Alaska Justice Forum

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A SYSTEM IN EVOLUTION

—John E. Havelock

Why the ALASKA JUSTICE FORUM? Another newsletter? No! Your own agency's news bulletin is the best place to find out what the "chief" thinks, who's moved where, stuff going on in the agency.

The Alaska Justice Forum will be built around a core of freshly prepared educational material, specially adapted to Alaska, about the whole system. Think of it as a graduate correspondence course for professionals on the administration of justice in Alaska.

Like any other human institution, the system of justice is in evolution. Regular staff meetings, briefings and the periodic literature of your profession help you to keep up with changes in your own sector. But changes in one area which sometimes dramatically impact all sectors frequently catch even the alert practitioner napping.

The Alaska Justice Forum will respond to those eductional needs which reflect whole system concerns through a permanent, looseleaf service wrapped in an information sheet on hotline developments, current training and educational opportunities, new book reports, and commentary on current issues with multiple agency impacts. The "permanent" sheets will be numbered and punched to provide a looseleaf service so over a period of months you will build a handy reference guide to topics like police organization, lineup procedures, discretionary diversions, updates on criminal law and procedure, referral agencies for juveniles, new sentencing laws, prisoner's rights and many other topics. These sheets will be replaced as dated by events and new knowledge. Frequently, they will be written by experts from your own agency.

The Alaska Justice Forum is dedicated to the proposition that the administration of justice will work more smoothly, produce a better result if each field professional has a better idea of how his work is in turn impacted by the work of others. The Forum is building a body of knowledge reflecting the inescapable fact that police, courts, prosecution, defense and corrections, though they pursue different and sometimes conflicting missions, share an overall interdependent responsibility to the public to shape and adminjster a coherent, recognizable system, swiftly, honestly and with justice, reflecting the highest values of the society.

The Forum invites contributions in articles, letters, check lists and practice aids and suggestions on how we can improve the service and its usefulness.

The Forum is a pilot project funded through a grant from the Governor's Commission on the Administration of Justice. In the long run, it will work because you need it and use it. Let us know how we can make it serve you better.

ALASKA CASE LAW: RIGHT TO COUNSEL

Blue v. State, 558 P2d 636 (Alaska, 1977). Benefield v. State, 559 P2d 91 (Alaska, 1977). These are companion cases arising out of the same events. The decisions provide answers to the unresolved issue for Alaska of the right of an accused to have counsel at pre-indictment lineups.

In Kirby v. Illinois, 406 U.S. 682 (1972), the United States Supreme Court had held that the Sixth Amendment to the U.S. Constitution did not require that an accused be provided with counsel at pre-indictment lineups. However, decisions by the U.S. Supreme Court on the meaning of provisions of the Federal Bill of Rights merely provide a minimum standard of conduct which state courts and local law enforcement must observe. States are free to interpret the meaning of provisions in their own constitutions which are similar to those contained in the Federal Bill of Rights in a more stringent fashion. This is what the Alaska Supreme Court did in the Blue and Benefield cases. The Court held:

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CRIMINAL CODE REVISION

The House Judiciary Committee has just completed three weeks of hearings on a substantial portion of the Proposed Alaska Revised Criminal Code. The recommendations of the Criminal Code Revision Subcommission, which was created by statute in 1976, are contained in three Tentative Drafts. A limited number of these volumes are available by contacting Phyl Booth at the Criminal Justice Center, 278-3938. The Subcommission will complete its comprehensive revision of Alaska's criminal laws by December 1, 1977.

A presentation outlining the highlights of the revision will be made at the Alaska Peace Officers Association's Crime Conference in Ketchikan on June 2, 1977. Public hearings will be held throughout the state during the summer and fall, providing an opportunity for criminal justice practitioners to comment on the Revised Code.

RIGHT TO COUNSEL...

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> " . . . a suspect who is in custody is entitled to have counsel present at a pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation." 358 P2d at 640 (footnotes omitted).

What constitutes "exigent circumstances" is not an easy question to answer. It would take more space than the limits of forum permit. However, the Criminal Justice Center has prepared a more extensive analysis of the holdings in Blue and Benefield and will provide it to interested parties upon request.

Another case of particular interest to law enforcement personnel is Scharver v. State, No. 1397, March 21, 1977. This case dealt with one of the major unresolved issues stemming from the U.S. Supreme Court's Miranda decision: Is a statement made by a suspect in custody who has once refused to answer any questions after having been informed of his Miranda rights admissible if it was made sometime after his initial refusal and after having been once again informed of his Miranda rights? The decision in Scharver seems to read that the Alaska Supreme Court is inclined to answer no.

