

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TERRICK HOOVER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13504  
Trial Court No. 3AN-18-09733 CI

MEMORANDUM OPINION

No. 7082 — December 13, 2023

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Michael L. Wolverton, Judge.

Appearances: Michael L. Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell, Judges.

Judge TERRELL, writing for the Court and concurring separately.

In 2003, Terrick Hoover pleaded no contest to, *inter alia*, third-degree misconduct involving a controlled substance and second-degree misconduct involving

a weapon.<sup>1</sup> Pursuant to his plea agreement, he was sentenced to 36 months with 24 months suspended (12 months to serve) on each count. For the next fifteen years, the Department of Corrections (DOC) interpreted these sentences as running concurrently. But after Hoover's probation was revoked in 2018, DOC changed its interpretation and concluded that Hoover's sentences were intended to run consecutively.

Hoover promptly filed an application for post-conviction relief, arguing that his sentences should run concurrently, not consecutively. In the alternative, Hoover argued that he did not knowingly enter into the plea agreement, the superior court violated Alaska Criminal Rule 11 when accepting the plea agreement, and his attorney provided him with ineffective assistance of counsel during the change of plea process.

The superior court dismissed Hoover's application on both procedural grounds and on the merits. Hoover now appeals that ruling. As we explain herein, we decline to resolve these questions on the current record due to the substantial procedural irregularities in Hoover's case. Instead, we remand for further proceedings.

*The procedural irregularities in this case*

Hoover's original post-conviction relief application was filed *pro se*, and it simply asserted Hoover's claims without providing any legal argument or analysis. Hoover retained a private attorney to represent him, but the attorney never filed an amended application, nor did he file a memorandum providing legal support for Hoover's claims. The State also did not respond to Hoover's application despite two calendaring notices from the superior court.

After the second deadline passed, Hoover's attorney moved for default judgment and requested a hearing on the matter. While Hoover's motion for default judgment briefly addressed the merits of Hoover's claims, it did not address any

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<sup>1</sup> Former AS 11.71.030(a)(1) (2003) and AS 11.61.195(a)(1), respectively.

procedural bars that could potentially have been raised by the State. Again, the State did not respond.

A hearing on the motion was scheduled and held over the course of two days. The ostensible purpose of the hearing was for Hoover to present testimony as to the meaning of the original plea agreement in support of his motion for default judgment.<sup>2</sup> On the first day of the scheduled hearing, however, the State filed an opposition to the motion for default judgment and a motion to dismiss the application for post-conviction relief as untimely and barred by collateral estoppel. The State's motion asserted that Hoover did not plead sufficient facts to state a claim, but did not address the underlying merits of Hoover's claims.

On the second day of the hearing, Hoover finished presenting evidence in support of a default judgment. Afterwards, the court orally denied Hoover's motion for default judgment and stated that it would "decide [the case] on the merits." The court then adjourned the hearing by stating, "I'll take this under advisement and if I need another hearing, I'll request one." The court did not request additional motion work from the parties, and none was filed. A few months later, the court issued a written order dismissing Hoover's application both on procedural grounds and on the merits.

#### *Why we remand for further proceedings*

The post-conviction relief court's handling of this case violated Alaska Criminal Rule 35.1(f)(1), which affords the applicant an opportunity to respond when the State moves to dismiss an application. Rule 35.1(f)(1) further provides that the court "may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading." These provisions protect each party's right to have

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<sup>2</sup> See *State v. Savo*, 108 P.3d 903, 908 (Alaska App. 2005) (holding that "[e]ven when the government fails to respond to the defendant's contentions, a court should grant relief to a defendant only when the defendant proves entitlement to relief").

their arguments heard and considered by the court. They also ensure that the legal issues are sufficiently developed so that they can be thoughtfully and intelligently considered on appeal.

Here, however, the post-conviction relief court found that Hoover's claims were procedurally barred even though Hoover was not given an opportunity to respond to the State's motion to dismiss or to amend his application. After the court denied Hoover's motion for default judgment, the court should have indicated that the State's motion to dismiss was ripe, and solicited briefing on that issue. Instead, the court bypassed this step and announced its intent to rule on the merits of Hoover's claims — even though neither Hoover nor the State filed any briefing on that issue.<sup>3</sup>

The post-conviction relief court's short-circuiting of the process set out in Criminal Rule 35.1 means that some of the most basic issues in this case never crystalized. On appeal, for example, the parties do not even agree as to what legal action Hoover's application is challenging. The State asserts that Hoover is seeking to withdraw his original plea taken in 2003, and thus argues that his application is untimely. However, Hoover claims that he is challenging DOC's reinterpretation of his sentence, which did not occur until 2018. This is precisely the sort of issue that would have been clarified by following the procedures set out in Criminal Rule 35.1.

