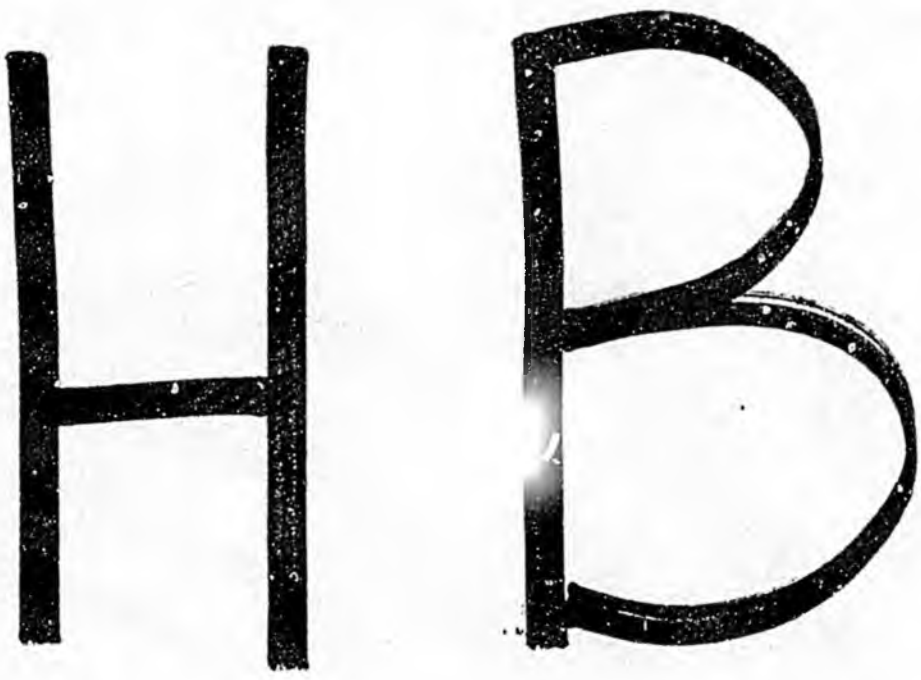
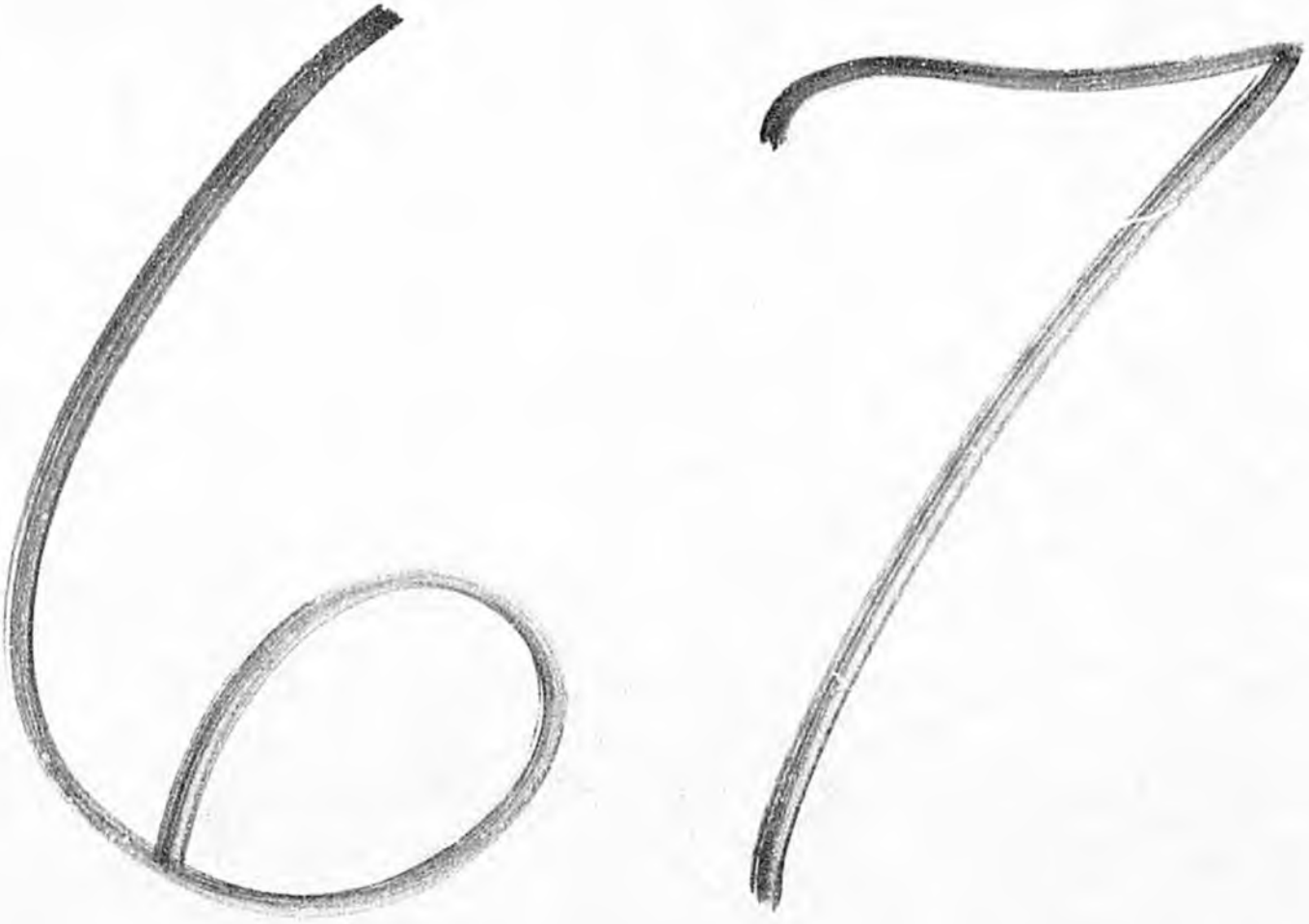

HB


67

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	4/12/85	1:30 pm
" "	4/13/85	9 Am
" "	4/20/85	1:30 pm

COMMITTEE REPORT

HOUSE

4/23

(7)

FURTHER: FINANCE

4/3/85

Date: _____

The Committee on JUDICIARY has had HB 67

"An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[✓] replace with CS for HB 67 (JUD) [ ] same title [✓] new title

and recommends it do pass

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Hal Wilson — NO REC

CHAIRMAN

Original sponsor: Phillips

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 67 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the admissibility of hearsay evidence of certain statements by children before grand juries and amending Rule 6(r), Alaska Rules of Criminal Procedure."

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

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability;

(2) additional evidence is introduced to corroborate the statement; and

(3) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

* Sec. 2. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by changing the circumstances under which hearsay evidence may be introduced in grand jury

proceedings for certain sexual offenses.

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: CSHB 67

Title: An Act Relating to Hearsay Evidence

Sponsor:

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: Alaska Court System

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Trial Courts

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		255.2	270.5	286.7	303.9	322.1
200 TRAVEL		9.0	9.5	10.1	10.7	11.3
300 CONTRACTUAL		6.0	6.4	6.8	7.2	7.6
400 SUPPLIES		2.0	2.1	2.2	2.3	2.4
500 EQUIPMENT		16.5				
600 LAND & STRUCTURES						
GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		288.7	288.5	305.8	324.1	343.4
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		288.7	288.5	305.8	324.1	343.4
FEDERAL FUNDS						
OTHER						
TOTAL		288.7	288.5	305.8	324.1	343.4

POSITIONS:

FULL-TIME		4	4	4	4	4
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Robert G. Fisher / Karla Forsythe Phone: 264-0561/264-0634

Division: Alaska Court System Date: 4/5/85

Approved by Commissioner: Arthur H. Snowden II Date: 4/11/85

Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):

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

7/1/84

ALASKA COURT SYSTEM

HB 67 - HEARSAY EVIDENCE IN CHILD ABUSE CASES
FISCAL IMPACT

PERSONAL SERVICES:

	SALARY	BENEFITS	TOTAL COST
Superior Court Judge - Anchorage	$73,620	$82,718	$156,338
In-Court Clerk - Anchorage (Range 12B)	24,512	8,116	32,628
Law Clerk - Anchorage (Range 13A)	25,332	8,299	33,631
Secretary - Anchorage (Range 12B)	24,512	8,116	32,628
Total Personal Services			255,225

TRAVEL (Judicial travel to outlying courts)	9,000
CONTRACTUAL (Word processing equipment, telephone, postage, etc.)	6,000
SUPPLIES	2,000
EQUIPMENT (one-time items)	
Standard office equipment for all employees and legal reference materials for judge and law clerk.	16,534
TOTAL FY 86 COST	$288,759

Subsequent fiscal years adjusted to reflect 6% inflation.

NARRATIVE

CSHB 67 (HESS)

According to information provided verbally by the Department of Law, the department projects 250 child sexual assault cases during FY 85 (up from 120 in FY 83). The department also estimates that 80 - 90% of these cases would involve the testimony of a minor, and would require the hearing contemplated in paragraph (d). It is further estimated by the department that the majority of these hearings will require one-half day of court time.

Based on these estimates, 225 half-day hearings would require 112 days of judicial time. The department indicates that approximately two-thirds of these cases are heard in Anchorage. Thus, judicial resources would be needed to cover 78 days of judicial time in Anchorage, and 34 days elsewhere in the state.

These hearings would require an additional superior court judge to sit in Anchorage and to cover other court locations. The cost of this position and related court staff are detailed on the previous page, along with the cost of travel to court locations outside of Anchorage.

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

CS HB67 (HESS)

"An Act relating to admissibility of hearsay evidence of certain statements by children before grand juries; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

The Council on Domestic Violence and Sexual Assault supports the allowance of hearsay evidence in grand jury proceedings for child sexual assault cases. Many victims of child sexual assault are too young to withstand the rigors of the proceedings or to be effective witnesses. Yet their disclosure of sexual assault to police officers and other individuals in less threatening circumstances should be available for consideration. Children often block out their very negative experiences and cannot remember specifics of the experience, particularly under pressure. These children deserve the protection of the criminal justice system as much as older, more articulate individuals.

The U.S. Attorney General's Task Force on Family Violence, which heard testimony in six U.S. cities, reviewed state statutes and researched issues, has recommended that hearsay evidence be allowed in preliminary hearings so the child is not required to testify repeatedly. To quote the Task Force Report:

> "To enable children to more easily and effectively relate the abuse they have suffered, prosecutors should adopt special procedures for child abuse and molestation cases.
>
> At the preliminary hearing the court considers only whether the evidence is sufficient to go forward with prosecution. The prosecutor should not require the child to testify in person. Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. If the state rules of procedure do not provide for such presentation, the prosecuting offices should work with concerned citizen groups and lawmakers to modify the rules of procedure to make such a presentation possible."

Two bills (CSSB 3 and CSHB 67), which allow the admittance of hearsay evidence in grand juries, are moving this session. The Council does not have the legal expertise to determine the most effective bill. However, the Council is strongly committed to the passage of a bill that provides for the admittance of hearsay evidence in grand jury proceedings in cases of child sexual assault to protect the child.

Robert J. Sundberg
Commissioner
Department of Public Safety

1/16/85

HB 67 Contents
APril 12, 1985

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4. Fiscal note - Social Services
5. Sectional Analysis - draft CS for HB 67
6. Position paper - HESS
7. Position paper - Dept. of Public Safety HB 565
8. Position paper - Dept. of Public Safety HB 565 support
9. Fiscal note - state troopers
10. Position paper - Alaska Network on Domestic Violence and Sexual Assault
11. Memo to Rep. Phillips from Michael Ford - re: hearsay evidence in sexual abuse prosecution
12. Alaska Statute Supplement 12.45.07 - Videotaping of testimony by young victims of sexual offenses
13. Letter to Lucy Berliner from Ann Plunket - HB 565
14. Letter to Kay Berbieri
15. Statistics
16. Letter to Norman Gorsuch from Barbara Lacher
17. Amendment to Alaska Rules of Evidence
18. Letter to Barbara Lacher from Kathy Marshall
19. Innovations in Prosecution of Child Sexual Abuse Cases by Lucy Berliner and Josephine Bulkley
20. Prosecution of the OFfender in Cases of Sexual Assault Against Children by Jon Ro Conte and Lucy Berliner
21. New Sexual Abuse Hearsay Exception - Washington
22. Question and answers on SB 4461 - Washington
23. Alaska Statutes - 12.14.410
24. Greenway v. State of Alaska
25. Rule 803 - Hearsay Exceptions
26. Memo to Barbara Lacher from Keith Levy re: hearsay evidence in prosecution for sexual abuse of a minor
27. Intent of Legislation - HB 563
28. Newspaper article "Woman asks abuse victims not be forced to testify"

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB No. 67

Title: An Act relating to heresay evidence.

Sponsor: Rep. Phillips

Requestor:

Date of Request: 2/4/85

FISCAL DETAIL

Agency Affected: Health and Social Services

Program Category Affected: Social Services

BRU, Program or Subprogram(s) Affected: Social Services BRU

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-		-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS: Attach a separate page if necessary

N/A

Prepared By: Michael L. Price Phone: 465-3170

Division: Family and Youth Services Date: 2/4/85

Approved by Commissioner: Don R. Gray Date: 2/5/85 jcc

Agency: Health & Social Services

Distribution (by Agency preparing fiscal note):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Budget

Impacted Agency(ies)

7/1/84

SECTIONAL ANALYSIS - DRAFT CS FOR HB 67 - AN ACT RELATING TO THE ADMISSION OF HEARSAY EVIDENCE BEFORE GRAND JURIES BY WITNESSES UNDER THE AGE OF 12; AND AMENDING RULE 6(r), ALASKA RULES OF CRIMINAL PROCEDURE

NOTE: This bill applies only to grand juries and is not related solely to sexual offenses (as the original bill provided), and the age was changed from 10 to 12.

SECTION 1 Provides that hearsay evidence of any child under the age of 12 would be admissable before the grand jury, as long as the circumstances indicate its reliability and the child testifies at the hearing or the testimony is corroborated if the child is unavailable.

Subsection 2 (B) was amended to provide that the grand jury would be informed of the reasons for the child's unavailability.

The factors determining "unavailable" in (b) 2 were amended in the following manner:

Declaration of incompetency by the judge was removed and substituted with (C) "likely to suffer substantial psychological, emotional or physical harm if required to testify" from the original HB 88.

The language in Subsection (b) (2) (B) was altered to match existing language in Rule 15 (e) (4).

Subsection (c) on page 2 was retained from the original HB 67.

Subsection (d) on page 2 was added by the subcommittee to provide that a closed hearing would be held in superior court to determine the admissibility of hearsay evidence.

SECTION 2 Amedns Rule 6(r), Alaska Rules of Criminal Procedure.

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

HOUSE BILL 67

For an Act entitled "An act relating to hearsay evidence in prosecution for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

This bill would allow admission at grand jury proceedings and at trial of hearsay statements of children under 10 years of age relating to sexual offenses. The bill would provide a means for admitting evidence from children at grand jury and trial proceedings while protecting those children from additional emotional trauma. The bill would also increase the likelihood of successful prosecution of sexual offenses committed against children.

