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The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801-1182

Re: Senate Bill 252
Constitutional Issues

Chair French:

Thank you for the opportunity to submit written testimony regarding Senate Bill 252. The American Civil Liberties Union of Alaska (“ACLU) represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation.

Section 4 Unconstitutional Restrictions on Pre-Trial Release

Section Four of the Bill proposes a new section AS 12.20.011 with a myriad of constitutional infirmities.

The Alaska Constitution states that “an accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great.” Alaska Const., Art. I, Sec. 11. Subsection (d) of Section 4 of the Bill, however, proposes that for a wide group of defendants the court should presume, subject to rebuttal by the defendant, that no amount of bail and no conditions of release will ensure the appearance of the defendant and protect the victim and the public. The language used for the presumption, that “no condition or combination of conditions will reasonably assure” public safety or the defendant’s appearance, is a phrase used to describe the

basis by which a judge can deny bail entirely to a defendant. *See, e.g.*, 18 U.S.C.A. § 3142(e)(1); Pa. Const. Art. 1, § 14.

While the proposed new statutory language does not specifically state that those who cannot be safely released shall be held without bail, the language leaves no clear alternative. Thus it proposes to impermissibly negate the dictates of the Alaska Constitution and to deny bail entirely to many defendants, while imposing on them the burden to refute the denial of bail. The categories of defendants to whom this denial would apply includes those arrested for class A or unclassified felonies, any sexual felony, anyone previously convicted of a felony except if the complete term (including any parole or probation term) had terminated more than five years ago, anyone also under charge in another case, anyone arrested for a domestic violence charge who had previously been convicted of a domestic violence charge within the last five years, or anyone arrested “in connection with” an allegation of commission of an offense outside the state or being a fugitive from justice in another state.

The Alaska Supreme Court has clearly and unequivocally held that the outright denial of bail violates the Alaska Constitution. *Martin v. State*, 517 P.2d 1389 (Alaska 1974) (holding that the refusal of bail to a person arrested on a charge of forgery who had three outstanding cases of forgery against him violated both Alaska statutes and Article I, Section 11 of the Alaska Constitution). In fact, the *Martin* court discussed a very similar argument by the Department of Law in these terms:

“The State urges that these amendments [to the bail statutes] permit the detention of defendants without bail when the judicial officer determines that the defendant ‘will pose a danger to other persons and the community.’ . . . The legislature could not, of course, infringe upon the constitutional right of bail. . . . [A] legislative enactment expressly permitting the detention of persons without right to bail would be unconstitutional unless a constitutional amendment were adopted.” *Martin*, 517 P.2d at 1396-97 (emphasis added).

Should the plain language of Article I, Section 11 be insufficient to inform the State that pretrial bail is a right not subject revocation by the legislature or the courts, the history of the enactment of the bail clauses to the Alaska Constitution should make clear that any and all defendants should receive a bail hearing. Victor Fischer, delegate to the Constitutional Convention, commented during the convention that the phrase “when the proof is evident and the presumption great” had been enacted in Alaska, as in other states, to show that even defendants in capital offenses should generally be eligible for bail: “The actual determination of when a person is released on bail, if charged with a capital offense, is still up to the judge.” 2 Proceedings of the Alaska Constitutional Convention 1344-45 (Jan. 6, 1956) *cited in State v. Wassillie*, 606 P.2d 1279, 1282 (Alaska 1980).

If the Constitutional Convention drafted Article I, Section 11 with the intent that even those charged with capital cases should receive a bail hearing, then the Governor’s bill that defendants

charged with felonies should be presumed not to be eligible for bail must surely violate the terms of the bail clauses of the Alaska Constitution. The proposed amendments in Section 4 of H.B. 324 do not pass constitutional review, as they contradict both the language of Article I, Section 11, which vests all defendants except those in capital cases with the right to bail, and the Supreme Court's analysis in *Martin*.

Even were a finding that "no condition or combination of conditions" support release somehow constitutional, the burden-shifting provision of the statute is inappropriate in the context of a bail hearing conducted within hours of arrest. These hearings may be conducted in the absence of counsel; even where the defendant obtains counsel within a few hours of arrest, defense counsel will not likely be capable of carrying the burden to show that the defendant is not a danger and not likely to fail to appear. *See Stack v. Boyle*, 342 U.S. 1, 11 (1951) (stating that an initial bail hearing "must be done in haste – the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves," Jackson, J., concurring). Bearing that burden would require witnesses and documentation on the defense side, resources likely impossible for even a privately retained counsel.

The ACLU of Alaska requests that this Committee delete or appropriately revise these clearly unconstitutional provisions in SB 252.

