Alaska Justice Forum

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The Exclusionary Rule: A Proposal

I would overrule neither Weeks v. United States nor Mapp v. Ohio. I am nevertheless of the view that the [exclusionary] rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief. (White, J., dissenting in Stone v. Powell, 428 U. S. 538 [1976]).

By Peter S. Ring
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In the last issue of the **Alaska Justice Forum** we reviewed the historical development of the exclusionary rule and analyzed the rationales which traditionally have been viewed as supporting its application.

It will be recalled that we concluded that at the moment, at least, the deterrence rationale dominates the thinking of the United States Supreme Court. In short, the exclusionary rule, as applied to violations of the federal constitution, is designed to deter the law enforcement agencies of the State from engaging in violations of citizens' constitutional rights.

As we noted, the exclusionary rule is a creature of the courts. No mention of it is to be found in the Federal (or state) Constitution. Consequently, the courts could, if they desired, use other remedies to achieve the same ends. We also noted that state courts at one point in time relied, at least theoretically, on other means of enforcing proper police conduct.

No Alternatives Proposed

This being the case, one might ask why has there been such reluctance by those officials most directly affected by the impact of the exclusionary rule—police and prosecutors—to propose or implement alternatives. Had such action been taken, it could have demonstrated to the courts at either state or federal levels that there are means by which the objectives of the exclusionary rule can be achieved, short of occasionally requiring that the guilty go free because the constable has blundered.

It goes without saying that there is nothing that Alaska's Supreme Court can do directly about the exclusionary rule's application to federal constitutional violations. That can only be changed by an amendment to the federal constitution or through a decision of the United States Supreme Court.

The fact remains, however, that Alaska's Supreme Court frequently relies on provisions of Alaska's Constitution in determining whether the rights of individual citizens have been violated by the actions of the government or its agents. In such circumstances the Alaska Court has routinely applied the exclusionary rule as both the remedy and the sanction.

But Alaska's constitution is no different than the federal constitution. It does not provide for an exclusionary rule in explicit constitutional language. The Alaska Supreme Court has simply followed the federal practice of sanctioning violations of state constitutional rights through the application of the exclusionary rule.

Other Remedies Possible

This, then, suggests an initial avenue of approach to the development of alternatives to the exclusionary rule. In short, there is nothing that would prohibit the Alaska Supreme Court from determining that remedies other than the exclusionary rule could satisfy the underlying objectives of the exclusionary rule, those being: (1) to minimize or eliminate those instances in which the State, in the personification of its government, infringes upon the individual liberties of its citizens; and (2) to insure the preservation of the "integrity" of the judicial system.

An initial reaction to the suggestion might take the form of: "Well, so what? Most cases involve the violation of federal constitutional rights and therefore even if the Alaska constitution covered the case there would be no way that the court could escape application of the exclusionary rule!"

In point of fact, however, and increasingly so, the Alaska Supreme Court has relied heavily on provisions of Alaska's constitution in determining the extent to which individual liberties were violated by governmental actions.

Stated more generally, Alaska's criminal procedure has been based in significant measure, on provisions of the Alaska constitution or court-made rule. Such being the case, it seems fairly clear that significant aspects of the day-to-day operations of the police are governed by the application of a state-made exclusionary rule.

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Current Trends in Criminal Law

The following article is derived from the 1978 Harvard Law School Program of Instruction for Lawyers, "Current Issues in Criminal Law and Administration," conducted by Prof. James Vorenberg. The professor is former chairman of the President's Commission on Law Enforcement and served on the Watergate Special Prosecution Force.

By the Hon. James C. Hornaday
District Court Judge, Homer

The central theme of this year's Harvard Law School Program on "Current Issues in Criminal Law and Administration" was the narrowing of discretion for officials in the criminal justice system.

A change of emphasis has been observable in criminal law during the past few years with simplistic answers to crime having been found wanting. For example, in the mid-1960s rehabilitation by indeterminate sentencing with wide judicial discretion was a popular concept.

But, the current trend is away from rehabilitation and support is increasing nationally for fixed periods of incarceration for adults and serious juvenile offenders.

Deemphasis on Inadvertent Police Presence

The United States Supreme Court is giving less emphasis to the inadvertent presence of police in search and seizure cases. In **United States v. Santana,** 49 L.Ed2d 300 (1976), the police commenced an arrest of a known criminal and followed her into her domicile. The seizure of evidence from the defendant was upheld under the "plain view" and "hot pursuit" doctrines. In **Pennsylvania v. Mimms,** 54 L.Ed2d 331 (1977), the supreme court upheld the procedure of requiring a motorist on a traffic stop to get out of the car as a minimal instrusion when weighed against the public interest in protecting the police officer.

In **United States v. Robinson,** 38 L.Ed2d 427 (1973), the supreme court indicated it may not look behind the facts in each case on a search incident to arrest, approving the seizure of heroin in a crumpled cigarette package discovered during a pat down search during a traffic arrest.

The court has afforded less protection to privacy interests in motor vehicles than in homes, as indicated in **South Dakota v. Opperman,** 49 L.Ed2d 1000 (1976) where the seizure of marijuana in a glove compartment of an automobile impounded on a traffic arrest was upheld.

Warrants as Sword and Shield

There is also a rebirth of the warrant requirement as both a sword and shield. In the much publicized **Zurcher v. The Stanford Daily,** 46 U.S.L.W. 4546 (1978), a search of a newspaper office pursuant to a warrant was upheld against the argument that a subpoena would have been sufficient. The court refused to create a special area of protection for the press.

Likewise, in **Anderson v. Maryland,** 49 L.Ed2d 627 (1976), the court held that business records seized pursuant to a warrant could be admitted into evidence against a Fifth Amendment contention of self-incrimination.

However, in **United States v. Martinez-Fuente,** 49 L.Ed2d 1116 (1976), a checkpoint boarder search without a specific warrant and without probable cause passed constitutional muster. Justice Powell, for the majority, balanced the interests of prohibiting illegal immigration with what he considered a minor intrusion.

Justice Powell as Key Member

In this regard, Justice Powell is being viewed as a key member of the U. S. Supreme Court as he avoids stereotyped rules and looks at the facts of the situation.

Bad Faith

The supreme court's decision in **Franks v. Delaware,** 23 Cr.L. 3179 (1978) may trigger numerous hearings. In that decision the court ruled that upon a substantial showing of bad faith a defendant may challenge the veracity of affidavits in support of issuance of a warrant.

Informer Guidelines Needed

The "outrageous" test on entrapment was rejected by the court in **Hampton v. United States,** 48 L.Ed.2d 113 (1976). In that case the defendant bought heroin from one government agent and sold it to another. The court focused on whether the defendant was predisposed to commit the crime.

As a result of this Prof. Vorenberg has urged the preparation of guidelines for the use of informers as, historically, no limitations have been imposed on the accountability of undercover agents.

A Return to Voluntary Test Seen

In the area of interrogation, the supreme court has moved from the third degree through the voluntary test of the 1950s to the right to counsel and warning cases of the 1960s. The court has not overruled any of these approaches but there is some indication of a return to the voluntary test.

Escobedo v. Illinois, 12 L.Ed2d 977 (1964) created a crisis in the allocation of state resources. If counsel notification was to be required before any interrogation, counsel would almost always advise silenced, and the effort would not be worth the cost.

The alternative was to ban all interrogation, and in **Miranda v. Arizona,** 16 L.Ed2d 694 (1966), the court backtracked from **Escobedo** and placed emphasis on a warning process through judicially imposed guidelines.

Although the present court has not overruled **Miranda,** lines are being drawn and there is a discernable hesitancy to expand the rule.

Prof. Vorenberg fears the Miranda warning may be only a sterile procedure. He suggests that guidelines should be established whereby each defendant, regardless of wealth and social position, would be questioned for several hours on tape before an attorney is called.

Before **Miranda,** some police departments were experimenting with giving more visibility to interrogation and since the 1966 decision there has been less incentive to increase visibility.

In the controversial **Brewer v. Williams,** 51 L.Ed2d 424 (1977), case, the conviction of a defendant for the murder of a young girl abducted from a YMCA was overturned because officers made statements interpreted by the court as

designed to induce confessions—after agreeing with defense counsel not to interrogate. Justice Stewart, writing for the majority, held that the state had not proved waiver of the right to counsel.

In a stinging dissent, Chief Justice Burger attacked the exclusionary rule and argued, "The result in this case ought to be intolerable in any society which purports to call itself an organized society."

Questioning on one crime after the defendant had refused to answer questions on another matter was permitted in Michigan v. Mosley, 46 L.Ed2d 313 (1975). The court focused on whether the right of a defendant to cut off questioning while in custody had been "scrupulously honored."

The statements of a parolee who came to the police station at the telephone request of an officer were admitted in **Oregon v. Mathiason,** 50 L.Ed2d 714 (1977), even though the defendant was falsely told his fingerprints were found at the scene. The court ruled the situation was noncustodial as the officer advised he was not arresting the defendant at that time.

In **Harris v. New York,** 28 L.Ed2d 1 (1971) the court admitted illegally obtained statements to impeach the defendant's credibility. In **Mincey v. Arizona,** 46 U.S.L.W. 4737 (1978), however, statements of a defendant made while in an intensive care unit after the defendant had repeatedly asked for an attorney were not admissible for impeachment on due process grounds.

The Exclusionary Rule

The exclusionary rule as an important judicial control arose in **Stone v. Powell,** 49 L.Ed1d 1067 (1976). In that decision the court refused to extend the rule to collateral attacks on state proceedings in the federal courts if the defendant is afforded the opportunity to raise the issue in a state court.

The current rationale for the rule is to deter improper enforcement conduct as opposed to prior arguments that the evidence is not reliable and that the courts should not be tainted by such evidence.

At the present time there is disagreement as to whether the exclusionary rule has the desired deterrent effect. But, whether the approach taken in **Stone** will be extended to other areas is an unanswered question.

There was considerable interest in the elimination of plea bargaining in Alaska expressed during the conference. It was reported that several other jurisdictions are considering a similar approach, but the practice is deeply embedded throughout the nation. Prof. Vorenberg expressed his opposition to plea bargaining because of the bad public image it gives to the criminal justice system.

In a recent decision on the subject, **Bordenkircher v. Hayes,** 46 U.S.L.W. 4089 (1978), the court held there was no violation of due process when a prosecutor carries out a threat made during plea negotiations to reindict on a more serious charge if the defendant does not plead guilty.

Although pretrial publicity is not an issue in most cases, the subject is well publicized when the right of a defendant to a fair trial conflicts with the freedom of the press. This was illustrated in **Nebraska Press Ass'n. v. Stuart,** 49 L.Ed2d 683 (1976) in which a prior restraint order was invalidated.

There is growing interest supporting the publication of juvenile records with the Alaska case, **Davis v. Alaska,** 39 L.Ed2d 347 (1974), being an example. In that case the supreme court preferred the right of an adult to a fair trial over the confidentiality of juvenile records.

There was also some discussion of cameras in the courtroom and it was reported that a number of court systems besides Alaska are now considering this exposure.

Concern for Defendant's Rights

In several decisions the supreme court has demonstrated that it is very concerned with the rights of defendants at the guilt-proving state. In **Holloway v. Arkansas,** 55 L.Ed2d 426 (1978), the court held that failure to hold a hearing on appointment of separate counsel deprived defendants of their Sixth Amendment right to counsel.

In Ballew **v. Georgia,** 55 L.Ed2d 234 (1978) the court struck down a five-person jury as violative of the Sixth and Fourth Amendments. In **Taylor v. Kentucky,** 23 CrL 3049 (1978) the court required a full instruction on the presumption of innocence.

But, in **United States v. Augurs,** 49 L.Ed2d 342 (1976) the court held that the failure of the prosecutor to disclose the prior record of the decedent on assault and carrying a deadly weapon did not violate the defendant's right to a fair trial on a charge of second degree murder.

In **United States v. Scott,** 23 CrL 3119 (1978) the court ruled there was no double jeopardy when the defendant moves for a mistrial for preindictment delay and the government appealed from an order terminating the case prior to a verdict on another count.

Growing Interest in Sentencing

In conclusion, it was the belief during the conference that the issue of sentencing may be to the 1970s what confessions and the exclusionary rule were to the 1960s.

Whereas the latter were contested in the courts, the battleground for sentencing will be in the state legislatures.

Studies have shown enormous disparity in sentences. Also, many involved in criminal justice are disillusioned with rehabilitation.

In the optimism of the mid-1960s there was a strong feeling that criminal defendants could change for the better if sufficient resources were provided and highly competent personnel were assigned to the task.

Expectations were high, but when rehabilitation programs showed less than satisfactory results, support for rehabilitation evaporated.

Those who favor stiffer sentences see rehabilitation and judicial discretion in terms of leniency. Those with a defense orientation contend that a definite sentence places less stress and strain on defendants. There are very few people now who credit prisons with successful rehabilitation programs, and taxpayers are concerned about the cost of rehabilitation programs.

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The Exclusionary Rule: A Proposed

Substitute Less Drastic Remedies

Under such circumstances, then, it would be possible for the Alaska Supreme Court to substitute for the exclusionary rule a number of less drastic remedies, at least in so far as the exclusion of otherwise reliable evidence is concerned, without running afoul of the federal constitution.

Having set the stage for the proposal to follow it is now appropriate to set forth a number of caveats.

First, to those who support the existing reach of the exclusionary rule (and would expand its application whenever possible), one is compelled to offer the advice that, as a judicial construct, the rule is subject to judicial change. And, judges are human. They read the "winds" of political change and public opinion. Therefore, the very real possibility exists that the entire rule could be overturned, at the federal level and here in Alaska.

Then, too, the people may exercise their constitutional rights and amend the rule out of existence.

Second, to those who decry the current application of the rule and call for its total abolition, one is compelled to advise that the people are not likely to countenance unchecked violations of their constitutional rights, however fed up with the rule they may appear to be. They are likely to demand alternate forms of protection, and rightfully so. An apparent drift in the current direction of public opinion could reverse itself and amend the exclusionary rule **into** the constitution.

How to Balance Rights of All

With these thoughts in mind, let us explore the means by which the rights of all individuals may be fully insured and protected against malicious intervention by agents of the state; and at the same time protecting the rights of all to have the issue of guilt or innocence resolved on the basis of a presentation of all relevant and reliable evidence.

Initially, this kind of balancing requires a delineation of the kinds of instances in which the exclusionary rule should continue to be applied. The nature of the evidence at issue provides a convenient point of demarcation.

To Protect Privilege Against Self-Incrimination

Where it is clear that a violation of the privilege against self-incrimination is involved, the exclusionary rule should continue in force. There is no other way of insuring that evidence which may be unreliable is withheld from consideration by the trier of fact.

And, there is no fully effective way of determining that, in fact, such evidence is reliable in the face of a clear violation of constitutionally protected rights.

This same type of analysis applies with equal force to certain instances involving eye-witness identification.

Physical Evidence Remains the Same

Philosophical differences over these types of circumstances seem less pronounced than those surrounding the exclusion of physical evidence associated with violations of the rights accorded citizens under Article I, section 14 of the Alaska Constitution and the Fourth Amendment. And, where the evidence is contraband, the instrumentality of the crime, or the fruits of the crime (that is, the property of another) the basis for disagreement becomes even more pronounced.

Here we are dealing with evidence which remains the same despite the circumstances under which it was obtained. Its reliability is unquestionable. A dead body remains a dead body (and the victim) regardless of the means by which the state obtains possession. The same is true for a weapon used to commit a crime, a stolen car, a radio, or a television set.

The Issue is Intent

The issue in such cases should focus on the intent of the agent of the state. Was the evidence obtained, in Justice White's words, in a "good faith belief that [the officer's] conduct comported with existing law and having reasonable grounds for this belief"? Or, was the evidence obtained as a result of a deliberate and knowing violation of the person's constitutional rights?

In the latter case, the application of the exclusionary rule **must** be preserved. It is in such a case that all three of the traditional rationales underlying the rule come into play most forcefully.

Moreover, in such cases the invocation of the rule by the courts should not end the matter. The alternatives proposed here **must** be applied with equal force and effect.

In the former cases, however, the application of the rule clearly can be said to be counterproductive.

In one sense the integrity of the court is directly damaged by a prevailing lack of public confidence in its operations. Moreover, as the United States Supreme Court observed in **United States v. Peters,** 422 U. S. 531, 538 (1975), judicial integrity "is not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." England, Canada and other common law countries somehow have managed to preserve the integrity of their judicial systems without benefit of the rule.

Is it not possible that our courts could do the same?

Rule Discourages Search For Alternatives

So long as the exclusionary rule remains in full force, there will be little incentive to explore other remedies and sanctions.

So long as it remains in full force countless numbers of citizens who do not have **standing,** or who are not formally arrested, will be deprived of adequate safeguards against official lawlessness.

So long as the rule remains in full force public confidence in the courts will remain at low ebb.