The department is extremely pleased that the Legislature has addressed the problem and offered a solution to reduce child sexual abuse in Alaska. The department supports admitting certain hearsay evidence by children at grand jury proceedings but not at trial. The admittance at trial of child's hearsay statement may raise a major constitutional question. A person's constitutional right to confront a witness would have to be weighed against the state's interest to protect a child. Presently this issue is on appeal in Washington.

Furthermore, the department supports the language in the Governor's Child Protection packet, House Bill 88, section 5, new section 12.40.055(a) which allows hearsay from children up to age 16. Hearsay will often be a statement the child has made to a trusted friend, teacher or to the non-offending parent regarding being a victim of sexual abuse. However, an older child will often recant. Older children recognize the consequences and conflicts of testifying against an offender especially if a parent is the offender. The older child is more accessible to the pressure of the non-offending parent's desire to have the child recant. House Bill 88 would allow the hearsay statement to be used to refresh the victim's memory. It would also allow the prosecutor the opportunity to present to the grand jury for their consideration, the sexual abuse statements made by the victim to another party.

A hearsay exception allows the hearsay statements to be used to strengthen the child's grand jury testimony or to counter accusations that the child fabricated a sexual abuse story. A child up to the age of 16 should be allowed the same safeguards.

POSITION PAPER/Department of Health & Social Services

House Bill 88 includes incest and indecent exposure as situations where the hearsay exception would apply. The department supports that position.

Finally, the department would like House Bill 67 new section 57.40.110(a) up to (1), be written exactly as House Bill 88. The language in the latter would be easier to understand by the public.

RECOMMENDED: Michael L. Price

Michael L. Price, Director
Division of Family
and Youth Services

DATE: 2-4-85

APPROVED: John R. Pugh

John R. Pugh, Commissioner
Department of Health
and Social Services

DATE: 2/5/85

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

HB 565

"An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor and amending Rules 803 and 804, Alaska Rules of Evidence."

The Council on Domestic Violence and Sexual Assault supports the admission of hearsay evidence in child sexual assault trials. Many victims of child sexual assault are too young to withstand the rigors of a trial or to be effective witnesses. Yet their disclosure of sexual assault to police officers and other professionals in less threatening circumstances should be available to juries for consideration.

Children often block out their very negative experiences and cannot remember specifics of the experience, particularly under the pressures of a trial. These children deserve the protection of the criminal justice system as much as older, more articulate individuals.

Although the admittance of hearsay evidence is not traditional in court, there are many exceptions to the rule. This circumstance, child sexual assault, warrants another exception.

Robert G. Sundberg
Commissioner

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - HB 565

Support

February 7, 1984

HB 565 - "An Act relating to hearsay evidence..."

Passage of this legislation will make prosecution of cases involving sexual abuse of a minor less difficult and may reduce the emotional distress to the victim.

Robert J. Sundberg
Commissioner

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 565
Title: "An act relating to hearsay evidence...."
Sponsor: Representative Lacher
Requestor: House HESS
Date of Request: 2-14-84

FISCAL DETAIL
Agency Affected: Public Safety
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Francis C. Allan G.C.A. Phone: 269-5691
Division: Alaska State Troopers Date: 02/07/84

Approved by Commissioner: Robert J. Sundberg Date: 2/14/84
Agency: Public Safety

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
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12/1/83

ALASKA NETWORK ON DOMESTIC
VIOLENCE AND SEXUAL ASSAULT
110 SEWARD #13 JUNEAU ALASKA 99801
(907)586-3650

POSITION PAPER

HB 565: An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor; and amending Rules 803 and 804, Alaska Rules of Evidence

The Alaska Network on Domestic Violence and Sexual Assault, a non-profit corporation representing 20 programs statewide that provide services to victims of domestic violence and sexual assault, supports HB565, which would facilitate the prosecution of cases of child sexual assault.

As you may be aware, the Network several years ago supported legislation that permitted the videotaping of testimony of young victims (aged 16 and under) of sexual assault in order to spare them the added trauma of testifying in open court. Since its passage, that legislation has worked successfully in cases of sexual assault involving children ages 5 and over, but has had little impact on the successful prosecution of sexual assault involving very young children.

Because there has been a dramatic increase in the number of cases of child sexual assault reported to the Division of Family and Youth Services, there is a real need to address the issue of prosecution of these crimes.

A very young victim of sexual assault will often tell the non-offending parent or day care worker about the assault, but they most often will not repeatedly relate the details of the incident. Consequently, it is the parent or day care worker who reports the crime to the Division of Family and Youth Services, a sexual assault program, or a law enforcement agency.

However, because prosecutors generally do not feel that a very young child is a reliable witness and because there is rarely a witness to the crime, the testimony of the adult person to whom the child disclosed the incident is the most reliable testimony available. Since that testimony is considered hearsay evidence and is not admissable in court, these cases are not being prosecuted but are, in fact, being dropped.

Washington State has enacted legislation similar to the bill that has been introduced. It is the Network's position that an exception to the hearsay rule is more than justified in order to facilitate prosecution of these cases.

In order to protect child victims from further harm, the Network urges your support for and passage of this bill.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM December 5, 1984

SUBJECT: Hearsay evidence in sexual abuse prosecutions (Work Order No. 14-0131)

TO: Representative Randy Phillips

FROM: Michael F. Ford
Legislative Counsel

As you know, last year the legislature considered a similar bill to the one you have requested, concerning prosecution of sexual abuse crimes and the use of hearsay evidence. At that time, the possibility that the constitution would prohibit use of such evidence was raised. This memo addresses section two of this bill, relating to introduction of hearsay evidence at trial. The first section of the bill deals only with grand jury proceedings, and does not raise a constitutional question.

This bill is based on Washington Criminal Code sec. 9A.44.120. I have been informed by the Department of Law that the Washington statute has been challenged a number of times and upheld in the trial courts, but it has yet to be ruled on by the state's highest court. Therefore the Washington law is of little help in determining the validity of this bill.

In prosecutions for sexual abuse of a minor in any degree, this bill allows the prosecutor to introduce at trial, "hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child" if certain criteria are met (AS 12.45.049). Before the hearsay evidence may be introduced, the court must determine that the circumstances of the child's statement indicate its reliability, and the child must either testify at the proceeding, or be unavailable as a witness. If the evidence is admitted on the basis that the child is

unavailable, there must be some further evidence introduced to corroborate the child's statement.

Existing Rules of Evidence provide that hearsay is inadmissible, but provide for certain exceptions (Rules of Evidence 803 and 804). The apparent purpose of the bill is to make it easier to prosecute sexual abuse cases by allowing in evidence that the jury would otherwise not be permitted to consider. For example, under present law, if a child tells a teacher that the child's parent is sexually abusing the child, but the child refuses or is emotionally unable to repeat the story at the parent's sexual abuse trial, the teacher would not be permitted to repeat the child's story at the trial because it would be hearsay and does not fall under one of the existing exceptions. The bill would allow the teacher to testify if (1) the court determines that the child's statement appears reliable, and (2) the child either testifies (on some other matter) or is unavailable and there is some further evidence that the child's statement is true.

The sixth amendment to the United States Constitution and Article I, sec. 11 of the Alaska Constitution both provide that a defendant in a criminal trial may not be denied the right "to be confronted with the witnesses against him." This bill is in potential conflict with this constitutional right because it permits the statements of a child to be used against a criminal defendant without giving the defendant the opportunity to cross-examine the child.

The Alaska Supreme Court has summarized the right to confrontation as follows:

> This right of confrontation protects two vital interests of the defendant. First, it guarantees him the opportunity to cross-examine the witnesses against him so as to test their sincerity, memory, ability to perceive and relate, and the factual basis of their statements. Second, it enables the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom. (Footnotes omitted).

Lemon v. State, 514 P.2d 1151, 1153 (Alaska 1973). The Court in Lemon analyzed the United States Supreme Court decisions on the right to confrontation as it relates to the introduction of hearsay evidence and concluded that

> ...while the demeanor interest of the right of confrontation is not a crucial element, the right to effective cross-examination is essential unless the testimony falls within certain established exceptions to the hearsay rule. (Footnote omitted).

Lemon, supra, at 1154. The Court ruled that Lemon had been denied the right of confrontation because of the admission of a hearsay statement against him that did not fall within the established exceptions to the hearsay rule.

This bill does contain certain protections for the defendant, but these may not be enough to survive a constitutional challenge. Since the bill permits the prosecution to use hearsay evidence that does not fall within one of the established exceptions to the hearsay rule against the defendant, the Lemon case seems to prohibit it. Even if the criteria for the admission of the hearsay evidence contained in the bill are met, a court could still find that the defendant has been denied the right to confrontation. Although the question is an open one, there is a strong possibility that the bill could be found unconstitutional if challenged.

If you have further questions, please contact me.

MFF:ojb
J9/095

Sec. 12.45.047. Videotaping of testimony by young victims of sexual offenses. (a) Upon application by the prosecuting attorney and notice to the defendant, the court shall permit the state to videotape the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455 and who is 16 years of age or younger at the time the court issues the order permitting the videotaping.

(b) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. The defendant shall be afforded all rights applicable to defendants during trial, including the right to an attorney and the right to confront and cross-examine the witness. The trial judge shall determine those persons other than the prosecuting attorney, the defendant, and the defendant's attorney who may attend the videotaping proceeding.

(c) Videotaped evidence taken in accordance with this section is admissible in evidence in the criminal trial of a defendant charged with a violation of AS 11.41.410 — 11.41.455. (§ 2 ch 67 SLA 1982)

Editor's notes. — For provisions setting forth the policy of the state, the purposes of the enacting legislation, and legislative findings, see § 1, ch. 67, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

Section 3, ch. 67, SLA 1982, provides: "AS 12.45.047 added by sec. 2 of this Act has the effect of changing Rule 804, Rules of Evidence, by adding the videotaped evidence of a young victim of a violation of AS 11.41.410 — 11.41.455 to the list of exceptions to the hearsay rule."

Sec. 12.45.048. Exclusion of public from trial during testimony by young victim of sexual offense. (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455. The order shall be granted if the court finds that the child is 16 years of age or younger at the time of the trial.

(b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a reasonable time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and the attorney and an investigator for the defendant;

(4) the prosecuting attorney and an investigating officer for the state;

(5) the parents or legal guardians of the child;

(6) a guardian ad li

(7) in the discretion developed a significar tional support for the

(8) court personnel mony. (§ 2 ch 67 SL

Editor's notes. — setting forth the policy o purposes of the enacting

Sec. 12.45.060. D

Based on Jencks Act. was modeled after the fed 18 U.S.C. § 3500, et seq. faced with questions req pretation of the statute turned to federal case law Putnam v. State, Sup. C (File No. 3475), 629 P.2d

Criminal R. 16 and inconsistent. — Crimin pretrial discovery while governs discovery during the same evidence may under both the rule and are not so overlapp inconsistent. Putnam v. S No. 2251 (File No. 34 (1980).

Duty of state to pres The duty of preservation to preserve any evi discoverable by the def attaches once any arm o gathered and taken pos dence in question. Putn Ct. Op. No. 2251 (File N 35 (1980).

When sanctions ar cases where the defend ably be said to have bee state's good faith failu evidence, sanctions wi appropriate. Where, h dant has suffered preju generally be warranted Sup. Ct. Op. No. 2251 P.2d 35 (1980).

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALMER, ALASKA 99645
(907) 376-4215

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

March 28, 1984

Lucy Berliner
325 Ninth Avenue
Seattle, WA 98104

Dear Lucy,

Enclosed is a copy of the Health, Education, and Social Services Committee Substitute for HB 565, relating to hearsay evidence in prosecutions for certain sexual offenses. The bill has not yet passed out of the HESS Committee, however it is scheduled for hearing again on Friday, March 30, and we are hoping to see it moved to Judiciary at that time.

Per our conversation of March 1, I believe that your testimony to the Judiciary Committee would be most beneficial. I am certain that questions pertaining to the constitutionality of this legislation will be brought forth at that time, and your comments regarding the Washington State hearsay law could probably shed some light on that subject. A copy of HB 565 has also been sent to Mary Kay Barbieri at UPS Law School, and we would hope to be able to hook you both up by telephone to offer testimony if the Judiciary chairman chooses to hear this bill. I will let you know if a hearing is scheduled.

I would be very appreciative if you could review our proposed legislation and offer comments, if any, on how the bill could be modified or improved. Please feel free to call collect (907-465-4894) if you wish to discuss your opinion, or need further information.

Sincerely,

Ann Plunkett
Legislative Aide

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALMER, ALASKA 99645
(907) 376-4215

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

March 28, 1984

Mary Kay Barbieri
UPS Law School
949 Market Suite 366
Tacoma, AK 98402

Dear Mary Kay,

Enclosed is a copy of the Health, Education, and Social Services Committee Substitute for HB 565, relating to hearsay evidence in prosecutions for certain sexual offenses. The bill has not yet passed out of the HESS Committee, however it is scheduled for hearing again on Friday, March 30, and we are hoping to see it moved to Judiciary at that time.

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I would be very appreciative if you could review our proposed legislation and offer comments, if any, on how the bill could be modified or improved. Please feel free to call collect (907-465-4894) if you wish to discuss your opinion, or need further information.

Sincerely,

Ann Plunkett
Legislative Aide

(1)

SEXUAL ABUSE OF MINORS HAS RECENTLY COME TO THE FOREFRONT IN ~~ALASKA~~ THERE IS AN INCREASED AWARENESS ON THE PART OF CHILDREN, PARENTS, FRIENDS, AND PROFESSIONALS THAT SEXUAL ABUSE IS WRONG AND CHILDREN SHOULD TELL SOMEONE. HOWEVER, TOO MANY CASES ARE STILL GOING UNREPORTED BECAUSE MANY CHILDREN DO NOT UNDERSTAND THEY CAN TALK ABOUT IT AN RECEIVE HELP. MANY ADULTS MINIMIZE THE PROBLEM AND WANT TO DENY IT IS HAPPENING. NATIONAL STATISTICS INDICATE THAT ONE OUT OF EVERY FOUR GIRLS AND ONE OUT OF EVERY EIGHT BOYS WILL BE SEXUALLY ABUSED BEFORE THEIR EIGHTEENTH BIRTHDAY.

STATS

ACCORDING TO POLICE STATISTICS, FROM 1980 TO 1982, REPORTED SEXUAL ASSAULTS AGAINST MINORS INCREASED BY 106 PERCENT STATEWIDE; FROM 142 INCIDENTS IN 1980, TO 201 INCIDENTS IN 1981, TO 293 IN 1982. PRELIMINARY FIGURES FOR 1983 INDICATE THAT REPORTED SEXUAL ASSAULTS ARE CONTINUING TO INCREASE; IN THE FIRST SIX MONTHS OF 1983, THE STATE TROOPERS HAD ALREADY RECEIVED 71 PERCENT AS MANY REPORTS OF SEXUAL ASSAULTS AGAINST MINORS AS THEY HAD RECEIVED IN ALL OF THE PREVIOUS YEAR. IT SHOULD BE NOTED THAT THESE STATISTICS EXCLUDE SEXUAL ASSAULTS REPORTED TO THE ANCHORAGE POLICE DEPARTMENT.

~~The Courts~~ Reports

THE DIVISION OF FAMILY AND YOUTH SERVICES' ~~RECORDS SHOW A TWO TO THREE-FOLD INCREASE IN CASES IN WHICH THE PRIMARY PROBLEM OF THEIR CLIENTS CONFIRMED OR SUSPECTED TO BE SEXUAL ABUSE OF A MINOR~~ ACTIVE CASES INVOLVING SUSPECTED SEXUAL ASSAULT INCREASED FROM 142 IN 1980 TO 529 IN 1983!

