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INTRODUCTION

The New Jersey material witness statute authorizes a judge to detain a person believed to be a material witness to a crime.¹ The statute, enacted in 1898, is not written in plain English and does not address the problems posed by the arrest and confinement of material witnesses who are often innocent witnesses to crimes. The material witness statute implicates the right of citizens to remain free from unreasonable arrest, and the state's need to prosecute crime. The present material witness statute does not protect either the citizen's or the state's interest as the decision in State v. Misik discussed below makes clear. The right of innocent citizens to remain free, as well as the need to prosecute crime, are serious matters requiring fair and well-balanced legislation. The New Jersey Law Revision Commission recommends the repeal of the present material witness statute and the adoption of its proposed statute.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the court found that a warrant issued under the material witness statute violated the Fourth and Fourteenth Amendments of the United States Constitution, and article 1, paragraph 1 of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.² The court prescribed guidelines to implement the statute consistent with the federal and New Jersey constitutions. The court recommended that the Supreme Court promulgate rules or that "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

The Supreme Court Committee on Criminal Practice is considering the issue, but has not yet recommended a rule.³ Because the guidelines that would make the material witness statute meet constitutional concerns raise issues of substantive law, the legislature, not the Supreme Court, is the proper forum to establish the guidelines. The rule-making power of the Supreme Court is limited to procedural issues. N.J. Const. art. IV, § II, ¶ 3. Even if the court rule deals with some matters of substance, it cannot treat

¹ The term "material witness statute" refers to N.J.S. 2A:162-2, N.J.S. 2A:162-3 and N.J.S. 2A:162-4. The key provision, N.J.S. 2A:162-2, provides: "Every judge and magistrate shall, when in his judgment the ends of justice so require, bind by recognizance with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not." N.J.S. 2A:162-3 mainly concerns the conditions of confinement; N.J.S. 2A:162-4 requires the county to pay the witness a fee of \$3 per day of confinement.

² The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The fourteenth amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV.

Article 1, paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. 1, ¶ 1.

³ The existing court rule, R. 3:26-3, merely reiterates the broad language of N.J.S. 2A:162-2.

the range of substantive issues or employ the range of remedies available to legislation. Moreover, to rely on the Supreme Court Committee on Criminal Practice to amend the existing court rule on material witnesses to rectify the constitutional defects of a statute is an abdication of legislative responsibility.

The Commission identified several procedural and substantive problems in the material witness statute: N.J.S. 2A:162-2 through N.J.S. 2A:162-4. First, N.J.S. 2A:162-2 does not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant have engendered uncertainty as to when the statute is applicable. Second, the statute does not contain procedural safeguards to make certain that the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, while 2A:162-3 forbids lodging the material witness in an ordinary jail, it does not require the court to impose the least restrictive constraint to detain the witness. Fourth, 2A:162-4 sets the payment of an unreasonably low fee of \$3 per day for detained witnesses. The material witness statutes do not deal with other issues such as warrantless arrests, finality of the order for purposes of appeal and the effects of taking the witness's deposition.

The Commission examined the material witness statutes of other states, the case law in New Jersey and the scholarly literature. None of the foreign material witness statutes addressed all important issues. The Commission thus drafted a comprehensive statute to regulate judicial orders directing the appearance or detention of a material witness. The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the state and the defendant the right to apply for material witness orders if three threshold requirements are met: (1) an indictment, accusation or complaint for a crime is pending, or a criminal investigation before a grand jury is pending (2) the alleged witness has information material to the pending criminal action and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to \$40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

Background

a. Material witness: definition and foreign law.

A material witness is "a witness whose testimony is crucial to either the defense or prosecution." Black's Law Dictionary 826 (5th ed. abridged 1983). "In most states, he may be required to furnish bond for his appearance and, for want of surety he may be confined until he testifies." Id. A material witness often is an innocent observer of a crime who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark by chance and gives a report to the police is a potential material witness in New Jersey. One court has observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government ... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." Application of Cochran, 434 F. Supp. 1207, 1213 (D. Neb. 1977).

Material witness statutes authorize the arrest and detention of alleged material witnesses. Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969). "Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. U. L. Q. 1, 21 (1980). Witness laws are justified under the concept that every citizen has a duty to testify. Hurtado v. United States, 410 U.S. 578, 589 (1973). Most material witness statutes are old. For example, the New Jersey material witness statutes derive from 1898. "[W]hen dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks -- even months -- in custody." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. L. Q. 1 (1980).

Several states have developed modern legislation in the area of material witness detention. E.g. Ariz. Rev. Stat. Ann. sec. 13-4083(b) (1989) (deposition of detained witness requires discharge); Hawaii Rev. Stat. sec 835-2 (1988) (detention system based on material witness order); and N.Y. Crim. Pro. Law sec. 620.20 (McKinney 1984) (detention system based on material witness order). However, notwithstanding this legislative activity, most state statutes contain little or no procedural or substantive protection for detained witnesses. Carlson and Voelpel, supra at 27. None of the newer state statutes address the constitutional concerns raised in State v. Misik, or resolve the procedural and substantive problems identified by the Commission. Thus none of the material witness laws of foreign states provides a model to follow.

The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. 18 U.S.C. 3144 (1989)(release or detention of a material witness); 18 U.S.C. 3142 (1989)(release or detention of a defendant pending trial); 28 U.S.C. 1821 (1989)(witness fees); 18 U.S.C. 3006(a) (1989) (assignment of counsel rule); Fed. R. Crim. P. 46 (release from custody); and Fed. R. Crim. P. 15 (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The

judiciary had to infer the power to arrest from the federal material witness statute. Bacon v. United States, 449 F. 2d 933, 937 (9th Cir. 1971).

b. New Jersey law and State v. Misik

In Misik, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to N.J.S. 2A:162-2 based on the ex parte application of a detective of the New Jersey State Police. State v. Misik, 238 N. J. Super. at 371. The application alleged that Misik had information concerning the commission of environmental crimes and that his arrest was necessary because he would not be available for service by subpoena. Id.

The affidavit in support of the application contained the following allegations: (1) Misik had knowledge that his employer, Petro King Terminal Corporation, released petroleum products into the Hackensack River, (2) Misik, though initially cooperative with the police, had missed an appointment, (3) Misik was a foreigner suspected of being an illegal alien because he once failed to produce his "green card" to the police, (4) Misik lived on a boat displaying a "for sale" sign, (5) Misik did not give the police the exact location of his boat in the marina and (6) Misik had a criminal record for drug offenses. State v. Misik, 238 N. J. Super. at 371. No criminal action or proceeding against Petro King Terminal Corporation was pending when the State applied for the arrest warrant.

The court held an in camera discussion with an assistant prosecutor concerning the State's authority to obtain an ex parte arrest warrant of Misik. The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. State v. Hand, 101 N. J. Super. 43, 55-56 (Law Div. 1968) holds that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness. The court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.

The police arrested Misik the day the arrest warrant was issued and, contrary to the court's order, brought Misik to the prosecutor's office, not the court. State v. Misik, 238 N. J. Super. at 372. The police subjected Misik to a lengthy custodial interrogation and detained him overnight in jail where he was treated like a prisoner contrary to N.J.S. 2A:162-3. The next morning Misik was brought to court handcuffed and in prison garb. State v. Misik, 238 N. J. Super. at 372. Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes. The court released Misik on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month. Id. The court informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, the court would vacate the reporting requirement. Id. The court further

granted leave to Misik's attorney to file a brief challenging the constitutionality of the material witness statute. Id. at 373.

At the hearing, the court held that the federal and New Jersey constitutions require that an alleged material witness be provided with notice and an opportunity to be heard before being detained under the New Jersey material witness statute. State v. Misik, 238 N. J. Super. at 388. The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness. Id. In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." Id. at 375. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." Id. at 376. Consequently, Misik was free to refuse to cooperate with the police. Because the prosecutor could not compel Misik's appearance by subpoena absent a grand jury investigation, the court found that the prosecutor had misused the material witness statute to detain and arrest Misik. Id. at 377.

The court also found that Misik was deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that "Misik was arrested without prior notice and an opportunity to be heard before he was arrested and committed to jail", and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution and article 1, paragraph 1 of the New Jersey Constitution. State v. Misik, 238 N. J. Super. at 377. The court also stated that "it was patently unreasonable under the Fourth Amendment of the United States Constitution to have arrested and detained Misik because of his refusal to cooperate with the police." Id. While the court found that the procedures followed to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute (N.J.S. 2A:162-2) was unconstitutional. Id. at 384.

Because the statute is silent as to constitutional safeguards, the court looked to federal and foreign state legislation for guidance. E.g. 18 U.S.C. § 3142 (e) and (f) and § 3144 (detention subject to clear and convincing evidence standard); N.Y. Crim. Pro. Law. § 620.30 (McKinney 1984) (order directs alleged material witness to appear at pre-deprivation hearing); Neb. Rev. Stat. § 29-507 (1989) (specifies the conditions of release for material witnesses). The court, deciding the New Jersey statute could be rehabilitated if procedural safeguards were established, then set forth a list of guidelines to fill the gap. State v. Misik, 238 N. J. Super. at 385-86.

Most important, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause. The judge stated, "This court believes that at the very least a heavy burden of proof should be imposed upon the State whenever it decides it is necessary to seek detention of an innocent person, not even a suspect, much less an accused." Id. at 383. The court cited Addington v. Texas, 441 U.S. 418 (1979) in support of its position. In

Addington, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis. The United States Supreme Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. at 423 (citation omitted). The court in Misik found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes. The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions. It also "reflects the value society places on individual liberty." Id. at 426 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)]. The court in Misik thus held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.

Prior to Misik, the two principal decisions on New Jersey material witness law were State v. Price, 108 N. J. Super. 272 (Law Div. 1970) and State v. Hand, 101 N. J. Super. 43 (Law Div. 1968). When read together, Price, Hand and Misik do not constitute a coherent statement of law on material witnesses, and therefore do not provide clear guidelines to the court, prosecutor or defendant. The inconsistencies concern primarily the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the court in Price indicated that the police may not hold a potential witness unless there is a pending criminal action against an accused. State v. Price, 108 N. J. Super. at 280-281. To the contrary, the court in Hand sanctions the detention of a person believed to be a material witness despite the absence of any formal charges against an accused. State v. Hand, 101 N. J. Super. at 56. The court in Misik held that a pending criminal action is necessary to obtain a material witness order. State v. Misik, 238 N. J. Super. at 385. In addition, the court in Hand authorizes the warrantless arrest of potential material witnesses. State v. Hand, 101 N. J. Super. at 56. The court in Misik prohibits the warrantless arrest of potential material witnesses. State v. Misik, 238 N. J. Super. at 388. The court in Misik stated that "under no circumstances may a person be arrested or detained without court process" Id. The decisions in Misik and Hand thus directly contradict one another on this issue. Because Price, Hand and Misik are law division opinions, each decision has equivalent legal weight and thus the inconsistencies generated by them unsettle the law on material witnesses.

PROPOSED STATUTE

2C:104-1. Definitions

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

Source: New

COMMENT

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes. See, N.J.S. 2C:1-4(a) and 1-14(k). The inclusion of definitions cures the defect noted by State v. Misik that the former statute did not define a material witness or material witness order. State v. Misik, 238 N. J. Super. 367, 374 (Law Div. 1989)

2C:104-2. Application for material witness order

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders. 18 U.S.C. 3144 (1989); Hawaii Rev. Stat. sec. 835-2(a)(1988); N.Y. Crim. Pro. Law sec. 620.20 (1) (McKinney 1984); and N.C. Gen. Stat. sec. 15A-803(a)(1990).

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by State v. Misik, 238 N. J. Super. at 385-386.

However, the requirements of this subsection differ in one important respect from the Misik guidelines. Misik limits applications for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law. See State v. Price, 108 N. J. Super. 272, 280-281 (Law Div. 1970).

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

2C:104-3. Order to appear

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

Source: New

COMMENT

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

2C:104-4. Arrest With Warrant

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the "clear and convincing" evidence standard. State v. Misik, 238 N. J. Super. at 386. The "clear and convincing" standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards. Addington v. Texas, 441 U.S. 418, 423 (1979). While it is difficult to define the term "clear and convincing" evidence precisely, it denotes a rigorous level of proof. The "clear and convincing" standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty. Id. at 425 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)].

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless confinement is the only method to secure the appearance of the witness. When the judge orders the person confined, the judge must hold the material witness hearing within 48 hours of the person's arrest.

2C:104-5. Arrest Without Warrant

a. A law enforcement officer may arrest an alleged material witness without a warrant only if the arrest occurs prior to the filing of an indictment, accusation or complaint for a crime, or the initiation of a criminal investigation before a grand jury, and if the officer has probable cause to believe that:

- (1) a crime has been committed,
- (2) the alleged material witness has information material to the prosecution of that crime,
- (3) the alleged material witness will refuse to cooperate with the officer in the investigation of that crime, and
- (4) the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness.

b. Following the warrantless arrest of an alleged material witness, the law enforcement officer shall bring the person immediately before a judge. If court is not in session, the officer shall immediately bring the person before the emergency-duty Superior Court judge. The judge shall determine whether there is probable cause to believe that the person is a material witness of a crime and, if an indictment, accusation or complaint for that crime has not issued or if a grand jury has not commenced a criminal investigation of that crime, the judge shall determine whether there is probable cause to believe that, within 48 hours of the arrest, an indictment, accusation or complaint will issue or a grand jury investigation will commence. The judge then shall proceed as if an application for a warrant has been made under 2C:104-4.

