H1463 HOUSE JUDICIARY

Alaska Public Health Law Reform Proposal

The Problem – *Our laws don't protect us anymore*

- Alaska's public health laws are antiquated and layered – Alaska Law Review, 2000
- Alaska is the only state in the nation that does not have adequate statutory authority to quarantine – Trust for America's Health, 2004

1949: AS 18.05.010	Administration of Laws by the Department
1995: AS 18.15.120	Tuberculosis Control
2003: AS 18.15.350	SARS Control

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

Alaska Public Health Law Reform Proposal

The Proposed Solution - Updated Laws that Provide:

- A statutory framework that supports the public health mission, services and role
- Clear authority for control of conditions of public health importance; and,
- Modern due process provisions for the protection of individual rights

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

HB 95: An Act Relating to Public Health

- Defines "Essential Public Health Services"
- Describes State's role in health protection and promotion
- Provides clear authority for disease control through:
  - Surveillance
  - Epidemiologic Investigation
  - Medical Treatment, Quarantine & Isolation
- Requires protection of individual rights - due process
- Strengthens requirements for confidentiality and data security

HB 95: An Act Relating to Public Health

I. Purpose/Intent (Sec. 1)

II. Administration of Public Health Laws by the Department (Sec. 4, 5, 7)

III. Public Health Authority and Powers (Sec. 8)

IV. Legal Representation and Court Powers
- a) Right of indigent person to counsel (Sec. 9)
- b) Judicial powers augmented (Sec. 10)
- c) Guardian ad litem responsibilities (Sec. 11)

V. General Provisions
- a) State Immunity (Sec. 2)
- b) Repeal and changes to citations of statutes (Sec. 3, 6, 12)
- c) Effective Date (Sec. 13)

HB 95: An Act Relating to Public Health

I. Purpose/Intent (Sec. 1)

- To protect and promote the health of the citizens of this state to the greatest extent possible through the public health system
- Not intended to mandate provision of certain services or implementation of unfunded programs

II. Administration of Public Health Law by DHSS (Sec. 4, 5, and 7)

- Modernize and clarify department's public health powers
- Clarifies nature of mandated regulations for public health reporting and adds regulatory mandate for data security and confidentiality
- Adds definition of "conditions of public health importance"

III. Public Health Powers and Authority (Sec. 8)

- Prevention and control of conditions of public health importance
- Surveillance through data collection and public health reporting
- Epidemiological investigations
- Medical treatment
- Quarantine and isolation
- Public health disasters

HB 95: An Act Relating to Public Health

Response to Feb. 2, 2005 Legal Services Memo

Legal Services/LAA Questions	DHSS & Dept. of Law Response
• Sufficient notice provided in due process provisions?	The due process provisions included in the bill strike a fair balance between individual rights and public protection.
• Why is refusal of medical treatment allowed?	While forced medical treatment may benefit the physical health of an individual with a contagious condition, it does not serve a public health purpose if the individual can be isolated from the public.
• Why no criminal penalties for non-compliance?	Civil contempt proceedings would be utilized for non-compliance because 1) it will be required very infrequently and 2) in most of these very rare cases non-compliance will be motivated by fear, not criminal intent.
• Are access to medical records provisions HIPAA compliant?	Yes, under the public health exemption provided by HIPAA (45 CFR 164.512(b)).
• Is an indirect court rule amendment made by this bill?	Yes – **an amendment is proposed** to address this issue.
• Why are parents deprived party status in quarantine/ isolation hearings of unemancipated minors?	No legal or public health purpose for denying parents party status can be identified – **an amendment is proposed** to remove this provision.
• Is shared jurisdiction with DEC in cases involving contaminated material in a public health disaster addressed?	The bill clearly designates DHSS and DMVA as the lead agencies for providing this type of service in a disaster and no further clarification in the bill is required. (DEC was consulted)

State Quarantine Authority

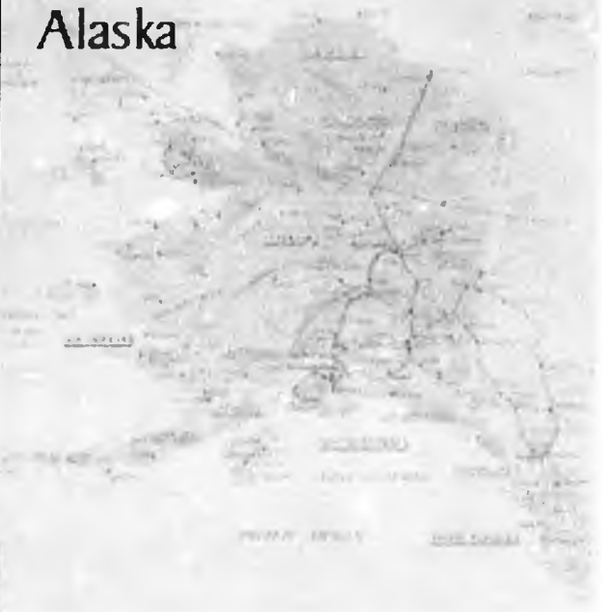
Source: Trust For America's Health with analytic and research support from the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.

49 states and D.C. have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alabama *
Arizona *
California
Colorado
Connecticut *
Delaware *
D.C. *
Florida *
Georgia *
Hawaii *
Idaho *
Illinois *
Indiana *
Iowa *
Kansas
Kentucky
Louisiana *
Maine *
Maryland *
Massachusetts *
Michigan *
Minnesota *
Mississippi
Missouri
Montana *
Nebraska
Nevada *
New Hampshire *
New Jersey
New Mexico *
New York
North Carolina *
North Dakota
Ohio *
Oklahoma *
Oregon
Pennsylvania *
Rhode Island *
South Carolina *
South Dakota *
Tennessee *
Texas
Utah
Vermont
Virginia *
Washington ^
West Virginia *
Wisconsin *
Wyoming *

1 state does NOT have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alaska



* State has statutory quarantine powers that may be enhanced or capable of expedited performance during general or public health emergencies.

^ Washington state has regulatory vs. statutory quarantine authority.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 2, 2005

SUBJECT: Public Health, HB 95 (HB 95 (Work Order No. 24-GH1002\A))

TO: Representative Peggy Wilson
Attn: Kathy Erickson

FROM: Jean M. Mischel
Legislative Counsel

You have asked generally whether there exist legal or drafting problems with the above referenced bill. Since this bill authorizes the Department of Health and Social Services to take actions that impinge on an individual's constitutional rights in the broadest sense, much of the authority will be subject to judicial review and interpretation. The bill allows for the isolation and quarantine of individuals and groups of individuals, medical screening and testing of an individual, and condemnation of facilities and businesses, all of which require, at a minimum, due process. Courts have generally upheld the exercise of broad police powers to protect public health but the following issues are brought to your attention. Most of the constitutional issues described in this memorandum can be addressed in regulation by the department.

With the exception of emergency orders, protective custody, and procurement "by condemnation or otherwise" of businesses or facilities, the bill establishes a court petition procedure in which the individual has a right to be heard before being deprived of a liberty or privacy interest. While the filing of a court petition implies sufficient notice under the applicable court rules, explicit notice requirements should be, and are not, included in this bill, particularly with regard to procurement and emergency administrative orders. For example, the bill at page 10, lines 2-7, requires the department to obtain a state medical officer's order and, if an individual objects to that order, an *ex parte* order of the court, to conduct screening, examination and testing of an individual who has or "may have been exposed to a contagious disease" without notice or an opportunity for hearing. In a public health emergency, covered in a different section of the bill, a deprivation of due process before the deprivation of the fundamental rights to privacy and association, may be supportable under the state's police powers. But when the deprivation is for the "prevention and control" of a contagious disease and the existence of the disease is speculative, the procedures eliminating notice and an early opportunity for hearing may be constitutionally infirm. In this instance, the bill does not even require that a copy of the orders be provided to the individual once the orders are issued.

It is surprising in light of such limited process available to an individual prior to being tested, examined or screened that the bill at page 11, lines 14-15 permits the refusal of

medical treatment when an individual is screened for a contagious disease and found to be a carrier. Since isolation is available, the department may isolate the individual. However, isolation costs money and resources (for monitoring, etc.) and may be necessary indefinitely. The model public health act recommends the option of compulsory medical treatment in these circumstances, an option that raises constitutional questions of its own. The deprivation of constitutional rights in order to conduct the screening and examinations, (including protective custody) however, seems to be serving a less compelling interest when the existence of the disease is allowed to be perpetuated in this way.

Conspicuously absent in the bill is a penalty provision associated with violations of section 8 should an individual fail to cooperate or comply with an order. Presumably, contempt of court proceedings could be initiated when a court order has been issued but some of the authority of the department is not dependent upon the issuance of a court order. Moreover, contempt proceedings take time when time may be of the essence. A criminal penalty option may provide a greater incentive for compliance.

Access to an individual's medical records by the department, without the consent of the individual, at page 9, line 24, runs afoul of some federal laws, particularly the Health Information Privacy Act, and implicates privacy interests. The bill does not deal with the due process issues pertaining to the records access either.

yes

In addition to clarifying the notice and penalty provisions, I recommend a review of the relevant court rules to identify whether an indirect or direct court rule amendment is being made by this bill. The review of emergency and temporary orders and the relatively short time frames for hearings on petitions and continuances appear to me to affect the court rules. If you would like me to draft something in this regard, let me know.

The quarantine and isolation authority extends to unemancipated minors. While a guardian ad litem and even an attorney may be appointed to represent the minor by the authority conferred in this bill, the parent is deprived of party status at page 15, lines 16-17 in proceedings affecting the minor.

a. P min + remove rest of line 16 & 17

The shared jurisdiction of the Departments of Health and Social Services and Environmental Conservation in cases involving "contaminated material" as defined at page 17, lines 25-26 is not dealt with in the bill.

In addition to the legal issues, some drafting corrections could be made to bring the bill into full compliance with the drafting manual. However, none of the drafting issues appear to raise any additional substantive concern.

If I may be of further assistance, please advise.

JMM:lmb
05-028.lmb

ALASKA PUBLIC HEALTH ASSOCIATION

Committed To Advancing Alaska's Public Health Since 1978

HB 95 (H)JUD March 4, 2005

In Support of HB 95 Public Health Disasters and Emergencies

Dear Chairman McGuire and members of the Judiciary Committee:

Thank you for hearing HB 95 today and for the opportunity to testify. My name is Marie Lavigne, I am honored to serve as Exec. Director of the Alaska Public Health Association, representing 220 members across Alaska who are deeply committed to developing sound public health policy to improve the health of all Alaskans.

We would like to thank the Murkowski administration for their leadership in developing HB 95, including Commissioner Joel Gilbertson, Division of Public Health Director Dr. Richard Mandsager, Deputy Director Deborah Erickson and the Attorney General's office. We've been honored to host public health law sessions at our Alaska Health Summit over the past several years and to have recommendations from our leadership included in this bill. Our members unanimously approved in 2003 a resolution in support of modernizing Alaska's public health statutes. Our governing Board has recently affirmed support for public health law reform in the framework of HB 95.

Public health laws are vital during disasters and emergencies to assure the public's safety, and to respond to health threats ranging from bio-terrorism to emerging infectious diseases such as SARS, West Nile Virus and Avian Flu. However, Alaska's current statutes are inadequate, outdated and leave us vulnerable to modern health threats. With recent front page headlines quoting the Center for Disease Control and Prevention warning of the threat of a nearing global flu pandemic, *time is of the essence for public health law reform.*

As you are aware, preparing for a public health emergency is an essential public health function. Preparedness is going on *every day*, by reducing the spread of infectious disease and lessening the threat of an epidemic. So too, our public health laws need to be strong and ready *every day* to protect the public's health in times of threat. Despite planning and training, significant vulnerabilities in Alaska's public health preparedness remain.

P.O. Box 9-1825 Anchorage, AK 99509 907/332-1030 *e-mail:* publichealth@alaska.net www.alaskapublichealth.org

The enabling statutes for public health (AS 18.05.010) were adopted in 1949, in the territorial days, with revisions in the mid 1990s for tuberculosis and in 2003 for SARS. Our laws pre-date modern scientific and constitutional developments. Nor do they support modern disease control measures to address today's health threats. Alaska remains the only state in the nation without clearly defined quarantine statutes. It has been sixteen years since the Institute of Medicine's *Future of Public Health report* found that public health laws were in need of major revision and recommended all states review their public health laws to make revisions. The result of that work is before you in HB 95.

To be an effective tool, these laws must provide a statutory framework that defines the mission, services and role for the Division of Public Health, *and* clearly defines the legal powers and duties of the state *to* ***assure conditions for its people to be healthy***. The laws need to ensure the protections of individual rights and due process against arbitrary or unwarranted government action, while ensuring that the state public health agency has authority to act to protect the community's health when necessary. Privacy and confidentiality protections already in place appear to be affirmed. The balance is of great concern to us. We will continue to closely monitor HB 95 and its companion SB 75 this session.

Healthy Alaskans 2010 set as a target for this decade "ensuring that governmental public health agencies have appropriate legal authority to assure the delivery of essential public health services." The Centers for Disease Control and Prevention further considers public health law reform one of its top ten priorities for improving public health outcomes.

Concurring with the respected health experts that Alaska's statutes need revision to best meet the health needs of all Alaskans, the Alaska Public Health Association urges you to pass HB 95 out of Committee today, and to make its passage a priority this session.

Thank you. Marie J. Lavigne

P.O. Box 9-1825 Anchorage, AK 99509 907/332-1030 *e-mail:* publichealth@alaska.net www.alaskapublichealth.org

HB

96

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

Commercial and Fair Business Section
P.O. BOX 110300
123 4TH ST. DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
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March 1, 2005

Sectional Analysis of HB 96 (Marijuana)

(Prepared by the Department of Law, March1, 2005)

HB 96 would enlarge the class of persons to whom delivery of certain controlled substances constitutes a crime; add new types of misconduct involving certain controlled substances that constitute a crime; lower the possession threshold amounts for certain degrees of misconduct involving a controlled substance; make the possession of any amount of marijuana a crime; and change the formula for calculating the aggregate weight of marijuana plants.

Sec. 1: Section 1 sets out the purpose of the bill.

Sec. 2: Section 2 sets out the bill's findings.

Sec. 3: Section 3 makes it a crime under the statute to deliver certain controlled substances to someone under the age of 21. Under the current law, delivery to someone who is under 19 and at least three years younger constitutes a crime.

Sec. 4: Section 4 lowers the minimum amount of certain controlled substances a person must possess to constitute a crime under the statute from one pound to four ounces.

Sec. 5: Section 5 lowers the minimum amount of certain controlled substances a person must possess to constitute a crime under the statute from one pound or more to one ounce or more. It also criminalizes under the statute the act of possessing certain controlled substances while driving or operating a motor vehicle, aircraft, or motorized watercraft.

Sec. 6: Section 6 lowers the minimum amount of certain controlled substances a person must possess to constitute a crime under the statute from less than one-half pound to less than one ounce.

Section 6 also adds the following types of conduct to the list of conduct that is criminalized under the statute:

- manufacture, delivery, or possession with intent to manufacture or deliver less than one ounce of certain controlled substances;

- possession of certain controlled substances while a passenger in a motor vehicle, aircraft, or motorized watercraft;

- being the driver or operator of a motor vehicle, aircraft, or motorized watercraft and knowingly permitting a passenger to possess certain controlled substances.

Sec. 7: Section 7 changes the calculation of the aggregate weight of a marijuana plant to be a percentage of the measured weight of a plant after its roots have been removed.

Sec. 8: Section 8 sets out an immediate effective date.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 96
(H) Publish Date: 1/21/05
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title: RELATING TO MARIJUANA USE AND POSSESSION

RDU: Juvenile Justice

Component: Probation Services

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR

Requester: GOVERNOR

Component No. 2134

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 (0)						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill is not anticipated to have a significant impact on Division of Juvenile Justice staff workloads and therefore no fiscal impact.

Prepared by: Patty Ware
Phone 465-2112
Division: Juvenile Justice
Date/Time 01/20/2005
Approved by: Joel S. Gilbertson, Commissioner
Date 01/20/2005
Agency: Department of Health and Social Services

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 96
(H) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act making findings relating to marijuana use and possession; relating to marijuana and misconduct.."
RDU CRIMINAL
Component CDCO
Sponsor
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill creates a new statutory section making findings regarding the mental and physical health risks, illegality and dangers of marijuana use. The bill makes changes to AS 11.71.030, .040, .050, and .060 concerning the crime of misconduct involving a controlled substance by adding additional offenses and significantly decreasing the amount of marijuana in possession that would constitute a violation. All of the conduct prohibited in this bill is already a crime in Alaska, although recent decisions by the appellate courts have made it difficult to investigate and prosecute some of these offenses. We do not expect the policies of police agencies to change significantly in response to this bill, and therefore we do not expect a workload increase above and beyond what was experienced before the courts made prosecution more difficult. Anticipated fiscal impact is zero.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/14/05 11:19 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/14/2005
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 96
(H) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An Act relating to marijuana use and possession; marijuana and misconduct controlled substance
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Rules Committee
Requester: Governor
Component No.: 2325

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Passage of this Act will have no fiscal impact on the Department of Public Safety. The potential increase in the number of arrests for violations can be handled by available staff. Provisions of this Act will help deter marijuana use and possession overall. The Act also addresses the issue of driving under the influence of marijuana which is a serious problem. Contrary to some contention on the subject, marijuana is not a harmless recreational drug.

Prepared by: Lieutenant Todd Sharp
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 1/20/05 2:20 PM
Approved by: Commissioner William Tandeske
Date 1/20/2005
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HB 96
(H) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to marijuana use and possession...
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Rules Committee
Requester: Governor
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	115.5	115.5	115.5	115.5	115.5	115.5
Travel	4.8	4.8	4.8	4.8	4.8	4.8
Contractual	35.9	35.9	35.9	35.9	35.9	35.9
Supplies	2.7	2.7	2.7	2.7	2.7	2.7
Equipment	6.7	0.7	0.7	0.7	0.7	0.7
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**165.6**	**159.6**	**159.6**	**159.6**	**159.6**	**159.6**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	165.6	159.6	159.6	159.6	159.6	159.6
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**165.6**	**159.6**	**159.6**	**159.6**	**159.6**	**159.6**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

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

This proposed bill significantly increases the penalties for possession, use, and delivery of marijuana. It raises from a B misdemeanor to a B felony in many cases the delivery of marijuana, in any amount to someone under 21. Possession of 4 ounces or more of marijuane is raised to a C felony from a misdemeanor. It also adjusts the misdemeanor penalties related to marijuana and creates new misdemeanors for possessing marijuana while driving, permitting a passenger to possess it, or being a passenger in possession. This bill would have an impact on Agency operations. We handle 500 misdemeanor drug cases, primarily involving marijuana. At least half of these would become felonies. Felonies take more work than misdemeanors. Also more misdemeanors would be prosecuted for less amounts and vehicle related offenses. This will increase by 50% the current number of misdemeanor cases handled by the Agency. The Agency will need one full time attorney to meet this increased case and work load. The position would be in Kenai, since their numbers are increasing in this area, and almost match Anchorage.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)334-4416
Division: Public Defender Agency
Date/Time 1/19/05 10:32 AM
Approved by: Micheal Tibbies, Deputy Commissioner
Date 1/19/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

Committee on HB 96, dated 4-8-05
bill # / subject public hearing date

Please do not support the recriminalization of marijuana as contained in HB 96.

I have worked in the criminal justice area as a defense attorney for the past 22 years.

There are much more serious criminals than marijuana users that need to be prosecuted.

I urge you not to pass HB 96 from committee.

Thank you.

Signed: Joe Ray Skrha
Testifier

Private attorney
Representing (optional)

2455 Watergate Way Kenai, AK 99611
Address

283-7100
Phone number

Alaska State Legislature

Please enter into the record my testimony to the HOUSE JUDICIARY
committee name

Committee on HB 96, dated 4-8-05
bill # / subject — public hearing date

SEE ATTACHED 4 PAGES

Signed: John M. Pinder
Testifier

Representing (optional)

P.O. Box 1683 / Soldotna, Alaska
Address

262-4152
Phone number

To Whom it May Concern:

In the words of one of the most respected governors in Alaska's history... "It is hypocritical to criminally punish users of marijuana, while legally sanctioning the use of alcohol..." Jay Hammond said that in 1975. This attempt to recriminalize small amounts of cannabis is a violation of Alaska's State Constitution and is an insult to and attack on the integrity of our state's Supreme Court and appellate courts.