PROSECUTION THE RECORD FOR PROSECUTION OF THIS CRIME IS NO MORE ENCOURAGING. ACCORDING TO THE CHIEF PROSECUTOR'S OFFICE IN THE DEPARTMENT OF LAW, CRIMINAL JUSTICE DIVISION, OF THE 252 CASES SCREENED IN 1983, THE CHIEF PROSECUTOR DECLINED TO PURSUE 85 CASES BECAUSE HE FELT THE STATE'S EVIDENCE WAS INSUFFICIENT. IN ADDITION TO THE CASES THAT THE STATE DECLINES TO PROSECUTE, SOME CASES MAY BE DISMISSED AFTER THEY ARE FILED WITH THE COURTS. IN 1983, 190 CASES INVOLVING SEXUAL ASSAULT OF A MINOR WERE DISPOSED OF IN ALASKA COURTS. OF THESE 190, 117 DEFENDANTS PLEADED GUILTY AND ANOTHER 27 DEFENDANTS WERE CONVICTED IN COURT OR JURY TRIALS.

THERE ARE SEVERAL DIFFERENT POSITIONS FROM WHICH TO ATTACK THE PROBLEM OF SEXUAL ABUSE OF MINORS. FIRST, WE MUST FOCUS ATTENTION ON PREVENTION AND EDUCATION WITH THE GENERAL POPULACE. SECOND, ~~ADEQUATE~~ TREATMENT PROGRAMS MUST BE AVAILABLE FOR VICTIMS, FOR NON-OFFENDING FAMILY MEMBERS, AND FOR PERPETRATORS. FINALLY, CHANGES MUST BE MADE WITHIN THE CRIMINAL JUSTICE SYSTEM TO FACILITATE THE PROSECUTION AND PUNISHMENT FOR THIS CRIME.

HB 565 HB 565 IS INTENDED TO PROVIDE THIS VERY FACILITATION BY ALLOWING HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. ALTHOUGH WE RECOGNIZE THAT IT WILL NOT BE A PANACEA FOR THIS OVERWHELMING PROBLEM, IT WILL, IN SOME CASES, PROVIDE THE NEEDED RELIABLE ~~CORROBORATION~~ TO BRING PERPETRATORS TO JUSTICE.

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALMER, ALASKA 99645
907) 376-4215

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

February 6, 1984

Norman C. Gorsuch
Attorney General
Room 412
Capitol Bldg.
Juneau, AK 99811

Dear Mr. Gorsuch,

Enclosed you will find a copy of legislation I am sponsoring relating to hearsay evidence in prosecutions for sexual abuse of a minor.

I would appreciate your comments regarding the possible effects of this legislation, e.g. assistance it might provide in the prosecution of offenders, or potential misuse of the hearsay law. Also, could you please explain the procedures involved when allowing this sort of testimony?

Your prompt attention to this matter will be most appreciated. Please contact my office if you require any further information.

Sincerely,

Barbara Lacher
Representative
District 16

BL/acp

Per Mark Wood, Assistant D.A., Fairbanks:

Alaska Rules of Evidence 601 is amended to read as follows:

. . . Notwithstanding (2) above, young children between the ages of 2 and 7 who are otherwise competent under these rules shall be allowed to testify as witness and victims in child abuse or child sexual abuse proceedings. The trier of fact may consider their capacity to understand the duty of a witness to tell the truth in deciding what weight to give a child's testimony.

TROOPER PAUL BARTLETT
"C" DETACHMENT

STATE OF ALASKA
DEPT. OF PUBLIC SAFETY
ALASKA STATE TROOPERS

OFFICE: 452-2114
1979 PEGER ROAD
FAIRBANKS, ALASKA 99701

BILL SHEFFIELD
GOVERNOR

PHONE
(907) 561-4227

STATE OF ALASKA
OFFICE OF THE GOVERNOR

ALASKA WOMEN'S COMMISSION
3601 C STREET - SUITE 742
ANCHORAGE, ALASKA 99503

March 21, 1984

Representative Barbara Lacher
State Capitol
Pouch V
Juneau, Alaska 99811

Dear Representative Lacher:

The Alaska Women's Commission is committed to supporting all efforts made at preventing and aiding the victims of domestic violence, sexual assault and child abuse. We wish to take this opportunity to thank you for sponsoring the following bills this session that address these issues:

HB 568, HB 567, HB 566 and HB 565

We appreciate your continued concern for the welfare of Alaska's women and children. If the Women's Commission can be of any assistance in supporting your efforts, please don't hesitate to contact us.

Sincerely,

Kathy Marshall

Kathy Marshall
Executive Director

Bill with Seal

"INNOVATIONS IN PROSECUTION OF CHILD SEXUAL ABUSE CASES"

By Lucy Berliner and Josephine Bulkley

American Bar Association
National Legal Resource Center For Child Advocacy and Protection

1981

Sexual Assault Center
Harborview Medical Center
325 Ninth Avenue
Seattle, Washington 98104
(206) 223-3047

I. Program Description

The Seattle/King County community has a comprehensive response to child sexual abuse which provides coordinated, specialized handling of all aspects of the problem. Specialized individuals or units exist within all the legally mandated agencies including law enforcement, Child Protective Services, prosecuting attorney and Probation and Parole. The core system members of the network are the Sex Crime Units of the King County Department of Public Safety and Seattle Police Department, the Sexual Abuse Unit of Seattle Child Protective Services, and the Special Assault Unit of the King County Prosecutor's Office. The Sexual Assault Center and Rape Relief offer specialized victim services including medical care, counseling and advocacy. Private mental health professionals or agencies provide specialized evaluation and outpatient treatment services to both adult and juvenile sexual offenders. An inpatient treatment facility exists within the State Department of Corrections to which an offender can be sentenced. A loose-knit network of community mental health professionals provides other sexual abuse treatment services including individual and family treatment, groups and specialized play and art therapy for abused children.

The Sexual Assault Center is located at Harborview Medical Center, a former county hospital administered as a University of Washington teaching hospital. From the inception of the program in 1973, there was a steady increase in child victims which led to the LEAA funded grant, "The Sexually Abused Child as a Victim/Witness" awarded in 1977. The premise of the project was that the criminal justice system should accommodate the special needs of child victims of sexual abuse, which would increase successful prosecution and minimize additional trauma to the child. This approach required the cooperation of all parties to reduce the negative aspects of system intervention and therefore enhance victim cooperation and successful outcome. The grant provided a structured opportunity to set about creating a specialized network response which addressed both the clinical and legal aspects of child sexual abuse.

Sexual Assault Center and various system components supported concerned colleagues within each system in establishing specialized units. Regular meetings among network members provided a forum for identifying areas of concern which could be addressed to result in the best possible response for victims, offenders and the community.

Specialists offer training and consultation to each other, to related community agencies and to the community at large. The approach is presented as a team approach which includes education to prevent possible abuse and to insure supportive and appropriate response to the child victim at disclosure. Information is shared about the legal requirements for reporting and available community resources.

The network developed from shared beliefs among individuals working within the systems who learned, through experience, that the special nature of child sexual abuse demanded a coordinated approach. Genuinely respectful, friendly personal relationships exist between members of the different systems. The evolution of the specialized units has been more or less difficult to accomplish. In some cases, a number of unrelated factors converged to allow a change in approach, such as the transfer or promotion of certain personnel, or a political election. Because it is so obviously beneficial there has been little argument with the idea, and the greater resistance has been to changing process and procedure. There is a high level of community awareness, pride and support for the services of the network.

II. Philosophical Assumptions

The underlying assumption of the Seattle/King County network is that a sexual offense against a child is both a crime and causes and is caused by psychosocial or behavioral disorder. It is believed that any sexual contact between an adult or a significantly older person and a child, or where sex is forced, is wrong. Children are naturally dependent and never in an equal position in a relationship with an adult, and cannot give informed consent. The adult or older person is always considered morally and legally responsible. However, some of these individuals who commit sexual offenses appear to be a treatable group who can be made safe to be at large in the community. The goal is that further children not be victimized and it is both the most effective and the humane solution to insure that treatment be made available to those who can benefit. This does not mean that punishment is not also an acceptable consequence for breaking the law. Punishment and treatment are the dual responses to those who have a behavioral disorder which appears as criminal conduct. Since children are the victims of the behavior disorder all efforts of the response must be directed at achieving safety and support for the victim. The intervention process should not exacerbate the trauma and can be a therapeutic experience. When the offender is cooperative, admits to having a problem and agrees to court recommended and supervised treatment with a qualified specialist, there's a good possibility of remaining in the community on probation status. Some offenders fail in community treatment or are too out of control but can be treated in an inpatient setting. For those who continue to deny the offense or who are determined to be not amenable to treatment, prison is the only available alternative.

III. Legal Authority

The program operates under the RCW Criminal Code of the State of Washington and the Administrative Code regulating matters of custody and relating to the Child Abuse Reporting Act. These are two different legal systems. The criminal statutes include Rape, 1st, 2nd and 3rd degree, Statutory Rape, 1st, 2nd and 3rd degree, Indecent Liberties, and Incest, all felonies, and Communicating with a Minor for Immoral Purposes, a Gross Misdemeanor. A conviction for Rape in the 1st degree, or Statutory Rape in the 1st degree requires a mandatory commitment to the State Department of Corrections, either to prison or to the inpatient sex offender treatment program at Western State Hospital.

The Department of Social and Health Services, the state social service agency, has legally mandated authority to investigate reported child abuse which includes sexual abuse by a caretaker, or where the caretaker neglects to take appropriate action and fails to protect the child. The Child Protective Service performs the investigation and must report substantiated cases to the Central Registry. A caseworker can file a Dependency Petition in the Juvenile Court to secure temporary custody of the child and authorize state intervention in the family. Child Protective Services has the responsibility for out of home placement. The state Attorney General's Office represents the state in dependency matters. There is also a Family Court with jurisdiction

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over custody arrangements or modifications.

There are procedures and protocols developed both within and among the various network components. The Sexual Assault Center maintains a protocol for medical intervention in the Emergency Room, and there is a joint agreement on collection and transfer of evidence with law enforcement agencies. There is a protocol for Child Protective Service and Sexual Assault Center case cooperation, and there is a protocol and referral form between Child Protective Services and law enforcement. The Prosecuting Attorney's Office has standards for filing cases and case management procedures in the Special Assault Unit which handles all cases of child sexual abuse. These agreements have all been developed by the members of the different agencies. What originally began as informal agreements have gradually been transformed into policy between agencies. There are also certain identified individuals, usually line supervisor level personnel, who are identified with the formal network and become the liaison for their systems. There are two regular meetings, one a systems meeting, conducted at the Prosecuting Attorney's Office, the second a case management meeting, conducted at the Child Protective Services.

IV. Staffing

Each program element is staffed and funded separately. The LEAA Victim/Witness grant at the Sexual Assault Center and the Treatment/Training Institute from the National Center for Child Abuse and Neglect have included contracts for time or personnel with the criminal justice system or with Child Protective Services. Sexual Assault Center operates under the University of Washington State Personnel System. Child Protective Services is part of the Department of Social and Health Services Personnel System, law enforcement hiring and promotion is through the local department, while the Prosecuting Attorney is authorized through county funding. Each agency operates under personnel guidelines for that particular system. The offender specialists are generally private practitioners operating on a fee for service basis. The Sexual Assault Center is staffed by a team of social workers and physicians. The Child Protective Services offices have either a specialized unit handling sex abuse cases, or individuals who have a specialized case load. They are usually Master's level social workers. The major police departments have sex crime units with specially trained detectives assigned. The smaller departments have certain detectives who have experience in child sexual abuse cases and do the follow-up investigation. The Prosecuting Attorney's Office has a Special Assault Unit which handles all sexual assault and child abuse cases from the filing to disposition. Prosecuting Attorneys may rotate into this unit.

V. Funding Sources

The Sexual Assault Center is supported by a combination of city of Seattle monies, federal grants and matching support from the University of Washington and the hospital. The Center currently has a regional Treatment/Training Institute from the National Center on Child Abuse and Neglect and is finishing up a National Rape Center research grant. In 1980, the Center had a one year county-funded project to establish a

network of victim groups located in Youth Service Bureaus around the county, trained and supervised by Sexual Assault Center personnel. In addition, the Sexual Assault Center occasionally receives donations from the community, or from convicted offenders, and will have to begin a partial fee for service system soon. Offenders are generally expected to pay the cost of treatment which can be reimbursed by third party payers. The inpatient treatment is a part of the state social service system and is subsidized by the state.

The increased rate of reporting and higher case loads at both the Child Protective Service and in the criminal justice system, has led to some increased assignment of personnel, but state hiring freezes and the general economic situation inhibits further expansion of personnel.

VI. Eligibility Requirement

Any situation of sexual assault is eligible for services by some or all components of the community network. All cases where the offender is a caretaker or where the child is not safe at home must be reported to Child Protective Service and investigated. Whenever a crime has been committed, where the victim is willing or able to participate in the criminal justice system, the legal requirements for competency are met and it is within the statute of limitations, involvement in the criminal justice system is encouraged. Any victim of sexual assault can receive services at the Sexual Assault Center regardless of participation in the criminal justice system. Offender specialists evaluate referred offenders and will only accept into treatment those who can be safely treated in the community. The recommendation of the specialist carries a significant weight in dispositional hearings or at sentencing. The network is concerned with insuring that the offender receives the proper treatment in a supervised setting and that the victim receives appropriate treatment with knowledgeable professionals.

VII. Program Components and Procedures

A. Not all incest cases have protective service or criminal justice involvement. If the parents are currently divorced or divorce following disclosure, or if the abuse happened a long time ago, or in another jurisdiction, the Child Protective Service may not become involved or may be involved only briefly because no further contact occurs between the offender and the victim. Child Protective Service involvement is primarily with families who do not believe or support the child and the environment is unsafe, or in cases where reunification is planned following treatment and supervision must be maintained until that time. In the cases where the offender is residing with the victim, separation following disclosure is expected in almost all cases. The offender is encouraged or pressured to leave so the children can remain with the family. If the family does not believe or support the child or where the child wishes to leave, out of home placement is arranged. The Department of Social and Health Services maintains a specialized group foster home for sexually abused children. The Child Protective Service is required to report all criminal cases to law enforcement although

this alone does not constitute an official report. A protective service worker may make an informal agreement with the family regarding separation, treatment plan for the victim, offender and family, and agreement to abide by certain conditions, such as no contact, or the worker may file a Petition in court for temporary custody and court imposed conditions. The family can agree to the Petition or may have a Fact Finding hearing which determines Dependency and if granted, the court establishes the conditions. It must be reviewed every six months.

Not all victims are able or willing to participate in criminal prosecution. No one is forced to in order to receive services. For those who do report there are special procedures for the handling of cases involving child victims. In general, the case is initially referred by Childrens Protective Services, the Sexual Assault Center, or other community agencies directly to the detective units. The detective then arranges a joint interview with the Prosecuting Attorney on the Special Assault Unit which is conducted with a support person present. The interview may occur in a special interviewing room for children with a one-way mirror in the Prosecuting Attorney's Office. Following the interview, additional information or evidence is collected by the detective, the suspect is interviewed, and when the case is ready, the Prosecutor makes a decision about whether to file charges and what charges to file. In borderline cases consultation with the Sexual Assault Center worker, Child Protective Service worker or the law enforcement personnel may happen. Once charges are filed, the defendant is arraigned and usually released in the community on bail or personal recognizance with the condition of no contact with the victim. There are negotiations between the Defense Attorney and the Prosecutor regarding plea possibilities. There are established filing standards and disposition recommendations within the Prosecutor's Office relating to type of offense and previous record. In most cases the offender pleads guilty and only about a quarter of cases go to trial. In general if the offender is willing to plead guilty and is determined to be amenable to treatment by a qualified specialist the Prosecutor will support the recommendation in addition to a recommendation for jail time on work release if eligible. At the sentencing there are usually recommendations in front of the judge from the Defense Attorney, from the Prosecuting Attorney, a Pre-sentence Probation report, and input from those working with the victim, the family or from treatment agencies. The judge makes the final decision and there are forty Superior Court judges in King County. The various components of the network do not always agree about the best disposition and each may make an individual recommendation.

B. Defense Counsel

All charged persons have legal counsel or have a lawyer appointed. All constitutional rights are recognized, although there is pressure from most systems to arrive at a plea rather than have the child testify. The child has many advocates in the process who try to limit defense contact with victims or attempts to harass, intimidate, confuse or manipulate victims. The Defense Counsel has the legal right to interview a victim prior to the trial, but it usually takes place in the presence of the Prosecuting Attorney. State law gives victims the legal right to have an advocate present during any part of the process.

C. Conditions of Sentence

Offenders either plead guilty or are convicted by jury or judge and then sentenced by Superior Court judges. He or she makes a final decision based on the various recommendations, as well as personal views on the proper legal response to the problem of child sexual abuse. Where there is little disagreement between the Prosecutor and Defense Attorney, which is frequently the case, the judge usually supports the recommendation. In some cases there are strong differences and the judge makes the final determination. Most cases are resolved by plea and of those that go to trial, about half result in convictions. In intra-family sexual abuse cases a small percent are sent to prison, another group go to the inpatient treatment program and the majority remain in the community on probation with deferred sentences for first offenders or suspended sentences and certain conditions on the probation status. The conditions often will include such things as a requirement to remain in treatment with an authorized specialist, some time in jail, generally on work release, payment of court costs, limitation on contact with the victim or other minor children, no use of alcohol, participation in other community treatment programs and sometimes payment for the cost of treatment for the victim.

D. Length of Time in Program

The length of the sentence is determined by statutory maximum and minimums, prosecutorial standards, and particular characteristics of the case. Treatment is usually ordered until termination is agreed upon by the therapist, or with the permission of the probation officer. Outpatient treatment generally takes one to two years and inpatient treatment at the state facility has a minimum of two years on inpatient status and about three to five years total including outpatient follow-up. Changes in contact orders, treatment requirements or the return of the offender into the family is usually jointly determined by the victim specialist, the offender specialist and the Probation Officer.

VIII. A. Treatment Services

1. Initial Crisis Services

Sexual Assault Center provides twenty four hour, seven day a week medical and psychosocial intervention at Harborview Medical Center. Assessment, individual and family therapy and advocacy is available. Social workers may refer to Child Protective Service, criminal justice system or other community agencies for concrete services such as public assistance, emergency shelter or ongoing treatment. The Sexual Assault Center social worker offers to provide case management during the initial crisis establishing the structure and making a treatment plan.

2. Ongoing

The Sexual Assault Center offers some individual and family services on an ongoing basis. There are groups for teenage victims, for

mothers of victims and for adult women victimized as children.

There is a network of groups to which a child may be referred on a geographic basis as part of the treatment package. There are several groups for mothers located around the county. In addition in community agencies and among private practitioners there are individuals who have identified themselves as having special training and an interest in working with some aspect of the problem of child sexual abuse. Some therapists provide play and art therapy for abused children. Others do family counseling once the sexual offense problem has been addressed. It is not uncommon for a family to have contact with a number of different agencies providing different services for different members of the family.

3. Offender Treatment

A number of agencies and individual practitioners provide specialized evaluation and treatment services. Most have a behavioral cognitive orientation to treatment. Individual and/or group are offered, depending on the particular agency. Community treatment generally addresses both the physiological aspect of decreasing deviant arousal and increasing normal arousal patterns and dealing with the behavior and attitude changes which are required to admit guilt and act in a responsible way with children and other people. After the sexual offending problem has been addressed marital therapy or family therapy may be conducted by the offender specialist and/or in conjunction with the Sexual Assault Center.

4.

Treatment Services continue to be offered by all treatment resources as long as it is indicated by the nature of the problem. In many cases there may be a delayed reaction and child victims often return for service years following disclosure.

B. Duration of Treatment

Offenders are in treatment about one to two years on the average in the community. Children and other non-offending family members can be in treatment any length of time although it is generally somewhat less time than is required for offenders. Attendance in group often occurs for a longer period than individual treatment. The victim groups and women's groups are open-ended and receive new members on an on-going basis.

C. Additional Treatment Issues

Failure to abide by conditions results in notification of the supervising agency, Probation and Parole or Juvenile Court, can result in revocation and commitment to the State Department of Corrections. All offenders sign the release of information to allow flow of information between Child Protective Services, the victim treatment agency and the offender therapist.

D. Termination

The offender therapist determines when the offender is ready to terminate treatment. Criteria are defined by the therapist. Supervision continues until the offender completes his sentence although the treatment may end prior to the end of the probationary period. An offender may progress to an unsupervised status on probation after completing treatment. In general if the individual intends to return to the family supervision continues until and during the re-entry period.

IX. Consequences of Violation

If an offender fails to cooperate with treatment, or makes no progress, the treatment agency may recommend revocation to the Probation Department. A reoffense constitutes an automatic revocation hearing where a judge makes a determination on the disposition based on reports from treatment personnel. Revocation depends generally on the degree of cooperation of the offender and the seriousness of any infraction.

X. Statistics

Since there is no single program in the community each agency maintains separate statistics. In 1981 the the Sexual Assault Center served 1,838 patients of which 1,031 were children sixteen and under. Of the adult patients approximately 28% were women who had been abused as children. Of the children served, 52% were incest victims. Of these incest situations, 85% were girls and 15% were boys; 72% of the family offenders were parents or parental figures (41% of all offenders against children). Those incest offenders who were not parents were usually an older brother, an uncle or a grandparent. In more than one-half of all child cases, the children were victims of multiple incidents of sexual abuse. 85% were assaulted by known offenders. About 80% were girls and 20% were boys. All but 19% of the cases were reported to either law enforcement, Children's Protective Services or some combination, although all cases did not occur in the King County jurisdiction.

Child Protective Services receives approximately 400 complaints of child abuse a month and about 20% are for child sexual abuse. Law enforcement does not compile crime statistics by relationship to offender or by age of victim, so there are no specific numbers available. There are 26 separate jurisdictions in King County although the primary jurisdictions are the Sheriff's office and the city police department. The Prosecuting Attorney filed charges in 215 cases involving child victims in 1980 and 120 were intrafamily cases. Of incest cases, 73% pled guilty, and of those that went to trial about 60% were convicted. Of convicted offenders the disposition was: 10% ordered to prison, 16% to Western State Hospital and the remaining 74% were in the community on supervised probation.

The numbers of cases handled by all systems increases continually. It is estimated that reports will by up 40% at the Sexual Assault Center.

In 1980 the Prosecuting Attorney increased prosecution of child cases by 200%.

There is no existing system for reliably determining recidivism which is generally defined as a reoffense or rearrest within two years. Community therapists estimate an 80 to 90% control rate for specialized behavioral treatment. Western State Hospital inpatient treatment program has a recidivism rate of approximately 20% for participants who successfully complete the program. Since true recidivism can only be determined reliably by victim reports there is no accurate way to know the rate of recidivism.

PROSECUTION OF THE OFFENDER IN CASES OF SEXUAL ASSAULT AGAINST CHILDREN +

Jon R. Conte

and

Lucy Berliner*

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Victimology: An International Journal

November 1979

+ Work on this manuscript was supported in part by LEAA Contract #77-DF-10-0016. The Sexually Abused Child As Witness/Victim to the Sexual Assault Center, Harborview Medical Center, Seattle, Washington.

* Jon R. Conte, Ph.D., is an Assistant Professor, Jane Addams College of Social Work, University of Illinois at Chicago Circle.
Lucy Berliner, MSW, is Co-Principal Investigator, Sexually Abused Child As Victim/Witness and social worker at the Sexual Assault Center, Harborview Medical Center, Seattle, Washington.

PROSECUTION OF THE OFFENDER IN CASES OF CHILD SEXUAL ASSAULT AGAINST CHILDREN

Introduction

As the rate of reporting of sex crimes has increased, so has discussions about the prosecution of the offender. Both within and without the criminal justice system there is a division about whether or not prosecution of the offender is necessarily a desirable avenue to pursue. Some proponents of prosecution maintain that it is the only way to insure that the offender will not commit additional sex offenses. Opponents often argue that criminal prosecution and its inherently punitive response not only to sex offenders but also to the victims can only have adverse effects which may far exceed the effects of the original crime.

These arguments become especially vehement when the offender is charged with a sex crime against a child victim. In addition, cases involving a child victim of sexual assault are unpopular with criminal justice system personnel. This unpopularity seems to be based on a number of factors, including the commonly held assumption that young children make poor witnesses; that the cases are often difficult to build; and the child and his/her family are emotional and difficult to deal. The prosecution of cases involving child victims of sexual assault appear to involve a series of contradictory

assumptions about the nature and benefits of criminal prosecution and the problems of child victims and their families. Disagreements are encouraged by a lack of information about prosecution of these cases and in some circumstances a lack of alternatives to current criminal justice procedures.

The report which follows will describe a set of procedures instituted in a county prosecuting attorney's office for the handling of cases involving a child victim of sexual assault. It will also present data regarding the prosecution of cases from a one year period.

These procedures were developed and data was collected as part of an LEAA contract with the Sexual Assault Center at Harborview Medical Center, Seattle, Washington. This contract entitled "The Sexually Abused Child as a Victim/Witness" has the objective of cooperating with criminal justice system personnel in developing new procedures for accommodating the child victim/witness.

The Sexual Assault Center

The Sexual Assault Center offers a range of services to child victims of sexual assault and their families. These services include: emergency medical care, examinations and treatments, crisis counseling, advocacy with the criminal justice system and social agencies, and on-going counseling to resolve emotional reactions of the child and non-

offending parent to the assault.

As part of the LEAA contract, social work staff of the Sexual Assault Center have participated in formal training sessions with criminal justice system personnel and attend a weekly meeting with police, prosecuting attorney, and child orotective service representatives to develop new procedures for handling child sex assault cases. Training has included the following topics: medical/legal evidence, interviewing techniques with young children, the nature of psychological reactions in children and their families, and the psychology of the offender.

In addition to these formal interactions between social work staff and criminal justice personnel, there are a series of cooperative exchanges around specific cases involving child victims. Social workers are familiar with the requirements and nature of reporting and prosecution of sexual assault cases and are able to assist the child victim and her/his family in making an informed decision about whether or not to proceed with prosecution.[1] As a basic philosophy the Sexual Assault Center is supportive of prosecution believing that it is a fundamental element in insuring the protection of the child and that the offender may be more likely to accept responsibility for his act and receive services to help him avoid further acts.

Criminal justice system personnel frequently refer victims and their families to the Sexual Assault Center for medical examinations and/or supportive counseling or advocacy services to assist them with their emotional reactions to the assault, its aftermath, and to maintain their cooperation with the prosecution process.

New Procedures for Accommodating Child Victims

Children face and present special problems in criminal proceedings. Many are so young that they do not completely understand the nature of the process in which they are a central figure. Statistics for 583 children seen at the Sexual Assault Center during the period from October 1977 to June 1979 indicate that 18.1% are six years of age or younger. A full 40.0% are below the age of ten. Young children do not possess the cognitive or language skills to be able to fix incidents in chronological time nor to recount different incidents in detail distinguishing between each in terms of specific events and actions. They also lack the skills to express feelings in words. In cases in which the offender is a family member (47%) or non-related but known to the child (42%), the child is likely to have ambivalent feelings about the offender and may be concerned about the effects of the child's involvement with the criminal justice system on the offender.

Accommodations within criminal justice procedures are necessary to lessen the trauma experienced by the child as a result of the

sexual abuse and their involvement with the criminal justice process. Accommodations resulting from interactions between criminal justice system personnel and Sexual Assault Center social workers are summarized below:

Interviewing Techniques - Criminal justice system personnel, both police and prosecuting attorneys are not trained to be effective interviewers of small children. Formal training was instituted to assist personnel in becoming more effective interviewers of children. This training included material on cognitive abilities of children (e.g., memory and recall skills), emotional and behavioral reactions to sexual assault, interviewing skills (e.g., developing a relationship, using child-appropriate language, probing for weakness in a child's story without frightening the child) and assessing the credibility and competency of the child as a witness.[2]

Victim Interview - In order to decrease the number of times the child has to recount the details of the sexual assault, the option of a joint detective prosecuting attorney interview was instituted. During this interview the detective, prosecuting attorney, and the social worker (when necessary for the support of the child) are present with the child. Although three adults are present, usually only one actually conducts the interview and another may take notes. In difficult cases (e.g., when the child was developmentally disabled

or especially frightened) the social worker might conduct the interview.

Several prosecuting attorneys report that they believe this system is most effective when they have the general facts of the case prior to the interview.

Child Interview Room - At the prosecuting attorney's office, a child interview room was established. This room was designed to make children feel more at ease during the actual interview. It was equipped with a box of toys, a rug, and child-size furniture. This environment tended to make the interview less formal and less frightening for the child.

Several of the adults reported that the room initially made them uncomfortable. However, most reported that the room also appeared to help the child tell her/his story.

Pre-assignment of Child Cases - Child cases involving a sexual assault are pre-assigned to one prosecuting attorney who handles the case through both the pre-trial and trial process. This decreased the number of adults to whom the child and her/his family must relate and identified one person for the family to call with questions. Prosecuting attorneys report they especially like this procedural

innovation. They report that it served to increase their personal knowledge of the case and their commitment to seeing it successfully through the entire prosecution process.

Prosecution of the Adult Offender

As part of the project, data was collected from the county prosecuting attorneys files on cases involving sexual assault against a child.[3] Of the eighty-four cases for which data is available, in 35.7% (30) the offender is a family member, 56.0% (47) a non-related adult who is known to the child, and only 8.3% (7) a stranger. The age of the child victims varies with about 6% between one and five years of age, 45% between six and twelve, and 26% between thirteen and sixteen years (23% data missing).

Data on charges brought against the offender reflect a pattern of multiple charges against a single offender. A total of 127 charges were filed against the eighty-four defendants. Almost 68% (57) were charged with indecent liberties (non-penetration sexual assault), 54.7% (46) with various degrees of statutory rape (lack of consent assumed due to age of child, no force may be present), 10.7% (9) incest, 1.2% (1) with misdemeanor sexual contact with a minor, and 16.7% (14) with other charges (e.g. rape, assault, theft).

