficient.

Affirmed.

1. Divorce ⇨252.1

The trial court has broad discretion in fashioning property divisions in divorce actions. AS 25.24.160(a)(4).

2. Divorce ⇨286(8)

The valuation of marital property is a factual determination which will not be set aside on appeal unless it is clearly erroneous. AS 25.24.160(a)(4).

3. Divorce ⇨286(8)

A valuation of marital property is clearly erroneous and should be set aside if the reviewing court is left with a definite and firm conviction on the entire record that a mistake has been made. AS 25.24.160(a)(4).

4. Divorce ⇨286(5)

The superior court's equitable distribution of property is reviewable under the abuse of discretion standard, and will not be disturbed on appeal unless it is clearly unjust. AS 25.24.160(a)(4).

5. Divorce ⇨223, 286(4)

The award of attorney's fees in divorce actions is within the broad discretion of the trial court, and the court's decision in that regard will not be reversed unless it is arbitrary, capricious, or manifestly unreasonable.

6. Divorce ⇨253(3)

Record in divorce case supported finding that, for equitable distribution purposes, \$25,000 note that husband received from parties' son in connection with his purchase of

parties' business was worth \$10; husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

7. Divorce ⇨253(2)

Record in divorce case supported assignment of 57% of marital property to wife, despite her claim that trial court did not sufficiently consider wife's age, i.e., 60; court did not find wife's age to be important because husband was of comparable age and both were approaching retirement. AS 25.24.160(a)(4).

8. Divorce ⇨282, 283

Wife waived appellate of her claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's station in life during marriage; wife neither raised that issue before superior court nor presented evidence or argument in her briefs that would have made her station in life relevant to property distribution. AS 25.24.160(a)(4).

9. Divorce ⇨253(2)

Record did not support claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's health; court simply was not convinced that wife needed any surgeries that she alleged, court also commented that wife's treatment might have been overly expensive, and court concluded that wife's health concerns were not so serious as to prevent her from continuing to work in future. AS 25.24.160(a)(4).

10. Divorce ⇨286(9)

Even if trial court incorrectly concluded in divorce case that wife was capable of being gainfully employed, any such error was harmless with respect to marital property division, as court valued wife's future earnings at zero. AS 25.24.160(a)(4).

11. Divorce ⇨239

Record in divorce case supported trial court's refusal to require husband to pay wife's future medical costs; superior court found that because wife received in excess of 50% of marital estate and because she was

MEMORANDUM

RE: Procedural Status of Western Auto Supply Co. (now Allstate Insurance Company and Certain Underwriters at Lloyd's of London) pending in the Superior Court for the State of Alaska, Third Judicial District at Kenai, Case No. 2KN-90-922 CI

DATE: February 12, 2002

Western Auto v. Savage Arms, Inc. is still a pending case in the Kenai Superior Court. The decision of the Supreme Court in *Savage Arms, Petitioner v. Western Auto Supply Co., Respondent*, 18 P.3d 49 (Alaska 2001) was an interlocutory decision by the Supreme Court on a petition for review. Western Auto and Savage Arms, Inc. filed cross-motions for summary judgment on the question of whether Savage Arms was liable as the "legal successor to Savage Industries, Inc." Judge Link, the Superior Court judge in Kenai, ruled in favor of Western Auto. This was not a final judgment as there were other issues remaining unresolved which would have to be decided by trial if not disposed of by additional pretrial motions.

Only final judgments of the Superior Court can be appealed to the Alaska Supreme Court. However, Appellate Rule 610 provides for an interlocutory review by the Supreme Court, before there has been a final judgment, at the discretion of the Alaska Supreme Court for issues which meet the criteria set forth in Appellate Rule 610. One of the grounds is if the decision of the lower court: ". . . involves a controlling question of law on which there is a substantial ground

for difference of opinion and an immediate review of the order may materially advance the termination of the proceedings”

Savage Arms petitioned the Supreme Court for a review of Judge Link's decision under this procedure. The Supreme Court granted the petition and ordered full briefing. Proceedings in the Superior Court were stayed pending the decision by the Supreme Court on the petition for review. After the Supreme Court decision (first handed down on March 2, 2001, with rehearing denied on April 4, 2001) the case was remanded to Judge Link for further proceedings. Trial has been scheduled by Judge Link for November of 2002.

