

**HOUSE JUDICIARY STANDING COMMITTEE**

April 27, 2022

1:08 p.m.

**MEMBERS PRESENT**

Representative Matt Claman, Chair  
Representative Liz Snyder, Vice Chair  
Representative Jonathan Kreiss-Tomkins  
Representative David Eastman  
Representative Christopher Kurka

**MEMBERS ABSENT**

Representative Harriet Drummond  
Representative Sarah Vance

**OTHER LEGISLATORS PRESENT**

Senator Bill Wielechowski

**COMMITTEE CALENDAR**

CS FOR SENATE BILL NO. 161 (JUD)

"An Act relating to the definition of 'political party'; and providing for an effective date."

- HEARD & HELD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 5

"An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits; and providing for an effective date."

- HEARD & HELD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 161

SHORT TITLE: POLITICAL PARTY DEFINITION

SPONSOR(S): SENATOR(S) WIELECHOWSKI

01/18/22	(S)	READ THE FIRST TIME - REFERRALS
01/18/22	(S)	STA, JUD
02/17/22	(S)	STA AT 3:30 PM BUTROVICH 205

02/17/22 (S) Heard & Held  
 02/17/22 (S) MINUTE(STA)  
 03/01/22 (S) STA AT 3:30 PM BUTROVICH 205  
 03/01/22 (S) -- MEETING CANCELED --  
 03/03/22 (S) STA AT 3:30 PM BUTROVICH 205  
 03/03/22 (S) Moved SB 161 Out of Committee  
 03/03/22 (S) MINUTE(STA)  
 03/04/22 (S) STA RPT 4NR 1DP  
 03/04/22 (S) NR: SHOWER, COSTELLO, REINBOLD, HOLLAND  
 03/04/22 (S) DP: KAWASAKI  
 03/14/22 (S) JUD AT 1:30 PM BUTROVICH 205  
 03/14/22 (S) Heard & Held  
 03/14/22 (S) MINUTE(JUD)  
 03/16/22 (S) JUD AT 1:30 PM BUTROVICH 205  
 03/16/22 (S) Moved CSSB 161(JUD) Out of Committee  
 03/16/22 (S) MINUTE(JUD)  
 03/18/22 (S) JUD RPT CS 1AM 3DP SAME TITLE  
 03/18/22 (S) AM: HOLLAND  
 03/18/22 (S) DP: MYERS, HUGHES, KIEHL  
 03/25/22 (S) TRANSMITTED TO (H)  
 03/25/22 (S) VERSION: CSSB 161(JUD)  
 04/04/22 (H) READ THE FIRST TIME - REFERRALS  
 04/04/22 (H) STA, JUD  
 04/05/22 (H) STA AT 3:00 PM GRUENBERG 120  
 04/05/22 (H) -- MEETING CANCELED --  
 04/09/22 (H) STA AT 10:00 AM GRUENBERG 120  
 04/09/22 (H) Heard & Held  
 04/09/22 (H) MINUTE(STA)  
 04/21/22 (H) STA AT 3:00 PM GRUENBERG 120  
 04/21/22 (H) Moved HCS CSSB 161(STA) Out of  
 Committee  
 04/21/22 (H) MINUTE(STA)  
 04/25/22 (H) STA RPT HCS(STA) 4DP 1NR  
 04/25/22 (H) DP: TARR, CLAMAN, STORY, KREISS-TOMKINS  
 04/25/22 (H) NR: EASTMAN  
 04/27/22 (H) JUD AT 1:00 PM GRUENBERG 120

BILL: HB 5

SHORT TITLE: SEXUAL ASSAULT; DEF. OF "CONSENT"

SPONSOR(s): REPRESENTATIVE(s) TARR

02/18/21 (H) PREFILE RELEASED 1/8/21  
 02/18/21 (H) READ THE FIRST TIME - REFERRALS  
 02/18/21 (H) STA, JUD  
 03/26/21 (H) SPONSOR SUBSTITUTE INTRODUCED  
 03/26/21 (H) READ THE FIRST TIME - REFERRALS  
 03/26/21 (H) STA, JUD

