IN THE SUPREME COURT FOR THE STATE OF ALASKA

KELLEY MAVES, Appellant, vs. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, Appellee,	)	S. Ct. Nos. S-17492

Prior Appeal No. S-16460/16470
Trial Ct. No. 3AN-15-08842CI

ADMINISTRATIVE APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT, AT ANCHORAGE
THE HONORABLE ERIC AARSETH, JUDGE

BRIEF OF APPELLANT

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Filed in the Supreme Court of the State of Alaska, this 25th day of November, 2019.

Meredith Montgomery, Clerk

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Deputy Clerk

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TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Administrate Regulation
13 AAC 09.060

Correction of information

(a) Upon receiving a completed department form from a person asking the department to review or correct information maintained in the registry about that person, the department will respond in writing within 30 days. If the request is denied, the department will state the reasons for the decision.

(b) An adverse response under (a) of this section may be appealed to the commissioner within 30 days after the person receives the response. The appeal must be in writing and must set out the reasons for the appeal. The commissioner will respond in writing within 45 days after receipt of the appeal.

(c) Repealed 11/3/99.

(d) Repealed 4/15/2009.

Alaska Administrative Code
13 AAC 09.900(2) (1995)

(2) "conviction" means that an adult, or a juvenile tried as an adult under AS 47.10 or a similar procedure in another jurisdiction, has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, whether or not the judgment was thereafter set aside under AS 12.55.085 or a similar procedure in another jurisdiction, or was the subject of a pardon or other executive clemency, but does not include a judgment that has been reversed or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief under the Alaska Rules of Criminal Procedure or similar procedures in another jurisdiction;

Alaska Statute
Section 09.60.010(c)(2)

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

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TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Statute
Section 09.60.010(c)(2), cont:

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

Alaska Statute
Section 12.55.078 (2017)

Suspending entry of judgment.

(a) Except as provided in (f) of this section, if a person is found guilty or pleads guilty to a crime, the court may, with the consent of the defendant and the prosecution and without imposing or entering a judgment of guilt, defer further proceedings and place the person on probation. The period of probation may not exceed the applicable terms set out in AS 12.55.090(c). The court may not impose a sentence of imprisonment under this subsection.

(b) The court shall impose conditions of probation for a person on probation as provided in (a) of this section, which may include that the person

(1) abide by all local, state, and federal laws;

(2) not leave the state without prior consent of the court;

(3) pay restitution as ordered by the court; and

(4) obey any other conditions of probation set by the court.

(c) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The

Alaska Statute
Section 12.55.078 (2017), cont:

court may revoke and terminate the probation if the court finds that the person placed on probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(d) If the court finds that the person has successfully completed probation, the court shall, at the end of the probationary period set by the court, or at any time after the expiration of one year from the date the original probation was imposed, discharge the person and dismiss the proceedings against the person. A person who is discharged under this subsection is not convicted of a crime.

(e) If the court finds that the person has violated the conditions of probation ordered by the court, the court may revoke and terminate the person's probation, enter judgment on the person's previous plea or finding of guilt, and pronounce sentence at any time within the maximum probation period authorized by this section.

(f) The court may not suspend the imposition or entry of judgment and may not defer prosecution under this section of a person who

(1) is charged with a violation of AS 11.41.100 – 11.41.220, 11.41.260 – 11.41.320, 11.41.360 – 11.41.370, 11.41.410 – 11.41.530, AS 11.46.400, AS 11.61.125 – 11.61.128, or AS 11.66.110 – 11.66.135;

(2) uses a firearm in the commission of the offense for which the person is charged;

(3) has previously been granted a suspension of judgment under this section or a similar statute in another jurisdiction, unless the court enters written findings that by clear and convincing evidence the person's prospects for rehabilitation are high and suspending

TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Statute
Section 12.55.078 (2017), cont:

judgment under this section adequately protects the victim of the offense, if any, and the community;

(4) is charged with a violation of AS 11.41.230, 11.41.250, or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if

(A) the charges were dismissed under this section;

(B) the conviction has been set aside under AS 12.55.085; or

(C) the charge or conviction was dismissed or set aside under an equivalent provision of the laws of another jurisdiction; or

(5) is charged with a crime involving domestic violence, as defined in AS 18.66.990.

Alaska Statute
Section 12.55.085

Suspending imposition of sentence.

(a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and

Alaska Statute
Section 12.55.085, cont:

bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 – 11.41.220, 11.41.260 – 11.41.320, 11.41.360 – 11.41.370, 11.41.410 – 11.41.530, AS 11.46.400, AS 11.61.125 – 11.61.128, or AS 11.66.110 – 11.66.135;

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TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Statute
Section 12.55.085, cont:

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 – 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

Alaska Statute
Section 12.63.020(b) (1994)

(b) The department shall adopt, by regulation, procedures to notify a sex offender who, on the registration form under AS 12.63.010, lists a conviction for a sex offense that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's duty under (a) of this section for that sex offense. (§ 4 ch 41 SLA 1994)

Alaska Statute
Section 12.63.100(6)(c)

(6) "sex offense" means

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Statute
Section 12.63.100(6)(c), cont:

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 – 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2)(B) if the person who was induced or caused to engage in prostitution was under 20 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; or

(ix) AS 11.66.100(a)(2) if the offender is subject to punishment under AS 11.66.100(e);

Alaska Statute
Section 18.65.087(a) (1994)

Central registry of sex offenders.

