Alaska Justice Forum

IN THIS ISSUE:

- Zehrung: Another Look
- Hawaiian Master Plan History
- Custody and Waiver: Law on Confessions
- Continuing Professional Development
- Summer School Schedule

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A Fresh Look at Zehrung

By Peter S. Ring
Criminal Justice Center

Now that the Alaska Supreme Court has handed down its opinion on rehearing in **Zehrung** (569 P.2d 189, P.2d (Jan. 27, 1978) it seems a good time to take another look and determine just what the Court really did decide in that controversial case.

A careful rereading some months after all the heat of full-page editorials leads one to wonder what the stink was all about in the first place.

The amazing thing about Zehrung is that it absolutely does not have any direct impact on the police, insofar as their "law enforcement" role is concerned. Without question, the decision does have an impact on those police departments in rural Alaska which run their own jails—or so it might seem. The opinion on rehearing casts doubt on the extent to which even this impact could be considered adverse.

In this article we will look again at Zehrung and reexamine the holding. More importantly, we will look at the most critical aspects of the decision for law enforcement personnel; aspects which must be reviewed in the context of the opinion of the highest court of our sister state California in **People v. Brisendine**, 531 P.2d 1099 (Cal. 1975).

One other note. It is clear that much of the "heat" which surrounded the **Zehrung** decision was generated by the effect of the exclusionary rule. This present discussion does not address that aspect of **Zehrung**. That rule will be discussed in a forthcoming issue of the **Forum**.

ZEHRUNG AND THE POLICE

As indicated previously, the **Zehrung** decision should have absolutely no impact on police search and seizure practices as related to their enforcement activities. As the **Zehrung** court noted, in **McCoy v. State**, 491 P.2d 127 (Alaska 1971) the Alaska Supreme Court had concluded that the following restrictions existed with respect to warrantless searches of the person incident to a lawful arrest:

> . . . the arrest must be valid—probable cause for the arrest must exist or the search is unconstitutional. (2) The search must be roughly contemporaneous with the arrest, at least within the boundaries suggested by United States v. DeLeo, and adopted here. (3) The arrest must not be a pretext for the search; a search incident to a sham arrest is not valid. * * * (4) **Finally, the arrest must be for a crime, evidence of which could be concealed on a person.** 491 P.2d at 138 (emphasis added, footnotes omitted)

In a footnote explaining the fourth restriction the court noted that "[t]his will operate to prevent **unlimited** searches in cases of arrests for minor offenses." (emphasis added. 491 P.2d at 138, footnote 58). The court made clear the fact that its decision in **McCoy** was based on an interpretation of the requirements of the Alaska Constitution. They then noted: "The extent of a valid search of a person charged with a crime is limited under our decision. Where there is probable cause to arrest for a particular crime of a type which can be evidenced by items concealed on the person there is little danger of a pretext arrest. In such circumstances the individual's rights of privacy must give way to the public need to investigate the crime." (491 P.2d at 139)

The dissenting judges in **McCoy** also stressed the limited scope or "intensity" of a search incident to an arrest permitted by the decision. It would have been difficult to imagine law enforcement officers drawing any other conclusion from **McCoy** but that thereafter they could only search a person without a warrant incident to arrest for (1) weapons or (2) destructible evidence of the offense for which the arrest was made.

If such a conclusion had not been drawn from **McCoy**, it was reenforced in **Lemon v. State**, 514 P.2d 1151 (Alaska 1973). There, while reversing on other grounds, the court noted once again that searches of a person without a warrant incident to an arrest were limited to efforts to recover destructible evidence related to the crime for which the arrest was made, and which could be concealed on the person. (See, footnote 17, 514 P.2d at 1159. See also, the discussion of the **McCoy** decision immediately following footnote 15 at p. 1158.

In retrospect, the only event which intervened between **McCoy** and **Zehrung** which might have caused police officers to question the continuing viability of the

(Continued on page 8)

Master Plan: Another View

The following was originally written for the Honolulu (Hawaii) Star-Bulletin concerning the fate of the Hawaii Correctional Master Plan. It is interesting in relating the experiences of the master plan in the 50th state as it also provides a perspective regarding developments on the same subject in the 49th state. The author, Hawaii State Representative Lisa Naito, is chairperson of the Committee on Corrections and Rehabilitation, Hawaii State House of Representatives. She was also one of the speakers at the Alaska Legislative Conference on Corrections held in Anchorage Dec. 9-10, 1977.

By Lisa Naito
Hawaii State Representative
Chairperson, Committee on
Corrections and Rehabilitation

Nearly eight years ago, Governor John A. Burns signed into law, Act 179 mandating the creation of a Hawaii Correctional Master Plan. It took over two years of conceptualization, studies, and consultation with local agencies for the hired experts from the Illinois-based National Clearinghouse for Criminal Justice and Architecture to come up with a finalized document.

The philosophy behind this master plan proposed that community-based corrections programs are preferable to institutional treatment whenever this is possible without endangering public safety. In 1973, the Legislature bought what it considered to be this progressive package and we were on our way.

Master Plan Still Not Off the Ground

Five years of slow, painful implementation have passed and yet the master plan has barely gotten off the ground. Most of its program proposals are still on paper and its goals are nearly as far from realization as they were in 1973.

What we are seeing instead is the construction of new facilities and some internal shifting of agency functions, but very little development in terms of rehabilitation and reintegration—the major focus of the Master Plan. White it is easy to point fingers at the various branches of state government as being the culprits, it might be more productive to examine the reasons for this apparent foot-dragging.

When it was first conceived, the master plan incorporated many modern correctional theories and was considered to be an innovative approach to criminal justice. It accepted the premise that crime was the sociological result of failure and disorganization in the community, and therefore, society was responsible for rehabilitating the offender.

Imprisonment was seen as the least effective (as well as the most expensive) way to deal with offenders, an attitude borne out by the high recidivism rates for incarcerated offenders and the rapidly rising costs of keeping a person imprisoned. To find more logical and humane solutions to these problems were the major goals of the Hawaii Correctional Master Plan.

