

CS FOR HOUSE BILL NO. 298(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 2/12/10
Referred: Finance

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the crimes of harassment, distribution and possession of child**
2 **pornography, and distribution of indecent material to a minor; relating to suspending**
3 **imposition of sentence and conditions of probation or parole for human trafficking or**
4 **for certain sex offenses; relating to aggravating factors in sentencing; relating to**
5 **registration as a sex offender or child kidnapper; relating to administrative subpoenas**
6 **for certain records involving exploitation of children; amending Rule 16, Alaska Rules**
7 **of Criminal Procedure; and providing for an effective date."**

8 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 *** Section 1.** AS 11.56.759(a) is amended to read:

10 (a) A person commits the crime of violation by sex offender of condition of
11 probation [OR PAROLE] if the person

12 (1) is on probation [OR PAROLE] for conviction of a sex offense;

13 (2) has served the entire term of incarceration imposed for conviction

1 of the sex offense; and

2 (3) [EITHER

3 (A)] violates a condition of probation imposed under
4 AS 12.55.100(a)(5), (a)(6), or (e), 12.55.101(a)(1), or any other condition
5 imposed by the court that the court finds to be specifically related to the
6 defendant's offense [; OR

7 (B) VIOLATES A CONDITION OF PAROLE IMPOSED
8 UNDER AS 33.16.150(a)(3), (a)(4), (a)(6), (a)(13), (b)(4), (b)(11), OR (f)].

9 * **Sec. 2.** AS 11.56.759(c) is amended to read:

10 (c) Violation by sex offender of condition of probation [OR PAROLE] is a
11 class A misdemeanor.

12 * **Sec. 3.** AS 11.56.840 is repealed and reenacted to read:

13 **Sec. 11.56.840. Failure to register as a sex offender or child kidnapper in**
14 **the second degree.** (a) A person commits the crime of failure to register as a sex
15 offender or child kidnapper in the second degree if the person

16 (1) is required to register under AS 12.63.010;

17 (2) knows that the person is required to register under AS 12.63.010;

18 and

19 (3) fails to

20 (A) register;

21 (B) file written notice of

22 (i) change of residence;

23 (ii) change of mailing address;

24 (iii) establishment of an electronic or messaging address
25 or any change to an electronic or messaging address; or

26 (iv) establishment of an Internet communication
27 identifier or any change to an Internet communication identifier;

28 (C) file the annual or quarterly written verification; or

29 (D) supply accurate and complete information required to be
30 submitted under this paragraph.

31 (b) In a prosecution for failure to register as a sex offender in the second

1 degree under (a) of this section, it is an affirmative defense that

2 (1) unforeseeable circumstances, outside the control of the person,
3 prevented the person from registering under (a)(3)(A) of this section or filing or
4 supplying the written notices, verification, and other information required under
5 (a)(3)(B) - (D) of this section; and

6 (2) the person contacted the Department of Public Safety orally and in
7 writing immediately upon being able to perform the requirements described in this
8 section.

9 (c) Failure to register as a sex offender or child kidnapper in the second degree
10 is a class A misdemeanor.

11 * **Sec. 4.** AS 11.61.118(a) is amended to read:

12 (a) A person commits the crime of harassment in the first degree if

13 (1) the person violates AS 11.61.120(a)(5) and the offensive physical
14 contact is contact with human or animal blood, mucus, saliva, semen, urine, vomitus,
15 or feces; **or**

16 (2) under circumstances not proscribed under AS 11.41.434 -
17 11.41.440, the person violates AS 11.61.120(a)(5) and the offensive physical
18 contact is contact by the person touching another person's genitals, anus, or
19 female breast, either directly or through clothing.

20 * **Sec. 5.** AS 11.61.125(a) is amended to read:

21 (a) A person commits the crime of distribution of child pornography if the
22 person distributes in this state or advertises, promotes, solicits, or offers to
23 distribute in this state [BRINGS OR CAUSES TO BE BROUGHT INTO THE
24 STATE FOR DISTRIBUTION, OR IN THE STATE DISTRIBUTES, OR IN THE
25 STATE POSSESSES, PREPARES, PUBLISHES, OR PRINTS WITH INTENT TO
26 DISTRIBUTE,] any material that is proscribed under AS 11.61.127 [VISUALLY
27 OR AURALLY DEPICTS CONDUCT DESCRIBED IN AS 11.41.455(a),
28 KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE
29 USE OF A CHILD UNDER 18 YEARS OF AGE WHO ENGAGED IN THE
30 CONDUCT].