Briefly, the case involved a suspect (Scharver) who was apprehended by a police officer's sharp shooting as the suspect fled the scene of a burglary. After the police officer who had shot Scharver (in the leg) had provided first aid to the wound, he took out his Miranda card and read Scharver his rights. Asked if he understood his rights, Scharver nodded affirmatively. When asked by the officer if he wanted to talk, Scharver said "no". All these events occurred around 6:00 – 6:30 a.m. Scharver was taken to the hospital where he underwent an operation to remove a bullet from his leg. At about 7:30 p.m. on the same day Scharver was visited in his guarded hospital room by another officer who began to advise him of his rights once again. Scharver interrupted the officer and said that he understood his rights. The officer asked him if he understood his rights and he again answered yes. He was then questioned and made a statement. This statement was excluded from evidence at trial.

The next morning at approximately 11:00 a.m., still a third officer visited Scharver. This officer testified that upon entering Scharver's room he began to inform him of his Miranda rights. Scharver interrupted to say that he knew his rights. This officer, unlike the second officer, continued to read the rights through to completion, after informing Scharver that he was obliged to do so. After completing the warning, the officer asked Scharver if he understood his rights. Scharver answered in the affirmative. The officer then asked him what happened and obtained admissions which were introduced at trial over Scharver's objection.

In deciding the case, the Court assumed, without explicitly so holding, that Scharver's rights under Miranda and Tarnef v. Alaska had been violated. However, they held that because the case was tried before a judge and because of the judge's remarks on how he had treated the admissions, that their admission into evidence was harmless error beyond a reasonable doubt. The Court affirmed Scharver's conviction. (There were other allegations of error made by Scharver which were not covered in this note.)

Because the Court assumed without so holding that Scharver's rights were violated it is difficult to guess where the error in the case lies. It may be that once a defendant has said he does not wish to speak to the police they can never again question him. It may be that the second questioning tainted the third. It may be that the evidence in the case did not support a knowing and intelligent waiver. It may be that there never was a waiver. Only subsequent decisions of the Court will resolve the issue. However, in the interim the following steps seem to be advisable for law enforcement to follow in similar cases.

First, whenever questioning of a suspect who has once refused to talk is contemplated, a considerable amount of time should be permitted to elapse before a second attempt is made.

Second, a complete reading of Miranda rights should be made. The fact that a suspect says he knows what his rights are is irrelevant. Moreover, the subsequent reading should be done in a fashion which makes it clear to the suspect that the reading is not a formality.

Third, the suspect should then be asked if he fully understands the meaning of his rights and the implications of talking.

Fourth, if he indicates that he now wishes to talk he should be asked to sign a waiver form indicating that he has been advised of his rights and that he understands them and is willing to waive them. Only after he has signed such a form should he be questioned.

These steps are only recommendations. Law enforcement personnel should contact their appropriate superior or legal advisor to seek his guidance on how to proceed.

– – Peter S. Ring

PROFESSIONAL DEVELOPMENT SESSIONS PLANNED

The Continuing Professional Development unit of the University's Criminal Justice Center is delivering a continuing series of short courses and seminars regionally, addressed to all criminal justice practitioners. The first course for this calendar year entitled "Corrections and the Community" was delivered through the Eagle River Community College in February and March. A one-day workshop, "Criminal Justice Update" delivered at Kenai Community College on April 30, 1977, attracted municipal police, state troopers, probation, court and bar personnel from Seward, Homer, Soldotna and Kenai. Topics included: Justice on Trial – Alaska's Criminal Justice System; The Role of Police – Contemporary Literature and Research; Search and Seizure; Evaluation of Police Organizations – Determination of Personnel and Organizational Needs and New Approaches; Alaska's Criminal Code Revision – A Progress Report; and a discussion of Current Problems and Prospects in Alaskan Criminal Justice.

Upcoming productions will include delivery of a series of two-day seminars the third week in May on the Juvenile Justice System in each of three cities; Juneau, Fairbanks and Anchorage, and a series of two-day seminars to be produced in June in each of four locations; Kenai, Anchorage, Fairbanks and Juneau, entitled "Executive Management in the Criminal Justice System". The former seminar will be conducted through the cooperation and participation of the National Council of Juvenile Court Judges, based at the University of Ne-

SEMINARS ...

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vada, Reno.

The third week in July the second block of the continuing series on the juvenile justice system will be delivered, in August a series of seminars for Ketchikan, Bethel and Nome will be delivered on "Alcohol and Addiction – Problems for Criminal Justice", and in September a statewide conference is tentatively scheduled on "The State of Criminal Justice". Other topics to be presented during the remainder of the year will include new developments in criminal law, sexual assault, law enforcement bush orientation, line and staff supervision and white collar crime.

These courses are the result of Center surveys statewide, the Standards and Goals project, and the State Criminal Justice Plan for 1977, which resulted in the identification of priority target topics of greatest concern to justice professionals. There is no charge for participating in these seminars and short courses (other than for those who elect to receive university credit for which a small fee will be required). It is hoped that agency program directors will encourage the widest possible participation by their staff personnel. Court, police, troopers, corrections and bar personnel will participate as well as peripheral justice service agencies (local, state and federal) and interested businessmen and citizens.