Time for Action

The time seems ripe (almost overripe) for action.

Where can we go?

First, the court should resist all efforts to expand the application of the rule

Solution

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beyond existing boundaries such as efforts to apply it to mere statutory violations.

Second, the Alaska court should consider a change to Criminal Rule 26(g) to permit the introduction of otherwise reliable evidence obtained under circumstances amounting to a violation of a person's constitutional rights in cases in which the officer(s) involved were reasonably acting in good faith.

Third, the Alaska court, and more importantly the Department of Law, should carefully explore the latitude provided by **Chapmen v. California,** 386 U. S. 18 (1967) and the "harmless error beyond a reasonable doubt" standard enunciated therein.

The court has used this standard in the past. Its continued use and expansion seems appropriate in cases involving clearly inadvertent actions or technical deviations from court rules or statutes.

Fourth, the court in conjunction with the Department of Law and law enforcement officials should explore the development of rules related to search and seizure.

This would include applicable federal and state court decisions, state statutes, state court rules, and the relevant rules for criminal procedure. It would have to be continually updated to reflect new court decisions and new legislation.

The rules would govern police conduct in the area of search and seizure and the conduct of district attorneys insofar as the use of evidence obtained through searches and seizure is concerned.

Local police departments or the Alaska State Troopers could develop alternative requirements concerning the conduct of their employees.

The same might be true for district attorneys among the various judicial districts.

The object of this exercise would be to determine what types of law enforcement conduct could be more or less controlled by varying rules and regulations.

Fifth, the development of training requirements and programs for law enforcement personnel in the area of search and seizure. This would include basic entry level training courses and at least quarterly in-service training programs. Obviously, parallel educational efforts would be required for district attorneys, judges, magistrates, public defenders, etc.

Sixth, the development of internal law enforcement and prosecutorial rules and regulations pertaining to discipline for violations of established rules and regulations relating to searches and seizures.

Seventh, development of external review panels to hear allegations of violation of Fourth Amendment rights. At issue, of course, would be the membership of such panels, the procedures by which such panels would operate, the authority of such panels, and, the remedies such panels could provide to those whose constitutional rights had been violated.

Eighth, the enactment of legislation to establish specific tort remedies, and criminal sanctions for violation of constitutional rights.

Ninth, the development of public education programs to inform citizens of their rights under the new system.

Guidelines Needed

Since rules relating to evidence are properly a court function, the proposal calls for the development of guidelines on current laws relating to search and seizure.

These guidelines would then be made available to all criminal justice practitioners.

They would state, as of the moment, applicable court decisions or statutory law relating to searches and seizures.

The proposal contemplates the need to continually update those guidelines to reflect changes in the law relating to search and seizures required either by federal or state court decision, or subsequent legislative enactments, a function properly carried out by a committee of the court similar in composition to the Criminal Rules Committee but including law enforcement personnel.

Training on Search And Seizure Law

In the area of training, the preparation of curricula designed to acquaint law enforcement personnel with the relevant guidelines relating to the law of search and seizure would be essential.

Quite clearly the whole concept of external review is an extremely volatile issue within the law enforcement community. However, it seems obvious that any reasonable alternative to the exclusionary rule must contain provisions for this type of action.

Law Enforcement Must Accept Review

In large measure, those who complain most bitterly about the rule and its impact must bear the responsibility for bringing about change.

Law enforcement, collectively, must demonstrate a willingness to have its conduct objectively reviewed. It must be willing to accept the consequences of its actions, good or bad. It must demonstrate its maturity. For, so long as law enforcement merely complains, it will not find solutions to the adverse aspects of the rule. Nor, should it expect that others will offer any.

Public Education

Since it is likely that a vast majority of the public is not fully aware of the extent to which the Fourth Amendment protects them from intrusions by law enforcement agents, it would be a necessary corollary to this program to develop public education so that citizens whose rights may be violated, but against whom no evidence is obtained will nevertheless have recourse to the courts or to law enforcement agencies to redress those violations.

As has been previously noted, one of the main weaknesses of the exclusionary rule is that it has provided literally no protection for those individuals who suffer the consequences of unlawful actions on the part of law enforcement agents, but who find themselves with no forum, e.g., a court through a motion to supress, to raise the issue. The proposed public education program would be designed to heighten citizen awareness in this area.

Space, obviously, limits the extent to which the proposal could be fleshed out, assuming that to be a desirable objective. However, the reader should understand that what is intended is a proposal, not a plan. This article is designed to stimulate responsible discussion on a vexsome issue. Too much rhetoric has already been expended.

Sentencing Alternatives

Two sections of the new criminal code—Section 12.55.055, Community Work, and Section 12.55.045, Restitution—will be of special interest to the courts, corrections, law enforcement agencies and the public provide for sentencing alternatives which may be used in addition to, or in lieu of, incarceration or probation for an offender.

The Community Work section provides: "(a) The court may order a defendant convicted of an offense to perform community work as a condition of a suspended sentence or suspended imposition of sentence, or in addition to any fine or restitution ordered. If the defendant is also sentenced to imprisonment, the court may recommend to the Department of Health and Social Services that the defendant perform community work.

"(b) Community work includes work on projects designed to reduce or eliminate environmental damage, protect the public health or improve public lands, forests, parks, roads, highways, facilities, or education. Community work may not confer a private benefit on a person except as may be incidental to the public benefit."

Community service as a sentencing alternative has been gaining in popularity across the country and is the subject of the following article which appeared in Corrections Digest, Vol. 9, No. 10 (May 19, 1978), and is being reprinted with permission.

Sentencing of convicted persons to volunteer work in a community rather than to jail is becoming a more acceptable practice among judges and offenders, according to a study released by the Law Enforcement Assistance Administration (LEAA).

Recent examples include:

- A taxi driver provided poor people with 40 hours' free transportation to medical facilities. A carpenter built a wheelchair ramp at the home of a senior citizen. Several offenders pooled their skills to make home repairs for low-income residents.
- One judge assigned graffiti scrawlers to clean up their mess. A defendant convicted on drunk and disorderly charges was ordered to the public works program of a county parks department.
- Another judge sentenced an educator, convicted of motor manslaughter, to lecture on the consequences of drinking and driving.

The "volunteer" workers—all convicted on various charges—performed their labors under a growing criminal justice practice known as "Sentencing To Community Service."

The study was carried out by Abt Associates, Inc., of Cambridge, Mass., under a $10,000 LEAA grant. It covered projects in Orange County, Calif., which includes Anaheim; Alameda Country, Calif., which includes Oakland; and Multnomah County (Portland), Ore. It also reviewed the United Kingdom's experience with similar programs.

The defendants, usually persons convicted of misdemeanors, are given a choice of going to jail, paying a fine, or volunteering to work a specified time in a community service agency.

The study emphasizes that the community service jobs are strictly volunteer, and many offenders elect to serve a jail term or pay a fine.

The Orange County court referral program is supported with $89,871 from LEAA. The Alameda County and Multnomah County projects use local funds.

Placements are made on the basis of each offender's interests and skills, after an expression of willingness by the defendant.

Volunteers work in hospitals, libraries, drug and alcohol abuse treatment centers, day care centers, homes for the aged, and churches.

The American Red Cross, American Cancer Society, March of Dimes, Lions Clubs, and Big Brothers and Big Sisters of America use program volunteers.

Over the past three years in Alameda County, more than 13,000 offenders have been placed in community service through the program. In 1976, the Alameda County Court Referral Program handled 4,759 interviews and arranged placements for 98 percent. This program focuses on minor traffic offenders, and more than half of the referrals are assigned to 40 or less hours' community work.

Roughly a quarter are assigned more than 80 hours of work, and assignments in excess of 400 hours are sometimes made.

The Orange County Voluntary Action Center established its referral program in October, 1973. The center interviews more than 1,000 offenders each year for placement in community service agencies. The majority have been convicted of misdemeanors—traffic and parking violations, disorderly offenses, petty theft, or malicious mischief. Ten percent are on formal probation.

"We began the program at the urging of several local judges who wanted to have this sentencing option but didn't want to add to the already overburdened probation caseload," said Joan McSunas, Orange Country court referral program coordinator. "Offender supervision by the Voluntary Action Center seemed an ideal solution."

The Alternative Community Service Program (ACSP) of Multnomah County was founded in 1972. The program handles approximately 180 referrals a month, using more than 150 community agencies.

Eighty percent of offenders volunteering for community service successfully complete their assigned hours, which range from 20 to 200. Offenders who fail to complete their assigned hours are referred back to the court, where a traditional sentence is imposed.