Times Have Changed

What was not anticipated by the mainland planners, however, were three very basic changes that were to take place in the almost immediate future:

(1)A major shift of public opinion in Hawaii away from penal reform and rehabilitation toward a demand for law and order, a "lock 'em up and throw away the key" approach;

(2)A drastic change in our state's economy from 1973, when tax revenues were up and programs and services were expanding, to the current recession where the cutting of programs and services are the order of the day;

(3)A complete turn-around by many renowned Correctional experts who now tell us that rehabilitation doesn't work, that mandatory and/or flat time sentences may be more appropriate.

The rapid changes that we have experienced in these few years since the development of the Correctional Master Plan have had a most devastating effect on its implementation. Communities will not accept Community Correctional Centers any longer. The attempted opening of halfway houses or conditional release centers in any residential area is sure to bring the neighbors out en masse in vocal opposition. The plan's major element—gradual reintegration of offenders into the community—has become unacceptable.

Additionally, the financial constraints of our state have necessitated a sharp cutback in funding new projects for alternatives to incarceration. To make life even more difficult, the prison population projections which were specified in the master plan and upon which our construction needs were based, were so underestimated that while $30 million is being spent for new facilities, a severe shortage of bed space is still imminent.

Corrections administrators are now in a position of scrambling to find room for the current inmate population, to beef up security, and to figure out where to put the additional inmates even after the new prisons are completed.

This is the bleak picture that currently faces government officials involved in the criminal justice system. Such an enormous amount of energy is being utilized to meet these immediate critical circumstances that there is little time to rise above the problems and conduct a major reassessment of where we are and where we are going.

But reassessment is precisely what we need at this poing in time. The dilemma has reached such major proportions that I feel it is incumbent on all of us who are concerned with Corrections to face up to reality, admit our failures, and seek alternative solutions.

The "progressive" package that the legislature bought back in 1973 must be redefined.

Considering the enormity of the problem, my proposition is a modest one, but a necessary approach if we are to accept the facts as they exist. Our mainland "experts" were apparently short-sighted. What we now must do is create a LOCAL "think tank" which would draw together a small lay group of community leaders who would utilize the expertise of Hawaii's administrators, judges, and legislators for the purpose of problem solving and creating a realistic future for this trouble-ridden system. Investigative clout should be given and a tight time constraint placed on this body so that the work is intensive and the recommendations appropriate, up to date and acceptable to our people.

(Continued on page 5)

Community Crime Prevention

On January 6, 1978, the Governor's Commission on the Administration of Justice approved a grant for the Community Crime Prevention Program, operated by the Criminal Justice Planning Agency. The program, located in Anchorage and directed by Sema Lederman, is mandated to provide information and technical assistance to local crime prevention projects throughout the state.

An immediate objective of the program is to initiate a 24-hour advocacy service for rape victims in Anchorage. Two VISTA volunteers assigned to the Community Crime Prevention Program have already recruited 20 volunteers who will respond to rape crisis calls after receiving training from police and prosecutors in investigation elements, medical personnel, psychologists, and experienced rape crisis advocates. The first training session was held on the weekend of April 1, and a second sesson is planned for April 15.

In some cases, agencies and organizations with similar goals work independently of each other, possibly duplicating services or unaware of available services or resources. The Community Crime Prevention Program will bring such groups together for discussion and cooperative effort.

On the weekend of February 18-20, representatives of battered women's groups from Anchorage, Barrow, Bethel, Fairbanks, Juneau, Kenai, Ketchikan, and Kodiak, attended a workshop presented by the Community Crime Prevention Program, and, as a result, formed the Alaska Council on Family Violence. That council is now lobbying the state legislature to approve a $600,000 appropriation for shelter services for battered women and their children.

A grant for LEAA Discretionary Violence in the Home funding was also developed in the February workshop, which, if funded, will provide direct services, education, research, and criminal justice system resources for victims and offenders of battering, child abuse, and incest. Two unique components of the program are a professional counselor who will respond with the Kodiak Police Department to family disturbance calls and a self-help group facilitator who will receive referrals from the Pretrial Intervention Project in Anchorage.

Contact is being made by the Community Crime Prevention Program with local police departments, such as Valdez, which have an interest in crime prevention techniques such as Operation ID, neighborhood watch groups, home security checks, seminars for business people on shoplifting and employee theft, and rape and assault prevention.

The program has proposed security-related amendments to the Anchorage Building and Safety Code Commission, and will continue this effort in other parts of the state which have building codes. These amendments define "defensible space" requirements, such as specifications on door and window construction and materials, hinges, locks, lighting, and keying systems with the goal of increasing resistance to forced entry.

A summer workshop for teachers in southeast Alaska is being organized in cooperation with the University of Alaska, Juneau. Crime-prevention curricula for elementary and secondary students will be developed at the workshop which offers teachers three credits in Education.

Groups such as Operation Breakthrough's Crime Task Force and the Anchorage Federation of Community Councils have sought the assistance of the Community Crime Prevention Program in organizing strategies, maximizing citizen input, and funding.

At least 800 communities across the United States have instituted crime prevention programs in recent years as it becomes more and more obvious that criminal justice system personnel alone can do little to reverse the social erosion associated with public perceptions of high crime rates. In Alaska, a number of activities having a crime prevention effect are carried on by a variety of public and private agencies, incidentally and directly. The Community Crime Prevention Program was established to provide comprehensive programming, organizational support, citizen education, evaluation designs, and to identify special problems and opportunities which may aid in crime prevention efforts.

Any group or agency interested in the services offered by the Community Crime Prevention Program should contact:

Ms. Sema E. Lederman, Director
Community Crime Prevention Program
Box 3356
Anchorage, AK 99510
(907) 277-2467

APOA Law Enforcement Seminar

The annual law enforcement seminar of the Alaska Peace Officers' Association will be held at the Captain Cook Hotel in Anchorage, June 6-9. The conference is being hosted jointly by the Anchorage, Kenai Peninsula and Mat-Su Chapters of the APOA.

The program will include discussions on:

- Police Hypnosis
- Forensic Pathology
- The Traveling Criminal
- Police Stress Analysis
- Organized Crime
- Aviation Security
- Dignitary Protection
- Commercial and Homemade Explosive Devices

Special presentations will be made by:

- Bureau of Alcohol, Tobacco and Firearms
- U.S. Customs Service
- Bureau of Land Management
- Federal Bureau of Investigation
- Federal Aviation Administration
- U. S. Secret Service
- Alaska Department of Public Safety, Laboratory Services.

Registration or further information can be obtained through:

Alaska Peace Officers Association
P. O. Box 3520 DT
Anchorage, Alaska 99510

A conference of the Alaska Association of Chiefs of Police will also be held in conjunction with the APOA Law Enforcement Seminar.

Fourth in a Series

The Law on Confessions: Custody

By Peter S. Ring

In this, the fourth in the series on court decisions relating to the law on confessions, we will discuss custody and waivers as they are affected by the decisions of the Alaska Supreme Court.

Am I Free To Go? Or, What Is Custody?

In **Pope v. State,** 478 P.2d 801 (Alaska 1970), as we have indicated, the court avoided the issue of whether the appellant was in custody. In reviewing the law in this area, the court observed—as was pointed out in the second installment of this analysis—that custody may occur outside the confines of the station house. It occurs when one is not free to go as he pleases. A case-by-case analysis of the totality of the facts and circumstances surrounding the interrogation will be required.

It would seem clear from the facts in this case that **Pope,** while not under arrest at the time the questions were asked about the gun, he certainly was not free to leave. He had been pointed out as the assailant by a witness to the homicide, and he was immediately subjected to a frisk by the officer. One can reasonably surmise that had he tried to leave the scene at this or any earlier point he would have been restrained by the officer.

The decision in **Peterson v. State,** 562 P.2d 1350 (Alaska 1976), provides still another dimension to the meaning of custody. There, **Peterson** was questioned on two occasions by the police without first being warned. The police testified that on neither occasion was Peterson considered a "suspect." He was free to come and go as he pleased, and did exactly that. Peterson contended at the trial court level that he was, in fact, in custody during these occasions, but the trial court rejected this argument. The Supreme Court found that "the evidence adequately support[ed] that decision." (562 P.2d at 1362)

Peterson also challenged admissibility of these statements on another front. Even if he were not in custody, he argued, he had become a prime suspect and the investigation had begun to "focus" on him. By his line of reasoning, the requirements of **Miranda** should extend to such individuals since potentially they would be subjected to the same kinds of pressures as one in custody.

The court did not feel constrained to reach a decision on this line of reasoning because there were other grounds on which to reach its decision. However, it did take note of language contained in **Beckwith v. United States,** 425 U. S. 341, (1976), in which the court recognized:

> that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . ." When such a claim is raised, it is the duty of an appellate court, including this court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. 425 U. S. at 347-348. (citations omitted) (562 P.2d at 1362)

Thus, it may well be that at some point in time the Alaska Court will be called upon to explicitedly determine whether Alaskan constitutional requirements mandate a broader analysis of the meaning of the term "custody" than does the U. S. Constitution.

Finally, in **Martel v. State,** 511 P.2d 1055 (Alaska 1973), there is an indication that a person who is hospitalized as a result of a shooting is not "in custody" within the context of **Miranda.**

Martel was interviewed on the night he was admitted to a hospital following a shooting. He was not a suspect in the case for which he was ultimately convicted and which he was appealing. The questioning lasted for less than 10 minutes. While the statement was excluded on grounds related to Martel's physical condition, the fact that it had not been preceded by **Miranda** warnings could have been used to suppress the statement had the trial judge felt that he was being confronted with a "custodial interrogation." That other grounds were chosen to suppress the statement is not an indication that a finding of no custody was made, but it would not be an unreasonable construction of the concept of custody to conclude that none existed in this case.

When Is a Waiver Not?

Peterson must be considered as the leading case on waiver of **Miranda** rights in Alaska. In it the court not only discussed the usual aspects of waiver—that it be knowingly and intelligently made in an environment free from coercion—but it also explored the issue of what differences a person's background might make in determining if the waiver was intelligently and knowingly made in a particular case.

Peterson argued that because he was Native, born and raised in a small remote village, and with only a third-grade education, he therefore could not knowingly and intelligently waive his constitutional rights on the basis of the information provided to him by the interrogating officers. Peterson's attorneys argued that the police were obliged to fully inform him of his rights in much the same manner that the Supreme Court had required of a magistrate conducting a judicial hearing in **Gregory v. State,** 550 P.2d 374 (Alaska 1976).

The court declined this invitation. It did state, however, that it would consider the suspect's mental condition, age, education, and experience in determining if a valid waiver had been obtained. The court urged law enforcement officers to ascertain these facts prior to undertaking an interrogation and to take them into consideration in determining if the person about to be questioned really understands the meaning of his **Miranda** rights.

The **Peterson** case is interesting in one other respect. At the time of a fifth

and Waivers

questioning, Peterson, after having been informed of his rights and asked whether he wished to waive them, asked the officers what "waiver" meant. They replied: "Number one, that you understand your rights. Number two, that you want to talk to us. But it also means that at any time you can stop answering questions." While the court was not called upon to consider the appropriateness of this language, the third aspect of the answer is a point frequently forgotten by officers. If suspects are informed of this aspect of the waiver, it will certainly go a long way towards supporting a finding that the decision to waive was not coerced, that it was intelligently made and that it was made knowing all the pros and the cons of the decision.

Ladd v. State, 568 P.2d 960 (Alaska 1977), provides another example of the process by which a waiver may be demonstrated. Ladd had been informed by the attorney representing him on the federal firearms charge that he should not talk to the police until he had obtained an attorney to represent him on the state homicide charges. Seven other attorneys also visited Ladd, but what advice they might have given him is not known. In any event, Ladd determined that he would talk with the officers and, on one occasion, expressly told the officers that he was going to talk with them even though his attorney in the federal case had told him not to until he was represented by counsel. The court had no problem in finding a valid waiver. In addition, Ladd signed waiver forms prior to all three of the most critical interrogations in his case.