We acknowledge that Hoover has never objected to the procedural irregularities identified above, either in the post-conviction relief court or on appeal. Hoover has, however, challenged the court's underlying ruling, and we cannot simply dismiss those arguments as inadequately briefed. We must address them, and, in our view, it is impossible to perform that task based on the current record.

We note that if Hoover's claims were obviously frivolous and unlikely to benefit from further development, we could affirm the court's dismissal of his

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<sup>3</sup> We acknowledge that the parties made arguments about these issues during the hearing. But it is clear from the record that these off-the-cuff arguments were not an adequate substitute for the written pleadings contemplated by Criminal Rule 35.1.

application despite the procedural irregularities. But it is not obvious that Hoover's claims lack merit. The DOC apparently agreed with Hoover's interpretation of his sentence for fifteen years, and Hoover promptly challenged the DOC's new interpretation shortly after it was issued. This suggests that Hoover's claims *may* be both timely and meritorious. If Hoover's claims are meritorious, it would be manifestly unjust to require him to serve additional time in prison.

*Conclusion*

We therefore VACATE the superior court's dismissal of Hoover's post-conviction relief application and REMAND this case for further proceedings, with directions for the superior court to follow the procedures described in Criminal Rule 35.1.

Judge TERRELL, concurring.

The procedural errors in this case require remand for the reasons set out in the lead opinion. I write separately to further explain why I believe Hoover's claims are not frivolous and are likely to benefit from further development.

The superior court dismissed Hoover's post-conviction relief application because it concluded that the application was untimely, Hoover had previously litigated his claim, and the application failed on the merits. The reasoning behind each of these rulings appears to be flawed. As we have explained, it was premature for the superior court to rule on these issues, and it would be similarly premature for us to definitively rule on them. But I provide this analysis of the record as it currently exists because it may be helpful to the court on remand.

*A detailed look at the facts and proceedings underlying this case*

*The 2003 change of plea*

The complexity in this case arises because Hoover's 2003 plea agreement was a global plea agreement covering three separate cases — two from Anchorage and one from Palmer. Hoover pleaded no contest to one count in the Palmer case (receiving a sentence of 6 months) and one count in one of the Anchorage cases (receiving a sentence of 30 days). But in the other Anchorage case (case number 3AN-03-09300 CR) he pleaded no contest to two counts — one count of third-degree misconduct involving a controlled substance and one count of second-degree misconduct involving a weapon. He agreed to a sentence of 36 months with 24 months suspended (12 months to serve) for each count in that case.

The dispute in this post-conviction relief case concerns whether these sentences were intended to run concurrently or consecutively. It is undisputed that the sentences for each *case* were intended to be consecutive to the sentences in the other cases. Rather, the question is whether the two counts in 3AN-03-09300 CR were intended to be consecutive or concurrent to one another. Because there were multiple

cases, including one case with multiple counts, the simple mention of consecutive sentences at the change of plea hearing is insufficient to establish the intent of the parties and the sentencing court with regard to the counts in 3AN-03-09300 CR.

Before the change of plea hearing, the parties submitted a proposed judgment in 3AN-03-09300 CR, which appears to state that the sentences in that case would run consecutively to each other:

IT IS ORDERED that the defendant is sentenced to the following: **36 months with 24 months suspended** on Count I, Misconduct Involving Weapons In the Third Degree and **36 months with 24 months suspended** on Count II, Third Degree Misconduct Involving A Controlled Substance. The sentences will be consecutive to each other in their entirety. The defendant will be placed on **probation for 3 years.**<sup>[1]</sup>

At the change of plea hearing, the court asked the attorneys to explain the agreement. Hoover's attorney described only one sentence for the two crimes, implicitly suggesting that the two sentences would be concurrent. He told the court, "[T]he agreed Rule 11 is 36 months with 24 months suspended, probation for 3 years." The prosecutor, who was covering for the case's assigned prosecutor, did not object to this recitation of the agreement.