(a) The Department of Public Safety shall maintain a central registry of sex offenders required to register under AS 12.63.010 and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders.

TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Alaska Statute
Section 18.65.087(d) (1994), cont:

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide to the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender or child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

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Alaska Statute
Section 44.62.020

Authority to adopt, administer, or enforce regulations.

Except for the authority conferred on the lieutenant governor in AS 44.62.130 – 44.62.170, AS 44.62.010 – 44.62.319 do not confer authority on or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Alaska Statute
Section 44.62.030

Consistency between regulation and statute.

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

Colo. Rev. Stat.
§ 16-7-403

(1) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his attorney of record and the district attorney, to continue the case for a period not to exceed four years from the date of entry of a plea to a felony or two years from the date of entry of a plea to a misdemeanor, or petty offense, or traffic offense for the purpose of entering judgment and sentence upon such plea of guilty; except that such period may be extended for an additional time up to one hundred eighty days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department.

Colo. Rev. Stat.
§ 16-7-403, Cont.

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, is authorized to enter into a written stipulation, to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation shall be similar in all respects to conditions permitted as part of probation. Any person convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), C.R.S., shall stipulate to the conditions specified in section 16-11-204 (2) (b). In addition, the stipulation may require the defendant to perform community or charitable work service projects or make donations thereto. Upon full compliance with such conditions by the defendant, the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice. Such stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon such guilty plea. When, as a condition of the deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the said restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney and upon notice of hearing thereon of not less than five days to the defendant or the defendant's attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney at any time within the term of the deferred judgment or within thirty days thereafter. The burden of proof at such hearing shall be by a preponderance of the evidence, and the procedural safeguards required in a revocation of probation hearing shall apply.

(3) When a defendant signs a stipulation by which it is provided that judgment and sentence shall be deferred for a time certain, he thereby waives all rights to a speedy trial, as provided in section 18-1-405, C.R.S. (Repealed and renumbered as C.R.S. § 18-1.3-102 (Sec. 1, Ch. 318, Session Laws of Colorado 2002).

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TEXT OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Colo. Rev. Stat.
§ 18-3-402(1)(a)

Sexual assault.

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or

Colo. Rev. Stat.
§ 18-3-403(1)(a) (1997) (Repealed 2000)

(1) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if:

(a) The actor causes submission of the victim to sexual penetration by any means other than those set forth in section 18-3-402, but of sufficient consequence reasonably calculated to cause submission against the victim's will

Colo. Rev. Stat.
§ 18-3-404(a)(1)

Unlawful sexual contact.

(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

(a) The actor knows that the victim does not consent;

JURISDICTION

The trial court entered its final decision on May 16, 2019. (Exc. 18-36; R. 384-402). Timely notice of appeal was filed on June 17, 2019. This Court has jurisdiction of this appeal under AS 22.05.010(c).

PARTIES

The caption of this case contains the names of all parties.[1] The appellant will be referred to as "Maves." The appellee will be referred to herein as "the State."

ISSUES PRESENTED FOR REVIEW

1. Whether the procedures employed under AS 12.55.085 are similar to the procedure employed under Colo. Rev. Stat. § 16-7-403.

2. Whether the State's adoption of the 1995 version of 13 AAC 09.900 exceeded the scope of the enabling legislation and authority to adopt regulations under the Administrative Procedures Act and, whether the Court of Appeals decision in *State v. Otness* 986 P.2d 890 (Ak. App. 1999) that the 1995 version of 13 AAC 09.900 was properly adopted, should be overruled.

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[1]. See AR 212(c)(1)(E).

STATEMENT OF THE CASE

A. Maves' Statement of Relevant Facts.

Maves was charged in the State of Colorado with two felony counts in violation of Colo. Rev. Stat. § 18-3-402(1)(a). (R. 29-30). Maves negotiated a plea agreement with the State of Colorado where the initial charges were amended to one felony count in violation of Colo. Rev. Stat. § 18-3-403(1)(a) and one misdemeanor count in violation of Colo. Rev. Stat. § 18-3-404(a)(1). (R. 8-9). The dates of the alleged offenses were May 13 and May 14, 1997. (R. 29-30). Maves was never convicted on the felony count, however, he did enter a guilty plea but the judgment of conviction was deferred. (R. 8-9). The deferred judgment was under Colo. Rev. Stat. § 16-7-403. *Id.* On Count II, the misdemeanor count, Maves was sentenced to 60 days in Jail. *Id.*

Following procedures in the Colorado deferred judgment and sentence statute, Maves entered into an agreement with the prosecutor under which he would enter a guilty plea, judgment would be deferred, he would live up to the terms of the agreement, and then, he would be allowed to withdraw his plea and have the charge dismissed with prejudice.[2] Once the plea is withdrawn and the

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[2]. Colo. Rev. Stat. § 16-7-403 (Amended in 2002 and relocated to section 18-1.3-102).