In **Ladd** the court expressly rejected another of the appellant's contentions: that once he had said he wished to speak to an attorney, any subsequent confession—no matter how obtained—would be inadmissible. The court declined to adopt such a broad rule, and opted for a case-by-case analysis of the issue (see footnote 8, page 966).

In **Hampton v. State,** 569 P.2d 138 (Alaska 1977), the court found a valid waiver had been obtained by the police even though it was not in writing, suggesting that such a requirement is not mandated on constitutional grounds. (Interestingly enough, the court ignored the appellant's contention that he had not expressly waived his rights, a situation which, if it actually was the case, would have required suppression of the statements under the rule in **Tarnef** and **Miranda.** The court merely observed that the officer questioning Hampton had asked him if he understood his rights. No written waiver was obtained. Beyond that the record outlined in the appellate decision is silent. One can only conclude that either a waiver of the rights was on the record below, **or** that an express waiver is obtained when a person indicates that he understands his rights and then talks.)

Scharver v. State, 561 P.2d 300 (Alaska 1977), leaves open a number of questions with respect to waiver. The appellant, there, argued that the statements used against him at trial should have been suppressed because of, among other reasons, a lack of proof of an explicit waiver, as well as a lack of proof of a knowing and intelligent waiver. The court assumed for purposes of discussion in the case that Scharver's constitutional rights had been violated, but chose not to state the reason why this was so since they were able to resolve the case on other grounds.

On the other side of the coin, it is clear what kinds of actions by a defendant will give rise to the absence of a waiver. In **Tarnef v. State,** 512 P.2d 923 (Alaska 1973), the appellant indicated to the private investigator questioning him that he would refuse to give him a statement if it were to be regarded as a waiver of his rights. The court quoted extensively from **Miranda** language indicating that a valid waiver will not be presumed simply from the silence of the suspect after the warnings have been given or from the fact that a confession is ultimately obtained. As the **Miranda** Court stated:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement **could** constitute a waiver." 384 U. S. 436, 475 (Emphasis added)

In **Tarnef,** the Alaska Court quoted this language approvingly and reinforced it by prefacing the word "waiver" with the word "express" on two occasions in the immediately following paragraph in their decision. That a warning must be expressly made seems unquestionable, and this requirement may have been the grounds on which the court presumed that Scharver's rights were violated since it cited **Tarnef** in the footnote in which it indicated that it had assumed a violation had occurred.

A final point with respect to the waiver issue is necessary. While it was always clear that the state had the burden of proof in demonstrating that a waiver had been obtained, and while it was equally clear that this was a heavy burden, there was a period of time after the decision of the court in **Martel,** supra, during which it was not at all clear what standard of proof the State would be required to meet in demonstrating that a waiver had been obtained in a permissible fashion. In **Schade,** supra, at 917 the court settled this issue by opting for the standard of proof by a "preponderance of the evidence." (See also, **Hampton,** supra., at page 141, footnote 6.)

Master Plan

(Continued from Page 2)

Admittedly, this is not an answer, but by this time we should be in agreement that new solutions must be sought. Some say that the original master plan concept of rehabilitation is still viable. If we can live with it, let's figure out how it can best be implemented with expedience under our present social and financial constraints.

If the plan no longer fits our needs, I believe it is our duty to accept that fact and perform the necessary surgery to alter it.

If the concept and philosophy must be totally scratched, then let us start anew and, hopefully, in the process learn from our past mistakes.

Cont. Professional Development

by Roger Endell,
Director
Continuing Professional Development

Seven hundred criminal justice in-service professionals and student/public participants have taken part in seminars and conferences offered by the Criminal Justice Center of the University of Alaska over the past year.

Between February 1, 1977, and February 1, 1978, the Continuing Professional Development (CPD) unit of the Center has produced a variety of programs on a monthly and sometimes twice-monthly basis. These programs have been delivered in regional locations ranging from Ketchikan to Nome in order to reach the widest possible criminal justice practitioner audience.

In response to needs identified by the Governor's Commission on the Administration of Justice and the several justice agencies, a grant was approved by the Commission for expanding the delivery of continuing educational opportunities to justice personnel statewide.

The 13 programs offered directly by the CPD unit of the Center, or through joint participation efforts with other agencies, attracted participants from every segment of the criminal justice system. The student/public sector was well represented in addition to in-service professional personnel. (See Table 1).

Of these participants, at least 228 individuals enrolled for academic credit. Most were first-time enrollees, but many returned for second and third courses. A goal of the programs will be to continue to attract repeating participants as well as to attract "new" personnel.

Table 2
CONTINUING PROFESSIONAL DEVELOPMENT
FEBRUARY 1, 1977 THROUGH FEBRUARY 1, 1978
PROGRAM COMPLETED

	Feb-March	April	May	June	July	August	
Topics	Corrections and the community	Criminal Justice Update	Juvenile Justice System—I	Crim. Just. System and Substance Abuse*	Juvenile Justice System—II	Crim. Justice Aspects of Alcohol & Drug Abuse	Crim. Justice Mngt. Seminar for Practitioners
Dates	2/3 to 3/17	4/30	5/23 to 5/28	6/15 to 6/17	7/25 to 7/30	8/4 to 8/12	8/22 to 8/30
Sessions	7 two-hour	1 eight-hour	3 two-day	1 three-day	3 two-day	3 two-day	4 two-day
Locations	Eagle River Correctional Center	Kenai Community College	UofA, Juneau, Fairbanks & Anchorage	U of A, Anchorage	UofA, Juneau, Fairbanks & Anchorage	Ketchikan C.C. Bethel (Kus. C.C.) Nome (N.W.C.C.)	Kenai C.C. UofA, Juneau, Fairbanks & Anchorage
Participants	Corr. 5 Inmates 4 Stu/Pub 12 21	Police 12 Troopers 2 F&WP 4 Court 5 23	Troopers 9 F&WP 4 Corr. 8 Courts 7 Stu/Pub 5 Misc Agcy 2 35	Stu/Pub 16	Police 4 Troopers 6 Corr. 12 Court 9 Stu/Pub 7 Misc Agcy 1 39	Police 3 Troopers 5 Corr. 8 Court 7 Stu/Pub 13 AlcCouns 13 Misc Agcy 1 50	Police 7 Troopers 3 Corr. 7 Court 2 Stu/Pub 7 CJ Plan. 4 30
For Credit	21	0	16	16	20	24	15
				*Joint Participation with Center for Alcohol & Addiction Study.			

