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HOUSE  
COMMITTEE REPORT

(7)

Date referred: 2/11/86

FURTHER REFERRALS: JUDICIARY

HEALTH, EDUCATION AND  
The SOCIAL SERVICES

DATE: April 22, 1986

Committee has considered HB 560

"An Act relating to imitation controlled substances."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CSHB 500 (HESS)  same title
- new title

and recommends no recommendation

further referral to the \_\_\_\_\_ Committee

and attaches:

- letter of intent
- first fiscal note
- new fiscal note
- 2 zero fiscal notes

SIGNING DO PASS:

[Signature]

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SIGNING OTHER RECOMMENDATIONS:

[Signature] No Rec.

[Signature] when amended

[Signature] - NO REC

[Signature] - No Rec.

[Signature] no rec

\_\_\_\_\_

\_\_\_\_\_

[Signature] Ch.  
Chairman

[Signature] co-chair

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : HB560  
 Title : "An Act relating to imitation  
 controlled substances"  
 Sponsor : Rep. Gruenberg  
 Requestor : H. HESS  
 Date of Request : \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected : Public Safety  
 BRU : Alaska State Troopers  
 Components : Narcotics

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

| OPERATING              | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 |
|------------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES      |       |       |       |       |       |       |
| TRAVEL                 |       |       |       |       |       |       |
| CONTRACTUAL            |       |       |       |       |       |       |
| SUPPLIES               |       |       |       |       |       |       |
| EQUIPMENT              |       |       |       |       |       |       |
| LAND & STRUCTURES      |       |       |       |       |       |       |
| GRANTS, CLAIMS         |       |       |       |       |       |       |
| MISCELLANEOUS          |       |       |       |       |       |       |
| <b>TOTAL OPERATING</b> | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |
| <b>CAPITAL</b>         | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |
| <b>REVENUE</b>         | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

**FUNDING : (Thousands of Dollars)**

|               |     |     |     |     |     |     |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND  |     |     |     |     |     |     |
| FEDERAL FUNDS |     |     |     |     |     |     |
| OTHER         |     |     |     |     |     |     |
| <b>TOTAL</b>  | -0- | -0- | -0- | -0- | -0- | -0- |

**POSITIONS :**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| FULL-TIME |  |  |  |  |  |  |
| PART-TIME |  |  |  |  |  |  |
| TEMPORARY |  |  |  |  |  |  |

**ANALYSIS :** Attach a separate page if necessary

*K. Allen*

Prepared by : Francis C. Allan *F.C.A.*  
 Division : Alaska State Troopers

Phone : 269-5691  
 Date : 2-20-86

Approved by Commissioner : *[Signature]*  
 Agency : Public Safety

Date : 2/24/86

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

Opposed

February 20, 1986

HB560 - "An Act relating to imitation controlled substances."

It is our interpretation of the wording used in this bill that law enforcement agencies will be required to prove the intent of a suspect in cases involving imitation controlled substances.

By requiring that law enforcement officers must demonstrate "...that the person knows..." that they are dealing with an imitation controlled substance, enforcement of the statute will be extremely difficult. The requirement for proving 'intent' was removed from various narcotics related statutes several years ago. This bill will return this element in cases involving imitation controlled substances.

As a result of the implementation of the bill, law enforcement agencies will be less likely to be able to prevent the sale of "look-alike" imitation drugs and drug pushers will be able to increase the initiation of minors into the drug culture. Further, dangers to the public will occur when users become accustomed to using "look-alikes" and unknowingly take the same dosage of a real drug.

  
Robert J. Sundberg  
Commissioner

# STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : \_\_\_\_\_

**REQUEST**

Bill/Resolution No. : HB 560  
 Title : "An Act relating to imitation  
 controlled substances."  
 Sponsor : Repr. Gruenberg  
 Requestor : House HESS  
 Date of Request : April 25, 1986

**FISCAL DETAIL**

Agency Affected : Department of Law  
 BRU : Prosecution  
 Components : \_\_\_\_\_

**EXPENDITURES/REVENUES : (Thousands of Dollars)**

| OPERATING              | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 |
|------------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES      |       |       |       |       |       |       |
| TRAVEL                 |       |       |       |       |       |       |
| CONTRACTUAL            |       |       |       |       |       |       |
| SUPPLIES               |       |       |       |       |       |       |
| EQUIPMENT              |       |       |       |       |       |       |
| LAND & STRUCTURES      |       |       |       |       |       |       |
| GRANTS, CLAIMS         |       |       |       |       |       |       |
| MISCELLANEOUS          |       |       |       |       |       |       |
| <b>TOTAL OPERATING</b> | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| REVENUE |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

**FUNDING : (Thousands of Dollars)**

|               |     |     |     |     |     |     |
|---------------|-----|-----|-----|-----|-----|-----|
| GENERAL FUND  | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS |     |     |     |     |     |     |
| OTHER         |     |     |     |     |     |     |
| <b>TOTAL</b>  |     |     |     |     |     |     |

**POSITIONS :**

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART-TIME |     |     |     |     |     |     |
| TEMPORARY |     |     |     |     |     |     |

**ANALYSIS :** Attach a separate page if necessary

This bill will not have a fiscal impact on the Department of Law.

