STATE OF ALASKA
THE LEGISLATURE

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May, 1988

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Mary Van Nimwegen

House Hess:

April 22, 1987

May 1, 1987

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____ **Bill Version :** HB237
Publish Date : _____

Revision Date: _____ **Agency Affected :** Department of Corrections
Title : "An Act relating to Murder, assault and physical and sexual abuse of children" **BRU :** _____
Sponsor : Rep. Ulmer, Hudson **Components :** _____
Requestor : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES				850.0	1,700.0	2,550.0
TRAVEL				3.1	6.2	9.3
CONTRACTUAL				66.6	133.2	199.8
SUPPLIES				89.1	178.2	267.3
EQUIPMENT				5.0	10.0	15.0
LAND & STRUCTURES						
GRANTS, CLAIMS				10.2	20.4	30.6
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	1,024.0	2,048.0	3,072.0
CAPITAL	0	14,496.0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	14,496.0	0	1,024.0	2,048.0	3,072.0
FEDERAL FUNDS						
OTHER						
TOTAL	0	14,496.0	0	1,024.0	2,048.0	3,072.0

POSITIONS:

FULL-TIME	0	0	0	18	36	54
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See attached analysis for 5 possible scenerios. This fiscal note represents the 10% scererio.

Susan E. Knighton

Prepared by : Susan E. Knighton, Research Analyst IV Phone : 1-24-87
Division : Statewide Programs Date : 465-3376

Approved by Commissioner : Susan Humphrey Barnett Date : 1-24-87
Agency : Department of Corrections

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 237

ANALYSIS

This analysis addresses the effects of sections 5, 6, 8, 9, 10 and 13 on the Department of Corrections. These sections would create three new offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second and Third Degree and provide penalties for them.

The profile of Alaska's prison population shows that approximately 200 persons are incarcerated at any time for Sexual Abuse of a Minor in the First, Second, Third and Fourth Degree. A large proportion of the offenders have probably committed the crime several times before the victim felt sufficiently endangered and compelled to seek the assistance of others and they would therefore possibly be charged with one of the new offenses.

In order to determine the fiscal impact of this legislation, five scenarios were created based on the profile of sentenced Sexual Abuse of Minor offenders currently being placed in the custody of the department and the length of sentences being served. The scenarios present the effects if 10% of these offenders were sentenced under the proposed statutes, 25%, 50%, 75% and 100%. The scenario which occurs will depend upon the charging policies of the Department of Law.

Scenario	10%	25%	50%	75%	100%
Additional Man Years to be Served	96	239	476	712	951
Additional Operating Costs	$14,496.0	$36,089.0	$71,876.0	$107,512.0	$130,500.0
Additional Capital Costs	$ 1,024.0	$ 2,549.3	$ 5,077.3	$ 7,594.7	$ 12,097.4

The impact of HB 237 will be to increase the State's inmate population requiring the additional beds to be built and associated operating costs.

Capital construction and operational costs are based on $31,960.00 per man year inflated by 5% per year and $151,000 per bed constructed.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 237
PUBLISH DATE: 5/4/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to murder, assault and sexual abuse of children"
Sponsor: Representative Ulmer
Requestor: Judiciary and Finance

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: January 19, 1988

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 1/21/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Revised 1/19/88

POSITION PAPER

CS HB 237 (HESS)

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency inmpact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: X None See attached fiscal note _____

Program impact: _____ None See analysis attached X

Constitutional impact: _____ None See analysis attached X

Based on the attached information, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill.

Dana Fabe, Public Defender
Public Defender Agency

1/20/88
Date

Brant McGee, Director
Office of Public Advocacy

1/20/88
Date

Commissioner John Andrews
Department of Administration

1/21/88
Date

This bill is a wide-ranging collection of amendments to the criminal laws and rules of evidence. It appears to be designed to overrule a number of appellate decisions unfavorable to the Department of Law in cases involving child victims. Since some of the decisions are constitutionally based, the corresponding attempted changes appear unconstitutional. The changes do not appear to be necessary to vigorous prosecution and effective enforcement of laws preventing assaults on children. Their primary consequence will be increased costs in processing the cases through the court system and increased populations in the already overcrowded prison system.

A. SECOND DEGREE MURDER AND ASSAULT

This bill proposes two changes to the second degree murder and assault statutes:

1. Neitzel change. The bill would change AS 11.41.110(a)(2) to define second degree murder as "knowingly engag[ing] in conduct [instead of: intentionally performing an act] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." We support this change, since it comports with appellate case law. See Neitzel v. State. The parallel change in the first degree assault statute is also unobjectionable.

2. Extreme indifference to the welfare of a child under 16. Under this section, it would be second degree murder if a child died as a result of a "pattern and practice of abuse." We have no problem with this concept, but suggest some tightening of the drafting.

Abuse is defined in section 2 to include bodily impact, restraint, and confinement. This is too broad, since it could encompass many normal disciplinary measures including spanking or placing a child in "time out" in his bedroom. Similar problems exist in the parallel assault provision. We suggest the following definition for abuse:

> (c) In this section, "Abuse is defined as:
>
> (1) striking a child with a body part or instrument in a manner likely to cause serious physical injury to the child; or
>
> (2) confining a child in a small enclosed area or container for a prolonged period of time without food or water in a manner likely to cause serious physical injury to the child; or
>
> (3) restraining a child by use of physical restraints in a manner which significantly limits the child's freedom of movement in a manner likely to cause serious physical injury to the child.

These changes to Sections 1 and 2 should eliminate the overbroad application of a second degree murder statute to those persons using reasonable disciplinary techniques which result in the accidental death of a child.

B. REPEATED SEXUAL ABUSE OF A MINOR

The bill creates a new set of offenses entitled Repeated Sexual Abuse of a Minor in the First, Second and Third Degrees (RSAM). These offenses, which require a "pattern and practice" of sexual abuse involving three or more incidents, will apply primarily to incest and family sexual abuse cases. As the Court of Appeals has noted in State v. Andrews, virtually all family sexual abuse cases involve repeated abuse.

1. Enhanced presumptive term (deleted by HESS). In the original draft of the bill, a person who is convicted on the first offense of Repeated Sexual Abuse of a Minor in the First Degree, would have been subject to a 13-year presumptive jail term. HESS removed this presumptive term. In the absence of the presumptive term we have no objection to the concept of the bill, although it is not necessary to get a pattern of acts against a victim into evidence.

It should be noted that the current offense of Sexual Abuse of a Minor in the First Degree carries an 8-year presumptive term for a first offender, as does Sexual Assault in the First Degree. Thus, the typical family incest offender will be punished much more harshly than a person charged with a violent rape of an adult due to the repetitive nature of incest behavior. On a second felony offense a defendant would receive a 25-year presumptive term, even if the prior felony were a theft conviction when the defendant was a young adult.

Although there may be some offenders who deserve lengthy periods of incarceration, others who willingly admit their conduct, seek treatment and exhibit remorse may not require such a lengthy presumptive term, particularly on a first offense. The prosecutor would also have unbridled discretion to charge one offender with three separate counts of Sexual Abuse in the First Degree and another offender with RSAM. Thus, two similarly situated offenders could receive vastly disparate sentences. This would certainly raise equal protection problems which would be litigated in virtually every RSAM case.

2. Non-unanimous jury verdicts. As noted above, it is an element of Repeated Sexual Abuse of a Minor that three or more incidents of the prohibited conduct have occurred. Section 8 of the bill provides that the jury need not be unanimous as to any particular incident.

This provision is in direct conflict with Covington v. State, a 1985 decision of the Alaska Court of Appeals. Covington requires that jurors must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. The Covington holding is based upon the defendant's constitutional right to a unanimous verdict. No state or federal court has reached a contrary result, even in the RICO line of cases which involve parallel "pattern and practice" provisions.

3. Definition of "Authority Over Child". The last troublesome portion of the Repeated Sexual Abuse of a Minor provision is the definition of "having authority over a child" found in Section 8. This broad language presumes that all members of a social unit have authority over a child when in fact they may not. Examples of the problematic application of this provision include a romantic relationship between a young teenager and an exchange student or step-sibling who is living in the family unit.