Judge Richard L. Unis, who initiated the Oregon program, said he did so to "offer the court a sentencing mechanism for distinguishing between the lawbreaker and the criminal while providing much needed and appreciated help to the community which repays the community for the expense it incurred as a result of the wrongdoing.

Some offenders enjoy community service so much they continue it after the sentence is finished.

The Alameda County program reported the case of a security guard who served his "sentence" in a ghetto project and then continued volunteering 30 hours a week free time.

James M. H. Gregg, LEAA acting administrator, said the programs fulfilled many purposes.

"Particularly in some misdemeanor cases," Gregg said, "traditional sentences such as fines or jail terms may not be in

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Rust v. State

A Right To Treatment

In a significant opinion handed down in July, the Alaska Supreme Court said prisoners held by the Division of Corrections have the right to psychological or psychiatric treatment, provided a three-point test of necessity is met.

The court also said that a sentencing court does not have the authority to designate a particular prison facility in which a prisoner is to be confined. Although the sentencing court can recommend placement of a prisoner in a particular facility under Alaska's statutes, the ultimate responsibility for placement is vested in the Division of Corrections.

Both of these holdings were in **William A. Rust v. State of Alaska**, Opinion No. 1668, July 21, 1978.

Arose from Sentence Recommendations

The questions of the right to treatment and the authority of the trial courts to enforce their sentencing recommendations arose from the sentencing of Rust for manslaughter and armed robbery in the superior court in Fairbanks. In imposing two concurrent 15-year sentences, Judge James R. Blair also recommended that the Division of Corrections provide Rust with treatment for dyslexia, with vocational training, and placement in a facility in the Anchorage area near his family.

But, when Rust was classified for placement at the Southeastern Regional Correctional Institution in Juneau filed motions for modification of sentence and other relief to prevent his transfer to Juneau.

But the motions were denied with the superior court ruling that "this court does not have the legal authority as a sentencing court to issue such an order."

This ruling was affirmed by the Supreme Court on appeal.

Authority of Trial Courts

On this question of the authority of the trial court to enforce its recommendations, the supreme court said prisoner classification, as indicated in several statutes, is committed to the administrative discretion of the Division of Corrections and not to the sentencing courts of Alaska.

The court said, that as previously implied, the sentencing power of the courts has its source in the legislature and that statutory provisions leave little doubt that the legislature intended to place authority for administering matters affecting prisoners with the Commissioner of Health and Social Services.

Citing its previous decision in **McGinnis v. Stevens**, 543 P.2d 1221, 1237 (Alaska 1975), the supreme court said:

"Decisions of prison authorities relating to classification of prisoners are completely administrative matters regarding which an inmate has no due process rights beyond the expectation of fair and impartial allocation of the resources of the prison system to its charges. As an extension of the state, the Division of Corrections must administer Alaska's prisoners in a manner which is neither arbitrary nor vindictive. However, resource allocation is an executive concern involving many day-to-day decisions which necessitate that court interference be kept to a minimum."

In a footnote to this, the supreme court said:

"Nevertheless we think it appropriate that the Division of Corrections give weight to the sentencing court's recommendations as to facility placement.

"In this regard the Draft Uniform Sentencing and Corrections Act, National Conference of Commissioners and Uniform State Laws, Section 4-406 (March 1, 1978) provides:

"... Factors to be considered in assigning a person to a facility include:

1. the person's security classification;
2. the availability of programs in the facilities;
3. the location of family or other supportive relationships;
4. the location in which the person intends to reside after release;
5. the location of employment opportunities;
6. the wishes of the person to be assigned;
7. the relationship with other confined persons;
8. a written pretrial agreement entered into by the person and prosecuting attorney concerning the facility to which the person would be assigned;
9. any recommendation made by the sentencing court; and
10. any factor established by the director relevant to the selection of an appropriate facility."

Right to Treatment

It was on the question of a prisoner's right to psychological or psychiatric treatment that the supreme court remanded the matter back to the trial court for further proceedings.

On this issue the supreme court the supreme court cited AS 33.30.020 and AS 33.30.050 which require the establishment of treatment, care, rehabilitation and reformation programs for prisoners; and that physicians, nurses and psychiatrists or their aids be detailed to furnish necessary medical services.

From these statutes, the court said it was clear the state legislature had determined that a prisoner has the right to receive necessary medical services, including psychiatric care, while confined.

Test of Necessity

But, the court said, the essential test for such treatment is one of medical necessity rather than what may be desirable, and a three-point test was listed:

That a patient has the right to receive psychological or psychiatric treatment—

1. if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty that the prisoner's symptoms evidence a serious disease or injury;
2. that such disease or injury is curable, or may be substantially alleviated;
3. and that the potential for harm to the prisoner by reason of delay or denial of care could be substantial.

This right to treatment and accompanying test was first ennunciated in a Fourth Circuit opinion, **Bowring v. Godwin**, 551 F.2d 44 (4th Cir. 1977), and it was the wording of this opinion which was incorporated by the Alaska Supreme Court.

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Opinions of Note

12-MAN JURY

Maurice Felix Walker
v.
State of Alaska
Opinion No. 1635
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge James A. Hanson.

The supreme court said it was error per se to allow the defense to waive the right to a trial by a 12-man jury without obtaining the personal express consent of the defendant, orally or in writing. The right cannot be waived by the defendant's attorney.

The court reversed the conviction of Maurice Felix Walker for larceny in a dwelling which was obtained following a trial before a six-man jury. His attorney had waived the right to a trial by a 12-man jury prior to trial and the trial court made no personal inquiry of the defendant.

The court explained that the right to a jury trial is guaranteed by the U. S. Constitution and the Alaska Constitution secures a similar right and fixes the number of jurors at 12. Consequently trial by jury is a fundamental right requiring a known and intelligent waiver for relinquishment, it cannot be presumed.

This was discussed previously in **Lanier v. State,** 486 P.2d 981, 988 (Alaska 1971) in which the court said:

> We hold that an attorney's waiver of his client's constitutional rights will be binding on the client—subject to established limitations—when it occurs during the trial and results from decisions made during the trial. Conversely, an attorney's waiver of his client's constitutional rights without his client's consent will not be binding on the client if the waiver occurs before or after the trial or is made during the pretrial period.

In the present case the supreme court said a personal waiver of a constitutionally guaranteed jury is required under the United States and Alaska Constitutions and requires that the court personally address the defendant.

This, the supreme court said, is supported by decisions interpreting Federal Rules of Criminal Procedure, Rule 23(b), which provides that parties in a trial may stipulate in writing for a jury of less than 12. This rule is essentially identical to Alaska's Criminal Rule 23(b).

The requirement of a written stipulation provides the best record of the express consent of a defendant. Oral consent may be substituted, but the defendant must personally express his waiver. The assertion by defense counsel that the defendant has consented is insufficient to show that the consent was given with the requisite degree of understanding.

It is the duty of the trial court to address the defendant personally and to inquire whether the waiver is voluntary and knowing. Failure to do so is error per se.

COMPETENCY

Mike G. Smiloff
v.
State of Alaska
Opinion No. 1637
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge Seaborn J. Buckalew.

- The supreme court said that under the facts of this case it was not necessary to hold a competency hearing on the eve of trial solely because defense counsel experienced difficulties and disagreements with the defendant over whether to accept a plea bargain or to have a jury trial. The trial court had earlier received a psychiatric evaluation that the defendant was competent to stand trial.

But the court explained that the duty to determine competency is not one that can be once determined and then ignored and the trial court must be alert to circumstances indicating that the accused is no longer competent to stand trial.

- The supreme court said the requirement that grand jurors must have resided in the state for at least one year.

The supreme court said the one-year residency requirement for grand jurors was not violative of the equal protection provisions of the Alaska and United States Constitutions, and AS 09.20.050(b).

The supreme court said its previous decision in **Hampton v. State,** 569 P.2d 138 (Alaska 1977) was dispositive, that the one-year residency requirement guarantees a substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect.

- The supreme court rejected arguments that Criminal Rule 24(d) was unconstitutional in allowing the prosecution peremptory challenges of jurors. The appellant argued that the rule was not promulgated within the constitutional powers of the supreme court as it is not merely a procedural rule, but confers a substantive right as well.

The supreme court construed AS 09.20.090 (which states: "the prospective jurors shall be examined, challenged and sworn as provided by the rules of the supreme court.") as a legislative declaration of the right to peremptory challenges, as well as authorization for the supreme court to deal with procedural aspects of the right through its rule-making powers.