Prepared by : Richard I. Pegues, Director Phone : 465-3672  
 Division : Administrative Services Division Date : 4/28/86  
 Approved by Commissioner : Harold M. Brown, Attorney General Date : 4/28/86  
 Agency : Department of Law

Distribution (by Agency preparing fiscal note) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

The Honorable Bill Sheffield  
Governor  
State of Alaska  
Pouch A  
Juneau, AK 99811

Re: CSSH 10(Jud) -- imitation  
controlled substances  
Our file no: 388-029-83

Dear Governor Sheffield:

As requested by Emil Notti on your behalf, we have reviewed CSSH 10(Jud), relating to imitation controlled substances. This bill prohibits the manufacture, delivery, or possession with intent to deliver of an "imitation controlled substance." An imitation controlled substance is defined as a substance that contains specific listed chemical components and which, by its dosage unit appearance (including color, shape, size, and markings) or representations made about it, would lead a reasonable person to believe that the substance is a "controlled substance."

Although this bill raises some legal questions, we recommend that you sign it.

The language of CSSH 10(Jud) is based upon a Model Imitation Controlled Substances Bill drafted by the federal Drug Enforcement Administration, and upon Alaska's new controlled substances law, ch. 45, SLA 1982, passed during the second session of the Twelfth Legislature. The new controlled substances law completely revised the state's drug laws, classifying controlled substances according to the degree of danger to health presented, and setting appropriate penalties for the possession or distribution of these substances. The imitation controlled substances bill responds to a problem not addressed in the drug bill: persons who sell substances that are not controlled, such as caffeine or lidocaine, representing to the buyer (either explicitly or impliedly) that they are controlled substances such as amphetamines or cocaine.

Experience in other states has shown that purchasers of these "fake" controlled substances believe that they are

buying the "real thing." These purchasers, often young teenagers, ingest large dosages of these fake substances in order to achieve the desired sensation or "high." When, without realizing the difference, the drug purchaser happens to purchase (for the same price) a genuine controlled substance, he or she is likely to ingest the customary dosage, and overdose on the drug. Testimony by law enforcement officers before the legislative committees considering this bill indicated that, although there have not yet been any known overdoses of this nature in Alaska, there have been several deaths in other states directly attributable to an overdose by a young person who in the past had taken large quantities of imitation drugs, believing that they were genuine. Members of the state troopers' drug enforcement network testified that a high percentage of the illicit "drug" traffic in Alaska involves imitation controlled substances.

This bill would enable law enforcement authorities to apprehend and charge those who are selling fake substances as genuine controlled substances. These persons often purchase the imitation substances wholesale from pharmaceutical suppliers, and may sell them as controlled substances with a 400 or 500 percent markup. The profit to these dealers is much higher than it would be if they were selling "real" controlled substances, which are more expensive to obtain. Also, a person selling "drugs" on the street, whether genuine or imitation controlled substances, exposes young purchasers to the drug subculture lifestyle. This lifestyle often involves other criminal offenses such as prostitution, theft, burglary, fencing of stolen articles, and violence. Under current law, if an undercover police officer purchases what he believes to be a controlled substance such as cocaine or heroin from a seller, and subsequent laboratory analysis indicates that the substance is a non controlled "look-alike" drug, the seller often cannot be charged with any criminal offense.

Since the substances which can be considered "imitation controlled substances" (depending upon the facts surrounding their manufacture, delivery, or possession) are specifically listed in the bill, the law provides adequate notice of prohibited conduct, as required by Crutchfield v. State, 627 P.2d 196 (Alaska 1980), and Williford v. State, 653 P.2d 339 (Alaska Ct. App. 1982).

There are two aspects of the bill, however, which may be subject to constitutional challenge. In common with the D.E.A. model statute, "imitation controlled substance" is defined (at AS 11.73.099(3)) as a substance containing specified chemical components and which, by dosage unit appearance or by representations made about it, would lead a reasonable person to believe that the substance is a controlled substance.

June 11, 1983

Since it would not be appropriate to charge a person with a crime for the mere possession of a legal substance which looks like a controlled substance, the "or" in the definition cited above should be changed to "and". This change would require that a person actually make representations about a substance; the item's appearance would be one factor which the trier of fact could consider when deciding whether, under all the facts of the case, a reasonable person would have believed the substance to be a controlled one.

As a general rule, a person to whom a criminal statute is constitutionally applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. New York v. Ferber, 448 U.S. 420, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). The criminal division of the Department of Law is aware of this potential problem in the statutory language, and will alert prosecutors to make sure that all instructions to grand or petite juries require that the jurors base their decisions in individual prosecutions upon representations made by the distributor of the substance, rather than upon the appearance of the item alone. If criminal prosecutions are instituted only in appropriate cases, the statute should withstand constitutional challenge. An amendment to the statutory definition, perhaps during the next legislative session, is recommended, however.

