2010 Alaska Bar Convention

Alaska Appellate Update

Thursday, April 29, 2010

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Anchorage, Alaska

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Alaska Bar Association

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FACULTY

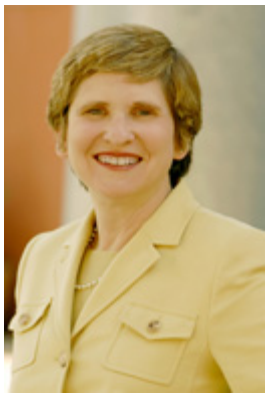
Erwin Chemerinsky, Dean and Distinguished Professor of Law, University of California, Irvine, School of Law. Prior to assuming this position in July 2008, was the Alston & Bird Professor of Law and Political Science, Duke University. Joined the Duke faculty in July 2004 after 21 years at the University of Southern California Law School, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. Before that he was a professor at DePaul College of Law from 1980-83. Practiced law as a trial attorney, United States Department of Justice, and at Dobrovir, Oakes & Gebhardt in Washington, D.C. Received a B.S. from Northwestern University and a J.D. from Harvard Law School.

Author of six books and over 100 law review articles that have appeared in journals such as the Harvard Law Review, Michigan Law Review, University of Pennsylvania Law Review, Stanford Law Review and Yale Law Journal. Writes a regular column on the Supreme Court for California Lawyer, Los Angeles Daily Journal, and Trial Magazine, and is a frequent contributor to newspapers and other magazines. Regularly serves as a commentator on legal issues for national and local media.

In April 2005, was named by Legal Affairs as one of "the top 20 legal thinkers in America." Named by the Daily Journal in 2008 and 2009 (and many prior years) as one of the 100 most influential lawyers in California. In 2006, received the Duke University Scholar-Teacher of the Year Award. Has received many awards from educational, public interest, and civic organizations.

Frequently argues appellate cases, including in the United States Supreme Court and the United States Courts of Appeals. Testified many times before congressional and state legislative committees.

Elected by the voters in April 1997 to serve a two year term as a member of the Elected Los Angeles Charter Reform Commission. Served as Chair of the Commission which proposed a new Charter for the City which was adopted by the voters in June 1999. Also served as a member of the Governor's Task Force on Diversity in 1999-2000. In September 2000, released a report on the Los Angeles Police Department and the Rampart Scandal, which was prepared at the request of the Los Angeles Police Protective League. Served as Chair of the Mayor's Blue Ribbon Commission on City Contracting, which issued its report in February 2005.



Laurie L. Levenson is Professor of Law and the David W. Burcham Chair in Ethical Advocacy at Loyola Law School where she teaches criminal law, criminal procedure, ethics, anti-terrorism, and evidence. She served as Loyola's Associate Dean for Academic Affairs from 1996-1999. In addition to her teaching responsibilities, Professor Levenson is also the Director of the Loyola Center for Ethical Advocacy. Professor Levenson was the 2003 recipient of Professor of the Year from both Loyola Law School and the Federal Judicial Center.

Prior to joining the Loyola Law School faculty in 1989, Professor Levenson served for eight years as an Assistant United States Attorney in Los Angeles. While a federal prosecutor, Professor Levenson tried a wide variety of federal criminal cases, including violent crimes, narcotics offenses, white collar crimes, immigration and public corruption cases. She served as Chief of the Training Section and Chief of the Criminal Appellate Section of the U.S. Attorney's Office. In 1988, she received the Attorney General's Director's Award for Superior Performance. Additionally, she received commendations from the FBI, IRS, U.S. Postal Service, and DEA.

Professor Levenson attended law school at UCLA School of Law and received her undergraduate degree from Stanford University. In law school, she was the Chief Article Editor of the Law Review. After graduation, she clerked for the Honorable Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit.

Professor Levenson is the author of numerous books and articles, including: *California Criminal Procedure* (2010); California Criminal Law (2010), *Handbook on the Federal Rules of Criminal Procedure* (2010; *Roadmap of Criminal Law* (2008); *Police Corruption and New Models for Reform,* 35 Suffolk L. Rev. 1 (2001); *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors (*1999); *Ethics of Being a Legal Commentator,* 69 So. Cal. L. Rev. 1303 (1996); *The Future of Civil Rights Prosecutions: The Lessons of the Rodney King Trial,* 41 U.C.L.A. L. Rev. 509 (1994); and *Media Madness or Civics 101: The Lessons of "The Trial of the Century,"* 26 U.W.L.A. 57 (1995).