After describing the agreement, Hoover's attorney stated that he intended to request that Hoover receive a delayed remand so that Hoover could enter an in-patient treatment program before serving his jail time. The attorney stated that if this was granted, Hoover could potentially serve the remainder of his sentence at the treatment program because Hoover had already served the 6-month sentence in the Palmer case and was facing only an additional 8 months and 20 days (*i.e.*, the amount of time he would serve on a 1-year sentence and a 30-day sentence, assuming he received good-

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<sup>1</sup> (Emphasis in original). It is clear from other parts of the judgment and the change of plea hearing that Count I is actually Misconduct Involving Weapons in the *Second* Degree.

time credits equal to one third of each sentence). This was consistent with the view that Hoover received concurrent 1-year sentences on each count in 3AN-03-09300 CR.

These two representations by Hoover's attorney were the only two times that the sentence was discussed on the record at the change of plea hearing prior to Hoover entering his no contest plea. While the court informed Hoover of the statutory maximum sentence for each of the two crimes to which he was pleading, it did not state the sentence that would be imposed pursuant to the agreement.

As part of the plea colloquy, the court asked if any promises other than what had been said in open court or were in the plea agreement documents had been made to Hoover. The court added, "I assume you got a chance to read the documents." Hoover responded that the agreement also included a provision precluding the State from filing any petitions to revoke probation in his prior misdemeanor cases based on the conduct charged in the three cases that were being resolved. The prosecutor stated that Hoover was correct. Hoover did not address the court's assumption that he had reviewed the documents.

Hoover pleaded no contest, and the court accepted the pleas.

After, the court asked if the parties had any remarks related to sentencing. At this point, the subject of consecutive and concurrent sentences was mentioned for the first time. The prosecutor stated, "Just one thing, Your Honor . . . I wasn't sure if this was mentioned, I think counsel already said this, but all these sentences are consecutive. . . . I wasn't sure if that was actually said to the defendant." The court responded, "I think that's pretty clear." Hoover's attorney agreed, but stated that probation would run concurrently, to which the prosecutor agreed. Based on this agreement between the parties, the court modified the judgment to say, "The defendant will be placed on probation **for 3 years** concurrent with [the other two cases in the global plea agreement]."

The court accepted the plea agreement and orally pronounced the sentences. Regarding 3AN-03-09300 CR, the court only stated one sentence: "What



I'm going to do is in Case 3AN-S03-9300, I'm going to impose 36 months with 24 months suspended." This was only the second time that the sentence was expressly stated on the record at the sentencing hearing.

The court signed a temporary order "instructions to jail" form, which again listed only one sentence in 3AN-03-09300 CR as "36 months/24 months suspended[,] consecutive to [the other two cases in the global plea agreement]." The court also signed the proposed judgment, which stated in pertinent part:

IT IS ORDERED that the defendant is sentenced to the following: **36 months with 24 months suspended** on Count I, Misconduct Involving Weapons In The Third Degree and **36 months with 24 months suspended** on Count II, Third Degree Misconduct Involving A Controlled Substance. The sentences will be consecutive to each other in their entirety. The defendant will be placed **on probation for 3 years** concurrent with [the other two cases in the global plea agreement].

As mentioned above, Hoover's attorney also requested that Hoover be given a delayed remand and released on bail so that he could attend a treatment program. The court declined to hear the request at the change of plea hearing and instead scheduled a bail hearing for later that day. At the bail hearing, Hoover's attorney expressly stated that Hoover only had 1 year to serve in 3AN-03-09300 CR. By contrast, the prosecutor — who was the assigned prosecutor in the case — stated at that hearing that she thought Hoover actually had 2 years to serve in the case because he had two consecutive 1-year sentences. This issue was not resolved at the bail hearing.

#### *DOC Time Accounting*

A time accounting sheet from 2003 reflects that DOC initially understood the active component of Hoover's sentence in 3AN-03-09300 CR to be 12 months, and his composite sentence across the three cases to be 18 months and 30 days.

In the years that followed, the State filed several petitions to revoke Hoover's probation. In two of the later petitions to revoke probation, filed in September

and December of 2015, the petition to revoke, in the section of the probation officer's affidavit listing the offenses for which Hoover was on probation, stated that Hoover was serving two consecutive sentences of 36 months with 24 months suspended (*i.e.*, 12 months to serve) in 3AN-03-09300 CR. But even then, DOC's time-accounting officials adhered to their treatment of Hoover's sentence in 3AN-03-09300 CR as a concurrent 12-month sentence.