Section 4 Improper Proposed Expansion of Court Authority

The primary purpose of bail is to ensure the appearance of the accused. A judge may consider public safety or the safety of individuals in setting conditions for release. However, beyond specific findings relating to an individual defendant and specific reasons for concern that he may fail to appear or endanger others, a judge does not have more interest in supervising an arrestee, who is presumed innocent, than he does over a member of the general public. *U.S. v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

Thus, certain provision in Section Four, subsection (b) of S.B. 252 violate the constitutional protections regarding granting of bail. Subsection (b)(9) permitting a judge to "require the person to maintain employment, or if unemployed, actively seek employment" has no bearing on either the likelihood of the individual to appear in court nor on any danger posed to the victim or the public. Pretrial supervision is not a period of "pre-probation" when the State may broadly supervise an accused. The State's legitimate interests are limited to ensuring public safety and ensuring the appearance of the accused. These kinds of provisions infringe on the right of the defendant to be considered an innocent person. Excessive bail conditions, unjustified by traditional state interests, resemble probationary supervision and thus constitute unconstitutional punishment prior to adjudication.

While other provisions in subsection (b) could have conceivable use in specific individual cases, the long list of bail conditions set forth essentially invites judges to overuse them. Prohibitions

on the use of alcohol and entry to licensed premises, for instance, are currently imposed excessively and frequently without the individualized inquiry required in *Scott*. Overuse of alcohol-related restrictions for Alaska Native defendants has been a basis of criticism for ethnic disparities in the criminal justice system. Instead of minimizing these existing disparities, S.B. 252 would institutionalize them.

Another area of particular concern in the enumerated bail conditions are two provisions relating to health care, subsections (b)(15) and (b)(16) which purport to permit a judge to require a defendant to adhere to courses of psychiatric and medical treatment and to compel a defendant to take prescription medications. The right to bodily privacy is an integral part of the right to privacy under the Alaska Constitution. Allowing the criminal justice system to shortcut the elaborate existing framework by which a person may be committed to psychiatric care would present serious constitutional problems. For instance, in a commitment proceeding, the individual has a right to notice of what treatment specifically has been proposed and then may line up appropriate experts to contest the treatment plan. Under this statute, the defendant has no notice of such a request, no opportunity to bring appropriate experts to court, and thus no way to contest whether the proposed plan of treatment is proper or not. The bill also invites an infringement of the right to privacy in one's medical information and records, since a judge must naturally inquire into the current medical and psychiatric treatment of the accused in order to ensure that the orders are carried out. In order to make sense, the provisions relating to medical care presuppose exposure of the accused's sensitive medical information in open court.

Again, given these important constitutional interests, the ACLU recommends the Committee delete or revise Section 4, subsection (b) of SB 252.

Section One's Proposed Addition of AS Sec. 11.56.730 Offends the Due Process Clause of the Alaska Constitution

Section One of S.B. 252 proposes creation of the offense of "failure to appear," and requires the state to show no mental state other than the knowledge that one should have been in court. Thus, a person could be convicted of a serious felony for inadvertently or accidentally failing to appear.

Generally, the criminal law requires "not only the doing of some act by the person to be held liable, but also the existence of a guilty mind *during the commission of the act.*" *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969) (emphasis added). The Alaska courts have held that, for major felonies, a mental state requirement is mandatory, while some *minor* offenses, such as hunting or public health related offenses may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see also State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996). In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has no provision for mental state. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484

P.2d 677 (Alaska 1971). However, given the explicit statement that no mental state is required in Section One, the courts would not be able to avoid the constitutional conflict and must rule the statute unconstitutional.

On a policy basis, the legislature should consider the impact of S.B. 252 on the prison population of the state. The ACLU of Alaska's recent review of the prison system showed that over the past seven years the population of prisoners in custody for most types of crimes (e.g., property offenses, offenses against the person, sex offenses) has remained largely stable. The expansion of the prison population from 2002 to 2008 was due exclusively to the *tripling* of the number of prisoners incarcerated for two types of offenses: for violations of probation and parole and for public order and administration offenses. Public order and administration offenses include victimless offenses relating to criminal justice administration, and the largest group of these offenders consists of those serving time for failure to appear in court. The state can hardly argue in the face of a tripling of the number of offenders incarcerated on those types of offenses that the judiciary has been too lenient on those who fail to appear. Passing this bill will ensure an even greater expansion in the Alaska prison population as a result of more prosecutions and more convictions for failures to appear.

The legislature should also take note that the equivalent federal rule, as well as many state rules, requires a showing that the defendant "deliberately" or "willfully" missed court. *Hutchison v. State*, 27 P.3d 774, 777-79 (Alaska App. 2001) (noting that the federal bail statute, 18 U.S.C. § 3150, as well as Connecticut, California, and Illinois statutes, require a showing of "willful" failure to appear). Given that the federal court system and several large state court systems do not find themselves facing large numbers of non-appearing defendants, even when only "willful" failures to appear are prosecuted, the current, stricter Alaska standard of "knowing" failure to appear should adequately ensure appearance of defendants.