C. PRIOR INCONSISTENT STATEMENTS (DELETED BY HESS)

This section, which was drafted to combat perceived problems caused by Brower v. State, was deleted by the HESS committee. This portion of the bill stated that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

The question whether an uncorroborated prior inconsistent statement is sufficient to support a conviction is a uniquely judicial determination, not one susceptible to legislative fiat. The federal constitution prohibits conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358. A court's holding on a question of the sufficiency of certain evidence is an interpretation of the constitutional requirement of proof beyond a reasonable doubt. Thus, the Court of Appeals' decision in Brower took no radical or novel position; the Brower holding is consistent with all other courts which have considered this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action.

D. CHANGES TO EVIDENCE RULE 404

The bill proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

This raises serious constitutional problems. In a very long line of cases, the Alaska appellate courts have held that evidence of prior bad acts by a defendant are not admissible to prove the defendant's propensity to commit crimes. E.g., Eubanks v. State, 516 P.2d 726 (Alaska 1973); Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980); Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd, 726 P.2d 546 (Alaska 1986). The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. U.S. Const., amend. VI; Alaska Const., art.I, subsection 7. When evidence of a defendant's character, as shown through prior bad acts, is admitted to show his propensity to commit a crime, there is a grave likelihood that the jury will convict the defendant because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, trials could take two to three times as long, as witnesses are called by both sides to establish and refute incidents entirely collateral to the real issues at trial. Longer trials also mean longer transcripts; increasing the cost of appeals means more defendants would need public defenders.

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly opens the door to evidence of prior bad acts when such evidence is probative of something other than criminal disposition, such as motive, intent, opportunity and common scheme or plan. The Alaska Supreme Court and Court of Appeals have in many instances allowed evidence of a defendant's prior abusive conduct to come in at trial, including abuse of the named victim, abuse of other victims in the family and abuse of victims outside of the family who are similarly situated to the named victim. Following are brief summaries of the cases in this area of the law.

1. Evidence of Other Abuse on Named Victim is Ordinarily Admissible.

In Burke v. State, 624 P.2d 1240 (Alaska 1980), the Alaska Supreme Court established the rule that evidence of earlier assaults on the same victim is admissible. The Supreme Court held that it was proper for a victim to testify to the whole history of assault by her step-father, the defendant.

A recent Court of Appeals decision, Patterson v. State, 732 P.2d 1102, 1103 (Alaska App. 1987), explained the justifiction for the well-established Burke rule: "First, to establish an ongoing relationship between the victim and the accused; and, second, to place an offense in context and to show the background of the offense." In Patterson, the court approved admitting evidence of a prior sexual assault on the named victim even though that assault occurred nearly two years earlier.

The "same victim" rule is also followed in cases charging physical assaults on children. The Court of Appeals in Garner v. State, 711 P.2d 1191, 1193 (Alaska App. 1986), held that it was proper to admit evidence indicating prior physical abuse by the defendant during the four-month period before the child's death.

2. Evidence of Abuse of Other Victims in the Same Family is Ordinarily Admissible.

In Soper v. State, 731 P.2d 587 (Alaska App. 1987), the Court of Appeals expanded Burke to cover testimony of abuse on other family members. The court in Soper said:

> The limited exception for lewd disposition recognized in Burke should be extended to cover the testimony of

the complaining witnesses' sisters who were allegedly seduced under similar circumstances at roughly the same age as the complaining witness.

3. Evidence of Abuse Outside the Family Can Be Admissible.

Evidence of abuse of other victims not in the same family but in the same class is admissible if the defendant's plan or pattern of sexual misconduct is relevant. Soper appears to authorize admission of evidence concerning sexual assaults of non-family victims so long as the victims are members of a "limited class [having] highly relevant common characteristics." 731 P.2d at 590. For example, in recent trials where the defendant was charged with sexual abuse of a child in a daycare situation, the state successfully argued that Soper authorized admission of evidence concerning sexual abuse on other children in the daycare.

Other cases upholding admission of evidence concerning abuse on non-family victims include Oswald v. State, 715 P.2d 276 (Alaska App. 1986); Moor v. State, 709 P.2d 498 (Alaska App. 1985).

4. Bolden v. State -- Similar in concept to the Rape Shield Law.

The only time a prior bad act is not admissible in this context is when there is no nexus or connection between the prior act and the charged conduct.

Bolden v. State, 720 P.2d 957 (Alaska App. 1986), illustrates the rule that evidence of sexual abuse of uncharged victims not part of the same class as the victim is ordinarily inadmissible. Bolden was charged with sexually abusing two of his daughters. At trial the state presented testimony by other girls that they had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

The Bolden rule, which disallows evidence of other sexual assaults where the only purpose for such testimony is to show the defendant's propensity to commit such acts, is comparable to the rape shild law protection for victims. That is, the fact that a victim may have engaged in a certain type of sexual practice on one occasion with one partner is not admissible to prove the victim consented to such practice on another occasion with the defendant.

In summary, in all situations in which prior bad acts by the defendant are relevant and probative of the issues at hand, the Court of Appeals and Supreme Court have upheld their admissibility. If it is not relevant and is admitted only to show that the defendant has done this in the past, there is a great danger that the defendant will be convicted because he is a "bad person" regardless of whether there is sufficient evidence to support the charges at hand.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HB 237
Publish Date:

Revision Date:
Title: An act relating to sexual abuse of children
Sponsor:
Requestor: Ulmer

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Karla Forsythe, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 4-24-87

Approved by: Stephanie J. Cole, Deputy Director — Date: 4-24-87
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 237
Publish Date :

REQUEST:

Revision Date:
Title :"An Act relating to murder, assault, ...physical and sexual abuse of children..."
Sponsor : Representative Ulmer
Requestor : House HESS Committee

Agency Affected : Department of Law
BRU : Prosecution
Components : All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : April 23, 1987

Richard L. Pegues/FOR/

Approved by Commissioner : Grace Berg Schaible, Attv. Gen.
Date : April 23, 1987
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 237

This bill amends the state's criminal laws relating to murder, assault, and the physical and sexual abuse of children. Additionally, the bill changes rules regarding the admissibility of certain evidence in criminal child abuse prosecutions.

Section 1 allows prosecution for second-degree murder in cases where a person engages in a pattern or practice of abuse of a child under the age of 16 that results in the death of the child. Many of the cases which would be second-degree murder under the new law are now being prosecuted as manslaughter or as criminally negligent homicide. Because the majority of these cases are already being prosecuted (although at a lower level), this section will not have a significant fiscal impact on the department.

Section 3 allows prosecution for first-degree assault, a class A felony, in cases where a person engages in a pattern or practice of abuse of a child under the age of 16 that results in serious physical injury to the child. The department currently prosecutes many of the cases which would fall under this section under lower level assault statutes. Because these are cases which, by and large, are already being handled by the department, this section will not have a significant fiscal impact.

Sections 5 and 6 create a new crime of repeated sexual abuse of a minor, in three degrees. This allows prosecution for a pattern of sexual abuse of a child if the child (because of youth, the passage of time, or the frequency of the assaults) is not able to particularly identify specific incidences. Although we anticipate that there will be only a few of these cases each year, it is important to effectively prosecute them because they are some of the most egregious offenses committed against children. Because most of the cases involving multiple assaults against children are already being prosecuted as numerous counts alleging specific incidents of abuse, the few new cases that will be prosecuted under the new crime can be handled with existing resources.