Over 44% (more than 125,000 Alaskan adults) voted in 2004 to decriminalize cannabis. Does the Murkowski administration wish to fill our already overcrowded prisons with these people? The U.S.A. already leads the world with more than 2.1 million of its citizens or 1 out of every 143 Americans currently incarcerated in its prisons and jails (a very high percentage of them are cannabis users). In the mid 1970s the Dutch legalized cannabis and began taxing and regulating it and in Holland today a much smaller percentage of underage youth have used cannabis than in the U.S. Even with our draconian laws supposedly serving as a deterrent. The argument that cannabis is more dangerous today because it is more potent is simply ridiculous. It's only logical that the more potent the cannabis is, the less of it people will use. Why don't we outlaw all booze that is stronger than beer then? It is the same bizarre logic. In fact, it is scientifically known that liquor and cigarettes are extremely addicting (cannabis is not) and far more dangerous than cannabis healthwise. So if the governor is truly interested in the health and well-being of Alaskans why isn't he pushing to ban their use?

(1)

I use to use all three substances (alcohol, cigarettes, and cannabis) and I decided to quit them all in 1994. Quitting cannabis was quite easy. Quitting alcohol and cigarettes however proved to be extremely difficult.

This is a blatant attempt by the Markowski administration to usurp the authority and jurisdiction of Alaska's courts. Both the Alaska State Supreme Court (in 1975) and a state appellate court (in 2003) have affirmed the right of Alaskans to possess and use cannabis in the privacy of their own homes. We already have more than enough legislation to punish those who buy and sell it. As a native born Alaskan (back when Alaska was a territory) I find this attempt to usurp Alaska's State Constitution, which as it stands is the very best in the nation, quite worrisome. By the way, anyone who is knowledgeable on the subject knows that different varieties of cannabis have always had different potencies. So following the convoluted, common sense less thinking that inspired this virulent bill would those busted with a less potent variety be punished less severely than those caught with a more potent variety? I remember the illegal voter referendum of the early 1990s which re-criminalized cannabis that was struck down by a state appellate court in the Noy case in 2003. How many Alaskans were prosecuted and sentenced under that illegal act? If this unscrupulous attempt to make possession of a small amount of cannabis a felony with penalties as severe as certain sex crimes is successful how many more Alaskans will suffer until the Alaskan courts once again strike down this heinous legislation? Also how many more

cops will we need to hire and how many more prisons will we need to build to house the 10s of thousands of cannabis users in this state? We already have to ship a plethora of prisoners out of state at a tremendous cost because we have no place to house them. Will other more serious and violent crimes have to go uninvestigated, unprosecuted, and unpunished simply because we would rather spend our increasingly scarce dollars draconically punishing people who prefer to relax with a joint of cannabis in the privacy of their own homes rather than with a stiff shot of booze? If this legislature wants to declare war on a drug that is devastating individuals and families other than the sacred cow, alcohol, I suggest it concentrate on methamphetamine. Even in the rest of the nation where cannabis isn't legal the punishment for possession of a small amount is a misdemeanor. Why is the Murkowski administration so intent on establishing such harsh penalties? Meanwhile the rest of the Western World is decriminalizing cannabis as most of Western Europe has done or legalizing it, such as; Belgium where individuals are now allowed to grow up to five plants for personal use.

The primary reason I am writing this letter is on behalf of a close friend who wishes to remain anonymous. He suffers from a debilitating and progressive, chronic disease and cannabis works extremely well in alleviating the intense pain and nausea he suffers from on a daily basis. Plus it is also quite effective in stimulating his appetite which is very important since his weight has plummeted from 168 lbs. down to 119 lbs. His physician has refused to prescribe cannabis out of fear of federal prosecution but has no problem prescribing very potent and addictive narcotics and anti-nausea medicine which are very expensive with sometimes harsh --

side effects. My friend greatly prefers the relief he gets from cannabis. His doctor has stated to him that he has a friend in the D. E. A. who has told him the feds are contemplating prosecuting physicians who do prescribe it. So he refuses to take the risk. As a matter of fact there are very few doctors in Alaska from what I understand who will prescribe it for that very reason. If this proposed legislation becomes law it would leave people in his position (and I believe there are many) without any type of legal protection. Does the Legislature want to put people like my friend behind bars and have the taxpayers finance their healthcare? My friend has far too much on his plate as it is. He is not a criminal and does not deserve to be treated like one. If that is the case one can only hope that every legislator who votes for this remarkably vicious and vitriolic bill gets to walk a mile in my friend's moccasins, so to speak.

This legislation is classic mean-spirited, alcoholic thinking. Maybe the legislature should be more concerned with banning liquor from being consumed in their offices in the publicly owned capitol building. After all, alcohol has devastated millions of Americans lives and often leads to terrible decisions, such as; this bill. If this is an example of compassionate conservatism in a Kinder and gentler America, I want no part of it.

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
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April 15, 2005

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

Re: HB 96 (Marijuana)

Dear Chair McGuire:

The Department of Health and Social Services supports HB 96, the Governor's bill on marijuana. Committee hearings on SB 74, the senate companion, have focused on scientific studies.

While the scientific studies make for interesting debate, I encourage you and the other committee members consider some of the facts regarding the harmful effects of marijuana use on real live Alaskans, particularly youth and Alaska Natives. My Department has worked with the Department of Law to compile hard facts about marijuana use in Alaska. A copy in bulleted form is attached to this letter.

At the end of the hearings, I urge you to review these bullet points and ask whether opponents of the bill have explained to your satisfaction how each statistic does not demonstrate a harmful effect of marijuana use in Alaska.

Sincerely,

Joel Gilbertson
Commissioner

JSG:lb

Marijuana: Things Have Changed and Parents Choices Matter

A Parent's Choice to Use Marijuana Affects Their Children

- **"More adolescents who report their parents use marijuana frequently use marijuana themselves compared with youths whose parents do not use marijuana"** (22.6% to 5%). *The State of Adolescent Health in Alaska, May, 1990, p.41.*

- **"Among youths in 2003 who perceived that their parents would strongly disapprove of trying marijuana or hashish once or twice, 5.4% used marijuana in the past month, vs. 28.7% of youths whose parents would not strongly disapprove"** *Overview of Findings from the 2003 National Survey On Drug Use and Health, Department of Health and Human Services, SAMHSA, Office of Applied Studies, 2004, p.23.*

The THC Content of Today's Alaska Marijuana is 14 Times Levels Found in Ravin

- **Average THC content in Alaska marijuana has steadily increased and averaged nearly 14% in 2003. This is approximately twice the national average THC content and 14 times stronger than THC content levels assumed and relied upon by the Alaska Supreme Court in weighing the harmful effects of marijuana. *State v. Ravin*, 537 P.2d 494, 505 (Alaska 1975) ("Most marijuana available in the United State has a THC content of less than one percent.")** *Average THC Levels for Alaska, National Averages, Reports Prepared by Dr. Elsohly, University of Mississippi, National Center for Natural Products Research.*

The Face of Alaska Marijuana Use: Who Is Using Alaska's Powerful Marijuana?

Pregnant Mothers

- **Between 1990 and 2000, the rate of pregnant mothers in Alaska using marijuana remained fairly constant at about 5%. (400 to 450 newborns each year) This rate was approximately 67% higher than the national average (3%) for this time period and just slightly below the rate for Alaskan mother's prenatal alcohol use. (5.3%).** *Alaska Maternal and Child Health Data Book, 2003, State of Alaska, Department of Health and Social Services, Division of Public Health, Section of Maternal Child and Family Health, pp. 52-55; 150-151.*

- **The prevalence of prenatal marijuana use among Alaska Native pregnant mothers has been significantly higher than the overall state prevalence over the last decade. More than twice the state average in 2002. (3.5% Alaska average for prenatal marijuana use vs. 7.8% for Alaska Natives).** *Women's and Children's & Health Fact Sheet, 2005, State of Alaska, Department of Health and Social Services, (Information from Alaska Pregnancy Risk Assessment Monitoring System, PRAMS, 2002).*

- **Recent progress has been made and the overall rate of pregnant mothers in Alaska using marijuana was down to 3.5%. (Nearly 1 in 29)** *Women's, Children's, & Family Health Fact Sheet, 2005, State of Alaska Department of Health and Social Services. (Information from Alaska Pregnancy Risk Assessment Monitoring System (PRAMS), 2002.*

- **The approximately 400 to 450 Alaskan newborns exposed to marijuana may suffer negative physical and behavioral effects. (Three recently published scientific studies found evidence a pregnant mother's marijuana use has negative physical and behaviorial effects).** *Porath AJ, Fried PA "Effects of Prenatal Cigarette and Marijuana Exposure on Drug Use Among Offspring" ("[m]ale offspring of mothers who reported using marijuana while pregnant had nearly four times the odds of initiating marijuana use compared to offspring whose mothers did not report using marijuana during pregnancy ... As data indicates that cannabinoid receptors are present in the placenta, and the fetal and neonatal brain, it is possible that prenatal exposure to marijuana also sensitizes the brain to the subsequent influence of marijuana consumed later in life. ... In summary ...the data suggest that in utero exposure to*

marijuana is associated with cigarette smoking and marijuana use initiation ... a reduction in rates of use may not only yield direct health benefits for the substance users ... it may also have unanticipated benefits for their offspring) ; Neurotoxicology Teratology, 2005 Mar-Apr; 27(2):267-77; Hurd, YL, Wang X, et.al., "Marijuana Impairs Growth in Mid-Gestation Fetuses": Neurotoxicology Teratology, 2005 Mar-Apr; 27(2):267-77; Wang X, et.al., "In Utero Marijuana Exposure Associated with Abnormal Amygdala Dopamine D2 Gene Expression in the Human Fetus", Biological Psychiatry, Dec. 2004, pages 909-915.

Pre-School Age Children and Their Parents

- **A study of rural Alaska villages found preschool parents aged 26-34 were using marijuana at a rate roughly 3 times the national average. (19% vs. 6.7%)** *Stillner, V, et.al., Drug Use in Very Rural Alaska Villages, Substance Use and Misuse, 1999.*

Elementary School Students

- **By sixth grade, (age 11) 7-10% of Alaskan students have tried marijuana.** *1995, Alaska Youth Risk Behavior Survey (7% of middle school students started smoking marijuana before age 11); 1999, Alaska Youth Risk Behavior Survey (8.5% of middle school respondents (excluding Anchorage) started smoking marijuana before age 11; 2003, Youth Risk Behavior Survey Resu' , Northwest Arctic Borough School District Middle School Survey: Unweighted (10.2% of students tried marijuana for the first time before the age of 11)*

- **Students who started smoking marijuana before the age of 11 usually make up from 25-30% of the overall group of middle school students reporting a lifetime use of marijuana.** *Id.*

- **Kids who started smoking marijuana before the age of 11 made up 40% of the juveniles placed in Alaska's secure juvenile facilities in a survey done in 1998.** *1999, Division of Juvenile Justice Survey of Youths in Secure Facilities.*

- **Kids who smoked marijuana 10 to 40 times or more a month made up 46% of the juveniles placed in Alaska's secure juvenile facilities.** *Id.*

- **67% of the youth in Alaska's secure juvenile facilities have smoked marijuana 100 or more times in their lives.** *Id.*

Middle School Students

- **Roughly one in four of all Alaska middle school students has at least tried marijuana.** *1995, Alaska Youth Risk Behavior Survey (26.1%); 1999, Alaska Youth Risk Behavior Survey (28.9%, unweighted excluding Anchorage).*

- **These middle school students make up some of the 3-4,000 youth aged 12-17 in Alaska that initiate marijuana use each year. (100 to 150 a day).** *Initiation of Marijuana Use, Trends, Patterns, and Implications, Gfroerer, J, Department of Health and Human Services, SAMHSA, Office of Applied Studies, 2002, Table 4.1.*

- **Many of the middle school students using marijuana are doing so before or during school.** *Middle school students were part of a 1990 survey of students in grades 7-12 which found 25% of students reporting marijuana use in the past year used marijuana before or during school. The State of Adolescent Health in Alaska, May, 1990.*

- **Middle school students may also start to make up the roughly 150-170 Alaskan youth aged 12-17 (on average for the years 2000-2003) admitted into a treatment facility primarily for marijuana abuse.** *Substance Abuse Treatment Admissions by Primary Substance of Abuse, SAMHSA TEDS data.*

High School Students

- **If you are one of the 6% of Alaska high school age students in an alternative high school due to being at risk for not graduating from a regular high school, there is an about an 85% chance you have used marijuana and a 53% chance you are a current marijuana user.** *Youth Risk Behavior Surveillance – National Alternative High School Youth Risk Behavior Survey, United States, 1998.*

- **If you are a Alaska Native high school student there is a 70% chance you have tried marijuana and a 35.5% chance you are a current user.** *2003, Alaska Youth Risk Behavior Survey.*

- **In high schools across the state, (excluding Anchorage) 18.8% of male students and 14.7% of female students have already tried marijuana for the first time by their freshmen year.** *1999 Alaska Youth Risk Behavior Survey.* **The national average for 2003 was 9.9% for all students.** *2003 National Youth Risk Behavior Survey Results.*

- **The average age of first marijuana use in Alaska is 16 years, but for American Indian / Alaska Native students (nationally), it is 14.1 years.** *SAMHSA, Office of Applied Studies, "Trends in Marijuana Incidence, Initiation of Marijuana Use: Trends, Patterns, and Implications Report", Table 3.6 and SAMHSA, Office of Applied Studies, Youth Substance Use: State Estimates from the 1999 National Household Survey on Drug Abuse, Table C.5.*

- **If you are high school age, a current user of marijuana, and have a predisposition to psychosis , your marijuana use increases the chances you will express a psychotic disorder or experience.** *Os, J., et.al., "Prospective Cohort Study of Cannabis Use, Predisposition for Psychosis, and Psychotic Symptoms in Young People", British Medical Journal, January, 2005.*

- **Daily use of marijuana by teenage females will also greatly increase (5 times) the chances of suffering from depression and anxiety. Weekly or more frequent use of marijuana by any teenager doubles the odds that you will suffer from depression and anxiety.** *Patton, G, et.al., Cannabis Use and Mental Health in Young People: Cohort Study, British Medical Journal, November, 2002.*

- **You may also be the one in six teenage drivers who drives while under the influence of marijuana.** *O'Malley, P., et.al., "Unsafe Driving by High School Seniors: National Trends from 1976 to 2001 in Tickets and Accidents After Alcohol, Marijuana and Other Illegal Drugs", Journal of Studies on Alcohol, May, 2003 (Data shows that 15% of U.S. high school seniors surveyed said they drove after using marijuana and 16% drove under the influence of alcohol).*

- **The New England Journal of Medicine has published results from a roadside study of reckless drivers (not impaired by alcohol) in which 45 % tested positive for marijuana. Another survey found that 68% of teen drivers who use drugs regularly reported they drive while under the influence of drugs.** *ONDCP, Press Release, Nov. 19, 2002.*

- **If you are a teenage driver who consumes both alcohol and marijuana and drives, the negative effects on your driving ability are magnified.** *National Highway Traffic Safety Administration, Traffic Tech, Number 201, June 1999, "Marijuana and Alcohol Combined Increase Impairment", ("The effect of combining moderate doses of alcohol and moderate doses of marijuana resulted in a dramatic performance decrement and levels of impairment as great as observed when at .14 BAC alone").*

- **If you are one of the approximately 75% of tobacco smokers who initiate their use as adolescents and you are a marijuana smoker, the additive effect of the carcinogens and other chemicals in marijuana increase the risk you will develop many respiratory symptoms associated with disorders common to tobacco use such as chronic bronchitis, chronic obstructive pulmonary disease, and cancer.** *State of Alaska, DHSS-Epidemiology Bulletin "Youth Tobacco Use", Results from the 2003 Youth Risk Behavior Survey; Moore, et.al., "Respiratory Effects of Marijuana and Tobacco Use in a U.S. Sample", Journal of General Internal Medicine, 2004.*

Adulthood

- **By the time you reach adulthood, if you are still using marijuana and have committed a crime and are incarcerated, you will be one of the 93% of Alaska inmates who have ever tried marijuana and may be one of the 23% of Alaska inmates with a marijuana disorder that needed treatment in the year prior to incarceration.** *State of Alaska, Department of Health and Social Services, Division of Alcoholism and Drug Abuse, "Substance Abuse Treatment Needs of Alaska's Newly Incarcerated Prisoner Population Prior to Incarceration, 2000.*

- **If your crime was rape, there is a 15% chance you used marijuana just prior to the assault and a little less than 10% chance that your victim was impaired by marijuana at the time of the rape.** *Descriptive Analysis of Sexual Assaults in Anchorage, October 2003.*

- **If you are Alaska Native and have a primary alcohol disorder for which you need treatment, it is more likely than not that you also have a secondary or co-occurring marijuana disorder.** *Alaska Natives Combatting Substance Abuse and Related Violence Through Self Healing, Center for Alcohol and Addiction Studies, January, 1999, (63% of native men and women with severe drinking problems surveyed in 1997 were also dependent on marijuana).*

- **If you are an Alaska Native male using marijuana, and you are seen at a community mental health center in rural Alaska, you may be one of the 17.4% of such patients with a diagnosis of marijuana dependence.** *Mental Disorders of Eskimos Seen at a Community Mental Health Center in Rural Alaska, Auon, S, et.al., Psychiatric Services, November 1998, vol.49, no. 11.*

- **If you committed a domestic violence crime and were arrested, there is a 69% chance you will test positive at the time of arrest for marijuana use.** *April, 2004, ONDCP Anchorage, Alaska, Profile of Drug Indicators.* **In comparison, there is only a 23% chance you would test positive for cocaine if you committed any type of violent crime.** *Id.*

- **If you somehow end up a drowning victim, you will be one of the 11% of drowning victims in Alaska that were found to have marijuana in their system.** *Drowning In Alaska Waters, Public Health Reports, v111, p.531-5, 1996.*

Tougher Criminal Penalties and Fines Have A Deterrent Effect
And Individuals Respond To Changes In How
The Government Treats Illegal Drugs

- **"The marijuana arrest rate has a strong negative effect [on use by adults] ... enforcement of drug possession violations reduces drug demand ... Changes in arrest rates [increase] for possession predict percentage point decreases of ... 3.0% in marijuana participation among juveniles";** *Price and Enforcement Effects on Cocaine and Marijuana Demand, Economic Inquiry, Desimone, J et.al., January, 2003;* **"[b]oth higher fines for marijuana possession and increased probability of arrest decrease the probability that young adults will use marijuana ..."** *Farrelly, MC, et.al., The Joint Demand for Cigarettes and Marijuana: Evidence from the National Household Surveys on Drug Abuse" Journal of Health Economics, 2001; Chaloupka, FJ, et.al., "Do Higher Cigarette Prices Encourage Youth to Use*

Marijuana", National Bureau of Economic Research, Working Paper No. 6938, 1999 (Study of the 8th, 10th, and 12th grade surveys found marijuana decriminalization had a positive and significant effect on both the prevalence and quantity consumed of marijuana when median jail terms and fines were included in the model); Chaloupka, F.J., et al, "The Demand for Cocaine and Marijuana by Youth", University of Chicago Press, 1999 (Data from the 1982 and 1989 Monitoring the Future Study showed individuals living in decriminalized states were significantly more likely to report use of marijuana in the past year); Saffer, H, and Chaloupka, FJ, "The Demand for Illicit Drugs", Economic Inquiry, 1999, (Analyzing data from the 1988, 1990, and 1991 NHSDA's and finding that decriminalization had a positive and significant effect on [reducing] marijuana prevalence).

WORKSAFE, Inc.
OCCUPATIONAL HEALTH & SAFETY

April 26, 2005

VIA FACSIMILE AND FIRST CLASS MAIL
(907) 465-5241
✓**(907) 465-6592**
(907) 465-2040
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✓Rep. Lesil McGuire
Chair, House Judiciary Committee
Room 118, State Capitol
Juneau, AK 99801-1182

Rep. Norman Rokeberg
Chair, House Rules Committee
Room 214, State Capitol
Juneau, AK 99801-1182

Sen. Ralph Seekins
Chair, Senate Judiciary Committee
Room 125, State Capitol
Juneau, AK 99801-1182

Sen. John Cowdery
Chair, Senate Rules Committee
Room 101, State Capitol
Juneau, AK 99801-1182

Re: HB 96 / SB 74 (Marijuana)

Dear Lesil, Ralph, Norman and John:

I am writing you to encourage quick passage of HB 96/SB 74. I find it amazing that it's the 21st century and we're still debating the ill effects of marijuana. This is a drug that was bad for you when it was made illegal under federal law in 1937 and is even worse today. It's worse because the average THC content is nearly 14 percent (2003), which means it is significantly stronger in potency than hashish. (THC stands for delta-9-tetrahydrocannabinol, the main psychoactive ingredient in marijuana). The Alaska Supreme Court based its decision in Ravin v. State on the assumption that marijuana contained 1 percent THC or less.

I am president of WorkSafe, an Alaska company that conducts drug and alcohol testing for the workplace. I can tell you that marijuana is the drug of choice for Alaskans. Some 79 percent of all positive drug tests in Alaska are positive for marijuana. Amazingly more than 6 percent of non-regulated job applicants test positive for drugs even though these folks know they must take a pre-employment drug test.