The second potential legal problem in the bill appears in AS 11.73.040, which prohibits a person from placing an advertisement to promote delivery of an imitation controlled substance in a newspaper, magazine, handbill, or other publication, if the person knows that the purpose of the advertisement is to promote the delivery of an imitation controlled substance in this state. It will generally be difficult to prove the requisite mental state of "knowing." A case would depend upon the language of the advertisement (i.e., what representations were made about the substances) and proof that the advertiser knew that the publication would be distributed in Alaska. If facts sufficient to prove the requisite mental element were present, however, the statute should survive a First Amendment challenge.

The placing of an advertisement is an exercise of "commercial speech," and is thus accorded less protection under the First Amendment than "pure speech." Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976). Additionally, a state may regulate or totally ban commercial speech which promotes an illegal transaction or advocates violating the law. Stoianoff v. Montana, 695 F.2d 1214 (9th Cir. 1983); Central Hudson Gas and Electric Co. v. Public Service Commission, 447 U.S. 557, 100

June 27, 1983

S.Ct. 2343, 65 L.Ed.2d 341 (1980); Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

Under AS 01.10.030, any portion of a law which is declared invalid is considered severed from the remainder of the law; the remainder may be enforced if, standing alone, it can be given legal effect. Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975); Williams v. Zobel, 619 P.2d 422 (Alaska 1980). Thus, even if the advertisement section and, to a lesser extent, the appearances portion of the imitation controlled substances definition were to be declared invalid, the remainder of the bill could be enforced.

The potential legal problems with the bill do not appear to be of sufficient magnitude to prevent the bill from becoming law.

Sincerely,

Norman C. Gorsuch  
Attorney General

NCG:GAH:gb

STATE OF ALASKA  
THE LEGISLATURE  
LEGISLATIVE AFFAIRS AGENCY


POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99811  
907 465 3800

MEMORANDUM

November 26, 1985

SUBJECT: Imitation controlled substances,  
Morrow v. State, No. 499, August 9, 1985  
(Work Order No. 14-1357)

TO: Representative Max Gruenberg

FROM: Richard A. Bradley  
Legislative Counsel 

You have asked that we analyze the Court of Appeals opinion in Morrow, above, and comment on the solution that you suggest.

While the "oversight" report comment that I just wrote suggests that legislative review is not necessary, that was because the court achieved the legislative goal through what you fairly call a "tortured interpretation."

The law in question, AS 11.73.010(a), provides:

(a) Except as provided in AS 11.73.050, a person may not manufacture, deliver, or possess with intent to deliver, an imitation controlled substance.

I agree with your suggestion that the material added in the draft bill enclosed, responsive to your suggestion, should resolve the question before the court in Morrow.

RAB:ml  
me1/024

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 1800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

December 4, 1985

SUBJECT: Imitation controlled substances  
(Work Order No. 14-1357)

TO: Representative Max Gruenberg

FROM: Richard A. Bradley  
Legislative Counsel *B*

Gayle Horetski called recently to comment on the "oversight report" and one of her concerns was our recommendation in the Morrow case, the case that was the occasion of your request.

Her concern was that we made the wrong recommendation in that case; she thought that the difficulty that the court had reaching the result it did should have indicated a need for review. My own basis for making the recommendations in the oversight report is that if the court seems to have reached the "apparent legislative intent", I leave it as it is, given the usual legislative difficulties in achieving change.

Be that as it may, she noted that the administration has a bill pending that addresses the matter. SB 151, a bill "amending the controlled substance, imitation controlled substance, and forfeiture laws" addresses the concern at Sec. 5. The bill solves the Morrow problem differently. The bill amends AS 11.73.099(3) as follows:

Sec. 11.73.099. DEFINITIONS. In this chapter

\* \* \*

(3) "imitation controlled substance" means a substance containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudoephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline, lidocaine, procaine, tetracaine, dyclonine, acetaminophen,

Representative Max Gruenberg

Page 2

December 4, 1985

salicylamide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or pyrilamine, or their salts, that is not a controlled substance, and that by dosage unit appearance (including color, shape, size, and markings) and [OR] by representations would lead a reasonable person to believe that the substance is a controlled substance; the term "representations", as used in this paragraph, includes

(A) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;

(B) statements made to the recipient that the substance may be resold for inordinate profit;

(C) whether the substance is packaged in a manner normally used for controlled substances;

(D) evasive tactics or actions used by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(E) the storage, packaging, presentation, display of or reference to a controlled substance with, near, or in connection with the activity involving the imitation controlled substance.

She suggests that the burden of proof would be simpler in her bill than in the language I read to her from your bill's solution to the problem.

I did not, of course, identify you as the legislator who had filed a request on the subject.