Sections 11 and 14 will broaden the kinds of evidence that may be admitted and used to support a conviction in cases of physical and sexual abuse of a minor, thus making it easier to successfully prosecute these cases. This will probably lead to the acceptance of some additional cases which would be considered "marginal" under the existing evidentiary rules. It is our view, however, that the addition of these cases will not have a significant fiscal impact on the department because the availability of additional probative evidence is likely to result in a larger percentage of guilty pleas in these cases, thus offsetting the cost of some additional trials.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 237
Publish Date : 4-1-87

Revision Date:
Title : "An Act relating to murder, assault and physical and sexual abuse of children"
Sponsor : Dept. Ulmer, Madson
Requestor :

Agency Affected : Dept. of Corrections
BRU :
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES				10,044.6	21,093.6	23,222.3
TRAVEL				36.8	77.2	121.5
CONTRACTUAL				787.5	1,653.8	2,604.6
SUPPLIES				1,050.0	2,205.0	3,472.8
EQUIPMENT				52.5	110.2	173.7
LAND & STRUCTURES						
GRANTS, CLAIMS				126.0	264.6	416.7
MISCELLANEOUS						
TOTAL OPERATING	Ø	Ø	Ø	12,097.4	25,404.4	40,011.6
CAPITAL	Ø	130,500.0	Ø	Ø	Ø	Ø
REVENUE	Ø	Ø	Ø	Ø	Ø	Ø

FUNDING: (Thousands of Dollars)

GENERAL FUND	Ø	130,500.0	Ø	12,097.4	25,404.4	40,011.6
FEDERAL FUNDS						
OTHER						
TOTAL	Ø	130,500.0	Ø	12,097.4	25,404.4	40,011.6

POSITIONS:

FULL-TIME	Ø	Ø	Ø	219	438	657
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See Attached Analysis

Prepared by : Susan E. Knighton, Research Analyst IV
Phone : 465-3376
Division : Statewide Programs
Date : 4-21-87

Approved by Commissioner : Susan Humphrey-Barnett
Date : 4/21/87
Agency : Department of Corrections

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 237

ANALYSIS

Sections 5-8 of this legislation would create three new offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second and Third Degree and provide penalties for them.

The profile of Alaska's prison population shows that approximately 200 persons are incarcerated at any time for Sexual Abuse of a Minor in the First, Second, Third and Fourth Degree. The majority of the offenders have probably committed the crime several times before the victim felt sufficiently endangered and compelled to seek the assistance of others.

If this legislation is passed and this population segment is convicted of these new offenses and given the indicated sentences, it would have a large fiscal impact on the Department of Corrections.

Current Inmates - Serving Time for Sexual Abuse of Minor

Total Number of man-years to be served = 750 years.
Total Cost of Care = $23,969,250.

Future Inmates - Repeated Sexual Abuse of Minor sanctions implemented

Total Number of man-years to be served = 1701 years.
Total Cost of Care = $54,362,259.

Increased Costs - Repeated Sexual Abuse of Minor sanctions implemented

Additional Number of man-years to be served = 951 years.
Additional Cost of Care = $30,393,009
Additional Capital Costs = $130,500,000.

The impact of HB 237 will be to quickly escalate the State's inmate population requiring the equivalent of 3 more Spring Creek facilities; one needed by FY90, another by FY91 and another by FY92. Additional costs will be incurred to operate the new institutions.

Capital construction and operational costs are based on the original estimates for the Spring Creek Correctional Center in Seward and full year cost of operation of that facility inflated by 5% per year.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 237
Publish Date :

Revision Date: 4/8/87
Title : "An Act relating to crimes against children..."
Sponsor : Ulmer, Hudson
Requestor : House Judiciary

Agency Affected : Administration
BRU : Office of Public Advocacy
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Brant McGee, Public Advocate
Division : Office of Public Advocacy
Phone : 274-1684
Date : 4/9/87

Approved by Commissioner : Garrey Peska
Agency : Department of Administration
Date : 4/10/87

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 237
Publish Date:

REQUEST:

Revision Date: April 8, 1987
Title: "An Act relating to crimes against children"
Sponsor: Rep. Ulmer, Hudson
Requestor: House Judiciary

Agency Affected: Department of Administrati
BRU: Public Defender Agency

Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: April 8, 1987

Approved by Commissioner:
Agency: Department of Administration
Date: 4/10/87

Distribution (by preparer):
- Legislative Finance
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- Senate Secretary

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

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APR 13 1987

Jim - pls read

April 9, 1987

Representative John Ellis
Representative Niilo Koponen
Co-Chairmen
Health, Education & Social Services Committee
P. O. Box V
Juneau, Alaska 99811

Dear Representatives Ellis and Koponen:

I understand that House Bill 237 has been referred to your committee for consideration. Although I certainly understand the concern of its drafters for the safety and welfare of child victims, the proposed changes contained in the bill do not appear to be necessary to vigorous prosecution and effective enforcement of laws preventing assaults on children. Many of the changes in the bill appear to be designed to overrule a variety of appellate decisions unfavorable to the state in cases involving child victims. Since some of the decisions are constitutionally based, the corresponding attempted changes appear unconstitutional. Furthermore, other provisions would substantially increase the presumptive jail term for a first incest conviction, rendering that term much more severe than the sentence required for a violent rape of an adult which results in serious physical injury.

Following is my analysis of the bill.

A. SECOND DEGREE MURDER

Section 1 proposes two changes to the second degree murder statute (AS 11.41.110(a)):

1. Neitzel change. The bill would change AS 11.41.110(a)(2) to define second degree murder as "knowingly engag[ing] in conduct [instead of: intentionally performing an act] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." This change simply brings the language of the statute in accordance with the interpretation of the statute adopted by the Court of Appeals in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982). The change does not present a problem and

could reduce confusion without substantively changing the law. Section 3 proposes a parallel change in the first degree assault statute, AS 11.41.200(a)(3), and is also not a substantive change in the law as it is presently applied.

2. Extreme indifference to the welfare of a child under 16. Proposed AS 11.41.110(a)(4) creates a new subsection of second degree murder, defined as "under circumstances manifesting an extreme indifference to the welfare of a child under 16, the person engages in a pattern or practice of abuse of that child that results in the death of the child." Abuse is defined in section 2 to include bodily impact, restraint, and confinement. "Pattern or practice" is defined in section 8 (proposed AS 11.41.610(2)) to mean "three or more incidents of the prohibited conduct."

It is not clear to me what the purpose of this section is. It appears to be unnecessary since if a person's conduct, even once, displays manifest indifference to the value of a child's life, and the child dies, that is unambiguously included in AS 11.41.110(a)(2). Requiring a "pattern or practice of abuse" might be interpreted to exclude murder prosecutions under AS 11.41.110(a)(2) when the person has only abused the child once or twice.

If the point of the new section is to insure that evidence of any pattern or practice of abuse will always be admissible, the statute is still unnecessary. Existing case law establishes that a history of abuse will ordinarily be admissible. E.g., Garner v. State, 711 P.2d 1191 (Alaska App. 1983); see also Abruska v. State, 705 P.2d 1261, 1264 & n.1 (Alaska App. 1985).

B. FIRST DEGREE ASSAULT

Section 3 creates a new category of first degree assault for any person who engages in a pattern of abuse which results in serious physical injury to a child under 16.

The proposed new assault provision is unnecessary. Given the broad definition of "dangerous instrument" adopted in Wettanen v. State, 656 P.2d 1213 (Alaska App. 1983), many assaults on a child would fit under existing AS 11.41.200(a)(1) (recklessly causes serious injury with a dangerous instrument). Many other assaults, particularly those as part of a pattern of abuse, would fit under AS 11.41.200(a)(3) (the Neitzel-type assault statute). Further, a prosecution under AS 11.41.200(a)(3) would be more likely than a charge under the new offense to open the door to evidence of assaults on other victims; evidence of such other assaults would not be relevant under proposed AS 11.41.200(a)(4) and the current rules of evidence, but such evidence could often be relevant to establish extreme indifference to the value of

life by showing that the defendant knew the likely consequences of his actions.

Further, AS 11.41.200(a)(4) could be read dangerously broadly. A parent who three times "confined" his child to his room for reasonable discipline could be liable under this class A felony if, one time, the child hurt himself seriously while in his room.