31

1 * **Sec. 6.** AS 11.61.127(a) is amended to read:

2 (a) A person commits the crime of possession of child pornography if the
3 person knowingly possesses **or knowingly accesses on a computer with intent to**
4 **view** any material that visually [OR AURALLY] depicts conduct described in
5 AS 11.41.455(a) knowing that the

6 (1) production of the material involved the use of a child under 18
7 years of age who engaged in the conduct **or a depiction of a part of an actual child**
8 **under 18 years of age who, by manipulation, creation, or modification, appears to**
9 **be engaged in the conduct; or**

10 (2) **material appears to include a child under 18 years of age**
11 **engaging in the conduct.**

12 * **Sec. 7.** AS 11.61.127(c) is amended to read:

13 (c) Each film, audio, video, electronic, or electromagnetic recording,
14 photograph, negative, slide, book, newspaper, magazine, or other material that visually
15 or aurally depicts conduct described in AS 11.41.455(a) that is possessed **or accessed**
16 **in violation of (a) of this section** [BY A PERSON KNOWING THAT THE
17 PRODUCTION OF THE MATERIAL INVOLVED THE USE OF A CHILD
18 UNDER 18 YEARS OF AGE THAT ENGAGED IN THE CONDUCT] is a separate
19 violation of this section.

20 * **Sec. 8.** AS 11.61.127 is amended by adding new subsections to read:

21 (e) In a prosecution under (a) of this section, it is an affirmative defense that
22 the person

23 (1) possessed or accessed fewer than three depictions described in (a)
24 of this section; and

25 (2) without allowing any person other than a law enforcement agency
26 to view the depictions, either took reasonable steps to destroy the depictions, or
27 reported the matter to a law enforcement agency and allowed the agency access to the
28 depictions.

29 (f) In this section,

30 (1) "appears to include a child" means that the material appears to
31 include, or conveys the impression that it includes, a person who is under 18 years of

1 age and the material was not created using a depiction of any part of an actual child
2 under 18 years of age, and

3 (A) the average individual, applying contemporary community
4 standards, would find that the depiction, taken as a whole, appeals to the
5 prurient interest; and

6 (B) a reasonable person would find that the depiction, taken as
7 a whole, lacks serious literary, artistic, political, or scientific value;

8 (2) "computer" has the meaning given in AS 11.46.990.

9 (g) In a prosecution under (a) of this section, the prosecution is not required to
10 prove the identity of a minor depicted or that the defendant knew the identity of a
11 minor depicted.

12 * **Sec. 9.** AS 11.61.128(a) is amended to read:

13 (a) A person commits the crime of [ELECTRONIC] distribution of indecent
14 material to minors if

15 (1) the person, being 18 years of age or older, knowingly distributes to
16 another person [BY COMPUTER] any material that depicts the following actual or
17 simulated conduct:

18 (A) sexual penetration;

19 (B) the lewd touching of a person's genitals, anus, or female
20 breast;

21 (C) masturbation;

22 (D) bestiality;

23 (E) the lewd exhibition of a person's genitals, anus, or female
24 breast; or

25 (F) sexual masochism or sadism; [AND]

26 (2) **the material is harmful to minors; and**

27 **(3)** either

28 (A) the other person is a child under 16 years of age; or

29 (B) the person believes that the other person is a child under 16
30 years of age.

31 * **Sec. 10.** AS 11.61.128(c) is amended to read:

1 (c) Except as provided in (d) of this section, [ELECTRONIC] distribution of
 2 indecent material to minors is a class C felony.

3 * **Sec. 11.** AS 11.61.128(d) is amended to read:

4 (d) **Distribution** [ELECTRONIC DISTRIBUTION] of indecent material to
 5 minors is a class B felony if the defendant was, at the time of the offense, required to
 6 register as a sex offender or child kidnapper under AS 12.63 or a similar law of
 7 another jurisdiction.