Marijuana is a disaster in the workplace. Marijuana users have 55 percent more industrial accidents than non-users and 85 percent more injuries. Their absentee rate is 78 percent higher and they create 64 percent more disciplinary problems.

Of course, the "workplace" also includes state employees. The State of Wisconsin estimates that expenses and losses related to substance abuse average 25 percent of the salary of each worker affected. I have no reason to think Alaska's numbers would be less. Unfortunately we can expect the problem to keep getting worse if a clear message against marijuana is not sent.

DHSS representatives and Dr. David Murray have testified in committee about the doubling and tripling of addiction rates for marijuana in the last 10-15 years. They have also testified the cause of this increase is due in large part to the increasing potency of the drug. Marijuana also plays a significant negative role when trying to treat alcoholics. A secondary marijuana addiction is a significant reason why many persons undergoing treatment for alcoholism fail to reach and maintain sobriety. The usual pattern is the person stops drinking, fails to remain completely sober by continuing to smoke marijuana, and ends up drinking again. More than 60 percent of Native Alaskans undergoing treatment for alcoholism have a secondary marijuana disorder.

Marijuana decreases motor skills, concentration and coordination, which is why the federal government requires drug testing for key federal employees and DOT regulated employers. (An impetus for the DOT drug testing program was the 1987 train wreck that killed 16 people and injured 174. The brakeman and engineer had shared a joint of marijuana on duty, missed several warning signals and crashed into a passenger train at 105 miles an hour). Studies show that up to 12 percent of non-fatally injured drivers and up to 16 percent of fatally injured drivers have marijuana in their bloodstreams.

Employees who use drugs have 300 percent higher medical costs, which increase insurance rates, and are five times more likely to file a workers' compensation claim. Employers end up bearing some of the costs for these workers compensation claims. Some states have considered passing laws that would ban payment for injuries due to marijuana consumption.

No one has studied the specific cost of marijuana in the Alaska workplace but a study by the Governor's Advisory Board on Alcoholism and Drug Abuse found that lost worker productivity accounts for more than half of the $600 million annual impact of substance abuse in Alaska. These losses occur when alcohol and drugs result in death, reduce worker efficiency due to mental or physical impairment or result in incarceration, inpatient treatment or hospitalization.

Alaskans well understand the dangers of marijuana, which is why they have spoken with clarity three times over the past 15 years. Alaskans voted 54 percent to 46 percent in 1990 to re-criminalize marijuana after the Alaska Supreme Court

ruled that residents had a constitutional right to possess a small amount of pot in the privacy of their homes. Alaskans turned down an effort to decriminalize marijuana in 2000 by a vote of 41 percent to 59 percent. And last fall, Alaskans rejected an initiative to legalize marijuana by a vote of 44 percent to 56 percent, despite a million-dollar campaign by the pro-initiative group. Edison Media Research's exit polls for the 2004 election found that nearly 80 percent of the "no" votes against the initiative legalizing marijuana were persons who voted for George Bush, i.e., Republicans and moderates.

The Supreme Court's refusal to recognize the voice of the people has now been taken to a new level. Recent rulings in the State v. Crocker and State v. Noy cases not only reaffirm the Ravin v. State decision by allowing up to 4 ounces of marijuana for personal use, (four ounces equals about 360 very potent marijuana cigarettes, an amount most Alaskans would consider more a "mis-use" than personal use), but the Court reversed precedent from another marijuana case, Gray v. State, by denying the state even the opportunity to present facts on the issue.

HB 96 / SB 74 are the right thing to do to protect Alaskans, particularly our most vulnerable, the young and those who suffer from mental disorders and alcohol abuse. It rights a wrong that dates back to 1975 when the Alaska Supreme Court ruled in Ravin that Alaskans' right of privacy protects the personal possession and use of marijuana in the home. From the 1990 study by DHSS we now know that children in the homes of parents who use marijuana are 350 percent more likely to smoke themselves.

Alaska is on the cusp of an exciting economic future, with the gas line, ANWR, Pogo and Pebble all on the horizon or in development. Alaskans deserve a drug-free, safe workplace and these mega-projects deserve a drug-free, productive workforce.

The passage of HB 96/SB 74 sends a clear, positive message to all Alaskans, including employees and employers. I encourage you to support and pass this legislation this session. Thank you.

Sincerely,

Matthew T. Fagnani
President

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

Committee on HB 96, dated 4-8-05
bill # / subject — public hearing date

Please do not support the recriminalization of marijuana as contained in HB 96.

I have worked in the criminal justice area as a defense attorney for the past 22 years.

There are much more serious criminals than marijuana users that need to be prosecuted.

I urge you not to pass HB 96 from committee.

Thank you.

Signed: Joe Ray Skrha
Testifier

Private attorney
Representing (optional)

2455 Watergate Way Kenai, AK 99611
Address

283-7100
Phone number

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

Committee on HB 96, dated 4-8-05
bill # / subject — public hearing date

SEE ATTACHED 4 PAGES

Signed: John M. Burton
Testifier

Representing (optional)

P.O. Box 1683 / Soldotna Alaska
Address

262-4152
Phone number

Westlaw.

83 P.3d 545
83 P.3d 545
(Cite as: 83 P.3d 545)

H

Court of Appeals of Alaska.
David S. NOY, Appellant,
v.
STATE of Alaska, Appellee.
No. A-8327.

Nov. 14, 2003.

Background: Defendant was convicted following jury trial in the Fourth Judicial District Court, Fairbanks, Jane F. Kauvar, J., of possession of less than eight ounces of marijuana. Defendant appealed, and the Court of Appeals, 83 P.3d 538 reversed.

Holdings: On State's petition for rehearing, the Court of Appeals, Mannheimer, J., held that:
(1) ***Ravin*** did not create affirmative defense that possession was less
than four ounces of marijuana on case-by-case basis;
(2) State was collaterally estopped from further prosecution in attempt to prove possession of more than eight ounces after defendant was acquitted on that charge; and
(3) application of ***Ravin*** in instant case did not prevent State from challenging validity of ***Ravin*** in future.
Petition for rehearing denied.

West Headnotes

[1] Controlled Substances ⇐49
96Hk49 Most Cited Cases
Ravin holding that privacy clause of state constitution restricted legislature's authority to enact laws prohibiting possession of marijuana in one home's for personal use did not create affirmative defense that defendants could raise, on case-by-case basis, that possession was less than four ounces. K.S.A. Const. Art. 1, § 22.

[2] Double Jeopardy ⇐100.1
135Hk100.1 Most Cited Cases

[2] Double Jeopardy ⇐101
135Hk101 Most Cited Cases
Double jeopardy protections did not merely preclude State from seeking appellate review of jury verdict of acquittal of possession of eight ounces or more of marijuana; State was also collaterally estopped from pursuing later prosecution of defendant on same charge, regardless of potential jury error in determining amount of marijuana that defendant possessed. U.S.C.A. Const.Amend. 5.

[3] Courts ⇐100(1)
106k100(1) Most Cited Cases
Application of ***Ravin*** holding as basis for determination that statute criminalizing possession of any amount of marijuana by adults in their home for personal use as violated state constitutional right to privacy would not
preclude State from challenging validity of ***Ravin*** in future. Const. Art. 1, § 22; AS 11.71.060(a).

West Codenotes
Held Unconstitutional

AS 11.71.060(a).

***545** William R. Satterberg, Jr., Fairbanks, for the Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

OPINION ON REHEARING

MANNHEIMER, Judge.

In ***Ravin*** *v. State,* 537 P.2d 494 (Alaska 1975), the Alaska Supreme Court held that the privacy clause of the Alaska Constitution (Article I, Section 22) protects the possession of marijuana in one's home for personal use. In 1990, the voters of Alaska enacted ***546**AS 11.71.060(a), which purports to

criminalize the possession of any amount of marijuana, even when the marijuana is possessed in one's home for personal use. In our initial opinion in this case--*Noy v. State*, Alaska App. 83 P.3d 538, 2003 WL 23207908 (2003) [FN1]--we held that this statute is unconstitutional because it conflicts with the right of privacy recognized in the ***Ravin*** decision. However, we concluded that the statute could be preserved to the extent that it prohibits possession of four ounces or more of marijuana.

FN1. 83 P.3d 538.

The State now seeks rehearing. In its petition for rehearing, the State argues that this Court's initial opinion is flawed in some half-dozen ways, but most of the State's arguments ultimately rest on one underlying assertion: that we misunderstood the nature of the Alaska Supreme Court's decision in ***Ravin.***

[1] In our initial decision in this case, we read the ***Ravin*** opinion to say that the privacy clause of the Alaska Constitution restricts the legislature's (and the voters') authority to enact laws prohibiting the possession of marijuana in one's home for personal use. The State contends that this view of ***Ravin*** is fundamentally flawed--that ***Ravin*** did not announce a constitutional restriction on the government's law-making power.

According to the State, ***Ravin*** did not hold that Article I, Section 22 of the Alaska Constitution restricts the government's authority to *enact* statutes that prohibit possession of marijuana in one's home for personal use. Rather, ***Ravin*** restricted the government's authority to *enforce* such statutes--by creating an affirmative defense that individual defendants can raise if they are prosecuted for violating such a statute.

The State argues that this defense is similar to a claim of entrapment or selective prosecution, in that it does not rest on a claim that the defendant is innocent of wrongdoing, but rather on a claim that the government violated constitutional guarantees when it singled out this particular defendant as the target of prosecution. According to the State, ***Ravin*** stands for the proposition that, in any prosecution for possession of marijuana in one's home, the defendant can assert that the possession was of a small amount for personal use. If the defendant raises such a claim, the matter is decided (before trial) by a judge, not a jury. To defeat the proposed defense, the State would have to prove either (1) that the marijuana was not for personal use, or (2) that the government had a sufficient interest in prohibiting the possession of that particular amount of marijuana under the specific circumstances of that defendant's case.

In other words, the State argues that ***Ravin*** created a system in which the constitutionality of marijuana prosecutions would be decided by trial judges on a case-by-case basis--and that, in these case-specific hearings the State would repeatedly try to convince numerous different judges that there is a sufficient government interest to justify imposing criminal penalties on people who possess varying amounts of marijuana.

The State's proposed interpretation of the ***Ravin*** decision would seemingly put us on the road to legal chaos. Under the State's proposal, dozens of judges across the state would be required to issue potentially inconsistent rulings as to whether, under the facts of a particular defendant's case, the State had sufficient justification to criminalize the defendant's possession of 3.0 ounces, or 2.2 ounces, or 1.4 ounces, or 0.6 ounces of marijuana.

However, our primary reason for rejecting the State's interpretation of ***Ravin*** is that the State's interpretation is inconsistent with ***Ravin*** itself.

The ***Ravin*** decision does not speak of an affirmative defense of the type proposed by the State in its petition for rehearing, nor does the ***Ravin*** opinion describe itself as establishing case-specific limits on the State's enforcement of marijuana statutes. Rather, in the opening sentence of ***Ravin***, the Alaska Supreme Court described the issue before them as "[t]he constitutionality of Alaska's statute prohibiting possession of marijuana" [FN2] ***547** Later in the opinion, after the supreme court held that Article I, Section 22 of our state constitution guarantees a right of privacy in one's home [FN3], the court declared that two major questions remained:

FN2. ***Ravin***, 537 P.2d at 496.

FN3. *Id.* at 504.

> whether the State has demonstrated sufficient justification for the prohibition of possession of marijuana in general ... and ... whether the State has met the greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.

Ravin, 537 P.2d at 504.

The supreme court then proceeded to analyze the scientific data concerning the uses and effects of marijuana. The court did not attempt to analyze the particular facts of Irwin **Ravin's** case; rather, the court assessed the legislature's overall justification for regulating *any* person's possession of marijuana in their home. [FN4]

FN4. *See id.,* 537 P.2d at 504-511.

And when the ***Ravin*** court announced its conclusion, the court did not frame that conclusion in terms of whether the State had an interest in prohibiting the possession of marijuana under the particular facts of the case before it. Instead, the court framed its conclusion as a general restriction on the government's authority to legislatively control this aspect of people's personal behavior:

> [W]e conclude that [the state has shown] no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home [.] The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.
>
> The state has a legitimate concern with avoiding the spread of marijuana use to adolescents who may not be equipped with the maturity to handle the experience prudently, as well as a legitimate concern with the problem of driving under the influence of marijuana. Yet these interests are insufficient to justify intrusions into the rights of adults in the privacy of their own homes.

Ravin, 537 P.2d at 511.

In the years since ***Ravin*** was decided, there has been no suggestion (until now) that ***Ravin*** was something other than normal constitutional litigation in which the supreme court adjudicated the constitutionality of a particular category of criminal statute. For example, six months after ***Ravin,*** in *Belgarde v. State,* the supreme court referred to ***Ravin*** as "[a] case [in which] we held that the state may not prohibit possession of [marijuana] by an adult in [their] home for personal consumption". [FN5] In 1978, in *State v. Erickson,* the supreme court again declared that ***Ravin*** represented a restriction on the state's power to legislate:

FN5. 543 P.2d 206, 207 (Alaska 1975).

> In ***Ravin*** *v. State,* this court held that the state could not bar the personal use and possession of marijuana in the home. In view of the relative harmlessness of the drug, the individual's right to privacy under the Alaska Constitution was found to outweigh the state interest in regulation.

574 P.2d 1, 21 (Alaska 1978) (footnote omitted). And more recently, in *Luedtke v. Nabors Alaska Drilling, Inc.,* the supreme court declared that " ***Ravin*** addressed the issue of whether the state could prohibit the use of marijuana in the home. We held that it could not." [FN6]

FN6. 768 P.2d 1123, 1135 (Alaska 1989).

Based on this analysis of the ***Ravin*** decision and the later supreme court decisions construing ***Ravin,*** we are convinced that the State's interpretation of ***Ravin*** is wrong. ***Ravin*** did not create an affirmative defense that defendants might raise, on a case-by-case basis, when they were prosecuted for possessing marijuana in their home for personal use. Instead, both in the ***Ravin*** opinion itself and in the supreme court's later descriptions of ***Ravin,*** the Alaska Supreme ***548** Court has repeatedly and consistently characterized the ***Ravin*** decision as announcing a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home.

Accordingly, we reject the State's suggestion that ***Ravin*** left Alaska's marijuana statutes intact but created an affirmative defense to be litigated in each

individual case.

Although this is not a factor in our interpretation of ***Ravin***, we note that the Alaska Legislature took this same view of ***Ravin*** when they refashioned this state's drug laws twenty years ago. As we described in *Walker v. State* [FN7], the legislature responded to ***Ravin*** in 1982 by enacting a statute--former AS 11.71.060(a)(4)--that prohibited possession of four ounces or more of marijuana, even if the marijuana was possessed in one's home for personal use. In the commentary that accompanied this statute, the legislature declared:

FN7. 991 P.2d 799 (Alaska App.1999).

> [T]his legislation is intended to clarify the law in Alaska concerning possession of marijuana, in light of the decision of the Supreme Court of Alaska in ***Ravin v. State***, 537 P.2d 494 (Alaska 1975). ***Ravin*** held that Alaska's constitutional right to privacy protects the possession and use of marijuana by an adult, in the home, in amounts indicative of personal use in a purely personal, non-commercial context. The approach taken in this Act is to define, for purposes of the decision in ***Ravin***, an amount which is indicative of personal use, and to provide a clear line of demarcation of four ounces, so that citizens of this state will know precisely what conduct is prohibited.

Commentary and Sectional Analysis for the 1982 Revision of Alaska's Controlled Substances Laws (CCSB 190), p. 19 (quoted in *Walker v. State*, 991 P.2d at 802-03).

Thus, not only is the State's suggested interpretation of ***Ravin*** at odds with the supreme court's statements on this question, but it is also at odds with the Alaska Legislature's announced policy aims in this area of the law: the aim of "defin[ing], for purposes of ... ***Ravin***, [a specific] amount which is indicative of personal use", and the aim of "provid[ing] a clear line of demarcation ..., so that citizens of this state will know precisely what conduct is prohibited".

We now address certain other aspects of the State's petition for rehearing.

[2] In our original decision in this case, we stated that because the jury acquitted Noy of the charge of possessing eight ounces or more of marijuana, the State is barred from asserting, in any future litigation, that Noy did indeed possess eight ounces or more of marijuana. The State argues that this conclusion is mistaken for two reasons.

First, the State contends that the doctrine of collateral estoppel does not apply when the aggrieved party had no method of seeking appellate review of the adverse judgement. The State points out that the double jeopardy clauses of the federal and state constitutions preclude the State from seeking appellate review of a jury's verdict of acquittal. Thus, the State argues, the fact that Noy's jury acquitted him of possessing eight ounces or more of marijuana should not estop the State from continuing to assert that Noy possessed more marijuana than the jury found.

The problem with the State's argument is that it is directly contrary to the United States Supreme Court's holding in *Ashe v. Swenson*, 397 U.S. 436, 445- 46, 90 S.Ct. 1189, 1195-96, 25 L.Ed.2d 469 (1970).

Second, the State argues that the jury's acquittal should not be considered conclusive because the jury was misinstructed on how to calculate the weight of marijuana. The State asserts that, given the evidence presented at Noy's trial, it is obvious that Noy possessed at least eight ounces of marijuana, and therefore the jury's verdict of acquittal must have been the fruit of the flawed jury instruction.

But as we explained in our initial opinion, the State did not introduce the marijuana itself; instead, the State relied on photographs and testimony concerning the marijuana. The photographs showed that the marijuana contained stalks, not just leaves ***549** and buds. Even if the jury had been correctly instructed, they would have been told that stalks are not to be considered when assessing the weight of harvested marijuana. Although there may be a substantial possibility that the erroneous weight-calculation instruction influenced the jury's thinking when they assessed the weight of the marijuana, it is also possible that the jurors were not convinced beyond a reasonable doubt that the harvested marijuana, minus the stalks, weighed

eight ounces or more. Thus, we must apply the collateral estoppel rule of *Ashe v. Swenson.* See our discussion of a related point in *State v. McDonald,* 872 P.2d 627, 660 (Alaska App.1994).

Moreover, even if we assume that the erroneous jury instruction played an instrumental role in the jury's decision to acquit Noy of possessing eight or more ounces of marijuana, the State would still be bound by the jury's verdict. The law on this point is summarized in Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* (2nd ed.1999):

> If the jury reaches a verdict of acquittal or the judge grants a judgment of acquittal, double jeopardy bars a new trial even if it appears that the acquittal was based on an erroneous interpretation of the law.

Id., § 25.1(g), Vol. 5, p. 648. *See also id.,* § 25.3(b), Vol. 5, pp. 666-68.

This view of the double jeopardy clause is borne out in the case law. *See United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977); *Livingston v. Murdaugh,* 183 F.3d 300, 301-02 (4th Cir.1999).

[3] Finally, the State argues for the first time that if we adjudicate the constitutionality of AS 11.71.060(a) in Noy's case, our decision will unfairly preclude the State from attempting to prove that ***Ravin*** should be overruled or limited--*i.e.,* preclude the State from attempting to prove that there is sufficient justification for a criminal statute prohibiting any and all possession of marijuana, even possession of marijuana by adults in their home for personal use.

But our decision in this case merely implements the supreme court's constitutional ruling in ***Ravin.*** The State remains free in the future to challenge the continuing vitality of ***Ravin.***

For all of these reasons, the State's petition for rehearing is DENIED.

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H

Court of Appeals of Alaska.
David S. NOY, Appellant,
v.
STATE of Alaska, Appellee.
No. A-8327.

Aug. 29, 2003.
Rehearing Denied Nov. 14, 2003.

Background: Defendant was convicted following jury trial in the District Court, Fourth Judicial District, Fairbanks, Jane F. Kauvar, J., of possession of less than eight ounces of marijuana. Defendant appealed.

Holdings: The Court of Appeals, Stewart, J., held that:
(1) statute declaring that any possession of marijuana by adults in their homes for personal use was a crime contravened constitutional right to privacy, but it remained constitutional to the extent it prohibited possession of four ounces or more of marijuana under those circumstances;
(2) reversal of conviction was required because jury was not asked to determine what amount less than eight ounces was possessed by defendant;
(3) necessity defense was governed by statute specifically defining affirmative defense of medical necessity to possession of marijuana, rather than by general necessity statute; and
(4) jury instructions regarding aggregate weight of live marijuana plant should not be given if defendant is only charged with possessing harvested marijuana.
Reversed.

West Headnotes

[1] Constitutional Law ⇐38
92k38 Most Cited Cases
When a statute conflicts with a provision of State Constitution, the statute must give way.

[2] Criminal Law ⇐13(1)
110k13(1) Most Cited Cases
A statute that purports to attach criminal penalties to constitutionally protected conduct is void.