If you would prefer the style of Sec. 5 from SB 151, that can be substituted for what I gave you earlier.

If I may be of further assistance, please advise.

RAB:mk  
M1:115

Enc: SB 151

AS 11.73.010(a) THE LAW REGULATING "IMITATION CONTROLLED SUBSTANCES" IS EXAMINED FOR CONSTITUTIONALITY.

The Court of Appeals of Alaska held that the law can be applied to a situation involving an intentional misrepresentation that an imitation drug is a controlled drug. The court noted that while the law possessed some vagueness problems, in Stock v. State, 526 P.2d 3, 8 (Alaska 1974), the Alaska Supreme Court allowed a court to construe a statute which is vague on its face in such a way as to avoid constitutional vagueness problems: "A statute in its broad contours may be subject to criticism for failure to give adequate notice to all types of conduct which are punishable, but, when not involved with the "overbreadth" (a First Amendment) problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood." The court concluded that the law could be interpreted to apply to those situations involving an intentional misrepresentation that an imitation drug is a controlled drug. Morrow v. State, 704 P.2d 226.

The Alaska Court of Appeals construed the law according to the apparent legislative intent. Legislative action is not recommended.

# State of Alaska

## COMMITTEES

HOUSE HEALTH, EDUCATION  
AND SOCIAL SERVICES  
(Co-Chairman)  
HOUSE JUDICIARY  
HOUSE COMMUNITY AND  
REGIONAL AFFAIRS

POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-4968

914 CLAY COURT  
ANCHORAGE, ALASKA 99503  
(907) 276-6844

Representative Max F. Gruenberg, Jr.  
District 11  
Spennard, Upper Midtown Anchorage

August 20, 1985

Billy G. Berrier, Director  
Division of Legal Services  
Pouch Y  
Juneau, Alaska 99811

Re: AS 11.73.010

Dear Mr. Berrier:

The above statute was recently construed in Morrow v. the State of Alaska, P.2d, Op. no. 499 (Alaska App. August 9, 1985), narrowly to avoid an unconstitutional interpretation. Footnote one at page 12 indicates other possible problems. It appears to me that the statute could be saved from unconstitutionality and from requiring appellate courts to engage in tortured interpretations by simply adding the requirement that the defendant can only be convicted if he (1) knows the substance is an imitation controlled substance, and (2) distributes it with the intent to misrepresent it as a controlled substance.


Do you agree?

If you so, please draft me a bill to amend the above statute to add these two elements.

Reviewing the remainder of Chapter 73, I do not believe any other section needs to be similarly amended. If you feel it does, please add such amendments in the bill.

Thank you very much.

Cordially,

  
Max F. Gruenberg, Jr.

*Thanks!*

enclosure

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

JO ANN MORROW, )  
Appellant, )  
vs. )  
STATE OF ALASKA, )  
Appellee. )

File No. A-510  
OPINION  
No. 499 - August 9, 1985

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Thomas B. Stewart, Judge.

Appearances: Carl E. Forsberg, Birch, Horton, Bittner, Pestinger and Anderson, Anchorage, for Appellant; John A. Scukanec, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

COATS, Judge.

December 1, 1983, the mother of a sixteen-year-old juvenile, M.W., contacted Alaska State Trooper Geoffrey Engleman. M.W.'s mother informed Trooper Engleman that she believed her daughter was dealing drugs. Later that day, Trooper Engleman and another officer met with M.W.'s mother at her residence. There, she informed them that she had discovered plastic bags containing pills in M.W.'s purse. An officer then

searched M.W.'s purse and discovered six plastic bags containing different colored pills. Subsequently, Trooper Engleman interviewed M.W. At that time, M.W. informed the trooper that seven to nine days previously, Jo Ann Morrow had supplied her with 300 pills. She had obtained them from Morrow while in Morrow's car. At that time, Morrow told M.W. the pills were "speed" and instructed M.W. to sell each pill for \$1.00. Morrow told M.W. she would receive 1/3 of the money from the sales and if M.W. ran out of pills, Morrow could supply more. M.W. also stated that she had sold some of the pills and had given Morrow \$39 and Morrow had returned \$12 or \$14 to M.W. on November 30, 1983, as commission on the sales.

Trooper Engleman had the pills field-tested and determined that they were not "speed." However, because of their appearance, they could pass for "speed" on the street. Subsequent laboratory tests disclosed that the pills contained caffeine and ephedrine.

Based on the information provided by M.W. and his own familiarity with "fake controlled substances," Trooper Engleman obtained a search warrant for Morrow's residence. The warrant authorized a search of the residence for: drugs which appeared to be amphetamine based; written records of the ordering of such drugs; and magazines or books

from which such drugs could be ordered. A search of the residence on December 1, 1983, resulted in the seizure of: approximately 5,000 tablets and capsules, similar to those obtained from M.W.; brochures advertising diet pills and stimulants; various items of drug paraphernalia; and from Morrow's purse, a list of names and telephone numbers, including M.W.'s.