charges dismissed, evidence of the guilty plea would no longer be admissible.[3] No judgment of conviction would be entered.[4]

Maves moved to Alaska in early 2015 and the State determined that he was required to register under the ASORA for life. (R. 02, 56-57). In making that determination, the State conducted an investigation and obtained evidence from the Colorado District Attorney, and the evidence was faxed to the State on February 2 & 3, 2015. (R. 04). The State also applied its unwritten rule that it would independently consider the conduct giving rise to the out-of-state offense, and ignore the facts of conviction. (R. 85, 344, 359). The State sent notice of the determination to Maves on April 17, 2015. (R. 56-57). In doing so, the State advised Maves that he had the right to appeal to the Commissioner of Public Safety under Alaska Administrative Code 13 AAC 09.060. (R. 56-57).

Maves filed an appeal of the State's determination with the Commissioner. (R. 59-61). Maves argued that the dates of his offenses was May 13-14, 1997 and the 1994 version of the ASORA should be applied to him. (R. 59-60). Maves also explained that he was given a deferred judgment in Colorado on the felony count and he was entitled to withdraw his plea and have the charges dismissed. *Id.* He argued that Count I should not be counted as a

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[3]. *Id.*

[4]. *Id.*

conviction and under the 1994 version of the ASORA he would not be required to register for life. *Id.*

After receiving Maves' appeal, the State again conducted an investigation and received additional documents from Colorado. (R. 44-54). These documents showed that Maves' case was handled under the Colorado deferred judgment and sentence statute and, although he successfully completed the probationary terms, the plea was never withdrawn and the charge was not properly dismissed. (R. 44-54). The documents also showed that the Colorado court had been notified of this error and the Colorado court corrected the error by allowing withdrawal of the plea and dismissal of the felony count, with prejudice. (R. 46).

On July 6, 2015, the Commissioner entered a decision denying Maves appeal. (R. 62-64). The Commissioner determined that Colorado law regarding a deferred judgment was not substantially similar to Alaska's suspended imposition of sentence provision and that, even if the laws were similar, a conviction that is dismissed under a deferred or suspended imposition of sentence provision remains a conviction for purposes of the ASORA. (R. 63).

Maves filed an administrative appeal to the Superior Court on August 6, 2015. (R. 66). On September 6, 2016, the trial court entered a written decision. (Exc. 4-12; R. 80-88). The trial court concluded that the date of Maves' offense was 1997 and the State sought to apply the 1999 ASORA amendments in determining Maves'

duty to register and the duration of the registration requirement. (Exc. 11-12; R. 87-88). The court held that the State should have applied the 1994 version of the ASORA and under that version, Maves would only have one conviction and be required to register for 15-years. Accordingly, the State violated the Ex Post Facto clause when determining the duration of the registration requirement. (Exc. 12; R. 88).

The State appealed the trial courts decision to this Court. (Exc. 13-15; R. 330-332). On December 19, 2017, this Court reversed the trial court's decision. *Id.* This Court held that the parties overlooked 13 AAC 09.900(2) (1995) and the Ex Post Facto Clause did not bar application of the ASORA to judgments entered after adoption of the 1995 regulation, even if they are set aside under AS 12.55.085, because the defendants in this category had notice that they would not be exempt from registration. (Exc. 14; R. 331).[5] This Court remanded to allow the court to determine whether the Colorado deferred judgment and sentencing procedure is similar to the set-aside procedure under AS 12.55.085. *Id.*

On remand, Maves filed a motion to supplement points to be considered by the trial court. (R. 480-481). Maves sought leave to argue that Alaska did not have jurisdiction to increase punishment

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[5]. *Citing Doe v. State, Dep't of Pub. Safety*, [Doe I] 92 P.3d 398, 412(Alaska 2004) (Matthews, J., concurring). See also Exc. 14; R. 331 fn. 2 citing *State v. Otness*, 986 P.2d 890, 891 (Alaska App. 1999).

for an offense committed in another jurisdiction. (R. 480-481). Maves also sought to argue that Alaska lacks jurisdiction to alter the consequences of a contract (plea agreement) entered into in Colorado and Maves has a due process right to receive the benefit of his bargain made in Colorado. *Id.* The State opposed Maves motion. (R. 475-478). On July 12, 2018, the trial court denied the motion for leave to brief the jurisdictional and contract issues. (Exc. 17; R. 462); (Tr. 17-18).

Maves filed a second motion to supplement points to be argued and sought to argue that 13 AAC 09.900 (1985) exceeded the scope of the enabling legislation and authority to adopt regulations under the Administrative Procedures Act. (R. 467-468). The State filed an opposition and the trial court granted Maves' second motion to supplement points to be briefed on remand. (R. 464-465); (Exc. 16; R. 461); (Tr. 18-19).

On October 1, 2018, Maves filed his supplemental memorandum on remand. (R. 432-445). Maves argued that the Colorado procedure for deferring judgment is not similar to the procedure under AS 12.55.085. (R. 435-440). Maves also argued that adoption of 13 AAC 09.900(2) (1985) exceeded the scope of the enabling legislation and was invalid because it expanded the scope of the ASORA by adding a class of individuals that were not included by the Legislature. (R. 440-445).