[3] Statutes ⇐325
361k325 Most Cited Cases
Just as statutes enacted through normal legislative process must not violate State Constitution, statutes enacted by ballot initiative must not violate the Constitution. Const. Art. 12, § 11.

[4] Constitutional Law ⇐48(1)
92k48(1) Most Cited Cases
Court has a duty to preserve a statute to the extent that it is consistent with Constitution.

[5] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases

[5] Controlled Substances ⇐6
96Hk6 Most Cited Cases
Statute declaring that any possession of marijuana by adults in their homes for personal use was a crime contravened constitutional right to privacy as interpreted by state Supreme Court, but statute remained constitutional to the extent it prohibited possession of four ounces or more of marijuana under those circumstances. Const. Art. 1, § 22; AS 11.71.060(a)(1).

[6] Criminal Law ⇐1173.2(3)
110k1173.2(3) Most Cited Cases
Reversal of conviction for possession of less than eight ounces of marijuana that was found in defendant's home was required because jury was not asked to determine what amount less than eight ounces defendant possessed and defendant had the right, under privacy provision of State Constitution, to possess less than four ounces in his home for personal use. Const. Art. 1, § 22; AS 11.71.060(a)(1).

[7] Judgment ⇐751
228k751 Most Cited Cases
Jury's acquittal of defendant on charge of possessing eight ounces or more of marijuana collaterally estopped state from retrying him on that

charge following reversal of conviction for possessing less than eight ounces of marijuana. AS 11.71.050(a), 11.71.060(a).

[8] Double Jeopardy ⚿108
135Hk108 Most Cited Cases
State remained free, following reversal of conviction for possessing less than eight ounces of marijuana that may have been based on a belief by jury that defendant possessed less than four ounces in his home for personal use, to retry defendant on a claim that he possessed at least four ounces of marijuana, thus exceeding the amount he had a right to possess at home for personal use pursuant to privacy provision of State Constitution. Const. Art. 1, § 22; AS 11.71.060(a)(1).

[9] Controlled Substances ⚿51
96Hk51 Most Cited Cases
Claim of necessity, as raised in defense to charge of marijuana possession, was
governed by statute specifically defining affirmative defense of medical necessity for possession of marijuana, rather than by the general necessity statute. AS 11.71.060, 11.71.090, 11.81.320.

[10] Controlled Substances ⚿97
96Hk97 Most Cited Cases
Jury instructions on aggregate weight of a live marijuana plant, as being the weight of the marijuana when reduced to its commonly used form, should not be given if defendant was only charged with possessing harvested marijuana. AS 11.71.060, 11.71.080.

West Codenotes
Limited on Constitutional Grounds

AS 11.71.060.

***539** William R. Satterberg, Jr., Law Offices of William R. Satterberg, Jr., Fairbanks, for Appellant.

***540** Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

OPINION

STEWART, Judge.

A jury convicted David S. Noy of violating AS 11.71.060(a), which prohibits possession of less than eight ounces of marijuana. The marijuana was found in Noy's home. Noy appeals his conviction, arguing that he was convicted for engaging in conduct (possession of marijuana for personal use in one's home) that is protected by the privacy provision of the Alaska Constitution (article I, section 22). [FN1]

> FN1. *See* ***Ravin*** *v. State,* 537 P.2d 494 (Alaska 1975).

We agree that Noy may have been convicted for conduct that is constitutionally protected. As we explain here, Alaska citizens have the right to possess less than four ounces of marijuana in their home for personal use. Accordingly, we reverse Noy's conviction. The State remains free to retry Noy if the State believes it can prove that Noy possessed at least four ounces of marijuana.

Noy also claims that the district court should have allowed him to raise the defense of medical necessity. However, as we explain, the district court properly rejected Noy's proposed defense.

Facts of the case

The North Pole police contacted Noy at his home and told him they smelled growing marijuana. The police searched Noy's house and found approximately eleven ounces of harvested marijuana, consisting of buds, leaves, and stalks. The police also found five immature marijuana plants. The police did not, however, find any scales or packaging material; nor was there any other evidence that Noy was engaged in any commercial conduct involving marijuana.

Except for the immature plants, all the plant material--including the buds, leaves, and stalks--was placed in a paper bag and sent to the state crime lab for identification and weighing. The immature plants were not tested, nor did they form part of the State's case. Ultimately, Noy was charged with possessing more than eight ounces of harvested marijuana.

At trial, however, the State did not offer the paper bag in evidence. Therefore, the jury had to rely on testimony and photographs showing what the police had placed in the bag. Based on the testimony and photographs, the paper bag obviously contained stalks along with buds and leaves. Among other things, the jury was instructed that "[m]arijuana means the seeds, leaves, buds, and flowers of the plant, Cannabis, whether growing or not, but it does not include the stalks of the plants, or fiber produced from the stalks." The jury found Noy not guilty of possessing eight ounces or more of marijuana, but guilty of possessing less than eight ounces.

Alaska Statute 11.71.060(a)(1), the statute that prohibits possession of less than eight ounces of marijuana under any and all circumstances, violates article I, section 22 of the Alaska Constitution as construed in ***Ravin*** *v. State*

Noy was convicted under AS 11.71.060(a)(1), which makes it a class B misdemeanor to use or display any amount of marijuana, or to possess "one or more preparations, compounds, mixtures, or substances" containing marijuana "of an aggregate weight of less than one-half pound." [FN2] This statute criminalizes conduct that the Alaska Supreme Court has declared is protected under article I, section 22 of the Alaska Constitution.

FN2. AS 11.71.060(a)(1) & (b).

Article I, section 22 states: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

*541 In ***Ravin,*** the Alaska Supreme Court held that this provision of our constitution protects possession of marijuana for personal use in one's home. The court acknowledged that there is no fundamental right to possess or ingest marijuana. Nevertheless, the court held that article I, section 22 gives people a heightened expectation of privacy with respect to their personal activities within their home. [FN3] The court held that this heightened right of privacy "encompass[ed] the possession and ingestion of ... marijuana in a purely personal, non-commercial context in the home" unless the state could show that such an intrusion into people's privacy bore "a close and substantial relationship ... to a legitimate governmental interest"--that is, unless the state proved "that the public health or welfare [would] in fact suffer" if private possession of marijuana were not prohibited. [FN4]

FN3. ***Ravin,*** 537 P.2d at 504-12.

FN4. *Id.* at 504, 511.

The supreme court concluded that the state had demonstrated a substantial interest in regulating the use of marijuana by drivers, in prohibiting the use of marijuana by children, in regulating the use or possession of marijuana in public places, and in regulating the buying and selling of marijuana. [FN5] The supreme court added that the state could validly prohibit "[p]ossession at home of amounts of marijuana indicative of [an] intent to sell rather than possession for personal use." [FN6] However, the court concluded that the state had shown "no adequate justification for ... prohibit[ing] possession of marijuana by an adult for personal consumption in the home." [FN7]

FN5. *Id.* at 511.

FN6. *Id.*

FN7. *Id.*

In 1975, following the supreme court's decision in ***Ravin,*** the Alaska Legislature amended AS 17.12 (the then-existing marijuana laws) to take into account the supreme court's ruling. The legislature exempted marijuana from the normal penalties for possession of "depressant, hallucinogenic, or stimulant drugs" [FN8] and enacted two special provisions governing marijuana possession: former AS 17.12.110(d) and (e). [FN9]

FN8. Former AS 17.12.110(a), as amended by ch. 110, § 1, SLA 1975.

FN9. Ch. 110, § 1, SLA 1975.

Former AS 17.12.110(d) prohibited public use of marijuana, possession of more than an ounce of marijuana in a public place, possession of any amount of marijuana while operating a motor vehicle or airplane, and possession of any amount

of marijuana by a minor. The maximum penalty for violating these provisions was a fine of $1,000.

Former AS 17.12.110(c) prohibited possession by an adult of one ounce or less of marijuana in a public place. It also prohibited possession by an adult of any amount of marijuana for personal use in a non-public place. This second provision clearly encompassed possession of marijuana in one's home for personal use--conduct that, in ***Ravin,*** the supreme court had said was protected from governmental intrusion. However, the legislature declared that there was no criminal penalty for violating subsection (e); rather, the offender faced a "civil fine of not more than $100."

Seven years later, in 1982, the legislature moved Alaska's drug laws from Title 17 to Title 11. The provisions of AS 17.12 dealing with marijuana were repealed, and new marijuana provisions were enacted in AS 11.71. [FN10] In this 1982 revision of the marijuana laws, the legislature dropped the civil fine for possession of marijuana for personal use in a non-public place--thus ending any potential conflict with ***Ravin.***

> FN10. Ch. 45, § 26, SLA 1982 (the repeal of AS 17.12) and § 2 (the enactment of AS 11.71).

Under the newly enacted AS 11.71.050(a)(3)(E), possession of eight ounces or more of marijuana was made a class A misdemeanor. Under the newly enacted AS 11.71.060(a)(4), possession of four ounces or more of marijuana was made a class B misdemeanor. [FN11] The legislature also made it a ***542** violation to possess any amount of marijuana in a public place. [FN12] However, no statute prohibited possession of less than four ounces of marijuana for personal use in a non-public place.

> FN11. The 1982 version of AS 11.71.060(a) also prohibited use of marijuana in a public place, or possession of one ounce or more of marijuana in a public place, or possession of any amount of marijuana while operating a motor vehicle, or possession of any amount of marijuana by a person under 19 years of age.

> FN12. Former AS 11.71.070(a)(2).

In other words, following the legislature's 1982 revision of the marijuana laws, there was no penalty (whether criminal or civil) for possessing less than four ounces of marijuana in one's home for personal use. But this changed in 1990.

In the general election of 1990, the voters of Alaska approved a ballot proposition that amended AS 11.71.060(a) and repealed AS 11.71.070. [FN13] Under the amended (that is, the current) version of AS 11.71.060(a), possession of any amount of marijuana less than eight ounces is a class B misdemeanor. [FN14] This is the statute that Noy violated.

> FN13. 1990 Initiative Proposal No. 2, §§ 1-2.

> FN14. AS 11.71.060(a)(1) and (b).

The question presented in this case is whether AS 11.71.060(a) is constitutional to the extent that it prohibits possession of marijuana by adults in their homes for personal use.

[1][2] On one level, the answer is straightforward. The Alaska Supreme Court ruled in ***Ravin*** that the right of privacy codified in article I, section 22 of our state constitution protects the right of adults to possess marijuana in their homes for personal use. When a statute conflicts with a provision of our state constitution, the statute must give way. [FN15] Thus, a statute which purports to attach criminal penalties to constitutionally protected conduct is void.

> FN15. *See Falcon v. Alaska Public Offices Comm'n,* 570 P.2d 469, 480 (Alaska 1977); ***Ravin,*** 537 P.2d at 511.

On a deeper level, the question is whether the voters of Alaska can, through the initiative process, abrogate a constitutional ruling of the Alaska Supreme Court--in particular, the court's ruling in ***Ravin*** that article I, section 22 of our state constitution protects an adult's right to possess marijuana in the home for personal use. The answer to this question is found in the Alaska Constitution itself. Article XII, section 11 states that the people

of this state, through the ballot initiative process, may exercise "the law-making powers assigned to the legislature" (subject to the limitations codified in article XI of the constitution). That is, the initiative process constitutes a method by which the people of this state can directly enact legislation.

[3] But just as the statutes enacted through the normal legislative process must not violate the constitution, the statutes enacted by ballot initiative must not violate the constitution. [FN16] Thus, even though the voters enacted AS 11.71.060(a)(1) through the initiative process, the constitutionality of this statute must be assessed in the same way as if it had been enacted through the normal legislative process. And, as we have said, this statute contravenes the constitutional right of privacy as interpreted by our supreme court in ***Ravin***--because it declares that any possession of marijuana by adults in their homes for personal use is a crime.

FN16. *See Alaskans for Legislative Reform v. State,* 887 P.2d 960, 962, 966 (Alaska 1994); *Citizens Coalition for Tort Reform v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991).

Alaska Statute 11.71.060(a) must be limited to preserve its constitutionality

We have concluded that AS 11.71.060(a)(1) is unconstitutional to the extent that it proscribes marijuana possession that, under the ***Ravin*** decision, is protected by article I, section 22 of the Alaska Constitution. But this does not mean that the statute is unconstitutional in its entirety. In ***Ravin,*** the supreme court acknowledged that the legislature could validly prohibit possession of marijuana in the home if the marijuana was of such a quantity as to be "indicative of [possession with] intent to sell rather than possession for personal use." [FN17] Thus, in *Walker v. State* [FN18] we held that the legislature could ***543** validly prohibit possession of eight ounces or more of marijuana--even if the marijuana was possessed by an adult in their home for personal use. [FN19]

FN17. 537 P.2d at 511.

FN18. 991 P.2d 799 (Alaska App.1999).

FN19. *Id.*

The question inherent in this analysis is whether, consistent with ***Ravin,*** the legislature might validly prohibit all instances of marijuana possession in some amount less than eight ounces. As we noted in *Walker,* the ***Ravin*** decision "does not elaborate on what amount of marijuana might constitute an 'amount ... indicative of intent to sell.' " [FN20]

FN20. *Id.* (quoting ***Ravin,*** 537 P.2d at 511).

Before the marijuana laws were amended by voter initiative in 1990, the Alaska Legislature had (by statute) defined the amount of marijuana that adults could lawfully possess in their home for personal use. Under the pre-1990 statutes governing marijuana possession, an adult could be prosecuted for possessing four ounces or more of marijuana in their home for personal use. Possession of less than this amount was not a crime. [FN21]

FN21. *See* former AS 11.71.060 and AS 11.71.070.

There are no appellate cases testing the constitutionality of the legislature's four-ounce dividing line. However, Noy has not argued that this four-ounce dividing line violates ***Ravin.*** We note, moreover, that article I, section 22 entrusts the legislature with the duty of implementing the constitutional right of privacy. Given the language of article I, section 22, and given the deference that we should pay to the decision of a co-equal branch of government, we conclude that the legislature's four-ounce dividing line is presumptively constitutional under ***Ravin.***

[4] Although we have declared that the current version of AS 11.71.060(a) is unconstitutional (because it prohibits conduct that is constitutionally protected), we have a duty to preserve the statute to the extent possible--that is, to the extent that it is consistent with the constitution. [FN22] The pre 1990 version of the statute contained a four-ounce ceiling on marijuana possession in the home by adults for personal use--a ceiling that is presumptively constitutional. The 1990 voter initiative expanded the scope of AS 11.71.060(a) by eliminating this four-ounce ceiling and declaring

that all possession of marijuana by adults in their homes for personal use was illegal. In this new version, the statute violates article I, section 22 of the constitution. To make the statute conform to the constitution again, we must return it to its pre-1990 version.

> FN22. *See Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965) (ruling that if a statute may be reasonably construed to avoid unconstitutionality, the court must do so).

[5] We thus conclude that, with respect to possession of marijuana by adults in their home for personal use (conduct that is protected under the ***Ravin*** decision), AS 11.71.060(a)(1) remains constitutional to the extent that it prohibits possession of four ounces or more of marijuana. Restricted in this fashion, AS 11.71.060(a)(1) remains enforceable.

Noy is entitled to a new trial

[6] We have ruled that AS 11.71.060(a) validly continues to prohibit possession of four ounces or more of marijuana, even when the possession is by adults in their home for personal use. But it is possible that the jury convicted Noy even though they believed that he possessed less than this amount. For this reason, we must reverse Noy's conviction.

As explained earlier in this opinion, Noy was prosecuted under AS 11.71.050(a) for possessing eight ounces or more of marijuana. The jury acquitted Noy of this charge, but convicted him under AS 11.71.060(a) for possessing some amount of marijuana less than eight ounces. The problem is that the jury was not asked to determine what lesser amount of marijuana Noy possessed.

[7][8] The State remains free to retry Noy for marijuana possession. However, because the jury acquitted Noy of possessing eight ounces or more of marijuana, the State is collaterally estopped from asserting that Noy possessed eight ounces or more. The State can, however, claim that Noy possessed ***544** at least four ounces of marijuana--enough to justify a conviction under AS 11.71.060(a)(1) (as we now have limited it).

Was Noy entitled to raise a common law defense of medical necessity?

At trial, Noy argued that he was entitled to have the jury decide whether his possession of marijuana was justified by medical necessity under AS 11.81.320. The trial judge, District Court Judge Jane F. Kauvar, ruled that Noy could not avail himself of the normal defense of necessity under AS 11.81.320 . Rather, Judge Kauvar ruled, Noy could only assert the affirmative defense for the medical use of marijuana codified in AS 11.71.090.

Judge Kauvar's ruling was based on the wording of AS 11.81.320. This statute declares that the defense of necessity remains available "to the extent permitted by common law" unless "[Title 11 or another] statute defining the offense provides exemptions or defenses dealing with the justification of necessity in the specific situation involved," or unless "a legislative intent to exclude the justification of necessity ... otherwise plainly appear[s]." [FN23]

> FN23. AS 11.81.320(a)(1)-(2).

Judge Kauvar noted that the legislature has enacted another statute, AS 11.71.090, that specifically deals with the defense of medical necessity for the possession of marijuana. Because of this, Judge Kauvar ruled that Noy's claim of medical necessity for his possession of marijuana had to be raised and litigated under AS 11.71.090 rather than under the general necessity defense codified in AS 11.81.320.

[9] This ruling was correct. The general necessity defense statute, AS 11.81.320, expressly states that a more specific statute takes precedence. Noy asserted that he had a medical need to use marijuana. Alaska Statute 11.71.090 specifically addresses this issue, and defines a separate affirmative defense of medical necessity to possess marijuana. Noy's claim of necessity was therefore governed by the specific necessity statute, AS 11.71.090, rather than by the general necessity statute, AS 11.81.320.

Jury instructions

Noy does not contest the jury instructions that were given at his trial. However, because Noy may be

retried, we believe we should address the State's contention that Judge Kauvar inaccurately instructed the jury concerning how to determine the weight of harvested marijuana.

[10] Judge Kauvar properly instructed the jury that "[m]arijuana means the seeds, leaves, buds, and flowers of the plant[.]" [FN24] But Judge Kauvar also instructed the jury that the aggregate weight of a live marijuana plant was "the weight of the marijuana when reduced to its commonly used form." Based on this instruction, Noy urged the jury to consider only the aggregate weight of the "buds" in determining how much marijuana he had possessed. But the "commonly used form" of marijuana is only relevant when a person is charged with possessing live marijuana plants. [FN25] Noy was only charged with possessing harvested marijuana. Therefore, in the event of a retrial, assuming the State again charges Noy with possessing only harvested marijuana, the district court should not instruct the jury on how to determine the aggregate weight of live marijuana, or allow the parties to argue about the definition of the "commonly used form" of marijuana.

FN24. *See* AS 11.71.900(14).

FN25. *See Maness v. State,* 49 P.3d 1128, 1134 (Alaska App.2002) (quoting *Gibson v. State,* 719 P.2d 687, 690 (Alaska App.1986)) (the "commonly used form" language of AS 11.71.080 "refers to the method of calculating the aggregate weight of live marijuana plants").

Conclusion

To make AS 11.71.060(a)(1) consistent with article I, section 22 of the Alaska Constitution as interpreted in ***Ravin,*** we must limit the scope of the statute. As currently written, the statute prohibits possession of any amount of marijuana. But with regard to possession of marijuana by adults in their home for personal use, AS 11.71.060(a)(1) *545 must be interpreted to prohibit only the possession of four ounces or more of marijuana.

The judgment of the district court is REVERSED.

83 P.3d 538

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97 P.3d 93
97 P.3d 93
(Cite as: 97 P.3d 93)

C

Court of Appeals of Alaska.
STATE of Alaska, Petitioner,
v.
Leo Richardson CROCKER Jr., Respondent.
No. A-8462.

Aug. 27, 2004.

Background: Defendant was charged with fourth-degree controlled substance misconduct after the police executed a search warrant at his home and found marijuana and marijuana-growing equipment. The Superior Court, Third Judicial District, Homer M. Francis Neville, J., found that the search warrant for defendant's home should not have been issued, and the superior court therefore suppressed all of the evidence and dismissed the charges. State appealed.

Holding: The Court of Appeals, Mannheimer, J., held that search warrant application failed to establish probable cause to believe that defendant's possession of marijuana fell outside realm of marijuana possession that was constitutionally protected.
Affirmed.

Coats, C.J., filed a dissenting opinion.

West Headnotes

[1] Controlled Substances ⇐146
96Hk146 Most Cited Cases
Upon seeking a warrant authorizing the search of a home for marijuana, government's warrant must establish probable cause to believe that the marijuana possessed in that home falls outside the person's constitutional right to privacy, which protects an adult's right to possess less than four ounces of marijuana. Const. Art. 1, § 22.