On December 6, 1983, a grand jury returned a two-count indictment charging Morrow with delivery of an imitation controlled

substance to a minor land possession of an imitation controlled substance with intent to deliver AS 11.73.030(a); AS 11.73.010(a). On March 10, 1984, a jury returned a verdict of guilty on the possession with intent to deliver charge only.

Morrow now appeals, raising the following issues: (1) that the trial court erred by denying her motion to suppress evidence because the search warrant for her residence was not supported by probable cause; (2) that the trial court erred in denying her motion to dismiss the indictment because hearsay evidence was presented to the grand jury in the form of a "telex" preliminary lab report; and (3) that AS 11.73.099, the statute defining "imitation controlled substances," is unconstitutional.

SEARCH WARRANT ISSUES  
The standard of review regarding a magistrate's determination of probable cause was enunciated in Rosa v. State, 633 P.2d 1027, (Alaska App. 1981), where this court said:

In reviewing a magistrate's determination of probable cause this court must give great deference to the magistrate's decision and must resolve doubtful or marginal cases largely by the preference to be accorded warrants. The Fourth Amendment's requirements are practical and not abstract, and affidavits must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. The burden of proof on questions pertaining to the sufficiency of the affidavit is on the defendant. [Citations and footnotes omitted.]  
Id. at 1029-30, quoting State v. Davenport, 510 P.2d 78, 82 n.8 (Alaska 1973). With these standards in mind, the question to be asked is "whether the issuing judge [or magistrate] was provided sufficient evidence to make an independent finding of probable cause" to issue a

warrant. Lockwood v. State, 591 P.2d 969, 970 (Alaska 1979), quoting Davis v. State, 499 P.2d 1025, 1028 (Alaska 1972), rev'd on other grounds, 415 U.S. 308, 39 L.Ed.2d 347 (1974).

Morrow argues that the affidavit in support of the search warrant was inadequate because there was no indication that M.W. was a credible informant. See Kralick v. State, 647 P.2d 1120, 1124-25 (Alaska App. 1982).

Morrow argues that the affidavit does not make any allegation that M.W. had given reliable information in the past and the police did not conduct an independent investigation to corroborate her statements.

Morrow also contends that this warrant is defective for the same reasons we articulated in Jones v. State, 681 P.2d 364 (Alaska App. 1984).

In Jones we held that an affidavit in support of a search warrant by a police detective was not sufficient where the detective relied on a report by a juvenile informant that he witnessed a sale of one-half gram of cocaine at Casey Jones's apartment. The juvenile also stated that he had been to the apartment several times when "he or his companions have purchased cocaine from Jones in the last few hrs." Id. at 365. The juvenile also

pointed out an apartment which was confirmed by another police officer to be Jones's apartment. In noting that the hearsay statement of the juvenile informant was not sufficient to support the warrant, we stated:

Moreover, B.V.'s statements that he had observed a friend purchase cocaine and that he had been to Jones's apartment ten to fifteen times when "he or his companions" had purchased cocaine do not qualify as the kind of declarations against penal interest which a court could find inherently credible. It is not a crime to be present when someone else is purchasing cocaine even though that someone else is a friend; nor would vague admissions about past purchases of cocaine support a criminal prosecution in the absence of evidence establishing a corpus delicti for a specific purchase. More significantly, the affidavit does not explain the circumstances under which B.V.'s statement was made. If B.V. was being prosecuted by

and juvenile authorities for drug transactions unrelated to Casey Jones, he would hardly view his statement that he had purchased cocaine in the past from Jones as increasing his exposure to criminal sanctions.

*Id.* at 365, n.6 (1980).

We see the situation in this case as significantly different from that in Jones. M.W. had the imitation drugs in her possession and apparently believed that she was confessing to the police that she had been selling amphetamines. There was every reason for the magistrate to credit her story as a declaration against interest. *Wong La Fave, Search and Seizure*, §3,3(c), (1978). We conclude that M.W.'s credibility was adequately supported.

Morrow next argues that the affidavit in support of the warrant did not establish probable cause because it was based on stale information. She argues this is true because M.W.'s alleged transaction with Morrow had occurred seven to nine days prior to the issuance of the warrant. In *Snyder v. State*, 661 P.2d 638, 647 (Alaska App. 1983), this court said:

The question of whether the information contained in the affidavit was "stale" depends on an evaluation of the circumstances related by the affidavit and the length of time between the issuance of the search warrant and the time of the most recent incriminating activity described in the affidavit. In evaluating "staleness," this court has chosen to evaluate the

- (1) the type of crime;
- (2) the nature of the items sought;
- (3) the extent of the suspect's opportunity for concealment; and
- (4) normal inferences as to where a criminal would be likely to hide incriminating articles. *Id.* at 648.