After being charged, offenders are released on personal recognizance in 59.5% of the cases, with bail of less than $5,000

in 14.3%, bail between $5-10,000 in 9.5% and bail over $10,000 in 16.7% of the cases.

Although data is not available for this sample of offenders, in the majority of cases involving sex offenses against children, the offender is not actually jailed during the justice process. Frequently the offender is called by telephone by the orginating police jurisdiction and requested to come in for formal booking.

Data suggest that the majority of offenders will plead to the original change when that charge does not carry a mandatory prison sentence. For example, as can be seen in Table 1, 45.6% (26) offenders charged with incident liberties (fondling) which does not require a mandatory prison sentence, plead to the original charge. In contrast, only 21.1% (4) of the nineteen offenders charged with statutory rape first-degree which carries a five year minimum mandatory prison sentence plead to the original charge.

Insert Table 1 about here

In a similar vein, only 22.2% (2) of nine offenders charged with incest, which carries high social stigma, plea to that original charge.

Data for the eighty-four offenders indicate that the ultimate case disposition is a guilty plea in 73.8% (62), a conviction in 14.3% (12) and an acquittal in 8.3% (7) of the cases. Only one case was

dismissed and this followed a trial resulting in a hung jury. These data are particularly important for those who are concerned with the effects of prosecution on the child because they indicate that in the majority of cases (73.8%) the child never appears in court.

Insert Table 2 about here

In terms of sentencing, the data indicate a pattern of mutiple sentencing. Only 12.2% (9) of the offenders actually go to prison and 13.5% (10) are committed to the Sexual Psychopath Program at Washington State's Mental Hospital. This means that 75% of the offenders remain in the community.

Of the total number of offenders receiving a sentence, 51.4% (38) received counseling as a condition of probation, 20.3% (15) were required to make restitution, 47.3% (35) received some jail time or work release, and 74.3% (55) other conditions of release (usually court costs). This pattern of sentencing can be found in Table 3.

Insert Table 3 about here

The entire criminal justice process involved in prosecuting these cases range from less than two months to six months in length. As can be seen in Table 4, the time lapse between filing data of charges and disposition (plea or conviction) varies with 40.6% taking less than two months. Washington State law requires a

trial date within 60 days if offender is incarcerated and 90 days otherwise. Only 9.6% (8) of the cases involve periods longer than four months. After disposition, sentencing normally takes six to eight weeks.

Conclusions

The descriptive data presented in the previous pages of this report provide preliminary evidence concerning prosecution of offenders in cases of child sexual assault.[4] Clearly, the data reflects prosecution of this sample of offenders in one geographical area during a one year period. Nevertheless, the evidence suggests that the prosecution of offenders need not necessarily be a punitive experience for the offender or the child.

*Once charges are filed by the prosecutor's office, an overwhelming majority of the cases result in successful prosecution. In the majority of cases, prosecution takes place over a period of less than four months.

*Offenders appear likely to plea to charges which do not require mandatory prison terms and which do not carry high social stigma.

*The consequence of successful prosecution, in the majority of cases, is that the offender receives counseling within his own community.

*For the child, in the majority of cases, she/he will not have to appear in court.

*Once charges are filed, most cases proceed to disposition with the continued cooperation of the child victim and her/his family.

Notes

1. Brochures developed for victims' families which describe what they can expect from involvement with the criminal justice system are available from the Sexual Assault Center, Harborview Medical Center, 325 9th Ave, Seattle, Washington, 98104.
2. Guidelines for interviewing young child victims which have been developed for criminal justice system personnel are available from the Sexual Assault Center.
3. Cases involving sexual assault against a child were identified by case number from the computerized filing system at the county prosecuting attorney's office. A total of 96 cases for 1978 were identified. A research assistant using the case number then hand pulled the case folder and read the record in search of information about the offender's relationship to victim, the length of time the process took, charges filed, release conditions and disposition. A total of 84 (87.5%) were satisfactorily located and data recorded.
4. A follow-up study is currently in process which will determine the consequences of involvement with the criminal justice system from the perceptions of the victims' non-offending parents.

Table 1

CHARGE DISPOSITION BY ORIGINAL FOR 126 CHARGES FOR 84 DEFENDANTS

	Plea, Original charges	Plea, lesser charge	Plea, multiple counts	Convicted jury	Acquitted, jury	Dismissed	Convicted, non-jury	Other	TOTAL
Indecent Liberties	26 45.67*	7. 12.3%	4 7.0%	2 3.5%	4 7.0%	9 15.8%	3 5.3%	2 3.5%	57** 67.8%
Statutory Rape 1°	4 21.1%	5 26.3%	-	1 5.3%	2 10.5%	5 26.3%	2 10.5%	-	19 22.6%
Statutory Rape 2°	7 41.2%	1 5.9%	2 11.8%	1 5.9%	1 5.9%	3 17.6%	-	2 11.8%	17 20.2%
Statutory Rape 3°	6 60.0%	1 10.0%	-	2 20.0%	1 10.0%	-	-	-	10 11.9%
Incest	2 22.2%	-	1 11.1%	-	1 11.1%	5 55.6%	-	-	9 10.7%
Misdemeanor Sexual contact with a minor	1 100.0%	-	-	-	-	-	-	-	1 1.2%
Other charges	-	-	-	2 15.4%	2 15.4%	8 61.5%	1 15.4%	-	13 15.5%

*Percents based on row totals
**Percent of 84 defendants

Table 2

ULTIMATE CASE DISPOSITION FOR 84 OFFENDERS CHARGED WITH A SEX CRIME AGAINST A CHILD *

	#	%
Plea	62	73.8
Conviction	12	14.3
Acquittal	7	8.3
Dismissed	1	1.2
Total		

* Two cases missing

Table 3

PATTERN OF MULTIPLE SENTENCES GIVEN TO SEVENTY-FOUR (74) DEFENDANTS CHARGES WITH SEX OFFENSE AGAINST A CHILD[1,2]

	Prison	Western State Hospital	Counseling	Restitution	Jail - Work Release	Other
Prison	9 (12.2%)	-	-	1 (1.3%)	-	-
Western State Hospital	-	10 (13.5%)	-	2 (2.7%)	1 (1.3%)	6 (8.1%)
Counseling	-	-	38 (51.4%)	8 (10.8%)	21 (28.4%)	34 (45.9%)
Restitution	1 (1.3%)	1 (1.3%)	8 (10.8%)	15 (20.3%)	10 (13.5%)	11 (14.9%)
Jail - Work Release	-	1 (1.3%)	18 (24.3%)	10 (13.5%)	35 (47.3%)	31 (66.0%)
Other	-	4	33 (44.6%)	12 (16.2%)	30 (40.5%)	55 (74.3%)

1 Out of sample of 84 defendants, 74 (88.1%) received a sentence; 7 (8.3%) were acquitted; 1 (1.2) was dismissed, and data was missing for 1 (1.2%).

2 Diagonal shows total number of defendants out of 84 receiving particular sentence. Other figures in row show pattern of other sentences. Percents based on 74 offenders receiving a sentence.

TABLE 4

LAPSE BETWEEN FILE DATE - DISPOSITION

Less 2 months	41	(48.8)
2 - 3 months	26	(31.1)
3 - 4 months	9	(10.7)
4 - 5 months	5	(6.0)
5 - 6 months	3	(3.6)
TOTAL	84	100.1

Washington

The New Sexual Abuse Hearsay Exception

SB 4461 was signed by Governor Spellman on April 1, 1982 and will become law on June 10, 1982. It is to be cited as Ch. 129, Laws of 1982.

The new law does the following:

Section 1 amends the Limitations of Actions statute, RCW 9A.04.080, by extending from three to five years the statute of limitations for Statutory Rape in the First Degree, Statutory Rape in the Second Degree, and Indecent Liberties (victim under 14 years of age).

This applies to offenses not barred as of June 10, 1982, but cannot operate to revive offenses already barred by the passage of years, since that would be an ex post facto application of the law. Thus a crime committed on or before June 10, 1979 is forever barred, but a crime committed after June 10, 1979 will have a five-year life of its own.

Section 2 adds to RCW 9A.44 a new section allowing a court to admit into evidence hearsay statements made by a sexual assault victim when under 10 years of age relating to the crime under certain circumstances. It does not supplant existing hearsay exceptions ("not otherwise admissible by statute or court rule"). The court must find:

(i) That the "time, content, and circumstances of the statement provide sufficient indici of reliability", and

(ii) The child either:

(a) testifies in court; or

(b) is unavailable as a witness, and there is "corroborative evidence of the act."

The defendant must be advised of the State's attempt to use such hearsay statements "sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement." See F.R. Evid. 803(24).

Some questions raised by the new law are:

1. Is it an unconstitutional usurpation of the Supreme Court's power to control evidentiary rules?

The legislature has always had the power to promulgate rules of evidence (Ch. 10.58 RCW). The Supreme Court assumed similar power through its rulemaking authority and has superseded some statutory evidence rules (e.g. ER 609 on impeachment under RCW 10.52.030). See State v. Murray, 86 Wn.2d 165, 170 (1975). When the new Rules of Evidence were adopted, the legislature still retained its authority to affect the hearsay rule. As ER 802 says:

> Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

(emphasis added.)

2. It is an unconstitutional evidence rule because it violates a defendant's state and federal constitutional rights to confront witnesses against him.

The U.S. Constitution (Sixth Amendment) and Washington State Constitution (Art. 1, §22) both provide the right of the accused to confront witnesses against him in a criminal trial. Where the child testifies, allowing hearsay in evidence would not affect this right since the defendant could cross-examine the victim on these hearsay statements. However, where the victim does not testify, confrontation clause problems will arise as the defendant cannot cross-examine the declarant.

Two Div. II opinions written by Judge Reed address this issue. State v. Parris, 30 Wn. App. 268 (1981), and State v. Valladares, 31 Wn. App. 63 (1982). Both conclude that the U.S. Supreme Court case of Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) is controlling.

> Roberts adopted a 2-pronged test for analyzing hearsay statements with respect to the Sixth Amendment: (1) the declarant must usually be unavailable; and (2) the statements must bear an adequate indicia of reliability; i.e. they must fall within a firmly rooted hearsay exception or there must be a particularized showing of trustworthiness.

31 Wn. App. at 71-72.

SB 4461 will pass this test since it requires (1) unavailability and (2) both corroborative evidence and a particularized showing of reliability. Also see State v. Carter, 23 Wn. App. 297 (1979); State v. Boast, 87 Wn.2d 447 (1976); and State v. Smith, 85 Wn.2d 840 (1975).

3. When does the rule become effective?

Does the rule apply to trials after June 10 or crimes committed after June 10? The very clear answer is the

former, for trials after June 10. Two Snohomish County cases arising in trials held after an amendment to the marital privilege rule in RCW 5.60.060(1) are directly on point. In State v. Clevenger, 69 Wn.2d 136, 417 P.2d 994 (1966) and State v. Pope, 73 Wn.2d 919, 442 P.2d 994 (1968), when the crimes (child murder and sexual abuse by Dad) occurred, the marital privilege law would have barred the wife from testifying against her husband. The trials occurred after the amendment in 1965 added the clause saying the privilege would not apply "to a criminal action for a crime committed by the husband against a child of the wife." The court said it was not an ex post facto application of the law to allow the wife's testimony. The rule is set forth in Clevenger, supra at 141 and Pope at 924.

> The argument of appellant is completely answered by the language of the court in Hopt v. Utah, 110 U.S. 574, 28 L. Ed. 2d 262, 4 Sup. Ct. 202 [as follows]. . . .
> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilty, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect to that offence, be obnoxious to the constitutional inhibition upon ex post facto laws. But alternations which do not increase the punishment, nor change the ingredients of guilty, but - leaving untouched the nature of the crime and the amount of degree of proof essential to conviction - only remove existing classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may

regulate at pleasure. Such regulations of the mode in which the facts constituting guilty may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charge.

QUESTIONS AND ANSWERS ON SB 4461

Prepared by Robert S. Lasnik, King County Prosecuting Attorney's office

1. Q. What is hearsay?

   A. Hearsay is a statement made outside the trial offered at the trial to prove the truth to the statement. e.g. Smith hears a crash and as he turns to look at the accident, he hears a bystander scream, "Oh, my God, the red car ran that light!" At the trial on the issue of liability Smith testifies as to what the bystander shouted. This is hearsay.

2. Q. Is all hearsay inadmissible?

   A. No. Evidence Rule (ER) 803 contains 23 exceptions to the Hearsay Rule ranging from "dying declarations" to "excited utterances" and ER 804 has four more exceptions.

3. Q. Why are some hearsay statements admissible in evidence?

   A. As the common law developed, certain hearsay statements began to be allowed because they were inherently reliable. For instance, the hearsay statement above would be admitted as an "excited utterance", because it was a statement relating to a startling event made while under the stress of excitement caused by the event. The combination of the startling event and the lack of time to reflect and fabricate, leads to reliability. Some are admissible because of reliability and necessity, e.g. dying declarations.

4. Q. Who may alter the evidence rules as to hearsay exceptions?

   A. The Supreme Court, by its rulemaking authority, and the Legislature both have this power. See ER 802.

5. Q. What is the Confrontation Clause?

   A. The Sixth Amendment to the U.S. Constitution provides, among other protections for the accused in a criminal case, that he "shall enjoy the right.... to be confronted with the witnesses against him." This is the Confrontation Clause.

6. Q. If the Confrontation Clause means what it says, how could hearsay ever be admissible?

   A. It couldn't be. But, like many Constitutional provisions, it does not have a literal definition. The United States Supreme Court, and the Washington State Courts, both recognize that hearsay may be admitted under certain circumstances, regardless of whether that speaker is

called as a witness. If the person does testify, of course he may then be questioned about these out-of-court hearsay statements. If he does not testify, before the hearsay may be admitted, the judge must find that the statement has sufficient indicia of reliability, and that the witness is unavailable. See Ohio v. Roberts, 448 U.S. 56 (1980) and State v. Parris, 30 Wn. App. 268, 275 (1981).

7. Q. What does "unavailable" mean?

   A. ER 804(a)(1) defines "unavailability" and includes situations where a witness is ruled incompetent to testify due to illness, infirmity or age.

8. Q. What does SB 4461 do?

   A. It would allow a judge to admit into evidence at any trial, hearsay statements made by a child under the age of 10, relating to sexual contact performed on him or her by another, under certain circumstances. First the judge must find that the time, content and circumstances of the statement show it is a reliable, trustworthy statement.

      1. When the child testifies and is cross-examined, others may also testify as to what the child told them about the sexual assault.

      2. When the child is unavailable as a witness, due to incompetency, infirmity or death, such statements may also be testified to by others. However, in addition to a specific finding that the necessary indicators of reliability are present, the judge must also find additional corroboration that the act occurred.

9. Q. Has any other state adopted such an evidence law?

   A. No. Washington would be the first.

10. Q. Is there a requirement that all states share the same laws for criminal procedure?

   A. No. In Washington, the accused has some rights not guaranteed in other states and the prosecution has some powers denied prosecutors in other states. Chief Justice Burger in California v. Green, 339 U.S. at 171, emphasized the "importance in allowing the states to experiment and innovate, especially in the area of criminal justice. If the new standards and procedures are tried in one state, their success or failure will be a guide to others and to Congress."

WHAT DOES THE STRIKING AMENDMENT DO?