03/27/21	(H)	STA AT 1:00 PM GRUENBERG 120
03/27/21	(H)	Heard & Held
03/27/21	(H)	MINUTE(STA)
04/13/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/13/21	(H)	Heard & Held
04/13/21	(H)	MINUTE(STA)
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/20/21	(H)	Heard & Held
04/20/21	(H)	MINUTE(STA)
04/27/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/27/21	(H)	Heard & Held
04/27/21	(H)	MINUTE(STA)
04/29/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/29/21	(H)	Scheduled but Not Heard
05/04/21	(H)	STA AT 3:00 PM GRUENBERG 120
05/04/21	(H)	Moved CSSSHB 5(STA) Out of Committee
05/04/21	(H)	MINUTE(STA)
05/06/21	(H)	STA RPT CS(STA) 1DP 5AM
05/06/21	(H)	DP: TARR
05/06/21	(H)	AM: VANCE, STORY, EASTMAN, KAUFMAN, KREISS-TOMKINS
05/06/21	(H)	FIN REFERRAL ADDED AFTER JUD
03/04/22	(H)	JUD AT 1:00 PM GRUENBERG 120
03/04/22	(H)	Heard & Held
03/04/22	(H)	MINUTE(JUD)
03/09/22	(H)	JUD AT 1:00 PM GRUENBERG 120
03/09/22	(H)	Heard & Held
03/09/22	(H)	MINUTE(JUD)
03/30/22	(H)	JUD AT 1:00 PM GRUENBERG 120
03/30/22	(H)	Heard & Held
03/30/22	(H)	MINUTE(JUD)
04/13/22	(H)	JUD AT 1:00 PM GRUENBERG 120
04/13/22	(H)	Heard & Held
04/13/22	(H)	MINUTE(JUD)
04/15/22	(H)	JUD AT 1:00 PM GRUENBERG 120
04/15/22	(H)	Heard & Held
04/15/22	(H)	MINUTE(JUD)
04/27/22	(H)	JUD AT 1:00 PM GRUENBERG 120

**WITNESS REGISTER**

DAVID DUNSMORE, Staff  
 Senator Bill Wielechowski  
 Alaska State Legislature  
 Juneau, Alaska

**POSITION STATEMENT:** On behalf of Senator Wielechowski, prime sponsor, presented HCS CSSB 161(STA).

SAMUEL BUELL, Professor of Law  
Duke University School of Law  
Duke University  
Durham, North Carolina

**POSITION STATEMENT:** Provided testimony during the hearing on CSSSHB 5(STA).

TROY PAYNE, Ph.D., Director/Assistant Professor  
Alaska Justice Information Center  
College of Health  
University of Alaska, Anchorage  
Anchorage, Alaska

**POSITION STATEMENT:** Offered a PowerPoint presentation on CSSSHB 5(STA), titled "FBI Uniform Crime Report Legacy Rape Statistics."

BRAD MYRSTOL, Ph.D., Professor  
Alaska Justice Information Center  
College of Health  
University of Alaska, Anchorage  
Anchorage, Alaska

**POSITION STATEMENT:** Offered a PowerPoint presentation on CSSSHB 5(STA), titled "Alaska Sex Offender Recidivism".

#### **ACTION NARRATIVE**

[1:08:18 PM](#)

**CHAIR MATT CLAMAN** called the House Judiciary Standing Committee meeting to order at 1:08 p.m. Representatives Kreiss-Tomkins, Snyder, and Claman were present at the call to order. Representatives Eastman and Kurka arrived as the meeting was in progress.

#### **SB 161-POLITICAL PARTY DEFINITION**

[1:08:50 PM](#)

CHAIR CLAMAN announced that the first order of business would be CS FOR SENATE BILL NO. 161(JUD), "An Act relating to the definition of 'political party'; and providing for an effective date." [Before the committee was HCS CSSB 161(STA).]

[1:09:11 PM](#)

DAVID DUNSMORE, Staff, Senator Bill Wielechowski, Alaska State Legislature, presented HSC CSSB 161(STA) on behalf of Senator Wielechowski, prime sponsor. He explained that the proposed legislation would simplify the process for political parties to gain recognition. He described the current threshold for official party recognition as "variable," as it is based on the voter turnout from the most recent general election. He explained that the proposed legislation would change the threshold to an even 5,000 voters, and after every centennial census the number of voters would be adjusted based on population changes and then rounded to the nearest 500. Because the current threshold is based on voter turnout, he said, the threshold can fluctuate wildly after a record voter turnout. This creates a paradoxical problem because midterm election turnout is lower; thus, political parties would have to meet a higher threshold to be on the ballot. He stated that since the passage of Ballot Measure 2 [in 2020] political parties would only have automatic rights in the election for the office of the U.S. presidency. He stated that having official party status guarantees the ability to purchase two pages in the official election pamphlet, nominate election workers, and have poll watchers.

[1:11:58 PM](#)

VICE CHAIR SNYDER, referring to the sponsor statement [copy included in the committee packet], addressed the sentence, which read as follows [original punctuation provided]: "This threshold can vary wildly from election to election and after the 2020 election it increased by 27% because of record voter turnout." She requested clarification on the use of the word "it" in the statement.

[1:12:29 PM](#)

MR. DUNSMORE responded that "it" refers to the threshold, which is the total number of registered voters a party must have to retain official status. He explained that the number increased because the voter turnout in 2020 had been 27 percent higher than in 2018.

[1:12:58 PM](#)

MR. DUNSMORE, in response to a follow-up question, confirmed that the number of votes required to reach the 3 percent threshold increased by 27 percent in the 2020 election. He explained that prior to Ballot Measure 2 there had been 2 ways

to achieve party status. A party could have registered voters which equaled 3 percent of the number of voters, or, in the previous election, the party's top ticket candidate would need to have received 3 percent of the vote. He said that Ballot Measure 2 changed the process, and now the only way to meet the threshold would be through voter registration.