It appears that the magistrate could have properly concluded the information was not stale because the affidavit evidenced ongoing criminal activity. See, e.g., 1 W. LaFare, Search and Seizure § 3.7(a), at 683-87 (1978); State v. Ogden, 391 So.2d 434 (La. 1980) (probable cause found despite fact that drug sale took place five days prior to the issuance of the warrant where the informant's statements indicated continuous activity and drug transactions, supporting an inference that a continuing supply of cocaine would be available). On the present facts, the affidavit stated that although the actual capsules and tablets were obtained from Morrow seven to nine days previously, money had been turned over to Morrow "within the last few days." Also, Morrow had represented to M.W. that if M.W. "sold out" of the substances, Morrow could readily obtain more. We conclude that the magistrate could properly find that there was probable cause that Morrow was still in possession of the imitation drugs and related material.

Next Morrow argues that because M.W. indicated she obtained the pills from Morrow while Morrow was in her car, there was no nexus between Morrow's residence and the items to be searched for.

In Snyder, 661 P.2d at 645, we said: "Probable cause to search requires sufficient information to permit the conclusion that criminal activity or evidence of crime will be found at the place to be searched. Put another way, there must be a 'nexus' between the place to be searched, criminal activity, and the items sought." 1 W. LaFare, Search and Seizure § 3.7(d), at 704 (1978).

See also State v. Gutman, 670 P.2d 1166 (Alaska App. 1983). We believe that the magistrate could properly conclude from the continuing contacts between M.W. and Morrow that Morrow was engaged in an ongoing business and it is logical to assume that some of the drugs would be stored at her

residence. We conclude there was probable cause to search Morrow's residence. Morrow next contends that the police should not have been permitted to seize the telephone list which had on it M.W.'s name and telephone number along with several other names and telephone numbers.

Morrow concedes the police could search her purse to find the list, but argues that the incriminating nature of the list was not immediately apparent and therefore the police had no authority to seize it. We disagree. The fact that Morrow had M.W.'s name and telephone number on a list in her purse showed her connection to M.W. and corroborated M.W.'s version of the relationship. It was also probable that the other names and telephone numbers on the list were connected with Morrow's distribution of imitation controlled substances. We conclude the police had authority to seize the list and that the trial judge did not err in refusing to suppress the use of the list as evidence.

GRAND JURY

Morrow argues that the indictment should have been dismissed since the state proved by means of a preliminary laboratory report that the substance which she was charged with possessing contained ephedrine and caffeine. Morrow claims that introduction of this report was inadmissible hearsay for which there was no compelling justification. Alaska R. Crim. P. 6(r). Morrow recognizes that in McKinnon v. State, 526 P.2d 18 (Alaska, 1974), the supreme court permitted the state to introduce the results of a laboratory report despite the fact that the report was hearsay. Morrow specifically objects to the fact that the report

presented to the grand jury was a telex which read: "Preliminary screening indicates presence of ephedrine and caffeine. Final report will be mailed upon completion of analysis." She argues that the situation in her case is more similar to that described by the supreme court in Metler v. State, 581 P.2d 669, 673-74 (Alaska 1978), where the court disapproved of introducing at grand jury the hearsay conclusion of handwriting experts. In Metler the court concluded that the grand jury was given insufficient information to evaluate the credibility of the experts and their methods. However in Morrow's case, Trooper Engleman, who introduced the report, did give the grand jury background information about the chemist who performed the test. He indicated that the chemist, Suzanne Feller, was a state chemist that he was personally acquainted with and that she had testified as an expert in other drug cases. Trooper Engleman also testified that he field-tested the suspected drugs and found they were not amphetamines. We also note that Suzanne Feller's testimony at trial was apparently essentially the same as her preliminary report, so it appears that we do not have a situation where later tests were inconsistent with the preliminary one. We conclude that under these circumstances the grand jury had sufficient information to evaluate Suzanne Feller's hearsay testimony and that the grand jury could properly find that the substances which Morrow possessed fell within the imitation controlled substances statute.

#### VAGUENESS AND OVERBREADTH

Morrow next challenges the statute under which she was convicted as being unconstitutionally overbroad and vague. U.S. Const.

amend. XIV and Alaska Const. art. I § 7. Morrow was convicted of possession of imitation controlled substances with the intent to deliver in violation of AS 11.73.010(a). That statute provides in part that "a person may not manufacture, deliver, or possess with intent to deliver, an imitation controlled substance." The definition of "imitation controlled substances" is found in AS 11.73.099(3) which provides:

(3) "imitation controlled substance" means a substance containing ephedrine, pseudoephedrine, pseudoephedrine hydrochloride, phenylpropanolamine, caffeine, theophylline, lidocaine, procaine, tetracaine, dyclonine, acetaminophen, salicylamide, doxylamine, diphenhydramine, pheniramine, chlorpheniramine, or pyrilamine, or their salts, that is not a controlled substance, and that by dosage unit appearance (including color, shape, size, and markings) or by representations would lead a reasonable person to believe that the substance is a controlled substance; the term "representations" as used in this paragraph, includes

- (A) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;
- (B) statements made to the recipient that the substance may be resold for inordinate profit;
- (C) whether the substance is packaged in a manner normally used for controlled substances;
- (D) evasive tactics or actions used by the owner or person in control of the substance to avoid detection by law enforcement authorities;
- (E) the storage, packaging, presentation, display of or reference to a controlled substance with, near, or in connection with the activity involving the imitation controlled substance. [Emphasis provided.]