1. Limits use to criminal proceedings.

2. Limits use to hearsay statements not already covered by other evidence laws or rules (e.g. excited utterances, etc.).

3. Presents court with a form of a "totality of the circumstances" test on reliability for ALL statements covered by this section.

4. Requires either:

   (i) that the child testifies, or
   (ii) the child is unavailable as a witness and there is corroborative evidence of the act.

5. Requires notice to the defense of intention to offer such a statement in advance to allow time to prepare to meet it.

6. Adds a severability clause.

Incest as included within charge of rape. 76 ALR2d 484.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 ALR2d 1017.

Fraud or impersonation, rape by. 91 ALR2d 591.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape. 23 ALR3d 1351.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 ALR3d 1227.

Liability of parent for injury to unemancipated child caused by parent's negligence. 41 ALR3d 904.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

Consent as defense in prosecution for sodomy. 58 ALR3d 636.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 ALR3d 1228.

What constitutes offense of "sexual battery." 87 ALR3d 1250.

Constitutionality of rape laws limited to protection of females only. 99 ALR3d 129.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 ALR4th 1009.

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

(2) being any age, the defendant attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) *[Repealed, § 10 ch 78 SLA 1983.]*

(4) *[Repealed, § 10 ch 78 SLA 1983.]*

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Effect of amendments. — The 1980 amendment inserted "or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person" near the end of paragraph (3) in subsection (a).

The 1982 amendment substituted "an unclassified felony and is punishable as provided in AS 12.55" for "a class A felony" at the end of subsection (b).

The 1983 amendment repealed paragraphs (3) and (4) of subsection (a).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

I. General Consideration.
II. Former Law.
  A. Generally.
  B. Age of Consent.
  C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state

must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the penalty provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Categories constitute same offense. — All of the categories contained within the definition of sexual assault in the first degree under subsection (a)(1) through (a)(4) of this section, constitute the same offense for legal purposes. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

And none is more serious than others. — Nothing contained in the statutory language of this section or the legislative history of the provision suggests that the type of conduct listed in any one of subsection (a)'s four paragraphs was meant to be inherently more serious than any of the others. To the contrary, the grouping of these four separate sets of conduct together under the same criminal heading, with identical classifications as class A felonies, is a forceful indication of the legislature's conclusion that all four paragraphs were meant to be viewed as involving equally serious conduct. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Subsection (a)(1) is akin to the common law definition of rape. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Mental state required under (a)(1). — Lack of consent is a "surrounding circumstance" which requires a complementary mental state as well as conduct to constitute a crime. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

No specific mental state is mentioned in subsection (a)(1) of this section governing the surrounding circumstance of "consent"; therefore, the state must prove that the defendant acted "recklessly" regarding his putative victim's lack of consent. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction for similar offense. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Sufficient evidence of attempted assault. — A jury could reasonably infer that defendant's entering of victim's bed naked and uninvited and fondling her breasts were "substantial steps" toward the commission of sexual assault in the first degree so as to provide sufficient evidence of attempted assault. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial court did not commit plain error in failing to specifically instruct the jury that defendant had to recklessly disregard a substantial risk that the victim did not consent to intercourse before he could be convicted of first-degree sexual assault. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Instructions on lesser included offenses. — In a prosecution of first-degree sexual assault, where the undisputed evidence including defendant's testimony establish sexual penetration, there was no duty to instruct on attempted sexual penetration or forcible sexual contact.

Hartley v. State, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

The 10-year presumptive term for first-degree sexual assault under the provisions of AS 12.55.125(c) was meant by the legislature to be appropriate in the majority of cases, which are those cases involving conduct that is characteristic of the offense of rape and that fall into the middle-ground between the most serious and least serious extremes for the offense, and it must be recognized that this presumptive term takes into account the high potential for the use of violence and the likelihood of some physical injury in the first-degree sexual assaults falling within the definition of subsection (a)(1) of this section. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Sentence upheld. — See Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Where record supported finding that defendant was the leader of a group of three or more persons who participated in offense of sexual assault in the first degree, such evidence, combined with consideration of prior, similar actions and of defendant's apparent lack of remorse, warranted imposition of eight-year sentence. Willard v. State, Ct. App. Op. No. 240 (File No. 6285), 662 P.2d 971 (1983).

Sentence of 10 years imprisonment, with eight suspended, was not excessive for conviction of attempted sexual assault in first degree. Van Hatten v. State, Ct. App. Op. No. 269 (File No. 5877), P.2d (1983).

Sentence for attempted sexual assault and burglary held excessive. — See Hansen v. State, Ct. App. Op. No. 218 (File No. 6965), 657 P.2d 362 (1983).

Applied in Nukapigak v. State, Ct. App. Op. No. 90 (File No. 5820), 645 P.2d 215 (1982); Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982); Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Stated in Born v. State, Ct. App. Op. No. 41 (File No. 5095), 633 P.2d 1021 (1981); Peetook v. State, Ct. App. Op. No. 178 (File No. 6630), 655 P.2d 1308 (1982); Tazruk v. State, Ct. App. Op. No. 195 (File No. 6954), 655 P.2d 788 (1982).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980); State v. Jane Doe, Ct. App. Op. No. 104 (File No. 5716), 647 P.2d 1107 (1982); Kuganaluk v. State, Ct. App. Op. No. 176 (File No. 6531), 655 P.2d 339 (1982); Ernart v. State, Ct. App. Op. No. 185 (File No. 6244), 656 P.2d 1199 (1982); Ecker v. State, Ct. App. Op. No. 190 (File No. 6726), 656 P.2d 577 (1982); Nukapigak v. State, Sup. Ct. Op. No. 2667 (File No. 5820), P.2d (1983).

II. FORMER LAW.

A. Generally.

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.120 and 11.15.130.

Forcible rape ranks among the most serious crimes. Newson v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); Ahvik v. State, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980).

The reason such a crime as forcible rape is most serious is because it amounts to a desecration of the victim's person which is a vital part of her sanctity and dignity as a human being. Gordon v. State, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); Ames v. State, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing on other grounds, 537 P.2d 1116 (1975); Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); Bordewick v. State, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978).

Definition of rape under former law. — Sekinoff v. United States, 283 F. 38 (9th Cir. 1922).

Criminal intent was required for conviction of statutory rape. — See State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Although former AS 11.15.120 was silent as to any requirement of intent, the requirement of criminal intent was inferred. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Rape is a general intent crime, and all that is required for a conviction is proof of the voluntary commission of the prohibited act. Walker v. State, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 88 (1982).

tate, Ct. App Op. No. 176
655 P.2d 339 (1982);
Ct. App Op. No. 165 (File
P.2d 1199 (1982); Ecker v.
o. No. 190 (File No. 6726,
821); Nukapigak v. State,
2667 (File No. 5620).

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Lesser included offense. — The Alaska statutes do not proscribe fornication, and therefore, it could not be considered an offense of a lesser degree to statutory rape. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978); Tookak v. State, Ct. App. Op. No. 108 (File No. 4656), 648 P.2d 1018 (1982).

The offense of assault with intent to commit rape is a lesser included offense to rape. Tuckfield v. State, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981).

Attempt. — Every element of an attempt is comprised in an assault with intent to commit the offense of rape. Sekinoff v. United States, 283 F. 38 (9th Cir. 1922).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping were separate crimes with separate elements. Lacy v. State, sup. Ct. Op. No. 2039 (File No. 3741), 608 P.2d 19 (1980).

Separate sentences were called for where defendant's conduct in kidnapping and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Occhipinti, Sup. Ct. Op. No. 1405 (File No. 3084), 562 P.2d 348 (1977).

B. Age of Consent.

Female under age of consent is in law incapable of consent. — The crime of rape is commited upon a female under the age of consent with or without her consent since she is in law incapable of consent. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Thus, it is not necessary to establish her consent as an essential element of the crime. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Indictment need not allege consent of female under age of consent. — An indictment for rape of a girl under the age of consent is not insufficient because it fails to allege that the act was done with her consent. Callahan v. United States, 240 F. 683 (9th Cir. 1917); Rose v. United States, 240 F. 685 (9th Cir. 1917).

Defense of reasonable mistake of age. — A charge of statutory rape was defensible where an honest and reasonable mistake of fact as to the victim's age was shown. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

The charge of statutory rape was legally unsupportable unless a defense of reasonable mistake of age was allowed. To refuse such a defense would have been to impose criminal liability without any criminal mental element. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

While, where an offender was aware he was committing an act of fornication, a mistake of fact did not serve as a complete defense, it should have served to reduce the offense to that which the offender would have been guilty of had he not been mistaken. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Under former AS 11.15.120, if an accused had a reasonable belief that the person with whom he had sexual intercourse was 16 years of age or older, he could not have been convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was 18 years of age or older, he could still have been criminally liable for contribution to the delinquency of a minor. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

For approved instruction on consent of female under age of consent, see Rose v. United States, 240 F. 685 (9th Cir. 1917).

C. Procedure.

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Charging defendant with the crime of murder committed "in the attempt to perpetrate a rape" fails to allege the separate crime of rape with sufficient clarity to support a conviction. Alto v. State, Sup. Ct. Op. No. 1443 (File No. 2339), 565 P.2d 492 (1977).

Severance of counts involving various victims. — Where defendant was prosecuted on multiple counts of unlawful entry with intent to rape, rape, assault, and burglary, involving various victims, the trial court did not err in denying severance of the counts since evidence regarding the attack on each of the alleged victims would have been admissible in the trial of each of the other charges if the charges had been separately tried. Nix v. State, Ct. App. Op. No. 157 (File No. 5841), 653 P.2d 1093 (1982).

Character evidence. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Questioning victim's credibility. — While a defendant could properly seek to question the victim's credibility, the established rule is that this may not be done by

extrinsic evidence on a collateral matter. Moss v. State, Sup. Ct. Op. No. 2239 (File No. 4389), 620 P.2d 674 (1980).

Corroboration of prosecutrix's testimony. — No corroboration of the prosecutrix's testimony is necessary in statutory rape cases. Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior history of sexual activity with victim. — Whether evidence in a statutory rape prosecution of prior history of sexual activity with the prosecutrix is justified as background or the ongoing nature of the relationship is probative, the nexus of these reasons justifies an exception to the general rule against admissibility of prior bad acts. Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior misconduct. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Evidence of prior sexual offenses. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Determining age from appearances. — See Toores v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Admission of defendant's driver's license into evidence to establish his age was harmless beyond a reasonable doubt. Torres v. state, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Psychiatric testimony. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence. Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Hearsay testimony. — It was not error to admit hearsay testimony concerning complaints made by a rape victim to her mother and a school counselor. Greenway v. State, Sup. Ct. Op. No. 2206 (File No. 4754), 626 P.2d 1060 (1980).

Failure at preliminary hearing to state all the facts attending a claimed rape in response to an instruction to proceed and tell what happened is not a ground of impeachment. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Error to admit recording of sodium pentothal interview. — In a prosecution for statutory rape and sodomy, it was error to admit the recording of a sodium-pentothal interview, even as a prior consistent statement for the limited purpose of rehabilitating an impeached witness. Lindsey v. United States, 16 Alaska 268, 237 F.2d 893 (9th Cir. 1956).

Or to exclude public from trial. — The trial court erred in assuming the power of excluding the public from a trial on the charge of rape of an adult woman. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

It would be denying the defendant his presumption of innocence and a predecision by the court of his guilt to hold that a married woman must be relieved of the embarrassment of a public trial because she is called upon to testify to the story of the defendant's crime and her shame. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Verdict supported by evidence. — Testimony of complaining witness of her conduct before and after the alleged rape, corroborated and contradicted, and her sole evidence of the rape itself, supports the verdict on the inference that the defendant's defense was untrue, and that she was the unfortunate victim of a brutal outrage. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Instructions. — The use of the following instruction in a statutory rape case is prohibited: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the indictment with caution." Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Since specific intent is not an element of the offense of rape, giving an instruction that the law assumes that every person intends the natural consequences of his voluntary acts was not error. Walker v. State, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 88 (1982).

Instruction sufficiently covering question of impeachment. — See Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

For approved instruction on consent of female under age of consent, see Rose v. United States, 240 F. 685 (9th Cir. 1917).

Sentencing. — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of Donlun v. State, Sup. Ct. Op. No. 1092 (File No. 2188), 527 P.2d 472 (1974), was

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not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." Edenshaw v. State, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation: in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).

Sentence for rape upheld. — See Gordon v. State, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); Ames v. State, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing, 537 P.2d 1116 (1975); Coleman v. State, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976); Nukapigak v. State, Sup. Ct. Op. No. 1410 (File No. 2915), 562 P.2d 697 (1977), aff'd on rehearing, 576 P.2d 982 (1978); Bordewick v. State, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); Morrell v. State, Sup. Ct. Op. No. 1577 (File No. 2790), 575 P.2d 1200 (1978); Alexander v. State, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); Moore v. State, Sup. Ct. Op. No. 1880 (File No. 4032), 597 P.2d 975 (1979); Wagner v. State, Sup. Ct. Op. No. 1897 (File No. 4381), 598 P.2d 936 (1979); Wikstrom v. State, Sup. Ct. Op. No. 1987 (File No. 4535), 603 P.2d 908 (1979); Tate v. State, Sup. Ct. Op. No. 2020 (File No. 4550), 606 P.2d 1 (1980); Mallott v. State, Sup. Ct. Op. No. 2027 (File No. 3364), 608 P.2d 737 (1980); Alexander v. State, Sup. Ct. Op. No. 2077 (File No. 3522), 611 P.2d 469 (1980); Cochrane v. State, Sup. Ct. Op. No. 2086 (File No. 4531), 611 P.2d 61 (1980); Helmer v. State, Sup. Ct. Op. No. 2181 (File No. 4383), 616 P.2d 884 (1980); Tuckfield v. State, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981); Edenshaw v. State, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981); Kompkoff v. State, Ct. App. Op. No. 015 (File No. 5324), 626 P.2d 1091 (1981); Williams v. State, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence for rape held excessive. — See Ahvik v. State, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980); Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981); Qualle v. State, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglary term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. Nix v. State, Ct. App. Op. No. 157 (File No. 5481), 653 P.2d 1093 (1982).

Sentence for rape too lenient. — See State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); State v. Jensen, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See Shelton v. State, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).

Sentence for assault with intent to rape upheld. — See Fomin v. State, Sup. Ct. Op. No. 2214 (File No. 5013), 619 P.2d 718 (1980).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if the offender engages in

(1) sexual contact with another person without consent of that person; or

(2) sexual penetration with a person who the offender knows

(A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration; or

(B) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Evidence. — Where victim woke up in the early morning hours to find defendant in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jury could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. Nicholson v. State, Ct. App. Op. No 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial judge did not err in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. Johnson v. State, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).

Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11.41.430. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983)

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No. 193 (File No. 6192),
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NOTES TO DECISIONS

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.134 and former AS 11.41.410(a)(4).

For cases construing former rape statute, see AS 11.41.410, Notes to Decisions, analysis line II.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Physical conduct punished under former statute. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); Smiloff v. State, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).