On November 13, 2018, the State filed its responsive memorandum on remand. (R. 411-419). The State argued that Colorado's deferred judgment program was similar to AS 12.55.085. (R. 413-417). The State also argued that adoption of 13 AAC 09.900(2)(1995) was authorized by the enabling legislation and the court was obligated to follow the decision in *State v. Otness*.[6]

On December 3, 2018 Maves filed his reply memorandum. (R. 403-406). Maves continued his argument that Colorado law was not similar to AS 12.55.085. (R. 403-405). Regarding the validity of 13 AAC 09.900(2) (1995), Maves argued that the legal foundation for the decision in *Otness* had changed and that *Otness* should be overruled. (R. 405-406). However, Maves recognized that the trial court was likely bound by *Otness* unless the decision was overturned by this Court. *Id.*

On May 16, 2019, the trial court entered its final decision. (Exc. 18-36; R. 384-402). The trial court concluded that Colorado's law is similar to AS 12.55.085. (Exc. 18-32; R. 384-398). The trial court also concluded that 13 AAC 09.900(2) (1995) was a valid regulation and its adoption was authorized by the enabling legislation. (Exc. 32-36; R. 398-402).

This appeal follows.

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[6]. *State v. Otness*, 986 P.2d 890, 891-892 (Alaska App. 1999).

ARGUMENT

I. STANDARD OF REVIEW.

Where the superior court acts as an intermediate appellate court, this Court gives no deference to its decision and will independently determine the merits of the administrative determination.[7] The question whether a law of another jurisdiction is "similar" to a specified Alaska statute is a question of statutory interpretation and is a question of law to which this Court will apply its independent judgment.[8]

The validity of an administrative regulation is also a question of statutory interpretation for which this Court will substitute its independent judgment for that of the agency.[9]

II. THE PROCEDURES EMPLOYED UNDER AS 12.55.085 ARE NOT SIMILAR TO THE PROCEDURE EMPLOYED UNDER COLO. REV. STAT. § 16-7-403.

The trial court correctly concluded that it had to consider whether Colorado's deferred judgment and sentence provision[10] is similar to Alaska's Suspended Imposition of Sentence ("SIS") provision.[11] (Exc. 24; R. 390). The trial court also correctly concluded that the procedures employed by each state need not be

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7. *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 742 n.5 (Alaska 1993).

8. *State v. Doe*, 425 P.3d 115, 119 (Alaska 2018) (footnotes and citations omitted).

9. *Alaska State Emples. Ass'n/AFSCME Local 52 v. State*, 990 P.2d 14, 18 (Alaska 1999).

10. Colorado Revised Statutes § 16-7-403.

11. AS 12.55.085.

identical or substantially equivalent so long as they are categorically alike with no significant differences. *Id.*

The trial court erred when it held that in determining whether the procedures were similar, it could not ignore the effect of each provision and that it could compare the effects of the procedure employed to determine similarity. (Exc. 28-35; R. 394-401). This was clear error because the regulation at issue, 13 AAC 09.900(2) did not say that the "effect" had to be similar; rather the clear language in the regulation reads:

> (2) "conviction" means that an adult, or a juvenile tried as an adult under AS 47.10 or a similar procedure in another jurisdiction, has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, whether or not the judgment was thereafter set aside under AS 12.55.085 or a **similar procedure in another jurisdiction**, or was the subject of a pardon or other executive clemency, but does not include a judgment that has been reversed or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief under the Alaska Rules of Criminal Procedure or similar procedures in another jurisdiction; (R. 447-448 emphasis added).

This regulation clearly states "... **or a similar procedure in another jurisdiction....**"[12] It does not say having a "similar effect." The trial court clearly erred in not comparing procedure and in failing to recognize that the procedures employed in both

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[12]. This Court interprets regulations by employing methods similar to it interpretation of a statute. *Wilson v. State*, 127 P.3d 826, 831 (Alaska 2006)

jurisdictions had to be categorically alike with no significant differences. (Exc. 28-35; R. 394-401).

In *State v. Doe*,[13] this Court interpreted the phrase "similar law of another jurisdiction," as used in the ASORA, to determine whether a law of another jurisdiction is "similar" to a specified Alaska statute. When interpreting AS 12.63.100(6)(c), this Court held that because the word "similar" modified the phrase "law of another jurisdiction" then it was the laws that had to be similar and under the categorical approach the Court would conduct an element to element comparison in determine whether the laws were similar.[14] This Court applied the plain language of the statute and did not look to compare the effects of the laws application.[15]

In *State v. Doe*, this Court compared Alaska law with California Penal Code Section 647.6(a).[16] The Court found that the California law broadly resembled the Alaska law but there were significant differences between the two laws at issue.[17] The Court found that

> The California offense of annoying or molesting a child under 18 is different from and substantially broader than the Alaska offense of attempted sexual abuse of a minor

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[13]. *State v. Doe*, 425 P.3d 115 (Alaska 2018).

[14]. *Id.*, at 119-120 ("Under the categorical approach, we compare the elements of the statute of conviction to the elements of the allegedly similar Alaska statute.").