8 * **Sec. 12.** AS 11.61.128 is amended by adding a new subsection to read:

9 (e) In this section, "harmful to minors" means

10 (1) the average individual, applying contemporary community
 11 standards, would find that the material, taken as a whole, appeals to the prurient
 12 interest in sex for persons under 16 years of age;

13 (2) a reasonable person would find that the material, taken as a whole,
 14 lacks serious literary, artistic, educational, political, or scientific value for persons
 15 under 16 years of age; and

16 (3) the material depicts actual or simulated conduct in a way that is
 17 patently offensive to the prevailing standards in the adult community as a whole with
 18 respect to what is suitable for persons under 16 years of age.

19 * **Sec. 13.** AS 12.55.085(f) is amended to read:

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

21 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260
 22 - 11.41.320, **11.41.360 - 11.41.370**, 11.41.410 - 11.41.530, [OR] AS 11.46.400, **or**
 23 **AS 11.61.125 - 11.61.128**;

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

26 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony
 27 and the person has one or more prior convictions for a misdemeanor violation of
 28 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction
 29 having [SUBSTANTIALLY] similar elements to an offense defined as a misdemeanor
 30 in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person
 31 shall be considered to have a prior conviction even if that conviction has been set aside

1 under (e) of this section or under the equivalent provision of the laws of another
2 jurisdiction.

3 * **Sec. 14.** AS 12.55.100(e) is repealed and reenacted to read:

4 (e) In addition to other conditions imposed on the defendant, while on
5 probation and as a condition of probation

6 (1) for a sex offense, as described in AS 12.63.100, the defendant

7 (A) shall be required to submit to regular periodic polygraph
8 examinations;

9 (B) may be required to provide each electronic mail address,
10 instant messaging address, and other Internet communication identifier that the
11 defendant uses to the defendant's probation officer; the probation officer shall
12 forward those addresses and identifiers to the Alaska state troopers and to the
13 local law enforcement agency;

14 (2) if the defendant was convicted of a violation of AS 11.41.434 -
15 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the
16 defendant may be required to refrain from

17 (A) using or creating an Internet site;

18 (B) communicating with children under 16 years of age; or

19 (C) possessing or using a computer.

20 * **Sec. 15.** AS 12.55.155(c)(5) is amended to read:

21 (5) the defendant knew or reasonably should have known that the
22 victim of the offense was particularly vulnerable or incapable of resistance due to
23 advanced age, disability, ill health, homelessness, consumption of alcohol or drugs,
24 or extreme youth or was for any other reason substantially incapable of exercising
25 normal physical or mental powers of resistance;

26 * **Sec. 16.** AS 12.55.155(c)(18) is amended to read:

27 (18) the offense was a felony

28 (A) specified in AS 11.41 and was committed against a spouse,
29 a former spouse, or a member of the social unit made up of those living
30 together in the same dwelling as the defendant;

31 (B) specified in AS 11.41.410 - 11.41.458 and the defendant

1 has engaged in the same or other conduct prohibited by a provision of
2 AS 11.41.410 - 11.41.460 involving the same or another victim; [OR]

3 (C) specified in AS 11.41 that is a crime involving domestic
4 violence and was committed in the physical presence or hearing of a child
5 under 16 years of age who was, at the time of the offense, living within the
6 residence of the victim, the residence of the perpetrator, or the residence where
7 the crime involving domestic violence occurred;

8 **(D) specified in AS 11.41 and was committed against a**
9 **person with whom the defendant has a dating relationship or with whom**
10 **the defendant has engaged in a sexual relationship; or**

11 **(E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128**
12 **and the defendant was 10 or more years older than the victim;**

13 * **Sec. 17.** AS 12.63.020 is amended by adding a new subsection to read:

14 (c) A person required to register under AS 12.63.010 for a conviction in
15 another jurisdiction that is not similar to an offense in this state shall register for a
16 period described in

17 (1) (a)(2) of this section if the person has been convicted of only one
18 offense;

19 (2) (a)(1) of this section if the person has been convicted of two or
20 more offenses for which the person is required to register in another jurisdiction.