COMMENT

This subsection settles the law regarding the right to arrest material witnesses without a warrant. Compare State v. Hand, 101 N. J. Super. at 56 (allowing warrantless arrests) with State v. Misik, 238 N. J. Super. at 388 (forbidding warrantless arrests). Subsection (a) allows the warrantless arrest of alleged material witnesses under precisely defined circumstances. The warrantless arrest power applies in exigent circumstances such as the encounter between a law enforcement officer and a witness at the scene of a crime. As a result, the power to arrest without a warrant ceases to exist subsequent to the filing of an indictment, accusation or complaint for a crime or the initiation of a criminal investigation before a grand jury.

Subsection (b) follows the procedure set forth in 2C:104-4 regarding arrests upon warrant. The law enforcement officer must bring the arrested person before a judge immediately after arrest so that the judge may review the propriety of the arrest and set appropriate conditions of release. The failure of the law enforcement officer to comply with the requirement to bring the arrested person before a judge immediately after arrest makes the arrest unlawful thereby providing the wrongfully arrested person with remedies for an unlawful arrest.

2C:104-6. Material witness hearing

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to have all of the evidence considered by the court in support of the application, and (4) the right to confront and cross-examine witnesses.

b. If the judge finds that there is probable cause to believe that the person is unlikely to respond to a subpoena and has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, the judge shall determine that the person is a material witness and may set the conditions of release of the material witness.

c. If the judge finds by clear and convincing evidence that confinement is the only method that will secure the appearance of the material witness, the judge may order the confinement of the material witness.

d. The judge shall set forth the facts and reasons in support of the material witness order on the record.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing. Among the rights granted is the right to know the evidence used by the court as the basis for grant of the application. If disclosure of particular evidence would obstruct the ongoing criminal investigation, the court may exclude that evidence from consideration in deciding whether to grant the application. Cf. State v. Kunz, 55 N. J. 128 (1969) and R. 3:21-2(a).

Subsections (b) and (c) distinguish conceptually between the finding that a person is a material witness and the decision to impose restraints to assure the appearance of the witness. Subsection (b) identifies the standard of review for determining that a person is a material witness and to impose non-custodial restraints on the witness. The standard of review is the probable cause standard. Subsection (c) identifies the standard of review for ordering the confinement of the witness. The judge may order the confinement of the material witness only when the judge finds by clear and convincing evidence that no other form of restraint will assure the appearance of the material witness. The clear and convincing standard is used to indicate that confinement is a last resort. The clear and convincing standard protects the constitutional right of the person to be free from arbitrary seizure. State v. Misik, 238 N. J. Super. at 387.

Subsection (d) requires that the judge set forth facts and reasons in support of the order. The requirement to set forth facts and reasons furnishes a record for appeal.

2C:104-7. Conditions of release; confinement

a. A confined person shall not be held in jail or prison, but shall be lodged in comfortable quarters and served ordinary food.

b. The conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the appearance of the material witness. A judge may: (1) place the witness in the

custody of a designated person or organization agreeing to supervise the person, (2) restrict the travel of the person, (3) require the person to report (4) set bail or (5) impose other reasonable restrictions on the material witness.

c. A person confined shall be paid \$40 per day, and when the interests of justice require it, the judge may order additional payment not exceeding the actual financial loss resulting from the confinement. The party obtaining the material witness order bears the cost of confinement and payment unless the party is indigent.

Source: 2A:162-3, 2A:162-4

COMMENT

Subsection (a) identifies the conditions of detention, and is substantially identical to the requirements of N.J.S. 2A:162-3. A material witness, if confined, cannot be treated like a prisoner because the material witness has not committed a crime. Rather, the state or defendant must provide comfortable lodging and ordinary food to a confined material witness.

Subsection (b) requires the judge to impose the least restrictive restraint upon a non-confined material witness to secure the appearance of the material witness. The list of alternatives is designed to guide the judge in the decision making process, but is not meant to exhaust the range of possible and appropriate alternatives. Subsection (b) permits the judge to exercise discretion in setting the appropriate restraints.

Subsection (c) substantially departs from present law which provides for payment of \$3 for each day the person is "committed or detained in jail." N.J.S. 2A:162-4. Subsection (c) requires the payment of \$40 for each day the material witness is confined. The amount of payment is the same as that provided by federal law. 28 U.S.C.A. § 1821(b). In addition, this subsection allows a court to order additional payment not to exceed actual financial losses, if the additional payment would serve the interests of justice.

N.J.S. 2A:164-2 required the board of chosen freeholders of the county where the confinement occurs to pay the costs of confinement regardless of the entity seeking the confinement. Subsection (c) reflects the fact that the county is not always responsible for the costs of prosecution when the prosecution is brought by the State. Cf. 2A:73A-9. The effect of subsection (c) is that the prosecution, whether county or State, bears the cost of a material witness confined on its behalf. Likewise, a defendant obtaining the material witness order requiring confinement is obligated to pay the cost of confinement, plus additional payment if ordered, unless the party is indigent.

2C:104-8. Deposition

A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. After the deposition is taken, the judge shall vacate the terms of confinement contained in the material witness order and impose the least restrictive conditions to secure the appearance of the material witness.

Source: New

COMMENT

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition pursuant to court rules to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule. R. 3:13-2. The

federal rules and other state laws take a similar approach. E.g. Fed. R. Crim. P. 15; Ariz. Rev. Stat. Ann. § 13-4083(b) (1989). The taking of a deposition to preserve testimony vacates the confinement terms of the material witness order and requires the judge to modify the material witness order to assure that the least restrictive conditions of release remain imposed on the material witness.

2C:104-9. Orders appealable

A material witness order shall constitute a final order for purposes of appeal, but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.

Source: New

COMMENT

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.

TABLE OF DISPOSITIONS

SECTION

DISPOSITION

2A:162-2

2C:104-2, 4 and 6

2A:162-3

2C:104-7

2A:162-4

2C:104-7

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Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

September 8, 2005

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Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

Summary

Witnesses at Congressional oversight hearings alleged that the authority to arrest and hold material witnesses until their appearance at federal criminal proceedings (including grand jury proceedings) had been abused following September 11, 2001. Section 12 of the USA PATRIOT Act and Terrorism Prevention Reauthorization Act (H.R. 3199) as reported by the House Judiciary Committee called for a periodic review and reports on the use of the material witness statute. In the face of Administration opposition, however, the provision was dropped from the bill prior to House consideration. No similar proposal can be found in the version of H.R. 3199 (S. 1389) approved in the Senate. The episode illustrates the level of controversy easily generated by material witness statutes.

This is an overview of the law under the federal material witness statute which authorizes the arrest of material witnesses, permits their release under essentially the same bail laws that apply to federal criminal defendants, but favors their release after their depositions have taken.

A list of citations to comparable state statutes and a bibliography of law review articles and notes are appended.

The report is available in an abridged form – without footnotes, citations to most authorities and appendices – as CRS Report RS22259, *Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act*.

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Arrest and Detention of Material Witnesses: Federal Law in Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

Introduction

When reported by the House Committee on the Judiciary, section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199) directed the Department of Justice to review the detention of individuals under the federal material witness statute, "including their length [of detention], conditions of access to counsel, frequency of access to counsel, offense at issue, and frequency of appearance before a grand jury." The Office of Management and Budget announced that the Administration strongly opposed section 12 on the grounds that the review by the Department of Justice's Inspector General and reports to the House and Senate Judiciary Committees called for by that section would "entail wholesale violation" of the grand jury secrecy provisions.¹ Perhaps as a consequence, the section was dropped from the bill prior to House consideration and no comparable provision appears in the version of H.R. 3199 which the Senate approved.

The episode illustrates the level of controversy easily generated by material witness statutes. Under the federal statute, 18 U.S.C. 3144, witnesses in a federal criminal case may find themselves arrested, held for bail, and in some cases imprisoned until they are called upon to testify. The same is true in most if not all of the states.² Although subject to intermittent criticism,³ it has been so at least from

¹ Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 3199 - USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*, available on September 5, 2005 at [<http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3199sap-h.pdf>].

² A discussion of the provisions of state law is beyond the scope of this report. Citations to the state statutes are appended.

³ 1 BISHOP, *CRIMINAL PROCEDURE*, 18-9 (2d ed. 1872) ("The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear and testify before the upper court. Sometimes the purposes of justices require that these recognizances should be with sureties, and occasionally the unpleasant result follows that a witness cannot obtain sureties, and he is detained in prison"; *ALI, CODE OF CRIMINAL PROCEDURE*, §58 note (Tent. Draft 1928) ("One of the evils in connection with the administration of the criminal law in most states is the practice of confining for long periods of time, generally in the country jail, witnesses who cannot give bail"); *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 *CATHOLIC UNIVERSITY LAW REVIEW* 37, 50 ("Failure of state and federal government to come up with

the beginning of the Republic.⁴ The Supreme Court has never squarely considered the constitutionality of section 3144 or any of its predecessors, but it has observed in passing that, "[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained in the absence of bail, as a material witness," *Stein v. New York*, 346 U.S. 156, 184 (1953).⁵ Even more telling may be an earlier remark from the Court to the effect that, "[t]he constitutionality of this [federal material witness] statute apparently has never been doubted," *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929).

In spite of the concerns of some that the authority can be used as a means to jail a suspect while authorities seek to discover probable cause sufficient to support a

a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation"); Studnicki, *Material Witness Detention: Justice Served or Denied?* 40 WAYNE LAW REVIEW 1533, 1568 (1994) ("The continued use of material witnesses statutes will undoubtedly be an issue debated well into the next century. Whether the criminal justice system abandons this ancient practice in favor of a more humane policy toward the treatment of witnesses remains to be seen"); Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 NEW YORK LAW SCHOOL LAW REVIEW 13, 13 (2003) ("Upon the mere conclusory statement of a government official that a person has material information and might not respond to a subpoena, the person may be incarcerated for an indefinite period of time, without bail, and under onerous conditions").

⁴ 1 Stat. 91 (1789) ("copies of the process [criminal complaint] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment"); see also, Rev. Stat. §879 (1878) ("Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case"); 28 U.S.C. 657 (1926 ed.); F.R.Crim.P. 46(b), 18 U.S.C. App. (1946 ed.); 18 U.S.C. 3149 (1970 ed.).

⁵ See also, *Blair v. United States*, 250 U.S. 273, 280-81 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . [B]y the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy trial and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act, the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. . . [The Revised Statutes] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions . . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice to the forms and modes established in our system of government. . ."); VIII WIGMORE ON EVIDENCE §§2190-2192 (3d ed. 1940).

criminal accusation⁶ or as a preventive detention measure,⁷ the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant.⁸ Particularly in the early stages of an investigation, however, an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect.⁹

The case law and statistical information suggest that the federal statute is used with surprising regularity¹⁰ and most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals.¹¹ Critics, however, contend

⁶ Carlson & Voelpel, *Material Witness and Material Injustice*, 58 WASHINGTON UNIVERSITY LAW REVIEW 1, 9 (1980) ("Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant").

⁷ Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOYOLA OF LOS ANGELES LAW REVIEW 1217, 1225 (2002) ("Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention. . . The government uses these laws to round up people because of what it expects them to do, rather than what it can prove they have done").

⁸ *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("The district court noted (and we agree) that it would be improper for the government to use §3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation"); *In re De Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983) ("no showing has been made that the arrest was a subterfuge designed to obtain non-testimonial evidence or to bring a target before the grand jury") (even though the witness had been subpoenaed to appear before the grand jury to testify, provide hair samples, and take part in a lineup).

⁹ Those subject to arrest under the federal statute include Terry Nichols (subsequently convicted for complicity in the Oklahoma City bombing), *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10th Cir. 1996); Jose Padilla (subsequently transferred to military custody as an "enemy combatant"), *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715 (2004); and Brandon Mayfield (whose fingerprint was erroneously thought to match one linked to the Madrid train bombing), *In re Federal Grand Jury Proceedings*, 337 F.Supp.2d 1218, 1220-221 (D. Ore. 2004).

¹⁰ United States magistrate judges conducted 4882 material witness hearings in FY2004; 4070 in FY2003; 2961 in FY2002; 3344 in FY2001; and 3603 in FY2000, Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3 (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [http://www.uscourts.gov]. The annual reports of the Administrative Office of the United States Courts indicate that the statistics have not changed a great deal over the last quarter century, United States magistrates conducted 6865 material witness hearings in FY1981; 8221 in FY1980; 6481 in FY1978; 3230 in FY1977; and 2048 in FY1976, *Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

¹¹ See e.g., *In re Class Action Application of Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F.Supp. 904 (W.D. Tex. 1985); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Aguilar-Tamayo*, 300 F.3d

that since September 11, 2001, seventy individuals, mostly Muslims, have been arrested and detained in abuse of the statute's authority.¹²

Arrest

The federal material witness statute provides that:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [relating to bail]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. 3144.

An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates.¹³ The statute

562 (5th Cir. 2002); *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003), all involving illegal alien smuggling. Statistics from the Administrative Office of the United States Courts indicate that an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur in judicial districts bordering Mexico:

District	FY2004	FY2003	FY2002	FY2001	FY2000
S.D. Cal.	1210	936	721	601	728
D. Ariz.	808	495	295	313	597
D. N. Mex.	287	288	253	233	220
W.D. Tex.	503	406	474	533	566
S.D. Tex.	1423	1290	676	814	765

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), *United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [<http://www.uscourts.gov>]. The historical picture is much the same:

District	FY1981	FY1980	FY1978	FY1977	FY1976
S.D. Cal.	2637	3636	2821	1095	755
D. Ariz.	603	691	978	770	366
D. N. Mex.	57	16	147	154	85
W.D. Tex.	651	734	1267	252	211
S.D. Tex.	2232	1946	2244	461	374

Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

¹² *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, 17 HUMAN RIGHTS WATCH 1-3 (June 2005), available on September 5, 2005 at, [http://hrw.org/english/docs/2005/06/27/usdom11213_txt.htm].