[15]. *Id.*

[16]. *State v. Doe*, 425 P.3d at 123.

[17]. *Id.*

in the second degree, and we conclude that the two are not similar for purposes of sex offender registration.[18]

In this case, "similar" modifies the "procedure in another jurisdiction" because the regulation at issue reads "whether or not the judgment was thereafter set aside under AS 12.55.085 or a **similar procedure** in another jurisdiction."[19] Because "similar" modifies "procedure," a comparison must be made of the procedures employed in Colorado with regard to the deferred judgment under Colo. Rev. Stat. § 16-7-403 versus the procedure employed in Alaska with regard to the set-aside process under AS 12.55.085. If the categorical approach is applied and the elements of the procedure employed under each provision is compared, they are far from being similar and the Commissioner was right when he determined that the Colorado "'deferred sentence' could not be considered similar [to] Alaska's suspended imposition of sentence." (R. 63).

Under AS 12.55.085 "if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence...."[20] Under these procedures, the individual is convicted and before the court for sentencing. Should the court

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[18]. *Id.*

[19]. *See Supreme Court's Order*, dated December 19, 2017 (emphasis added).

[20]. 1995 Alaska Statute § 12.55.085(a); *see Nattrass v. State*, 554 P.2d 399, 401 (Alaska 1976) (the decision whether to suspend imposition of sentence is left to the discretion of the sentencing court).

decide to suspend imposition of sentence, sentencing must be suspended for a period not exceeding the maximum sentence that could be imposed or for a period of one year, whichever is greater.[21] In other words, the length of the suspended period is left to the court's discretion. The court is also required to place the individual on probation, and under the supervision of the probation authorities.[22] Under these procedures, the trial court has the discretion and can impose a suspended imposition of sentence with or without the State's agreement.[23]

Under subsection (b) of 12.55.085, the probation department has full authority to supervise the individual and under (c) the court may revoke or modify the judgment for violation of conditions, or a violation of the law. Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by the statute.[24] Under paragraph (d), if probation is not revoked, the defendant is discharged by the court at the end of the probationary term. Then, under paragraph (e), the court may set aside the conviction and issue a certificate to that effect but the charges are not dismissed and the plea is not withdrawn. Additionally, the conviction can be considered under recidivist provisions in future

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21. *AS 12.55.085.*

22. *Id., see also Nattrass v. State,* 554 P.2d 399, 401 (Alaska 1976).

23. *Id.*

24. *Id.,* paragraph (c).

cases, although it would not count as a conviction for purposes of presumptive sentencing.[25] Finally, long before the adoption of the ASORA and as of 1988, the court no longer had authority to grant a suspended imposition of sentence where the charge was for a sexual offense.[26]

In comparison and under the Colorado deferred judgment statute, the court accepting the plea has the power to continue the case but only with the written consent of the defendant and his or her attorney of record and the district attorney.[27] The Court's discretion is limited.[28] As an example, the Court lacks authority to act unilaterally to modify the terms of an agreement without the district attorney's consent.[29] Upon full compliance with conditions imposed by the court, the defendant has the right to withdraw the guilty plea and the charge upon which the judgment and sentence of the court was deferred must be dismissed with prejudice.[30] Once the plea is withdrawn and the charges dismissed, no judgment of conviction could ever be entered as to that offense. Moreover, the evidence of the guilty plea would no longer be admissible after

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25. *Larson v. State*, 688 P.2d 592, 596-97 (Alaska Ct. App. 1984).
26. *Doe v. State, Dep't of Public Safety*, 92 P.3d 398, 400 fn.3 (2004) (*citing* Ch. 36, § 2, SLA 1988; codified in AS 12.55.085(f)).
27. (R. 42), Colo. Rev. Stat. § 16-7-403(a).
28. *People v. Ward-Garrison*, 72 P.3d 423, 425 (Colo. App. 2003).
29. *Id.*
30. Colo. Rev. Stat. § 16-7-403(b).

successful completion of the period of the deferred sentence.[31] A deferred judgment is not the equivalent of a SIS because no sentence has been imposed or suspended.[32] Rather, a deferred judgment is a continuance of the defendant's case thereby deferring judgment of conviction and judgment may be issued if the defendant fails to abide by prescribed conditions.[33] Finally, under Colorado's deferred judgment and sentence provision, the statute can be applied to someone charged with a sex offense.

Clearly, the procedures employed under AS 12.55.085 are not similar to the procedure employed under Colo. Rev. Stat. § 16-7-403. In Alaska, judgment is entered and grant of a suspended imposition of sentence is vested in the discretion of the trial court. The defendant is placed on probation under certain conditions. In Colorado, there must be an agreement on the part of all parties and judgment is not entered; rather the case is continued pending defendants compliance with certain imposed conditions.[34] The defendant is not placed on probation, although probation type conditions are agreed to by the parties.[35] In Alaska, completion of the probation results in the judgment being set aside and a certificate granted. In Colorado, successful

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31. *Cf: United States v. Kipp*, 10 F.3d 1463, 1467 (9th Cir. 1993)
32. *Id.*
33. *See Kazadi v. People*, 291 P.3d 16, 22-23 (Colo. 2012).
34. *Id.*
35. *Id.*, at 20.