[2] Controlled Substances ⇐6
96Hk6 Most Cited Cases

[2] Controlled Substances ⇐49
96Hk49 Most Cited Cases
Personal use of marijuana in an amount less than four ounces is not an affirmative defense to be raised by persons charged with marijuana possession; rather, there exists a constitutional limitation on the government's authority to enact legislation in the first instance that prohibits the possession of marijuana in the privacy of one's home. Const. Art. 1, § 22.

[3] Searches and Seizures ⇐113.1
349k113.1 Most Cited Cases
Before a search warrant can lawfully issue, the government must establish probable cause to believe that the evidence being sought is connected to a crime.

[4] Controlled Substances ⇐146
96Hk146 Most Cited Cases
No search warrant can issue for evidence of marijuana possession unless the State affirmatively establishes probable cause to believe that the type of marijuana possession at issue in that case is something other than possession for personal use, in an amount less than four ounces. Const. Art. 1, § 22

[5] Criminal Law ⇐394.4(6)
110k394.4(6) Most Cited Cases
Search warrant application failed to establish probable cause to believe that defendant's possession of marijuana fell outside the realm of marijuana possession that is constitutionally protected, and therefore evidence obtained under authority of that warrant was properly suppressed; although two officers smelled a strong odor of growing marijuana when they stood at defendant's front door, the search warrant application contained no assertion that the strength of the smell gave the officers any indication of the amount of marijuana that might be growing in the house, and it could not be assumed, in the absence of evidence, that there was a direct proportionality between the strength of the odor and the amount of marijuana giving rise to that odor. Const. Art. 1, § 22.

[6] Controlled Substances ⚿146
96Hk146 Most Cited Cases
The amount of electricity usage at defendant's house failed to establish probable cause that defendant's possession of marijuana fell outside the realm of marijuana possession that is constitutionally protected; although the search warrant application stated the average rate of electricity consumption, and defendant's usage greatly exceed the average rate, the search warrant application failed to describe the size of defendant's house, and the magistrate who issued the warrant had no way of knowing whether one would reasonably expect defendant's electricity usage to fall within, below, or above the average range for all electricity users. Const. Art. 1, § 22.

***94** Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for the Petitioner.

Andrew Haas, Haas & Spigelmyer, Homer, for the Respondent.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

OPINION

MANNHEIMER, Judge.

Leo Richardson Crocker Jr. was charged with fourth-degree controlled substance misconduct after the police executed a search warrant at his home and found marijuana plants, harvested marijuana, and marijuana-growing equipment. The superior court later concluded that the search warrant for Crocker's home should not have been issued. The superior court therefore suppressed all of this evidence and dismissed the charges against Crocker. The State now appeals the superior court's decision.

Our main task in this appeal is to clarify what the State must prove in order to obtain a warrant to enter and search a person's home for evidence of marijuana possession. The issue arises because not all marijuana possession is illegal. In ***Ravin*** *v. State,* [FN1] the Alaska Supreme Court held that the privacy provision of our state constitution (Article I, Section 22) protects an adult's right to possess a limited amount of marijuana in their home for personal use. And recently, in *Noy v. State,* [FN2] we held (based on ***Ravin***) that Alaska's marijuana statutes must be construed to allow possession by adults of any amount less than four ounces of marijuana in the home for personal use. [FN3]

FN1. 537 P.2d 494 (Alaska 1975).

FN2. 83 P.3d 538 (Alaska App.2003), *on rehearing,* 83 P.3d 545 (Alaska App.2003).

FN3. *Noy,* 83 P.3d at 542-43, *on rehearing,* 83 P.3d at 546-48.

For the reasons explained in this opinion, we hold that a judicial officer should not issue a warrant to search a person's home for evidence of marijuana possession unless the State's warrant application establishes probable cause to believe that the person's possession of marijuana exceeds the scope of the possession that is constitutionally protected under ***Ravin***. And, because the State's warrant ***95** application in Crocker's case fails to meet this test, we conclude that the superior court properly suppressed the evidence against Crocker.

A search warrant application must establish probable cause to believe that the property being sought is connected to the commission of a crime.

Under AS 12.35.020, a judicial officer is empowered to issue a warrant authorizing the police to enter a premises and search for specified property if the government's warrant application establishes probable cause to believe:

that the property was stolen or embezzled, or
that the property was used as a means of committing a crime, or
that the property is the intended means of committing a crime, and the property either is in the possession of a person who intends to commit the crime or is in the possession of someone else to whom it has been delivered for the purpose of concealing it or otherwise preventing its discovery, or
that the property constitutes evidence of a particular crime or tends to show that a certain person has committed a particular crime.

In every case, the government must establish probable cause to believe that the property being sought is connected in one of these ways to the

commission (or intended commission) of a crime.

> *Not all possession of marijuana is a crime. Thus, when the government seeks a warrant authorizing the search of a home for marijuana or related paraphernalia, the government's warrant application must establish probable cause to believe that the marijuana possessed in that home falls outside the type of possession protected under* ***Ravin****.*

[1] Not all marijuana possession is a crime in Alaska. Under ***Ravin*** and *Noy*, an adult may possess any amount of marijuana less than four ounces in their home, if their possession is for personal use. Thus, it would seem that a court should not issue a search warrant based on an allegation of marijuana possession unless the State establishes probable cause to believe that the type of marijuana possession at issue in the case is something other than the type of possession protected under ***Ravin***. (For instance, a court might properly issue a search warrant if the State establishes probable cause to believe that the marijuana is possessed for commercial purposes, or that the amount of marijuana is four ounces or more.)

[2] But the State disputes this conclusion. In its brief to this Court, the State argues that ***Ravin*** does not actually forbid the legislature from criminalizing the possession of marijuana. Rather (the State argues), ***Ravin*** established an affirmative defense--the defense of personal use--that can be raised by people who are charged with marijuana possession. Based on this interpretation of ***Ravin***, the State argues that all possession of marijuana continues to be crime in Alaska--and, thus, a judicial officer can lawfully issue a search warrant for evidence of marijuana possession so long as the State establishes probable cause to believe that the premises to be searched contains *any* marijuana (or any other property tending to show possession of marijuana).

We addressed and rejected this same argument in our opinion on rehearing in *Noy*:

> ***Ravin*** did not create an affirmative defense that defendants might raise, on a case-by-case basis, when they were prosecuted for possessing marijuana in their home for personal use.... [T]he Alaska Supreme Court has repeatedly and consistently characterized the ***Ravin*** decision as announcing a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home.
>
> Accordingly, we reject the State's suggestion that ***Ravin*** left Alaska's marijuana statutes intact but created an affirmative defense to be litigated in each individual case.

Noy (*opinion on rehearing*), 83 P.3d at 547-48.

The State further argues that if search warrant applications must establish probable cause to believe that the marijuana possession ***96** at issue in that case falls outside of the marijuana possession protected by ***Ravin***, this would be tantamount to "a presumption that all marijuana possessed in a home is for purely personal use". But this "presumption" of non-criminality is built into the search and seizure clause of the Alaska Constitution and the statutory law governing the issuance of search warrants.

[3] Before a search warrant can lawfully issue, the government must establish probable cause to believe that the evidence being sought is connected to a crime. This same rule governs search warrants for all controlled substances, not just marijuana.

Every day, people obtain controlled substances legally through a doctor's prescription. For instance, several prescription painkillers contain codeine, which is a Schedule IA controlled substance. [FN4] Our state constitution protects people from government intrusion into their homes unless the government affirmatively establishes a valid reason for the intrusion. Thus, even though the police may have firm information that a person currently possesses codeine in their home, a judicial officer should not issue a warrant that authorizes the police to enter the person's home and search the person's cupboards and drawers for evidence of this codeine possession unless the police also present the magistrate with some affirmative reason to believe that the codeine was obtained illegally or that (having been obtained lawfully) it is being distributed illegally.

FN4. AS 11.71.140(b)(1)(G).

[4] The same rule applies to marijuana possession.

Under the supreme court's decision in ***Ravin*** and our recent decision in *Noy*, not all possession of marijuana is illegal. Rather, Alaskans have a right to possess a limited amount of marijuana for personal use in their homes. We accordingly hold that no search warrant can issue for evidence of marijuana possession unless the State affirmatively establishes probable cause to believe that the type of marijuana possession at issue in that case is something other than the type of possession protected under ***Ravin***.

As the State correctly points out, the question is one of probable cause, not ultimate proof. Thus, the search warrant application need not negate every other reasonable, exculpatory explanation of the observed facts. [FN5] But the search warrant application can not rely solely on the fact that someone is in possession of marijuana. The warrant application must provide an affirmative reason to conclude that the possession is illegal or that the marijuana otherwise constitutes evidence of a crime.

> FN5. *See McCoy v. State*, 491 P.2d 127, 130 (Alaska 1971); *State v. Grier*, 791 P.2d 627, 632 n. 3 (Alaska App.1990).

In his dissent, Judge Coats asserts that this holding is a departure from precedent. He points out that in several prior decisions, this Court has accepted the premise that the smell of growing marijuana could establish probable cause for a search of a home. But those cases were decided in the context of state law that forbade any and all possession of marijuana (and the parties did not attack that law under ***Ravin***). Thus, in those prior instances, the smell of growing marijuana emanating from a house was persuasive evidence that someone was breaking the law. That is no longer the case.

Judge Coats also seconds the State's argument that, if we require the police to present the magistrate with some reason to believe that a homeowner's possession of marijuana is illegal, we are creating the unwarranted "presumption" that all possession of marijuana is legal. This is a misunderstanding of our decision.

Our holding does not rest on a presumption, one way or the other, about whether a particular instance of possession of marijuana in the home is legal. Rather, our holding rests on the constitutional principle that no search warrant can issue until the police present a magistrate with good reason to believe that the law has been broken (and that evidence of that illegality can be found on the premises to be searched).

Evidence that a person possesses an unspecified quantity of marijuana in their home does not, standing alone, establish probable cause to believe that the person is breaking *97 the law. Thus, without some additional indication of illegality (for instance, evidence suggesting that the marijuana is being sold, or that the amount of marijuana equals or exceeds the statutory ceiling of four ounces), the search and seizure provision of our state constitution (Article I, Section 14) prohibits the issuance of a search warrant.

Under the law advocated by the State and by Judge Coats in his dissent (that is, if possession of any amount of marijuana in one's home constituted adequate grounds for the issuance of a search warrant), Alaska citizens would have the constitutional right to possess marijuana for personal use in their homes, but they would exercise this right at their peril--because their possession of marijuana would subject them to thorough-going police searches of their homes. If this were the law, the Alaska Constitution's protection of the right of privacy in one's home--the cornerstone of the ***Ravin*** decision--would be eviscerated.

We therefore reiterate that no search warrant can issue for evidence of marijuana possession unless the State affirmatively establishes probable cause to believe that the type of marijuana possession at issue in that case is something other than the type of possession protected under ***Ravin***.

> *The State's search warrant application in Crocker's case failed to establish probable cause to believe that his possession of marijuana fell outside the realm of marijuana possession that is protected under* ***Ravin***.

[5] The search warrant application in Crocker's case begins with seven pages of "boilerplate"--dozens of paragraphs containing general descriptions of how marijuana is normally grown and processed. The warrant application then contains one page of factual assertions specific to

Crocker's case.

According to these case-specific assertions, the state troopers received a tip from an unidentified "confidential source" that marijuana cultivation was being conducted in the Anchor Point residence of Debra Steik. Based on this tip, two officers visited the Steik residence "to conduct an investigative contact". The two officers smelled "a strong odor of growing marijuana" when they stood at Steik's front door. Thus, there was ample probable cause to believe that marijuana was being grown inside the residence. The question, however, is whether there was probable cause to believe that this marijuana was being grown for commercial purposes or that the amount of marijuana inside the house exceeded the amount protected under the ***Ravin*** and *Noy* decisions.

The State asserts that the strength of the smell (including the fact that the officers could detect the odor while standing outside the house) tends to show that the amount of marijuana inside the house must have exceeded the amount protected by ***Ravin*** and *Noy*. But the search warrant application contains no assertion that the strength of the smell gave the officers any indication of the amount of marijuana that might be growing in the house.

Moreover, we can not simply assume that there is a direct proportionality between the strength of the odor and the amount of marijuana giving rise to that odor. We addressed a similar issue in *Ballard v. State*, 955 P.2d 931 (Alaska App.1998), where we concluded that nystagmus (an involuntary "jerking" of a person's eyeball as they attempt to follow the path of a moving object) is a reliable indicator of alcohol consumption, but that there is no direct correlation between the *degree* of a person's nystagmus and the amount of their alcohol consumption or intoxication. *Id.* at 933, 939- 940, 942.

There may or may not be a correlation between the strength of the odor of growing marijuana and the amount of marijuana being grown. But the search warrant application in the present case makes no assertion concerning such a potential correlation, and we will not assume such a correlation in the absence of evidence.

Moreover, even if such a correlation exists, the officer in this case merely asserted that the odor was "strong". There was nothing to indicate whether an odor of this unexplained degree of strength provided a reasonable basis for concluding that the amount of marijuana in the house exceeded the amount protected under ***Ravin*** and *Noy*.

98** [6] The State also argues that the amount of electricity usage at the Steik residence provided probable cause to believe that the amount of marijuana inside the house exceeded the amount of marijuana protected under ***Ravin and *Noy*.

After receiving the tip from their "confidential source" that marijuana was being grown at the Steik residence, the police--employing unspecified means-- conducted a "check" of the utility usage at the residence. They discovered that, over the preceding thirteen months, the average electricity usage at Steik's home was 56.6 kilowatt hours per day. The officer who applied for the search warrant asserted that, "[b]ased on [his] training and experience, the [electricity] consumption at [Steik's] residence [was] higher than average for a home of [its] size."

One of the boilerplate paragraphs of the search warrant application contains an assertion that, according to the Homer Electric Association, "prospective customers should expect an average monthly [electricity] consumption of approximately 22 [kilowatt-hours] per day with natural gas heating, and 27 to 31 [kilowatt-hours] per day with electric heat." However, the search warrant application does not describe Steik's house (other than identifying its address). The magistrate had no way of knowing whether Steik's house was of average size or was smaller or larger than average. Thus, the magistrate had no way of knowing whether one would reasonably expect Steik's electricity usage to fall within, below, or above the average range for all of the Homer Electric Association's customers.

Indeed, when the officer who applied for the search warrant made his assertion about the "higher than average" electricity usage at Steik's residence, he did not rely on the estimate given by the Homer Electric Association. Rather, the officer relied on his "training and experience". But the officer did

not explain what training or experience he might have received that would allow him to offer an informed opinion concerning the typical or average electricity usage for homes of various sizes.

And although the officer asserted that the electricity usage at Steik's home was "higher than average" for a house its size, the officer did not say how much higher than average this usage was. When an "average" amount of electricity usage has been identified for a particular type or size of house, this means that many (conceivably, up to half) of those houses will have electricity usage that is *higher* than average. Thus, even if we credit the officer's assertion that the Steik residence was using more electricity than average for a house its size, this unelaborated assertion did not significantly bolster the assertion that Steik's house was the site of marijuana cultivation. Much less did this "higher than average" electricity usage establish probable cause to believe that the amount of marijuana being cultivated in the house exceeded the amount protected under ***Ravin*** and *Noy*.

For these reasons, we conclude that even though the search warrant application established probable cause to believe that marijuana cultivation was being conducted inside the residence, the warrant application failed to establish probable cause to believe that this marijuana cultivation was for commercial purposes or that the amount of marijuana being cultivated exceeded the amount protected under ***Ravin*** and *Noy*. Accordingly, the search warrant should not have been issued, and the superior court correctly suppressed the evidence obtained under the authority of that warrant.

Conclusion

The decision of the superior court is AFFIRMED.

COATS, C.J., dissents.

COATS, Chief Judge, dissenting.

In reviewing whether a magistrate properly issued a search warrant, this court is to give the magistrate's findings great deference. This court "view[s] the evidence in the light most favorable to upholding the warrant and will only invalidate the warrant if the magistrate abused her discretion." [FN1] We are **99** to uphold the decision to issue the search warrant in doubtful or marginal cases. [FN2] When I apply this standard, I conclude that the information contained in the warrant established a fair probability that Crocker possessed an unlawful amount of marijuana. I would therefore uphold the warrant.

FN1. *Van Buren v. State,* 823 P.2d 1258, 1261 (Alaska App.1992) (citing *State v. Chapman,* 783 P.2d 771, 772 (Alaska App.1989)).

FN2. *McClelland v. State,* 928 P.2d 1224, 1225 (Alaska App.1996); *State v. Conway,* 711 P.2d 555, 557 (Alaska App.1985).

In several prior decisions, this court has upheld search warrants that were based primarily on testimony from police officers that they smelled the strong odor of growing marijuana coming from a particular source. [FN3] In its decision today, the court overrules all these prior cases and adds a further requirement for the State to obtain a warrant: the State must prove that the growing marijuana was not a small quantity being grown for personal use, protected by ***Ravin*** *v. State.* [FN4] I would adhere to our precedent.

FN3. *See, e.g., Lustig v. State,* 36 P.3d 731, 732-33 (Alaska App.2001); *Wallace v. State,* 933 P.2d 1157, 1163 (Alaska App.1997); *McClelland,* 928 P.2d at 1226-27; *Landers v. State,* 809 P.2d 424, 424-25, 426-27 (Alaska App.1991).

FN4. 537 P.2d 494 (Alaska 1975).

Our former cases, going back many years, accepted the conclusion that where the police could establish that there was a strong odor of growing marijuana, there was probable cause that there was criminal activity and that a search warrant could properly be issued. Without any notice to the State, the court has suddenly reversed ground. The court now assumes that a marijuana growing operation is protected by ***Ravin*** and that the State has the duty to disprove this presumption before obtaining a search warrant. I do not see any basis for the majority's presumption, [FN5] and therefore, I would follow our former precedent. [FN6]

FN5. *See Illinois v. Gates,* 462 U.S. 213, 245 n. 13, 103 S.Ct. 2317, 2335 n. 13, 76 L.Ed.2d 527 (1983) (stating that "innocent behavior frequently will provide the basis for a showing of probable cause"); *Van Sandt v. Brown,* 944 P.2d 449, 452 (Alaska 1997) (quoting *Murdock v. Stout,* 54 F.3d 1437, 1441 (9th Cir.1995)) (stating that probable cause "requires only a fair probability or substantial chance of criminal activity, not an actual showing that such activity occurred"); *McCoy v. State,* 491 P.2d 127, 130 (Alaska 1971) (holding that probable cause existed despite possible innocent explanation for conduct); *Badoino v. State,* 785 P.2d 39, 41 (Alaska App.1990) (quoting *Harrelson v. State,* 516 P.2d 390, 396 (Alaska 1973)) ("Probable cause to issue a search warrant exists when 'reliable information is set forth in sufficient detail to warrant a reasonably prudent [person] in believing that a crime has been or was being committed.' "); *State v. Grier,* 791 P.2d 627, 632 n. 3 (Alaska App.1990) ("[P]robable cause is established even though the facts known to the officer could also be reconciled with innocence."); *Dunn v. State,* 653 P.2d 1071, 1079 (Alaska App.1982) (holding that probable cause existed even though "various factors, if taken individually, are as readily consistent with innocence as guilt, ... the main point to be made is that the factors did not occur individually, and in isolation from each other"); *People v. Atley,* 727 P.2d 376, 377-78 (Colo.1986) (holding that the state established probable cause when the suspect's apartment did not appear to be lived in and the apartment contained a mushroom growing operation even though the informant's observations were as consistent with growing lawful mushroom plants, as they were with growing psychedelic mushrooms containing psilocybin, a controlled substance).

FN6. *See Planned Parenthood of Southeastern Penn. v. Casey,* 505 U.S. 833, 854, 112 S.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992) (explaining that courts have a duty and obligation to follow precedent); *State v. Coon,* 974 P.2d 386, 394 (Alaska 1999) (quoting *State v. Fremgen,* 914 P.2d 1244, 1245 (Alaska 1996)) (stating that courts should reverse prior decisions only when they are "clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more harm than good would result from a departure from precedent").

The majority states that our prior cases are questionable authority because they were decided "in the context of a state law that forbade any and all possession of marijuana." But ***Ravin*** has been the law in Alaska since 1975. So in our prior cases the parties and the court had to be aware of ***Ravin***. Furthermore, the state statute which was based on the initiative that "forbade any and all possession of marijuana" was in effect at the time the warrant was issued in this case. *Noy v. State,* striking down that law, was decided long after the magistrate issued the search warrant in Crocker's case. [FN7]

FN7. *Noy v. State,* 83 P.3d 538 (Alaska App.2003) was issued in 2003, while the warrant in this case was issued in 2001.

100** I certainly believe, as does the majority, that it is this court's duty to follow the supreme court's decision in ***Ravin. My concern, however, is that the majority's decision actually threatens the viability of ***Ravin*** by departing from our former precedent and operating on the assumption that a marijuana growing operation is legal unless the State shows otherwise. The majority's decision makes it difficult for the State to enforce legitimate laws prohibiting the possession and sale of marijuana.

