

Honorable Darrel Rexwinkel  
Commissioner  
Department of Revenue

September 22, 1993

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465-2398

Meaning of incarceration  
for purposes of  
AS 43.23.005(d).

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You have asked the Department of Law to provide you with a definition of the term "incarcerated" for purposes of applying AS 43.23.005(d), which denies eligibility for a Permanent Fund Dividend (PFD) to an individual who is incarcerated during the qualifying year because of conviction for a felony.<sup>1</sup>

The specific answers to your questions are:

1. Incarceration is determined by the fact that an individual would be entitled to credit for time served according to the *Lock/Nygren* standard discussed below. The manner in which the person is housed or monitored does not appear to be determinative.

2. While the answers to the second set of questions are essentially answered by reference to answer 1 above, we specifically respond to them as follows:

a. An individual under sentence and housed in a community residential center or "half-way" house is incarcerated.

b. An individual under sentence who is confined by means of an electronic device which monitors movement is incarcerated.

c. An individual on probation or parole is not

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<sup>1</sup> AS 43.23.005(d) provides:

(d) Notwithstanding the provisions of (a) - (c) of this section, an individual who has been convicted of a felony is not eligible for a permanent fund dividend for a year when, during all or a part of the previous calendar year, as a result of the conviction, the individual is incarcerated.

incarcerated, even if required to report daily to a probation officer.

Our analysis follows:

Generally, we believe "incarcerated" to apply to a person who is confined in a facility or environment that is intended to restrain the person's movement and freedom, and includes prisons, jails, and other penal institutions. Penal institutions can include hospital, medical, or treatment facilities which serve persons who would otherwise be confined in prison, but for the condition for which they are sent to the hospital or treatment facility. We also believe persons who are restrained in their movements but not confined to a penal institution may be considered to be incarcerated. Included in this latter category would be a person who is confined to an otherwise nonpenal setting - such as his or her living quarters - and monitored by some sort of electronic device.

Legislative history provides no indication of the legislature's intent with respect to the definition of incarceration for purposes of AS 43.23.005(d). We believe, however, that, given the purpose of the statute as making money available to the Violent Crimes Compensation Board, our interpretation of incarcerated is in keeping with an implied legislative intent. There is nothing either in statute, regulations,<sup>2</sup> dictionary definitions,<sup>3</sup> nor case law that is completely determinative, and

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<sup>2</sup> Various custody classifications for *prisoners* are contained in regulations of the Department of Corrections at 22 AAC 05.271 and range from "Community Custody" in which the prisoner is under the least restrictive custody to "Maximum Custody" in which the prisoner's movement is highly restricted, and, even while within the facility, requires two escorts and physical restraints. "Community Custody" includes work releases, furlough, and hospital treatment while the individual is under sentence.

These classifications comport conceptually with the *Lock/Nygren* standard presented below.

<sup>3</sup> Dictionary definitions of incarceration provide no real help in this determination. Among those definitions are: "Incarceration: a confining or state of being confined: IMPRISONMENT." *Webster's Third International Dictionary, Unabridged* 1141 (1966). "Incarceration: Imprisonment; confinement in a jail or penitentiary. See **Imprisonment**." *Black's Law Dictionary* 685 (5th ed. 1979). Both definitions refer to imprisonment, which is defined as:

we believe reliance on common sense and implications derived from case law is warranted and provides a sound conclusion.

Under Alaska case law, a person whose freedom of movement is substantially restricted because of court-ordered confinement to a residential rehabilitation program is considered to be in custody for purposes of *crediting time spent in custody towards service of his sentence*. *Lock v. State*, 609 P.2d 539 (Alaska 1980). The court provided some helpful amplification of the meaning of "custody," which, while not necessarily precisely the same as incarceration, gives considerable guidance in development of our interpretation. The court said:

We think that under certain circumstances the restraints imposed as conditions of probation may be so substantial that the defendant is, in legal effect, "in custody" although on probation. Confinement need not be penal in nature to be custodial. *McNeil v. Director of Patuxent Institution*, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719 (1972). Nor need the defendant be confined to a prison or jail in order to be "in custody" within the meaning of AS 11.05.040 [the statute mandating credit for time spent in custody, now contained in AS 12.55.025]. Custodial confinement takes many forms and has

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The act of putting or confining a man in prison. The restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose; it may be in a locality used only for the specific occasion; or it may take place without the actual application of any physical agencies of restraint (such as locks or bars), as by verbal compulsion and the display of available force. Every confinement of the person is an "imprisonment," whether it be in a prison, or in a private house, or even by forcibly detaining one in the public streets. Any unlawful exercise or show of force by which person is compelled to remain where he does not wish to be.

*Black's Law Dictionary* 681 (5th ed. 1979) (citation omitted).

been interpreted to include time spent in a mental hospital, a juvenile detention center, a diagnostic center, a hospital, a halfway house, and a hotel room.

*Lock v. State*, 609 P.2d 539, 543-44 (Alaska 1980) (footnotes omitted). See also *Nygren v. State*, 658 P.2d 141, 146 (Alaska App. 1983), in which the determinant is whether "'substantial restrictions on one's freedom of movement and behavior' have been imposed, so as to require *credit for time served* under *Lock*" (emphasis added).

By contrast, a person in third-party custody, however, is not in such a custodial setting as to warrant credit for such time against his sentence. *Ackermann v. State*, 716 P.2d 5 (Alaska App. 1986).<sup>4</sup> Probation and incarceration are, under ordinary circumstances, mutually exclusive. See, e.g., *State v. Jackson*, 776 P.2d 320 (Alaska App. 1989) (making the distinction between a probationary sentence and incarceration for purposes of propriety of sentence). Parole and incarceration are not the same, even though the parolee must report frequently to an officer charged with his or her supervision. See, e.g., *Jackson v. State*, 616 P.2d 23 (Alaska 1980); *Walters v. State*, 798 P.2d 357 (Alaska App. 1990).

Other case law provides some additional insights in harmony with those above. A situation in which a person is under "community confinement" or home detention, i.e., not within an institution, but whose movement is restricted, has been found to be "imprisoned," and, therefore, incarcerated. *United States v. Strozier*, 940 F.2d 985, 988 (6th Cir. 1991). This is in concert with the "Community Custody" status described by 22 AAC 05.271(b)(1). However, a person given a suspended imposition of sentence and period of probation was found not to be under conditions of incarceration in *Petition of Sewell*, 474 P.2d 146, 147 (Mont. 1970).

Thus, the common determinant in Alaska case law is exemplified by the *Lock* and *Nygren* holdings above. That is, if the individual is subjected to such restriction and limitation that he or she would be entitled to credit for time served while in that condition, he or she is incarcerated. This comports with

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<sup>4</sup> "We are satisfied that a person in third-party custody who has the freedom to move about the community, limited only by his custodian's accompaniment, and one who is confined to a fishing boat while it is at sea is not entitled to *credit for time spent* on pretrial release." 716 P.2d at 6 (emphasis added).

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holdings from other jurisdictions and with the definitions and regulations considered above. Accordingly, we believe the proper standard to apply in making the determination of whether an individual is incarcerated for these purposes is whether the individual, in the status in question, would be entitled to credit for time served against whatever sentence might be imposed.

We hope this responds to your question. Should you have need of further clarification, please do not hesitate to contact us.

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