Reaches 700 Statewide

Evaluations completed by participants in each of these offerings have generally been positive with many requests for expanded programming. Future course and program productions will benefit from the feedback and knowledge gained from these initial CPD efforts. There is every indication that criminal justice and student/public involvement will continue to grow at a steady rate. In terms of attendance, 467 criminal justice and related agency personnel took part in these courses compared to the 233 student/public participants.

The CPD grant was based partially on the assumption that a greater cost/benefit ratio could be obtained by taking the instructional packages to the field, nearest to the in-service population. This procedure is the reverse of many educational/training efforts which tend to draw practitioners to one location.

The continuing education format attempts to reach the justice professional at or near his work location so that costs and agency disruptions are held to a minimum. Normally only the costs of the instructional package, i.e., instructor, transportation, materials, per diem and related incidental costs are incurred.

It has also been demonstrated that by utilizing primarily in-state justice personnel as instructional resources, costs can be kept to a minimum while quality is more

(Continued on Page 10)

Table 1
Continuing Professional Development Program Participants

Municipal Police	88
State Troopers	83
Division of Corrections	43
Court System	30
Fish & Wildlife Protection	34
Student/Public	233
Treatment Personnel (Alcohol)	13
Undifferentiated Criminal Justice	138
Architects and Planners	26
Miscellaneous Agencies	4
TOTAL	700

September		October	November	December		January
AK Justice Facilities Planning Conference*	Citizen Action Project/ Courts*	Tort Law		Legislative Conference on Corrections	Substantive Crim. Law for Law Enforcement Personnel	Conference Incarceration and Re-Entry Alterns.*
9/12 to 9/16	9/24 to 10/1	10/21 to 12/9		12/9 & 12/10	12/2-1/11	1/19 to 1/21
2 two-day	2 one-day	7 two-hour		1 two-day	4 two-day	1 three-day
Anchorage Court Bldg., Juneau, UofA	Anchorage Court Building	Anchorage		U. of A. Anchorage	U of A, Juneau, Fairbanks, Anchorage, Kenai	Anchorage
Criminal Justice 27 Architects & Planners 26 53	Stu/Pub 90	Stu/Pub 33		Criminal Justice, Public, Legislators 50	Police 62 Troopers 58 F & W Pr. 26 Corrections 3 Fire 2 Airport 2 Military 7 160	Criminal Justice Personnel & Public 100
Noncredit	Credit Course Number unknown	33		Noncredit	83	Noncredit
*Joint Participation with Crim. Justice Planning Agency	*Joint Participation with Alaska Judicial Council					*Joint Participation with Natl. Alliance of Businessmen & Coalition on Corrections

A Fresh Look at Zehrung (Continued from Page 1)

decision was the decision of the United States Supreme Court in **United States v. Robinson,** 414 U. S. 218 (1973) which apparently authorized unlimited searches of the person incident to a custodial arrest.

But the fact that **McCoy** was decided on the basis of an interpretation of the requirements of Alaska's Constitution should be sufficient to answer any doubts about the application of **Robinson.** Since the U. S. Supreme Court's decision provided only minimal standards of conduct, the stricter requirements of the **McCoy** decision would control the actions of Alaska's law enforcement community.

As has been pointed out already in this article, the **Zehrung** decision did not disturb the holding in **McCoy** one iota. The court quite clearly characterized the search as one not incident to arrest, but as an inventory search. As they cogently noted in footnote 21 at page 196 of the decision, a search cannot be both a search incident to an arrest and an inventory search.

Thus, police officers may still continue to search prisoners away from the scene of the arrest in order to spare the suspect the embarrassment of a public search so long as the search is roughly contemporaneous with the arrest. Such a search might take place in a correctional facility as well as a station house. The critical point will be the need to demonstrate the same kind of issue presented in **McCoy**—that there is a need to conduct the search in the interrogation room.

However, it should be remembered that there was a strong two-man dissent in **McCoy** (and both Justices are still members of the court) and that the dissent objected to the intensity of the search.

This is still a "live" issue, one not resolved directly by **Zehrung,** and one which is likely to be the subject of further litigation. In short, while both **McCoy** and **Zehrung** permit a search for destructible evidence related to the offense for which the arrest was made, the dissenters in **McCoy** have argued that there are limits to the extent of such a search. Items may be seized, but may not be searched without further recourse to a warrant.

The more interesting aspect of the decision in **Zehrung** for police officers is one which received absolutely no discussion in the flood of "media" discussion which surrounded the decision.

That point deals with the extent to which a search for weapons may be made incident to an arrest. While not in issue in **Zehrung,** the court nonetheless took the opportunity to issue some dicta on the subject. Once again they resorted to a brief sentence in a footnote, a practice which historically seems to have served as a substitute for the telegraph.

In summarizing their decision on the search and seizure issue the court observed:

> A warrantless search for weapons is permissible when one is arrested and taken into custody. However, as to the permissible extent and limitations on the scope of such a warrantless search, see People v. Brisendine, 13 Cal. 3rd 528, 119 Cal. Rptr. 315, 323-325, 531 P.2d 1099, 1107-09 (1b75). * * * (footnote 39 569 P.2d at 199-200)

Thus, it will pay to take a look at the decision in **Brisendine** to see what the California Court had to say about the limits of warrantless weapons searches. Summarizing their decision, the California Supreme Court observed:

> Typically in cases of warrantless weapons searches the police must be able to point to specific and articulable facts which reasonably justify a belief that the suspect is armed. In the ordinary citation situation the fact of the arrest alone will not supply this justification and additional facts must be shown. In the case of transportation in the police vehicle, however, or in the analogous circumstance here, the necessity of close proximity will itself provide the needed basis for a protective pat-down of the person. To intrude further than a pat-down, the officer must provide additional specific and articulable facts necessitating the additional intrusion. (531 P.2d of 1109.)