¹³ 18 U.S.C. 3156(a)(1) ("As used in sections 3141-3150 of this chapter— (1) the term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release

applies to potential grand jury witnesses as well as to potential trial witnesses.¹⁴ Section 3144 on its face authorizes arrest at the behest of any party to a criminal proceeding. In the case of criminal trial, both the government and the defendants may call upon the benefits of section 3144.¹⁵ Availability is a bit less clear in the case of grand jury proceedings. In a literal sense, there are no parties to a grand jury investigation other than the grand jury.¹⁶ Moreover, it seems unlikely that a suspect, even the target of a grand jury investigation, would be considered a "party" to a grand jury proceeding. The purpose of section 3144 is the preservation of evidence for criminal proceedings. Potential defendants, even if they are the targets of a grand jury investigation, have no right to present evidence to the grand jury.¹⁷ On the other hand, a federal prosecutor ordinarily arranges for the presentation of witnesses to the grand jury.¹⁸ It is therefore not surprising that the courts seem to assume without deciding that the government may claim the benefits of section 3144 in the case of grand jury witnesses.¹⁹

Issuance of a section 3144 arrest warrant requires affidavits establishing probable cause to believe (1) that the witness can provide material evidence, and (2) that it will be "impracticable" to secure the witness' attendance at the proceeding simply by subpoenaing him.²⁰ Neither the statute nor the case law directly address

a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia"). Section 3041 authorizes federal and state judges and magistrates to issue arrest warrants and conduct bail proceedings in federal criminal cases.

¹⁴ *United States v. Awadallah*, 349 F.3d 42, 49-51 (2d Cir. 2003); *United States v. Bacon*, 449 F.2d 933, 939-41 (9th Cir. 1971); *contra*, *United States v. Awadallah*, 202 F.Supp.2d 55, 61-79 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

¹⁵ *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1966).

¹⁶ *United States v. Williams*, 504 U.S. 36, 47 (1992)("the grand jury . . . has not been textually assigned [by the Constitution] to any of the branches described in the first three Articles. It is a constitutional fixture in its own right. In fact the whole theory of its function is that it belongs to no branch of the institutional government").

¹⁷ *Chandler v. Moscicki*, 253 F.Supp.2d 478, 490 (W.D.N.Y. 2003), quoting, *United States v. Williams*, 504 U.S. 36, 52 (1992)("a suspect under investigation by the grand jury does not have a right to testify or have exculpatory evidence presented").

¹⁸ Rule 17(a) of the Federal Rules of Criminal Procedure states that federal criminal subpoenas are issued in blank by the clerk of the court and filled in by "the party" requesting them. Nevertheless, federal prosecutors complete and see to the service of most grand jury subpoenas, *Lopez v. United States*, 393 F.3d 1345, 1349 (D.C.Cir. 2005)("the term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does").

¹⁹ See e.g., *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003)("in the case of a grand jury proceeding, we think that a statement by a responsible official, such as the United States Attorney is sufficient"), quoting on the question of affidavit sufficiency under section 3144, *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

²⁰ *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971);

the question of what constitutes "material" evidence for purposes of section 3144, but in other contexts the term is understood to mean that which has a "natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."²¹ At the grand jury level, the government may establish probable cause to believe a witness can provide material evidence through the affidavit of a federal prosecutor or a federal investigator gathering evidence with an eye to its presentation to the grand jury.²² This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury's power of inquiry.²³

As to the second required probable cause showing, a party seeking a material witness arrest warrant must establish probable cause to believe that it will be impractical to rely upon a subpoena to securing the witness' appearance. The case law on point is sketchy, but it seems to indicate that impracticality may be shown by evidence of possible flight,²⁴ or of an expressed refusal to cooperate,²⁵ or of difficulty

United States v. Coldwell, 496 F.Supp. 305, 307 (E.D.Okla. 1979).

²¹ *Neder v. United States*, 527 U.S. 1, 16 (1999), quoting, *United States v. Gaudin*, 515 U.S. 506, 509 (1995)(materiality as an element of various federal fraud statutes). In the context of the prosecution's failure to disclose material exculpatory evidence, "the material standard *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Banks v. Dretke*, 540 U.S. 668, 698 (2004), quoting, *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

²² *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

²³ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)("Because [the grand jury's] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime"); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991)("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").

²⁴ The government's affidavit merely asserted "with respect to the probability of Nichol's flight: Terry Nichols' renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena." *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10th Cir. 1996), dismissing as moot an appeal from, *United States v. McVeigh*, 940 F.Supp. 1541, 1562 (D.Colo. 1996)(denial of a motion to quash a material witness arrest warrant on grounds of impracticality).

²⁵ *United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D. Okla. 1979)(As to impracticality, "the Dempewolf affidavit shows that (a) Alston has refused to cooperate with law enforcement officials. . . (b) Alston has indicated that he will not testify in this case unless the Oklahoma Bureau . . . satisfies certain conditions that . . . are impossible to meet; (c) two unsuccessful attempts have been made to serve Alston with a subpoena through his attorney;

experienced in serving a subpoena upon a trial witness,²⁶ or presumably by evidence that the witness is a foreign national who will have returned or been returned home by the time his testimony is required.²⁷ Evidence that investigators have experienced difficulties serving a particular grand jury witness may not be enough to justify the issuance of an arrest warrant in all cases.²⁸

Bail

With limited variations, federal bail laws apply to material witnesses arrested under section 3144.²⁹ Arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to detain private counsel.³⁰ The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is

and (d) Alston's attorney has indicated that Alston has expressed a definite unwillingness to cooperate with the government").

²⁶ *United States v. Feingold*, 416 F.Supp. 627, 628 (E.D.N.Y. 1976) ("We are not here dealing with a witness before a grand jury where disregard of a subpoena would simply mean a continuation of the grand jury's deliberations until an appropriate warrant might be served and executed. Here, Feingold's testimony is needed at Nashi's trial. Once commenced, the trial would continue on consecutive days, and Feingold's testimony would be needed before the Government rested its case. Since Feingold is presumably in California, for the Government to have to defer its arrest warrant until he ignored a subpoena to attend the trial will preclude his testifying altogether. The . . . affidavit showed unsuccessful attempts to serve Feingold with a subpoena either through his California attorney or on seven different days at Feingold's home").

²⁷ Perhaps because the point seems too obvious for dispute or discussion, none of the reported federal cases appear to have held the impracticality of future appearance requirement can be satisfied by evidence that a material witness, who is a foreign national illegally present in this country, may be overseas and thus beyond the reach of the court's subpoena when his testimony is required. The number of foreign material witnesses arrested and held for the trial of immigration prosecutions indicate the government has experienced little difficulty satisfying the impracticality requirement in such cases, see e.g., *Torres-Ruiz v. United States District Court*, 120 F.3d 933 (9th Cir. 1997); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Huang*, 827 F.Supp. 945 (S.D.N.Y. 1993).

²⁸ *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9th Cir. 1985) ("In the district court's view, the difficulties encountered by agents . . . in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena. . . . The facts do not show that Arnsberg was a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena").

²⁹ 18 U.S.C. 3144 (" . . . a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title . . .").

³⁰ *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940, 943-45 (W.D.Tex. 1985); 18 U.S.C. 3142(f); 18 U.S.C. 3006A(a)(1)(G).

preferred, and finally as a last option detention is permitted.³¹ A defendant is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety.³² A material witness need only satisfy the appearance standard.³³ A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify.³⁴ If neither word nor bond nor conditions will suffice, the witness may be detained.³⁵ The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.³⁶

Depositions

Section 3144 declares that “[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” The corresponding federal deposition rule permits the witness,³⁷ the government, or the defendant to request that a detained material witness’ deposition be taken.³⁸ A court enjoys only limited discretion to deny a

³¹ 18 U.S.C. 3142(a)(“Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be – (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section.”).

³² 18 U.S.C. 3142(b)(“The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community”).

³³ *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003), citing, S.Rep.No. 98-225, at 28 no.90 (1983)(“Of course a material witness is not to be detained on the basis of dangerousness”); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass. 1996)(“a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight”)

³⁴ 18 U.S.C. 3142(c).

³⁵ 18 U.S.C. 3142(e).

³⁶ *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003); 18 U.S.C. 3142(g).

³⁷ F.R.Crim.P. 15(a)(2)(“A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript”).

³⁸ F.R.Crim.P. 15(a)(1)(“A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is

detained witness' request. The Fifth Circuit has observed that, "Read together, Rule 15(a) and section 3144 provide a detained witness with a mechanism for securing his own release. He must file a written motion requesting that he be deposed. The motion must demonstrate that his testimony can adequately be secured by deposition, and that further detention is not necessary to prevent a failure of justice. Upon such showing, the district court must order his deposition and prompt release," *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992). Other courts seem to agree.³⁹ The "failure of justice" limitation comes into play when release of the witness following the taking of his deposition would ultimately deny a defendant the benefit of favorable material testimony in derogation of his right to compulsory process.⁴⁰ It does not include the fact that a judicial officer will not be present at the taking of the deposition or that the witness is an illegal alien subject to prosecution.⁴¹

Unlike the request of a detained witness, a government or defendant's request that a witness' deposition be taken must show "exceptional circumstances" and that granting the request is "in the interest of justice," F.R.Crim.P. 15(a)(1).⁴² Nevertheless, the fact that a witness is being detained will often be weighed heavily regardless of who requests that depositions be taken.⁴³ The Circuits appear to be divided over whether in compliance with a local standing order the court may authorize depositions to be taken *sua sponte* in order to release a detained material

not privileged, including any book, paper, document, record, recording, or data.").

³⁹ *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 935 (9th Cir. 1997); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1996); *United States v. Huang*, 827 F.Supp. 945, 948 (S.D.N.Y. 1993).

⁴⁰ *United States v. Huang*, 827 F.Supp. 945, 950-52 (S.D.N.Y. 1993); cf., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-73 (1982) (The government may deport "illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense").

⁴¹ *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 936 (9th Cir. 1997).

⁴² *United States v. Allie*, 978 F.2d 1401, 1404 (5th Cir. 1992); *United States v. Lai Fa Chen*, 214 F.R.D. 578, 579 (N.D.Cal. 2003).

⁴³ *United States v. Fai Fa Chen*, 214 F.R.D. 578, 580-81 (N.D.Cal. 2003) (Other courts faced with a motion brought by the government to depose material witnesses have considered their detained status when finding exceptional circumstances [citing *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992) and *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988)]. . . Although detention itself does not amount to a per se 'exceptional circumstance' under Rule 15(a)(1), it would be the rare case when it would not"). In *Rivera*, the court observed that "[i]f the court had denied the motion for depositions, these alien witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported," 859 F.2d at 1207.

witness.⁴⁴ In any event, whether any such depositions may be introduced in later criminal proceedings will depend upon whether the defendant's constitutional rights to confrontation and compulsory process have been accommodated.⁴⁵

Related Matters

The government must periodically report to the court on the continuing justification for holding an incarcerated material witness.⁴⁶ While a material witness is being held in custody he is entitled to the daily witness fees authorized for attendance at judicial proceedings.⁴⁷ Upon his release, the court may also order that he be provided with transportation and subsistence to enable him to return to his place of arrest or residence.⁴⁸ Should he fail to appear after he has been released from custody he will be subject to prosecution,⁴⁹ an offense which may be punished more severely if his failure involves interstate or foreign travel to avoid testifying in a felony case.⁵⁰

⁴⁴ Compare, *United States v. Lopez*, 918 F.2d 111, 112-114 (10th Cir. 1990)(depositions should not have been taken), and, *United States v. Allie*, 978 F.2d 1401, 1403-405 (5th Cir. 1992)(depositions were validly taken).

⁴⁵ *United States v. Allie*, 978 F.2d 1401, 1406-408 (5th Cir. 1992); *United States v. Eufracio-Torres*, 890 F.2d 266, 268-71(10th Cir. 1989); *United States v. Rivera*, 859 F.2d 1204, 1207-209 (4th Cir. 1988); *United States v. Huang*, 827 F.Supp. 945, 947-52 (S.D.N.Y. 1993).

⁴⁶ F.R.Crim.P. 46(h)(2) ("An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)").

⁴⁷ 28 U.S.C. 1821 (" . . . (b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. . . (d) . . . (4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section").

⁴⁸ 18 U.S.C. 4282 ("On the release from custody of . . . a person held as a material witness, the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest").

⁴⁹ 18 U.S.C. 3146 ("(a) Offense.— Whoever, having been released under this chapter [relating to bail] knowingly — (1) fails to appear before a court as required by the conditions of release . . . shall be punished as provided in subsection (b) of this section. (b) Penalties — (1) The punishment for an offense under this section is . . . (B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both").

⁵⁰ 18 U.S.C. 1073 ("Whoever moves or travels in interstate or foreign commerce with intent either . . . to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, is charged shall be fined under this title or imprisoned not more than five years, or both. . .").