completion of the conditions results in withdrawal of the plea and dismissal of the charge with prejudice.[36]

The elements of the Colorado law are more similar to the recently enacted AS 12.55.078 (2017). AS 12.55.078 creates a suspended entry of judgment program similar to Colorado's deferred judgment program.[37] Under AS 12.55.078, "if a person is found guilty or pleads guilty to a crime, the court may, with the consent of the defendant and the prosecution and without imposing or entering a judgment of guilt, defer further proceedings and place the person on probation."[38] The Court may not impose a sentence of imprisonment.[39] Only after successful completion of the requirements, the defendant is discharged and the proceedings are dismissed.[40] A person who is discharged is not convicted of a crime.[41] "Similar" means the elements need to be categorically alike with no significant differences."[42] In applying this definition, the elements of the procedures employed under AS 12.55.085 and the procedures employed under Colo. Rev. Stat. § 16-7-403 are not categorically alike because there are significant differences. Those significant differences are more brightly

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36. R. 42.
37. AS 12.55.078 (2017).
38. *Id.*, subsection (a).
39. Id.
40. *Id.*, subsection (d).
41. *Id.*
42. *State v. Doe*, 425 P.3d 115 (Alaska 2018)

illuminated by Alaska's recent adoption of AS 12.55.078. If AS 12.55.085 is substantially similar to the Colorado statute then the question that arises would be why adopt AS 12.55.078. Because the procedures employed by Alaska versus Colorado are not categorically alike and there are significant differences, Maves felony conviction was not set aside under procedures similar to those found in AS 12.55.085. Thus, Maves only stands convicted of one misdemeanor and is only required to register for 15-years.

III. 13 AAC 09.900(2) (1995) IS INVALID BECAUSE IT EXCEEDS THE SCOPE OF THE ENABLING LEGISLATION AND AMENDS THE ASORA BY ADDING A CLASS OF INDIVIDUALS NOT INCLUDED BY THE LEGISLATURE.

When reviewing administrative regulations, this Court will apply a three-step approach.[43] The Court will first determine whether the agency has a statutory grant of authority to make regulations.[44] Secondly, the Court will determine whether the regulation is "consistent with and reasonably necessary to carry out the purpose of the statutory provisions conferring rule making authority on the agency.[45] Thirdly, this Court will determine whether the regulation is "reasonable and not arbitrary."[46] The

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[43]. *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 624 (Alaska 1993) (*quoting Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971))

[44]. *Alaska State Emples. Ass'n/AFSCME Local 52 v. State*, 990 P.2d at 18.

[45]. *Id.*

[46]. *Id.*

party challenging a regulation has the burden of demonstrating that it is invalid.[47]

Under AS 12.63.020(b) (1994), the State was authorized to adopt, by regulation:

> (b) ... procedures to notify a sex offender who, on the registration form under AS 12.63.010, lists a conviction for a sex offense that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's duty under (a) of this section for that sex offense. (§ 4 ch 41 SLA 1994).

Under AS 18.65.087(a) (1994) the State was authorized to adopt regulations:

> (a) ... necessary to carry out the purposes of this section and AS 12.63.

Under AS 18.65.087(d), the State was again authorized to adopt regulations but only for the specific purposes set out in the following subsections:

> (d)(1)(A) ... [to] allow a sex offender to review sex offender registration information that refers to that sex offender, and if the sex offender believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;
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> (d)(1)(B) [to] ensure the appropriate circulation to law enforcement agencies of information contained in the central registry; and
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> (d)(3) ... to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a

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[47]. *Kelso v. Rybachek*, 912 P.2d 536, 540 (Alaska 1996).

level whereby registration is discouraged; the fee for an information request may not be greater than $10;

Relevant here is the authority to adopt regulations thought to be "necessary to carry out the purposes of ... AS 12.63" as found in AS 18.65.087(a) (1994). This is the relevant section because the State asserted that it was "[p]ursuant to that legislative directive, [that] DPS in 1995 promulgated 13 AAC 09.900(2) to clarify the definition of "conviction" for purposes of ASORA." (R. 418). Máves contends the regulation was not necessary to carry out the purposes of AS 12.63; it was arbitrary and capricious and it exceeded the scope of the enabling legislation.[48]

In *State v. Otness*,[49] the Alaska Court of Appeals upheld the validity of 13 AAC 09.900(2) based, in part, on its prior holding in *Patterson v. State*[50] where it held the ASORA was not punitive but regulatory. After the Court of Appeals decided both *Otness* and *Patterson*, the Court decided *Doe v. Dep't of Public Safety*[51] wherein the Court recognized the decision in *Otness* but held that because Doe's conviction and set-aside predated the effective date of 13

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48. AS 44.62.020 ("... To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.); AS 44.62.030 ("... a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute."

49. *State v. Otness*, 986 P.2d 890, 894 (Alaska App. 1999).

50. *Patterson v. State*, 985 P.2d 1007 (Alaska App. 1999).

51. *Doe v. Dep't of Public Safety*, [Doe I] 92 P.3d 398 (Alaska 2003).

