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February 7, 2013

The Honorable John Coghill, Chair
The Honorable Lesil McGuire, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
Juneau, AK 99801
via email: Sen.John.Coghill@akleg.gov
Sen.Lesil.McGuire@akleg.gov

Re: Senate Bill 22 – Omnibus Crime Bill
Constitutional Review

Chair Coghill, Vice-Chair McGuire:

Thank you for the opportunity to submit written testimony regarding Senate Bill 22, the omnibus crime bill.

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, we appreciate the opportunity to provide the Committee with our constitutional analysis of the proposed legislation.

We would be happy to work with the Committee and the Department of Law to answer any questions you and propose or review revisions to the Bill.

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 SB 22. 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 SB 22 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 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

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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.*

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; overincarceration 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 point 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.

SB 22 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, 20, 21: 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); *see supra* note 3. 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.

Sections 2 & 9: 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 9 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.

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[3] Alaska Judicial Council, Criminal Recidivism in Alaska, at 4, *available at* http://www.correct.state.ak.us/admin/docs/2011Profile06.pdf; *id.* at 8; *id.* at 12.

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.

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 9 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 and 6: Sexual Contact with Supervisees by Probation/Parole Officers

The ACLU of Alaska generally supports the aims of Sections 3, 4, 5, and 6 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 7: Barring Contact Between Victims and Offenders

The ACLU suggests the language in section 7 could be refined to clarify the law. The existing statute makes it clear that the "order" being violated must be in a sentencing order, bail order, or condition of release, all of which must be set by a judge or (in the case of parole condition) the Parole Board.

The open-ended language in the bill states that a person may be convicted of the offense if he contacts a victim or witness he has been ordered not to contact while in official detention. The scope of ***who*** may order him not to contact the victim or witness is unclear. Certainly, a judge committing a prisoner to jail could order the prisoner not to contact the victim or witness; those orders are clear, made in a hearing-type setting, and typically either written down or audio-recorded.

However, the bill does not limit who can order the individual not to contact the witness or victim. Can someone be prosecuted for the offense merely because a correctional officer comes

by his cell and tells him not to call a witness? The bill is silent on this point and – unlike a sentence order, bail order, or condition of release – the number of people who could issue an order to a detainee during his detention is very long. To prevent ambiguity that could be fatal to the new amendment, Section 7 should be amended to state that any order giving rise to charges under this section must be issued on the record or in writing by a judge or the parole board.

Section 13: Limiting Admission of Evidence Relating to the Alleged Victim's Sexual Conduct

This section seeks to balance several important rights, including the right of the accused to a fair trial and the right of privacy for victims of sexual assault. The bill proposes that a criminal defendant should have to give notice that he wishes to introduce evidence relating to sexual conduct of the alleged victim at least five days prior to trial. This proposal has substantial value. While evidence of sexual conduct on other occasions may be relevant for some limited purposes at a trial, in many instances, improper use of information about the alleged victim's sexual history is used to assassinate the alleged victim's character.

The ACLU of Alaska would suggest a minor amendment to the language proposed in the bill. The bill mandates that the defendant file his motion five days before trial. However, the bill only permits the defendant to raise a motion to admit the evidence at trial if the evidence was unavailable prior to trial. This bill creates a legal lacuna, where the prosecution could provide evidence *two days* before trial, and the defendant would be helpless to introduce the evidence. He could not meet the standard that the evidence was not presented to him before trial, because it was presented before trial; however, it was presented after he could have filed any motion to admit it.

A bill thwarting a defendant from presenting relevant evidence would clearly violate the due process right to a fair trial. Obviously, the bill must allow the defendant to make a motion at trial to admit certain evidence about the sexual conduct of the alleged victim if the evidence is not disclosed to the defendant at least five days prior to trial. Given the seriousness of the charges at issue, a defense attorney should not have to scramble to present a motion in an hour or two.