DOC did not change its treatment of Hoover's sentence in 3AN-03-09300 CR until almost fifteen years after its initial calculation of Hoover's time accounting. In 2017, Hoover violated his probation conditions and was ordered to serve the remainder of his sentence in 3AN-03-09300 CR. Following this disposition, DOC performed an updated time accounting in January 2018 and, for the first time, interpreted Hoover's sentence in 3AN-03-09300 CR to be two consecutive sentences. DOC therefore concluded that Hoover had to serve not just the remainder of the 24 months of suspended time for the first count, but also an additional 24 months of suspended time for the second count and the 12 months of active time for the second count that he had never served.

Upon receiving DOC's new time accounting, Hoover submitted a request to the time accounting officer at the facility where he was imprisoned, stating that the time accounting was incorrect. The officer responded by telling Hoover to look to the written judgment, which, as previously noted, appears to state that the two sentences in 3AN-03-09300 CR were to be served consecutively. Hoover then requested a copy of the judgment, which he was given.

*Hoover's motion to correct clerical error*

After Hoover's unsuccessful efforts to have DOC modify its time-accounting in 3AN-03-09300 CR, Hoover filed a "motion to correct clerical error." The superior court ruled that the indication on the judgment that the sentences were consecutive was not a clerical error. The court concluded, based on a review of the

record, that the sentences were meant to be consecutive because “Hoover’s trial attorney presumably reviewed the judgment with Hoover prior to entering a guilty plea and understood the sentences were consecutive.” It added, “nowhere on record during the sentencing hearing [did] the parties say that the sentences were to be concurrent.” It thus denied the motion to correct clerical error.

*Hoover’s application for post-conviction relief*

Following the denial of his motion to correct clerical error, Hoover filed an application for post-conviction relief. He raised four claims: that (1) the sentences in 3AN-03-09300 CR should run concurrently and not consecutively, and alternatively, that (2) he did not knowingly enter into the plea agreement, (3) the superior court violated Alaska Criminal Rule 11 when accepting the plea agreement, and (4) his attorney failed to provide him with effective assistance of counsel during the change of plea process. Hoover included an affidavit, stating that during the change of plea process, his attorney told him that the agreement included only one sentence (for 36 months with 24 months suspended), and that he would not have accepted an offer to serve two consecutive sentences. He further stated that he was never shown a written version of the plea agreement and never saw the judgment form until 2018.

The State did not file a response to Hoover’s application despite two calendaring notices from the superior court providing deadlines for it to do so. After the second deadline passed, Hoover moved for a default judgment and requested a hearing to put forward a sufficient factual basis for a default judgment. The State did not respond, and a hearing was scheduled.

On the first day of the scheduled hearing, the State filed an opposition to the motion for default judgment and a motion to dismiss the application for post-conviction relief as untimely and barred by collateral estoppel. At the hearing, Hoover moved to strike these two motions. Hoover also called the attorney who represented him in 2003 to testify. The attorney testified that he had no independent recollection of

the terms of Hoover's global plea agreement in the 2003 cases. He also said that he would not have stated in open court that Hoover had to serve 1 year in connection with 3AN-03-09300 CR while privately telling Hoover something different before the plea agreement was entered. The State did not cross-examine the attorney.

On the second day of the hearing, Hoover testified consistently with his affidavit.

At the end of testimony, the post-conviction relief court orally denied Hoover's motions for default judgment and to strike the State's filings. It also stated that it planned to issue a ruling on the merits of the case.

The court subsequently issued an order dismissing Hoover's application for post-conviction relief. First, it concluded that Hoover's claims were time barred under AS 12.72.020(a)(3)(A) because Hoover did not seek post-conviction relief within eighteen months of the entry of the judgment. Second, it concluded that the application was barred by AS 12.72.020(a)(5)'s ban on raising a claim that has already been decided, because "Hoover litigated this same issue in the underlying criminal case as a request to modify the judgment." And finally, it denied the application on the merits, concluding "it [was] clear that the sentences of Counts I and II were meant to run consecutively." The court reasoned that the written judgment provided for consecutive sentences, "the trial judge confirmed that Hoover had a chance to read the documents[,] and "Hoover is assumed to have received that chance." Lastly, the court noted that the prosecutor stated on the record that all the sentences were to be consecutive.

*Potential flaws in the superior court's analysis of the timeliness of Hoover's post-conviction relief application*

The superior court concluded that Hoover's application for post-conviction relief was untimely under AS 12.72.020(a)(3)(A) because it was filed more than eighteen months after the judgment of conviction was entered. This ruling is problematic.

As the majority opinion explains, Hoover filed a *pro se* application for post-conviction relief that simply asserted his four claims without providing further legal argument or analysis. His retained attorney did not file an amended application for post-conviction relief or a memorandum further explaining Hoover’s claims. It therefore is not entirely clear the claims that Hoover was making or the relief that Hoover was requesting. But the first claim that Hoover made in his application for post-conviction relief — that the sentences in 3AN-03-09300 CR are concurrent and not consecutive — appears to be an assertion that DOC improperly interpreted his sentence.

Assuming this is the case, it may be that AS 12.72.020(a)(3)(A) does not provide the proper limitations period. The statute of limitations in AS 12.72.020(a)(3)(A) applies “if the claim relates to a conviction.” Meanwhile, AS 12.72.020(a)(4) sets out the limitations period when a “final administrative decision of . . . the Department of Corrections is being collaterally attacked.” This limit is one year from the date of the administrative decision. If Hoover is collaterally attacking a final administrative decision of DOC, then his application was timely because it was filed within one year of that decision.<sup>2</sup>

Hoover’s remaining claims for post-conviction relief — that he did not knowingly enter into the plea agreement, that the superior court violated Criminal Rule 11 when accepting the plea agreement, and that his attorney provided him with ineffective assistance of counsel — are claims that, if proved, would allow him to withdraw his plea.<sup>3</sup> These claims appear to be challenges to his conviction, meaning that AS 12.72.020(a)(3)(A)’s limitations period applies to them. But this Court has recognized that due process and fundamental fairness may, under certain circumstances,

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<sup>2</sup> It is unclear from the record before us whether Hoover pursued his challenge to his time accounting all the way through any available appeal process within DOC.

<sup>3</sup> See Alaska R. Crim. P. 11(h)(3), (h)(4)(C) (allowing a defendant to withdraw a plea after imposition of sentence upon a showing of manifest injustice, which includes a showing that “[t]he plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed”).

require relaxation of the post-conviction relief statutory deadline.<sup>4</sup> And we have analyzed whether, on the individualized facts of a particular case, a defendant’s private interest in the right of access to the courts and the risk of erroneous deprivation of this interest outweighed the statute of limitations’ goal of finality.<sup>5</sup> If Hoover reasonably relied on DOC’s prior time accountings (which matched his own interpretation of the plea agreement), then it would be fundamentally unfair to not allow him to pursue challenges to it based on DOC’s decision to revise its interpretation of his sentence after fifteen years.

DOC is under a ministerial duty to faithfully carry out the sentences imposed by courts, which includes a duty to correctly calculate an inmate’s release date and general time accounting.<sup>6</sup> And like other government actors, its fulfillment of this function is subject to the presumption of regularity — *i.e.*, the presumption that government officials perform their duties correctly.<sup>7</sup> Therefore, unless Hoover was aware of specific information that suggested that DOC’s original interpretation of the judgment in 3AN-03-09300 CR was erroneous, he could justifiably rely on DOC’s time accounting and not take action to clarify his sentence in that case until DOC changed its interpretation in 2018.

These issues warrant consideration on remand.

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<sup>4</sup> See, e.g., *Hall v. State*, 446 P.3d 373, 376-78 (Alaska App. 2019); *Alex v. State*, 210 P.3d 1225, 1228-29 (Alaska App. 2009).

<sup>5</sup> See *Xavier v. State*, 278 P.3d 902, 904-05 (Alaska App. 2012).

<sup>6</sup> See, e.g., *Kinegak v. State, Dep’t of Corr.*, 129 P.3d 887, 892 (Alaska 2006) (“The conduct involved in [time accounting] by DOC clerks is an integral part of the state’s imprisonment function.”); *McNeil v. Canty*, 12 So. 3d 215, 217 (Fla. 2009) (recognizing that under the doctrine of separation of powers, sentencing is a judicial function, and the executive branch in the form of the DOC must carry out the court’s sentence); *Banks v. State*, 73 Ill. Ct. Cl. 142, 143 (Ill. Ct. Cl. 2020) (stating that the state prison system had a duty to ascertain inmates’ release dates).

<sup>7</sup> See, e.g., *Wallace v. State*, 933 P.2d 1157, 1162 (Alaska App. 1997) (citing cases).

*Potential flaws in the superior court's analysis of whether Hoover had previously litigated the same claim*

The superior court concluded that Hoover's application for post-conviction relief was also procedurally barred under AS 12.72.020(a)(5). Under this provision, applications for post-conviction relief are barred if "the claim was decided on its merits or on procedural grounds in any previous proceeding." The court concluded, "Hoover litigated this same issue in the underlying criminal case as a request to modify the judgment[.]" But AS 12.72.020(a)(5) requires that the claim being raised in the application for post-conviction relief be a claim that was already litigated.

In his application for post-conviction relief, Hoover raised four claims. Hoover first argued that he was actually given concurrent sentences in 3AN-03-09300 CR. In order to prevail on this claim, Hoover had to show that the intent of the parties when entering into the plea agreement was to have concurrent sentences.<sup>8</sup> Success on this claim would result in an order to DOC to revise its time accounting to reflect concurrent sentences in the case.

In the alternative, Hoover argued that he did not knowingly enter into the plea agreement. If he proved this, the result would be allowing Hoover to withdraw his pleas in the 2003 cases.<sup>9</sup>

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<sup>8</sup> See *Dutton v. State*, 970 P.2d 925, 928 (Alaska App. 1999) ("Plea agreements are, in essence, contracts between a defendant and the government. If a dispute arises concerning the terms of the agreement, the trial court must make findings regarding the existence and meaning of those terms." (citation omitted)); *Ghosh v. State*, 400 P.3d 147, 154-55 (Alaska App. 2017) (explaining the role of judges in accepting plea agreements); see also *Ririe v. Anchorage*, 474 P.3d 660, 664 (Alaska App. 2020) ("When the terms of the agreement are ambiguous, 'the court is required to construe the ambiguity against the State, because the State is the party with the greater bargaining power.'" (quoting *Anthony v. State*, 329 P.3d 1027, 1032 (Alaska App. 2014))).

<sup>9</sup> See Alaska R. Crim. P. 11(h)(3), (h)(4)(C).

His final two claims were that the plea process did not follow Rule 11 and that his attorney was ineffective. If Hoover proved either claim, then he would similarly be entitled to plea withdrawal.<sup>10</sup>

Meanwhile, Hoover's prior claim was that there was a clerical error in his written judgment.<sup>11</sup> In order to prevail on this claim, Hoover had to show that the written judgment differed from "the court's original intent insofar as that intent [was] clearly ascertainable from the record."<sup>12</sup> And if he had proven this claim, the remedy would have been to change the wording on the written judgment.

Although similar, the claim that Hoover made in his motion to correct clerical error — with its requirement that the court's intent be clearly ascertainable from the record — does not appear to be the same as any of the claims Hoover made in his application for post-conviction relief. After all, the purpose of post-conviction relief is to allow for the development of an additional record.

I note that in its motion to dismiss, the State argued that Hoover's claim was precluded by collateral estoppel, or issue preclusion, and not by AS 12.72.020(a)(5). Thus, in context, the superior court's ruling that Hoover had previously litigated the same "issue" might have been a ruling that Hoover was collaterally estopped by his prior motion to correct clerical error. But, in order for collateral estoppel to apply, the issues decided in the prior adjudication must be

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<sup>10</sup> See *Lindoff v. State*, 224 P.3d 152, 156 (Alaska App. 2010) (explaining that a defendant may withdraw their plea if Criminal Rule 11(c) was violated and the defendant was prejudiced, which means "(1) that the defendant was not otherwise aware of the information that the judge forgot or neglected to say, and (2) that the defendant would not have entered the guilty plea or the no contest plea if the defendant had been aware of this information"); *Garay v. State*, 53 P.3d 626, 628 (Alaska App. 2002) (explaining that a defendant may withdraw their plea if their attorney's advice was incompetent and there is a reasonable possibility that competent advice would have affected the defendant's decision to enter the plea).

<sup>11</sup> Alaska R. Crim. P. 36.

<sup>12</sup> *Graybill v. State*, 522 P.2d 539, 542 (Alaska 1974).



“precisely the same as [those] presented in the action in question”<sup>13</sup> and “must have been essential to the final judgment.”<sup>14</sup> This test does not appear to have been satisfied for the same reason Hoover appears to have asserted different claims. The issue of whether there was an intent on the part of the sentencing judge that was clearly ascertainable from the record to impose concurrent sentences does not appear to be precisely the same issue as those presented by any of Hoover’s post-conviction relief claims.

On remand, the superior court should carefully consider the precise claims Hoover is making and precise issues he is raising when deciding whether any of his claims are procedurally barred.

*The superior court does not appear to have adequately considered Hoover’s substantive claims*

The superior court also denied Hoover’s application on the merits. But the court again does not appear to have adequately considered the individual claims that Hoover made.

Before examining Hoover’s claims in light of the record, I briefly discuss the law regarding consecutive sentencing in effect at the time of Hoover’s plea agreement. The Alaska Supreme Court stated in 1976 in *Cleary v. State* that “[i]mposition of a consecutive sentence should require the affirmative action of the sentencing court.”<sup>15</sup> And this Court explained in 1984 in *Griffith v. State* that though the then-governing consecutive sentencing statute (former AS 12.55.025(e) & (g)) had been amended in 1982 to delete the default presumption that sentences were concurrent, nonetheless, “in those situations where the sentencing judge has discretion to impose

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<sup>13</sup> *Briggs v. State, Dep’t of Pub. Safety, Div. of Motor Vehicles*, 732 P.2d 1078, 1081 (Alaska 1987).

<sup>14</sup> *Snook v. Bowers*, 12 P.3d 771, 777 (Alaska 2000).

<sup>15</sup> *Cleary v. State*, 548 P.2d 952, 956 (Alaska 1976).

concurrent sentences he should make findings to justify the imposition of a consecutive sentence.”<sup>16</sup> In *Schaffer v. State*, we again explained, “Under this view, a judgment silent on its face should be presumed to impose a concurrent, not consecutive, sentence, except when the imposition of a consecutive sentence would be required as a matter of law.”<sup>17</sup> And in *Baker v. State*, we recognized that the post-1982, pre-2004 version of AS 12.55.025 reflected a legislative “preference” for consecutive sentences, but that despite that preference, the *Cleary/Griffith* rule still governed and a judge needed to expressly make sentences consecutive.<sup>18</sup> We reiterated that holding again in *Paige v. State* and *Carr v. State*.<sup>19</sup> Thus, in order for the original unsuspended portion of his two sentences in 3AN-03-09300 CR to be consecutive to each other, there needed to be some affirmative indication that the parties intended such, and that intent had to be reflected in the judge’s remarks at sentencing or in the judgment itself.

Turning to Hoover’s specific claims, as explained above, Hoover first argued that he actually was sentenced to concurrent sentences in 3AN-03-09300 CR. In the absence of evidence to the contrary, the default presumption would be that the sentences were concurrent. But there was evidence to the contrary — the language in the judgment. Thus, in order to prove this claim, Hoover had to show that, despite the wording of the judgment, the intent of the parties was to have concurrent sentences in

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<sup>16</sup> *Griffith v. State*, 675 P.2d 662, 664 (Alaska App. 1984).

<sup>17</sup> *Schaffer v. State*, 1992 WL 12153285, at \*2 (Alaska App. July 29, 1992) (unpublished).

<sup>18</sup> *Baker v. State*, 110 P.3d 996, 1002 (Alaska App. 2005).

<sup>19</sup> *Paige v. State*, 115 P.3d 1244, 1247-48 (Alaska App. 2005); *Carr v. State*, 2006 WL 3530584, at \*2 (Alaska App. Dec. 6, 2006) (unpublished) (“For cases governed by the pre-2004 law, the test is whether the ‘[sentencing] judge’s remarks, taken as a whole, . . . clearly show the judge’s intent to impose consecutive sentences.’ If not, the sentences will be deemed concurrent.”).

the case.<sup>20</sup> But the post-conviction relief court made no findings as to the intent of the parties when they entered into the plea agreement.

In the alternative, Hoover argued that he should be allowed to withdraw his no contest pleas on the grounds that his plea was not knowing, that the superior court's failure to follow the procedures of Criminal Rule 11 invalidated his plea, or that he received ineffective assistance of counsel from his trial attorney (who led him to reasonably believe that the plea agreement was for concurrent sentences).<sup>21</sup> But the post-conviction relief court made no findings as to what Hoover understood the terms of the plea agreement to be, or whether any misunderstanding was caused by an improper Rule 11 colloquy or ineffective assistance of counsel.

The post-conviction relief court did find that “it [was] clear that the sentences of Counts I and II were meant to run consecutively.” But the court does not appear to have considered all of the evidence when coming to this conclusion. For example, the court stated that “the trial judge confirmed that Hoover had a chance to read the documents” and “Hoover is assumed to have received that chance.” This language mirrors the superior court's finding in its order on the motion to correct clerical error that “Hoover's trial attorney presumably reviewed the judgment with Hoover prior to entering a guilty plea.” But in the default judgment hearing in the post-conviction relief case, Hoover testified that he did not see the judgment until 2018 and never otherwise saw the terms of the plea agreement reduced to writing. From the superior court's order, we are unable to tell if the court considered this testimony when denying Hoover's application. To be clear, the court is not required to credit Hoover's testimony. But, when faced with testimony that directly contradicts an assumption of

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<sup>20</sup> See *Dutton v. State*, 970 P.2d 925, 928 (Alaska App. 1999); *Ghosh v. State*, 400 P.3d 147, 154-55 (Alaska App. 2017); *Ririe v. Anchorage*, 474 P.3d 660, 664 (Alaska App. 2020).

<sup>21</sup> See Alaska R. Crim. P. 11(h)(3), (h)(4)(C); *Lindoff v. State*, 224 P.3d 152, 156 (Alaska App. 2010); *Garay v. State*, 53 P.3d 626, 628 (Alaska App. 2002).

the court, one would expect the court to acknowledge the testimony and address its credibility.

Similarly, the post-conviction relief court noted that the sentencing court orally pronounced the sentences in front of the parties. But the post-conviction relief court did not acknowledge that the sentencing court described only one sentence of 36 months with 24 months suspended in 3AN-03-09300 CR, as opposed to two consecutive sentences. Nor did the post-conviction relief court acknowledge the points in the sentencing hearing and the later bail hearing where Hoover's trial attorney represented that Hoover only had a sentence of 12 months to serve (36 months with 24 months suspended) in 3AN-03-09300 CR.

The post-conviction relief court also relied on the fact that the written judgment stated the sentences were to run consecutively and on the prosecutor's statement on the record at the change of plea hearing that the sentences would be consecutive. This evidence certainly supports the State's position. But the court never acknowledged in its order that the plea agreement in question was a global plea agreement that resolved three separate cases and not just 3AN-03-09300 CR. And the court appears not to have considered how the word "consecutive," as used in the judgment, might be ambiguous in this situation — *i.e.*, how this could mean that the sentences for all counts in 3AN-03-09300 CR would be consecutive or merely that the sentences for all three cases would be consecutive. That is to say, it is possible that a judge — or, in this case, an attorney drafting a proposed judgment for a judge — could decide in a multi-case sentencing to set out the consecutive/concurrent relationship of the sentences in each case only in the judgment form for one case (presumably in the judgment involving the most serious charges). This may not be an ideal drafting practice, but the possibility exists that this is what happened in this case.

The judgment in 3AN-03-09300 CR stated that "[t]he sentences will be consecutive to each other in their entirety[,]" which would ordinarily suggest that it was referring to the sentences for each count in that case. But it is possible that this sentence

reflects inartful drafting, and that it really meant to refer to the relationship of the sentences in all three cases.<sup>22</sup> (This would explain the sentencing court’s remark — “I think that’s pretty clear” — made in response to the prosecutor’s statement that “all these sentences are consecutive.”)

I express no view on the correct outcome in this case, both because the record in this case is insufficiently developed and because any findings of fact must be made by the superior court. But, on remand, if the court reaches the merits of the case, it should thoroughly analyze the evidence to determine whether the evidence supports any of Hoover’s claims.

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<sup>22</sup> In this vein, I note that interpretive principles such as construing documents against their drafter cannot be brought into play until it is known who drafted the judgment. I also note that the judgments in 3AN-03-03140 CR and 3PA-03-01338 CR were not made part of the record below, and on remand might be helpful in resolving this case.