SENTENCE REVIEW

Duncan Campbell Webb
v.
State of Alaska
Opinion No. 1638
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge Thomas B. Schulz.

The supreme court said the trial judge was clearly mistaken in not placing Anchorage attorney Duncan Webb in prison for a reasonable length of time following his conviction for being an accessory after the fact to a first degree murder. The two-year suspended sentence and probation was disapproved as too lenient.

In imposing sentence the trial judge expressed his belief that incarceration does not rehabilitate and that what Webb had done in this was to lie.

But the supreme court said Webb did more than simply lie; that after a brutal and cold-blooded murder he concealed or aided the murders with knowledge that they had committed first degree murder and with the intent that they might avoid arrest.

Brief digests of Alaska Supreme Court Opinions and the criminal justice issues involved

The supreme court also said that the fact a criminal should be rehabilitated or reformed does not mean that he should escape punishment.

Citing its previous opinion in **State v. Lancaster**, 550 P.2d 1257, 1259 (Alaska 1976), the supreme court said:

> "The very opposite may be true. Penalties must be imposed in most instances in order to make rehabilitation effective, as well as to protect the public and deter others from engaging in criminal conduct."

The supreme court went on to say that the judge gave little, if any, consideration to the need to recognize and express community condemnation of the offender's antisocial conduct.

The supreme court found that many of the points raised by Webb on appeal were of little merit or worthy of serious consideration. But the court did discuss some of the issues.

- Webb claimed that as a newcomer to the state he was denied his constitutional and statutory right to an impartial jury because persons with less than one-year residence in Alaska were excluded from the jury.

This was addressed twice before by the supreme court in **Hampton v. State**, 569 P.2d 138, 149 (Alaska 1973), and **Smiloff v. State**, Opinion No. 1637 (Alaska, May 26, 1978). In both cases the supreme court upheld the one-year residency requirement for jury service

In Webb the supreme court went on to say there is no constitutional right to a jury composed of a cognizable group that would tend to be partial or biased or prejudiced against the state and in favor of the accused in a criminal case.

- Webb claimed that his lies to police, as established during the trial, were protected by the constitutional guarantee of freedom of speech and the privilege not to incriminate himself.

The supreme court found no merit in these arguments. The court said Webb's lies to the police constituted the principal basis for his indictment and conviction of being an accessory after the fact to the crime of first degree murder. The court said speech is not constitutionally protected when it is the very vehicle of the crime itself.

Webb had the privilege of remaining silent, he was not compelled to lie, the court said. The Fifth Amendment privilege is not a privilege to commit crime.

SENTENCE REVIEW

Mark Spencer Smothers
v.
State of Alaska
Opinion No. 1641
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge James K. Singleton.

The supreme court affirmed the 12-year sentence concurrent with 3½ for revocation of probation imposed upon Smothers following his conviction for burglary in a dwelling.

The court said the sentence was not excessive in light of his extensive prior record, the fact that he was on probation at the time of the offense and this must be considered the worst type of burglary in which the victims were tied and struck.

The supreme court also commented on remarks by the sentencing judge suggesting that the fourth element of the **Chaney** criteria might be a disguise for retribution.

That element to be considered in sentencing is: "community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves."

The supreme court said retribution was not adopted in Chaney and is inconsistent with the mandate of the Alaska Constitution that "penal administration shall be based on the principle of reformation and upon the need for protecting the public."

The court went on to say, "The support of community expectations that existing norms will be enforced and delicts will be punished is separate from retribution. The judge's balancing of the factors of rehabilitation, isolation and deterrence must also include an awareness that in sentencing, he is reflecting community beliefs that certain norms are viable and will be upheld by the courts."

EVIDENCE

Kenneth P. Gould
v.
State of Alaska
Opinion No. 1640
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge James K. Singleton.

The supreme court said that evidence of narcotic addiction taken alone is not sufficient to establish motive and it was prejudicial error for such evidence to have been admitted in the particular factual context of this case.

Gould's conviction for armed robbery was reversed and remanded for a new trial.

The court said that evidence of narcotic addiction standing alone is insufficient to establish motive for a crime, that there must be an affirmative link between the addiction and the specific crime charged.

This affirmative link was lacking as the only evidence was Gould's statements to police that he had a habit, was unemployed and lived with a welfare recipient.

Since Gould's identity as the robber was contested with defense witnesses claiming he was elsewhere at the time of the robbery and, with a beard his appearance was different at the time of the robbery from that described by the victims, the court said the only relevance of the evidence goes to the issue of identification.

The court found the evidence too attenuated and possessing too many gaps to show motive and thus the identity of the robber.

Opinions of Note

INSANITY DEFENSE

Arthur George Post
v.
State of Alaska
Opinion No. 1642
Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Judge Warren William Taylor.

The Alaska Supreme Court addressed two issues relating to insanity defense.

- The court held that the right of psychotherapist-patient privilege is waived in a criminal case by the assertion of a defense of insanity. This waiver applies to communications which are relevant to that defense.

This is in accord with Rule 504(d)(1) of the proposed Alaska Rules of Evidence.

This rule excepts from the psychotherapist-patient privilege "communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient."

The court said it would give a defendant an unfair advantage at trial to allow him to claim insanity and to prohibit the prosecution from obtaining what may be the most reliable evidence available on the subject from the defendant's treating psychiatrist.

The court also held that the right of a defendant pleading insanity to waive a jury trial [AS 12.45.083(d)] does not include the right to a bifurcated trial in which the facts of the crime are tried before a jury and the question of insanity before a judge.

But the court warned there is a danger of prejudice when a jury charged with deciding whether a defendant committed a crime also hears evidence that he was insane at the time of the crime.

In this case the court found no abuse of discretion by the trial court.

JURY INSTRUCTIONS

Irwin Howard Christie
v.
State of Alaska
Opinion No. 1644
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge C. J. Occhipinti.

Under the facts of the case the Alaska Supreme Court found there was no fatal variance between the wording of the indictment against Christie which charged "shooting with intent to kill and wound, and the instruction to the jury which used "kill or wound."

While it is error for the trial court to refuse to give the jury an instruction on the lesser included offense, the court held that there was no prejudicial error under the circumstances of this case.

The court also held that the trial court did not err in determining that one brief reference to the key words of the state's insanity statute was insufficient to present a jury with a question of insanity and such an instruction was not necessary.

TESTIMONY PLAYBACK

Frederick Richardson
v.
State of Alaska
Opinion No. 1646
Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Judge J. Justin Ripley (Judge Gerald J. Van Hoomissen).

The supreme court said it is constitutional error for a judge to permit the playback of testimony to a jury in the defendant's absence and without an express waiver.

The case was remanded for a new trial as the defense was not advised of the jury's request and neither the judge, nor counsel for the state or defense was present. The record was unclear about what testimony was heard by the jury.

In the course of the opinion the supreme court held that testimony regarding a command to dispose of stolen heroin was admissible as a "Present Sense Impression," exception to the hearsay rule. This is a "statement describing or explaining an event or condition made while the delarant was perceiving the event or condition, or immediately thereafter." This is in Federal Rules of Evidence, 803(1), and the proposed Alaska Rules of Evidence 803(a).

The heroin was that allegedly taken from a Fairbanks courtroom during the trial of another person and the testimony was that of a witness who said he observed the heroin at a residence and heard the command when someone came to the door: "Flush the bags and tags down the toilet and get rid of them."

SENTENCE REVIEW

Edgardo Sumabat
v.
State of Alaska
Opinion No. 1648
Appeal from the Superior Court, Third Judicial District, Anchorage, Judge Victor D. Carlson.

The supreme court said the trial court was clearly mistaken in imposing a 12-year sentence on Sumabat for manslaughter. The court said a 10-year sentence with five suspended would be appropriate.

The court explained that Sumabat had a responsible work history, no prior criminal offenses and was supporting his family in the Philippines. The event which led to his indictment and conviction involved a quarrel between two of Sumabat's friends. Sumabat allegedly took a gun away from one but became involved in a scuffle with the other when the gun discharged and the friend was fatally wounded.

Points on Appeal

Brief descriptions of points being raised in criminal appeals filed with the Alaska Supreme Court.

Michael Eugene Williams
v.
State of Alaska
File No. 4159
Filed May 4, 1978, by Richard B. Collins, attorney.

Appellant raises the following points of appeal:

- The trial court's failure to allow the defendant to give a courtroom demonstration to show how an individual, who knows the answer to a situation, can steer an unsuspecting "victim" to the correct answer.
- The trial court, over objection, allowed the state witness, Gomez, to testify on rebuttal, giving testimony which impeached the victim, Hurst, the state's star witness. This happening during the second week of trial after the victim had been released from his subpoena by the state and had returned to Colorado unbeknownst to the defendant.
- That the six-year sentence imposed was excessive.