In light of the affirmative duty of the prosecutor to disclose potentially exculpatory evidence and the desire to avoid trials by ambush, the language requiring that the evidence be admitted at trial should also be removed. Some evidence may be potentially exculpatory and only relevant to the defendant's theory of defense. The defendant should be free to introduce exculpatory evidence, even if the prosecution does not enter it at trial.

The ACLU of Alaska would suggest that the line "The defendant may apply for an order during trial if the request is based on evidence admitted at trial that was not available to the defendant before trial" be replaced with the line "The defendant may apply for an order during trial if the request is based on evidence that was not available to the defendant <u>until 14 days</u> before trial."

We read the term "available to the defendant" as including evidence independently discovered by defense investigation; otherwise, the statute would say too little. The prosecution has an affirmative constitutional and ethical duty to disclose exculpatory evidence, not merely to make it "available." We trust that courts will read the statutory language "available to the defendant" without diminishing that prosecutorial obligation of affirmative disclosure. This section should also be read to set a basic minimum for announcing a defense. It should not be read to diminish a criminal court's inherent authority to set its own deadlines for disclosure of evidence.

Sections 14, 15, 43, and 44: Examination of Witnesses Invoking the Right Against Self-Incrimination

The Fifth Amendment of the United States Constitution states that no one "shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. V. The Alaska Constitution states a similar concept somewhat more broadly: "No person shall be compelled in any criminal proceeding to be a witness against himself." Alaska Const., Art. I, Sec. 9.

Notwithstanding this very clear language, these sections propose that anyone who is compelled to appear in a criminal case, who invokes the right that two different constitutional conventions bestowed upon her, and whom the prosecutors decline to make immune, shall be compelled to testify before the court, so that the court can decide if there is a valid claim for immunity. No reason is given for compelling the testimony in question. It is unclear why a written proffer to the court would be inadequate, and nothing in the record shows that the proffer from the witness's counsel has historically been inadequate.

The nominal protections against use of the information which is supposedly protected by the *in camera* nature of the hearing are destroyed by Section 15, which requires that the court write detailed statements of its findings of fact "explain[ing] the real or substantial danger that the proffer or testimony" would pose to the witness.

This proposed procedure wherein the witness's *in camera* testimony would be "privileged and inadmissible for any purpose" but the Court would be required to write up its findings *based on that testimony and relaying the substance of the testimony*, obviously violates the constitutional protection against disclosure.

The only protection for the Court's opinion – which contains the substance of the protected testimony – is that it is "sealed." A "sealed" order is one which is "restricted to the judge and persons authorized by written order of the court." Alaska R. Admin. 37.5(c)(5). It is unclear whether the statute even excludes the Department of Law from the scope of those authorized to obtain a copy of the trial court's opinion reflecting the substance of the protected testimony.

Even assuming the Department of Law initially lacks access to the sealed opinion, the witness is compelled by law to testify and incriminate himself, knowing that the continued secrecy of his

testimony is protected only by the willingness of a judge to exclude every person other than the judge from the scope of his order sealing the document. The determination to unseal a document should be made by weighing whether the public interest in disclosure is outweighed by a legitimate interest in confidentiality. Alaska R. Admin. 37.6(b). The right of a person not to be compelled to incriminate himself is not subject to weighing tests. Constitutional protections must be respected by guarantees.

However, it is doubtful as to whether the bill even allows the Department to be excluded from the scope of those with access to this document. Section 15 guarantees that the Department of Law has a right to an immediate interlocutory appeal of the order. If the Department isn't entitled to obtain a copy of the order in the first place, it won't know that it has any decision to appeal. Moreover, the Department of Law could (and almost certainly would) argue that, in order to appeal the trial court's order, it would need to have a copy of the document to evaluate its claims. The only other alternative would be the absurd scenario in which the Department would somehow appeal an order that it was not allowed to read.