[1:13:54 PM](#)

CHAIR CLAMAN referenced the amendment adopted to the proposed legislation by the House State Affairs Standing Committee in its [04/21/2022] meeting, which deleted the language "represents a political program". He requested Mr. Dunsmore speak to the deletion of the language, and he questioned whether the deletion should be undone.

[1:14:28 PM](#)

MR. DUNSMORE responded that after the proposed legislation moved out of the previous committee of referral, Legislative Legal Services sent a memorandum pointing out that the language change could be tied to the operation of the statute in regard to appointments to vacancies in the legislature. He clarified that the change was thought to be stylistic, and the intention of the amendment was not to change the statute in this way. He advised the committee that reverting back to the language passed out of the Senate may be wise.

[1:16:07 PM`](#)

REPRESENTATIVE KREISS-TOMKINS suggested that maintaining the language in the legislation would maintain parallelism in the statutes.

MR. DUNSMORE responded in the affirmative.

[1:16:35 PM](#)

VICE CHAIR SNYDER expressed the understanding that, in terms of the proposed legislation, "political party" means an organized group of voters with at least 5,000 registered voters. She pointed out that a political party would not exist until 5,000 voters have been registered, and she questioned how voters would register in a political party which does not exist.

MR. DUNSMORE responded that this is provided elsewhere in statute, and he would follow up after the meeting with this

information. He said to achieve official status the party's bylaws would need to be submitted to the Division of Elections, and then the party would be added to the voter registration form. He explained that every month the division updates the voter list, and when the number hits the threshold, the party would be qualified for the election.

[1:18:01 PM](#)

CHAIR CLAMAN opened public testimony on SB 161. After ascertaining that there was no one who wished to testify, he closed public testimony.

[1:18:35 PM](#)

The committee took an at-ease from 1:18 p.m. to 1:20 p.m.

[SB 161 was held over.]

**HB 5-SEXUAL ASSAULT; DEF. OF "CONSENT"**

[Contains discussion of SB 187.]

[1:20:46 PM](#)

CHAIR CLAMAN announced that the final order of business would be HOUSE BILL NO. 5, "An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits; and providing for an effective date." [Before the committee was CSSSHB 5(STA).]

[1:22:25 PM](#)

SAMUEL BUELL, Professor of Law, Duke University, thanked the committee for the discussion on reforming the definition of sexual assault and related offenses. He commended the committee's efforts to shift from the historical definition of rape, which indicates force, to a more modern concept of consent. He shared his biography, highlighting that he is a member of the American Law Institute (ALI) and serves as an appointed advisor in the project which is revising the definitions of sexual assault and related offenses in the Model Penal Code (MPC). He said, "My remarks today are based on my knowledge and views and do not reflect necessarily the positions or opinions of the ALI as a body or the project's reporters."

MR. BUELL identified the two main issues in the modern definition of rape as consent and mens rea, or mental state. He acknowledged that ALI's debates on these topics have been contentious for many years. Addressing the topic of consent, he expressed the understanding that the basic wrong in sexual assault would be to compel another to submit to sexual penetration or contact without consent. He explained that because "consent" is not an all-purpose concept under one definition of the law, it must be defined within a context. He stated that consent, at its core, is a question of "mental state" itself. In other words, he said, the question would be, "Was contact or penetration wanted or unwanted?" He conveyed that ALI has recognized punishment cannot be based on an unobservable mental process of one individual, and consent is ultimately in the mind and must be expressed in some fashion to be known. He stated that ALI has settled on a hybrid approach, making clear "non-consent" means no consent, or "no means no." He pointed out that verbally expressed consent is not required, as it could be acted out or performed. He said that the current MPC draft definition of consent "means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact, all of which are defined terms." He continued that neither verbal nor physical resistance are required to prove lack of consent, but it may be inferred by behavior in the context of the circumstances. He said this makes the question of consent a variable and fact-based question.

[1:26:30 PM](#)

MR. BUELL explained that the language in the definition of consent had been a compromise at ALI. Some had wanted a verbal-affirmative requirement, while others argued this would require changes in existing practices and put ALI too far ahead of the social curve in the law reform process. He expressed the view that the current ALI definition of consent accommodates both the rights of victims and accused persons and is realistic in respect to the current national attitude of sexual mores. He expressed the opinion that CSSSHB 5(STA) appears to be heading in a similar direction; however, he suggested the language should be simplified to avoid confusion in the judicial process. He expressed the opinion that the definition of "freely" in Section 6 could raise questions. He compared this to the use of "free will" in [SB 187]. He described this usage as "fraught." He voiced the opinion that the language in Section 5 of CSSSHB 5(STA) is problematic because there is an attempt to specify the conditions when consent is lacking. He expressed confusion concerning subsection (c)(3) in regard to the idea that an

offender's actions could cause a victim's lack of resistance. He expressed further confusion concerning what "lack of resistance" is meant to cover. He reasoned that the drafting process is difficult, but the law must make judgements about the different pressures which would render consent invalid. He referenced the general opinion that many forms of sex in situations of lesser-power balances are outside of criminal law, and this is the problem with the language "freely given" or "free will" in the legislation. He said the language tends to "beg the question of what level of free decision making ... specifies the line between legally operative consent and failure of consent."

MR. BUELL, concerning mens rea, pointed out that Alaska's MPC style rules require a finding of "recklessness" in order to convict for lack of consent. He acknowledged that this is consistent with ALI's definition. He advised that using the term "recklessly" within the crime definitions themselves may be better than relying on the Alaska statutory provision on mens rea. The reasoning is because Alaska's statutory provision on mens rea requires a mental state of "knowingly" for any conduct elements and "recklessness" for any circumstances or results. The current language in the proposed legislation could lead to debates about which parts of the sexual assault definitions are part of the conduct element of the offenses, as opposed to aspects of a circumstance or result. He suggested that adding mens rea within the definitions themselves would be more specific, avoid confusion, and avoid possible mitigation.

[1:30:23 PM](#)

MR. BUELL stressed the importance of understanding that using "recklessness" would indicate a highly culpable knowledge state. In other words, the actor must have contemplated whether consent was lacking, perceived a risk that it was lacking, and decided to proceed, nonetheless. He stated that there has been a great deal of discussion about using "recklessness" as a mens rea, as it could lead to convictions of mistaken actors, for example. He stated that MPC does not use the definition "recklessness" in this way.

[1:31:26 PM](#)

MR. BUELL, in addressing the first of two additional drafting concerns, said that ALI has debated on grading and punishment with respect to excessive incarceration. He stated that ALI's draft is different than the proposed legislation because the

proposed legislation treats "penetration without consent" as a first-degree felony, even in the absence of the use of force. He suggested that the definition should move away from including "use of force" because historically this has made rape problematic for victims. He stated that "force" as an aggravating factor could be retained in the definitions, but he suggested making grading distinctions between nonconsensual sex and nonconsensual sex through the use of physical force. He stated that the ALI draft is available online and could be seen as an example of grading on different levels of sexual assault.

[1:32:38 PM](#)

MR. BUELL, as a last point, expressed confusion in Section 1(a)(5) concerning the language "artifice, pretense, or concealment". He expressed confusion how cases of rape by fraud would be covered under this language. He explained that determining the types of deceptions which would render consent invalid is a tricky issue. Deception comes in many different forms and contexts, and many of those have not been treated as a basis for imprisonment.

[1:33:49 PM](#)

VICE CHAIR SNYDER, for clarification, requested that Mr. Buell speak again on the topic of recklessness.

MR. BUELL stated that the definitions of the various mental states are a part of the Alaska Criminal Code and were modeled after MPC. He referenced the definition of "recklessly" in AS 11.81.900(a), which read as follows [original punctuation provided]:

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

MR. BUELL stated that to understand the meaning of the statute, the corresponding meaning of "results" and "circumstances" would need to be understood within the elements of crimes. He explained that, for example, a "result" would be the causation of death in a homicide statute. This is a separate element because it is something which happened as a consequence of the defendant's physical conduct. Using the term "circumstance" to describe an element of a crime would mean something about the world, separate from the defendant's actions or thoughts. He stated that a simple example of "circumstance" would be the age of a victim, in a case in which age is relevant. For the definition of mens rea, or mental state, a defendant would have to be "reckless" as a result of a "circumstance". For example, there is a criminal penalty for selling cigarettes to an underage person, so the defendant must be "reckless" as to the fact that the victim was underage. He said, in other words, the defendant thought about it and sold the cigarettes anyway.

[1:37:13 PM](#)

MR. BUELL explained that the definition of "recklessness" uses the language "unjustifiable risk" because some situations would require that a risk be taken. He cited the example of recklessly driving to the hospital because there is a person bleeding to death in the car, however; he expressed the opinion that in the context of sexual offenses it is unclear whether the word "unjustifiable" would mean anything. He explained that the focus is not on the justifiability of the risk, but whether the actor was aware of the risk. He described this as the "knowledge state." He continued that the question is not whether the actor thought about it, but whether the actor was aware of the risk and decided to proceed anyway.

[1:38:30 PM](#)

CHAIR CLAMAN pointed out the provision in [AS 11.81.900] that addresses mental states specific to sexual assault in the first degree. He said this provision refers to ["knowingly"] as to the conduct and ["recklessly"] as to the circumstance. In the context of a sexual assault, he questioned whether the meaning would be "knowing" as to the conduct of sexual penetration and "reckless" as to the circumstance of lack of consent.

[1:39:03 PM](#)

MR. BUELL responded in the affirmative. He elaborated that the other side would argue that nobody should go to prison unless it

is practically certain consent was lacking, with "knowledge" being the "recklessness" standard. He continued that this definition would make the bar extremely high for conviction because there must be a burden of proof beyond a reasonable doubt. For example, an acquittal could be produced by raising a doubt about whether a person was, or was not, sure consent was lacking.

[1:39:48 PM](#)

CHAIR CLAMAN, referencing Section 6 of the proposed legislation, pointed out the language "freely given, reversible agreement" used in the definition of consent. He questioned whether MPC has taken a different approach to the definition of consent. He requested feedback on the pros and cons of the approach taken in CSSSHB 5(STA).

MR. BUELL responded that this is difficult and "the absolute nub of this law reform problem." He said that ALI has spent hours debating, and multiple drafts have been written. He expressed the opinion that ALI chose not to use the terms "freely" or "free will" because it begs the question of what type of freedom of thought one needs to be genuinely consenting. He stated that ALI uses "willingness" in the definition. This captures more of a concept of something which is wanted, setting a higher bar for consent, rather than something which is simply agreed to. He suggested that this would beg the question less. He stated that using "freely" and "free will" in the definition would raise the question, "What is freedom?" He stated that there is not a perfect solution, and there will be debates about the use of "willingness" as well.

[1:42:56 PM](#)

CHAIR CLAMAN, with a follow up, questioned whether the use of "willingness" within the definition of consent is more victim friendly than the proposed legislation's use of "freely given".

[1:43:31 PM](#)

MR. BUELL expressed the opinion that this would be his instinct because the idea of "freely given" depends on the circumstances, whereas "willingness" would go to the ultimate question of the internal mental state of the victim, and whether the victim actually wanted the sexual contact. He explained that the model is new for ALI, and how it will play out in court cases is unknown. Concerning the use of "freely" and "free will" in the

definition, he said, the pressures which would make a person's decisions not free are unknown. He provided the example of a woman in a bad domestic situation, with a huge economic disparity in the relationship. He suggested that because she is completely dependent on her partner, she may not be able to withhold sex. He questioned whether that would be "freely given" consent. He expressed the opinion that these cases are not generally prosecuted, and he questioned whether the law would want to get involved. He expressed the realization that he is pointing out issues instead of resolving issues. He stressed the importance and difficulty of these issues, concluding that legislators must work to get the best language possible.

[1:47:20 PM](#)

MR. BUELL, in response to a follow-up question, voiced the opinion that the use of "willingness" would be more victim friendly than the use of "freely given" in [SB 187]. He stated that this had been the intent behind the language choice in the ALI process. He said that the current MPC definition is similar to the language in CSSSHB 5(STA), which further specifies consent can be expressed and inferred from the circumstances. He stated this has been an important issue for ALI, as sexual contact and penetration can occur through mutual physical action and be fully consensual without being discussed. He said that care had been taken [in ALI] not to criminalize this.

[1:48:49 PM](#)

REPRESENTATIVE KREISS-TOMKINS requested an analysis of "rape by fraud" as it appears in the proposed legislation.

MR. BUELL responded that Section 1(a)(5) of the proposed bill addresses sexual assault by impersonation. He stated that an example of this would be identical twins, where one of the twins sexually deceives the other's partner, and once discovered, it is treated as rape. He identified that the problem would be writing a definition distinguishing this from someone who is an actor and tricks people into having sex. He stated that these cases are close to hedge-fund lying, which are morally problematic, but not treated as criminal because of the fear of where to draw the line. He reasoned this could become the case where "if you don't tell 100 percent of the truth in all relationships, you are engaging in sexual assault." He expressed difficulty in understanding the phrasing in [Section 1(a)(5)].

[1:52:29 PM](#)

REPRESENTATIVE KREISS-TOMKINS, with a follow-up question, asked whether there is language from other states which speak to these situations.

MR. BUELL responded that other states do use this language, but he has not done research on the topic. He stated that there is academic literature with clear examples which can be researched. He expressed confusion about the intent of the language concerning deception in the proposed legislation.

[1:53:52 PM](#)

CHAIR CLAMAN questioned whether the impersonation topic is addressed in the current version of MPC. If so, he questioned where the section could be found.

MR. BUELL responded in the affirmative, and he indicated that he would do a quick search for the section number.

[1:54:22 PM](#)

REPRESENTATIVE KREISS-TOMKINS expressed confusion and concern about the extent to which the language [in the proposed legislation] is tailored to some of the situations which have been described. He expressed the understanding that these situations need to be addressed; nonetheless, the tightness in statutory language caught his attention.

[1:55:27 PM](#)

MR. BUELL responded that Section 213.5(1)(b)(i) of MPC covers the category of fraud cases which traditionally involve fake medical procedure scams. He stated that Section 213.5(1)(b)(ii) of MPC addresses the situation when a person believes falsely that an actor is someone who is personally known, and the deception causes this person to engage [in sex]. He said the current MPC draft is limited to a literal impersonation of someone who is known to the victim. He said that the category is narrow because of the fear it could be opened to other kinds of deception.

[1:57:44 PM](#)

CHAIR CLAMAN, in reference to the section in MPC under discussion, stated that there have been comments which express the language is both overinclusive and underinclusive. He stated that a certain degree of specificity to a certain conduct almost excludes another conduct which otherwise might be criminal.

MR. BUELL responded that he would need an example before speaking to this.

[1:58:36 PM](#)

MR. BUELL, before responding to Vice Chair Snyder, questioned whether Alaska had adopted the original MPC sex offense provisions completed in the early 1960s.

[1:59:26 PM](#)

CHAIR CLAMAN responded that Alaska had made a major revision to its penal code in the late 1970s. He stated that this largely followed modern MPC, and since that time more changes have been made.

[2:00:18 PM](#)

MR. BUELL responded to Vice Chair Snyder's request for an explanation of the MPC updating process. He described MPC as one of ALI's most influential products, as it has helped clarify criminal law in the country. He said that the original drafters of MPC had been a small group of "older, white, male law professors and not a very representative group," and the rape law had not considered victims' rights or the sociological point of view; the provisions concerned force, consent, and had an exception for spousal rape.

MR. BUELL stated that about 10 years ago ALI appointed legal writers and advisors to start the revision project. He described the work as "painstaking" with extensive drafts. The first draft took two years, with each revision creating more discussion. As the number of meetings increased, he said, more people became aware of the project, and the circle expanded to include judges, prosecutors, defense attorneys, law professors, victims' rights organizations, and more. Deep concerns were raised by defense lawyers, academics, judges, and others about the law going too far and allowing wrong convictions, so the process resulted in only a moderate change. Instead of finding ways to reduce incarceration, he said opinions had been voiced

that ALI's work on the project would put more people in prison. He continued that many victim advocacy groups pushed back with the opinion that rape is the one crime most underenforced by the criminal justice system. He stated that ALI is not an advocacy organization, so the current draft is a balance of interest. He added that ALI has been successful at being a collective view of the legal profession, but the project is a contentious issue.

[2:06:33 PM](#)

MR. BUELL, in response to Representative Kreiss-Tomkins, stated that the final draft will be in front of ALI's annual meeting for a vote in the upcoming weeks; however, the draft does not need to be a finished product for states to utilize the information, as it does not have the force of law. He stated that ALI makes its products available but does not push for legislatures to use them.

[2:09:59 PM](#)

CHAIR CLAMAN expressed the understanding that some states have incorporated changes to their sexual assault laws. He observed that ALI's approach has not been adopted completely, but also it has not been completely rejected.

MR. BUELL responded in agreement. He stated that the code is a model, and ALI does not expect it to be adopted across the board. There is the expectation that issues will be controversial, and states will go in a variety of ways.

[2:11:32 PM](#)

VICE CHAIR SNYDER, concerning the sexual assault section of the model, questioned whether ALI's motivation for modifications had been the result of any political, cultural, or social challenges.

MR. BUELL responded that the question is difficult, and he does not have the data for an answer. He stated that prosecutors can often have an influential voice in criminal law reform debates, and they recommend the law not be narrowed, as convictions would be more difficult. He stated that there are proposals for even broader definitions; however, the definitions in some jurisdictions could become overbroad, as defense lawyers have argued that definitions need to be specific in order for defendants to have a fair trial. He expressed the opinion that who gets heard in the process may depend on politics.

[2:16:07 PM](#)

CHAIR CLAMAN referenced the differences in CSSH 5(STA) and SB 187 in respect to the use of "force" in the sexual assault [definitions]. He questioned the approach other states may have taken.

MR. BUELL responded that without the data the question is difficult to answer. He expressed the opinion that when states use "force" defined in a significant way for a nonconsensual sex offense, the offense would be graded at a higher level. He stated that the definition of "force" was not an element in old rape law. The absence of this definition had created the question whether one body putting pressure on another body in sexual penetration should be considered as force. He continued that, if so, force would always be present; however, the definition he had been referring to would include the threat of violence, possibly with a weapon and injury to the victim. He noted that this is not to minimize the basic offense, but having the threat of a weapon or an injury to the victim would be a "substantially aggravating" factor. He stated that there are distinctions to be made, as each jurisdiction has its own level of penalties, and its criminal code should be consistent with the levels of penalties imposed for different crimes.

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CHAIR CLAMAN stated that the next testifier had been invited back [after the hearing on 4/13/2022] to discuss statistics in relation to the pre-2013 definition of rape in Alaska. He [reminded the committee] that the question had concerned the change in rape statistics over time in Alaska.

[2:20:47 PM](#)

TROY PAYNE, Ph.D., Director/Assistant Professor, Alaska Justice Information Center, College of Health, University of Alaska, Anchorage, presented a PowerPoint on CSSH 5(STA), titled "FBI Uniform Crime Report Legacy Rape Statistics" [hard copy included in the committee packet]. He directed attention to slide 2 and stated that the definition of rape in the FBI's Uniform Crime Reporting Program (UCR) changed in 2013 because advocates in academics had said UCR's definition did not encompass a wide variety of acts which are considered as sexual assault. He stated that his discussion would not address the definition change but the overall trends in Alaska. He displayed slide 3

which charted the rape rate since 1979 in the state using the legacy definition. Because both definitions had been used by UCR, he said there is an overlap [from 2013 to 2016]. In every year with readily accessible data, he pointed out that Alaska rape rates are far higher than the national average. He mentioned that these are the same patterns seen in the previous presentation.

[2:23:55 PM](#)

DR. PAYNE, moving to slide 4, directed attention to the handout [copy included in the committee packet] on the previous changes in [AS 12.55.125]. Regardless of the changes in the statute, he said, the chart shows little difference in aggregate rape rates over time, as the pattern for rates oscillate around the average across the entire time series. He noted the changes in relation to the criminal penalties. He reminded the committee that a variety of details of criminal sentencing have not been considered.

[2:26:10 PM](#)

REPRESENTATIVE KREISS-TOMKINS questioned whether an increase in sentencing would reduce the rate of rape crimes and whether it is fair to say that the rate of rape has not changed in Alaska.

DR. PAYNE responded that there have been dramatic changes in sentence lengths over time, but there have been no changes in offense rates over time.

[2:27:14 PM](#)

DR. PAYNE, in response to Representative Eastman, acknowledged an error in the chart and verified that there had been no change in maximum sentencing from 2003 to 2006.

CHAIR CLAMAN commented that the change was in the minimum, as the minimum had gone up in those years.

[2:28:18 PM](#)

REPRESENTATIVE KREISS-TOMKINS, concerning recidivism, questioned whether there is data on perpetrators reoffending after release.

CHAIR CLAMAN interjected that the next presenter would possibly be able to address the question.

DR. PAYNE commented that decades of research has shown that increasing criminal sanctions for offenses does not affect offender behavior. He expressed the opinion that it is possible to deter offenders through other methods, but increasing prison time is unlikely to change behaviors.

[2:31:25 PM](#)

BRAD MYRSTOL, Ph.D., Professor, Alaska Justice Information Center, College of Health, University of Alaska, Anchorage, offered a PowerPoint presentation on CSSSHB 5(STA), titled "Alaska Sex Offender Recidivism" [hard copy included in the committee packet]. He shared that the presentation would include highlights from his previously published report, "Alaska Sex Offender Recidivism and Case Processing Study: Final Report" [included in the committee packet]. He directed the attention to slide 2 which overviewed the data and methods used. Moving to slide 3, he explained that the two goals of the study had been to update and expand the knowledge of sex offender recidivism in Alaska. The goals had been accomplished with the following three objectives: provide specific estimates of Alaska sex offender recidivism, expand the post incarceration follow-up period from two years to seven years in order to better understand desistance, and examine potential differences in the frequency and intensity of recidivism for post-incarcerated sex offenders.

DR. MYRSTOL stated that [the study of] recidivism in the state only looks at two or three years following a perpetrator's release. He expressed interest in taking a longer view in analyzing recidivism and understanding desistance. He explained that desistance is a term in criminology for the patterns of declining rates of criminal participation following release from prison. To understand heterogeneity in the patterns of reoffending on release from prison, he indicated that the study used a group-based trajectory technique to examine the potential preferences in sex offender recidivism. He expressed the assumption that in most discussions recidivists are considered the same and measured on whether or not they reoffend; however, deeper questions have not been asked. In example, he posed the question, "Did recidivists reoffend at higher or lower rates compared to others?"

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DR. MYRSTOL, moving to slide 4, stated that the Alaska Department of Corrections (DOC) supplied the data which

identified the 406 sex offenders used in the study. The individuals in the study had to have been convicted of one or more qualifiable sex offenses, incarcerated in a DOC facility, and released from incarceration between January 1, 2006, and December 31, 2008. He stated that the Department of Public Safety provided a detailed criminal history of the 406 offenders. He stated that rearrest and conviction for a new offense are the two important outcome measures of the analysis.

[2:38:21 PM](#)

DR. MYRSTOL, responding to Vice Chair Snyder, stated that the study did not use a "sample" of sex offenders, rather it used a "population" of released persons who met the inclusion criteria. Addressing the graph on sex offender recidivism on slide 6, he explained that the horizontal axis is time following release from prison beginning at day zero going to seven years, and the vertical axis is the cumulative percentage of sex offenders who were released from an Alaska prison and reoffended at each point of time. He pointed out that because the data is cumulative, the graph will always go up or flat, but never decrease. He added that once a person is counted as a recidivist using this measure, he/she is always in this pool.

[2:40:55 PM](#)

DR. MYRSTOL, explaining the data depicted in the graph, said the top bold line depicts the percentage of sex offenders who were released from prison and rearrested for any offense. He stated that the graph culminates at seven years showing there were a total of 55.4 percent of sex offenders rearrested for any offense. He compared this percentage with the 40.4 percent recidivism which had resulted after three years. He pointed out that the long-dashed line represents the number of sex offenders released from prison and convicted of any new offense. He explained that conviction is a lagged indicator because it takes time for cases to reach resolution, and this would explain why the conviction rate is less than the rearrest rate. Continuing, he explained that the small-dashed line near the vertical axis depicts the percentage of sex offenders who were released from prison and rearrested for a qualifying sex offense.

[2:44:00 PM](#)

VICE CHAIR SNYDER observed that the graph depicts a "fairly flat" line for the rearrest for sex offenses. She suggested that something is slowing the cumulative rate.

DR. MYRSTOL indicated that slide 7 would address the comment in full. He stated that sex offenders, like other offenders, engage in a wide variety of criminal conduct. He pointed out that rearrests could cover anything from motor vehicle offenses to felony property crimes.

[2:46:33 PM](#)

DR. MYRSTOL pointed out that recidivism is rarely for the same crime, which is opposed to the assumption that individuals would recommit the same crime. He addressed the straightness of the line representing the rearrests of sex offenders for sex offenses. He pointed out the same is not true for rearrests for any crime, as the slope of this line is steep in the early days following release, and then it flattens. He suggested this would mean the first year following release from prison is the biggest at-risk period for recidivism for any crime, and then the relative risk for recidivism declines over time.

[2:49:42 PM](#)

DR. MYRSTOL, moving to slide 7, stated the graph puts into context sex offenders in Alaska. The graph compares Alaska's recidivism rates with aggregated data from 30 other states. To help understand the likelihood of recidivism for different offenses, he explained that each line on the graph depicts different classes of offenders. He pointed out that the graph shows the risk of recidivism for sex offenders is substantially lower than people who were convicted of other offenses. He noted that, not included in the presentation, are results from a different analysis which shows the rate of recidivism for sex offenders in Alaska is less than offenders who had misdemeanor driving under the influence charges (DUIs), felony DUIs, and domestic violence charges. He stated that the data makes it clear the likelihood of sex offender recidivism following release from prison is lower than other offenders; however, in general, sex offender recidivism in Alaska is not low.

[2:53:11 PM](#)

REPRESENTATIVE EASTMAN suggested that sex offenders are harder to convict than other criminals, and this would explain sex offenders' lower recidivism rates.

DR. MYRSTOL clarified that the data depicted reflects rearrests, not convictions. He stated that there could be differences in

investigatory practices, but this depicts the earliest point in the criminal-legal process, and other case factors become mute.

[2:54:33 PM](#)

DR. MYRSTOL, turning to slide 8, addressed homogeneity of sex offenders. He stated that analysis shows there is diversity, as depicted on the graph in the four distinctive groups. He highlighted group 4, which is depicted by the bold line arching across the graph. The line shows that post release, through year 5, group 4 had an accelerated rate of reoffending. He observed that the curve turns downward as it approaches year 7 on the graph, but the number of reoffenders is still much higher than the other groups. He pointed out that the dynamic process illustrates change over time, exemplified by group 4. In other words, he said, "There is a small group of people doing lots of stuff." He pointed out that this activity accelerates by year 5, and then declines. He compared this to the relative stability in the other groups. For context, he stated that group 4, which represents 6.7 percent of all the sex-offender recidivist, committed 17 percent of all the new arrests. He explained that the members in group 4 had been reincarcerated most of the study period and only available to reoffend 15 percent of the total time; however, they still composed 17 percent of all rearrests. He reiterated that group 4 comprised only around 7 percent of the reoffender population. He said, "For me, this was a bit of a revelation." He said this had been his initial hypothesis because it is a criminological fact that there tends to be one small group of offenders who commit an extraordinarily disproportionate amount of crime. He added that released sex offenders are not unique in this regard; however, prior to this work, he said he had not seen this type of pattern.

[3:00:08 PM](#)

DR. MYRSTOL, in response to Chair Claman, stated that the groups are described in generalities. In terms of the research, great pains were taken to not identify individuals. He referred to page 21 of the study report for the demographics in each of the groups.

REPRESENTATIVE KREISS-TOMKINS commented that the ratio of 80 percent of things being attributed to 20 percent of the minority can be applied [across the board].

[3:03:18 PM](#)

REPRESENTATIVE EASTMAN pointed out that the study differentiated between high-risk rates and low-risk rates for recidivism. He questioned whether the group with the higher-risk rates could receive stiffer penalties.

DR. MYRSTOL, providing the caveat that he is not a criminal attorney, expressed the understanding that a criminal sanction would be in relation to the offense, not the likelihood of reoffence. He expressed the hope that the data presented would inform practice within DOC rather than larger policies in criminal law. Based on the risk-assessment tools and framework used, he expressed the belief that DOC is aware of recidivism risks. He stated that his aim has been to help policy makers be aware of the features of recidivism. He stated he has no recommendations in terms of a law change but stressed that not all recidivists are the same.

CHAIR CLAMAN thanked the presenter.

[HB 5 was held over.]

[3:07:10 PM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:07 p.m.