97 P.3d 93

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537 P.2d 494.
537 P.2d 494
(Cite as: 537 P.2d 494)

Supreme Court of Alaska.
Irwin RAVIN, Petitioner,
v.
STATE of Alaska, Respondent.
No. 2135.

May 27, 1975.
As Amended May 28, 1975.

Proceeding was instituted on defendant's motion to dismiss charge of violation of statute proscribing possession of marijuana. The District Court, Third Judicial District, Anchorage, Dorothy D. Tyner, J., denied motion to dismiss and the superior court affirmed and petition for review from the superior court's affirmance was granted. The Supreme Court, Rabinowitz, C. J., held that need for control of drivers under influence of marijuana and existing doubts as to safety of marijuana demonstrate a sufficient justification for statutory proscription of possession of marijuana, and thus an individual's right to possess or ingest marijuana while driving is subject to statute proscribing possession of marijuana; and that no adequate justification exists for State's intrusion into citizen's right of privacy by its prohibition of possession of marijuana by an adult for personal consumption in home, and thus possession of marijuana by adults at home for personal use is constitutionally protected.

Remanded for further proceedings.

Boochever and Connor, JJ., filed specially concurring opinions.

West Headnotes

[1] Criminal Law ⇨1030(2)
110k1030(2) Most Cited Cases
Issue of cruel and unusual punishment in application of statute proscribing possession of marijuana to possession of marijuana for personal use was not considered by Supreme Court, since issue was not raised below or in petition for review to Supreme Court. Rules of Appellate Procedure, rule 24(c); AS 17.12.010, 17.12.150.

[2] Constitutional Law ⇨82(1)
92k82(1) Most Cited Cases
(Formerly 92k82)
Once a fundamental right under State Constitution has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, government must come forward and meet its substantial burden of establishing that abridgment in question was justified by a compelling governmental interest.

[3] Constitutional Law ⇨82(1)
92k82(1) Most Cited Cases
(Formerly 92k82)
When governmental action interferes with an individual's freedom in an area which is not characterized as fundamental, a less stringent test is ordinarily applied and, in such cases, court's task is to determine whether legislative enactment has a reasonable relationship to a legitimate government purpose, and under this "rational basis" test state need only demonstrate existence of facts which can serve as a rational basis for belief that measure would properly serve public interest.

[4] Constitutional Law ⇨82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
If governmental restrictions interfere with individual's right to privacy, court will require that relationship between means and ends be not merely reasonable but close and substantial.

[5] Constitutional Law ⇨82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Federal right to privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home, and even in connection with penumbra of home-related rights, right of privacy in sense of immunity from prosecution is absolute only when private activity will not endanger or harm the general public.

537 P.2d 494.
537 P.2d 494
(Cite as: 537 P.2d 494)

Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 3-5, 14.

[6] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 138k41 Drugs and Narcotics, 92k82)
Right to privacy amendment to Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right. Const. art. 1, § 22.

[7] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Privacy amendment to Alaska Constitution was intended to give recognition and protection to the home. Const. art. 1, § 22.

[8] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Privacy in the home is a fundamental right. Const. art. 1, § 22; U.S.C.A.Const. Amend. 4.

[9] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Right of privacy in the home must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. Const. art. 1, § 22; U.S.C.A.Const. Amend. 4.

[10] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Const. art. 1, § 22; U.S.C.A.Const. Amend. 4.

[11] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Right of privacy in home is limited in that possession of substances is guaranteed only for purely private, noncommercial use in home. Const. art. 1, § 22; U.S.C.A.Const. Amend. 4.

[12] Constitutional Law ⇐70.1(10)
92k70.1(10) Most Cited Cases
In determining validity of legislative proscription of possession of marijuana, it is not function of court to reassess scientific evidence in the manner of a legislature.

[13] Constitutional Law ⇐82(1)
92k82(1) Most Cited Cases
(Formerly 92k82)
State cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.

[14] Constitutional Law ⇐82(1)
92k82(1) Most Cited Cases
(Formerly 92k82)
The right of an individual to do as he pleases is not absolute and it can be made to yield when it begins to infringe on the rights and welfare of others.

[15] Constitutional Law ⇐81
92k81 Most Cited Cases
Authority of state to control activities of its citizens is not limited to activities which have a present and immediate impact on public health or welfare.

[16] Constitutional Law ⇐82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
State is under no obligation to allow otherwise "private" activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare.

[17] Health ⇐356
198Hk356 Most Cited Cases
(Formerly 199k20 Health and Environment)
Statutes designed to protect the public health will receive a liberal construction.

[18] Health ⇐350
198Hk350 Most Cited Cases
(Formerly 199k20 Health and Environment)
There is a presumption in favor of public health measures.

[19] Health ⇐350
198Hk350 Most Cited Cases
(Formerly 199k20 Health and Environment)

[19] Health ⇐372

198Hk372 Most Cited Cases
(Formerly 199k20 Health and Environment)
When there is substantial doubt as to safety of a given substance or situation for public health, controls intended to obviate the danger will usually be upheld.

[20] Automobiles ⚿332
48Ak332 Most Cited Cases
Need for control of drivers under influence of marijuana and existing doubts as to safety of marijuana demonstrate a sufficient justification for statutory proscription of possession of marijuana; and thus an individual's right to possess or ingest marijuana while driving is subject to statute proscribing possession of marijuana. AS 05.25.060 , 17.12.010, 17.12.150, 28.35.030; Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 14.

[21] Controlled Substances ⚿6
96Hk6 Most Cited Cases
(Formerly 138k43.1, 138k43 Drugs and Narcotics)
No adequate justification exists for State's intrusion into citizen's right of privacy by its prohibition of possession of marijuana by an adult for personal consumption in home, and thus possession of marijuana by adults at home for personal use is constitutionally protected. AS 17.12.010, 17.12.150; Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 4, 14.

[22] Constitutional Law ⚿82(7)
92k82(7) Most Cited Cases
(Formerly 92k82)
Privacy of individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest.

[23] Controlled Substances ⚿25
96Hk25 Most Cited Cases
(Formerly 138k68.1, 138k68, 138k62.1, 138k62 Drugs and Narcotics)

[23] Controlled Substances ⚿33
96Hk33 Most Cited Cases
(Formerly 138k62.1, 138k62 Drugs and Narcotics)

[23] Controlled Substances ⚿36
96Hk36 Most Cited Cases
(Formerly 138k62.1, 138k62 Drugs and Narcotics)
Neither federal nor Alaska Constitution affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. AS 17.12.010, 17.12.150; Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 4, 14.

[24] Controlled Substances ⚿29
96Hk29 Most Cited Cases
(Formerly 138k66 Drugs and Narcotics)
Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is unprotected. AS 17.12.010, 17.12.150; Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 4, 14.

[25] Constitutional Law ⚿250.1(2)
92k250.1(2) Most Cited Cases

[25] Controlled Substances ⚿6
96Hk6 Most Cited Cases
(Formerly 138k43.1, 138k43 Drugs and Narcotics)
Statute proscribing possession of marijuana is not violative of equal protection on ground that other commonly used recreational drugs, such as alcohol and tobacco, are not proscribed, even though they may inflict more damage on user than does marijuana. AS 17.12.010, 17.12.150; Const. art. 1, § 22; U.S.C.A.Const. Amends. 1, 14.

[26] Health ⚿354
198Hk354 Most Cited Cases
(Formerly 199k20 Health and Environment)
It is not irrational for legislature to regulate those public health areas where it can do so, when other areas exist where controls are less feasible.

[27] Controlled Substances ⚿6
96Hk6 Most Cited Cases
(Formerly 138k43.1, 138k43 Drugs and Narcotics)
Fact that marijuana may be the least harmful of drugs covered by statute proscribing possession is not alone sufficient to make classification of marijuana with other drugs covered irrational. AS 17.10.010 et seq., 17.12.010, 17.12.150(3); U.S.C.A.Const. Amends. 1, 14.

[28] Constitutional Law ⚿70.3(12)
92k70.3(12) Most Cited Cases
Wisdom of statute proscribing possession of marijuana was for legislature, rather than judiciary. AS 17.10.010 et seq., 17.12.010, 17.12.150(3).

***496** R. Collin Middleton and Robert H. Wagstaff, Anchorage, for petitioner.

Stephen G. Dunning, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for respondent

OPINION

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

RABINOWITZ, Chief Justice.

The constitutionality of Alaska's statute prohibiting possession of marijuana is put in issue in this case. Petitioner Ravin was arrested on December 11, 1972 and charged with violating AS 17.12.010. [FN1] Before trial Ravin attacked the constitutionality of AS 17.12.010 by a motion to dismiss in which he asserted that the State had violated his right of privacy under both the federal and Alaska constitutions, and further violated the equal protection provisions of the state and federal constitutions. Lengthy hearings on the questions were held before District Court Judge Dorothy D. Tyner, at which testimony from several expert witnesses was received. Ravin's motion to dismiss was denied by Judge Tyner. The superior court then granted review and after affirmance by the superior court, we, in turn, granted Ravin's petition for review from the superior court's affirmance.

> FN1. AS 17.12.010 provides:
> Except as otherwise provided in this chapter, it is unlawful for a person to manufacture, compound, counterfeit, possess, have under his control, sell, prescribe, administer, dispense, give, barter, supply or distribute in any manner, a depressant, hallucinogenic or stimulant drug.
> AS 17.12.150 defines 'depressant, hallucinogenic, or stimulant drug' to include all parts of the plant Cannabis Sativa L.

[1] Here Ravin raises two basic claims: first, that there is no legitimate state interest in prohibiting possession of marijuana by adults for personal use, in view of the right to privacy; and secondly, that the statutory classification of marijuana as a dangerous drug, while use of alcohol and tobacco is not prohibited, denies ***497** him due process and equal protection of law. [FN2]

> FN2. In his briefs before this court, Ravin also attempts to raise the issue of cruel and unusual punishment in the application of AS 17.12.010 to possession of marijuana for personal use. Because this issue was not raised below or in the petition for review to this court, we decline to consider the issue in this proceeding. See Appellate Rule 24(c). Cf. Moran v. Holman, 501 P.2d 769, 770 n. 1 (Alaska 1972).

We first address petitioner's contentions that his constitutionally protected right to privacy compels the conclusion that the State of Alaska is prohibited from penalizing the private possession and use of marijuana. Ravin's basic thesis is that there exists under the federal and Alaska constitutions a fundamental right to privacy, the scope of which is sufficiently broad to encompass and protect the possession of marijuana for personal use. Given this fundamental constitutional right, the State would then have the burden of demonstrating a compelling state interest in prohibiting possession of marijuana. In light of these controlling principles, petitioner argues that the evidence submitted below by both sides demonstrates that marijuana is a relatively innocuous substance, at least as compared with other less-restricted substances, and that nothing even approaching a compelling state interest was proven by the State.

Ravin's arguments necessitate a close examination of the contours of the asserted right to privacy and the scope of this court's review of the legislature's determination to criminalize possession of marijuana.

[2] We have previously stated the tests to be applied when a claim is made that state action encroaches upon an individual's constitutional rights. In Breese v. Smith, 501 P.2d 159 (Alaska 1972), we had before us a school hairlength regulation which encroached on what we determined to be the individual's fundamental right to determine his own personal appearance. There we stated:

> Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest. [FN3]
>
> FN3. 501 P.2d at 171. See State v. Wylie, 516 P.2d 142 (Alaska 1973); State v. Van Dort, 502 P.2d 453 (Alaska 1972); Gray v. State, 525 P.2d 524, 527 (Alaska 1974); Gilbert v. State, 526 P.2d 1131, 1133 (Alaska 1974); State v. Adams, 522 P.2d 1125 (Alaska 1974).

This standard is familiar federal law as well. As stated by the United States Supreme Court:

> Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. [FN4]
>
> FN4. Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480, 486 (1960). See Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147, 178 (1973).

The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.' [FN5]

> FN5. McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222, 231 (1964), quoted in the concurrence of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510, 523 (1965).

[3] When, on the other hand, governmental action interferes with an individual's freedom in an area which is not characterized as fundamental, a less stringent test is ordinarily applied. In such cases our task is to determine whether the legislative enactment has a reasonable relationship to a legitimate governmental purpose. [FN6] Under this latter test, which is sometimes referred to as the 'rational basis' test, the State *498 need only demonstrate the existence of facts which can serve as a rational basis for belief that the measure would properly serve the public interest.

> FN6. See Concerned Citizens v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974); Mobil Oil Corp v. Local Boundary Comm'n, 518 P.2d 92, 101 (Alaska 1974); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

In our recent opinion in Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), we recognized the existence of considerable dissatisfaction with the fundamental right-compelling state interest test. There we said:

> It has been suggested that there is mounting discontent with the rigid two-tier formulation of the equal protection doctrine, and that the United States Supreme Court is prepared to use the clause more rigorously to invalidate legislation without expansion of 'fundamental rights' or 'suspect' categories and the concomitant resort to the 'strict scrutiny' tests. We are in agreement with the view that the Supreme Court's recent equal protection decisions have shown a tendency towards less speculative, less deferential, more intensified means-to-end inquiry when it is applying the traditional rational basis test and we approve of this development. See Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal .protection, 86 Harv.L.Rev. 1 (1972). See, e. g., James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

[4] This court has previously applied a test different from the rigid two-tier formulation to state regulations. In State v. Wylie, [FN7] we tested durational residency requirements for state employment by both the compelling state interest test and a test which examined whether the means chosen suitably furthered an appropriate

governmental interest. [FN8] It is appropriate in this case to resolve Ravin's privacy claims by determining whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial.

FN7. 516 P.2d 142 (Alaska 1973).

FN8. Id. at n. 16.

Thus, our undertaking is two-fold: we must first determine the nature of Ravin's rights, if any, abridged by AS 17.12.010, and, if any rights have been infringed upon, then resolve the further question as to whether the statutory impingement is justified.

As we have mentioned, Ravin's argument that he has a fundamental right to possess marijuana for personal use rests on both federal and state law, and centers on what may broadly be called the right to privacy. This 'right' is increasingly the subject of litigation and commentary and is still a developing legal concept. [FN9]

FN9. The right to privacy was recently made explicit in Alaska by an amendment to the state constitution. Alaska Const. Art. I, s 22.

In Ravin's view, the right to privacy involved here is an autonomous right which gains special significance when its situs is found in a specially protected area, such as the home. Ravin begins his privacy argument by citation of and reliance upon Griswold v. Connecticut, [FN10] in which the Supreme Court of the United States struck down as unconstitutional a state statute effectively barring the dispensation of birth control information to married persons. Writing for five members of the Court, Mr. Justice Douglas noted that rights protected by the Constitution are not limited to those specifically enumerated in the ***499** Constitution. In order to secure the enumerated rights, certain peripheral rights must be recognized. In other words, the 'specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.' [FN11] Certain of these penumbral rights create 'zones of privacy', for example, First Amendment rights of association, Third and Fourth Amendment rights pertaining to the security of the home, and the Fifth Amendment right against self-incrimination. The Supreme Court of the United States then proceeded to find a right to privacy in marriage which antedates the Bill of Rights and yet lies within the zone of privacy created by several fundamental constitutional guarantees. It was left unclear whether this particular right to privacy exists independently, or comes into being only because of its connection with fundamental enumerated rights.

FN10. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

FN11. 381 U.S. at 484, 85 S.Ct. at 1681, 14 L.Ed.2d at 514.

The next important Supreme Court opinion regarding privacy is Stanley v. Georgia, [FN12] in which a state conviction for possession of obscene matter was overturned as violative of the First and Fourteenth Amendments. The Supreme Court had previously held that obscenity is not protected by the First Amendment. [FN13] But in Stanley the Count made a distinction between commercial distribution of obscene matter and the private enjoyment of it at home. The Constitution, it said, protects the fundamental right to receive information and ideas, regardless of their worth. Moreover, the Supreme Court said,

FN12. 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

FN13. See Roth v. U. S., 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

. . . in the context of this case-a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home-that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. [FN14]

FN14. 394 U.S. at 564, 89 S.Ct. at 1247, 22 L.Ed.2d at 549.

The Supreme Court concluded that the First Amendment means a state has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch. The Court took care to limit its holding to mere possession of obscene materials by the individual in his own home. It noted that it did not intend to restrict the power of the state or federal government to make illegal the possession of items such as narcotics, firearms, or stolen goods.

The Stanley holding was subsequently refined by a series of cases handed down in 1973. In Paris Adult Theatre I v. Slaton, [FN15] the Supreme Court rejected the claim of a theater owner that his showing of allegedly obscene films was protected by Stanley because his films were shown only to consenting adults. The Court explicitly rejected the comparison of a theater to a home and found a legitimate state interest in regulating the use of obscene matter in local commerce and places of public accommodation. It apparently found no fundamental right involved in viewing obscene matter under these conditions, for it noted that the right to privacy guaranteed by the Fourteenth Amendment extends only to fundamental rights. The protection offered by Stanely, the Supreme Court stated, was restricted to the home, and it explicitly refused to say that all activities occurring between consenting adults were beyond the reach of the government. [FN16]

FN15. 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). See also United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. 12 200-Ft. Reels, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

FN16. In a companion case, United States v. Orito, 413 U.S. 139 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973), the Supreme Court observed that the Stanley right to possess obscene matter in the home is limited to the home and does not create a right to transport, receive, or distribute the matter. The Supreme Court further said that it is not true that a zone of constitutionally protected privacy follows such materials when they are moved outside the home. See United States v. 12 200-Ft. Reels, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

***500** [5] These Supreme Court cases indicate to us that the federal right to privacy arises only in connection with other fundamental rights, such as the grouping of rights which involve the home. And even in connection with the penumbra of homerelated rights, the right of privacy in the sense of immunity from prosecution is absolute only when the private activity will not endanger or harm the general public.

The view is confirmed by the Supreme Court's abortion decision, Roe v. Wade [FN17] There appellant claimed that her right to decide for herself concerning abortion fell within the ambit of a right to privacy flowing from the federal Bill of Rights. The Court's decision in her favor makes clear that only personal rights which can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are protected by the right to privacy. The Supreme Court found this right 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy,' but it rejected the idea that a woman's right to decide is absolute. At some point, the state's interest in safeguarding health, maintaining medical standards, and protecting potential life becomes sufficiently compelling to sustain regulations. One does not, the Supreme Court said, have an unlimited right to do with one's body as one pleases.

FN17. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

The right to privacy which the Court found in Roe is closely akin to that in Griswold; in both cases the zone of privacy involves the area of the family and procreation, [FN18] more particularly, a right of personal autonomy in relation to choices affecting an individual's personal life.

FN18. Cf. Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972) where the Supreme Court said in part:
If the right of privacy means anything, it is

> the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In Alaska this court has dealt with the concept of privacy on only a few occasions. One of the most significant decisions in this area is Breese v. Smith, [FN19] where we considered the applicability of the guarantee of 'life, liberty, the pursuit of happiness' found in the Alaska Constitution, [FN20] to a school hairlength regulation. Noting that hairstyles are a highly personal matter in which the individual is traditionally autonomous, we concluded that governmental control of personal appearance would be antithetical to the concept of personal liberty under Alaska's constitution. Since the student would be forced to choose between controlling his own personal appearance and asserting his right to an education if the regulations were upheld, we concluded that the constitutional language quoted above embodied an affirmative grant of liberty to public school students to choose their own hairstyles, for 'at the core of (the concept of liberty) is the notion of total personal immunity from government control: the right 'to be let alone." [FN21] That right is not absolute, however; we also noted that this 'liberty' must yield where it 'intrude(s) upon the freedom of others.' [FN22]

> FN19. 501 P.2d 159 (Alaska 1972).
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> FN20. Alaska Const. Art. I, s 1.
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> FN21. 501 P.2d at 168.
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> FN22. 501 P.2d at 170, quoting Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971).

Subsequent to our decision in Breese, a right to privacy amendment was added to the Alaska Constitution. Article I, section 22 reads:

> The right of the people to privacy is recognized and shall not be infringed. The ***501** legislature shall implement this section.

The effect of this amendment is to place privacy among the specifically enumerated rights in Alaska's constitution. But this fact alone does not, in and of itself, yield answers concerning what scope should be accorded to this right of privacy. [FN23] We have suggested that the right to privacy may afford less than absolute protection to 'the ingestion of food, beverages or other substances'. [FN24] For any such protection must be limited by the legitimate needs of the State to protect the health and welfare of its citizens. [FN25]

> FN23. For a discussion of the origins and scope of a similar constitutional guarantee of privacy, in the Hawaii Constitution, Art. I, s 5, see State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972), particularly n. 4 in the dissent of Justice Levinson at p. 314. This court has, in the area of searches and seizures, attempted to define the right of privacy. See, e.g., Erickson v. State, 507 P.2d 508 (Alaska (1973); Mattern v. State, 500 P.2d 228 (Alaska 1972); Davis v. State, 499 P.2d 1025 (Alaska 1972); Ellison v. State, 383 P.2d 716 (Alaska 1963); Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969); Sleziak v. State, 454 P.2d 252 (Alaska 1969).
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> FN24. Gray v. State, 525 P.2d 524, 528 (Alaska 1974). In Gray we said:
> There is no available recorded history of this amendment, but clearly it shields the ingestion of food, beverages or other substances. But the right of privacy is not absolute. Where a compelling state interest is shown, the right may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare.
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> FN25. Id. If the State were required, for instance, to carry the extremely heavy burden of showing a compelling state interest before it could regulate the purity of foodstuffs and medicines, the result would be a practical inability to protect the public from health threats which consumers could neither know about nor protect themselves against.