Former section prohibited fellatio. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Mitigating Factors. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year old daughter) was not a mitigating factor. Hodges v. State, Ct. App. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Sentence under former AS 11.15.134 upheld. — See Noble v. State, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1976); Buchanan v. State, Sup. Ct. Op. No. 1316 (File No. 2553), 554 P.2d 1153 (1976); Morgan v. State, Sup. Ct. Op. No. 1908 (File No. 4187), 598 P.2d 952 (1979); Baker v. State, Sup. Ct. Op. No. 1963 (File No. 4631), 602 P.2d 797 (1979); Alvarado v. State, Sup. Ct. Op. No. 2323 (File No. 5133), 626 P.2d 582 (1981).

Sentence for assault upheld. — In prosecution of defendant with no prior criminal record on two counts of first-degree sexual assault of his 12-year old daughter, sentence of two consecutive eight-year terms with five years suspended was not excessive Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

In light of the substantial duration of defendant's sexual abuse of his stepdaughter (three years), his failure to learn from the earlier discovery of his prior offenses, his disregard of a court order that he avoid contact with the victim, and his total failure to take any meaningful step toward rehabilitation, 10-year sentence with four years suspended was not excessive for conviction of first-degree sexual assault. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence under AS 11.15.134 held excessive. — See Qualle v. State, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 120 years. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. Langton v. State, Ct. App. Op. No. 226 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Applied in Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6).

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if, being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if, being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § ch 102 SLA 1980; am § 3 ch 78 SLA 1983)

Effect of amendments. — The 1980 amendment rewrote subsection (a).

The 1983 amendment rewrote this section.

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Applied in Goulden v. State, Ct. App. Op. No. 201 (File No. 6465), 656 P.2d 1218 (1983).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1981); Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Collateral references. — Civil liability for carnal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Parent or person in loco parentis, liability for rape of minor child, 19 ALR2d 460.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.410 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless

(1) the spouses were living apart; or

(2) the defendant caused physical injury to the victim.

(b) In a prosecution under AS 11.41.410 — 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978)

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. Hartwell v. State, Sup. Ct. Op. No. 391 (File No. 704), 423 P.2d 282 (1967), decided under former AS 11.40.110.

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality; or

(6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or magazine that depicts such conduct, the person," substituted "18 years" for "16 years" in two places, and added "the following actual or simulated conduct" to the end, all in the introductory paragraph; substituted "lewd" for "obscene" in paragraphs (2), (3) and (6); and deleted "female" preceding "breast" in paragraph

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Harold F. GREENWAY, Appellant,

v.

STATE of Alaska, Appellee.

No. 4754.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted in the Superior Court, Fourth Judicial District, Warren W. Taylor, J., of rape, and he appealed. The Supreme Court held that testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible.

Affirmed.

Matthews, J., filed concurring opinion in which Rabinowitz, C. J., concurred.

1. Rape ⇐48(1)

Testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible under special hearsay exception concerning complaints of victims in sex crimes.

2. Rape ⇐48(2)

Testimony from either victim or witnesses pertaining to details of victim's complaint is generally not admissible in criminal prosecution.

Dick L. Madson, Cowper & Madson, Fairbanks, for appellant.

Natalie K. Finn, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

PER CURIAM.

Harold Greenway was convicted of raping his thirteen year old stepdaughter. The rape occurred in July, 1978, on the banks of the Yukon River, near Greenway's summer fish camp. According to the victim, Greenway threatened to kill her if she told anyone about the rape and, as a result, she told no one other than her mother[1] until September, when she reported the rape to her school counselor. At trial the State, over Greenway's objections, presented testimony by the victim's mother and her school counselor concerning her complaints of rape. Greenway now contends that the trial court's failure to exclude this testimony as inadmissible hearsay constituted reversible error.[2]

The State contends that the statements in question were admissible under the special hearsay exception concerning complaints of the victim in sex crimes. We find this argument persuasive.

[1, 2] We recognized this exception in *Torres v. State*, 519 P.2d 788, 793 n.9 (Alaska 1974):

> [A]s Wharton points out, statements concerning the crime of rape or sexual assault, shortly after the commission of the act are admissible as a recognized exception to the hearsay rule:
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> In a prosecution for a sex crime, such as rape or assault with intent to rape, it

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1. There is conflicting testimony as to whether or not the victim actually told her mother of the rape. The victim testified that she told her mother of the rape about three days after the incident but the mother interpreted this conversation differently and denied that she knew of the rape until after the victim told her school counselor in September. A social worker also testified that she and the mother had discussed the victim's rape and that the mother had indicated that her daughter had told her of the rape shortly after the incident. The mother admitted to having several conversations with the social worker but again denied admitted knowledge of the rape prior to her daughter's report to the school counselor.

2. Appellant also claims as error the admission of the testimony of the victim that she had told her mother, best friend, social service worker and her school counselor about the rape. However, no objection was made to this testimony and, in fact, the appellant agreed that it should be admissible. Therefore, this claim of error was waived.

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may be shown by testimony of the prosecutrix or by that of some other witness that the prosecutrix made complaint of the crime shortly after its commission. Such evidence tends obviously to indicate the truth of the charge and is corroborative thereof; conversely, evidence of the failure to make a prompt complaint casts doubt upon the truth of the claim that a crime had been committed.

2 F. Wharton, Criminal Evidence § 313, at 113–114 (13th ed. Charles E. Torcia 1972) (footnotes omitted).

See also 4 J. Wigmore, Evidence §§ 1134–36 (Chadbourn rev. ed. 1972) (discussing at length the justifications behind the exception). It is true that, other than the disputed complaint made to her mother approximately three days after the incident, the victim here did not complain of the rape until September, over a month after its commission. However, her delay is both explained and excused by Greenway's threats against her and her young age. *See, e. g., Hunt v. State*, 213 So.2d 664 (Ala.App.), *cert. denied*, 213 So.2d 666 (Ala. 1968) (delay of nine months does not bar admission of testimony, in light of, *inter alia*, defendant's threats to kill victim); *State v. Twyford*, 85 S.D. 522, 186 N.W.2d 545 (1971) (delay of over two months not reason to exclude testimony, since victim was only twelve years old).[3] We therefore conclude that the trial judge did not err in admitting the testimony of the rape victim's mother and her school counselor concerning her complaint of rape.[4]

The conviction is AFFIRMED.

MATTHEWS, J., with whom RABINOWITZ, C. J., joins, concurs.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I agree with the Per Curiam opinion. Moreover, I believe that the questioned evidence was properly admitted under the recent fabrication exception[1] to the common law rule prohibiting the admission of prior consistent statements, for the following reasons.

Defense counsel in this case elicited testimony that the victim was generally unhappy living with her mother and stepfather before the rape, and that thereafter, in early September, her mother and stepfather were in a violent fight involving a gun during which the victim and her younger sister were forced to flee to a neighbor's house and the police were called. It was just a few days after this incident that the victim complained of the rape to her school counselor, which resulted in her being taken from the home of her mother and stepfather. Thus, while there was a general mo-

3. We realize that the list of hearsay exceptions found in our present Rule 803, A.R.E. Evid., does not include this exception. This omission, however, was more in the nature of an oversight on our part, and not a repudiation of *Torres*; we shall refer the question of whether the rules should be amended to include the exceptions noted in *Torres* to our standing committee on the Evidence Rules. In any event, Evidence Rule 803 was not in effect at the time of Greenway's trial, and so does not govern this appeal.

4. We find no merit to appellant's argument that the victim's testimony went beyond the "fact of the complaint" limitation which is part of the special hearsay exception concerning complaints of the victim in sex crimes. Appellant argues that it was error to allow the victim to testify that she had mentioned the location of the event and, impliedly, the perpetrator, to third persons. Testimony from either the victim or witnesses pertaining to "details" of the victim's complaint is generally not admissible. *See generally* 4 J. Wigmore, Evidence § 1136, at 306 (Chadbourn rev. ed. 1972). However, in her testimony the victim did not, in fact, state anything about the rape or the name of the perpetrator in her complaints to third persons. The victim's testimony was only to the effect that she had told third persons of the rape. She gave no details pertaining to her complaints and nothing else in the record indicates that either the victim or the witnesses gave such testimony.

1. This exception has been codified in the Alaska Rules of Evidence as Rule 801(d)(1)(B). It provides:

> A statement is not hearsay if
> (1) The declarant testifies at the trial or hearing and the statement is ...
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive ...

tive to fabricate which antedated the rape there was also a specific event which could have supplied a motive to fabricate which occurred after the victim complained of the rape to her mother but before she complained of the rape to the school counselor.

Where there are several events which supply a motive to fabricate, evidence of a statement consistent with the declarant's testimony which was made before the latest event, but after the others, may be admitted:

> Otherwise, it would never be proper to rehabilitate a witness by proof of prior consistent statements in cases where numerous impeaching circumstances were shown to exist at the time of the trial but where there may be found a theoretical possibility that the witness might have been motivated by one of them at the time of making the prior consistent statement.... The principle involved is that where the circumstances are such as to leave it reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.

United States v. Grunewald, 233 F.2d 556, 566 (2nd Cir. 1956), *rev'd on other grounds*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

Applying this rule to this case, the victim's complaint to her mother was admissible under the recent fabrication exception.

Walter John DALE, Appellant,

v.

STATE of Alaska, Appellee.

No. 4506.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted, on guilty plea, before the Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., of five counts of sale of cocaine and was sentenced to five concurrent five-year terms, and he appealed. The Supreme Court, Matthews, J., held that: (1) even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, and (2) trial judge was shown to have considered the possibility of defendant British citizen's deportation when sentence was determined, and judge's failure to articulate the role which such factor played in his decision was not error.

Affirmed.

Rabinowitz, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1177

In proceeding in which defendant pled guilty to five counts of sale of cocaine, even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as a middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, in view of the substantial, uncontradicted evidence suggesting that defendant was a "professional" cocaine dealer. AS 17.10.010.

2. Drugs and Narcotics ⇐133

On appeal from proceeding in which defendant British citizen pled guilty to five counts of sale of cocaine and was sentenced to five concurrent five-year terms, trial judge was shown to have considered the possibility of defendant's deportation when sentence was determined; judge's failure to articulate the role which such factor played

in his decision was
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3. Aliens ⇐17

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Rule 803. Hearsay Exceptions — Availability of Declarant Immaterial.

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. *See* Rule 602.

(1) and (2) Present Sense Impression—Excited Utterance. In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Subdivision (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-41 (1962).

The theory of Subdivision (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, at 135. Spontaneity is the key factor in each instance, though arrived at by some-

what different routes. Both are needed in order to avoid needless niggling.

While the theory of Subdivision (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928), it finds support in cases without number. *See* cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). It is well grounded in Alaska case law. *See Torres v. State,* 519 P.2d 788, 792-93 (Alaska 1974); *Watson v. State,* 387 P.2d 289 (Alaska 1963). Since unexciting events are less likely to evoke comment, decisions involving Subdivision (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost,* 10 So.2d 83 (Fla. 1942); *Houston Oxygen Co. v. Davis,* S.W.2d 474 (Tex. 1942); and cases cited in McCormick (2d ed.) § 278, at 709-11. *See also Beech Aircraft Corp. v. Harvey,* 558 P.2d 879, 884 (Alaska 1976).

With respect to the time element, Subdivision (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Subdivision (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961); McCormick (2d ed.) § 297, at 706-07.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. Never-

theless, on occasion [illegible]ly evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick (2d ed.) § 299, at 705. Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland,* 174 N.E.2d 804 (Ill. 1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden,* 387 P.2d 874 (N.M. 1963); *Beck v. Dye,* 92 P.2d 1113 (Wash. 1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Subdivision (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Subdivision (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. *See* Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-09 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code § 1240 (as to Subdivision (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

(3) **Then Existing Mental, Emotional, or Physical Condition.** Subdivision (3) is essentially a specialized application of Subdivision (1), presented separately to enhance its usefulness and accessibility.

The exclusion of "statements of memory or belief to prove that fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States,* 290 U.S. 96, 78 L.Ed. 196 (1933);

Maguire, The Hillmon Case: Thirty-three Years After, 38 Harv. L. Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L. Rev. 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed as applied to a declarant.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, indentification, or terms of a declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

The addition of the words "offered to prove his present condition or future action" limits the exception to avoid results like *People v. Alcalde,* 148 P.2d 627 (Cal. 1944). For the statements of one person as to his mental or emotional condition to be used against another, Subdivision (23) must be satisfied. This modifies the *Hillmon* rule.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission,* 119 N.E.2d 224 (Ill. 1954); New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus, a patient's statement that he was struck by an automobile would qualify but not his statment that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambu-

lance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of trustfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

(5) Recorded Recollection. A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. *Cf.*, Reporter's Comment accompanying Rule 801(d)(1)(A). Hence, the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New

Jersey Rule 63(1)(b), and this has been the position of the federal courts.

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella*, 107 A. 279 (N.J. 1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

(6) Business Records. This exception continues in effect the business records exception to the hearsay rule previously found in Alaska R. Civ. P. 44(a)(1) and Alaska R. Crim. P. 26(e). While the language is slightly different, the basic thrust of the new rule is identical to the old.

The background of this exception is set forth in the Advisory Committee's Note accompany Federal Rule 803(6). The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, are acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz,* 170 N.E. 517 (N.Y. 1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Subdivision (6) has been drafted to eliminate the confusion caused by Federal Rule 803(6), which could be read to read to abolish the business duty concept although the legislative history plainly indicates that no such thing was intended.

Entries in form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. In the state courts, the trend favors admissibility. In order to make clear its adherence to the latter postion, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman,* 318 U.S. 109 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on

records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate.

The lower court had concluded that the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir. 1942). Other courts also have focused on a motive to misrepresent, although many business records are potentially self-serving. The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicat· lack of trustworthiness." *See generally Patrick v. Sedwick,* 391 P.2d 453, 458-59 (Alaska 1964); *Commercial Union Companies v. Smallwood,* 550 P.2d 1261 (Alaska 1976).

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.

(7) **Absence of Records.** Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14) Comment. While probably not hearsay as defined in Rule 801, supra, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick (2d ed.) § 307; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence 63(14). This Rule supersedes Alaska R. Civ. P. 44(a)(2) and Alaska R. Crim. P. 26(e); it provides for identical results.

(8) **Public Records and Reports.** "The reliability and trustworthiness of official documents and also the desire to keep

officials from having to testify personally in every instance have generally been established as the policies underlying this hearsay exception." *Webster v. State*, 528 P.2d 1179, 1181 (Alaska 1974). The exception was recognized in Alaska R. Civ. P. 44(b) and Alaska R. Crim. P. 26(e), which are superseded by this rule.

Subdivision (8) follows Maine Rule 803(8), rather than its federal counterpart. The Maine rule is clearer, easier to apply, and avoids some of the confrontation problems presented by the Federal Rule. *See generally, United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975). It recognizes that government records that are compiled for purposes other than presentation on the government's behalf at trial are generally reliable (part (a)), but that reliability is substantially diminished when the government stands to gain an edge in litigation through the introduction of a record or report it has prepared (parts (b)(ii) & (iii)). Similarly, the rule differentiates factual findings made by the government in the process of carrying out public responsibilities, which are presumed to be reliable, from factual findings resulting from a special investigation of a particular complaint, case or incident, which are not within this exception, since there is no reason to believe that the government would itself rely on its findings outside the litigation context (part (b)(iv)). Finally, investigative reports by police and law enforcement personnel are excluded because they are often unreliable. *See Menard v. Acevedo*, 418 P.2d 766 (Alaska 1966).