The bill suggests that one basis for appeal by the prosecution would be that the Court lacked a sufficient factual basis for its decision. If the Court fails to adequately explain the factual basis of its opinion, one presumes that the Department of Law will challenge the adequacy of the opinion. If the Court explains the factual basis for its reasoning in detail, the Court may be vindicated but the privilege would be lost. This proposal puts the right against self-incrimination in a vise from which it cannot escape.

The bill explicitly allows the compelled testimony of a person against himself. The only even plausible defense of such a process is that "the state has taken measures to remove the hazard of incrimination." *State v. Gonzalez*, 853 P.2d 526, 530 (Alaska 1993). SB 22 instead seems set up to ensure that incrimination takes place, whether the state wins or loses.

Sections 16 and 17: Time Served Credit for Rehabilitative Programs

This section mandates that a defendant provide notice 10 days before a sentencing hearing that he seeks time served credit for time spent in a residential rehabilitative program and disallows any claims for time credit requested after the date of sentencing.

The proposal doesn't have a clear basis in any obvious policy concern, and seems to fly in the face of others. The state certainly has an interest in encouraging detainees to attend treatment programs. If the state enacts policies that tend to *deter* people from seeking out substance abuse treatment and mental health treatment, how does that foster a legitimate state end? If this bill passes, a defense attorney would be required to inform his client that getting time served credit for treatment programs is very difficult, and that his client might be better off in jail, where at least he knows he'll get credit for his time served.

The bill also presents no real solution for what happens in the case where a person seeks to plead and be sentenced on the same day, such as for a minor misdemeanor case. It's not plausible or feasible for a person to send notice regarding sentencing prior to a plea being entered.

If the concern embodied in this section is a record-keeping one, clarity at the time of sentencing could be much better accomplished by ordering treatment facilities receiving bailees to provide a notice to the court, prosecutor, and defense counsel when someone is admitted, and notice to the court, prosecutor, and defense counsel when someone is released. That way, time credit could be easily calculated at the time of sentencing. Erecting procedural barriers to time served credit for treatment programs seems calculated to accomplish nothing more than discouraging participation in treatment. Stamps are cheap; alcoholism and drug addiction aren't.

Section 18: 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 23: Making Engaging in Prostitution with a Person Under 20 a Registrable Sex Offense

As stated above, one of the problems inherent in the over-prosecution of sex offenders is that current policy overpunishes many people unlikely to commit new crimes or pose a danger to the public. Section 23 illustrates the overbreadth of this movement. Our laws should now categorize a person who pays a 19-year-old for sex in with a person who abducts, rapes, and murders children. Treating such dissimilar behavior similarly will diminish public trust in the registry.

Moreover, it will impose on an undeserving individual many presumptions and legal handicaps; Section 36 of this same bill would make it easier for the state to remove children from the home of a sex offender, yet patronizing a 19-year-old prostitute—while not morally laudable—does not necessarily make one an unfit parent. The effects of the sex offender registry are so sweeping that one should not casually add to the list of sex offenses on the registry.

No evidence is presented that a person who pays a 19-year-old for sex is somehow a dangerous individual. The ACLU of Alaska recognizes that prostitution is illegal. However, a 19-year-old is an adult in every jurisdiction in this country. The age of consent in Alaska is 16, and we house children as young as 16 in adult correctional facilities. A 19-year-old can vote, can be prosecuted as an adult for a criminal offense, can enlist in the army, and can make virtually every adult decision that a 50-year-old can (with a few exceptions like buying alcohol or running for the U.S. Senate). Without commending people who seek out prostitution, a reasonable person can readily recognize the relative moral difference between rape and prostitution with a consenting adult. Unfortunately, SB 22 cannot.