Appellant reserved the right to raise other points after review of the transcript.

Kenneth E. Deal
v.
State of Alaska
File No. 4169
Filed June 23, 1978, by William D. McCool, attorney.

Appellant raises the following points:

- The superior court's denial of the defendant's motion to suppress physical evidence and statements by the defendant filed March 1, 1978.
- The superior court's denial of defendant's motion to dismiss filed March 1, 1978.
- The superior court's denial of defendant's motion to reconsider filed April 6, 1978.
- The sentence imposed was excessive and improper.

Donald E. Schultz
v.
State of Alaska
File No. 4152
Filed July 6, 1978 by Dick L. Madson, attorney.

Appellant alleges error in the denial of his motion to suppress evidence.

Lenney Ackers
v.
State of Alaska
File No. 4043
Filed July 17, 1978, by Brian Shortell, Public Defender.

Raising an issue of first impression the appellant asks:

- Whether the superior court erred in ruling that the Governor's Warrant of Arrest complied with AS 12.70.060, since the warrant is directed to any peace officer of the State of Alaska or of any municipality within the State of Alaska, while the statute requires direction of the warrant to a specific peace officer or other person whom the governor may think fit to entrust with the execution of the warrant.

Appellant also asks:

- Whether the superior court committed plain error in denying the petition for a writ of habeas corpus in light of the total absence of any showing that the executive of the demanding state had ever requested the appellant's extradition and in light of the complete failure of the executive of the demanding state to certify to the executive of the asylum state the authenticity of the documents supporting the appellant's extradition.

Thomas Schanrock
v.
State of Alaska
File No. 3783
Filed July 10, 1978 by Brian Shortell, Public Defender.

Appellant argues on appeal from a conviction for lewd and lascivious acts towards a child that:

- The defendant's constitutional right to confront his accuser was denied by the trial court's evidentiary rulings concerning the alleged victim's sexual and social behavior, specifically:
  - A. The trial court improperly excluded evidence of prior bad acts committed by the alleged victim, which established the witness' motive, bias and prejudice against the defendant.
  - B. The trial court improperly excluded a prior inconsistent statement by the alleged victim.

David R. Stobaugh
v.
State of Alaska
File No. 3729
Filed July 7, 1978, by G. R. Eschbacher, attorney.

Stobaugh appeals from a conviction for burglary and seven-year sentence arguing that:

- The trial court erred in denying the defendant's motion to dismiss the charge for failure to proceed to trial within the required time period set forth in Criminal Rule 45.
- The trial court erred in failing to suppress the defendant's statement or confession at the time of arrest and a confession in the judge's chambers.
- The trial court erred in denying the defendant's request to allow the jury to consider both the elements of trustworthiness and voluntariness of the confession.
- The trial court erred in failing to grant a new trial.
- The seven-year sentence was excessive and should be reduced.

Raymond Anthony Harvey
v.
State of Alaska
File No. 3921
Filed July 11, 1978 by Bruce A. Bookman, attorney.

In an appeal arising from a conviction of negligent homicide, the appellant argues that:

- The trial court erred in failing to dismiss the indictment on the grounds of insufficient evidence at the grand jury.
- The trial court erred in failing to limit evidence of prior bad acts of the defendant.
- The trial court erred in failing to limit the jury's consideration of the facts and offense set out in the indictment.

Points on Appeal

Warren G. Price
v.
State of Alaska
File No. 3524
Filed July 11, 1978, by Brian Shortell, Public Defender.

Appellant asks: was it prejudicial error for the trial court to allow testimony during a trial for assault with a deadly weapon that the arresting officer found marijuana on the defendant and in his vehicle at the time of arrest.

Edward D. Badger
v.
State of Alaska
File No. 4156
Filed July 14, 1978 by Johnson, Chrisenson and Glass, attorneys.

Appellant alleges the following errors by the trial court:

- In the use of a special jury instruction.
- In initially refusing to present separate verdicts to the jury covering the three separate forms of manslaughter upon which a verdict could be returned.
- There was insufficient evidence to sustain the jury's verdict that the defendant was guilty of manslaughter by culpable negligence.

Eugene Ustaszewski
v.
Charles Moses, Superintendent,
Alaska State Jail;
State of Alaska
File No. 4182
Filed July 24, 1978 by Brant McGee, Assistant Public Defender.

Appellant alleges that the trial court erred in denying appellant's petition for a Writ of Habeas Corpus because probable cause was not established by the extradition documents.

Maureen L. Ustaszewski
v.
William Green, Superintendent,
Ridgeview Correctional Center;
State of Alaska
File No. 4181
Filed July 19, 1978, by George E. Weiss, attorney.

Appellant alleges the following errors by the trial court:

- The court erred in finding that the extradition warrant and requisition papers were duly supported and authenticated.
- The trial court erred in that the copies of the Information and supporting papers served upon the appellant failed to comply with AS 12.70.020.
- The court erred in that the affidavit supporting the extradition papers was made upon information and belief making it neither complicit with Alaska law nor with California law.
- The court erred in that the information presented failed to sufficiently establish probable cause under Alaska law and California law.
- The court erred in that it failed to determine whether or not the governor had complied with the mandate of AS 12.70.030 once the appellant had posed the issue, that this error also infringes upon appellant's rights under Article I, Section 7, of the Alaska Constitution.
- The court erred in that, to uphold its Judgment and Order denying appellant's discharge from custody, would violate her substantive rights to due process under both the federal and state constitutions.
- The court erred in permitting appellant to be held to answer for an infamous crime without the benefit of an Alaskan or Californian presentment or indictment of a grand jury in violation of her rights under Article IV, Section 2 and Amendments IX and XIV of the United States Constitution and Article I, Sections 1, 3, 7, 8, 11, 13, 15, and 21 of the Alaska Constitution.
- The court erred in finding the Governor's Warrant valid in that it was not supported by an oath or affirmation as required by the Alaska Constitution, Article I, Section 14.
- The court erred in that the cumulative effect of appellant's continued incarceration in the face of prosecutional delays and errors constitutes cruel and unusual punishment and that to continue her present confinement would be tantamount to the suspension of the Writ of Habeas Corpus and amount to a Bill of Attainder directed at the class of alleged out-of-state felons whose extradition was being sought by means less stringent than the requisites of Alaska law.

Appellant reserved the right to supplement and addend her assignments of error.

Right to Treatment

(Continued from Page 7)

The **Bowring** court, in reaching its holding, said: "This limited right to treatment stems from the Eighth Amendment, whose language must be interpreted in light of 'the evolving standards of decency that mark the progress of a maturing society.' It is also premised upon notions of rehabilitation and the desire to render inmates useful and productive citizens upon their release."

Grey Areas

The Alaska Supreme Court recognized that the test criteria included grey areas due to the impossibility of fitting health problems into discrete classifications such as "serious": and "harmless," "physical" and "mental," or even "medical" and "nonmedical." The court expressed its confidence, however, that these criteria can be rationally applied and that they represent opposite standards for delineating both the inmate's right to psychological or psychiatric treatment, and the appropriate circumstances for judicial intervention in daily operations of state correctional institutions.

Alaska Death Investigation Seminar

A 40-hour Death Investigation Seminar, led by some of the country's leading forensic pathologists, will be held Sept. 25-29, at Alaska Methodist University.

The course is sponsored by the Criminal Justice Center and the Alaska State Troopers and is certified by the Alaska Police Standards Council.

It was originally designed for the "Bush" trooper and the small community police officer, but has been expanded to include magistrates, prosecutors, defense attorneys, municipal police and coroners and medical examiners throughout the state.

Instructors for the course will be:

Dr. Patrick E. Besant-Matthews, consultant in forensic pathology, Anchorage.

Dr. Vincent J. M. DiMaio, deputy chief, Office of Medical Examiner, Southwestern Institute of Forensic Sciences, Dallas, Tex.

Dr. James C. Garriott, Chief of Toxicology, Southwestern Institute of Forensic Sciences, Dallas.

Dr. Larry V. Lewman, deputy chief, Office of Medical Examiner, Multnomah County, Portland, Ore.

Dr. Donald T. Reay, Chief Medical Examiner, King County, Seattle, Wash.

Dr. Lawrence R. Simson, Jr., Supervisor of Laboratories, E. W. Sparrow Hospital, vice president Lansing Area Pathology, Inc., Lansing, Mich.