The first objective of these courses is to broaden the professional level of competency within the subject matter area for those who participate. The second objective is to create an educational environment which will enhance lines of communication across justice agency lines so that the public benefits from a more truly systemic criminal justice effort.

All courses will be delivered regionally in order to bring the programs as near as possible to the majority of criminal justice practitioners, and all courses are specifically aimed at interagency involvement.

Announcements are being sent out to all criminal justice agencies in each region prior to each program, detailing the program and schedule of the production. Participants will, if they wish, be able to earn at least one credit for participating in each of the two to three-day seminars. Contact the Criminal Justice Center for additional information.

SEARCH AND SEIZURE ...A BRIEF HISTORY

This is Part I in a series by Peter Ring designed to give working knowledge of the basic issues surrounding search and seizure in Alaska today.

In its historical sense the law of search and seizure, which has developed out of the Fourth Amendment has been designed to insure that the activities of the government which led the framers of the first ten amendments to the Constitution to break from England in 1776 were not repeated by the government they were creating. In colonial times Writs of Assistance could be issued by any court to search any house without any showing of probable cause. They were used repressively by the King's officers and the framers of our government were determined that they would not be repeated in the future.

Early cases in which the Supreme Court of the United States was called upon to interpret the meaning of the Fourth Amendment, such as Boyd v. United States, 116 U.S. 616 (1886) and Weeks v. United States, 232 U.S. 383 (1914), provide ample evidence of the reasons supporting the adoption of the Fourth Amendment. In Boyd the Court noted:

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgement." 116 U.S. at 630.

And, in Weeks the Court observed that:

> "[The Fourth Amendment] took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things those safeguards which have grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under the authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers used in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies." 232 U.S. at 390.

The holding of the Court in Weeks established, at the Federal level, the exclusionary rule which required that evidence obtained in violation of Fourth Amendment rights be inadmissible as evidence against the individual whose rights were violated. But the holding only applied to actions by Federal law enforcement officials, as the Supreme Court noted in Wolf v. Colorado, 338 U.S. 25 (1949):

> "In Weeks v. United States, supra, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. *** When we find that in fact most of the English-speaking world does not regard as vital to such protection (against unreasonable searches and seizures) the exclusion of the evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient to the right.*** When we find that in

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> fact most of the English-speaking world does not regard as vital to such protection (against unreasonable searches and seizures) the exclusion of the evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient to the right.*** Granting that in practice the exclusion of the evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimum standards assured by the Due Process Clause a State's reliance upon other methods, which if consistently enforced, may be equally effective." 338 U.S. at 28-31.

Twelve years later, however, the Supreme Court re-addressed the issue of whether to apply the exclusionary rule to the States in Mapp v. Ohio, 367 U.S. 643 (1961). After reviewing the history behind the Fourth Amendment, what had happened in the States since the decision in Wolf v. Colorado, supra, the Court concluded that "other methods" had not been "consistently applied" and that the application of the exclusionary rule to the States was the only effective means of deterring unlawful police conduct. It rejected the argument that such a position resulted in the criminal going free, noting that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. at 659.

Thus, it is settled -- for the moment -- that evidence obtained in violation of an individual's Fourth Amendment rights can not be used as evidence against him in subsequent criminal proceedings. Further, because it is settled that "[o]nce it is decided that a Bill of Rights guarantee is fundamental ***, the same Constitutional standards apply against both the State and Federal Governments." Benton v. Maryland, 395 U.S. 784, 795 (1969), the standards of reasonableness and probable cause established in Federal cases also apply, as a minimum, to State cases. Ker v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964).

It is for this reason that such heavy reliance on Federal cases is made in subsequent sections of this document. Local law enforcement officials, however, can ill afford to rely solely on an understanding of what the Supreme Court has said in the area of search and seizure in making decisions in this critical area.

Great care should be taken to understand that the Federal standards serve as minimum standards of conduct for law enforcement officers. As the Alaska Supreme Court noted in Ellison v. State, 383 P2d 716 (Alaska 1963):

> "Article I, section 14 of the Alaska Constitution is the state counterpart of the fourth amendment and contains an even broader guarantee against unreasonable searches and seizures, for it begins: 'The right of the people to be secure in their persons, houses and other property, papers and effects ***.' " (Emphasis in the original) 383 P2d at 718.

And in McCoy v. State, 491 P2d 127, (Alaska 1971) the Court made the point quite clear as follows:

> "While we are not bound by the United States Supreme Court's interpretations of the Fourth Amendment in expounding the corresponding section fo the Alaska Constitution's Declaration of Rights, article I, section 14, we do not find this case to be an appropriate one to expand those rights in Alaska beyond their federal counterparts." 491 P2d at 139, (footnote omitted).

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