(In its decision, the Supreme Court also ruled that because all of Western Auto's defense costs and attorney's fees and the entire amount of the settlement by Western with the plaintiff, Taylor, had been paid by Western Auto's insurers, Allstate and Certain Underwriters at Lloyd's, those insuring entities were the proper parties plaintiff and in compliance with that ruling, Allstate and Certain Underwriters at Lloyd's have been substituted in place of Western Auto as the plaintiff.)

Thus, *Allstate Insurance Company and Certain Underwriters of Lloyd's v. Savage Arms, Inc.* is very much still a pending case and there has been no final judgment. If legislation past by the legislature is made specifically retroactive and/or curative, it could be expected that the Alaska courts would apply such new legislation to the pending case in spite of the Supreme Court's prior ruling. See *Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980).

HB

501

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 501
 (H) Publish Date: 3/18/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to the use of unclaimed BRU Civil Division
property to pay court-ordered restitution; . . ." Component Collections and Support
 Sponsor House Judiciary Committee
 Requester House Judiciary Committee Component No. 2210

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill allows the use of unclaimed property to satisfy restitution and related interest, collection costs, and attorneys fees that are ordered by the court and owed by the owner of the property. Under the bill, if the owner of unclaimed property owes restitution as a result of a criminal or delinquent act, the Department of Revenue would be able to pay the victim the fair market value of the unclaimed property to satisfy the judgment.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 3/8/02 8:37 AM
 Approved by: Kathryn Daughhetae for Bruce M. Botelho, Attorney General Date 3/8/2002
 Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 501
(H) Publish Date: 3/18/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
Title Unclaimed Property & Restitution BRU Revenue Operations
Component Treasury Division
Sponsor House Judiciary Committee
Requester House Judiciary Committee Component No. 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would not require an increased appropriation for the division.

This legislation would allow the Department of Revenue's Unclaimed Property Section to pay -- as restitution or to satisfy a judgment -- any unclaimed property owed to a convicted criminal.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469
Division Department of Revenue Date/Time 3/13/02 4:59 PM
Approved by: Larry Persily, Deputy Commissioner Date 3/13/2002
Agency Department of Revenue

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Rep. Norman Rokeberg, Chairman
House Judiciary Committee

DATE: April 18, 2002

RE: Request to hear HB 501

A handwritten signature in black ink, appearing to be "N. Rokeberg", written over the "FROM" line of the memorandum.

I respectfully request that HB 501, Unclaimed Property & Restitution, be scheduled for a hearing. I have attached the following for your information:

1. Copy of the bill
2. Sponsor Statement
3. Two zero fiscal notes
4. Letters of support

**REQUEST FOR
HEARING**

ALASKA STATE LEGISLATURE

HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Scott Ogan, Vice-Chairman
Representative John Coghill
Representative Jeannette James
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4990
Fax: (907) 465-2040

Heather M. Nobrega
Counsel to Committee

Sponsor Statement for HB 501

This legislation would amend Alaska's Unclaimed Property Code, AS 34.45, to give the Department of Revenue the authority to pay to the state or an individual or business as restitution, or to satisfy a judgment, any unclaimed property owed to a criminal. The department already has the authority to take unclaimed property owed to criminals and to use the assets to pay toward the individual's child support, but the department cannot use the assets to pay other claims without additional court action.

The need for this legislation became apparent last year when the Department of Revenue received several claims for property from prisoners serving sentences in state correctional facilities. The staff at the Unclaimed Property Section inquired if any of the property owners owed restitution or court-appointed attorney fees associated with their criminal cases. The staff learned that in two cases there were unpaid court judgments against the property owners.

In both cases, the Unclaimed Property Section had little choice under existing statute but to release the funds to the inmates with a letter reminding them of their outstanding judgments. As one might imagine, both inmates promptly deposited the checks into their own accounts. Each unclaimed property payment was in excess of \$500.

Under existing statute, the Department of Law, an individual or a business must file a Writ of Execution with the court to obtain approval to seize any unclaimed property and to apply the money toward unpaid judgments. The resources used to research, process and file another court document when an existing judgment to pay restitution or attorney fees is already on file seem redundant.

Enacting this legislation would allow the Department of Law to submit proof of court-ordered restitution orders or judgments in criminal and delinquency cases to the Department of Revenue, which would then honor the orders and forward to the appropriate party any unclaimed property owned by incarcerated criminals. This legislation would not apply to judgments in civil cases.