The course goes beyond the elementary subjects of death investigation and will include:

- All aspects of injury by firearms, including handguns, shotguns and high-powered rifles, including emphasis on trace evidence recovery.
- Toxicology, including alcohol, carbonmonoxide, cocaine, heroin, PCP and amphetamines.
- Time of death and post mortem change.
- Death by asphyxiation, burns, fire and arson.
- Teeth and identification of the dead body.
- Sudden Infant Death and sudden unexpected death.
- Sexual assault.
- The fatally abused child.
- Head injury and its interpretation
- X-rays in death investigations.
- Autos and pedestrians, patterns and problems.
- Aircraft Accident Investigations.
- Selection and preservation of evidence.
- Identification of unknown remains.
- The medicolegal autopsy and death certification.

There is no tuition for the course, but those attending must provide their own transportation, food and lodging.

Further information can be obtained by contacting:

Capt. C. E. Swackhammer
Criminal Investigation Bureau
Alaska State Troopers
P. O. Box 6188 Annex
Anchorage, Alaska 99502

Predicting Success in Clearing Cases

Can a police department predict the likelihood of clearing a burglary based on the availability of certain items of evidence?

This question is presently being tested in an unprecedented nationwide study involving 30 police departments.

The 30 police departments are all members of the Police Executive Research Forum (PERF), and they are testing a model developed by the Stanford Research Institute which indicated that burglary clearance can be predicted.

The mass, nationwide replication of the Stanford model marks the first time that police agencies have sought to learn on a major scale whether the product of research is valid in the real world.

According to Chief E. Wilson Purdy of Miami, Fla., PERF president, as quoted by the Criminal Justice Newsletter (Vol. 9, No. 13, June 19, 1978), the mass, nationwide test marks the first time police agencies have sought to learn on a major scale whether the product of research is valid in the real world of American policing.

It is believed that replicating major research projects, such as the Stanford project in this instance, provides the link, which has been missing until now, between what is supposed to work and what really does.

Chief Purdy reports the study is already having an important impact on the participating departments. He reports that several departments talking part in the project have identified gaps in investigative data collection and records, that the project has suggested the need for new investigative procedures, and in some instances has raised questions about the use of evidence presently being collected.

This nationwide study was designed by PERF based on the initial experience of the Peoria (Ill.) Police Department and an initial design proposed by Peoria Police Chief Allen Andrews. In that experience the Peoria Police Department found that the Stanford burglary model was 92 per cent correct in predicting the investigative outcome of 500 burglary cases.

The present nationwide replication of the Stanford model involves 500 burglary cases from each of the 30 participating departments, for a total of 15,000 cases, and is being conducted entirely by police agency personnel.

Departments participating in the project include: Arlington County, Va. Atlanta, Ga.; Baltimore County, Md. Boston, Mass.; Dade County, Fla. DeKalb County, Ga.; Fairfax County Va.; Hartford, Conn.; Jacksonville, Fla. Lakewood, Calif.; Madison, Wis.; Montgomery County, Md.; Multnomah County, Ore.; Newark, N. J.; New Rochelle, N. Y.; Oakland, Calif.; Orange County, Fla.; Orlando, Fla.; Peoria, Ill. Portland, Ore.; Prince Georges County Md.; Rochester, N. Y.; San Diego, Calif. San Francisco, Calif.; Santa Ana, Calif. Savannah, Ga.; and Toledo, Ohio.

Results of the nationwide study are expected to be announced next fall.

Additional information can be obtained by contacting:

Michael Farmer
Director of Research
Police Executive Research Forum
Suite 420
1909 K Street, NW
Washington, D. C. 20006

Justice Training Calendar

POLICE

Oct. 1-6. Traffic Accident Investigation. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 2-4. Hostage Negotiation. Florida Institute for Law Enforcement. St. Petersburg, Fla.

Oct. 2-6. Developing Administrative Staff Skills. IACP. Washington, D. C.

Oct. 2-13. On-Scene Accident Investigation. The Traffic Institute. Evanston, Ill.

Oct. 3-5. Major Case Investigations. Case Western Reserve University. Cleveland, Ohio.

Oct. 3-5. Seminar on Audits/Financial Investigations that Detect Fraud and Embezzlement. Association of Federal Investigators. Chicago, Ill.

Oct. 7-Nov. 4. Arrests and Firearms. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 9-13. Police Budget Preparation Workshop. The Traffic Institute, Evanston, Ill.

Oct. 12-13. Crime and the Elderly. Case Western Reserve University. Cleveland, Ohio.

Oct. 16-19. Police Performance Evaluation and Appraisal Workshop. The Traffic Institute. Evanston, Ill.

Oct. 16-19. Developing Police Computer Capabilities. IACP. Nashville, Tenn.

Oct. 16-19. Legal Problems in Police Administration. Traffic Institute. Evanston, Ill.

Oct. 16-20. Responses to Hostage Taking Workshop. IACP. Norfolk, Va.

Oct. 16-24. 46-Hour course in Firearms, Arrest and Search and Seizure. Case Western Reserve University. Cleveland, Ohio.

Oct. 16-Nov. 3. Technical Accident Investigation. The Traffic Institute. Evanston, Ill.

Oct. 16-Nov. 17. Organized Crime Investigators Course. Institute on Organized Crime. Miami, Fla.

Oct. 16-Dec. 15. Basic Police School. Case Western Reserve University. Cleveland, Ohio.

Oct. 17-Jan. 26. Basic Police Academy. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 18-20. Tactical Approaches to Crimes in Progress. Case Western Reserve University. Cleveland, Ohio.

Oct. 23-26. Equal Employment Opportunity and Affirmative Action. IACP. New Orleans, La.

Oct. 23-26. Assessment Center Workshop for Law Enforcement Personnel. University of Chicago. San Diego, Calif.

Oct. 23-27. The Allocation and Distribution of Police Manpower. IACP. San Francisco, Calif.

Oct. 23-Nov. 3. Police Middle Management. Cook County Sheriff's Department. Chicago, Ill.

Oct. 25-27. Hostage Procedures and Negotiations. Case Western Reserve University. Cleveland, Ohio.

Oct. 30-Nov. 1. Detection and Identification of Illegally Used Explosives. Bureau of Alcohol, Tobacco and Firearms. Reston, Va.

Oct. 30-Nov. 2. Police Discipline. IACP. Orlando, Fla.

Oct. 30-Nov. 3. Hostage Negotiation. Florida Institute for Law Enforcement. St. Petersburg, Fla.

Oct. 30-Nov. 3. Field Training Officer. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 1-3. Body Armor, Weapons and Ammunition Workshop. IACP. Kansas City, Missouri.

Nov. 6-9. The Police Executive and the Law. IACP. Atlanta, Ga.

Nov. 6-17. Selective Traffic Enforcement Program. The Traffic Institute. Evanston, Ill.

Nov. 6-17. Law Enforcement Planning Officers Seminar. The Traffic Institute. Evanston, Ill.

Nov. 6-17. Standards for Driver Examinations. The Traffic Institute, Northwestern University. Evanston, Ill.

Nov. 6-17. Federal Investigators Advanced Seminar. National Institute of Professional Education for Investigators. San Francisco, Calif.

Nov. 6-17. Investigation of Sex Crimes. Southern Police Institute. Louisville, Ky.

Nov. 7-9. Rape Investigation. Case Western Reserve University. Cleveland, Ohio.

Nov. 7-18. Motor Fleet Accident Investigation Workshop. Traffic Institute. Evanston, Ill.

Nov. 11-22. Supervision of Police Personnel. The Traffic Institute. Evanston, Ill.

Nov. 13-16. Advanced Police Computer Applications and Management. IACP. San Diego, Calif.

Nov. 13-17. Basic Fingerprinting. Case Western Reserve University. Cleveland, Ohio.

Nov. 13-17. Training for Trainers. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 13-17. Workshop on Management of Job-Related Stress. IACP. Phoenix, Ariz.

Nov. 13-17. Vehicle Theft Investigation. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 15-17. Interview and Interrogation. Florida Institute for Law Enforcement. St. Petersburg, Fla.

Nov. 27-30. Police Decision-Making and Leadership Development Seminar. Traffic Institute. Evanston, Ill.

Nov. 27-Dec. 1. Crowd and Spectator Violence. IACP. Miami, Fla.

Nov. 27-Dec. 1. Traffic Law Enforcement. The Traffic Institute. Evanston, Ill.

Nov. 27-Dec. 1. Burglary Investigation. Florida Institute for Law Enforcement. St. Petersburg, Fla.