Professor Levenson has served as a volunteer counsel for the "Webster Commission" and as a Special Master for the Los Angeles Superior Court and United States District Court. She has served as a member of the Los Angeles County Bar Association Judicial Appointments Committee and Judiciary Committee. She was a member of two Rampart Investigation Commissions.

Professor Levenson has provided legal commentary on several high profile cases while working as a columnist for the Los Angeles Times and an expert

legal consultant for CBS, NBC, ABC, CNN and NPR. She also regularly lectures on legal ethics issues. Professor Levenson currently serves on a working group studying the ABA Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Standards.

She is an active member of the Los Angeles community. Professor Levenson has served on the Board of Directors for Bet Tzedek Legal Services, Levitt & Quinn Family Services, and the UCLA Hillel Advisory Committee. Professor Levenson lectures regularly throughout the country and internationally for the Federal Judicial Center, National Judicial College, international bar associations, bar review courses, community groups and legal societies.

Alaska Constitutional Cases

Erwin Chemerinsky

Alaska Conference
April 29, 2010

Erwin Chemerinsky
Dean and Distinguished Professor of Law
University of California, Irvine, School of Law

I. Civil procedure

A. Pro se litigants

Adkins v. Stansel, 204 P.3d 1031 (Alaska 2009). A prisoner who filed a pro se complaint alleging that a warden intentionally violated his constitutional right to rehabilitation should be given the opportunity to get past the pleading stage. A pro se litigant is held to a lower pleading standard than a lawyer.

Alexander v. State Department of Corrections, 221 P.3d 321 (Alaska 2009). A district court has a requirement to tell pro se litigants as to how to proceed and the failure to do so is an abuse of discretion. The prisoner was entitled to prejudgment interest and reimbursement of litigation costs.

B. Standing

Keller v. French, 205 P.3d 299 (Alaska 2009). Plaintiffs do not have standing to file suit under the fair and just treatment clause of the Alaska Constitution where there are other potential litigants who are more directly affected by the case and when plaintiffs do not have a sufficient personal stake in the outcome.

C. Bar on abstract adjudication

State v. ACLU of Alaska, 204 P.3d 364 (Alaska 2009). The bar on abstract litigation precluded the Court from ruling on the constitutionality of a statute when the risk of offending the co-equal branches of government outweighed the need for a decision. The challenge was to a state statute that

criminalized possession of less than one ounce of marijuana. The Court stressed that such possession violated federal law and that there was little evidence that law enforcement officials were pursuing those who possessed and used only small amounts of marijuana.

II. Due process

A. Mentally ill patients

E. P. v. Alaska Psychiatric Institute, 205 P.3d 1101 (Alaska 2009). When a court finds that a mentally ill person is a danger to himself or others, a court does not need to find that treatment will improve his condition before ordering involuntary commitment.

Bigley v. Alaska Psychiatric Institute, 208 P.3d 168 (Alaska 2009). A patient's due process rights were violated when he did not receive adequate notice of the State's petition for involuntary administration of psychotropic drugs and he was denied access to his medical chart.

B. DUI statute

Valentine v. State, 215 P.3d 319 (Alaska 2009). Amendment to DUI statute, which excluded delayed-absorption evidence to challenged prosection under the "under the influence" part of the statute, violated due process. A defendant's due process rights are violated when legislation significantly affects the ability to present a defense.

C. Judicial impartiality

DeNardo v. Maasen, 200 P.3d 305 (Alaska 2009). So long as a judge reasonably believes that he or she can be fair and impartial, the judge does not have to recuse himself or herself, even if one of the parties is suing the judge.

III. Individual liberties

Huffman v. State, 204 P.3d 339 (Alaska 2009). An individual has a right to control medical treatment for himself and his children, which is a fundamental liberty and privacy right protected by the Alaska Constitution

and cannot be infringed except upon a showing of a compelling state interest and no less restrictive means to accomplish the interest.

Ferrick v. State, 217 P.3d 418 (Alaska Ct. App. 2009). Alaska's child pornography statute is not unconstitutionally overbroad because it prohibiting explicit images of virtual children rather and by allowing conviction who thought that they had pictures of real children, but only had pictures of virtual children.

Warden v. State, 213 P.3d 144 (Alaska Ct. App. 2009). A defendant cannot be convicted of knowing possession of child pornography simply for having images stored in his computer's cache.