While this rule may appear, at first blush anyway, to be at odds with *Webster v. State, supra*, that case would be decided the same way under these rules. Presumably the breathalyzer test would be admissible as a business record under Subdivision (6) *Menard v. Acevedo, supra*, is in accord with this Subdivision.

More leeway is provided for admission of public reports involving factual findings in civil cases than criminal cases. In this way deference is paid the confrontation clause. But records and reports not involving investigations into particular events and findings of fact are admissible under this Subdivision even in criminal cases.

There is no doubt that Subdivision (8) differs from former Alaska R. Civ. P. 44(b), but the goals of both rules are similar. When Subdivisions (6) and (8) of the rules are read together, it should be apparent that the admissibility of official records is not unduly circumscribed by the rule.

The notice requirement, formally found in Alaska R. Civ. P. 44(b)(2) is carried forward, but the authentication provisions of Alaska R. Civ. P. 44(b)(4) & (5) and the regulation of copies under Alaska R. Civ. P. 44(b)(6) & (c) are eliminated as these subjects are covered by Articles IX and X of these rules.

(9) **Records of Vital Statistics.** Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment, Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281. It is consistent with the previous exception and may overlap with it in some instances.

(10) **Absence of Public Record or Entry.** The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Subdivision (7) with respect to regularly conducted business activities, is here extended to public records of the kind mentioned in Subdivisions (8) and (9). 5 Wigmore § 1633(6), at 519. Some harmless duplication no doubt exists with Subdivision (7). This continues in effect the policy of former Alaska R. Civ. P. 44(b)(3).

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry; *e.g., People v. Love,* 142 N.E. 204 (Ill. 1923) (certificate of Secretary of State admitted to show failure to file documents required by Securities Law); as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

(11) **Records of Religious Organizations.** Records of ac-

tivities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, at 371, and Subdivision (6) would be applicable. However, both the business record doctrine and Subdivision (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 142 N.E. 478 (Ill. 1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the likelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. *See* California Evidence Code § 1315 and Comment.

(12) Marriage, Baptismal, and Similar Certificates. The principle of proof by certification is recognized as to public officials in subdivisions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. *See* 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials (*see*, Rule 902) is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, *see*, Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

(13) **Family Records.** Records of family history kept in family bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with California Evidence Code § 1312. In approving the Federal Rule counterpart to Alaska Rule 803(13), the House of Representatives' Judiciary Committee approved this rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11). This is a sensible approach to the Subdivision and accurately discribes the purpose of the Alaska rule. *See also,* Annot., 39 A.L.R. 372 (1924).

(14) **Records of Documents Affecting an Interest in Property.** The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. *See* AS 34.15.260. *See also,* AS 34.15.300 and AS 35.25.060. *See generally* Hearsay Under the Proposed Federal Rules: A Discretionary Approach, 15 Wayne L. Rev. 1077, 1172-73 (1968).

(15) **Statements in Documents Affecting an Interest in Property.** Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the

recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. Although there is authority restricting this exception to ancient documents, there is no good reason to so limit it. It should not be surprising, however, to see that in practical application the document will most often be an ancient one. *See* Uniform Rule 63(29), Comment. The fact that the Alaska Rule and Federal Rule 803(15) are identical removes any question whether the Federal Rule violates the policy of *Erie* recognized in other Federal Rules (*e.g.*, 301, 501, 601). *See* K. Redden and S. Saltzburg, Federal Rules of Evidence Manual 334 (2d ed. 1977).

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

(16) Statements in Ancient Documents. Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. 7 Wigmore § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. *But see* 5 Wigmore § 1573, at 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick (2d ed.) § 323, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. Nebraska followed the usual common law view in defining ancient documents as those in existence more than 30 years. Most other states that have adopted rules based on the federal model agree with the federal provision reducing the number of years to 20. Subdivision (16) also reduces the num-

ber of years on the theory that twenty years should be sufficient to counteract fraud.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," *see* California Evidence Code § 1331.

(17) **Market Reports, Commercial Publications.** Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. 6 Wigmore §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, *see* Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market." This rule is consistent with AS 45.05.240.

(18) **Learned Treatises.** Commentators have generally favored the admissibility of learned treatises; *see* McCormick 2d ed.) 321; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692. *See also* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc). But the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this po-

sition may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the United States Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla. App. 1967), *cert. denied*, 201 So.2d 556 (Fla. 1968); *Darling v. Charleston Memorial Community Hospital*, 211 N.E.2d 253 (Ill. 1965); *Dabroe v. Rhodes Co.*, 392 P.2d 317 (Wash. 1964).

Nebraska did not adopt such a provision in its rules, but other states following the Federal model did.

(19), (20), and (21) Reputation Concerning Personal or Family History—Reputation Concerning Boundaries or General History—Reputation as to Character. Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons

having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, at 444, and *see also*, § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Subdivision (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. 5 Wigmore § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions *see,* Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Subdivision (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick (2d ed.) § 324. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, McCormick (2d ed.) § 324, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the con-

troversy with respect to which it is offered. For similar provisions *see*, Uniform Rule 63(27)(a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Subdivision (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick (2d ed.) §§ 44, 186. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *See City of London v. Clerke*, Carth. 181, 90 Eng. Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire*, 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and subdivision (22) goes no further, not even including character.

(23) **Other Exceptions.** Whether or not to include a general section like this divided the United States Congress during its consideration of the Federal Rules of Evidence. At first the House Committee on the Judiciary deleted draft rules [803(24) and 804 (b)(5)] intended to allow courts flexibility in creating hearsay exceptions to fit particular cases. Such rules were viewed "as injecting too much uncertainty into the law of evi-

dence and impairing the ability of practitioners to prepare for trial." The Senate Committee on the Judiciary believed

> that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The Senate Committee "intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances." Thus, it modified the rule proposed by the Advisory Committee and approved by the United States Supreme Court to narrow the exception. House and Senate Conferences finally agreed on the Senate's approach but added a provision that a party intending to request the Court to use a statement under this subdivision must notify, sufficiently in advance of trial to allow for a fair contest on the issue of whether the statement should be used, any adverse party of the intent as well as of the particulars of the statement.

Some states that adopted rules based on the federal model rejected any residual exception (*e.g.*, Maine and Nebraska), or modified the Federal Rule (*e.g.*, Nevada and New Mexico). Alaska Rule 803(23) copies the Federal Rule in the belief that the Senate Judiciary Committee was correct in concluding that the specific exceptions provided for in Rule 803, "while they reflect the most typical and well recognized exceptions to the hearsay rule may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence made clear that it should be heard and considered by the trier of fact." *Cf., Beech Aircraft Corp. v. Harvey,* 558 P.2d 879 (Alaska 1976). The intent of the rule is that it should be used sparingly. It has been cited with favor in *Alaska Airlines, Inc. v. Sweat,* 584 P.2d 544 (Alaska 1978).

Note on Omission—Omitted from this rule is an exception for judgments of previous conviction. *See* Federal Rule 803 (22). Since guilty pleas and statements in connection therewith are admissible under Rule 801(d)(2)(a), unless banned under Rule 410, the only reason to include an exception for judgments of previous conviction is to permit a finding of one

trier of fact to come before another. If a judgment of guilty in a criminal case, which follows proof beyond a reasonable doubt, is to have impact in subsequent cases, the impact should be by way of collateral estoppel, not by admitting the previous judgment. The judgment tells the second trier of fact nothing; that trier will either disregard it or defer to it, neither of which tactic is intended by the Federal Rule. There are strong arguments to the effect that facts once proved beyond a reasonable doubt should be binding in subsequent proceedings, especially subsequent civil proceedings. But such a rule is beyond the scope of rules of evidence. The only argument in favor of the Federal Rule is that it might be unconstitutional to attempt to invoke the doctrine of collateral estoppel against a defendant in subsequent criminal cases and Federal Rule 803(22) is an attempt to use a prior finding in *some* way. But the fact remains that the trier of fact in the second case cannot know how to use the first finding. There is no reason to adopt a rule that can only confuse the trial process. In *Scott v. Robinson*, 583 P.2d 188 (Alaska 1978), the Supreme Court held that a conviction in a criminal case would be conclusive in a subsequent civil case as to the facts necessarily decided in the criminal case under certain circumstances, to wit: the prior conviction was for a serious criminal offense, the defendant had a full and fair hearing, and the issue on which the prior judgment is offered was necessarily decided in the previous trial.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM February 29, 1984

SUBJECT: Hearsay evidence in prosecutions for sexual abuse of a minor (HB 565)

TO: Representative Barbara Lacher

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested an analysis of the practical and legal implications of HB 565, relating to hearsay evidence in prosecutions for sexual abuse of a minor. The bill allows the introduction of certain kinds of hearsay evidence in limited sexual abuse prosecutions. Since this evidence would probably not be admissible under the present Rules of Evidence, adopted by the Alaska Supreme Court, the bill has the effect of amending those rules and must be passed by a two-thirds vote. The bill, by allowing hearsay evidence to be admitted in criminal prosecutions, raises the issue of the defendant's right to confront the witnesses against him or her, under the state and federal constitutions.

Analysis of the bill

HB 565 is based on Washington Criminal Code sec. 9A.44.120. I have been informed by the Department of Law that the Washington statute has been challenged a number of times and upheld in the trial courts, but it has yet to be ruled on by the state's highest court. Therefore the Washington law is of little help in determining the validity of HB 565.

In prosecutions for sexual abuse of a minor in any degree, HB 565 allows the prosecutor to introduce "hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child" if certain criteria are met (AS 12.45.049). Before the hearsay

> perceive and relate, and the factual basis of their statements. Second, it enables the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom. (Footnotes ommitted).

Lemon v. State, 514 P.2d 1151, 1153 (Alaska 1973). The Court in Lemon analyzed the United States Supreme Court decisions on the right to confrontation as it relates to the introduction of hearsay evidence and concluded that

> ...while the demeanor interest of the right of confrontation is not a crucial element, the right to effective cross-examination is essential unless the testimony falls within certain established exceptions to the hearsay rule. (Footnote ommitted).

Lemon, supra, at 1154. The Court ruled that Lemon had been denied the right of confrontation because of the admission of a hearsay statement against him that did not fall within the established exceptions to the hearsay rule.

HB 565 does contain certain protections for the defendant, but these may not be enough to survive a constitutional challenge. Since the bill permits the prosecution to use hearsay evidence that does not fall within one of the established exceptions to the hearsay rule against the defendant, the Lemon case seems to prohibit it. Even if the criteria for the admission of the hearsay evidence contained in the bill are met, a court could still find that the defendant has been denied the right to confrontation. Although the question is an open one, there is a strong possibility that the bill could be found unconstitutional if challenged.

KBL:ojb
J4/022

INTENT OF LEGISLATION

HB 565 - "An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor; and amending Rules 803 and 804, Alaska Rules of Evidence."

This legislation will allow hearsay evidence of statements made by children under the age of 10 relating to sexual abuse of that child if:

1) The court determines that the circumstances indicate the statement would be reliable, and

2) The child either testifies in person or, if the child is unavailable as a witness, there is additional evidence to corroborate the statement.

We have been advised by troopers that they have videotapes of children 2½ or 3 years old where the sexual abuse is articulated clearly. However, they are unable to proceed with the grand jury indictment because these very young children often block out the experience before they are questioned in court. The sworn statement of the professional who interviewed the child, along with the videotapes, would be admissable under this act.

Introduced: 2/1/84
Referred: Health, Education &
Social Services and Judiciary

IN THE HOUSE BY LACHER, PHILLIPS AND FLOOD

HOUSE BILL NO. 565

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. In a prosecution for the crime of sexual abuse of a minor in any degree, hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement.

* Sec. 2. AS 12.45.049, added by this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by adding hearsay evidence of certain statements made by a certain victim of sexual abuse of a minor to the list of exceptions to the hearsay rule.

~~Clerk Version~~

Levy
3/23/84

Original sponsors: Lacher, Phillips,
Flood, et al

2nd CS

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement that is not otherwise admissible made by a child under the age of 10 who is the alleged victim of the offense describing the conduct establishing the offense may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the proponent of the statement informs the adverse party of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the adverse party a fair opportunity to respond to the statement.

(b) In this section,

(1) "unavailable" means the child

..keith levy

To CSHB 565 (HESS)

Line 13, Page 1

after statement," insert "which is not otherwise admissable"

Line 24, Page 1

substitute "proponent of the statement" for "prosecutor"

Line 24, Page 1

substitute "adverse party" for "defendant"

Line 26, Page 1

substitute "adverse party" for "defendant"

Line 8 and Line 15, Page 2

substitute "proponent of the child's statement" for "prosecutor"

WORK DRAFT WORK DRAFT WORK DRAFT

1st Committee Substitute Levy 3/1/84

Original sponsors: Lacher, Phillips, Flood, et al

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement made by a child under the age of 10 who is the alleged victim of the offense describing the conduct establishing the offense may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the prosecutor informs the defendant of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the defendant a fair opportunity to respond to the statement.

(b) In this section,

(1) "unavailable" means the child

Levy
3/30/84

Original sponsors: Lacher, Phillips,
Flood, et al

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

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

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the grand jury proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the

party a fair opportunity to respond to the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 3. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain hearsay evidence admissible in grand jury proceedings for certain sexual offenses without requiring compelling justification.

* Sec. 4. AS 12.45.049, added by sec. 2 of this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by allowing admission at trial of hearsay evidence of certain statements made by certain victims of certain sexual offenses.

Woman asks abuse victims not be forced to testify

Bill aimed at protecting children from psychological damage in grand jury proceedings

By DEAN FOSDICK
The Associated Press

JUNEAU — Traumatized children who are the victims of sexual abuse should not be made to testify before grand juries although they would be required to undergo cross-examination during trials, a Senate committee was told.

Beth Kerttula, a lawyer and aide to Sen. Jay Kerttula, D-Palmer, told members of the Senate Health, Education and Social Services Committee on Thursday that hearsay evidence from sexually abused children should be allowed in grand jury proceedings.

"It would apply only in cases where the child is traumatized," she testified. "And it's only aimed at grand jury proceedings. It doesn't go any farther than that."

Kerttula told the committee he was proposing several changes in his bill, one of which would drop the age of children allowed to submit hearsay evidence from 16 to 13.

"The younger the child, the more likely trauma will occur," Kerttula said.

Two similar bills are weaving their way through the legislature. One, introduced by Gov. Bill Sheffield, specifies age 16. Another, by Rep. Randy Phillips, R-Eagle River, specifies age 10.

"The younger the child, the more potential for trauma and ...e less chance for fabrication," said Gayle Horetski, an assistant attorney general. "On the other hand, you have to balance that off on individual children. Some are more fragile than others."

While Horetski wouldn't recommend an optimum age, she did say prosecutors "wouldn't want to go under 10 in any circumstances."

Hearsay evidence would not replace the use of videotapes in such cases, she said in response to a question from Sen. Joe Josephson, D-Anchorage.

"Videotaping is preferred," Horetski said. "But in Bush areas, authorities often don't have videotaping equipment. And ... a child may make a telling statement when videotaping equipment isn't available."

"You don't have a tape around when a kid is talking to a school nurse," she said. "Although it's a good tool, it may not be appropriate to narrow it to that."

"I don't want it (bill) to erode grand jury proceedings," Josephson said. "I'm worried about that."

The committee deferred action on the bill Thursday, pending the introduction of Kerttula's amendments.