Nov. 27-Dec. 1. Jail Operations. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 29-March 9. Basic Police Academy. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 30-Dec. 3. Law Enforcement Hypnosis Seminar. Law Enforcement Hypnosis Institute. Los Angeles, Calif.

Dec. 2 and 9. Crowd Control and Use of Chemical Agents. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 4-6. Police Fleet Management: Selection and Maintenance of the Police Vehicle and Auxiliary Equipment. IACP. Daytona Beach, Fla.

Dec. 4-7. Personal Adjustment Problems of Law Enforcement Personnel Seminar. The Traffic Institute. Evanston, Ill.

Dec. 4-8. Advance Officer Course. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 4-15. Command Seminar. Institute on Organized Crime. Miami, Fla.

Dec. 5-7. Criminal Law Seminar. University of Missouri. Columbia, Mo.

Dec. 6-8. Executive Development. Florida Institute for Law Enforcement. St. Petersburg, Fla.

Dec. 11-15. Executive Development. IACP. Orlando, Fla.

Dec. 11-15. Traffic Accident Investigation. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 11-15. Arrest and Firearms, 832 PC. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 12-13. Institute on Crime and Law Enforcement in Parks and Recreation Areas. Case Western Reserve University. Columbus, Ohio.

Jan. 15-19. Advanced Officer Course. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 3-5. Internal Affairs Investigation. Florida Institute for Law Enforcement. Miami, Fla.

JUDICIAL

Oct. 1-6. Criminal Evidence, graduate course. National Judicial College. Reno, Nev.

Oct. 9-12. Annual Meeting, State Judicial Educators Association. Hyannis Resort, Maine.

Oct. 16-27. Coroner Training. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 22-26. Appellate Court Administration. Institute for Court Management. San Francisco, Calif.

Oct. 22-26. Appellate Judges Seminar. ABA Judicial Administration Div. and Appellate Judges Conference. San Francisco, Calif.

Oct. 22-27. Evidence, specialty course. National Judicial College. Reno, Nev.

Oct. 22-Nov. 3. Special Court Jurisdiction. National Judicial College. Reno, Nev.

Oct. 25-28. Annual Conference, National Conference of Metropolitan Courts. Atlanta, Ga.

Oct. 26-27. Western Regional Conference. National Center for State Courts. San Francisco, Calif.

Oct. 29-Nov. 3. Search and Seizure, specialty course. National Judicial College. Reno, Nev.

Nov. 5-10. Alcohol and Drugs, specialty course. National Judicial College. Reno, Nev.

Nov. 5-17. Fall College. National College of Juvenile Justice. Reno, Nev.

Nov. 5-17. Nonlawyer Judges, General Course. National Judicial College. Reno, Nev.

Nov. 8-10. ABA Traffic Court Seminar. ABA Judicial Administration Div., National Conference of Special Court Judges, and National Judicial College. New Orleans, La.

Nov. 12-15. Building and Evaluating Court Information Systems. Institute for Court Management. Location to be announced.

Nov. 12-17. Administrative Law, advanced course. National Judicial College. Reno, Nev.

Nov. 12-17. Sentencing Misdemeanants, specialty course. National Judicial College. Reno, Nev.

Nov. 15-18. Annual Education Conference. National College of Probate Judges. Austin, Tex.

Nov. 28-30. Conference of State Court Administrators—Continuing Education Program. National Center for State Courts. Denver, Colo.

Dec. 3-8. Court Administration. National Judicial College. Reno, Nev.

Dec. 3-8. Decision-Making Process—graduate course. National Judicial College. Reno, Nev.

Dec. 3-8. Evidence—graduate course. National Judicial College. Reno, Nev.

Dec. 7-9. Annual Meeting of State Court Representatives. National Center for State Courts. Fort Lauderdale, Fla.

Dec. 10-15. Decision-Making Skills and Techniques. National Judicial College. Reno, Nev.

Dec. 10-15. Administrative Law Procedure. National Judicial College. Reno, Nev.

CORRECTIONS

Oct. 10-13. Group Counseling. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 17-19. Probation Supervisor. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 23-27. Probation Case Management, Phase I. Regional Criminal Justice Training Center. Modesto, Calif.

Oct. 26-27. Narcotics and Dangerous Drugs. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 6-7. Reality Therapy. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 27-Dec. 1. Jail Operations. Regional Criminal Justice Training Center. Modesto, Calif.

Nov. 27-Dec. 8. Basic Correctional Academy. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 11-15. Probation Case Management, Phase II. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 11-15. Correctional Ancillary Program. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 3-5. Crisis Intervention. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 8-19. Basic Correctional Academy. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 15-19. Probation Case Management, Phase III. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 22-23. F.I.R.O.-B Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 22-26. Correctional Ancillary Program. Regional Criminal Justice Training Center. Modesto, Calif.

Jan. 29-Feb. 9. Basic Correctional Academy. Regional Criminal Justice Training Center. Modesto, Calif.

PROSECUTION

Oct. 4-7. Trial Techniques for the Prosecutor. National College of District Attorneys. Denver, Colo.

Oct. 8-12. The Prosecutor and the Juvenile Court—Update 1978. National College of District Attorneys and National Council of Juvenile and Family Court Judges. Reno, Nev.

Oct. 29-Nov. 1. Law and Evidence for the Prosecutor. National College of District Attorneys. San Francisco, Calif.

DEFENSE

Oct. 6-7. Defending Criminal Cases—The Rapidly Changing Practice of Criminal Law. Practicing Law Institute. Los Angeles, Calif.

JUVENILE

Oct. 1-7. Juvenile Justice Management Institute. National College of Juvenile Justice. Reno, Nev.

Oct. 31-Nov. 2. National Symposium CIP Dimensions of Placement. National Council of Juvenile and Family Court Judges. Nashville, Tenn.

Nov. 13-17. Advanced Juvenile Hall Training. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 10-15. Juvenile Justice Management, Basic Seminar. Institute for Court Management. Snowmass, Colo.

Dec. 10-15. Juvenile Justice Management Program, Phase I. Institute for Court Management. Aspen, Colo.

CRIME PREVENTION

Dec. 4-7. Crime and the Senior Citizen Workshop. IACP. Miami, Fla.

MANAGEMENT

Oct. 2-27. Leadership and Organizational Innovation. University of Pittsburgh. Pittsburgh, Pa.

Oct. 23-27. Criminal Justice Fiscal Administration Techniques and Practices. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 1-2. Statistics Seminar. National Center for State Courts. Denver, Colo.

Dec. 3-8. Budget, Planning and Financial Controls. Institute for Court Management. San Diego, Calif.

Jan. 11-Apr. 13. Seminar on Project Planning and Evaluation. University of Pittsburgh. Pittsburgh, Pa.

PRIVATE POLICE

Oct. 3-Nov. 2. Private Investigator Training. Case Western Reserve University. Cleveland, Ohio.

Oct. 23-Dec. 7. Private Police Training. Case Western Reserve University. Cleveland, Ohio.

Nov. 27-Dec. 15. Private Patrol Academy. Regional Criminal Justice Training Center. Modesto, Calif.

Dec. 7-8. Private Patrol Arrest Function. Regional Criminal Justice Training Center. Modesto, Calif.

Trends in Criminal Law

(Continued from Page 3)

Reflecting this growing interest in sentencing, Senate Bill 437, Revision of the Federal Criminal Code, states, *inter alia* ". . . imprisonment is generally not an appropriate means of promoting corrections and rehabilitation."

In this state Article 1, #12 of the Alaska Constitution requires "Penal administration shall be based on the principle of reformation and upon the need to protect the public," and the new Alaska Criminal Code includes provisions for presumptive sentences.

The supreme court, in **United States v. Grayson,** 46 U.S.L.W. 4840 (1978), permitted a judge to consider false testimony of a defendant when imposing sentence.

While the court held in **Gregg v. Georgia,** 49 L.Ed2d (1976) that the Georgia death penalty for murder did not violate the Eighth and Fourteenth Amendments; but the Ohio mandatory death penalty was struck down in **Lockett v. Ohio,** 23 CrL 3215 (1978) as the court appears to be requiring individualized decisions in capital cases.

Sentencing Alternatives

(Continued from Page 6)

the best interest of society. On the other hand, a suspended sentence, perhaps with probation, may not satisfy a victim who feels the offender is 'getting off too easy' or impress an offender with the seriousness of his crime."

Single copies of the report, "Sentencing to Community Service," are available from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850. Multiple copies may be purchased from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. 20402, at $2.30 prepaid. The stock number is 027-000-00613-2.

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