C. REPEATED SEXUAL ABUSE OF A MINOR

Sections 5-8 create a new set of offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second, and Third Degree. "Repeated" is given meaning in section 8 as "pattern or practice," defined as three or more incidents. Section 13 provides penalties for RSAM in the First Degree, an unclassified felony, setting a presumptive term for first offenders of 13 years (and 25 and 35 years, respectively, for second and third offenders), with a maximum of 50 years. RSAM in the Second Degree is an A felony, with a presumptive five-year term for a first offender.

Effectively, the proposed offense of RSAM in the first degree declares that all family sexual abuse cases will be treated far more harshly than violent rape of a stranger. As the Court of Appeals has noted, virtually all family sexual abuse cases involve repeated abuse. State v. Andrews, 707 P.2d 900, 908-09 (Alaska App. 1985), aff'd, 723 P.2d 85 (Alaska 1986); see Benboe v. State, 698 P.2d 1230, 1232 (Alaska App. 1985) (single incident of abuse may make crime among least serious in its class). To penalize the family offender more harshly than the bike-path rapist is an illogical and unfair result. The typical defendant charged under RSAM will be a middle-aged man who has abused his step-daughter on a number of occasions. He will have no criminal record of any sort and will be an upstanding member of the community in all other respects than his sexual offense. Yet, he will face a presumptive term of 13 years. If he had a prior felony conviction as a young adult, perhaps for a property crime such as theft, he would face a presumptive term of 25 years.

By contrast, the bike-path rapist, who is convicted of one sexual assault and has a misdemeanor record, a serious alcohol problem, or a sociopathic personality which makes him predictably dangerous, faces a presumptive term of only 8 years for his first offense and 15 years for his second violent rape.

RSAM in the second degree parallels the first degree offense and covers any pattern of sexual contact with a child under 16 or of sexual penetration with a child aged 13-15 who is at least 3 years younger than the defendant. This is made a class A felony, in contrast to the present statute, which treats basically the same conduct as a class B felony. See AS 11.41.436. The father

who fondles his 12-year-old on a few occasions would now face a presumptive term of 8 years in prison; the bike-path assailant who grabs and fondles a child once would face no presumptive term.

Increasing the presumptive terms for sexual offenses will undoubtedly increase the number of cases going to trial. While the present 8-year presumptive term for first degree sexual abuse of a minor is certainly long, more defendants will plead guilty to an 8-year term than a 13-year term. Similarly, although the present sanctions for sexual contact with a minor are stiff (0-10 years), there is no presumptive term applicable to first offenders. Clearly more people will plead guilty to class B charges than to the new class A charge. Any increase in the number of trials will mean increased costs for the prosecutors, court system, and Public Defender Agency. Every time the number of trials increases, appeals increase, too, with corresponding extra burdens on the appellate courts, Office of Special Prosecutions & Appeals and the Public Defender appellate case load.

The proposed new statutes are not necessary. If the state can prove three incidents of sexual abuse, the state is presently free to file three charges of sexual abuse of a minor in the first degree. Although the convicted defendant would face a presumptive term of 8 years, rather than 13, Andrews v. State establishes that consecutive terms can be imposed, and the possible maximum term would be 90 years. Thus, the defendant whose pattern of abuse deserves more serious punishment than 8 years can be sentenced more severely by imposition of consecutive terms.

The problems with the proposed RSAM crimes are compounded when considered in the light of other provisions in the bill. All of the repeated sexual abuse of a minor crimes described above include as an element that the defendant "hav[e] authority over a child under the age of 16." "Having authority over a child" is defined in section 8, proposed AS 11.41.610(1), to mean:

> (a) the child is entrusted to the defendant's care by authority of law [e.g., foster parents];
>
> (b) the child is the defendant's son or daughter, including adopted children and step-children;
>
> (c) the child resides as a member of a social unit in the same household as the child; or

(d) the child has been temporarily entrusted to the defendant's care [e.g., babysitter, older sibling, day care worker].

These definitions, particularly (c) and (d), are so broad that virtually every sexual abuse of a minor case would involve a person having authority over a child. The definition of "having authority over a child" is so far reaching that a 16-year-old boy who, on several occasions has consensual sexual foreplay involving digital penetration with his new step-sister just prior to her 13th birthday, would be exposed to the 13-year presumptive term should he be waived into adult court. An 18-year-old involved with a 15-year-old step-sister under similar circumstances could be prosecuted for RSAM in the second degree with a presumptive 8-year term on the first offense.

D. PRIOR INCONSISTENT STATEMENTS AS SOLE EVIDENCE AT TRIAL

Section 11, proposed AS 12.845.025, is an attempt to overrule Brower v. State, 728 P.2d 645 (Alaska App. 1986). This proposal states that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

The question whether an uncorroborated prior inconsistent statement is sufficient to support a conviction is a uniquely judicial determination, not one susceptible to legislative fiat. The federal constitution prohibits conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358. A court's holding on a question of the sufficiency of certain evidence is an interpretation of the constitutional requirement of proof beyond a reasonable doubt. Thus, the Court of Appeals decision in Brower took no radical or novel position; the Brower holding is consistent with all other courts which have considered this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action. Section 11 is, therefore, unconstitutional.

E. NONUNANIMOUS JURY VERDICTS

Section 8, proposed AS 11.41.600, provides that in the statutes requiring a "pattern or practice," each juror must be convinced beyond a reasonable doubt that at least three incidents of the prohibited conduct occurred, but the jury need not be unanimous as to any particular incident. This provision is an attempt to overrule Covington v. State, 703 P.2d 436, opin. on reh., 711 P.2d 1183 (Alaska App. 1985).

Covington requires that, where a defendant is charged with one count of criminal conduct, in order to convict the defendant,

jurors must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. The Covington holding is based upon the defendant's constitutional right to a unanimous verdict. Johnson v. Louisiana, 406 U.S. 356, 362 (1972). No state has reached a contrary result. The legislature cannot overrule Covington. Proposed AS 11.41.600(2) is unconstitutional.

F. CHANGES TO EVIDENCE RULE 404

Section 14 proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

This is arguably not constitutional. In a very long line of cases, the Alaska appellate courts have held that evidence of prior bad acts by a defendant are not admissible to prove the defendant's propensity to commit crimes. E.g., Eubanks v. State, 516 P.2d 726 (Alaska 1973); Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980); Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd, 726 P.2d 546 (Alaska 1986). The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. U.S. Const., amend. VI; Alaska Const., art. I, § 7. When evidence of a defendant's character, as shown through prior bad acts, is admitted to show his propensity to commit a crime, there is a grave likelihood that the jury will convict the defendant because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, trials could take two to three times as long, as witnesses are called by both sides to establish and refute incidents entirely collateral to the real issues at trial. Longer trials also mean longer transcripts; increasing the cost of appeals means more defendants would need public defenders.

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly open the doors to evidence of prior bad acts when such evidence is probative of something other than criminal disposition. E.g., Coleman v. State, 621 P.2d 869 (Alaska 1980); Adkinson v. State, 611 P.2d 528 (Alaska 1980); Oswald v. State, 715 P.2d 276 (Alaska App. 1976). Further, the Alaska courts

already recognize and have recently expanded an exception to Evidence Rule 404(b) for cases where the defendant is charged with sexual misconduct and the state wishes to offer evidence of prior misconduct with the same victim or another victim having highly relevant common characteristics (e.g., another child in the same family), particularly where the evidence of misconduct with the other[s] approaches being evidence of a habit. Burke v. State, 624 P.2d 1240 (Alaska 1980); Soper v. State, Op. No. 675 (Alaska App., Jan. 23, 1987), pet. hearing denied (April 3, 1987). Thus, the state is currently able to introduce evidence of prior bad acts in child sexual assault cases when it is probative.

Please let me know if I can provide you with any further information on this or any other proposed legislation. I appreciate this opportunity for input.