The legislature should also consider the potential negative effects of this policy on judicial efficiency. As the law stands now, a defendant who misses court through neglect or confusion has a strong interest in appearing in court immediately upon realizing the mistake to have his bench warrant lifted, since that response will tend to show an innocent mental state and a sincere desire to participate in the court process. Under the proposed bill, a defendant who misses court through neglect or confusion will face the same penalty for turning himself in the next day as if he disappears for the next six months. Creating a stiffer penalty and eliminating any meaningful defense will encourage those who do miss court to absent themselves from court indefinitely. No policy or penalty is ever going to prevent neglect, mistake, and confusion. A flexible, and in some cases forgiving, policy will serve judicial efficiency best.

Problematic Extension of Time for Bail Hearing

Section Three proposes to extend the window of detention prior to a bail hearing to 48 hours. Under current Alaska law, a defendant must be brought before a judicial officer within 24 hours.

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975).

After a standard of 24 hours was adopted by most states and most circuits, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions. In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term under the case, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska has guaranteed a 24-hour window for initial appearances for *18 years* since the *Riverside* decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit “unreasonable delay.” The Alaska courts have not yet had a chance to rule on the dimensions of the “speedy trial” provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state’s success over the last 18 years in providing a hearing within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Unconstitutional Imposition of Warrantless Search

Section Four’s proposed addition of A.S. Sex.12.30.016 seeks to allow unconstitutional warrantless searches. Subsections (b)(2). (c)(2). Compared to probationers and parolees, the rights of pretrial defendants against unreasonable search and seizure are strong.

While comparatively little case law exists in Alaska courts, a recent Ninth Circuit case strongly endorsed the rights of pretrial defendants against warrantless searches. In *United States v. Scott*, the defendant had been arrested on drug charges and his release was conditioned on his “consent” to suspicionless search of his home and random drug tests. 450 F.3d 863 (9th Cir. 2006). After a positive urine test for methamphetamine, officers searched his home and found a shotgun. *Id.* at 866. The Ninth Circuit held that his consent was not valid, as he would have been placed in custody if he had declined. *Id.* at 870. Most importantly, the court said: “if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. The government cannot, as it is

trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required.” *Id.* at 874.

Creating a blanket rule that a court may impose bail conditions that violate rights against unreasonable search without requiring any kind of individualized finding would violate the rule enunciated in *Scott*. A provision that states that such conditions may only be imposed after a written finding of the reasons particular to the individual defendant as to why such bail conditions are necessary may render this section constitutional.

Overly Broad Imposition of Third Party Custodians

Section 5 of the Bill unconstitutionally proposes to limit a pre-trial defendant’s liberty. A pretrial defendant enjoys a right to be considered innocent; he also enjoys a default right to his liberty. *Stack v. Boyle*, 342 U.S. 1. (“This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”). No showing of proof, no adversarial proceeding is required for the filing of a complaint. As such, the court should require a showing from the prosecution to impose a condition of bail on the accused. Yet the third-party custodian provision imposes no restraint on the court’s authority.

Contrast, for instance, the language from Section 5, “a judicial officer may appoint a third-party custodian if the officer finds that the appointment will, singly or in combination with other conditions, reasonably assure the person’s appearance and the safety of the victim, other persons, and the community” to the language from Section 4, “the officer shall impose *the least restrictive condition* or conditions that will reasonably assure the person’s appearance.” The term “least restrictive,” or any sense that a bail condition should be “necessary” rather than simply the court’s preference, is missing from Section 5.

Arguably, the imposition of a third party custodian requirement would enhance the likelihood of *any* defendant’s appearance in court. However, the courts are not free to impose any quantity of bail they like or to impose any conditions that seem like a good idea. Such conditions may be imposed only when found to be necessary.

The legislature should note that in a recent Alaska Judicial Council survey on the criminal justice system, excessive and arbitrary use of the third-party custodian requirement was one of the most frequent complaints. The original purpose of the third-party requirement – to ensure that impoverished defendants incapable of making cash bail could be released in a manner that assured community safety and court appearance – has been almost totally lost. A third-party custodian is now often imposed as a matter of course, rather than after specific findings, and in addition to, not in lieu of, cash bail. To prevent more abuse, a court should be required to make specific, written findings as to why a third-party custodian is necessary.

Conclusion

We hope that the Judiciary Committee will note these are just some of the constitutional infirmities in Senate Bill 252.

While the ACLU of Alaska supports appropriate revisions to the criminal justice system to address the special circumstances of our State, and evolving needs, this Bill is not well-crafted to vindicate the state's purposes.

The sections we have identified present substantial Constitutional problems and will likely entangle the state in litigation, should S.B. 252 pass as currently written.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska