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April 3, 2013

The Honorable Alan Austerman, Co-Chair
The Honorable Bill Stolze, Co-Chair
The Honorable Mark Neuman, Vice-Chair
House Finance Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Rep.Alan.Austerman@akleg.gov
Rep.Bill.Stoltze@akleg.gov
Rep.Mark.Neuman@akleg.gov

Re: Senate Bill 22 – Omnibus Crime Bill
Constitutional Concerns

Co-Chair Austerman, Co-Chair Stolze, Vice-Chair Neuman:

Thank you for the opportunity to provide written testimony with respect to the Committee Substitutive (Finance) for Senate Bill 22, the Omnibus Crime Bill. We are available to work with the Committee on any questions that may arise.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, below is our constitutional analysis of the proposed legislation.

The Backdrop of the Bill: Criminal Justice in Alaska

Operating the criminal justice system is rapidly becoming one of the most expensive functions of the state of Alaska. Virtually the entire budgets of the

Department of Corrections and the Department of Public Safety – for which the governor is requesting $327 million and $208 million this year – go exclusively to managing the massive security apparatus of the state of Alaska. Large portions of the Department of Law's budget, the Department of Administration's budget, and the Court System's budget go to managing the costs associated with prosecuting criminal cases. The indirect costs of the criminal justice system to the state, such as by the increased filings of Child in Need of Aid cases when parents are incarcerated, are difficult to calculate.

The imposition of enormous drains on the economic resources of the state is often the result of proposed statutory revisions, such as are set forth in CS for SB 22 (FIN). Fiscal notes prepared by many affected state agencies list the costs as "undetermined," because no one knows exactly how much each provision of the law will cost.

However, reasonable educated guesses could be made regarding the costs. For instance, would eliminate the grant of good time to prisoners convicted of a class A or unclassified sex offense. Individuals convicted of an unclassified sex offense must be sentenced to at least 20 years, but may be sentenced to as many as 99 years. AS 12.55.125(i)(1). Individuals convicted of a Class A sex offense must be sentenced to at least 15 years, but may be sentenced to as many as 99 years. AS 12.55.125(i)(2). In 1999, 15 people were sentenced for an unclassified sex offense.[1] Due to the interim changes in the law, all of them would have been sentenced to serve at least 20 years, if sentenced today. If CS for SB 22 (FIN) passes, none of them would be eligible for mandatory parole on the basis of good time.

Assuming – and this is likely an underestimation – that about 15 people are convicted of unclassified sex offenses every year, and assuming – and this is also likely an underestimation – that they are all sentenced to the mandatory minimum sentence, that means that at least 300 person-years of incarceration are handed down each year for unclassified sex offenses. If unclassified sex offenders become ineligible for mandatory parole, they will likely serve 100 person-years more in custody, because the "good time" deduction is usually about one-third of the sentence. Each person-year of incarceration costs the state about $48,000. So, just excluding "good time" credit for unclassified sex offenders could cost the state about $5 million dollars in correctional costs for fifteen people. And each year, more offenders will be incarcerated for longer; by 2025, this bill have imposed on the state at least $53 million in incarceration costs to manage 165 people.

The same thing will be true of Class A felony sex offenders. In 1999, 10 people were sentenced for Class A felony sex offenses.[2] Now, they would each be sentenced to a mandatory minimum

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[1] Alaska Judicial Council, Alaska Felony Process: 1999, Table C-1 *at* http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf.

[2] *Id.*

of 15 years; roughly, 150 person-years of sentences would be passed on this category of prisoners each year. Eliminating good time credit will tend to impose an extra 50 person-years of incarceration for Class A sex offenses each year, or roughly $2.5 million worth of incarceration costs for managing 10 people. These are very rough, likely very conservative estimates based on old data. But it is better to start framing the costs of our correctional policy in terms of some roughly estimated numbers rather than just declaring the costs to be "undetermined," and putting a zero down on the bottom line.

Every year, there is a new omnibus crime bill. Every year, increases in grading of offenses are proposed; more mandatory minimums are proposed; and more limitations on means to manage our prison populations are imposed. Rarely if ever do these changes to our criminal justice policies reflect any systemic consideration of how much punishment is enough. Every year, we incrementally expand the scope of the criminal laws and criminal penalties without reference to any study or determination about what is happening on the ground in Alaska. And these incremental changes impose millions and millions of dollars in future liabilities to be paid for by our children and grandchildren.

The governor's FY2004 budget for the Department of Corrections was $178 million; this year, it is $327 million, a growth of 83% in 10 years. But that budget line doesn't tell the full story, because the costs of many of the most expensive policies won't be fully realized for years to come. At some point, we will not be able to afford to build roads, bridges, and schools, because we will need the money to build another and another prison.

In the 21st century, the Legislature has access to the best criminal justice studies, and can look at what other states are doing to manage correctional costs in a way that defends public safety. The consensus opinion from almost any serious review of Alaska criminal justice policy indicates that more focus should be put on preventing crime, treating the causes of crime, enabling the smooth re-entry into society of those leaving prison, and preventing recidivism of those who have previously offended. The Governor's office appears to be focusing solely on a state policy that reflects misunderstanding and rejection of the basic concepts reflected in criminology studies.

More and longer incarceration doesn't solve any crime problem; over-incarceration may actually pose a threat to public safety. John Dillinger was first arrested for robbing a grocery store of $50; after spending years in the Indiana state prison system, where he learned the fine points of how to rob a bank, his prison experiences helped turn him into career criminal. Today, in California, we see a state whose policies of mass incarceration facilitated the creation of statewide prison gangs. Those prison gangs tended to become street gangs on the outside, creating a framework for organized crime throughout the state.

CS for SB 22 (FIN) also appears to ignore the basic statistics on recidivism. Sex offenses are extremely serious crimes and deserve to be met with a stern response from the state. However, sex offenders are also the *least likely*, among all offenders, to be rearrested or to commit another

offense.[3] Despite this extensively documented phenomenon, this bill would continue a long-standing policy of singling out sex offenders for mandatory minimum sentences and parole exclusions far beyond what is necessary to control those who have previously committed sex offenses.

Our founding fathers experienced the harsh hand of criminal investigations and prosecutions under the hand of Great Britain. Because of their experiences, they knew that the criminal justice apparatus was the most likely way for a government to deny the people their rights and liberty. Four of the ten amendments in the Bill of Rights are aimed in large part at limiting the criminal justice system. We should not casually ignore the hazards to our collective liberty in an ever-snowballing criminal justice system.

Sectional Analysis

Section 1, 21, 22: Three-Judge Sentencing Panels in Certain Sex Offense Cases

As discussed above, the apparent conclusion in 2006 that "sex offenders usually have committed multiple sex offenses by the time they are caught, that they often do not respond to rehabilitative treatment, and that they therefore cannot be safely released into society" should be seriously questioned in light of Judicial Council's recidivism study, showing that sex offenders were the least likely to be rearrested or to reoffend. *Collins v. State*, 287 P.3d 791, 796 (Alaska App. 2012). Certainly, *some* sex offenders may be repeat offenders who are particularly dangerous; however, painting *all* sex offenders with the same broad brush will tend to mask those who are truly dangerous and unnecessarily punish those least likely to reoffend. At minimum, it makes sense to allow three-judge panels to serve as a safety valve and to consider deviations from the presumptive sentencing range where individual facts dictate. None of the legislative findings show instances where the public safety has been jeopardized by these three-judge panels. Alaska judges are fit to make these determinations.

Categorically, the research strongly supports the notion that the ordinary sex offender is less likely to reoffend than other offenders. Several Alaska-specific studies have been conducted on sex offenders. A comprehensive study of *all felons* by the Alaska Judicial Council found that sex offenders were least likely to reoffend among *all categories* of felons.[4] Another UAA study

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[3] Alaska Judicial Council, Criminal Recidivism in Alaska, at 4, *available at* http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf; *id.* at 8; *id.* at 12.

[4] *Id.* at 4 (2007) (showing that 39% of sex offenders were re-arrested in the time frame of the study, compared to 67% of property offenders, 61% of driving offenders, 60% of violent offenders, and 52% of drug offenders); *id.* at 8 (finding that sex offenders were the least likely among all felons studied to be re-arrested for the same type of crime as their original conviction).

found that several categories of Alaskan sex offenders were less likely to reoffend than a control group of non-sex offenders.[5] "The myth of the incorrigible sex offender, all but guaranteed to reoffend, has been largely refuted. A study by the Alaska Justice Statistical Analysis Center of sex offenders released from Alaska corrections facilities in 2001 found that non-sex offenders were more likely to be rearrested than sex offenders."[6]

Nationwide, studies bear out the notion that sex offenders as a whole are those least likely to reoffend. A 2003 U.S. Department of Justice survey of 9600 sex offenders released in 1994 found that the overall re-arrest rate for sex offenders was 43%, while the overall re-arrest rate for non-sex offenders was 68%.[7] That study also found that sex offenders were less likely to be re-arrested for a felony than non-sex offenders.[8]

A 2012 U.S. Department of Justice study recently found that the creation of the New Jersey sex offender registry had absolutely no effect on the likelihood that sex offenders would reoffend.[9]

> Sex offenders, the seemingly worst of the worst among criminal offenders today, are commonly, *albeit incorrectly*, assumed to be highly recidivistic, as well as specialists, engaged in sex offending only. Despite the fact that our legal responses to sex offenders, primarily sex offender registration and notification (SORN), are based on assumptions that those who commit sex crimes have no control over their sexual impulses and will repeat their crimes again, relatively little research has found support for such beliefs.[10]

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[5] Anthony M. Mander *et al.*, *Sex Offender Treatment Program: Initial Recidivism Study: Executive Summary*, Fig. 1, *available at* http://justice.uaa.alaska.edu/research/1990/9419sotp/9602sotp.html (showing treated sex offenders had the longest "survival rate" without reoffending, followed by unmotivated, untreated offenders; motivated, untreated offenders; and, last, the control group of non-sex offenders); *see also* Deborah Periman, *Sex Offender Registries and Notification Programs*, 4 UAA Justice Center Research Overview, at 2 (2009) ("The majority of sex offenders do not reoffend, and when they do commit another crime it is not usually a sexual offense or crime of violence."), *available at* http://justice.uaa.alaska.edu/occasionalpapers/op02.asora.pdf.

[6] Deborah Periman, *Revisiting Alaska's Sex Offender Registration and Public Notification Statute*, 25 UAA JUSTICE FORUM (Spring/Summer 2008), *available at* http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/c_asora.html.

[7] Patrick A. Langan *et al.*, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, at 2 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf.

[8] *Id.*

[9] Richard Tewksbury *et al.*, Bureau of Justice Statistics, *Final Report on Sex Offenders: Recidivism and Collateral Consequences*, at 10-11, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf.

[10] *Id.* at 1 (emphasis added).

The overall findings of the New Jersey study showed that recidivism rates were comparatively low for sex offenders as a whole.[11] "Research on the offending patterns of incarcerated sex offenders and probationers, however, typically finds that recidivism rates for sex offenders are relatively low and vary across different sex offender types."[12]

Studies, both in Alaska and from national authorities, show decisively that sex offenders are among the offenders least likely to re-offend and least likely to be re-arrested. The legislature should decline, in light of the scientific evidence, to affirm statements about the likelihood of re-offense from sex offenders against the weight of the scientific consensus.

Sections 2 & 11: Expanding the List of Offenses Without a Statute of Limitations

Section 2 would remove any statute of limitation for *civil actions* arising out of a claim of felony sex trafficking or felony human trafficking. Section 11 would remove any statute of limitations for *criminal prosecutions* for certain sex trafficking offenses, human trafficking offenses, newly created sex offenses, and child pornography offenses.

Nothing about the legislative record makes clear why these offenses are singled out for special treatment. Nor is there a common thread that links them all. Many of the listed offenses do not require that the victim be underage. For instance, AS 11.66.120 makes "advertis[ing] . . . travel that includes commercial sexual conduct as enticement for the travel" a Class B felony. Under the bill, not only would it be a crime to advertise for a travel package including a visit to a legal brothel in Nevada, one could be prosecuted for this offense at any point until one dies, even if the charges are brought 50 years after an advertisement is published.

Statutes of limitations on criminal charges serve an important purpose. Such statutes recognize that witness move, grow old, forget, and die. They recognize that it grows harder and harder to mount a successful defense to criminal charges as those charges grown stale. Statutes of limitations tend to preserve the reliability of and public trust in criminal proceedings. They also encourage prosecutors to focus their efforts on the most serious crimes.

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[11] *Id.* at 10 ("The non-sex offenders, on average, were re-arrested significantly more frequently post-release compared to the sex offenders."); *id.* ("94.7% of the sex offenders are identified as low-risk compared to less than 75% of the non-sex offenders.").

[12] Lisa L. Sample & Timothy Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIMINAL JUSTICE POLICY REVIEW 83, 97 (Mar. 2006), *available at* http://constitutionaldefense.org/wp-content/uploads/2009/12/51-21.pdf.

Exceptions to the statute of limitations may be appropriate in some cases. For some offenses, like murder, the crime is so serious that many people believe the danger in letting such offenses go unprosecuted is worse than the hazard posed by trial on stale evidence. For other offenses, such as sex crimes against children who may be unable to report abuse or to participate effectively in a prosecution, the statute of limitations is extended or eliminated.

However, there is enormous hazard in slowly adding every offense in the book to the list of offenses exempted from the statute of limitations, regardless of the offense's seriousness or circumstances making prompt prosecution difficult. Adding B felonies and offenses unrelated to the minority of the victim to this list of crimes exempt from statutes of limitations merely multiplies the already enormous number of opportunities for criminal prosecutions in Alaska.

Some might defend Section 11 by stating that prosecutors will use their discretion only to bring the most important cases and will not prosecute stale cases of dubious value. One might point to many recent cases, including the Ted Stevens prosecution, to question whether prosecutorial discretion and supposed lack of bias should be relied upon as a defense of our liberties. However, Section 2, which deals with *civil* statutes of limitations, raises similar concerns, unmitigated by any of the benefits that might inhere in prosecutorial discretion.

A party bringing a claim for monetary damages is by definition biased, and that party has little incentive to ignore old, stale claims. Allowing a party to bring private claims unrestricted by any statute of limitations will allow that party to wait until the most opportune time to file the complaint. A claimant could simply wait until the best witness for the defendant has died and file suit then. Since defending oneself from even frivolous litigation entails a certain amount of cost, opening the door to all manner of litigation for all of one's life exposes ordinary people to the duty to defend themselves indefinitely against all manner of tort claims. If a claimant chooses not to file a case in some reasonable interval, for reasons unrelated to minority or disability, why should the state facilitate the delay of proceedings in a way which is harmful to justice and the truth-finding purpose of the courts?

As a side note, our concerns about the endless extension of time in which to file criminal and civil complaints are particularly heightened with regard to the human trafficking laws, which we criticized as poorly drafted last year. The human trafficking law criminalizes, among other acts, "induc[ing] another person to engage in sexual conduct . . . or labor . . . by deception." AS 11.41.360(a). This open-ended statute leaves ordinary dishonesty in sexual relations subject to prosecution, like lovers who falsely state they'll be faithful to their partners or who misrepresent how many prior sexual partners they've had. It also allows felony punishment for misleading statements from an employer.

This year, the original error in the human trafficking bill is compounded by opening employers to endless litigation on labor cases and private sexual partners open to endless litigation on any matter arising from allegedly false representation to their partners. These problems serve only to make the implications of a badly written law worse.

Sections 3, 4, 5, 6, 7, and 8: Sexual Contact with Supervisees by Probation/Parole Officers

The ACLU of Alaska generally supports the aims of Sections 3, 4, 5, 6, 7, and 8 of the bill. Sexual misconduct by adult and juvenile probation and parole officers poses a serious risk to vulnerable individuals in the state's care. Probation and parole officers have great authority in determining whether a probationer or parolee is detained. Probation and parole officers should know that sexual contact with a probationer or parolee is not tolerated and subject to penalty. While most officers will fulfill their role professionally, the officer who wishes to abuse his authority should be strongly deterred from doing so.

Section 19: Removing Sex Trafficking Offenses from the List of Offenses Eligible for Suspended Imposition of Sentence

Suspended Imposition of Sentence is virtually the only statutory diversionary program for criminal charges in Alaska. While many of the offenses described in AS 11.66.110-135 are very serious, some are less so. AS 11.66.130 could be read broadly to allow prosecution of minor participants in prostitution operations, as it criminalizes "conduct that institutes, aids, or facilitates a prostitution enterprise." One could read AS 11.66.130 so broadly as to criminalize all sorts of acts by the victims of sex trafficking. If a victim of sex trafficking answers the phone at a massage parlor and puts a note in the calendar book, she has "aid[ed] or facilitate[d] prostitution" in some sense. Does that make her no longer a victim? No, but it does make her a felon under Alaska law.

The first thing most sex trafficking advocates say is to stop prosecuting the victims. As long as victims are subject to prosecution, it will be difficult for them to seek protection. Section 18, by sweeping a lot of dissimilar conduct into the same basket, would bar merciful treatment to those who were merely minor participants in the criminal operation or who were generally the victims of the operation. Section 18 should be rewritten to exclude the suspended imposition of sentence for offenses under AS 11.66.110 and 11.66.120 only.

Section 30: Expanding the List of Offenses Not Eligible for Good Time

We have already discussed this proposed expansion in our review of the general criminal justice backdrop of this bill. We incarcerate an ever expanding number of prisoners, for longer and longer times, and often less and less serious reasons. The effect on our prisons has been striking. This section would eliminate unclassified and Class A sex offenses from good time calculations. Along with the previously discussed financial problems, this section could impose some significant non-monetary problems. One reason for having "good time" rewards is to encourage good behavior from prisoners. As we are increasing the number of prisoners in custody, do we really want to house a lot of prisoners on long sentences with no incentive to behave? This

proposal puts correctional officers at risk by eliminating any incentive towards good behavior. It is bad correctional policy and bad public safety policy. The correctional officers in Alaska institutions deserve serious enactments from this body, not bills that put them in harm's way.

Section 34: Defining the Attorney General's Designee

The legislature previously authorized the Attorney General to sign administrative subpoenas for information about an Alaskan's use of the internet. Allowing a prosecutor to write his own search warrants for private information is a stunning expansion of unilateral prosecutorial power, unreviewed by any judge. In order to limit the potential for abuse, that power should be held by as few people as possible. CS for SB 22 (FIN) would allow an Attorney General's designee to issue those subpoenas as well.

Section 34 states that "the attorney general's designee *may be*" the Deputy Attorney General for the civil or criminal units of the Department of Law. Unfortunately, the terms "may be" do not clearly *limit* the designees with authority to issue those subpoenas only to those two attorneys, although we believe that was the legislative intent. To ensure the law is clear, the section should be rephrased to clarify that an attorney general's designee *may only be* a Deputy Attorney General.

If the Attorney General could designate the authority to demand internet records to anyone he chose, the subpoena power could be abused without adequate oversight. While we do not support expanding the already enormous grant of prosecutorial authority, we certainly believe that power should be carefully limited in scope.

Section 38: Restriction on Access to Evidence in Criminal Cases

This section would prohibit any release of evidence to defense counsel that constitutes child pornography. Absent from the record is evidence of child pornography being misused by defense attorneys. Careful restrictions on how a defense attorney may use the evidence or how and when he may show the evidence to his client might be appropriate. Forcing defense attorneys to view the primary piece of evidence in a case at the convenience of the state, in a police station or prosecutor's office, does not comport with basic due process or effective assistance of counsel. Careful review of the evidence is simply not possible in a prosecutor's office.

The rule could also present substantial difficulty for attorneys located at a distance from the prosecutor's office designated by the state; an attorney in Fairbanks can't be expected to travel to Barrow just to look at evidence (or vice versa). While the rule would allow review of the evidence by an *out-of-state* expert, it would still require an in-state expert to appear in person at the prosecutor's office, which would also create significant difficulties for the in-state expert if he lived in a different city from the prosecution or the defense.

Further, some experts may be retained for the purposes of showing that the defendant did not or could not have knowingly put the file in question on the hard drive in question. Managing electronic evidence may require running diagnostics or specific programs on the data, a process impossible on someone else's computer in the middle of the prosecutorial office. Only by conveying a full copy of the evidence to the defense can a person be adequately represented in such cases.

Section 39: Rejecting Pre-Sentence Reports Without Victim Impact Statements

Allowing victim impact statements may be helpful and appropriate at sentencing hearings. However, the problem with the proposed rule amendment is that it does not explain what should happen if the statements are not included. The rule says merely that the entire pre-sentence report should be rejected. Should the sentencing then proceed without *any* pre-sentence report? Should the Court simply discard all the existing research and information? Should the defendant – who may be waiting in custody – continue to await sentencing until an acceptable pre-sentence report is filed? If so, how long must he wait?

It seems counter-productive to reject the whole pre-sentence report in the absence of a victim-impact statement. The Alaska Constitution already guarantees the right to "be present at all criminal or juvenile proceedings where the accused has the right to be present [and] the right to be allowed to be heard, upon request, at sentencing." Alaska Const., Art. I, Sec. 24. The prosecution, the Department of Corrections, and the Office of Victim Services ought to be actively involved in consulting with the victim at sentencing. The victim also has a right to "timely disposition of the case following the arrest of the accused." *Id.*

A simpler solution might go as follows. Under existing criminal rules, the presentence report must be filed with the court 30 days prior to the sentencing date. Instead of *rejecting* the report, the legislature could state that, if a presentence report lacks a victim impact statement, the Court should notify the victim and the Office of Victim's Rights by mail of the date of sentencing and invite the victim to appear. The victim would then be able to appear in person at the sentencing, as contemplated by the constitution. The 30-day window should permit adequate notice to issue.

Conclusion

We hope that the House Finance Committee will note our concerns with the proposed language in CS for SB 22 (FIN).

While the ACLU of Alaska **does not contest the State's ability and duty to pass laws to protect public safety**, as drafted, **many provisions in CS for SB 22 (FIN) are poorly tailored to advancing the cause of public safety and would come at substantial fiscal and personal costs to the community as a whole.**

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

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