Very truly yours,

Dana Fabe

Dana Fabe
Public Defender

DF:rjb

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M April 1, 1987

SUBJECT: Abuse of children/admissibility of certain criminal evidence (Work Order No. 5-0809)

TO: Representative Fran Ulmer
Chair, State Affairs Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested a sectional analysis of Work Order 5-0809, relating to abuse of children and the admissibility of certain evidence in criminal prosecutions. As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 makes two changes to the offense of murder in the second degree. First, under existing law, one way a person may be guilty of murder in the second degree is if the person "intentionally performs an act" resulting in death under certain circumstances. Section 1 lowers the level of intent required by substituting the language "knowingly engages in conduct" (AS 11.41.110(a)(2)). Section 1 also adds a new provision under which a person may be guilty of murder in the second degree: if "under circumstances manifesting an extreme indifference to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse of the child that results in the death of the child" (AS 11.41.110(a)(4)). The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)).

Section 2 defines the term "abuse", as used in the second degree murder statute, to include bodily impact, restraint, or confinement (AS 11.41.110(c)).

Section 3 makes changes to the offense of assault in the first degree similar to those changes discussed in sec. 1. First, under current law, a person may be guilty of assault in the first degree if that person "intentionally performs an act" that results in serious physical injury under certain circumstances. Section 2 lowers the required level of intent by substituting the words "knowingly engages in conduct" (AS 11.41.200(a)(3)). Section 2 also adds a new provision under which a person may be guilty of assault in the first degree: if "the person engages in a pattern or practice of abuse of a child under the age of 16 that results in serious physical injury to the child" (AS 11.41.200(a)(4)). The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)).

Section 4 defines the term "abuse", as used in the first degree assault statute, to include bodily impact, restraint, or confinement (AS 11.41.200(c)).

Sections 5 and 6 create three new offenses: repeated sexual abuse of a minor in the first degree (AS 11.41.441), in the second degree (AS 11.41.442), and in the third degree (AS 11.41.444). Each of these offenses is committed if a person over a certain age having authority over a child under 16 years of age (1) engages in a pattern or practice of sexual penetration or sexual contact with the child, or (2) aids, induces, causes, or encourages the child to engage in a pattern or practice of sexual penetration or sexual contact with another person. The phrase "pattern or practice" is defined in sec. 8 of the bill to mean three or more incidents of the prohibited conduct (AS 11.41.610(2)). The phrase "having authority over a child" is defined in sec. 8 of the bill to mean (1) the child is entrusted to the person's care by authority of law, (2) the child is the person's son, daughter, illegitimate or adopted child or step child, (3) the person resides as a member of a social unit in the same household as the child, or (4) the child has been temporarily entrusted to the person's care (AS 11.41.610(1)).

The degree of the offense of repeated sexual abuse of a minor depends upon the age of the defendant, the age of the victim, and the nature of the sexual conduct. Repeated sexual abuse of a minor in the first degree is an unclassified felony punishable as provided in AS 12.55.125(j) under sec. 13 of the bill. Repeated sexual abuse of a minor in the second

degree is a class A felony and repeated sexual abuse of a minor in the third degree is a class B felony.

Section 7 amends existing law to make two affirmative defenses applicable to the offenses of repeated sexual abuse of a minor in the first, second, and third degree. The first defense is that, at the time of the alleged offense, the victim was the legal spouse of the defendant and the defendant had the consent of the victim (AS 11.41.445(a)). The second defense is that, if the offense required that the victim be under a certain age, the defendant reasonably believed the victim to be that age or older. However, this defense does not apply if the victim is under the age of 13 (AS 11.41.445(b)).

Section 8 adds two new general provisions. AS 11.41.600 applies to the offenses, discussed above, that require a "pattern or practice" of conduct as an element of the offense. First, it provides that a prosecution for an offense requiring a "pattern or practice" of conduct does not preclude a prosecution on charges of separate incidents of the conduct. Second, this section provides that the jury must find that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to the specific incidents. Third, if a person is found innocent of a specific incident, that incident may not be used to establish the pattern or practice. Finally, as many as two of the three incidents used to establish a pattern or practice may have occurred before the effective date of the act.

AS 11.41.610 contains the definitions of "pattern or practice" and "having authority over a child" discussed above.

Sections 9 and 10 make technical amendments to existing provisions indicating that repeated sexual abuse of a minor in the first degree is an unclassified felony and is among the most serious of offenses (AS 11.81.250).

Section 11 provides that in a criminal prosecution, evidence of a prior inconsistent statement of a witness is, by itself, sufficient to support a conviction if believed by the trier of fact (AS 12.45.025).

Section 12 amends existing law to provide that a defendant convicted of sexual abuse of a minor in the first degree or repeated sexual abuse of a minor in the first degree may be sentenced to pay a fine of up to $75,000 (AS 12.55.035(b)).

Section 13 sets out the punishments a defendant convicted of repeated sexual abuse of a minor is subject to. The maximum term is 50 years with presumptive terms of 13 years for a first felony conviction, 15 years for a first felony conviction if the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 years for a second felony conviction, and 35 years for a third felony conviction (AS 12.55.125(j)).

Section 14 amends Rule 404 of the Alaska Rules of Evidence by adding a new subsection to provide that in any prosecution for physical assault upon or sexual misconduct with a child under the age of 16, evidence of prior acts of the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

Section 15 makes the provisions of sec. 14 retroactive and applicable to offenses and evidence of acts committed before the effective date of the bill.

Section 16 provides for an immediate effective date.

KBL:mkr
m10/082

Remarks by Representative Fran Ulmer
On the Floor of the House
March 27, 1987

The Safety of Our Children

I would ask permission of this body to speak on the safety of our children.

The death in this community of a seven year old boy who was accidentally electrocuted has brought to mind for all of us the need to be particularly concerned about the safety of young children. When a young child dies for what appears to be no good reason, it makes us all very sad. But when young children in our community and in our state die because of abuse, it makes us not only sad but also mad.

April is Child Abuse Prevention Month and on the first of April, next Wednesday, I will be introducing some legislation which will increase penalties for child abuse and which, I believe, will make it easier for the prosecutors in the State of Alaska to successfully obtain convictions of child abusers. I'd like to talk just very briefly this morning about that, because nothing would be greater than to have 40 co-sponsors on this legislation.

Child sexual assault and child abuse in Alaska have reached epidemic proportions. In FY 80 there were 185 cases of child sexual assault. That number has grown to 1,447 in FY 86. And national statistics show that only one out of seven cases actually gets reported, and a much smaller percentage than that actually get successfully prosecuted. Moreover, the number of children who receive protective services due to child abuse has also risen in what I would describe as an astronomical number. One out of nineteen children in Alaska last year received some kind of child protection services. Indeed, 9,222 children had such serious problems that some kind of assistance was requested and received from the State of Alaska due to child abuse or neglect.

The cycle of violence if gone unbroken creates not only undue anguish and injury within the family but also on the streets. Sons who witness their father's violence in the home have a 1,000 percent greater chance of creating that kind of abuse for either their spouses or their children. We don't know what the statistics are on the number of people who commit crimes when they are adults who were abused as children, but experts in the field indicate that a very large percentage of these adults were abused as children.

As a society, how do we break that cycle of violence? What do we here in the Alaska Legislature do about this problem? Well, we first have to recognize it exists. It is a problem that

we cannot hide from and we cannot cover up. It is a problem which needs our resources, not only in terms of intervention and protection of the victim, but prevention and treatment of the abusers and the victims. We have many worthwhile programs in the State of Alaska but they are at risk, both in terms of funding and in terms of support from those of us who choose to ignore the problem as we often do.

We also need to tighten the prosecution of these offenses. Our resources must first and foremost go to the victims to get them out of the abusive situation and to get them treatment and protection. I believe it is also time for us to face up to the fact that we make it incredibly easy for those who commit the abuse to never be punished for the offense. Part of the problem is a fairly recent ruling by Alaska's Court of Appeals which makes it much more difficult to prosecute these cases.

I'd like to explain that this morning because that will be the first of the bills that I introduce and with which I would like your assistance. In Covington vs. State of Alaska, the Court of Appeals made it much more difficult to obtain successful convictions for sexual abusers who abuse more than once. Covington's victim was his natural daughter. He started abusing her at about age 9, continued to do so; he forced her to have sexual intercourse with him at age 16. This conduct continued night after night, week after week, year after year. In this case the Court of Appeals reversed Covington's conviction because his daughter could not be specific with the jury as to any particular instance. Hence, it was possible that some members of the jury were thinking of one instance of sexual intercourse and convicting him for that offense, while others were thinking of a different instance of sexual assault and convicting Covington for that offense. In effect, Covington, because of the frequency and number of occasions that he attacked his daughter, was able to convince the Court of Appeals that the jury could not be unanimous as to any specific act that he engaged in. Therefore his conviction was reversed. This case all but eliminates the prosecution of multiple sexual assaults on young children who cannot readily distinguish between events or remember specific nights. Indeed, the Covington decision rewards multiple sex offenders who offend against young children.

Recently in a Ketchikan case, during the middle of a trial, the State was forced to dismiss a sexual abuse case, although the child's testimony was that he was consistently abused by his father. On cross examination the child gave different dates than the State had elicited in direct examination.

I give these two examples and there are indeed hundreds of other cases just like these in the State of Alaska. Because the child cannot remember the specific event and cannot testify as to these specific events, the abuser gets off scot free or with a significantly reduced charge.

There's another problem regarding admissibility of evidence in child abuse cases that I'd like to bring to your attention and that I hope you will join me in dealing with in this legislation. It is the multiple offense of child abuse. A recent case in Juneau, which you have probably read about in the newspaper because a citizens group has become very involved with it, involves the death of a 20-month-old child. Next Monday will be the one year anniversary of the death of that child. He died as a result of a kick or a punch to the stomach which was so hard as to rupture his intestines. He died in the middle of the night without any medical care. Had that case gone to trial, the prosecution would have tried to admit evidence that this was not the first but a series of abuse which this child received from the live-in boyfriend of his mother. Indeed, a couple of weeks earlier his arm was broken, a month or so earlier his arm had been tied behind his back because he was using the wrong arm to eat with. But because of evidentiary restrictions imposed by prior decisions, that evidence could not be presented.

I force you to deal with these facts so that you can understand prosecution has been made very difficult by Court of Appeals rulings. The prosecutor would not have been allowed to bring into evidence the fact that this child's arm had been broken or any of the other abuse of which there was good evidence, because of a ruling that shows that this kind of previous incidents or previous events are inadmissible as being too prejudicial.

Having reviewed these cases and a recent case in the State of Washington where a young child died as a result, again, of a series of abuse, I have come to the conclusion that we should create a new statutory offense: It is a child abuse offense which recognizes a pattern of conduct. When a child is being abused in his or her home by a parent or authority figure, night after night, day after day, week after week, year after year, it is a very different kind of offense than a simple assault case. If I'm walking down South Franklin Street in front of the Red Dog Saloon and some drunk slugs me, there are likely to be witnesses, it is one event, it is a relatively simple case to prove and would probably be dealt with by our court system. Child abuse cases, by their very nature, take place in the privacy of people's homes where there frequently aren't witnesses, and recent rulings are making it even more difficult for the proof to be presented. I submit to you it is a different kind of offense; it deserves a more serious penalty; and we ought to have different rules of evidence associated with what kind of proof is permissible to be able to get successful convictions in these hideous cases. I speak not only to those which result in death of a child but also serious abuse, of which there are many.

I will be submitting these bills on April 1. I will hold a briefing session Monday at 9:00 a.m. for those of you who are interested in learning more about the bills. I would welcome you

to come to my office at 9:00 on Monday morning to discuss it. I would, again, welcome your participation and your co-sponsorship. I sincerely believe that child abuse, because it is so incredibly painful for us to consider, is an example of a problem that has been long overlooked and inadequately dealt with in our society. I would urge you, during April, Child Abuse Prevention Month, to put as much energy as you can into helping those who want to reduce child abuse in Alaska.

Thank you very much.

STATE OF ALASKA

OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT	DIVISION	BILL NUMBER	SPONSOR
Health and Social Services	Family and Youth Services	HB 237	Ulmer, et al.

DEPARTMENT POSITION: Support concept

PREPARED BY	DATE	COMMISSIONER'S SIGNATURE	DATE
Yvonne M. Chase, Director YMC	4/22/87	Myra M. Munson	4/22/87

SUMMARY

OTHER AGENCIES AFFECTED BY BILL	CONSTITUENT GROUP(S) AFFECTED BY BILL
Department of Law	Victims of child abuse Offenders
ORGANIZATIONAL SUPPORT FOR BILL	**ORGANIZATIONAL OPPOSITION TO BILL**

FISCAL IMPACT: ☒ NONE ☐ FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

This bill is intended to return the interpretation of affected sections to what it was before recent appeals cases resulted in more narrow applications of those sections.

ANALYSIS OF BILL/PROGRAM EFFECTS

In general, this bill would make successful criminal prosecution in certain child abuse cases easier to achieve. This would be accomplished by: 1) changing the mental state required for conviction in certain cases of second degree murder and first degree assault to "knowingly" rather than "intentionally" causing the person's death or serious injury under circumstances of "extreme indifference" to human life, 2) by including within the definition of assault in the first degree a "pattern of practice" of abuse of a child under age 16 which causes serious physical injury to the child; 3) by establishing the crime of repeated sexual abuse of a minor in the first, second and third degrees based on a "pattern or practice" of sexual abuse; 4) by allowing conviction for repeated sexual abuse of a minor or assault in the first degree based on a unanimous agreement among jurors that three or more incidents of a prohibited abusive act occurred, but not requiring unanimous agreement on the three incidents which establish the pattern or practice; and 4) by allowing conviction based on a prior statement by a witness which may be inconsistent with present statements (allowing statements, such as those of child victims, later recanted under pressure to serve as the basis for conviction). This bill would address problems encountered as a result of recent criminal appeals decisions and would not have direct programmatic impact on the Department.

AMENDMENTS PROPOSED

(1) Proposed change: Sections 1 (a)(4) and (3)(a)(4) from "age 16" to age 18.

Rationale: The age in this section should be consistent with the age of majority in the children's statutes rather than with the age of consent for sexual activity because physical abuse does not involve the concept of consent.

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

01-009 (Rev. 12/83)

Amendments Proposed continued:

(2) Proposed change: Section (1)(a)(4) and (3)(a)(4) from "pattern or practice of abuse" to pattern or practice of abuse or neglect.

Rationale: More children die of neglect than abuse. Situations of neglect which manifest extreme indifference for the welfare of a child and are habitual are just as lethal for the child as abusive behavior and affect more children.

(3) Proposed change: Sections 2 and 4 from "bodily impact, restraint, or confinement" to bodily impact, restraint, confinement, administration of lethal chemicals or drugs, exposure to conditions which could result in death or injury due to hypothermia, severe burns or suffocation.

Rationale: The current definition is too narrow and possibly would exclude many common forms of abuse that lead to serious injury and death.

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TELEPHONE
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April 9, 1987

Representative Niilo Koponen
Alaska State Legislature
P.O. Box V
Mail Stop 3100
Juneau, Alaska 99811

Re: House Bill 237

Dear Representative Koponen:

I am writing concerning House Bill 237 which creates the new offense of "Repeated Sexual Abuse of a Minor" and proposes certain changes to Alaska's law on sentencing and the Rules of Evidence. This Bill has serious problems and should not be passed.

In opposing House Bill 237, I do not mean to minimize the seriousness of the problem of sexual abuse of children. No intelligent or reasonable person would quarrel with the notion that children should be protected from abusive adults and that adults who abuse children should be prosecuted. But the existing criminal code provisions provide an ample framework for the prosecution of child abusers. Statistics reflect that the incidence of child abuse prosecution and conviction has risen significantly in recent years and I do not believe that a compelling case can be made in support of the proposition that the existing laws do not provide an opportunity to impose serious and severe criminal punishment on those convicted of sexually abusing children.

The proposed offense of repeated sexual abuse of a minor would provide an enhanced penalty for those individuals found to have engaged "in a pattern or practice" of sexual misconduct. The term "pattern or practice" is defined in the proposed statutes as three or more incidents of misconduct. The fact of the matter is that only rarely is sexual misconduct with children detected upon the first episode. The reality is that nearly all adults prosecuted for one level or another of sexual misconduct misbehaved for a period of time (sometimes long and sometimes short) before being reported and prosecuted.

The existing laws, by mandating a substantial minimum sentence of seven years, already virtually ensure that punishment, rather than rehabilitation, is the focus of sexual abuse prosecutions. Even in families that are relatively "intact" and have a severe and motivated interest in working out their problems, the existing laws governing the prosecution of sexual abuse make it difficult, and often times impossible, to keep a family together, even when it is their strong desire to remain together and professional therapists and counselors are supportive of such plan. The new law will have the effect of taking virtually every person who has engaged in sexual misconduct (since nearly all engaged in more than three instances) and essentially turn them into lifetime prisoners. Many of these individuals are not "hard core criminals", in the classic sense, but fathers and stepfathers who have a real, and often times curable, emotional or psychological problem. To be sure, their conduct is improper and harmful. Careful thought should be given, however, before a policy decision is made to turn all of these people, regardless of their past circumstances, their family settings, their prior criminal records or absence of records, their emotional conditions, their physical conditions, and the circumstances of their offenses, into long-term prisoners. Such a decision inevitably will impose enormous hardship on a large number of individuals and their families without a rational basis and will cost the State literally millions of dollars of funds to warehouse these individuals for decades.

Most ironic is the provision in Section 7 of the Bill which would provide that the prosecution for repeated sexual abuse does not preclude charges for the separate incidents that comprise the sexual abuse. As a result, charges could be stacked upon charges, all arising out of the same conduct. The law on consecutive sentencing in this state is such that it is entirely conceivable that a stepfather who engages in sexual misconduct on three or four occasions with his teenage stepdaughter and who has a sincere interest and good prognosis for rehabilitation, and who enjoys the support of his family, might be prosecuted and never see the light of day.

Another portion of the Bill is seemingly aimed at making convictions easier to obtain. Section 12 provides that a prior inconsistent statement of a witness is, alone, sufficient to support a conviction. What this means is that if an individual makes an unsworn statement out of court and then later recants the statement when he or she is placed under oath, the unsworn prior inconsistent statement is, alone, sufficient to support a

conviction. This is quite bizarre. Convictions should be predicated on competent and sworn testimony. I do not think that it is an oversimplification to say that if an individual is not willing to swear that the facts comprising the offense are true, that the individual charged should not be convicted of the offense. I know that the prosecution response to this argument is that there are times when children will make allegations of abuse and then later recant them in court. I, personally, have seen evidence of such occurrences only rarely. It is certainly not a sufficiently frequently or consistently occurring phenomenon to justify creating a framework by which individuals can essentially be convicted upon unsworn prior statements. Police officers, investigators, and social workers often times, perhaps with the best of motivations, interrogate children with leading questions that suggest the answer. The phenomenon of children and those in dependent positions desiring to provide answers that the parental or authority figure desires is well known and frequently observed. As a consequence, it is not at all uncommon to have individuals, not only in sexual abuse cases but in other cases as well, provide responses to interrogations out of court that are quite different from what the individual would state in court, when properly questioned and placed under oath.

In summary, House Bill 237 has a lot of problems. It is a bad Bill and should not be passed. It is easy and popular to take positions that make one appear "tough" on problems such as child abuse. And to be sure, child abuse is a problem worth being "tough" over. Being "tough" does not necessarily mean being irrational, unfair and misguided, which I think is how House Bill 237 is best described. If you have any further questions concerning this issue, I would be pleased to confer with you.

Very truly yours,

Jeffrey M. Feldman

JMF:jd

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION/FIRST JUDICIAL DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

STEVE COWPER, GOVERNOR

REPLY TO:

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February 11, 1987

Barbara Walker
326 Fourth Street, Suite B
Juneau, Alaska 99801

Re: Impact of FY 88 budget on sexual abuse cases

Dear Barbara:

As a result of your request on Friday, February 6, 1987, I am providing you with information regarding the impact of the proposed FY 88 budget on the prosecution of both physical and sexual abuse of children.

In FY 84 there were 309 cases referred to the district attorney offices across the state which dealt with sexual abuse of children. During that year, the district attorneys declined 37% of the cases submitted for prosecution. There was a dramatic increase in the number of cases in FY 85 with 462 cases being submitted for prosecution and 40% of those cases being declined. In FY 86, 356 cases were submitted for prosecution with 43% of the cases being declined. This figure compares with a 30% rate of decline of all felony cases being submitted to the Criminal Division of the Department of Law.

It is my belief that the higher percentage of declination in sexual assault cases is a direct result of the availability of staff to deal with these cases. Child sexual assault cases are very labor intensive. In FY 84 we had the resources to spend time with children to prepare them for the impact of the criminal justice system on their lives after they nad already been victimized. For example, in FY 84 one attorney in the Juneau District Attorney's Office was assigned responsibility for all child sexual abuse cases; I was the assigned attorney to deal with child sexual abuse cases and had sufficient time to be involved in the initial interview with the child. Because of the impact of declining oil revenues on this office, it is impossible to maintain this specialized skill. In the court building here in Juneau we had established a child interview room where the police or social worker's initial interview with the child was conducted with me being present. This limited the number of times the child had to be interviewed regarding the sexual assault. This is no longer the case. As a result of the decline in resources, it became necessary to do away with the child interview room and to no longer be involved in the initial interview with the child. This is a result of both the declining resources in the district attorney's office and with the police officers investigating these cases.

What I attempted to do, after I could no longer become involved in the initial interview, was to conduct two meetings with the child. The first meeting was simply an introductory meeting where I would talk with the child and we would not discuss the elements of the sexual assault. During the next couple of days a grand jury would be set up and before the grand jury was to hear the case, I would spend another hour talking with the child, going over what was going to happen during the grand jury, a view of the grand jury room and going over what the child's testimony would be. Unfortunately, with the decline in resources, the time available to even do this two-step meeting process has been for the most part eliminated.

To illustrate the effect of the FY 88 budget on the Criminal Division, I should first point to the amount of proposed funding for this division. In the governor's budget for FY 88 there is 7.7 million dollars allocated to the Criminal Division of the Department of Law. This compares to 9.35 million dollars which is presently allocated for the Office of Public Advocacy and the Public Defender Agency. In other words, OPA and Public Defender have approximately 20% more money for the defense of criminal cases than the state has for the prosecution of those cases. This obviously does not include any private money spent

for the defense of criminal cases. Two years ago, approximately 50% of all child sexual abuse cases were handled by private attorneys. This is probably the first time in history that the defense can far outspend the prosecution in bringing a case to trial. It must not be forgotten that the state has the burden of proving beyond a reasonable doubt that an offense occurred and this generally means that the majority of the cost of the trial will be borne by the state. On an average, my estimate would be five witnesses are called by the state for every two or three called by the defense in a child sexual abuse case. The defense can rely upon any perceived weakness in the state's case and choose to call no witnesses at all. Obviously the increased funding for counsel at public expense and the ability of people who can afford attorneys to defend cases will negatively impact the ability of the state to prosecute all felony cases, including child physical and sexual abuse cases.

As I indicated above, the Criminal Division's proposed budget for FY 88 is 7.7 million dollars. This compares to the FY 87 budget when the state was funded at 11.7 million dollars and the FY 86 budget where the Criminal Division received even more. Sixty-six positions are being eliminated from the Criminal Division. The Criminal Division has operated with 20 of these

positions unfilled for several months, so there will be a lay-off, come the first of July, of 46 Department of Law employees. This will include the elimination of almost all victim-witness aid that we now provide. The paralegals who will be left with the department will have to spend all of their time on litigation support and will not be able to deal with lessening the impact of the criminal justice system on victims and witnesses. Although it is a policy of the Criminal Division not to divert any sex offenders, the Pretrial Diversion Program is totally eliminated. The prosecution of child abuse cases in Valdez, Sitka, Dillingham and Barrow will obviously be impacted by the closing of offices in those locations.