SB

2009

SENATE COMMITTEE REPORT

First Committee of Referral

DATE: 1/9/06

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered SENATE BILL NO. 209

SB 209 UNDERAGE MILITARY ON LICENSED PREMISES

"An Act relating to access by persons under 21 years of age to premises licensed to sell alcoholic beverages as clubs."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
SCS House Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

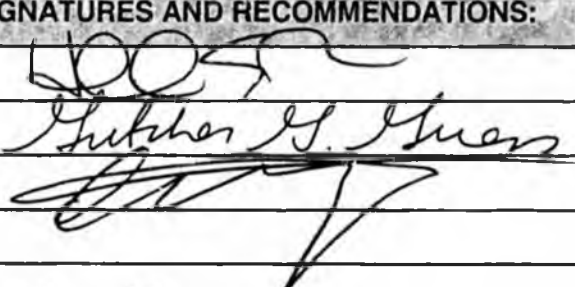
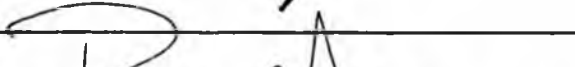
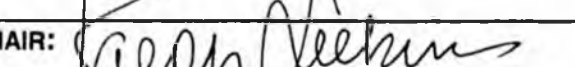
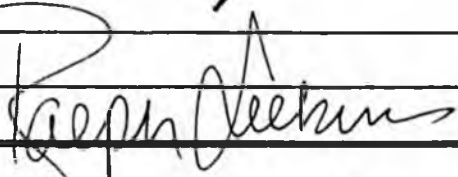
NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
	X			
	X			
	X			
CHAIR: 	✓			

ALASKA STATE LEGISLATURE

Senate District H
600 E. Railroad Avenue
Wasilla AK 99654
907-376-4866
907-373-4724 - Fax
Senator_Charlie_Huggins@legis.state.ak.us



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Charlie Huggins
Senator

Senate Bill No. 209

Sponsor Statement

“An Act relating to access by persons under 21 years of age to premises licensed to sell alcoholic beverages as clubs”

Senate Bill 209 amends AS 04.11.110(g) by authorizing access by persons under 21 years of age, who possess a valid military active duty (or armed forces identification card issued by the United States Department of Defense or the United States Department of Homeland Security) ID card, to a club's licensed premises without specific authorization of the Alcoholic Beverage Control board in certain circumstances.

Under present state law, persons under the age of 21 cannot be on any premises that are licensed to sell alcoholic beverages unless a parent or legal guardian accompanies them. Current law causes a dilemma to the under age veteran. Although they are eligible to join an organization, they are unable to go to the veteran's meetings or functions because they are under age.

This legislation will, in no way, allow the consumption of alcoholic beverages by persons under the age of 21 in licensed clubs. This bill will simply allow our troops access to the supportive and safe environments which they currently are not allowed. A military organization post will truly be a place where veterans across the generations will have an accepting atmosphere in which they can impart their wisdom and stories. This bill will help ensure a place of safety for our troops while they are on the home front.

Contact: Josh Tempel
Staff to Senator Charlie Huggins
465-3878

Version 24-LS1215

24-LS1215Y
Mischel
2/2/06

CS FOR SENATE BILL NO. 209()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR HUGGINS

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to access by persons under 21 years of age to premises licensed to sell
2 alcoholic beverages as clubs when alcoholic beverages are not present and, when
3 alcoholic beverages are present, to premises of a patriotic organization licensed as a club
4 if the person possesses a valid active duty military or armed forces identification card
5 issued by the United States government."

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

7 * Section 1. AS 04.11.110(g) is amended to read:

8 (g) Notwithstanding AS 04.16.049, [THE BOARD MAY AUTHORIZE]
9 access by persons under 21 years of age to

10 (1) a club's licensed premises is permitted [DURING HOURS] when
11 [NO] alcoholic beverages are not present; and

12 (2) the premises of a patriotic organization licensed as a club
13 under this section is permitted when alcoholic beverages are present if the person

as defined in regulation

1
2
3

possesses a valid active duty military or armed forces identification card issued by the United States Department of Defense or the United States Department of Homeland Security [SOLD, SERVED, OR CONSUMED].

SENATE BILL NO. 209

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY SENATOR HUGGINS

Introduced: 1/9/06

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to access by persons under 21 years of age to premises licensed to sell
2 alcoholic beverages as clubs."

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

4 * Section 1. AS 04.11.110(g) is amended to read:

5 (g) Notwithstanding AS 04.16.049, [THE BOARD MAY AUTHORIZE]
6 access by persons under 21 years of age to

7 (1) a club's licensed premises is permitted [DURING HOURS] when
8 [NO] alcoholic beverages are not present; and

9 (2) the premises of a patriotic organization licensed as a club
10 under this section is permitted when alcoholic beverages are present if the person
11 is 18, 19, or 20 years of age and possesses a valid active duty military or armed
12 forces identification card issued by the United States Department of Defense or
13 the United States Department of Homeland Security [SOLD, SERVED, OR
14 CONSUMED].



August 1, 2005

WHEREAS, The Joint Venture (Disabled American Veterans, The American Legion, and Veterans of Foreign Wars) is made up of patriotic veterans' organizations and membership in the organizations is based solely upon honorable federal military service to our country during dates established by the Congress of The United States, and without regard to age, sex, creed or color; and

WHEREAS, The Joint Venture, throughout their history, have welcomed home active duty military units returning from areas of conflicts. As well, Posts located in our coastal cities have done the same when US Naval and Coast Guard ships sail into port. And, it is generally acknowledged and recognized that a large percentage of active duty military personnel are under the age of 21 years and that their legal guardian is now considered to be the Federal Government; and

WHEREAS, Many Veterans' Posts in Alaska typically consist of one or two general usage rooms for their members, one containing a lounge where alcohol is available to members who are of legal drinking age and desire to purchase a drink; and

WHEREAS, Alaska Statute 04.16.049 allows a person under the age of 21 years, for the purpose of dining, to enter unaccompanied by his/her parent, legal guardian, or spouse 21 years or older in an establishment primarily designated by the Alcohol and Beverage Control Board (the Board) as a restaurant even though it may also contain a licensed bar. This statute also prohibits this individual from entering or remaining in other liquor licensed establishments during hours of liquor sales; and

WHEREAS, Alaska Statute 04.11.110 provides that the Board must authorize access by persons under 21 years of age to a club's licensed premises during hours when no alcoholic beverages are sold, served or consumed. These statutes, 04.16.049 and 04.11.110, provide an unfair and seemingly unjust requirement that not only keep an active duty member out of his/her Post when alcohol beverages are being sold but require the Board's permission to enter when they are not being sold; and,

WHEREAS, The Joint Venture desires that its Posts be able to put on welcoming activities for active military units, selling and serving drinks to those at least 21 years of age, and offering free meals, soft drinks, shuffleboard, pool and darts to those under 21 years of age. And, we recognize that the requirement not to serve alcohol to those under 21 years of age would be levied on our Posts as it does in the current case of restaurants as stated in Alaska Statute 04.16.049; now, therefore, be it

RESOLVED, That The Joint Venture lobby legislators in Juneau to amend Alaska Statute 04.11.110, to allow military personnel who are under the age of 21 years and who possess a federal active duty military identification card to enter and remain in patriotic service organizations' Posts, as a guest or member, without accompaniment of a parent, legal guardian, or spouse 21 years of age or older, and be it further

RESOLVED, Alaska Statute 04.16.049, also be amended to reflect the same requested change.

Clayton Love
Commander
Disabled American Veterans

Peggy Dettori
Commander
The American Legion

Calvin Pope
Commander
Veterans of Foreign Wars

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB209-DMVA-COMM-01-12-06
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Military and Veterans' Affairs
 Title Underage Military on Licensed Premises RDU Military and Veterans Affairs
 Component Office of the Commissioner
 Sponsor Senator Huggins
 Requester _____ Component No. 414

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 ()	0.0	0.0	0.0	0.0	0.0	0.0

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 (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0
Part-time	0.0	0.0	0.0	0.0	0.0	0.0
Temporary	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: John Cramer Phone (907) 465-4602
 Division Administrative Services Division Date/Time 1/12/06 3:15 PM
 Approved by: Craig E. Campbell, Commissioner Date 1/12/2006
 Agency Department of Military & Veterans' Affairs

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB209-DMVA-COMM-01-12-06
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Military and Veterans' Affairs
 Title: Underage Military on Licensed Premises RDU: Military and Veterans Affairs
 Component: Office of the Commissioner
 Sponsor: Senator Huggins
 Requester: _____ Component No. 414

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 ()	0.0	0.0	0.0	0.0	0.0	0.0

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 (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0
Part-time	0.0	0.0	0.0	0.0	0.0	0.0
Temporary	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: John Cramer
 Division: Administrative Services Division
 Approved by: Craig E. Campbell, Commissioner
 Agency: Department of Military & Veterans' Affairs

Phone: (907) 465-4602
 Date/Time: 1/12/06 3:15 PM
 Date: 1/12/2006

ALASKA STATE SENATE



Session:
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Juneau, Alaska 99801-1182
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Senator_Ralph_Seekins@legis.state.ak.us

SENATE JUDICIARY COMMITTEE

Senator Ralph Seekins, Chairman

REPORT ON RECOMMENDATION OF APPOINTMENTS

February 7, 2006

The Honorable Ben Stevens
President of the Senate
State Capitol
Juneau, Alaska 99801-1182

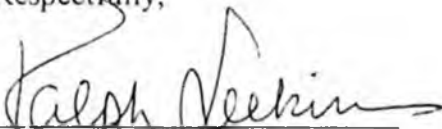
Dear President Stevens.

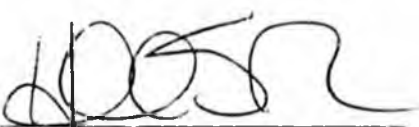
In accordance with AS 24.60.130, the Senate Judiciary Committee reviewed the following and recommends the appointment be forwarded to the Senate floor or to a joint session (whichever applies) for consideration:

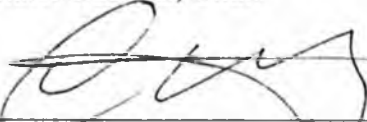
Select Committee on Legislative Ethics: Lindsey Holmer

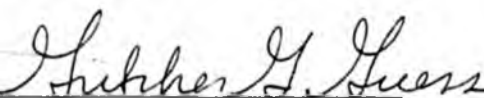
This does not reflect an intent by any of the members to vote for or against the individual during any further session(s).

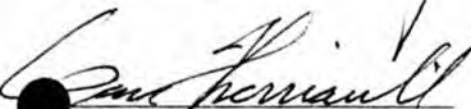
Respectfully,


Senator Seekins, Chair


Senator French


Senator Huggins


Senator Guess


Senator Therriault

ALASKA STATE SENATE



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State Capitol
Juneau, Alaska 99801-1182
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SENATE JUDICIARY COMMITTEE

Senator Ralph Seekins, Chairman

REPORT ON RECOMMENDATION OF APPOINTMENTS

February 7, 2006

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President of the Senate
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Juneau, Alaska 99801-1182

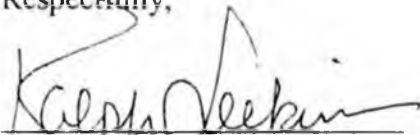
Dear President Stevens:

In accordance with AS 18.85.030, the Senate Judiciary Committee reviewed the following and recommends the appointment be forwarded to the Senate floor or to a joint session (whichever applies) for consideration:

Public Defender: Quinlan Steiner

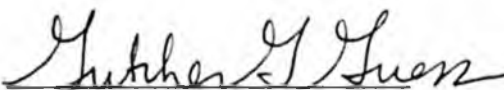
This does not reflect an intent by any of the members to vote for or against the individual during any further session(s).

Respectfully,


Senator Seekins, Chair


Senator French


Senator Huggins


Senator Guess


Senator Therriault

ALASKA STATE SENATE



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SENATE JUDICIARY COMMITTEE

Senator Ralph Seekins, Chairman

REPORT ON RECOMMENDATION OF APPOINTMENTS

February 7, 2006

The Honorable Ben Stevens
President of the Senate
State Capitol
Juneau, Alaska 99801-1182

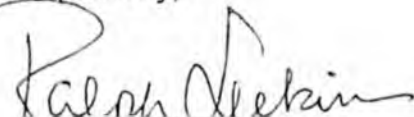
Dear President Stevens:

In accordance with AS 24.60.130, the Senate Judiciary Committee reviewed the following and recommends the appointment be forwarded to the Senate floor or to a joint session (whichever applies) for consideration:


Select Committee on Legislative Ethics: Dennis "Skip" Cook

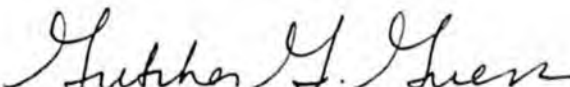
This does not reflect an intent by any of the members to vote for or against the individual during any further session(s).

Respectfully,


Senator Seekins, Chair


Senator French


Senator Huggins


Senator Guess


Senator Therriault

ALASKA STATE SENATE



Session:
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SENATE JUDICIARY COMMITTEE

Senator Ralph Seekins, Chairman

REPORT ON RECOMMENDATION OF APPOINTMENTS

February 7, 2006

The Honorable Ben Stevens
President of the Senate
State Capitol
Juneau, Alaska 99801-1182

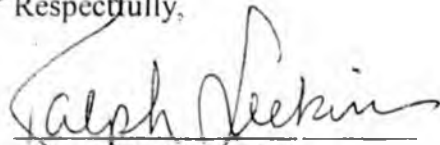
Dear President Stevens:

In accordance with AS 24.60.130, the Senate Judiciary Committee reviewed the following and recommends the appointment be forwarded to the Senate floor or to a joint session (whichever applies) for consideration:


Select Committee on Legislative Ethics: Herman G. Walker, Jr.

This does not reflect an intent by any of the members to vote for or against the individual during any further session(s).