Thus, in California the police may only pat-down a person who is being cited when they have articulable facts on which to base a conclusion that the person poses a threat to their safety or to the safety of others. Put another way, "routine" traffic stops standing alone do not justify "pat-down" searches. That the Alaska court might reach a similar conclusion should be apparent to those who have carefully read the court's decision in **Coleman v. State,** 553 P.2d. 40.

On the other hand, where the police may be required to transport a person for some distance, or in some other way remain in close proximity to such a person for a period of time in manner similar to a transportation situation, then a pat-down may be permissible even in the absence of articulable facts.

In **Brisendine** the police were dealing with a situation which might happen in Alaska with some frequency. They had arrested the appellant, and others, for camping in a closed area and for having a fire going in violation of fire regulations. It was going to be necessary for the police officers to walk the defendants out to the officer's car where they had left their citation books. The walk would take two hours, much of it in the dark, over very rugged terrain, much of it passable only in single file holding onto the adjacent cliffs. Under those circumstances the California Court concluded that a pat-down of the suspects was a reasonable search in the absence of a search warrant.

The more interesting aspects of **Brisendine** deal with issues related to the scope or intensity of the search. The officers testified that because the persons were going to have to take out all their camping gear, the officers wanted to "pat" it down to make sure that it did not contain weapons. Some of the knapsacks were too stiff to get a good idea of their contents so the officers opened them and looked inside. The appellant argued that this was an unreasonable search. The California Court disagreed. The issue was not whether the person being taken into custody might be armed, but simply one of increased likelihood of danger to the officer **if** the person is in fact armed because of the sustained period of close proximity between the officer and the person in

custody. And, the court noted, such dangers are not eliminated merely because the person in custody may be placed in handcuffs for he still may be able to reach for a secreted weapon.

Once inside the knapsack the officers were entitled to search and seize anything that came into "plain view," which they did when they found a clear plastic pill bottle which contained a white powdery substance.

The similarities between the decisions in **Brisendine** and **Zehrung** are striking enough that one might conclude that the former will be relied upon by the Alaska Supreme Court in warrantless weapons search cases. However, the very recent decision in **Weltin v. State**, (No. 1568, Feb. 17, 1978, Alaska) clouds such a conclusion.

Weltin was originally stopped on a traffic offense. It was then that the police learned of an outstanding traffic warrant. (To this point in time, we have a case which is virtually identical to **Zehrung.**) Weltin was then placed under arrest. A pat-down search was commenced. A "hard" object was felt in Weltin's left shirt pocket. When the officers tried to investigate this object further, Weltin pushed their hand away and stated that they could not search him. He was handcuffed and the hard object removed from his pocket. It turned out to be a nail which had been hammered into the shape of a spoon and a glass vial which contained a white powdery substance. By then a crowd had gathered, become unruly, and the officers decided to break off the pat-down search and transport the suspect to headquarters. While Weltin was being booked and searched at the station he informed the officers that he had dropped a gun in the back seat of the squad car. (Note, a handcuffed traffic offender. Remember the conclusion of the California Supreme Court about the abilities of handcuffed traffic offenders?!!!)

The Alaska Supreme Court upheld the search in this case. What is intriguing is that nowhere in the opinion is **Brisendine** mentioned at all, and **Zehrung** is mentioned in passing only in a footnote. The decision was based entirely on the long line of cases commencing with **Goss v. State** in 1964 that a person may be searched for weapons incident to an arrest.

Thus, it appears that if the court is going to rely on the analysis in **Brisendine** it is reserving the necessity for doing so for a case in which a noncustodial stop is present.

ZEHRUNG AND CORRECTIONS

A very careful reading of **Zehrung** would have made plain the fact that the decision's impact came to rest most heavily on the Division of Corrections. (Unless, of course, the police had come to rely on the personnel of the Division to conduct searches and seizures which the police knew were unreasonable.)

The impact on the Division results from the holding in **Zehrung** that the Division had to permit a person being brought into a detention facility for a minor offense for which the bail schedule had been set the opportunity to post that bail before a search was conducted.

While it might have been unclear prior to the opinion on rehearing, it now seems absolutely clear that the court was talking about "inventory" searches when it used the term search, and was not inhibiting the ability of the Division or its personnel to conduct searches for weapons. (See, 569 P.2d at 195, referring to footnote 39. See also, text preceding footnote 1 in the opinion on rehearing, and Justice Burke's dissenting opinion on rehearing, especially footnote 2 of that opinion.)

On rehearing the court modified the apparent (or perceived) breadth of the original opinion by indicating that in cases arising out of rural communities, or from smaller state facilities, it would take a case-by-case approach to decide if the exigencies of a particular setting might demand a more thorough search for contraband than would be the case in Anchorage, Fairbanks or Juneau under usual circumstances. In short, **Zehrung** should be followed **unless** the exigencies of the setting dictated a different result.

To conclude, now that all of the "heat" surrounding the decision has calmed down, it is difficult to perceive what the fuss was all about, other than the issue of the impact of the exclusionary rule; an impact that was certainly not new nor unique to **Zehrung.** To the extent that the "heat" might have facilitated review of the issue of the impact on small correctional facilities, it may have been worth it.

On the other hand, one must ask oneself whether, in the long run, it is not better to let the "dust" settle around an opinion before leaping to an attack on the court. As the final arbiter of many of society's more sticky wickets, the need to maintain a high level of public confidence in the court as an institution is essential to the best interests of a truly free society.