Although a number of other jurisdictions have considered the privacy issue as it applies to marijuana prosecutions, they provide little help in

defining the scope of article I, section 22 of Alaska's constitution. In Hawaii, whose constitution also contains an express guarantee of the right to privacy, [FN26] the supreme court has faced a similar issue. In State v. Kantner, [FN27] the Supreme Court of Hawaii upheld a conviction for possession of marijuana by a 3-2 vote, with one member of the majority concurring only because he thought the constitutional issue had not been properly raised. A majority rejected the claim that application of the statute violated guarantees of equal protection and due process, and two members of the court rejected the claim of violation of 'fundamental liberty' based on Griswold. In dissent, Justice Levinson emphasized the guarantees of privacy and personal autonomy which he found in both the Hawaii Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. He found that the right to privacy 'guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others.' [FN28] The experiences generated by use of marijuana are mental in nature, he wrote, and thus among the most personal and private experiences possible. So long as conduct does not produce detrimental results, the right of privacy protects the individual's conduct designed to affect these inner areas of the personality. The state failed to show, he found, any harm to the user or others from the private, personal use of marijuana, and so the statute infringed on the right to personal autonomy.

FN26. Hawaii Const. Art. I, s 5.

FN27. 53 Haw. 327, 493 P.2d 306 (1972).

FN28. 493 P.2d at 315.

In a Michigan case the same year, a conviction for possession of marijuana was overturned by a unanimous court, though for a variety of reasons. One of the justices in People v. Sinclair, [FN29] Justice T. G. Kavanagh, rested his opinion squarely on the basic right of the individual to be free from government intrusions. He found the marijuana possession statute to be 'an ***502** impermissible intrusion on the fundamental rights to liberty and the pursuit of happiness, and is an unwarranted interference with the right to possess and use private property.' [FN30] He noted the basic freedom of the individual to be free to do as he pleases so long as his actions do not interfere with the rights of his neighbor or of society. '. . . 'Big Brother' cannot, in the name of Public health, dictate to anyone what he can eat or drink or smoke in the privacy of his own home.' [FN31]

FN29. 387 Mich. 91, 194 N.W.2d 878 (1972).

FN30. 194 N.W.2d at 896.

FN31. Id.

Generally, however, privacy as a constitutional defense in marijuana cases has not met with much favor. It was rejected, for instance, by the Massachusetts Supreme Judicial Court in Commonwealth v. Leis, [FN32] where the court held that there was no constitutional right to smoke marijuana, that smoking marijuana was not fundamental to the American scheme of justice or necessary to a regime of ordered liberty, and that smoking marijuana was not locatable in any 'zone of privacy'. Furthermore, the court said, there is no constitutional right to become intoxicated. [FN33]

FN32. 243 N.E.2d 898 (Mass.1969).

FN33. The privacy argument has been rejected in several other cases. Miller v. State, 458 S.W.2d 680 (Tex.Crim.App.1970); In re Klor, 64 Cal.2d 816, 51 Cal.Rptr. 903, 415 P.2d 791 (1966); People v. Aguiar, 257 Cal.App.2d 597, 65 Cal.Rptr. 171 (1968); United States v. Drotar, 416 F.2d 914 (5th Cir. 1969), vacated on other grounds, 402 U.S. 939, 91 S.Ct. 1628, 29 L.Ed.2d 107 (1971); Borras v. State, 229 So.2d 244 (Fla.1969); Raines v. State, 225 So.2d 330 (Fla.1969). See Scott v. United States, 129 U.S.App.D.C. 396, 395 F.2d 619 (1968).

[6] Assuming this court were to continue to utilize the fundamental right-compelling state interest test in resolving privacy issues under article I, section 22 of Alaska's constitution, we would conclude that there is not a fundamental constitutional right to possess or ingest marijuana in Alaska. For in our

view, the right to privacy amendment to the Alaska Constitution cannot be read so as to make the possession or ingestion of marijuana itself a fundamental right. Nor can we conclude that such a fundamental right is shown by virtue of the analysis we employed in Breese. In that case, the student's traditional liberty pertaining to autonomy in personal appearance was threatened in such a way that his constitutionally guaranteed right to an education was jeopardized. Hairstyle, as emphasized in Breese, is a highly personal matter involving the individual and his body. In this sense this aspect of liberty-privacy is akin to the significantly personal areas at stake in Griswold and Eisenstadt .v Baird. Few would believe they have been deprived of something of critical importance if deprived of marijuana, though they would if stripped of control over their personal appearance. And, as mentioned previously, a discrete federal right of privacy separate from the penumbras of specifically enumerated constitutional rights has not as yet been articulated by the Supreme Court of the United States. Therefore, if we were employing our former test, we would hold that there is no fundamental right, either under the Alaska or federal constitutions, either to possess or ingest marijuana.

The foregoing does not complete our analysis of the right to privacy issues. For in Gray we stated that the right of privacy amendment of the Alaska Constitution 'clearly it shields the ingestion of food, beverages or other substances', but that this right may be held to be subordinate to public health and welfare measures. Thus, Ravin's right to privacy contentions are not susceptible to disposition solely in terms of answering the question whether there is a general fundamental constitutional right to possess or smoke marijuana. This leads us to a more detailed examination of the right to privacy and the relevancy of where the right is exercised. At one end of the scale of the scope of the right to privacy is possession or ingestion ***503** in the individual's home. If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. The importance of the home has been amply demonstrated in constitutional law. Among the enumerated rights in the federal Bill of Rights are the guarantee against quartering of troops in a private house in peacetime (Third Amendment) and the right to be 'secure in their . . . houses . . . against unreasonable searches and seizures . . .' (Fourth Amendment). The First Amendment has been held to protect the right to 'privacy and freedom of association in the home.' [FN34] The Fifth Amendment has been described as providing protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' [FN35] The protection of the right to receive birth control information in Griswold was predicated on the sanctity of the marriage relationship and the harm to this fundamental area of privacy if police were allowed to 'search the sacred precincts of marital bedrooms.' [FN36] And in Stanley v. Georgia, [FN37] the Court emphasized the home as the situs of protected 'private activities'. The right to receive information and ideas was found in Stanley to take on an added dimension precisely because it was a prosecution for possession in the home: 'For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.' [FN38] In a later case, the Supreme Court noted that Stanley was not based on the notion that the obscene matter was itself protected by a constitutional penumbra of privacy, but rather was a 'reaffirmation that 'a man's home is his castle." [FN39] At the same time the Court noted, 'the Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education.' [FN40] And as the Supreme Court pointed out, there exists a 'myriad' of activities which may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public. [FN41]

FN34. Moreno v. United States Dep't of Agriculture, 345 F.Supp. 310, 314 (D.D.C.1972), aff'd, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

FN35. Boyd v. U. S., 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746, 751 (1886).

FN36. 381 U.S. at 486, 85 S.Ct. at 1682, 14 L.Ed.2d at 516.

FN37. 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

FN38. 394 U.S. at 564, 89 S.Ct. at 1247, 22 L.Ed.2d at 549.

FN39. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66, 93 S.Ct. 2628, 2640, 37 L.Ed.2d 446, 462 (1973).

FN40. U. S. v. Orito, 413 U.S. 139, 142, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513, 517 (1973). See U. S. v. 12 200-Ft. Reels, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

FN41. U. S. v. Orito, 413 U.S. 139, 142-143, 93 S.Ct. 2674, 37 L.Ed.2d 513, 518 (1973).

[7] In Alaska we have also recognized the distinctive nature of the home as a place where the individual's privacy receives special protection. This court has consistently recognized that the home is constitutionally protected from unreasonable searches and seizures, reasoning that the home itself retains a protected status under the Fourth Amendment and Alaska's constitution distinct from that of the occupant's person. [FN42] The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the ***504** home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

FN42. State v. Spietz, 531 P.2d 521 (Alaska 1975); Ferguson v. State, 488 P.2d 1032 (Alaska 1971). See cases cited supra at n. 21.

[8][9][10][11] The home, then, carries with it associations and meanings which make it particularly important as the situs of privacy. Privacy in the home is a fundamental right, under both the federal and Alaska constitutions. We do not mean by this that a person may do anything at anytime as long as the activity takes place within a person's home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the Stanley guarantee to possession for purely private, noncommercial use in the home. And secondly, we think this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.

This leads us to the second facet of our inquiry, namely whether the State has demonstrated sufficient justification for the prohibition of possession of marijuana in general in the interest of public welfare; and further, whether the State has met the greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.

[12] The evidence which was presented at the hearing before the district court consisted primarily of several expert witnesses familiar with various medical and social aspects of marijuana use. [FN43] Numerous***505** written reports and books were also introduced into evidence. [FN44]

FN43. Among the works we have examined in addition to the testimony below are the following: Marihuana: A Signal of Misunderstanding, the First Report of the National Commission on Marihuana and Drug Abuse (March 1972);

Drug Use in America: Problem in Perspective, the Second Report of the National Commission on Marihuana and Drug Abuse (March 1973); Drug Use in Anchorage, Alaska, 223 J.Am.Med. Ass'n 657 (1971); G. Nahas, Marihuana: Deceptive Weed (1973); Nahas et al, Inhibition of Cellular Mediated Immunity in Marihuana Smokers, 183 Science 419 (1974); L. Grinspoon, Marihuana Reconsidered (1971); Hearings before the U. S. Senate Subcommittee on Internal Security, May 1974; Nahas & Greenwood, The First Report of the National Commission on Marihuana (1972): Singal of Misunderstanding or Exercise in Ambiguity, draft of article to be published in Bulletin of N. Y. Academy of Medicine; Marihuana and Health: Fourth Annual Report to the U. S. Congress from the Secretary of Health, Education, and Welfare (1974); Silverstein & Tessin, Normal Skin Test Responses in Chronic Marihuana Users, 186 Science 740 (1974); Marihuana: The Grass May No Longer Be Greener, 185 Science 683 (1974); Marihuana (II): Does it Damage the Brain?, 185 Science 775 (1974); Depression of Plasma Testosterone Levels After Chronic Intensive Marihuana Use, 290 N.Engl.J.Med. 872 (1974); Plasma Testosterone Levels Before, During and After Chronic Marihuana Smoking, 291 N.Engl.J.Med. 1051 (1974); Marijuana Survey-State of Oregon, Drug Abuse Council (1974).

FN44. It is not the function of this court to reassess the scientific evidence in the manner of a legislature. See U. S. v. Thorne, 325 A.2d 764 (D.C.App.1974), where an attack on the constitutionality of the District of Columbia marijuana statutes was made. There the court said:

In our opinion the court below misconceived its function in its approach to the constitutionality of the statutory proscription of the possession and use of marijuana. In deciding that this drug has virtually no harmful effects upon the human system, the court had occasion to consider the testimony of four expert witnesses and a voluminous mass of documentary studies. The court weighed this evidence and resolved the conflict to its own satisfaction. If this were a hearing or a trial turning upon the determination of facts upon which there was conflicting testimony, such procedure was, of course, correct.

But a holding that a legislative enactment is invalid cannot rest open a judicial determination of a debatable medical issue. Any party assailing the constitutionality of a statute has the heavy burden of demonstrating that it has no rational basis.

. . . It is apparent from the record in this case that the question decided by the court below after the hearing on the pretrial motions was 'at least debatable.' Hence, under the tests set forth in Carolene Products, the court should have deferred to congressional judgment.

Similarly the Supreme Judicial Court of Massachusetts in Commonwealth v. Leis, 243 N.E.2d 898, 901-02 (1969), said:

We know of nothing that compels the Legislature to thoroughly investigate the available scientific and medical evidence when enacting a law. The test of whether an act of the Legislature is rational and reasonable is not whether the records of the Legislature contain a sufficient basis of fact to sustain that act. The Legislature is presumed to have acted rationally and reasonably. See Commonwealth v. Finnigan, 326 Mass. 378, 379, 96 N.E.2d 715; Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 422, 204 N.E.2d 281. 'Unless the act of the Legislature cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down as violative of the Constitution.' Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life of Commonwealth, 307 Mass. 408, 418, 30 N.E.2d 269, 274, 131 A.L.R. 1254. See United States v. Carolene Prod. Co., 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234.

Justice Kirk, in his concurring opinion in

> Leis, also explains the question of legislative judgment and the range of judicial cognizance.

Marijuana is the common term for dried leaves or stalk of the plant Cannabis sativa L. The primary psychoactive ingredient in the plant is delta-9-tetrahydrocannabinol (THC). Most marijuana available in the United States has a THC content of less than one percent. Other cannabis derivatives with a higher THC content, such as hashish, are available in the United States although much less common than is marijuana.

According to figures published by the National Commission on Marihuana and Drug Abuse [FN45] in 1973, an estimated 26 million Americans have used marijuana at least once. The incidence generally cuts across social and economic classes, though use is greatest among young persons (55% of 18-21 year-olds have used it). Only about 2% of the adults who have used it were classified by the National Commission as 'heavy users' (more than once daily). The experience in Alaska seems to be similar. A report published in the Journal of the American Medical Association in 1971 indicated that 24% of Anchorage school children in grades six through twelve had used marijuana, as had 46% in grades eleven and twelve. [FN46]

> FN45. Drug Use in America: Problem in Perspective, the Second Report of the National Commission on Marihuana and Drug Abuse (March 1973) at 64.

> FN46. Drug Use in Anchorage, Alaska, 223 J.Am.Med.Ass'n 657 (1971).

Scientific testimony on the physiological and psychological effects of marijuana on humans generally stresses the variability of effects upon different individuals and on any one individual at different times. The setting and psychological state of the user can affect his responses. Responses also vary with the amount of marijuana one has used in the past. A new user, for instance, often feels no effects at all.

***506** The short-term physiological effects are relatively undisputed. An immediate slight increase in the pulse, decrease in salivation, and a slight reddening of the eyes are usually noted. There is also impairment of psychomotor control. These effects generally end within two to three hours of the end of smoking.

Long-term physiological effects raise more controversy among the experts. The National Commission on Marihuana and Drug Abuse reported that among users 'no significant physical, biochemical, or mental abnormalities could be attributed solely to their marijuana smoking.' [FN47] Certain researchers have pointed to possible deleterious effects on the body's immune defenses, [FN48] on the chromosomal structures of users, [FN49] and on testosterone levels in the body. [FN50] The methodology of certain of these studies has been extensively criticized by other qualified medical scientists, however. These studies cannot be ignored. It should be noted that most of the damage suggested by these studies comes in the context of intensive use of concentrated forms of THS. It appears that the use of marijuana, as it is presently used in the United States today, does not constitute a public health problem of any significant dimensions. It is, for instance, far more innocuous in terms of physiological and social damage than alcohol or tobacco. But the studies suggesting dangers in intensive cannabis use do raise valid doubts which cannot be dismissed or discounted.

> FN47. Marihuana: A Signal of Misunderstanding, First Report of the National Commission on Marihuana and Drug Abuse (March 1972), p. 61.

> FN48. See Nahas, et al. Inhibition of Cellular Mediated Immunity in Marihuana Smokers, 183 Science 419 (1974). But cf. Normal Skin Test Responses in Chronic Marijuana Users, 186 Science 740 (1974).

> FN49. See Stenchever, Statement before the Senate Subcommittee on Internal Security, May 16, 1974. The National Institute on Drug Abuse, in Marihuana and Health, Fourth Report to the United States Congress from the Secretary of Health, Education, and Welfare, states in part:
> The preclinical findings of greatest interest and potential significance during the past two years have been a series of studies

> indicating that delta-9-THC (and possibly other marihuana constituents) have an effect upon certain basic cellular mechanisms which involve the uptake of amino acids and the nucleotides into primary nuclear components such as DNA.
>
> Since this may interfere with basic biological processes, the preliminary data raises the possibility that the effects of marihuana, under some circumstances, may be more widespread on the organism than has been previously thought.
> Id. at 6.

> FN50. Depression of Plasma Testosteron Levels After Chronic Intensive Marihuana Use, 290 N.Engl.J.Med. 872 (1974). But cf. Plasma Testosterone Levels Before, During and After Chronic Marihuana Smoking, 291 N.Engl.J.Med. 1051 (1974).

The immediate psychological effects of marijuana are typically a mild euphoria and a relaxed feeling of well-being. The user may feel a heightened sensitivity to taste and to visual and aural sensations, and his perception of time intervals may be distorted. A desire to become high can lead to a greater high; fear of becoming high or general nervousness can cause the user to fail to experience any high at all. In rare cases, excessive nervousness or fear of the drug can even precipitate a panic reaction. Occasionally a user will experience a negative reaction such as anxiety or depression, particularly when he takes in more of the substance than needed to achieve the desired high. However, in smoking marijuana, the usual method of taking it in this country, the user can self-titrate, or control the amount taken in, since the effect builds up gradually.

Additional short-term effects are an impairment of immediate-past-memory facility and impairment in performing psychomotor tasks. Experienced users seem less impaired in this regard than naive users.

In extremely rare instances, use of marijuana has been known to precipitate psychotic episodes; however, the consensus of the experts seems to be that the potential for precipitating psychotic episodes exists only for a limited number of prepsychotic *507 persons who could be pushed into psychosis by any number of drug or nondrug-related influences.

There is considerable debate as to the long-term effects of marijuana on mental functioning. Certain researchers cite evidence of an 'amotivational syndrome' among long-term heavy cannabis users. However, the main examples of this effect are users in societies where large segments of the population exhibit such traits as social withdrawal and passivity even without drug use. The National Commission concludes that long-time heavy users do not deviate significantly from their social peers in terms of mental functioning, at least to any extent attributable to marijuana use. [FN51]

> FN51. Marihuana: A Signal of Misunderstanding, the First Report of the National Commission on Marihuana and Drug Abuse (March 1972), 63. See also Marihuana and Health, Fourth Report to the United States Congress from the Secretary of Health, Education and Welfare (1974), which reads at 12:
> While chronic users in the United States have used for appreciably shorter periods of time than users overseas, studies of American chronic users are potentially of great importance in assessing possible implications of marihuana use for the American population. In one large scale study of undergraduate student use comparisons were made between nonusers (including those who had done a limited amount of experimentation), occasional users and chronic users (those who had used three or more times a week for three years or more or for two years if use was almost daily). No statistical differences in academic performance were found nor was there any evidence of reduced motivation. . . . Another study of moderately using medical students who has used regularly for three or more years and who were matched with nonusing medical students for intelligence, found no difference on an extensive battery of neuropsychological tests.

The experts generally agree that the early widely-held belief that marijuana use directly

causes criminal behavior, and particularly violent, aggressive behavior, has no validity. On the contrary, the National Commission found indications that marijuana inhibits 'the expression of aggressive impulses by pacifying the user, interfering with muscle coordination, reducing psychomotor activities and generally producing states of drowsiness, lethargy, timidity and passivity.' [FN52] Moreover, the Commission and most other authorities agree that there is little validity to the theory that marijuana use leads to use of more potent and dangerous drugs. Although it has been stated that the more heavily a user smokes marijuana, the greater the probability that he has used or will use other drugs, 'it has been suggested that such use is related to 'drug use proneness' and involvement in drug subcultures rather than to the characteristics of cannabis, per se.' [FN53]

FN52. Id. at 70-71.

FN53. Marihuana and Health, Fourth Report to the United States Congress from the Secretary of Health, Education, and Welfare (1974) at 6.

The most serious risk to the public health discerned by the National Commission is the possibility of an increase in the number of heavy users, who now constitute about 2% (500,000) of those who have used the drug. Within this group certain emotional changes have been observed among 'predisposed individuals' as a result of prolonged heavy use. This group seems to carry the highest risk, particularly in view of the risk of retarding social adjustment among adolescents if heavy use should grow.

Most authorities have accepted the theory that marijuana users develop a 'reverse tolerance', that is, that a moderate user needs less and less marijuana over time to achieve a high. Recent research indicates that this may be true only up to a point, and that beyond a certain intensity of use a true tolerance begins to develop. [FN54] If true, this may be relevant regarding only ***508** heavy use of concentrated forms of cannabis, since marijuana use is self-limiting due to the forms in which it is taken.