Morrow points out that this statute could reach some conduct which it is unlikely that the statute was intended to cover. Morrow proposes a hypothetical where someone, without any intent to deceive, gives caffeine diet pills, which are available as non-prescription medicine, to someone indicating that the pills are as effective for weight loss as any

prescription medicine. The state recognizes that the statute could be construed to reach conduct, such as that described by Morrow, which it is unlikely that the legislature intended to prohibit in promulgating the statute. The state urges us to interpret the statutory language defining an imitation controlled substance in such a manner that the meaning of the statute will be more clear to avoid any vagueness problems. As AS 11.73.099(3) now reads in part, an imitation controlled substance is a substance containing specific chemical components which by dosage unit appearance or by representations would lead a reasonable person to believe that the substance is a controlled substance. [Emphasis provided.] The state asks us to read the "or" in AS 11.73.099(3) as "and" in construing the statute. The state argues that as so construed, the statute would not reach innocent behavior.

In Summers v. Anchorage, 589 P.2d 863, 866-67 (Alaska 1979),

the supreme court set out three factors which must be considered in determining whether a statute is unconstitutionally vague: (2)

First, a statute may not be so imprecisely drawn and overbroad that it "chills" the exercise of first amendment rights. The second consideration is that in order to be consistent with notions of fundamental fairness a statute must give adequate notice of the conduct that is prohibited. The final element in an analysis of statutory vagueness is whether the statute's imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of its prohibitions. [Footnotes omitted.]

The first question we need to answer is whether the statute is overbroad. The overbreadth doctrine was described in Marks v. Anchorage, 500 P.2d 644, 646 (Alaska 1972):

The overbreadth doctrine has evolved to give adequate breathing room to specific first amendment freedoms; a statute violates the doctrine when constitutionally-protected conduct as well as conduct which the state

and can legitimately regulate are included within the ambit of the statute's prohibition. [Footnote omitted.]

The statute in question regulates conduct, the possession and sale of certain specific drugs, not speech or association. See Summers v. Anchorage, 589 P.2d at 867; McKenzie v. Anchorage, 631 P.2d 514, 516-17 (Alaska App., 1981). We therefore conclude that the statute is not overbroad.

The next question which we need to answer is whether the statute gives "adequate notice of the conduct that is prohibited." The state has conceded that the statute does have vagueness problems in this area and has asked us to construe the statute. In Stock v. State, 526 P.2d 3, 8 (Alaska 1974), the supreme court stated the doctrine which allows a court to construe a statute which is vague on its face in such a way as to avoid constitutional vagueness problems:

A statute in its broad contours may be subject to criticism for failure to give adequate notice to all types of conduct which are punishable, but, when not involved with the "overbreadth" problem, may still pass muster if: (a) there can be no question as to its applicability to the particular offense involved, and (b) a construction may be placed upon the statute so that in the future the type of offenses coming within its purview may reasonably be understood. [Footnotes omitted.]

In this case the state contends Morrow possessed certain imitation drugs with the intent to deliver those drugs. The state alleges that Morrow knew that the drugs were imitation drugs but intended to deliver them while intentionally misrepresenting that the imitation drugs were controlled drugs. Certainly the conduct which the state alleges is clearly covered by the statute. We believe that the statute can be interpreted by us to apply to those situations involving an intentional misrepresentation that an

imitation drug is a controlled drug. As so interpreted we believe that the statute is not vague.

The third factor which we are to consider is the statute's potential for arbitrary enforcement. The record of this case does not reflect a history of arbitrary or selective enforcement of this statute. See Summers v. Anchorage, 589 P.2d at 868. We also do not find that the

language of the ordinance is so vague that arbitrary enforcement is likely. See Brown v. Anchorage, 584 P.2d 35 (Alaska 1978). We therefore do not invalidate the ordinance for vagueness on this ground. We conclude that the statute, as interpreted, is not unconstitutionally vague.

The state asks us to affirm Morrow's conviction even though the state concedes that the jury instructions which were given in the trial below vary from the interpretation of the imitation controlled drug statute which the state has argued on appeal. The state contends that it is clear that Morrow's defense did not turn on the particular jury instructions which were given in her trial and which might be modified in response to her vagueness claim. See Stock v. State, 526 P.2d at 11-12. Morrow did not file a reply brief and therefore had not responded to the state's argument that the statute can be construed so that it is not vague or

whether, if the statute is so construed, Morrow's conviction should be affirmed. Furthermore, we have before us only a minimal record to decide this case, which does not include a transcript of the trial. We therefore

1. It appears to us that it may be argued that certain other conduct falls within the statute. An example of conduct which might fall within the statute would be a person who delivers an imitation drug honestly believing that the imitation drug is a controlled substance. However, the case before us does not present this question, and this matter has not been briefed on appeal. We reserve ruling on this issue.

do not decide whether Morrow has any claim that her conviction was improper because of a claim that might arise out of our post-trial construction of the statute. We remand the case to the trial court to determine whether Morrow's conviction should stand in light of our construction of the statute under which she was convicted.<sup>2</sup>

This case is REMANDED for proceedings not inconsistent with this opinion.