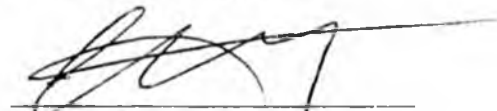
Respectfully,



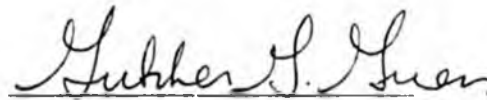
Senator Seekins, Chair



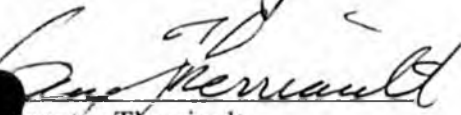
Senator French



Senator Huggins



Senator Guess



Senator Therriault



Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 213
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email: senate_secretary@legis.state.ak.us

Memorandum

TO: Senator Seekins, Chair
Senate Judiciary Committee

FROM: Kirsten Waid *Kirsten Waid*
Secretary of the Senate

DATE: January 30, 2006

SUBJECT: Confirmation of Governor's Appointment

Pursuant to AS 18.85.030, President Stevens has referred the following name, with attached resume, for legislative confirmation to your committee for a hearing, recommendation and report:

Public Defender

Quinlan Steiner

Appointed: 10/14/2005

Term Expires: 10/14/2009

Attachment

KW:lc

Public Defender
Steiner

Alaska Judicial Council Application for Public Defender Appointment

Position(s) for which you wish to be considered:
Alaska Public Defender

Date: May 31, 2005

I. Public Information (Questions 1-24)

Personal

1. (a) State full name* Quinlan Gary Steiner
 Name as it should appear on bar survey: Quinlan Steiner
* Unless otherwise specified, this is how your name will appear on the bar survey.
- (b) Have you ever used or been known by any other name? If so, please identify
No.

2. How long have you been a resident of the State of Alaska immediately preceding the date of this application? **

	<u>39</u> years	<u>0</u> months
Total	<u>39</u> years	<u>0</u> months
3. How long have you been engaged in the active practice of law immediately preceding the date of this application? **

	<u>6</u> years	<u>9</u> months
Total	<u>6</u> year	<u>9</u> months

Nonlegal Education

4. State names and dates of attendance of all colleges and professional schools (other than law schools) ever attended and degrees and dates conferred. List any honors.

Seattle University - Winter 1988 through Spring 1989 - B.A. Business Administration.

University of Alaska, Anchorage - Fall 1992 through Spring 1993, Spring 1987 through Fall 1987.

University of Colorado, Boulder - Fall 1984 through Fall 1986.

** See AS 22.10.090; see also 1984 Inf. Op. Atty. Gen. (July 19; 366-624-84).

Legal Education

5. List all law schools, dates attended and degrees conferred. If you did not receive a degree from any law school please indicate.

Northwestern School of Law of Lewis & Clark College - J.D. 1998

6. (a) Did you receive any honors in law school or belong to any honorary societies or groups?
 Yes No If yes, please give details.

Empty box for details of honors or societies.

(b) Have you taken any CLE (continuing legal education) courses during the past five years?
 Yes No

Please describe or list. Please do not attach individual certificates of attendance.

I have attended the Public Defender Conference each year I have been practicing law. Additionally, I have attended the following CLEs: Power Editing (2002), On the Record Bench/Bar (2003, 2004, 2005), Effective Brief Writing (2004), US Supreme Court Opinions & Alaska Constitutional Law (2004), ATLA - Advocating for a Bright-Line Rule (2005).

Military

7. Have you served in the armed forces (reserves or otherwise)? Yes No

If so, please provide the following information:

- (a) Dates of service:
(b) Branch of service:
(c) Rank at time of discharge:
(d) Type of military discharge:
(e) Awards or citations:

Empty box for military service details.

(1) Have you ever been refused admission to or released from any of the armed services for reasons other than honorable discharge? Yes No If so, state the details.

Empty box for details of refusal of admission or release.

Nonlegal Employment

8. Describe major nonlegal working experience. If you had a business or association that has been discontinued, please note whether there are unpaid debts or claims pending litigation.

National Bank of Alaska - Loan Officer/Management Trainee - July 1990 through July 1992.

Northwest Deck Construction - Co-owner - 1988 through 1989 (no unpaid debts, claims, or pending litigation).

Legal Experience

9. Describe chronologically your legal employment since admission to law school. Please provide dates, name of employer, name of supervisor or person who can verify employment, addresses, the reason you left the position, and a brief description of type of practice (i.e., insurance defense, criminal, appellate, general, litigation, etc.) for each position listed below.

The Council will ask for comments from your current and former employers about your employment and your judicial qualifications. You may choose to list other persons as character and professional references in response to Question 20 of this application.

If the supervisor or contact person asks (in writing) that the letter be shared with the governor, the Council will send designated letters for each nominee. The applicant should not request a copy of the letter from the reference. References or letters not solicited by the Council are considered public (with few exceptions) and will be sent to the governor for all nominees.

Current Employer: Alaska Public Defender Agency

Supervisor or name of contact person who can verify employment: Margi Mock

Current address of this person: 900 W. 5th Ave., Suite 200

City Anchorage State AK Zip 99501

Dates of Employment: From August 1998 To Current

Description: Assistant Public Defender - Appeals

Previous Employers: *(In chronological order, most recent first)*

Employer: Steven Ungar, Attorney at Law

Supervisor or name of contact person who can verify employment: Steven Ungar

Current address of this person: 601 S.W. Second Avenue

City Portland State OR Zip 97204

Dates of Employment: From February 1998 To February 1998

Description: Isolated research project - Criminal law.

Reason for Leaving: Project completed.

Employer: Alaska Public Defender Agency

Supervisor or name of contact person who can verify employment: Margi Mock

Current address of this person: 900 W. 5th Ave., Suite 200

City Anchorage State AK Zip 99501

Dates of Employment: From June 1997 To December 1997

Description: Criminal Law Externship - Bail Attorney/Appals

Reason for Leaving: End of Externship.

Previous Employers (continued)

Employer: Averil Lerman, Attorney at Law
 Supervisor or name of contact person who can verify employment: Averil Lerman
 Current address of this person: Office of Public Advocacy, 900 W. 5th Ave.
 City Anchorage State AK Zip 99501
 Dates of Employment: From Summer 1996 To _____
 Description: Legal Intern - Research/Writing (criminal law).

Reason for Leaving: To return to law school.

Employer: _____
 Supervisor or name of contact person who can verify employment: _____
 Current address of this person: _____
 City _____ State _____ Zip _____
 Dates of Employment: From _____ To _____
 Description: _____

Reason for Leaving: _____

Employer: _____
 Supervisor or name of contact person who can verify employment: _____
 Current address of this person: _____
 City _____ State _____ Zip _____
 Dates of Employment: From _____ To _____
 Description: _____

Reason for Leaving: _____

Employer: _____
 Supervisor or name of contact person who can verify employment: _____
 Current address of this person: _____
 City _____ State _____ Zip _____
 Dates of Employment: From _____ To _____
 Description: _____

Reason for Leaving: _____

Employer: _____
 Supervisor or name of contact person who can verify employment: _____
 Current address of this person: _____
 City _____ State _____ Zip _____
 Dates of Employment: From _____ To _____
 Description: _____

Reason for Leaving: _____

10. For the past five years, please indicate (approximately) the following:

(a)	Percent of your practice that was:	Civil	_____
		Criminal	<u>100</u>
		Other	_____
			= 100%

Comment: _____

(b)	Percent:	State	<u>100</u>
		Federal	_____
		Other	_____
			= 100%

Comment: _____

(c)	Of practice in state courts, percent:	Supreme Court	<u>20</u>
		Court of Appeals	<u>70</u>
		Superior Court	<u>5</u>
		District Court	<u>5</u>
			= 100%

Comment: _____

(d) Frequency of appearance in court:
 Regularly Occasionally Infrequently Not at All

Comment: _____

(e) Number of trials (by court or jury) you conducted in the past 5 years:
 None 1-5 6-15 16-30 31 or more

Comment: _____

(f) Percent of these trials which were: Jury 100 Non-Jury _____

Comment: _____

(g) Approximate number of appellate matters handled: 50-60

Comment: _____

(h) Approximate number of arbitrations or administrative hearings:
 None 1-5 6-15 16-30 31 or more

Briefly describe type of matters heard:

(i) Have you undertaken any *pro bono* work through a *pro bono* legal service provider (e.g. Alaska Legal Services, Alaska Network on Domestic Violence and Sexual Assault, etc.) during this period? Yes No

Describe:

11. List all the courts and administrative tribunals in the United States or elsewhere to which you are or have been admitted to practice, and the dates of admission.

State of Alaska - October 1998

Public Service

12. List bar associations, and sections and committees of which you are or have been a member or officer.

Alaska Bar Association

13. List legal publications, if any (give title, subject and date of publications).

14. Have you ever applied for a judgeship? Yes No

Please list dates and judgeships applied for, as well as whether you were nominated by the Judicial Council and appointed.

Judgeship	Date	Nominated By Council (Y/N)	Appointed By Governor (Y/N)

15. Have you ever held public or political office, elective or appointive? Yes No

If so, state office, manner selected, and when and where held.

16. Please provide the Council with information that you would like the Council to consider about other legal and nonlegal organizations and clubs of which you are a member, including civic, charitable, religious, educational, social and fraternal organizations. Please indicate whether you participate in the organization's activities, or simply hold a membership. Your involvement in the community is one of the criteria the Council uses in its evaluations. The Council does not use affiliation with a particular group as a criterion except to the extent that it might raise questions of conflict of interest or would affect an applicant's ability to impartially apply the law.

17. Indicate (Yes or No) whether you have ever:

- (a) been arrested, charged with, pled guilty or *nolo contendere* to, or been convicted of the violation of any law or ordinance, or been requested to appear before any prosecuting or investigative agency in connection with any matter in any jurisdiction, including all traffic offenses, unless the fine was less than \$50 and there were no other sanctions?
 Yes No
- (b) failed to answer any summons or other legal process served upon you personally at any time? Yes No
- (c) as a member of any armed forces, been the subject of any charges which may have resulted in disciplinary action or court martial? Yes No

(d) had any proceedings brought to have you declared a ward of any court or adjudged an incompetent? Yes No

If your answer is "yes" to any part of this question, state the facts in detail. Give the name and place of the court or agency, dates of the beginning and end of any action or proceeding, case numbers, and the judgment or other disposition.

I have been issued traffic citations. I do not know the dates of the citations, but I received one speeding citation about five years ago.

18. (a) Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities? Yes No

In particular, have you been the subject of any proceeding, criminal or civil, initiated against you by the Internal Revenue Service or a State Tax Office? Yes No
If so, give particulars, including case numbers.

(b) Have you ever been sued by a client? Yes No

If so, give particulars, including case numbers

(c) Have you ever been a party in any other legal proceeding? Yes No

If so, give the particulars. Include all legal proceedings in which you were a party in interest, including petitioner or respondent in dissolution or divorce proceedings; a material witness; a named co-conspirator or correspondent; and subject or witness in any grand jury proceedings. Do not list proceedings in which you were sued only in a representative capacity (e.g. guardian ad litem, or as Commissioner of Natural Resources).

19. State the nature and disposition of any of the following actions which apply to you:

(a) Are there any unsatisfied judgments against you? Yes No
Have you ever defaulted in the performance of any court-imposed obligation, including payment of alimony or child support or compliance with another court order or decree?

Yes No

In each case, list the name and address of the creditor, the court which rendered the judgment, the case number, the date, the amount of the judgment, and the circumstances on which such claim was based.

Has property owned by you been either judicially or non-judicially foreclosed?

Yes No

Please state the circumstances and outcome of any such unsatisfied or default judgment, or of any foreclosure.

[Empty rectangular box for providing details of judgments and foreclosures]

(b) Have you ever made an assignment for the benefit of creditors? Yes No

Have you ever filed any petition in bankruptcy? Yes No

If so, state the circumstances, case number, and the outcome.

[Empty rectangular box for providing details of assignments and bankruptcy petitions]

References and Counsel Questionnaires*

Please Note: Letters of reference from these persons are confidential and will not be given to the applicant. If the reference asks (in writing) that the letter be shared with the governor, the Council will send designated letters and counsel questionnaires for each nominee. The applicant should not request a copy of the letter from the reference. (You should not list the Chief Justice of the Alaska Supreme Court.)

References or letters not solicited by the Council are considered public (with few exceptions) and will be sent to the governor for all nominees.

20. (a) List the names, addresses, including zip codes, and phone numbers of two persons whom the Judicial Council may contact who can discuss your general character and background.

Name: Danielle Ryman

Address: 310 K Street, Suite 200

City/State/Zip: Anchorage, AK

Phone: 264-6726

Name: John Conway

Address: 9739 Hialeah Dr.

City/State/Zip: Anchorage, AK

Phone: 277-9739

- (b) List the names, addresses, including zip codes, and phone numbers of three other persons whom the Judicial Council may contact who can discuss your professional competence and qualifications for a judicial position.

Name: Margi Mock

Address: 900 W. 5th Avenue, Suite 200

City/State/Zip: Anchorage, AK

Phone: 334-4400

Name: Verzil Lerman

Address: 900 W. 5th Avenue - Office of Public Advocacy

City/State/Zip: Anchorage, AK

Phone: 269-3500

Name: David Stewart

Address: 303 K Street

City/State/Zip: Anchorage, AK

Phone: 264-0612

References and Counsel Questionnaires (continued)

(c) List the names, addresses, including zip codes, and suite numbers where applicable, and phone numbers of each attorney involved in your three most recent cases that have gone to trial. (Applicants who are currently judges should list the three most recent trials they presided over.) List only those cases which have gone to trial within the past three years. Please include the judge's name and case names and numbers. (Attach additional pages if necessary.)