IV. Criminal cases

A. Fourth Amendment

Beltz v. State, 221 P.3d 328 (Alaska 2009). Police's reasonable suspicion of methamphetatime production was sufficeint to justify a warrantless search of suspect's garbage even though there was some reasonable expectation of privacy in garbage set out for collection.

State v. Miller, 207 P.3d 541 (Alaska 2009). A police officer's reasonable suspection was sufficient to conduct an investigative stop of a car when the factors of a balancing test were met. The balancing test considers: (1) the seriousness of the suspected crime; (2) the immediacy of the investigation; (3) the strength of the officer's reasonable suspicion; and (4) the intrusiveness of the stop.

Majaev v. State, 223 P.3d 629 (Alaska 2010). A law enforcement officer's hand motion for defendant to return to him after defendant started to drive away constituted a seizure under the state constitution.

Brand v. Alaska, 204 P.3d 383 (Alaska Ct. App. 2009). Police officers may not conduct a protective sweep of a residence unless they have a reasonable belief that there are other individuals inside the home who might put him in danger.

State v. Avery, 211 P.3d 1154 (Alaska Ct. App. 2009). An inmate has no reasonable expectation of privacy in phone calls made from a jail and the contents of such phone calls are admissible as evidence.

Boles v. State, 201 P.3d 454 (Alaska Ct. App. 2009). It was improper for a sentencing court to require warrantless searches for weapons as a condition for probation for the charge of attended second-degree sexual abuse of a minor when no weapon was involved.

Dale v. State, 209 P.3d 1038 (Alaska Ct. App. 2009). Exigent circumstances exist as a matter of law and police are justified in conducting a blood test without a warrant when a motor vehicle accident has caused death or serious physical injury and police have probable cause to believe that the driver was intoxicated.

Skjervem v. State, 215 P.3d 1101 (Alaska Ct. App. 2009). Law enforcement must have a separate, legally sufficient reason to continue to detain a defendant after suspicions that led to an initial investigative stop have been resolved.

B. Privilege against self-incrimination

Rockwell v. State, 215 P.3d 369 (Alaska Ct. App. 2009). Improperly admitting as evidence a defendant's inculpatory statements is harmless error if the government can demonstrate that the statements did not contribute to the verdict obtained.

Kalmakoff v. State, 199 P.3d 1188 (Alaska Ct. App. 2009). A statement is admissible even after a defendant's *Miranda* rights are violated if there is a sufficient break in the stream of events between the violation and a subsequent statement.

C. Denial of a speedy trial

Brown v. State, 221 P.3d 20 (Alaska Ct. App. 2009). A defendant's conviction was overturned because his right to a speedy trial under Alaska Criminal Rule 45 was violated. His trial was set for a date more than 120 non-excludable days after the time he was charged.

D. Change of venue

Lestenkof v. State, ___ P.3d ___, 2010 WL 1633042 (Alaska Ct. App. April 23, 2010). The superior court acted properly in transferring venue after making a reasonable, diligent attempt to seat a jury in the small community of Saint Paul before moving the trial to Dillingham.

E. Confrontation

Clark v. State, 199 P.3d 1203 (Alaska Ct. App. 2009). A victim's prior testimony at an evidentiary hearing could be used at trial without violating the confrontation clause, even though the victim refused to testify at trial and refused to be cross-examined.

Vann v. State, ___ P.3d ___, 2010 WL 1635834 (Alaska Ct. App. April 23, 2010). Testimony by laboratory technician at State Crime Lab about results from testing of DNA samples conducted by another Crime Lab technician did not violate Confrontation Clause in sexual assault prosecution. Rule allowing admission of expert testimony based in part on test data obtained from other people, provided that expert is not a mere conduit for an absent witness's analysis but offers an independent analysis, is consistent with Confrontation Clause if, and only if, rule is applied with due regard to concerns that underlie right of confrontation.

F. Separate offenses?

Cronce v. State, 216 P.3d 568 (Alaska Ct. App. 2009). Two separate assault convictions arising from a single incident are merged into a single punishable offense when the record is ambiguous.

G. Exclusions from the courtroom

Douglas v. Alaska, 214 P.3d 312 (Alaska 2009). A trial court does not abuse its discretion by excluding a disruptive defendant from the courtroom, by refusing to allow a defendant to reclaim the right to be present at a trial to testify in person whenever he promises to behave, and requiring a disruptive defendant to testify by speaker phone.