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2. We retain jurisdiction of this appeal.



ANCHORAGE  
SCHOOL DISTRICT

4600 DeBarr Avenue  
P.O. Box 196614  
Anchorage, Alaska 99519-6614  
AREA CODE [907] 333-9561

March 21, 1986

The Honorable Max Gruenberg, Jr.  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Dear Mr. Gruenberg:

Review of House Bill No. 560 entitled, "an Act relating to imitation controlled substances", prompts this letter. The Anchorage School District has for the past four years prohibited imitation controlled substances as well as currently illegal drugs and alcohol in schools and at school functions. We have found it necessary to treat the imitation substances as if they were the real things in order to continue to maintain as drug/alcohol free school environment as possible.

Since these substances are reported to be real, they promote drug related activity in exactly the same manner the actual substance does. We would welcome State support in eliminating this troublesome feature of the drug subculture from our schools and our State.

Sincerely,

E. E. (Gene) Davis, Ed.D.  
SUPERINTENDENT

rs

cc Steve Daeschner, Deputy Superintendent for Instruction  
L. T. Freeman, Assistant Superintendent for Business Management  
Bill Miles, School District Lobbyist

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E.E. (Gene) Davis, Ed.D.

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

Opposed

February 20, 1986

HB560 - "An Act relating to imitation controlled substances."

It is our interpretation of the wording used in this bill that law enforcement agencies will be required to prove the intent of a suspect in cases involving imitation controlled substances.

By requiring that law enforcement officers must demonstrate "...that the person knows..." that they are dealing with an imitation controlled substance, enforcement of the statute will be extremely difficult. The requirement for proving 'intent' was removed from various narcotics related statutes several years ago. This bill will return this element in cases involving imitation controlled substances.

As a result of the implementation of the bill, law enforcement agencies will be less likely to be able to prevent the sale of "look-alike" imitation drugs and drug pushers will be able to increase the initiation of minors into the drug culture. Further, dangers to the public will occur when users become accustomed to using "look-alikes" and unknowingly take the same dosage of a real drug.

  
Robert J. Sundberg  
Commissioner

Bradley  
4/19/86

Original sponsor: Gruenberg

1 IN THE HOUSE

BY THE HEALTH, EDUCATION AND  
SOCIAL SERVICES COMMITTEE

2 CS FOR HOUSE BILL NO. 560 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to imitation controlled substances."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 11.73.010(a) is amended to read:

9 (a) Except as provided in AS 11.73.050, a person may not manu-  
10 facture, deliver, or possess with intent to deliver, an imitation  
11 controlled substance with an intent to misrepresent the imitation  
12 controlled substance as a controlled substance.

13 \* Sec. 2. AS 11.73.030(a) is amended to read:

14 (a) Except as provided in AS 11.73.050, a person 19 years of age  
15 or older may not deliver an imitation controlled substance with an  
16 intent to misrepresent the imitation controlled substance as a con-  
17 trolled substance to a person under 19 years of age, who is at least  
18 three years younger than the person delivering the substance.

19 \* Sec. 3. AS 11.73.099(3) is amended to read:

20 (3) "imitation controlled substance" means a substance  
21 containing ephedrine, ephedrine sulfate, pseudoephedrine, pseudoephe-  
22 drine hydrochloride, phenylpropanolamine, caffeine, theophylline,  
23 lidocaine, procaine, tetracaine, dyclonine, acetaminophen,  
24 salicylamide, doxylamine, diphenhydramine, pheniramine, chlorpheni-  
25 ramine, or pryrilamine, or their salts, that is not a controlled  
26 substance, and that by dosage unit appearance (including color, shape,  
27 size, and markings) and [OR] by representations would lead a reason-  
28 able person to believe that the substance is a controlled substance;  
29 the term "representations", as used in this paragraph, includes

1 (A) statements made by an owner or by anyone else in  
2 control of the substance concerning the nature of the substance,  
3 or its use or effect;

4 (B) statements made to the recipient that the sub-  
5 stance may be resold for inordinate profit;

6 (C) whether the substance is packaged in a manner  
7 normally used for controlled substances;

8 (D) evasive tactics or actions used by the owner or  
9 person in control of the substance to avoid detection by law  
10 enforcement authorities;

11 (E) the storage, packaging, presentation, display of  
12 or reference to a controlled substance with, near, or in connec-  
13 tion with the activity involving the imitation controlled sub-  
14 stance.  
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