Case Number 1

Case Name: My most recent trial was Case Number: _____
v. more than three years ago Judge Name: _____
Attorneys Involved:

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Case Number 2

Case Name: _____ Case Number: _____
v. _____ Judge Name: _____
Attorneys Involved:

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Case Number 3

Case Name: _____ Case Number: _____
v. _____ Judge Name: _____
Attorneys Involved:

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

References and Counsel Questionnaires (continued)

- (d) List the names, addresses, including zip codes, and suite numbers where applicable, and phone numbers of each attorney involved in your three most recent cases that did not go to trial but in which you did significant work. (Applicants who are currently judges should list the three most recent cases they presided over that did not go to trial but in which they did significant work.) Please include the judge's name and case names and numbers. (Attach additional pages if necessary.)

Case Number 1

Case Name: Damyan Riggins Case Number: A-8701
 v. State of Alaska Judge Name: Court of Appeals

Attorneys Involved:

Name: <u>John Scukinec</u>	Name: _____
Address: <u>OSPA, 310 K Street</u>	Address: _____
City, State, Zip: <u>Anchorage, AK 99501</u>	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Case Number 2

Case Name: Jamar Howard Case Number: A-8491
 v. State of Alaska Judge Name: Court of Appeals

Attorneys Involved:

Name: <u>Kan Rosenstein</u>	Name: _____
Address: <u>OSPA, 310 K Street</u>	Address: _____
City, State, Zip: <u>Anchorage, AK 99501</u>	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Case Number 3

Case Name: Kevin Dell Case Number: A-8389
 v. State of Alaska Judge Name: Court of Appeals

Attorneys Involved:

Name: <u>Teresia Chleborad</u>	Name: _____
Address: <u>OSPA, 310 K Street</u>	Address: _____
City, State, Zip: <u>Anchorage, AK 99501</u>	City, State, Zip: _____
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Writing Sample

21. Attach one example of a brief, memorandum of law, or legal opinion or similar example of legal writing (10-20 pages in length; 15-25 pages for appellate positions) prepared solely by you within the last five years. If you do not have a good sample of this length, include an excerpt from a longer writing. Make sure the sample contains sufficient facts to make it understandable.

Please do not submit: (a) coauthored writing samples, (b) samples with confidential information unless redacted to remove such information, (c) longer writing samples.

22. Has any public sanction been imposed against you in response to a complaint, charge or grievance brought against you as an attorney or a judge? Yes No

Have formal grievance procedures been brought against you? Yes No

See Bar Rule 22(b) & (e) concerning public grievance procedures against attorneys, and AS 22.30.011(b) and .060(b)(3) concerning public grievance procedures against judges.

Have you ever been held in contempt of court? Yes No

In each case, state in detail the circumstances and the outcome.

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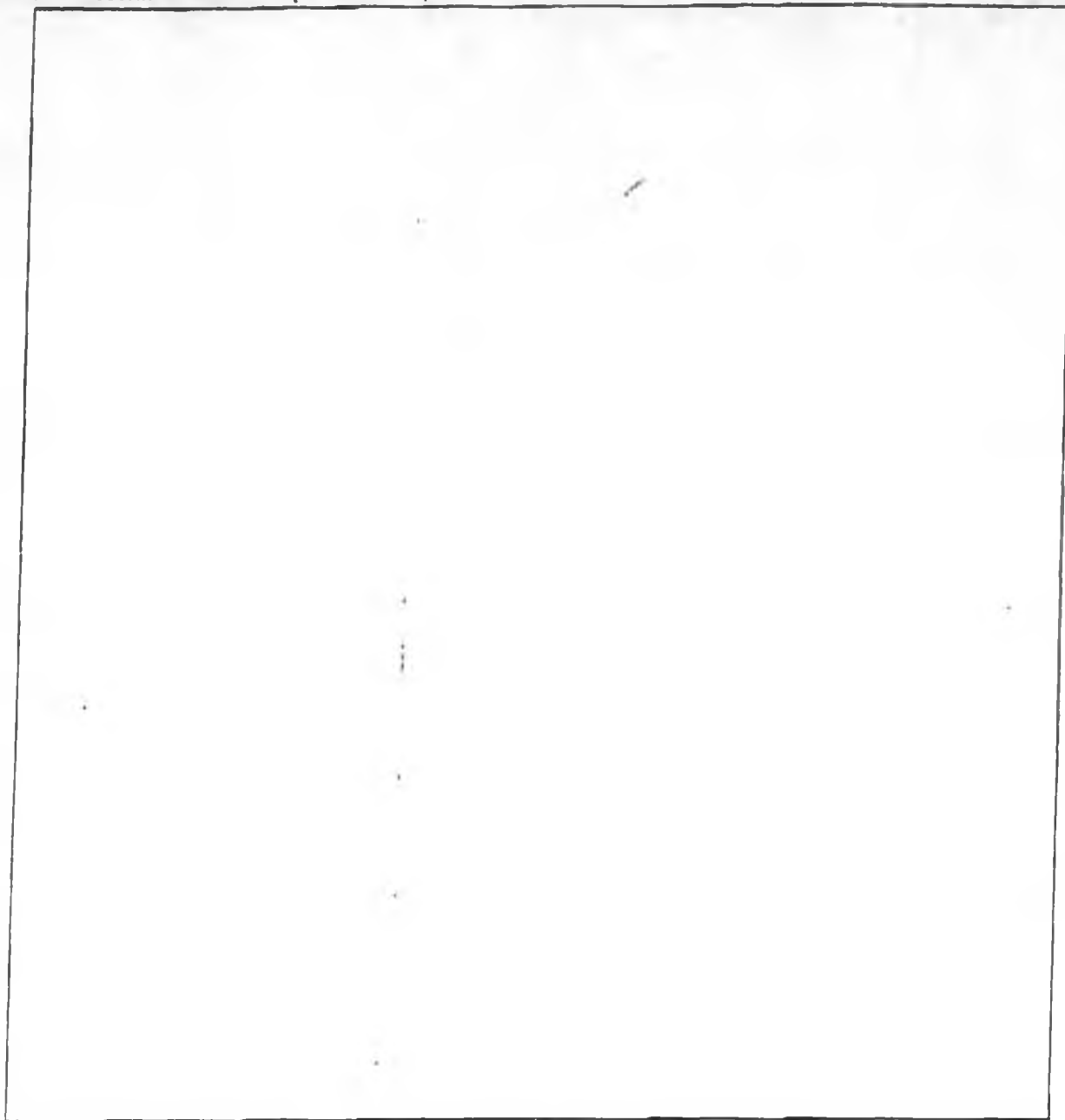
Additional Comments (Non-Confidential)

23. Please make any additional comments that you wish to bring to the Council's attention about your experience and suitability for this judgeship.

I began working at the Public Defender as a legal intern during law school, conducting bail hearings and drafting appellate arguments. I was able to conduct an oral argument before the Alaska Court of Appeals before I returned to school. After law school, I started in the appellate section of the Agency, drafting appeals and representing parole clients. I then managed a trial case load in Anchorage and for St. Paul Island. During that time, I conducted trials in District and Superior Court.

Following the trial case load, I returned to the appellate section. As an attorney in the appellate section, I am responsible for drafting appeals and conducting oral argument before the Alaska Court of Appeals and the Alaska Supreme Court on all types of cases, including unclassified felonies. I also consult with trial attorneys on legal issues that arise during litigation and the Public Defender on pending legislation and other legal issues affecting the Agency. I have also trained and supervised legal interns and new attorneys hired to represent our parole clients. Additionally, I have assisted in planning the Public Defender Conference, developing and implementing a training session specifically designed for the Agency's new lawyers.

Additional Comments (Continued)



24. Please prepare a brief biographical statement (limited to 150 words) about your background, legal education, and legal experience. Your picture and a copy of this statement will be scanned and posted on the Council's website after the application deadline. In its Bar survey, the Council will invite attorneys to review the information if they wish to become more familiar with your background and experience. Use the form on the following page for your biographical statement. Please leave the box at the top empty. The Council will use this space for your scanned picture.

Biographical Statement



Name Quirlan Steiner

Position(s) for which you wish to be considered:

Alaska Public Defender

Date: May 31, 2005

I am _____ years old, married, and a fourth-generation Alaskan. I received a B.A. in Business Administration from Seattle University in 1989. I received my J.D. from Northwestern School of Law of Lewis & Clark College in 1998. Prior to attending law school, I worked as a loan officer for the National Bank of Alaska in Juneau. I started with the Alaska Public Defender Agency as an intern during law school, conducting bail hearings, representing clients on parole and probation, and drafting appeals. I began working for the Agency after graduating from law school. I have managed a trial caseload in Anchorage and for St. Paul Island, trying cases in both District and Superior Court. I am currently working in the appellate unit. As an appellate attorney, I practice before the Alaska Court of Appeals and the Alaska Supreme Court.

Certification and Waiver

I hereby certify that, to the best of my knowledge, the information provided on this application is true and complete; and that I am a citizen of the United States and of the State, and will be eligible to be licensed to practice law in Alaska at the time of expected appointment (Al. Const. Art IV; § 4).

I waive any privilege of confidentiality I may have with respect to information concerning my qualifications for judicial office that the Judicial Council may desire to obtain. I specifically authorize the Council to obtain and examine my personnel files from current and past employers, including all files maintained by the Alaska Court System, and to obtain information, records and documents regarding me from any credit reporting agency, any law enforcement agency, any bar association, any occupational licensing board, any educational institution, and any disciplinary body, including specifically the Alaska Bar Association and the Alaska Judicial Conduct Commission. I further authorize these institutions, organizations, and individuals, and any other institutions, organizations and individuals to make available to the Council all confidential and non-confidential documents, records and information concerning me that the Council may request.



Signature of Applicant

Quinlan Steiner

Typed Name

5.31.05

Date

Subscribed and sworn to before me this 31 day of May, 2005.



Notary Public, State of Alaska

My Commission expires:

July 31 2008





DAVID STEWART, JUDGE

Court of Appeals
State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501
907-264-0781

June 24, 2005

Larry Cohn
Executive Director
Alaska Judicial Council
1029 W. Third Ave., Suite 201
Anchorage, Alaska 99501-1969

RE: Quinlan Steiner

Dear Mr. Cohn:

I first met Quinlan Steiner when he was an intern with the Public Defender Agency. In the years since then, Mr. Steiner has continuously represented client in the Court of Appeals. As a result, I am familiar with his work through the briefs that he has filed and through the cases in which he has participated in oral argument. I have also attended various administrative and committee meetings at which Mr. Steiner has represented the Public Defender Agency.

I draw several conclusions about Mr. Steiner from these contacts. The quality of his work is excellent. His briefs are well-written. His arguments are thorough, fair, and sound. He possesses outstanding judgment and first-rate legal skills. In short, he is a consummate professional.

I believe that Mr. Steiner's work has shown that he understands the subject matter that the Public Defender Agency handles. When this knowledge is combined with his financial experience, I have no doubt that Mr. Steiner has the skills to serve as the Public Defender. If I served on the Council, I would vote in favor of Mr. Steiner's candidacy. If the Council does refer Mr. Steiner to Governor Murkowski, please provide this letter to the Governor.

Regards,

David Stewart

13 September 2005

Larry Cohn
Executive Director
Alaska Judicial Council
1029 W.3rd Ave., Suite 201
Anchorage, AK 99501-1969

Re: Recommendation of Quinlan Steiner for Public Defender

Dear Mr. Cohn (and other members of the Judicial Council),

I submit this letter in support of Quinlan Steiner, who is seeking appointment to the post of Public Defender. I have, of course, the utmost respect and admiration for *all* of the candidates, three of whom I have had the pleasure of working with on an occasional to regular basis (Ms. Linda Wilson, Quinlan Steiner, and David Reineke). And, although each of the candidates for this position is extremely well-qualified and dedicated, I believe that Quinlan would be best-suited for this appointment.

I have spoken with Quinlan in the past with respect to various current legal issues (*e.g.*, *Blakely* and its impact upon Alaska's sentencing scheme). Quinlan is well-versed in the law and takes a very pragmatic, yet zealous and professional approach to its implementation.

I also have spoken with Quinlan concerning what appears to be the negative perception that some prosecutors and criminal defense attorneys have concerning the mission with which each practitioner is charged. Quinlan, however, appears to take no such view; he vigorously fights the good fight both intellectually and practically on behalf of his clients, all the while conducting himself with the highest degree of professionalism towards his colleagues across the aisle. These qualities have not gone unnoticed and as a result, I believe that if Quinlan were to be appointed as the next Public Defender, he would, by such example, foster even more professional good will between prosecutors and criminal defense lawyers.

Finally, no one who hasn't already held the position as Public Defender can walk right in and easily handle such a position.

Quinlan, nevertheless, is very intelligent and articulate, and his quiet resolve lends itself particularly well to quickly learning and excelling at all of the duties and responsibilities that accompany this highly important position within the criminal justice system.

In sum, all of the above referenced qualities, along with his obvious desire to do good, lead me to conclude that Quinlan is best-suited to be the next Public Defender. I have tremendous respect for him - and for all of the candidates - and trust he will be given the consideration he deserves. Thank you very much for your consideration.

Sincerely,

Ken Diemer
Assistant Attorney General, OSPA

October 11, 2005

Teri Cams
Senior Staff Associate
Alaska Judicial Council
1029 W. Third Avenue, Suite 201
Anchorage, Alaska 99501-1969

Re: Application of Quinlan Steiner for Public Defender

Dear Ms. Cams:

I received a letter from the Alaska Judicial Council asking me to provide a personal and professional reference for Quinlan Steiner and to comment on his qualifications for the position of Director of the Alaska Public Defender Agency. I am very pleased to do so.

In 1997 while still in law school, Quinlan was hired by then-Director John Salemi for a six-month internship in trial court and appeals. During his tenure, Quinlan distinguished himself by his work ethic, his exceptionally good judgment, and his tenacious advocacy on behalf of parolees and misdemeanor clients. He also excelled in appellate advocacy. Many Agency interns have written briefs that were filed in the Court of Appeals. But we were so impressed with Quinlan's abilities that he became the first (and only) intern allowed to argue a client's case before the Court of Appeals—and he won! He is also the only intern who was guaranteed a full-time position before he graduated and passed the Bar. Quinlan did return to the Agency the next year. Although he has had other employment offers during the ensuing years and will not, I suspect, be a "career public defender", he has remained solidly committed to the Agency's mission to provide high quality representation to indigent defendants in every area encompassed within the Agency's statute. Quinlan has practiced before the parole board, the trial courts, and the Court of Appeals and Supreme Courts. He has also worked on CINA cases. In short, Quinlan has experience in every facet of public defender work.

From his first days at the Agency, Quinlan has demonstrated the high degree of integrity that is essential for the Director of the Public Defender Agency. Quinlan believes in the legal and moral strength of the criminal justice system and that the legal system stands or falls on the adherence of the participants to highest ethical standards. He never deviates from those standards. He is scrupulously honest with the courts, opposing counsel, and his clients. Quinlan also has a well-deserved reputation for assuming responsibility and for reliably following through with his commitments. For example, I recently needed to get some temporary help with a number of cases that were ready for briefing at the same time. Although I was promised that someone could

be hired. I was told that the only individuals who were available had no appellate experience. When I told Quinlan of my problem, he promised he would take immediate, active efforts to find someone. Before the week was out, Quinlan delivered as promised. He sought out a bright and talented former Alaska Supreme Court law clerk who was looking for part-time work. She's proved to be a godsend. If my experience is any example, Quinlan will reestablish the crucial practice employed by former directors Brian Shortell and Dana Fabe of actively recruiting new, energetic legal talent from among the court's law clerks. Like Quinlan, these new lawyers come with an excitement for the job and new ways of looking at issues. Both the Agency and the clients will benefit from renewed vitality and commitment to defense work.

Over the past ten years as state revenues have contracted and the Agency caseload has expanded, the primary task for the Director—at least from October to May—has become to prepare the Agency's annual budget and defend it before the legislature. Most public defenders have little or no interest in accounting or finance. Quinlan is the only assistant public defender on staff who has a background in finance and who understands the budgetary process. (To my knowledge, he's the only assistant public defender who actually balances his checkbook!) In addition, Quinlan's extensive experience in defending his clients' legal issues in the appellate courts will be invaluable when performing the director's task of testifying before the legislature on the impact and constitutionality of proposed legislation. Quinlan is very adept at explaining his position and answering the most penetrating and confrontational questions without reacting negatively or losing his composure. He also handles "unfriendly" questions from the court without losing his sense of humor—a particularly desirable quality when testifying before the judiciary and finance committees.

Ideally, the Director of the Agency should be someone to whom staff attorneys can turn for assistance in analyzing issues and brainstorming trial strategy. Quinlan already occupies that position in the Agency. He has an excellent legal mind and extensive knowledge of criminal law and criminal procedures. He is known as having argued and won more appeals than any other lawyer in the office. Thus, he is the lawyer in the office to whom all public defenders and many private defense attorneys turn when they need help with their cases or when they need to analyze an ethical question. Quinlan's judgment and knowledge has qualified him to become part of the "brain trust," a group of experienced attorneys who meet with the Director on a discuss the Agency's policy and position on legal issues that arise. Quinlan's particular talent in that group is using his exceptionally sound judgment to point out the pros and cons of every position espoused in the debates. Quinlan is not only highly regarded and sought out by the older more experienced attorneys in the Agency, he is respected by the newer assistant public defenders. Several years ago, Quinlan approached another lawyer with the suggestion that they set up training sessions for new attorneys at the annual Public Defender conference. The two of them now annually train new attorneys in everything from jury voir dire, to cross-examination, to closing arguments. In fact, Quinlan wrote the training manual. The training is extremely popular and evaluations of the course from the participants indicate that it is very helpful.

The most important qualification for a Director is the ability to lead the Agency's lawyers. Quinlan certainly has the legal experience to do so. He has been working at the Agency for eight years. Only one of the Directors with whom I have worked during my twenty-plus years at the Agency had more than eight years experience before being appointed. That person was Barbara Brink, who had practiced for approximately ten years. Quinlan also has the necessary legal skills for the job. He has practiced in both the trial court and the appellate court, and has a breadth of legal knowledge that has made him the resource for attorneys seeking legal advice and assistance with their cases. While Quinlan's supervisory experience since he joined the Agency has been limited to overseeing the work of the parole attorney and Agency interns, he did have prior supervisory experience before going to law school. More importantly, Agency directors traditionally have allowed staff attorneys to remain autonomous in their practice and have refrained from actively micromanaging their cases. In positions other than that of misdemeanor supervisor, the term "supervisor" is somewhat of a misnomer. A "supervisor" at the Agency primarily acts as a resource for the less experienced lawyers in their sections who are seeking advice on how to handle a particular matter and also distribute the section's workload. Thus, prior supervisory experience is not a particularly important attribute for a director and some previous directors have not had any at all.

The essential and nonnegotiable qualification for the Director's position is the ability to lead by example. Quinlan already does. He is one of the first lawyers to arrive in the morning and one of the last to leave at night. He carries a very heavy caseload and still volunteers to cover for absent co-workers and to take cases that no one else wants. He constantly thinks about what is good for the Agency and acts accordingly. One memorable example of this quality occurred when Quinlan learned that a skilled lawyer was going to quit because he was exhausted from doing a number of taxing trials. Quinlan believed that this lawyer's departure would be a great loss to the Agency and the clients. He voluntarily gave up his appeals position to the lawyer and returned to the trial court so that the lawyer could have a hiatus.

Quinlan will bring great energy, and new ideas to the job. I suspect that he will make some changes in Agency policies that will be welcomed by staff attorneys who want the Agency to be among the nation's best. He will set high standards for staff lawyers and, rightly, will hold them accountable to the courts, to their co-workers, and most importantly, to their clients. Quinlan is certainly exceptionally well-qualified to lead the Public Defender Agency, and I urge the Council to recommend him.

Sincerely


Margi A. Mock
Assistant Public Defender

October 11, 2005

Alaska Judicial Council
1029 W. Third Avenue, suite 201
Anchorage, Alaska 99501-1969

Re: Quinlan Steiner's Qualifications for Director of the Public Defender Agency

Dear Council Members,

My name is Paul Malin. I began working as an Assistant Public Defender in 1984. I have worked with Quinlan Steiner since he began his internship here eight years ago. All the applicants for the Agency Director position are well qualified. However, of all the applicants, Quinlan is probably the least well known and has been a lawyer for the shortest time. Based upon my knowledge of Quinlan's work and personal skills, I feel that I have a firm basis of knowledge to evaluate his suitability for the Director's position. Because I believe that Quinlan is exceptionally well qualified to be the Agency Director, I urge you to forward his name to the Governor for consideration.

Quinlan's background is unique for a public defender. He received his Bachelor's Degree in Business Administration from Seattle University. This four-year degree focused on accounting, business strategy, marketing, finance, management and supervision. Quinlan also has real life business experience. While pursuing this degree, Quinlan was a partner in a deck building company. He managed the revenue and built the decks.

Following his graduation, Quinlan worked as a loan officer in the Juneau branch of the National Bank of Alaska. After a one year training program, Quinlan made commercial, consumer, and residential loans. He interviewed the loan applicants, evaluated their financial history and business plans, and determined whether the applicants were qualified for the loan. He approved loans up to his loan limit, and made recommendations to the branch manager for loans that exceeded his limit. When the manager was absent, Quinlan supervised a staff of six.

Quinlan then sought to incorporate his business skills with his love of the outdoors. He worked for Adventures and Delights, an Anchorage based outdoor adventure company operated out of a coffee shop across from the courthouse. This job piqued Quinlan's interest in becoming a public defender because it led to his acquaintance with Assistant Public Defender and Appellate Section Chief Margi Mock, a frequent visitor to the coffee shop. The more Quinlan got to know Margi, the more he became fascinated by her cases, the legal issues that they raised, and the creativity that a public defender must have to make these issues alive, compelling and persuasive. Consequently, Quinlan decided to go to law school for the sole purpose of becoming a public defender.

One of Quinlan's first assignments at the Agency was to handle the parole caseload, a position affectionately referred to as the "Parole Slave." This is a thankless job of representing defendants who have been released on mandatory parole but who have violated, often within days of their release, their parole conditions and therefore face serving their "good time" in jail. Quinlan quickly became known as the "Parole Guru" and was revered for his amazing success in persuading the Parole Board to let his people go. This success underscores Quinlan's exceptional diplomacy and negotiation skills, as the Board invariably rejects technical legal arguments.

As a member of the appellate section, I have proof read many of Quinlan's briefs and have attended his oral arguments. Quinlan is an accomplished appellate lawyer who excels at technical legal arguments. He is a "quick study" who can rapidly synthesize and distill the essence of a legal argument. He is a brilliant abstract thinker. His legal writing is clear, concise, and persuasive. These qualities have led other lawyers to bring Quinlan their most difficult, complex legal issues.

Quinlan is a born teacher as well. I have observed this skill over the past several years when Quinlan co-lead the training sessions for the new lawyers at the annual Public Defender Training Conferences. Quinlan prepared the training manual and presented the material in an organized and understandable way. He has also co-taught (with Margi Mock) an undergraduate class in Criminal Law at the University of Alaska at Anchorage.

Quinlan also possesses sound, thoughtful and pragmatic judgment, both legally and politically. He displays a calm, objective and usually unflappable demeanor, a characteristic that should be invaluable in dealing with the Legislature. Moreover, Quinlan's business background makes him uniquely well qualified to manage the Agency's budget. The combination of these three qualities -- unusually strong analytical legal skills, sound political judgment, and a solid business acumen -- are rare and highly desirable for the Agency Director.

My observations of Quinlan would not be complete without mention of his ability to place the Agency's interests above his own interests. For example, Quinlan volunteered to assume a trial caseload in order to give a talented but burned out trial lawyer (Mike Deini) a much-deserved rest. Quinlan believed that the Agency would be hurt by Deini's departure and was willing to give up his beloved appellate position to keep him.

Quinlan demonstrated his ability to place the needs of others above his own needs this winter when the administrative section moved to the appellate section's floor. Because the administrative section wanted to keep all their members in a contiguous unit, I was directed to move to an office in the southern part of the floor. I was not happy with this prospect because I do not tolerate heat well, and my office was north facing and cool. Quinlan's office was next to mine, and was also cool. Even though he also preferred a cool office, he unselfishly volunteered to give me his office and take the south facing, hotter office (which was also by the lunchroom, making it noisier) because he knew how uncomfortable I would be.

In sum, even though Quinian has not practiced law as long as the other applicants, he has the maturity, legal skills and political savvy of a much more experienced lawyer. More importantly, he possesses the passion, enthusiasm, and creativity to lead the next generation of public defenders. Please allow the Governor to consider his application.

Sincerely,



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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARK EDWARDS,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

)
)
)
) Court of Appeals No. A- 8507
)
)
)

Trial Court No. 3AN-S99-1269CR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT
HONORABLE ELAINE ANDREWS, JUDGE

OPENING BRIEF OF APPELLANT

PUBLIC DEFENDER AGENCY

BARBARA K. BRINK (82-06009)
PUBLIC DEFENDER

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Filed in the Court of Appeals
Of the State of Alaska

_____, 2004

MARILYN MAY, CLERK
Appellate Courts

Deputy Clerk

VRA CERTIFICATION AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Univers 12.5 point.

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STATEMENT OF THE CASE

Police officers responded to the home of M.E. after receiving a welfare call indicating that M.E. failed to report for work. [Tr. 758] Responding officers found M.E. and her friend, M.C., dead at the scene from gunshot wounds. [Tr. 285-290] Mark Edwards, M.E.'s ex-husband, was also found at the scene with a gun shot wound to the head. [Tr. 283-290] Officers found a .22 caliber Derringer pistol on the floor of the room in which Edwards and M.E. were located. [Tr. 290] Officers later found nine .22 caliber bullets in Edwards's pants pocket when the pants were processed into evidence. [Tr. 857]

Although Edwards suffered permanent brain damage and total blindness as a result of the gunshot wound, the trial court found him competent to stand trial. [R. 1829] Mark Edwards was subsequently indicted on two charges of first-degree murder. [Exc. 1-2; R. 1982-83] The state pursued the indictment under the theory that Edwards shot M.E. and M.C., then shot himself in retaliation for a domestic violence protective order obtained by M.E. against Edwards shortly before the homicide. [Exc. 90; G.J. 7-8] The state supported its request for a true bill with a single witness, Detective Branchflower. [Exc. 90-95; G.J. 9-29]

Edwards filed a motion to dismiss the indictment arguing that the indictment rested entirely upon improperly admitted hearsay evidence. [Exc. 3-14; R. 1718-29] Edwards also filed a motion to suppress the bullets found in his pants pocket arguing that they had been obtained through an illegal warrantless search. [Exc. 15-20; R.1732-37] The trial court denied Edwards's motions. [Exc. 55-82; R. 1646-1678]

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in failing to dismiss the indictment where the state obtained a true bill based upon the uncorroborated and improperly introduced hearsay testimony of a single witness?

2. Did the trial court err in failing to suppress evidence obtained from an illegal warrantless search of Edwards's pants pocket?

Edwards was convicted at trial and received a sentence of ninety-six years to serve. [Exc. 83-87; R. 1977-1981] This appeal follows.

ARGUMENT

I. THE GRAND JURY'S VERDICT RESTS ENTIRELY UPON IMPROPERLY ADMITTED HEARSAY EVIDENCE

A. Introduction

No person shall be held to answer for a felony offense without the support of a grand jury indictment.¹ "[T]o obtain an indictment, the State must prove to the grand jury 'that the evidence ... establishe[s] a probability of [the defendant's] guilt.'² The Alaska Supreme Court has stated that this determination should be a reliable one.³ Hearsay evidence that is inadmissible at trial is, therefore, only admissible before the grand jury under certain limited circumstances.⁴

The rationale for limiting hearsay testimony is based upon the view that a reliable determination of probable guilt is required "before the accused suffers any of the grave inconveniences which are apt to ensue upon the return of a felony indictment."⁵ As the Alaska Supreme Court has stated, "[t]his can best be guaranteed when witnesses against the accused appear in person before the grand

¹ The Constitution of the State of Alaska, Article I, section 8.

² State v. Ladd, 951 P.2d 1220, 1222-23 (Alaska App. 1998) (citations omitted).

³ State v. Gieffels, 554 P.2d 460, 465 (Alaska 1976).

⁴ Alaska Rule of Criminal Procedure 6(r)(1), (2), (3), & (6).

⁵ Gieffels, 554 P.2d at 465.

jury so that the panel can view their demeanor and subject them to cross-examination."⁶ The Alaska Supreme Court has warned that "hearsay evidence, if unchecked, would erode the protective value of the grand jury so as to make it nothing more than an administrative arm of the district attorney's office."⁷

B. The State Improperly Introduced The Firearm And Toolmark Expert's Opinion Through Detective Branchflower

To strengthen the protective value of the grand jury, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification" that is stated on the record. The time and expense of presenting an expert to the grand jury may be a sufficiently compelling justification for presenting the expert's opinion through hearsay testimony if the opinion is based on "accepted scientific procedures that yield objective results."⁸ If an expert's opinion, however, is "subjectively based or depend[s] on procedures the reliability of which has not been established," the time and expense of presenting the expert to the grand jury will not be a sufficiently compelling justification.⁹

Appellate courts in Alaska have held that drug testing results are objectively based on accepted scientific procedures and that the technician who

6 Id.

7 Id.

8 Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985).

9 Id.

performs a drug test is not required to testify before the grand jury.¹⁰ In so holding, the Alaska Supreme Court has reasoned that the competence of the technician and the reliability of the test would not likely be tested by vigorous cross-examination and that "the technician could do no more than affirm that he did perform the test reported, and that those tests did indicate the presence of a narcotic substance."¹¹

Conversely, appellate courts in Alaska have held that the conclusions of handwriting experts and treating physicians are not excluded from the requirement that they testify.¹² In Metter v. State, for example, the state secured an indictment using hearsay testimony concerning the opinions of two handwriting experts. The state did not present a report from either expert or provide any information concerning their professional credibility. According to the Alaska Supreme Court, the method of proof employed by the state failed to provide a basis for showing the grand jury how the experts' reached their conclusions or for presuming that the comparisons were performed and reported accurately.¹³ The

¹⁰ McKinnon v. State, 526 P.2d 18, 27-28 (Alaska 1974) (Holding that the laboratory analysis of cocaine was properly admitted through the hearsay testimony of a police officer.); Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985) (Holding that the chemical analysis of LSD was properly admitted through the hearsay testimony of an investigating officer.).

¹¹ McKinnon, 526 P.2d at 27-28.

¹² Adams v. State, 598 P.2d 503, 508 (Alaska 1979) (hearsay evidence concerning treating physician's opinion of victim's medical condition inadmissible before the grand jury without a showing of compelling justification); Metter v. State, 581 P.2d 669, 673-74 (Alaska 1978) (hearsay testimony concerning the results of handwriting analysis inadmissible before the grand jury absent a showing of credibility and reliability).

¹³ Metter, 581 P.2d at 674.

court ultimately held that the state had failed to establish the reliability of the handwriting expert's opinion.¹⁴

Although the court's decision in Metler appears at first blush to turn on the state's failure to present a report to the grand jury, as this court's decision in Ingram v. State¹⁵ indicates, such a limited reading of Metler would fail to account for the continued applicability of the "compelling justification" requirement. In Ingram, the defendant argued that the Alaska Supreme Court's earlier decision in McKinnon v. State,¹⁶ which held that the state was not required to present a technician who performs a drug test to the grand jury, had been subsequently overruled by cases requiring the state to present handwriting experts and treating physicians to the grand jury. This court, however, held that McKinnon was still good law.¹⁷ In so holding, this court stated that later cases simply distinguished between two classes of expert opinions: subjectively based and objectively based.¹⁸ Thus, Ingram reiterates the necessity for a compelling justification when introducing an expert's subjective opinion through hearsay regardless of whether the hearsay method is in the form of a report, live testimony, or both.

In the present case, the trial court concluded that Robert Shem, the

14 Id.

15 703 P.2d 415 (Alaska App. 1985).

16 Supra, n. 10.

17 Ingram, 703 P.2d at 432.

18 Id.

firearm and toolmark expert, issued a report that was "an expert opinion based on accepted scientific procedures that yield objective results" similar to drug testing results. [Exc. 75; R. 1666] The court reasoned that toolmark identification was based upon viewing tool marks that are objectively visible. [Exc. 75; R. 1666] The court further reasoned that because Shem's report was submitted to the grand jury, they were allowed to examine it for themselves. [Exc. 76; R. 1667] The court, therefore, concluded that Shem's testimony would not have added to the proceedings and his opinion, introduced through a written report and Branchflower's testimony, was not improperly presented to the grand jury. [Exc. 75-76; R. 1666-67]

The art of toolmark identification is, however, subjective and not objective. Toolmark identification typically involves microscopic examination of toolmarks to determine if the toolmarks have a sufficient number of microscopic features of sufficient clarity and definition for identification.¹⁹ Identification is possible when unique surface contours are compared and are found to be in "sufficient agreement."²⁰ Sufficient agreement means that "the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so

¹⁹ Alfred A. Biasotti & John Murdock, The Scientific Basis Of Firearms And Toolmark Identification, § 29-2.2 at 502, in Modern Scientific Evidence: The Law And Science Of Expert Testimony (David L. Faigman, David H. Kaye, Michael J. Saks, & Joseph Sanders eds., 2002).

²⁰ Id. at 504-05 (citing Theory Of Identification, Range of Striae Comparison Reports, and Modified Glossary Definition—An AFTE Criteria for Identification Committee Report, 24 Ass'n Firearm & Toolmark Examiners J. 336 (1992)).

remote as to be considered a practical impossibility."²¹ The Association of Firearm and Toolmark Examiners recognizes that this process is "subjective in nature, founded on scientific principles and based on the examiner's training and experience."²² At least one published expert has noted that "it would be the 'art' of the experienced examiners that would be the basis" for a quantifiable model, not the science, even if this process could be objectively quantified.²³

In contrast to drug testing, firearm and toolmark identification does not involve a test result which once obtained could be confirmed by a technician or simply communicated by report. The analysis performed by a firearm and toolmark examiner is similar to comparing handwriting samples and involves the judgment of an expert who has sufficient training, experience, and skill. Artful decisions must be made at each step of the process, including what types of marks to look for, what marks are sufficiently definite and clear to form a basis for identification, and whether the compared surfaces are in "sufficient agreement" as to exclude other tools, rendering misidentification a practical impossibility.

Although Shem's report was presented to the grand jury, the subjective nature of firearm and toolmark identification renders this method of proof unreliable and insufficient. Shem's report consisted of a single page that merely listed the items submitted and Shem's opinion. [Exc. 88] Moreover, Shem's report is

²¹ Id.

²² Id.

²³ Id. at 508 (quoting John E. Davis (author of An Introduction To Tool Marks, Firearms and the Striagraph (1958)) in a letter to John Murdock).

misleading because it reports his subjective opinion under the heading "Results." [Exc. 88] Shem's opinion is, however, not the result of a test; it is an opinion based upon his subjective judgment. Moreover, the report does not provide the grand jury with any information from which it could evaluate how Shem formed his opinion, whether he performed his analysis according to established and reliable procedures, or whether he was a qualified or credible expert.²⁴

C. The State Improperly Relied on Detective Branchflower's Testimony Concerning The Investigation And The Scene Of The Crime.

As previously noted, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification." Rule 6(r) does permit otherwise inadmissible hearsay evidence to be presented to the grand jury if the evidence fits within an enumerated exception. One exception permits a police officer involved in an investigation to repeat the statements and observations of another officer if additional evidence is introduced to corroborate the statement.²⁵

No reported opinions from Alaska's appellate courts have grappled with the extent to which hearsay testimony may be used under this exception or the level of corroboration required to permit its use. A legislative statement of findings and purpose for the rule provides some guidance, however. The 1994 legislature stated that the rule permitting police officer hearsay was enacted "to allow the grand jury to be fully informed about the evidence available on a criminal case through testimony

²⁴ See Ingram, 703 P.2d at 432.

²⁵ Alaska Rule of Criminal Procedure 6(r)(3).

of lead peace officers, while allowing officers who played a minor role in the investigation not to personally appear and testify so that they can continue to perform their vital duties on the street to protect the public."²⁶

One prior unreported opinion of this court does address of the level of corroboration required to justify the admission of police officer hearsay. In Wilson v. State,²⁷ the state established the location of a homicide victim's body through the hearsay testimony of an investigating officer. According to this court, the hearsay testimony concerning the location of the victim's body was properly admitted because photographs of the scene identified by the testifying detective corroborated his statement.²⁸

In the present case, every material aspect of the state's case was introduced through Branchflower's hearsay testimony. Branchflower apparently did not investigate the scene of the homicide. [Tr.66] Branchflower, however, testified about both the report that lead officers to the scene and the responding officers' observations of the scene without stating the basis for her testimony. [Exc. 91-94; G.J. 11-14, 20-21, 24] Branchflower told the jury about a phone message from Edwards to M.E., but did not state who listened to the message or who wrote it down; she stated "I think they listened to the message." [Exc. 93; G.J. 20-21] The only observations of the scene that Branchflower testified to and also stated the

²⁶ Alaska S.L.A. 1994, ch. 114, sec. 1: Findings and Purpose.

²⁷ Wilson v. State, 1998 WL 254000 (Alaska App. May 20, 1998).

²⁸ Id. at 2.

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basis for were those of Lieutenant Gifford, the crime scene reconstruction and blood spatter expert. [Exc. 92-93; G.J. 14-18]

Branchflower's testimony included a hearsay account of the location of the Derringer, bullets, and expended shells found at the scene. [Exc. 92-93; G.J. 14-18] Her testimony also included a statement from an unnamed source indicating that nine bullets were found in Edwards's pocket. [Exc. 95; G.J. 26] The state introduced photographs of the scene through Branchflower without any statement indicating who took the photographs, when the photographs were taken, or whether the photographs accurately represented the scene or the evidence. [Exc. 93-94; G.J. 21-23] The only evidence provided to the grand jury that was not improperly admitted was Branchflower's testimony that she searched Edwards's residence and found an empty box of .22 caliber bullets and the sheath to a knife several, and photographs that she had taken at Edwards's residence. [Exc. 95; G.J. 27-28]

Branchflower's non-hearsay testimony, however, did not corroborate the hearsay testimony. The fact that Branchflower observed an empty box of .22 caliber ammunition does not corroborate the number of bullets found at the scene or the existence of a gun with a discharged shell. It merely shows that Edwards had an empty box of the most common type of ammunition sold in the United States in the most common quantity available. [Tr. 1862, 1878] Branchflower's observation of a knife sheath at Edward's residence, again, fails to corroborate any observation of the scene upon which the grand jury's verdict rested. The fact that a filet knife was found at the scene that could possibly fit a sheath found at Edwards's residence is not surprising and does not establish that Edwards's shot M.C. and M.E.

This court's unpublished opinion in Wilson appears to indicate that the existence of photographs would serve to corroborate Branchflower's testimony. Unlike Wilson, however, the photographs introduced through Branchflower were not properly identified and can not reliably corroborate her testimony. Photographs are inadmissible at trial unless they are properly authenticated.²⁹ Here, the state introduced photographs through Branchflower, but there is no basis for concluding that the photographs are a faithful representation of what they purport to depict. Branchflower does not indicate who took the pictures, when the pictures were taken, or whether they are an accurate representation of the scene and evidence.

The state's presentation of the evidence to the grand jury violated the plain language of Rule 6(r)(3) and the intent of the legislature. The state presented its entire case using the uncorroborated hearsay testimony of an officer who, though involved in the investigation, played only a minor role in the investigation. This reliance on hearsay evidence has eliminated any protection provided by the grand jury process and should not be countenanced here.

D. The Indictment Must Be Dismissed Because It Rests Entirely Upon Improperly Admitted Evidence

"In deciding whether the presentation of improper evidence requires dismissal of the indictment, it is first necessary to decide whether there is sufficient

²⁹ Sheakley v. State, 644 P.2d 864, 870 (Alaska App. 1982) (stating that "[t]his court has held that a photograph is admissible in evidence in the discretion of the trial judge, as an aid to the court or jury, after it has been shown to be a faithful representation of whatever it purports to depict.")