AAC 09.900(2) (1995) it was not necessary to consider whether the regulation was valid.[52] In the concurring opinion, Justice Mathews recognized that:

> ASORA was first made applicable to SIS convictions by a regulation promulgated in 1995. The effective date of this regulation thus will be the critical date governing the application of the precedent established by the opinion of the court assuming the regulation was authorized and validly promulgated.[53]

Maves contends that the *Otness* court got it wrong and 13 AAC 09.900(2) was not reasonably necessary to carry out the purposes of he ASORA, that adoption of the regulation amended the enabling legislation by expanding the scope of the ASORA's application and the regulation was arbitrary and capricious. Maves also contends that the foundation for the court's decision in *Otness* collapsed with the decision in *Doe v. State*[54] because *Doe* makes clear that the purposes of the ASORA is not regulatory, but punitive. Therefore, strict construction should be applied.

Adoption of 13 AAC 09.900(2() was not necessary to carry out the purpose of the ASORA because prior to adoption of the regulation, the ASORA did not apply to those individuals whose convictions had been set aside.[55] Moreover the evidence shows that

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[52]. *Id.*, at 402, 412 fn. 83.

[53]. *Doe v. Dep't of Public Safety*, 92 p.2d at 412 fn. 1 (Mathews, Justice concurring).

[54]. *Doe v. State* [Doe II] 189 P.3d 999 (Alaska 2008).

[55]. In 1994, when the ASORA was enacted, anyone accused of a sex offense was not eligible to receive an SIS under AS 12.55.085.

13 AAC 09.900(2) was aimed at adding approximately 185 individuals convicted of sex offenses in the early 1980's whose convictions were set aside under AS 12.55.085 to the list of persons required to register.[56] To the extent this is interpreted as authority to adopt regulations to expand the ASORA to cover individuals that were not included by the legislature, the grant of authority is an unconstitutional delegation of authority to modify and expand the reach of a penal statute. The nondelegation doctrine protects the constitutional separation of powers and lawmaking procedure by prohibiting a legislature from delegating its legislative powers and thereby circumventing this carefully crafted scheme.[57] The doctrine protects individual liberty, promotes democratic accountability, and preserves the separation of powers.

Because of its focus on protecting individual liberty, the nondelegation doctrine is enforced most rigorously in the criminal context. The Framers recognized that, with "criminal subjects," legislators should "leave as little as possible to the discretion of those who are to apply and to execute the law."[58] As a result, the U.S. Supreme Court has made clear that "defining crimes" is a

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[56]. Exhibit 2, 1995 HB 86 and Exhibit 3, Governor's Transmittal of HB 86.

[57]. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928).

[58]. James Madison, The Report of 1800, p. 14 The Papers of James Madison 266, 307, 324 (Robert A. Rutland et al. eds., 1983).

"legislative" function[59] and that legislators cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes."[60]

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement the statutory law, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purposes of the statute.[61] The Alaska Legislature recognizes that granting authority to adopt regulations to an agency does not mean that the agency can, by regulation, amend the statutes or expand their reach.[62] The Legislative Drafting Manual states:

> As to drafting technique, a drafter should not include a provision for adopting regulations for the sole reason that there might be a need for the agency to fill in "holes" in the new law. The only "holes" left in a bill should be those that are there deliberately because the technical nature of the program involved requires agency expertise to interpret and administer it with regulations. Policies and guidelines for the agency should be clearly established in the bill being drafted. Agency regulations should only be necessary to implement those policies.[63]

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[59]. *United States v. Evans*, 333 U.S. 483, 486 (1948).

[60]. *United States v. Kozminski*, 487 U.S. 931, 949 (1988); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature . . . which is to define a crime, and ordain its punishment.").

[61]. *See e.g. State v. Alyeska Pipeline Service Company*, 723 P.2d 76 (Alaska 1986); (DOT regulation concerning travel on the Dalton Highway inconsistent with applicable statute and therefore invalid).

[62]. *Manual of Legislative Drafting*, 35 (2019).

[63]. Id., p. 39.

Here, 13 AAC 09.900 (1995) violates that principle because it was aimed at filling a hole left by the legislature. (R. 400; 451). Court's were holding that the ASORA did not apply to an SIS because an SIS was not a conviction under the 1994 version of the ASORA. (R. 451). The 1995 regulation was aimed at filling that hole and was obviously intended to include individuals under the ASORA that had not been included by the legislature. The Regulation was not reasonably necessary to carry out the purpose of the ASORA; it expanded the scope of the enabling legislation and it was arbitrary and capricious in that it was aimed at individuals not considered by the legislature. Indeed, the 185 individuals to whom the regulation was aimed fell under the Alaska Supreme Court's decision in *Doe v. Dep't of Public Safety*[64] and could not be subjected to the ASORA. As the Supreme Court stated in *United States v. Bass*[65] "legislatures and not courts [or agencies] should define criminal activity."[66] Courts must be careful not to allow expansion of the reach of criminal statutes except by the legislature because citizens should not be subjected to criminal or penal statutes unless the [legislature] has said they should be so subjected. *Id.*

Here the legislature did not make the ASORA applicable to persons whose convictions were set aside (in the early 1980's)

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[64]. *Doe v. Dep't of Public Safety*, 92 P.3d 398, 412 (Alaska 2004).
[65]. *United States v. Bass*, 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)
[66]. *Id.* at 348, 92 S. Ct. at 523.

under prior AS 12.55.085. The Department of Public Safety thought the penal provisions known as the ASORA should be expanded to reach those individuals left out by the legislature. When that failed, because of challenges to the regulations, the State then went to the legislature asking to have that extended reach codified in statute. However, that did not occur until 1999, after the date of Maves' offenses. (R. 451).