FN54. 'While tolerance to the effects of marihuana has not been generally observed among American users, there is increasingly convincing evidence that tolerance (i. e., larger dosages required to produce the same effects found with lower dosages) does develop under conditions of heavy, regular use. Given the relatively low doses and infrequent use typical of present patterns of use in the United States it is not surprising that tolerance has not usually been observed. . . . While the amounts involved were usually large and quite atypical of current use patterns, the probability of a withdrawal syndrome in at least some American heavy users must be considered.' Marihuana and Health, Fourth Report to the United States Congress from the Secretary of Health, Education, and Welfare (1974) at 10, 75-81.

The National Commission rejected the notion that marijuana is physically addicting. It also rejected the notion that marijuana as used in the United States today presents a significant risk of causing psychological dependency in the user. Rather, the experimental or intermittent user develops little or no psychological dependence. Lengthy use on a regular basis does present a risk of such dependence and of subsequent heavier use, and strong psychological dependence is characteristic of heavy users in other countries. This pattern of use is rare in the United States today, however.

While there is no confirmed report of a human ever having died from an overdose of cannabis, the toxic levels of THC have been determined from tests on animals. The lethal dose for marijuana is approximately 40,000 times the dose needed to achieve intoxication. The equivalent ratio of intoxicating to lethal doses for alcohol is 4/10 and for barbiturates is 3/50.

The number of persons arrested for marijuana possession has climbed steeply in recent years. In 1973, over 400,000 marijuana arrests occurred, a 40% rise over the previous year. It should also be noted that 81% of persons arrested for marijuana-related crimes have never been convicted of any crime in the past, and 91% have never been convicted of a drugrelated crime. [FN55]

FN55. Marihuana: A Signal of Misunderstanding, Appendix II, at 622.

The justifications offered by the State to uphold AS 17.12.010 are generally that marijuana is a psychoactive drug; that it is not a harmless substance; that heavy use has concomitant risk; that it is capable of precipitating a psychotic reaction in at least individuals who are predisposed towards such reaction; and that its use adversely affects the user's ability to operate an automobile. The State relies upon a number of medical researchers who have raised questions as to the substance's effect on the body's immune system, on chromosomal structure, and on the functioning of the brain. On the other hand, in almost every instance of reports of potential danger arising from marijuana use, reports can be found reaching contradictory results. It appears that there is no firm evidence that marijuana, as presently used in this country, is generally a danger to the user or to others. But neither is there conclusive evidence to the effect that it is harmless. [FN56] The one significant risk in use of marijuana which we do find established to a reasonable degree of certainty is the effect of marijuana intoxication on driving. We shall return to this aspect of the problem later in this opinion.

FN56. Petitioner's witnesses, Doctors Fort and Ungerleider, both testified that marijuana was not harmless.

Possibly implicit in the State's catalogue of possible dangers of marijuana use is the assumption that the State has the authority to protect the individual from his own folly, that is, that the State can control activities which present to harm to anyone except those enjoying them. Although some courts have found the 'public interest' to be broad enough to justify protecting the individual against himself, [FN57] most have found inherent limitations on the police power of the state. An apposite example is the litigation regarding the constitutionality of laws requiring motorcyclists to wear helmets. Most of the courts addressing the issue, including this one, have resolved it by finding a connection between ***509** the helmet requirement and the safety of other motorists, [FN58] but a significant number of courts have explicitly rejected such restrictive measures as beyond the police power of the state because they do not benefit the public. [FN59] Typical of the logic of these latter cases is the dissent of Justice Abe in State v. Lee, [FN60] in which the Hawaii Supreme Court upheld a motorcycle helmet requirement despite finding no clear link between lack of the equipment by the motorcyclist and injury to others. The court reasoned that where a person's conduct is so reckless, and the resulting injury and death are so widespread as to be of concern to the public, then the conduct affects the public interest and is within the scope of the police power. Justice Abe dissented, citing a general right to be left alone or liberty to do as you please. There has to be a genuine harm to others, he wrote, to justify such controls; a state cannot simply decide what is in a person's best interest and compel it. [FN61]

FN57. E. g., Raines v. State, 225 So.2d 330 (Fla.1969).

FN58. E. g., Kingery v. Chappel, 504 P.2d 831 (Alaska 1972); People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 797 (1967); State v. Mele, 103 N.Y.Super. 353, 247 A.2d 176 (1968).

FN59. E. g., American Motorcycle Ass'n v. Davids, 11 Mich App. 351, 158 N.W.2d 72 (1968); People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969). See Everhardt v. New Orleans, 208 So.2d 423 (La.App.1968), rev'd, 217 So.2d 400 (1969); People v. Carmichael, 53 Misc.2d 584, 279 N.Y.S.2d 272 (1967), rev'd, 56 Misc.2d 388, 288 N.Y.S.2d 931 (1968).

FN60. 51 Haw. 516, 465 P.2d 573 (1970).

FN61. Similarly, in State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972), which involved the constitutionality of Hawaii's marijuana statute, Justice Abe noted his belief that the statute, went beyond the police power of the state because of the lack of evidence that use of marijuana harms anyone other than the user. There is, he wrote, under the Hawaii Constitution a fundamental right of liberty to make a fool of oneself so long as one's act does not endanger others.

[13][14] We glean from these cases the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large [FN62] as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others. [FN63]

> FN62. Cf. Liggett Co. v. Baldrige, 278 U.S. 105, 111-12, 49 S.Ct. 57, 59, 73 L.Ed. 204, 208 (1928):
> The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

> FN63. See Roe v. Wade, 410 U.S. 113, 154, 93 S.Ct. 705, 35 L.Ed.2d 147, 177 (1974); Gray v. State, 525 P.2d 524, 528 (Alaska 1974); Breese v. Smith, 501 P.2d 159, 170 (Alaska 1972).

[15][16] Further, the authority of the state to control the activities of its citizens is not limited to activities which have a present and immediate impact on the public health or welfare. It is conceivable, for example, that a drug could so seriously develop in its user a withdrawal or amotivational syndrome, that widespread use of the drug could significantly debilitate the fabric of our society. Faced with a substantial possibility of such a result, the state could take measures to combat the possibility. The state is under no obligation to allow otherwise 'private' activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare. But we do not find that such a situation exists today regarding marijuana. It appears that effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates ***510** and amphetamines. Moreover, the current patterns of use in the United States are not such as would warrant concern that in the future consumption patterns are likely to change. [FN64]

> FN64. We recognize that more potent forms of cannabis than marijuana are commonly used in other countries and are available on a limited scale here. However, studies of use patterns here do not indicate any great likelihood of a significant shift in use here to the more potent substances. If such a shift were to occur, then marijuana use could be characterized as a serious health problem.

[17][18][19] Research is continuing extensively. Scientific doubts persist, however, and that fact has significance for our application of the law. It is a long-standing rule of law that statutes designed to protect the public health will receive a liberal construction. [FN65] We have seen repeated examples in recent years where scientific doubts as to the safety of various products, drugs, or environmental conditions have been held to justify controls. There is a presumption in favor of public health measures; when there is substantial doubt as to the safety of a given substance or situation for the public health, controls intended to obviate the danger will usually be upheld.

> FN65. 3 Sutherland Statutory Construction s 71.02 (4th ed. 1974) and the cases cited in note 42 supra.

But one way in which use of marijuana most clearly does affect the general public is in regard to its effect on driving. All of which brings us to the opposite (from the home) end of the scale of the right to privacy in the context of ingestion or possession of marijuana, namely, when the individual is operating a motor vehicle. Recent research has produced increasing evidence of significant impairment of the driving ability of persons under the influence of cannabis. [FN66] Distortion of time perception, impairment of psychomotor function, and increased selectivity in attentiveness to surroundings apparently can combine to lower driver ability. [FN67] In this regard, Ravin points out that marijuana usually

produces passivity and inactivity, in contrast to alcohol, which increases aggressiveness and is likely to result in overconfidence in one's driving ability. Although a person under the influence of marijuana may be less likely to attempt to drive than ***511** a person under the influence of alcohol, there exists the potential for serious harm to the health and safety of the general public. [FN68]

FN66. See Marijuana and Health, Fourth Report to the United States Congress from the Secretary of Health, Education, and Welfare 105 (1974). This report contains citations to the most recent studies.

FN67. Evidence that marijuana has a detrimental effect on driving performance, especially as the does increases, continues to mount. It has been found to increase both braking and starting times, to adversely affect attention and concentration abilities, and to detract from performance on a divided attention task, all of which are presumably involved in driving. A recent Canadian study of driving ability while marijuana-intoxicated examined drivers' performance under both driving course and actual traffic conditions. A significant decline in performance as measured by several criteria was found in most drivers tested. Based on the accumulated evidence, it seems clear that driving while under the influence of marijuana is ill-advised. Marihuana and Health, Fourth Report to the U. S. Congress from the Secretary of Health, Education, and Welfare 10-11 (1974).
Petitioner's own experts do not disagree with the Secretary's conclusions. Dr. Grinspoon testified that '. . . it stands to reason that anybody who is intoxicated or has a psychoactive drug in him should not drive, because there is no question . . . his wherewithall is not with him, and I think that would be the case with marijuana.' Dr. Fineglass stated that '. . . moderate or heavy use of marijuana can definitly interfere with some of the local skills that would be necessary for the operation of a motor vehicle, and therefore, in their recommendations did take note of driving while intoxicated as a potential danger to the public safety.' Dr. Ungerleider testified that although the immediate effects of marijuana intoxication on the organs and bodily functions are transient and have little or no permanent effect, 'there is a definite loss of some psychomotor control, temporary impairment of time space perception. . . .' Later in the course of his testimony, Dr. Ungerleider concluded that recent studies had proven that driving under the influence of marijuana presents a serious risk resulting from impaired driving ability.

FN68. Current Alaska law enacted since the trial of this case prohibits driving under the influence of an hallucinogenic drug. AS 28.35.030. Alaska law also specifically prohibits operation of a boat while under the influence of marijuana. AS 05.25.060.
There does not now exist a means for detecting the presence of cannabis in the body which is available for practical use by law enforcement agencies. Such means are in use in laboratories, however, and research is progressing toward a device which could be used by police in the way that breathalyzer tests for alcohol are used now.

[20][21][22][23][24] In view of the foregoing, we believe that at present, the need for control of drivers under the influence of marijuana and the existing doubts as to the safety of marijuana, demonstrate a sufficient justification for the prohibition found in AS 17.12.010 as an exercise of the state's police power for the public welfare. Given the evidence of the effect of marijuana on driving an individual's right to possess or ingest marijuana while driving would be subject to the prohibition provided for in AS 17.12.010. However, given the relative insigificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession

of it in the home for personal use. Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.

The state has a legitimate concern with avoiding the spread of marijuana use to adolescents who may not be equipped with the maturity to handle the experience prudently, as well as a legitimate concern with the problem of driving under the influence of marijuana. Yet these interests are insufficient to justify intrusions into the rights of adults in the privacy of their own homes. [FN69] Further, neither the federal or Alaska constitution affords protection for the buying or selling of marijuana, nor absolute protection for its use or possession in public. Possession at home of amounts of marijuana indicative of intent to sell rather than possession for personal use is likewise unprotected. [FN70]

> FN69. We do not intend to imply that the right of privacy in the home does not apply to children. See Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972). We note that distinct government interests with reference to children may justify legislation that could not properly be applied to adults.
>
> FN70. Statistics indicate that few arrests for simple possession occur in the home except when other crimes are simultaneously being investigated. The trend in general in law enforcement seems to be toward minimal effort against simple users of marijuana, and concentration of efforts against dealers and users of more dangerous substances. Moreover, statistics indicate that most arrests for possession of marijuana in Alaska result in dismissals before trial.

In view of our holding that possession of marijuana by adults at home for personal use is constitutionally protected, we wish to make clear that we do not mean to condone the use of marijuana. The experts who testified below, including petitioner's witnesses, were unanimously opposed to the use of any psychoactive drugs. We agree completely. It is the responsibility of every individual to consider carefully the ramifications for himself and for those around him of using such substances. With the freedom which our society offers to each of us to order our lives as we see fit goes the duty to live responsibly, for ***512** our own sakes and for society's. This result can best be achieved, we believe, without the use of psychoactive substances.

[25][26] We briefly address Ravin's second assertion of error, namely that AS 17.12.010 denies him due process and equal protection of the law. The argument is two-fold. First, Ravin asserts, the proscription denies equal protection because the other commonly used 'recreational' drugs, alcohol and tobacco, are not proscribed, though they inflict far more damage on the user than does marijuana. We reject, however, the assumption that the legislature must apply equal controls to equal threats to the public health. Assuming some degree of control of marijuana use is permissible, it does not follow that the political obstacles to placing controls on alcohol and tobacco should render the legislature unable to regulate other substances equally or less harmful. [FN71] It is not irrational for the legislature to regulate those public health areas where it can do so, when there exists other areas where controls are less feasible.

> FN71. See U. S. v. Maiden, 355 F.Supp. 743 (D.Conn.1973); U. S. v. Kiffer, 477 F.2d 349 (2d Cir. 1973). In attacking a complex problem, the state need not choose between attacking every aspect of that problem or not attacking that problem at all. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

[27] Ravin also attacks as irrational the classification of marijuana with the other drugs

covered by AS 17.12.150(3) ('depressant, stimulant, or hallucinogenic'). He may be correct that marijuana is the least harmful of the drugs covered by AS 17.12.150(3), but that alone is not sufficient to make the classification irrational. In a number of cases the classification of marijuana either as or with narcotic drugs has been struck down as irrational in view of the relative harmlessness of marijuana. [FN72] In other cases, courts have deferred to the legislative finding of facts implicit in the classification. [FN73] However, in every case in which statutes have been struck down, the statutory scheme classified marijuana with, or subject to equal sanctions with, the most dangerous proscribed drugs. In Alaska, however, 'hard' drugs are in a completely different category [FN74] from marijuana, with substantially greater penalties for misuse. The drugs with which marijuana is grouped in AS 17.12.150(3) are not so different from marijuana that yet another classification must be set up for marijuana alone. We find no merit to Ravin's contention on this point.

FN72. E. g., People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971); Attwood v. State, 509 S.W.2d 342 (Tex.Crim.App.1974); see People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972); cf. State v. Zornes, 475 P.2d 109 (Wash.1970).

FN73. E. g., Bettis v. United States, 408 F.2d 563 (9th Cir. 1969); Commonwealth v. Leis, 243 N.E.2d 898 (Mass.1969); Miller v. Texas, 458 S.W.2d 680 (Tex.Crim.App.1970); Raines v. State, 225 So.2d 330 (Fla.1969); People v. McKenzie, 169 Colo. 521, 458 P.2d 232 (1969); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965). See State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972).

FN74. See AS 17.10.010 et seq. (The Uniform Narcotic Drug Act).

[28] One other facet of this petition remains for discussion. Ravin urges us to recognize that whatever harm results from marijuana use is far outweighed by the negative aspects of enforcement. Over 400,000 persons were arrested for marijuana-related crimes in 1973; 81% of them had no previous criminal records. Using these statistics, and asserting that marijuana use does not pose a substantial public health threat, Ravin questions the wisdom of AS 17.12.010. We note that the Alaska Bar Association, American Bar Association, National Conference of Commissioners on Uniform State Laws, National Advisory Commission on Criminal Justice Standards and Goals and the Governing Board of the American Medical Association have recommended decriminalization of possession of marijuana. The National Commission on Marihuana and Drug ***513** Abuse has recommended that private possession for personal use no longer be an offense. A Canadian study has arrived at similar results. And at least one state, Oregon, has already decriminalized possession of small amounts of marijuana. [FN75]

FN75. O.R.S. 167.207. The Alaska legislature have also recently passed a bill which would decriminalize possession of marijuana in certain contexts.

In opposition, the State argues that under Alaska's constitutional system of separate but equal branches of government the issue is a 'political controversy over the State's fundamental policy toward the drug marijuana'. Thus, the 'issue should be properly determined by the people's elected representatives'. We agree that determination of the wisdom of a particular legislative enactment is more properly the subject of investigation and resolution by the legislature rather than the judiciary.

The record does not disclose any facts as to the situs of Ravin's arrest and his alleged possession of marijuana. In view of these circumstances, we hold that the matter must be remanded to the district court for the purpose of developing the facts concerning Ravin's arrest and circumstances of his possession of marijuana. Once this is accomplished, the district court is to consider Ravin's motion to dismiss in conformity with this opinion.

Remanded for further proceedings consistent with this opinion.

BOOCHEVER, Justice (concurring, with whom CONNOR, Justice, joins).

Because of the importance of the issues discussed

in this case and the possibility that portions of the opinion may be construed as substantially circumscribing the Alaska Constitutional right to privacy, I find it necessary to file this concurrence. By its reliance on certain United States Supreme Court cases [FN1] and the manner in which some of the conclusions are set forth, the opinion may be read as limiting the right of privacy principally to protection of activities engaged in within the confines of the home. [FN2] The opinion relies chiefly on United States Supreme Court precedent, although there is no Federal Constitutional provision corresponding to art. 1, s 22 of the Alaska Constitution which specifies that 'the right of the people to privacy is recognized and shall not be infringed'. While Federal cases defining the right of privacy derived from other provisions of the United States Constitution are of assistance in determining the perimeters of our constitutional right to privacy, we are certainly not bound by those cases in construing the separate Alaska provision. Even when Alaska Constitutional provisions are closely akin to those of the Federal Constitution, we have stated:

> FN1. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
>
> FN2. The court writes that art. I, s 22 of the Alaska Constitution '. . . was intended to give recognition and protection to the home'.

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law. [FN3]

> FN3. Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (footnotes omitted).

Although the majority opinion emphasizes the right of privacy in the home, it recognizes *514 that analysis of the Federal decisions does not indicate that the right of privacy is relegated to the home. It is true that Griswold v. Connecticut [FN4] invalidated a Connecticut statute prohibiting the distribution of contraceptives and the dissemination of birth control information to married adults by finding a right of privacy, emanating from other constitutional provisions, within which the marital relationship, arguably home related, was protected. But the later case of Eisenstadt v. Baird [FN5] held that a statute prohibiting the distribution of contraceptives to unmarried persons but allowing such distribution to married persons violated the equal protection clause of the fourteenth amendment. In so holding, the Court referred to Griswold and explained what the case stood for.

> FN4. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
>
> FN5. 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the Marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. [FN6]

> FN6. Id. 405 U.S. at 453, 92 S.Ct. at 1038, 31 L.Ed.2d at 362.

The Court held that the right of privacy involved

being free to decide for oneself whether to bear or beget a child, a right relating to the automony of the individual, not to a place.

Similarly, Roe v. Wade, [FN7] in upholding the right of a woman to decide whether she should terminate her pregnancy, stated:

> FN7. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determiend, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. [FN8]

> FN8. Id. 410 U.S. at 153, 93 S.Ct. at 727, 35 L.Ed.2d at 177.

Again, the right of privacy pertained to the freedom of the individual to decide as to her course of action and was unrelated to any situs.

On the other hand, there are the Stanley-Paris Adult Theatre I group of cases [FN9] holding that the 'broad power to regulate obscenity does not extend to mere possession by the individual in the privacy of his own home' although obscenity is not otherwise constitutionally immune from state regulation.

> FN9. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States, v. 12 200-Ft. Reels, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

Thus it appears that the United States Supreme Court has found a right of privacy to exist as to activities within the home or with reference to values associated with the home, and, additionally, as a right of personal autonomy, to make decisions that shape an individual's personal life. [FN10]

> FN10. On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L.Rev. 670, 703 (1973).

Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to ***515** privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution. As such, it includes not only activities within the home and values associated with the home, but also the right to be left alone and to do as one pleases as long as the activity does not infringe on the rights of others. Thus, the decision whether to ingest food, beverages or other substances comes within the purview of that right to privacy. [FN11]

> FN11. Gray v. State, 525 P.2d 524 (Alaska 1974).

The right to privacy, however, is not monolithic For example, the right to decide whether to eat strawberry ice cream cannot be placed on the same level as that of deciding whether to bear a child. Moreover, the importance of the right may properly be related to the place where it is exercised, for example, at the home or in the market place. Other considerations would be the nature of relationships involved (marital, doctor-patient, attorney-client, etc.), the particular activity in question and the individual's interest in it.

Having discussed generally the contours of what I perceive to be the right to privacy under the Alaska Constitution, I shall turn briefly to the test utilized by the court in determining infringements of that right. Particularly in equal protection cases, but also as to cases alleging infringement of other constitutional rights, the United States Supreme Court, [FN12] and this court [FN13] in the past, have followed a two-tiered test. If the right involved was deemed to be 'fundamental', a statute infringing upon it was required to be 'necessary' to furtner a 'compelling state interest'. Whereas if the right infringed upon was classified as non-fundamental, any rational basis that might be conceived to justify the legislation was held to be sufficient. [FN14] As a practical matter, the test was result oriented, since once a right was declared