Sections 24, 25, 26, 27and 28: Allowing GPS Surveillance Under a Protective Order

SB 22 would allow the imposition of a requirement that the subject of a protective order or stalking/sexual assault order submit to GPS surveillance of his whereabouts for six months or a year, without any jury verdict, finding of probable cause, or even necessarily the attendance of the subject. Moreover, since a court granting emergency *ex parte* relief under AS 18.65.855 can grant any relief authorized by AS 18.65.850(c), the bill would also allow a judge to impose GPS monitoring on an individual for 20 days even without any notice or opportunity to be heard. It is unclear how the subject of an emergency order is supposed to comply with the GPS tracking provision of the order as soon as he is given notice of the order.

Protective orders impose real burdens on individuals, but generally they are *negative*: the subject of the order cannot contact the petitioner, threaten her, or must stay ***away from*** the petitioner's home or office. Generally, even if the allegations are false or exaggerated, avoiding contact with someone who is upset enough to seek such an order is a good idea. Requiring the ***affirmative*** participation of the subject of the order in the GPS program is thus a first for Alaska. It constitutes a substantial burden on the privacy of the individual subject to the order.

Allowing longstanding government surveillance of an individual on an *ex parte* basis and without notice to the individual is a shocking invasion of individual privacy. While there may be extreme cases of stalking, domestic abuse, or sexual assault where electronic surveillance might be appropriate, it is difficult to imagine any such compelling scenario where the state would not simply press criminal charges. If law enforcement or prosecutors are not promptly acting in response to victims of stalking, domestic abuse, or sexual assault with very credible, very compelling claims, the legislature should take that concern up with the Department of Law or the Department of Public Safety rather than creating a private, *ex parte* avenue for long-term

surveillance and subject to substantial abuse by private actors with their own grudges, biases, and ulterior motives.

The ACLU also notes that the statute puts no restriction on what use the state can make of the information obtained pursuant to GPS surveillance; law enforcement can use it for collateral purposes unrelated to the alleged stalking or abuse.

Section 31: 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.

Sections 32, 33, 34, and 35: Increased Authority for Administrative Subpoenas from Law Enforcement

The Department of Law continues to seek expanded administrative subpoena power for its criminal investigations, avoiding the trouble of complying with the warrant requirement in our Constitution. The original enactment was of dubious constitutionality, but this bill allows for far more abuse.

The bill appears on its face to allow any attorney in the Department of Law to send a letter legally compelling an internet provider to produce information about the internet use from a particular location. Formerly, only the Attorney General himself could sign such a letter. Under this bill, many more letters could be sent, by many more attorneys. As long as the Attorney General is the only person who can sign such letters, there would at least be some accountability within the Department of Law. Once any lawyer can sign such a letter, hundreds of Department lawyers will be able to demand information about internet usage without any oversight. The Attorney General will only be able to guess whether those letters issue for the purpose of criminal investigation, to find out what address unpopular on-line postings are coming from, or to track down some attorney's ex-girlfriend.

The privacy of Alaskans deserves better than a rubber stamp inquiry before their personal information is seized. The authority to seize individual records should not be disseminated widely and without control or supervision.

Upon review of the statement in support of the bill from the Department of Law, it appears that the Department is taking the position that the attorney general may have only one designee. If so, that limitation should be clearly enunciated in statute. Section 35 could be rewritten to clarify that there may be only one attorney general's designee.

Section 39: 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 40: 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 Senate Judiciary Committee will note the multiple constitutional infirmities with the proposed language in SB 22.

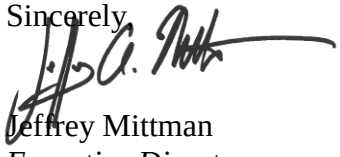
While the ACLU of Alaska **does not contest the State's ability and duty to pass laws to protect public safety**, as drafted, **SB 22 goes far outside this permissible sphere.**

The issues raised above present substantial Constitutional problems and would entangle the state in lengthy, costly, and needless litigation, should SB 22 pass as currently written.

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

cc: Senator Fred Dyson, Sen.Fred.Dyson@akleg.gov
Senator Donald Olson, Sen.Donald.Olson@akleg.gov
Senator Bill Wielechowski, Sen.Bill.Wielechowski@akleg.gov