Because 13 AAC 09.900(2) (1995) is invalid under the Alaska Administrative Procedures Act. To the extent the Court of Appeals decision in *Otness* held otherwise, the decision should be overruled. Maves has only one misdemeanor conviction for purposes of the ASORA and need only register for 15-years.

IV. THE ATTORNEY FEES AWARDED TO THE STATE SHOULD BE VACATED.

Maves filed a motion to supplement points on appeal to include the issue of attorney fees because the trial court ruled on the State's motion without response from Maves. (R. 373; R. 500-501). The motion to supplement was granted on August 14, 2019. On August 8, 2014 the trial court granted reconsideration and allowed Maves to file an opposition to fees. (R. 499). However, the trial court has not ruled on the motion for fees and in fact stayed the issue pending a ruling from this Court. (Trial Court Docket Entry 01/01/2999 Stay of Proceedings Ordered Order Granting Fees and Costs to the State are Stayed Pending Appellant's Appeal to the Alaska Supreme Court.).

The ruling from this Court should be that Maves is a public interest litigant and the State was not entitled to an award of fees and costs. Under AS 09.60.010(c)(2) a public interest litigant is immune from an award of attorney fees if the case was not frivolous and if certain factors are shown to exist. Four factors are examined to determine whether a party qualifies for the public interest litigant exception to Civil Rule 82. The factors are (1) whether the case is designed to effectuate strong public policies; (2) whether the plaintiff's success will cause numerous people to benefit from the lawsuit; (3) whether only a private party could have been expected to bring the suit; and (4) whether the purported public interest litigant would have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance.[67] A case involves strong public policies if constitutional claims are asserted.[68] Where an individual litigant brings constitutional claims before the court and lacks sufficient economic incentive to bring the claim, the individual meets the requirements necessary to be classified as a public interest litigant.[69]

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[67]. *Alaska Railroad Corp. v. Native Village of Eklutna*, 142 P.3d 1192, 1203 (2006); *Carr-Gottstein Properties v. State*, 899 P.2d 136, 147 (Alaska 1995).

[68]. *Lake & Peninsula Borough v. Oberlatz*, 329 P.3d 214, 227 (Alaska 2014).

[69]. *Id.*, *see also Manning v. Dep't of Fish & Game*, 355 P.3d 530, 539-540 (Alaska 2015).

In the instant case, appellant brought purely constitutional and statutory or regulatory interpretation claims before the court. Only a private party could have been expected to bring this suit to determine whether the challenged statutes violated any provisions of the constitution or whether the statutes at issue denied due process. Had appellant prevailed in this case, numerous people would have benefitted from the court's decision. Appellant lacked economic incentive to bring suit purely for money damages and the claims made by the appellant were not patently frivolous and without merit. Although appellant's suit raised issues of statutory interpretation, those issues do not deprive the appellant of the right to be classified as a public interest litigant. As recently restated by the Alaska Supreme Court:

> It does not matter that the deprivations of the plaintiffs' constitutional rights also violated statutes designed to regulate the constitutional right . . . or that the statutes provide the rule of law for determining whether the constitutional right has been infringed. The ultimate question is whether the claimants sought to protect themselves from deprivation of their constitutional rights . . . .[70]

Clearly, the fact that appellant's claims were based on the ASORA and its interpretation does not preclude a finding that appellant was a public interest litigant because appellant claimed the statutes and the manner in which the statutes were being interpreted by the State violated his constitutional rights. Only a private litigant would be expected to bring the claim asserted by

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[70]. *Manning*, 355 P.3d at 539 fn. 53.

the appellant and no significant financial incentive would cause the appellant to bring the claim, absent the constitutional issues. Because the appellant clearly meets the requirements, appellant is immune from an award of fees under AS 09.60.010(c)(2).

CONCLUSION

The procedures employed under AS 12.55.085 are not similar to the procedure employed under Colo. Rev. Stat. § 16-7-403. If the Court decides in favor of Maves on this issue, the Court need not decide whether 13 AAC 09.900(2) (1995) was invalid but it may wish to do so because the issue may be subject to future litigation.

The State's adoption of the 1995 version of 13 AAC 09.900 exceeded the scope of the enabling legislation and authority to adopt regulations under the Administrative Procedures Act and the regulation was arbitrary and capricious because it was aimed at a specific group left out by the legislature. Because the regulation was invalid, the Court of Appeals decision in *State v. Otness* 986 P.2d 890 (Ak. App. 1999) that held the 1995 version of 13 AAC 09.900 was properly adopted, should be overruled.

The trial court's order awarding fees to the State should be vacated regardless of the success in this appeal.

DATED this 21st day of October 2019.

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