Although this legislation would not affect many cases each year, it would ensure that criminals do not receive unclaimed property until they have first satisfied all of the court judgments against them. This legislation would not diminish the priority of child support cases, which would retain first position for any unclaimed property owned by criminals.

The committee urges your support of this bill.

HB 510: 3/4/02

Sponsor Statement

TONY KNOWLES, GOVERNOR

DEPARTMENT OF REVENUE

TREASURY DIVISION

333 WILLOUGHBY AVENUE, 11TH FLOOR
P.O. BOX 110405
JUNEAU, ALASKA 99811-0405
PHONE: (907) 465-2350
FAX: (907) 465-2394

March 7, 2002

The Honorable Norman Rokeberg
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Dear Representative Rokeberg:

The Department of Revenue Treasury Division manages the Unclaimed Property Program of the State of Alaska. We would like to offer our support for HB501, which amends AS 34.35 and gives us the authority to pay unclaimed property owed to a criminal as restitution or to satisfy a judgment against that criminal.

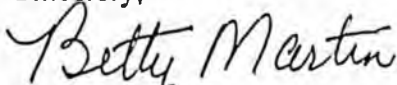
In the past, we have paid claims to criminals even though we knew they owed restitution or had outstanding attorney fees. Under the existing law we had no way to use the criminal's unclaimed property to help satisfy those obligations. The best we have been able to do is send them a letter with their payment, reminding them of their obligation. Of course, none have chosen to use the money to reduce the restitution or judgments due.

Truthfully, passage of this bill will not result in a large increase in the amount of money available to pay restitution claims. However, it will take the burden away from the victims, as they will no longer have to file a Writ of Execution to collect the criminal's unclaimed property. Filing another court document (the writ) when a judgment already exists is onerous and simply works to the benefit of the criminal not the persons owed the restitution.

Finally, we already have the authority to use criminal's unclaimed property to pay child support. Child support payments would continue to have priority over restitution and judgments.

Thank you and the House Judiciary Committee for sponsoring this legislation.

Sincerely,



Betty Martin
State Comptroller and Unclaimed Property Manager

**INFORMATION
STATEMENT**

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)278-3458

March 8, 2002

Representative Norman Rokeberg
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Re: *House Bill 501- Unclaimed Property*

Dear Chairman Rokeberg:

This letter concerns House Bill 501, relating to the use of unclaimed property to pay court-ordered restitution. Last year, the Alaska Legislature enacted legislation which authorized the Department of Law to collect restitution on behalf of crime victims. The legislation recognized that victims often do not receive the restitution ordered by the court because the victims do not have the resources to hire an attorney or the sophistication to pursue collection on their own. Under the new laws, the Department of Law's collections unit, which is also responsible for collecting criminal and civil judgments owed to the state, may collect court-ordered restitution from criminal defendants and disburse that money directly to victims.

Because the unit collects this restitution at state expense, it is important that the collections occur in the most efficient and cost-effective manner possible. House Bill 501 would further this goal by creating a simple procedure allowing the Department of Law to attach unclaimed property belonging to criminal defendants. Under the bill, the Department of Law would submit proof of court-ordered restitution directly to the Department of Revenue. This would avoid the necessity of first obtaining a writ of execution through the court system. Thus, the process would be streamlined, requiring less paperwork and other resources to complete. It would also assure that unclaimed property is used to pay restitution owed by criminal defendants, rather than being returned to the defendants.

Rep. Norman Rokeberg
Chair, House Judiciary Committee

March 8, 2002
Page 2

Thank you for your consideration. Of course, if you have any questions, please do not hesitate to contact me.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: *Diane L. Wendlandt*
Diane L. Wendlandt
Assistant Attorney General

cc: Michael K. Abbott
Larry Persily
Deborah Behr
Chrystal Smith

DLW\dg

HJR

30

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HJR 30
 (H) Publish Date: 1/22/02

Revision Date/Time (Note if correction): _____ Dept. Affected: HSTA for LAA
 Title: Relating to an amendment to the Constitution BRU: _____
of the United States prohibiting Component: _____
 Sponsor: desecration of the Flag of the United States
 Requester: H(STA) Component Number: _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This resolution has no fiscal impact on state spending.

Prepared by: Rynnleva Moss

Phone 465-3719

Representative John Coglianese
 Committee Chair

Date 1/22/02