When the public begins to lose confidence in the court, it does so on all its decisions: those which may be viewed as "favorable" to law enforcement as well as those which may be viewed as "adverse."

In Alaska, at the moment, the scales are weighted heavily on the side of decisions which can only be characterized as representing the former perspective.

A final note. We sometimes forget that even assuming that the Alaska Supreme Court might be disposed to reassessing the continued viability of the exclusionary rule in its current form, it is precluded from doing so as long as the United States Supreme Court continues to require its application as a matter of federal constitutional law.

In a future issue of the **Forum,** this author will present a proposal for an alternative approach to the problems associated with the admissibility of evidence obtained in violation of a person's constitutional rights.

Contribute!

All our readers are encouraged to contribute articles and notices of events pertinent to criminal justice. The more practitioner participation we have, the more effective our work will be in providing a single forum for the entire field.

CPD

(Continued from Page 7)

readily assured. Out-of-state specialists have been added to supplement the program with specialized expertise where in-state resources were deficient. This practice is also less costly and more efficient than sending a limited number of Alaskan practitioners to "outside" programs. This will not eliminate, however, the need for Alaskans to attend programs outside the state which cannot be made available locally.

Table 2 provides an overview of the CPD courses offered during the past year. An assessment of the Continuing Professional Development program is useful in determining the future direction for education programs through delivery of short courses, conferences and seminars.

Other justice agencies may also benefit from evaluating program delivery mechanisms and cost/benefit ratios in the continuing attempt to upgrade the professionalism of both in-service and preservice personnel. The CPD program has provided an educational alternative to the Alaska justice practitioner, the interested citizen, and the preservice student for acquiring knowledge about the justice system while maintaining his or her professional or occupational pursuits.

As the CPD effort of the Criminal Justice Center continues and is further refined, professional justice programs will be designed to meet the needs of the busy professional and the interested preprofessional.

Short courses, seminars and conferences will supplement the justice degree programs offered through the University Continuing education and will undoubtedly play an increasingly important role for professionals who wish to be eligible for advancement opportunities within the various justice agencies. The CPD effort will continue to anticipate these needs and respond with a quality continuing education program in justice.

Crime Code Passes House

By a 32-4 vote on April 14, the Alaska House of Representatives approved HB 661, the proposed new criminal code for the State of Alaska.

Although passing by an overwhelming vote, the proposed criminal code incorporated numerous amendments to that originally submitted by the criminal code revision subcommittee.

These amendments will be detailed in the May issue of the Forum by Barry Stern, staff counsel for the Criminal Code Revision Subcommittee.

The major changes made to the original proposal involved the provisions on sentencing.

In approving the proposed criminal code the house largely rewrote the section on sentencing, incorporating provisions for presumptive sentencing as proposed by Gov. Jay S. Hammond last year.

The house further amended the sections on sentencing to eliminate the possibility of probation, parole or suspended imposition of sentence for repeat felony offenders.

The proposed criminal code now awaits action in the state senate where it has been introduced as SB 443.

Summer School Schedule

Bachelor of Arts Program — University of Alaska, Anchorage

Contact: **John Angell**
Criminal Justice Center
University of Alaska, Anchorage
3211 Providence Avenue
Anchorage, Alaska 99504
Tele: 274-9217

Course		Credit	Days	Time	Inst.	Dates
Just. 110	Intro: To Criminal Justice	3	MTWTh	8:15-10am	Angell/ Endell	5/30—7/6
Just. 250	Development of Law	3	MTWTh	8:15-10am	Conn	7/10—8/17
Just. 398	Practicum Research	1-6		ARR	Barry	5/30—8/19
Just. 493A	Settlement Act Law	3	MW	12:15-2pm	Havelock	5/30—8/19

Associate Degree Program — Anchorage Community College

Contact: **Robert Congdon**
Anchorage Community College
2533 Providence Drive
Anchorage, Alaska 99504
Tele: 279-6622, ext. 515

Course		Credit	Days	Time	Inst.	Dates
Just. 110	Intro: to Criminal Justice	3	TTh	6:15-8pm	Congdon	5/30—8/19
Just. 150	Line & Staff Administration	3	T	6:30-10pm	TBA	6/5—8/25
Just. 153	Evidence	3	TTh	6:30-9:30pm	Bonner	5/15—6/30
Just. 203	Juvenile Delinquency	3	TTh	6:30-9:30pm	Prewitt	7/10—8/26
Just. 210	Principles of Corrections	3	Th	6:30-10:30pm	TBA	6/5—8/25
Just. 210	Principles of Corrections	3	MTWTh	9:00-11:15am	TBA	5/8—6/2
Just. 220	Practicum: Field Practice	3		ARR	Congdon	5/30—8/19

Justice Training Calendar

WEST

June 1-2. "Reality Therapy." Regional Criminal Justice Training Center. Modesto, Calif.

June 4-7. "Pretrial Diversion." Institute of Court Management. Location to be announced.

June 4-7. "Advanced Jury Management." Institute for Court Management. Keystone, Colo.

June 4-9. "1978 Advanced Juvenile Justice Management Institute." National College of Juvenile Justice. Reno, Nev.

June 5-7. "Weapon Selection: Body Armor, Weapons and Ammunition." IACP. Seattle, Wash.

June 5-16. "Basic Correctional Academy." Regional Criminal Justice Training Center. Modesto, Calif.

June 8-9. "Narcotics and Dangerous Drugs." Regional Criminal Justice Training Center. Modesto, Calif.

June 11-July 7. "General Jurisdiction." National Judicial College, Reno, Nev.

June 11-14, "Schools, Educational Services and the Justice System." Delinquency Control Institute. Phoenix, Ariz.

June 11-23, "The Judge and the Trial—graduate course." National Judicial College, Reno, Nev.

June 12-15. "Police Labor Relations." IACP. San Francisco, Calif.

June 12-23. "Executive Prosecutor Course." National College of District Attorneys. Houston, Tex.

June 18-23. "Caseflow Management and Juror Utilization." Institute for Court Management. Keystone, Colo.

June 19-23. "Management of the Investigative Function." IACP. Denver, Colo.