21 * **Sec. 18.** AS 12.63.100(6) is amended to read:

22 (6) "sex offense" means

23 (A) a crime under AS 11.41.100(a)(3), or a similar law of
24 another jurisdiction, in which the person committed or attempted to commit a
25 sexual offense, or a similar offense under the laws of the other jurisdiction; in
26 this subparagraph, "sexual offense" has the meaning given in
27 AS 11.41.100(a)(3);

28 (B) a crime under AS 11.41.110(a)(3), or a similar law of
29 another jurisdiction, in which the person committed or attempted to commit
30 one of the following crimes, or a similar law of another jurisdiction:

31 (i) sexual assault in the first degree;

1 (ii) sexual assault in the second degree;

2 (iii) sexual abuse of a minor in the first degree; or

3 (iv) sexual abuse of a minor in the second degree;

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

6 (i) AS 11.41.410 - 11.41.438;

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

8 (iii) AS 11.41.450 - 11.41.458;

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

12 (v) AS 11.61.125 - 11.61.128;

13 (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who
14 was induced or caused to engage in prostitution was 16 or 17 years of
15 age at the time of the offense; or

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

19 **(D) a crime in another jurisdiction that requires the person**
20 **to register as a sex offender or child kidnapper in that jurisdiction;**

21 * **Sec. 19.** AS 44.23 is amended by adding a new section to read:

22 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
23 **of an Internet service account in the exploitation of children.** (a) In an
24 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
25 11.61.128 and on reasonable cause to believe that an Internet service account has been
26 used in the exploitation or attempted exploitation of children, the attorney general may
27 issue in writing and cause to be served a subpoena requiring the production and
28 testimony described in (b) of this section.

29 (b) A person receiving a subpoena under (a) of this section shall disclose, for
30 the account that is the subject of the subpoena,

31 (1) the name of the person holding the account;

- 1 (2) the address associated with the account;
- 2 (3) local and long distance telephone connection records, including
3 records of session times and durations for the account;
- 4 (4) length of service, including service start date, and types of service
5 used by the account;
- 6 (5) the telephone or instrument number or other subscriber number or
7 identifier, including any temporarily assigned network address for the account; and
- 8 (6) the means and source of payment for the service, including a credit
9 card or bank account number associated with the account.

10 (c) At any time before the return date specified on the subpoena, the subpoenaed
11 person may petition a court of competent jurisdiction for the judicial district in which the
12 person resides or does business for an order modifying or setting aside the subpoena or for
13 an order sealing the court record.

14 (d) A subpoena under this section must describe the objects required to be
15 produced and must prescribe a return date with a reasonable period of time within which
16 the objects must be assembled and produced.

17 (e) If no case or proceeding arises from the production of records or other
18 documents under this section within a reasonable time after those records or documents
19 are produced, the attorney general shall either destroy the records and documents or return
20 them to the person who produced them.

21 (f) A subpoena issued under this section may be served as provided for service of
22 subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under
23 Rule 4, Alaska Rules of Civil Procedure.

24 (g) Except as provided in this section, any information, records, or data reported
25 or obtained under a subpoena under this section shall remain confidential and may not be
26 disclosed unless the disclosure occurs in connection with a criminal case related to the
27 subpoenaed materials.

28 * **Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to
29 read:

30 DIRECT COURT RULE AMENDMENT. Rule 16(b), Alaska Rules of Criminal
31 Procedure, is amended by adding a new paragraph to read:

- 32 (9) Restriction on Availability of Certain Material or Property.

1 Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the
2 defendant to copy, photograph, duplicate, or otherwise reproduce any property or
3 material that may be illegal or prohibited under AS 11.41.455(a) or defined as "child
4 pornography" under 18 U.S.C. 2256, provided the prosecution makes the property or
5 material reasonably available to the defendant. Property or material shall be deemed to
6 be made reasonably available to the defendant if the prosecution provides, at a
7 prosecution or law enforcement facility, ample opportunity for inspection, viewing,
8 and examination of the property or material by the defendant, the defendant's attorney,
9 and any individual the defendant may seek to qualify to furnish expert testimony at
10 trial.

11 * **Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to
12 read:

13 LEGISLATIVE STATEMENT CONCERNING CULPABLE MENTAL STATE. In
14 AS 11.56.840(a), as repealed and reenacted by sec. 3 of this Act, the only culpable mental
15 state required to be proven by the prosecution is the "knowing" requirement in paragraph (2)
16 of that subsection. No other culpable mental state needs to be proven for the other elements of
17 that offense.

18 * **Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to
19 read:

20 APPLICABILITY. (a) Sections 1 - 18 and 21 of this Act apply to offenses committed
21 on or after the effective date of this Act.

22 (b) Sections 19 and 20 of this Act apply to offenses committed before, on, or after the
23 effective date of this Act.

24 * **Sec. 23.** This Act takes effect July 1, 2010.