June 19-23. "Current Problems and Solutions in Police Planning and Research." Regional Criminal Justice Training Center, Modesto, Calif.

June 19-23. "Correctional Ancillary Program." Regional Criminal Justice Training Center. Modesto, Calif.

June 19-28. "Survey Research in Criminal Justice." Regional Criminal Justice Training Center. Modesto, Calif.

June 19-30. "Security Guard Baton Training." Regional Criminal Justice Training Center. Modesto, Calif.

June 20-24. "Current Problems and Solutions in Police Planning and Research." Regional Criminal Justice Training Center, Modesto, Calif.

June 25-30. "Management for Justice System Supervisors." Institute for Court Management. Keystone, Colo.

June 25-July 7. "Sentency/Criminal Law—Graduate Course." National Judicial College. Reno, Nev.

July 1-22. "Security Guard Baton Training." Regional Criminal Justice Training Center. Modesto, Calif.

July 9-14. "Management for Supervisors." Institute for Court Management. Keystone, Colo.

July 10-21. "Trail Judges Academy." American Academy of Judicial Education. Boulder, Colo.

July 10-21. "Citizen Judges Academy." American Academy of Judicial Education. Boulder, Colo.

July 16-Aug. 11. "General Jurisdiction." National Judicial College. Reno, Nev.

July 16-19. "Planning and Evaluating Jury Management Systems." Institute for Court Management. Keystone, Colo.

July 16-28. "New Trends—graduate course." National Judicial College. Reno, Nev.

July 22-Aug. 18. "Phase II: Management in the Courts and the Justice Environment: Residential Seminar." Institute for Court Management. Keystone, Colo.

July 23-26. "The Courts and Adult Probation." Institute for Court Management. Snowmass, Colo.

July 24-28. "Appellate Judges Writing Program." American Academy of Judicial Education. Boulder, Colo.

July 24-28. "Trial Judges Writing Program." American Academy of Judicial Education. Boulder, Colo.

July 30-Aug. 11. "Special Court Jurisdiction. National Judicial College. Reno, Nev.

July 30-Aug. 11. "Summer College, Session I." National College of Juvenile Justice. Reno, Nev.

MIDWEST

June 1-9. "Firearms, Arrest and Search and Seizure." Center for Criminal Justice, Case Western Reserve University. Cleveland, Ohio.

June 2. "Search and Seizure—Update." Center for Criminal Justice. Case Western Reserve University. Cleveland, Ohio.

June 5-9. Homicide Investigation." Center for Criminal Justice. Case Western Reserve University, Cleveland, Ohio.

June 5-16. "Seminar for Traffic Engineering Technical Assistants." Traffic Institute, Northwestern University. Evanston, Ill.

June 6-7. "First Line Supervision." Michigan Law Enforcement Officers Training Council and Michigan State University. Lansing, Mich.

June 6-8. "Improving Performance Appraisal and Performance Evaluation Programs in Law Enforcement Agencies: an Advanced Workshop." Law Enforcement Human Resources Division, University of Chicago. Chicago, Ill.

June 13. "Retraining for Senior Operators (Breathalyzer)." Center for Criminal Justice. Case Western Reserve University. Cleveland, Ohio.

June 13-15. "Arson Investigation." Center for Criminal Justice. Case Western Reserve University. Cleveland, Ohio.

June 16. "Juvenile Law—Update." Center for Criminal Justice. Case Western Reserve University. Cleveland, Ohio.

June 18-23. "Graduate Session." National College of Juvenile Justice. Lake of the Ozarks, Mo.

June 19-23. "25th Science in Law Enforcement Institute." Center for Criminal Justice. Case Western Reserve University. Cleveland, Ohio.

July 24-28. "Police Corruption Issues." IACP. Detroit, Mich.

July 25-27. "Training Workshop for Trainers and Project Supervisors." Interface Resource Group. Cincinnati, Ohio.

EAST

June 5-9. "Law Enforcement Training Managers. Law Enforcement Institute, University of Maryland. College Park, Md.

June 5-16. "Traffic Management—advanced/technical." Regional Criminal Justice Education and Training Center. Rochester, N. Y.

June 5-16. "Mid-Level Management." Regional Criminal Justice Education and Training Center. Rochester, N. Y.
June 5-23. "Institute of Law Enforcement Management—Spring Training Program." New England Institute of Law Enforcement Management. Wellesley, Mass.
July 10-13. "The Police Executive and the Law." IACP. Boston, Mass.
June 19-23. "Specialty Academy." American Academy of Judicial Education. Cambridge, Mass.

SOUTH

June 5-8. "Vice and Organized Crime Seminar." Florida Institute for Law Enforcement. St. Petersburg, Fla.
June 12-23. "Command Seminar." Institute on Organized Crime. Miami, Fla.
June 18-21. "25th Annual National Institute on Crime and Delinquency." NICD. Bal Harbour, Fla.
June 19-21. "Police Fleet Management: Selection and Maintenance of the Police Vehicle and Auxiliary Equipment." IACP. Jackson, Miss.
June 20-22. "Executive Development." Florida Institute for Law Enforcement. St. Petersburg, Fla.
June 25-30. "Juvenile Justice Management: Basic Seminar." Institute for Court Management. Reston, Va.
July 9-13. "41st Annual Conference." National Council of Juvenile and Family Court Judges, Hollywood, Fla.
July 9-28. "Career Prosecutor Course." National College of District Attorneys. Houston, Tex.
July 10-21. "Criminal Redistribution (Fencing) Systems Investigation." Institute on Organized Crime. Miami, Fla.

INTERNATIONAL

June 5-9. "Protective Services: Meeting the Clandestine Threat." IACP. Brussels, Belgium.
June 20-23. "Annual Conference," National Association of College and University Attorneys. San Juan, Puerto Rico.
July 17-21. "Responses to Hostage-Taking Workshop." IACP. Ottawa, Ontario, Canada
July 17-22. "10th Congress of the International Association of Youth Magistrates." Montreal, Canada

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