Child sexual abuse cases have been on the increase in Juneau with 20 cases being referred in FY 84, 28 in FY 85 and 31 in FY 86. Because of the closure of the Sitka District Attorney's Office, it is necessary to use an attorney from the Juneau DA's Office to cover that community. With the legislature creating a superior court judgeship in Wrangell and Petersburg, it is necessary for the Juneau District Attorney's Office to have an attorney cover those communities as well. Because this obviously decreases the amount of time a Juneau attorney can spend on Juneau cases, this negatively impacts all criminal cases

in Juneau, especially child abuse cases, which are especially labor intensive.

Another cause for the increased time involved in child sexual abuse cases and the increasing rate of district attorney offices declining these cases is a result of procedural changes in the law made by the court of appeals. The first major setback dealt to the state by the court of appeals in the prosecution of child sexual assault cases came in Covington v. State, 503 P.2d 436 (Alaska App. 1985). The facts in Covington are set out by the court of appeals as follows:

> Covington's victim was his natural daughter, D.C.O.
>
> She testified at trial that Covington began sexually abusing her when she was 9 or 10 years old. D.C.O. was 18 years old at the time of trial. D.C.O. testified that Covington slept with her, touched her breasts and penetrated her vagina with his finger. After D.C.O's death in November 1977 when D.C.O. was 13-years-old, Covington told her that she reminded him of her mother and had D.C.O sleep with him in bed.
>
> Shortly before D.C.O.'s sixteenth birthday, Covington began having sexual intercourse with her. D.C.O. testified that she had sexual intercourse with Covington "practically every night," until she moved out in March 1983. Covington allegedly told her that he did not want her to "grow up naive like [her] mother." C.C., D.C.O.'s brother, the 13-year-old son of the defendant, also corroborated D.C.O testifying that on Mother's Day 1982 he saw an empty condom package on the night table next to the bed in which

> Covington and D.C.O. were sleeping but that he could not see if they had clothes on, nor could he remember if the door of the bedroom had been shut. He also testified that throughout 1982 his father and sister were sleeping in the same bed. Covington testified in his own defense, he conceded that he had slept in the same bed with D.C.O. from August or September 1979 until D.C.O. moved out in March 1983 but contended he had never fondled or penetrated her with his finger or penis. He stated that the bedroom door was always open and that D.C.O. had slept with him at her own request and not because of anything he said or did. He also denied the truth of earlier out-of-court tape recorded statements in which he admitted having had sexual intercourse with D.C.O. after her sixteenth birthday. Covington's testimony also suggested that D.C.O. was motivated to lie in order to obtain custody of her younger sister and prevent Covington from moving out-of-state with her.

In this case the court of appeals reversed Covington's conviction because D.C.O. could not be specific with the jury as to any particular instance and hence it was possible that some members of the jury were thinking of one instance of sexual intercourse and convicting Mr. Covington for that offense, while others were thinking of a different instance of sexual assault and convicting Covington for that instance. In effect, Covington because of the frequency and number of occasions that he penetrated his daughter, was able to convince the court of appeals that a jury could not be unanimous as to any specific act he engaged in and therefore should have his conviction reversed. In Covington the victim was, at the time of trial, over 18 years of age and the

state may well have been able to focus in on one of the sexual assaults sufficient to convince all twelve people on a jury of that one event. However, this case all but eliminates the prosecution of multiple sexual assaults on young children who cannot as readily distinguish between events occurring on consecutive nights when they are four or five years of age. The Covington decision rewards the multiple sex offender who offends against younger children. If an offender were to sexually abuse a child on only one occasion, the child could be specific to that event; however, if multiple sexual assaults have occurred, as they do in the majority of cases, young children are unable to distinguish between multiple events.

This was aptly demonstrated only a week ago in Ketchikan when during the middle of a trial the state was forced to dismiss the sexual abuse case against a child who, although testified consistently as to sexual abuses by his father, on cross-examination gave different dates than the state elicited in its direct examination. Children up through third grade often have difficulty in time sequencing and specificity as to dates. A statute similar to AS 11.46.110, Consolidation of Theft Offenses: Pleading and Proof, which allows for a jury to convict

a person guilty of a crime of theft on multiple theories may solve the Covington problem.

In a case arising out of Juneau, Moor v. State, 709 P.2d 498 (Alaska App. 1985), the court of appeals rejected the long-held belief that incidents of sexual abuse involving other child victims are admissible in sexual assault cases to show "lewd disposition." The Alaska Supreme Court in Burke v. State, 624 P.2d 1240 (Alaska 1980), seemed to agree with the state's position but the court of appeals distinguished Burke in saying that the prior sexual misconduct needed to be with the same victim.

Another blow was dealt to the prosecution of child sexual assault cases by the court of appeals in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The facts in Bolden as recited by the court of appeals are:

> Robert Bolden was convicted after a jury trial of three counts of Lewd and Lascivious Acts Towards Children, former AS 11.15.135(a) and of one count of Rape, former AS 11.15.120(a). The victims were Bolden's daughters, R., then aged 13 or 14, and M., then aged 11 or 12. The incidents occurred in December 1978 and through 1979.

> Concerning the incident charged in Count I of the indictment, R. testified that Bolden had offered to pay her $50 to "give him head." R. testified that Bolden forced her to touch his penis after she refused. In addition to this incident, R. testified that Bolden frequently fondled her breasts and that Bolden had touched her vagina on numerous occasions.
>
> R. also testified to other incidents involving Bolden, herself, her sisters, and friends. R. testified that she had seen Bolden fondle her sister K.'s vaginal area. She also testified that Bolden supplied herself and one of her friends with liquor, and that Bolden attempted to molest her friend. R. additionally testified that Bolden had once attempted penile intercourse with her and that he had attempted to bribe her to have sex with him. The state charged Bolden with one incident only with respect to R. - that being the incident when he offered R. the $50.

Of course, under Covington the state was precluded from charging multiple counts and had to be very specific as to one incident. Returning to the court's description of the case, the court said:

> The other three counts of the indictment charged Bolden with incidents involving M. M. testified that Bolden had inserted his fingers into her vagina on four or five occasions. M. also testified that Bolden touched her breasts and forced her to touch his penis.
>
> In addition to the incidents involving her personally, M. testified that she saw Bolden with his hand under the bed covers near R.'s vaginal area. M. also related an incident when she heard a friend, who was spending the night, tell Bolden to "stop it." M. similarly described an incident involving another friend who was also spending the night. In this incident, M.'s friend apparently became intoxicated on liquor that Bolden had supplied and had intercourse with Bolden. The victim was also a minor.

> In addition to Bolden's two daughters' testimony, the state presented several other witnesses who testified about uncharged sexual acts. A third daughter, K., reluctantly testified for the state. She testified that Bolden had touched her breasts and vagina. She also indicated that she had seen Bolden touch her sisters and corroborated M.'s account of the incident where Bolden had supplied liquor and had sexual intercourse with M.'s friend. Bolden's daughters' mother (Bolden's ex-wife) testified that she had seen one incident in which Bolden was fondling K.
>
> The state called several other minor victims. One testified that Bolden had laid on top of her, without her consent, and tried to force her legs apart, and that Bolden had bought her liquor. Another testified that Bolden pulled her close to him on the couch and then asked her to take off her robe. Yet another testified that Bolden kissed her without her permission. Finally, the state called a minor who related two separate incidents involving Bolden. First, she testified that Bolden, M., and herself were all in Bolden's bedroom naked. She testified that Bolden performed cunnilingus upon her, digital penetration on her, and forced her to perform fellatio upon him. Second, she testified that Bolden bought her, R., M., and another friend liquor and ordered them to take their underwear off. She testified that Bolden then had intercourse with the other friend while she and Bolden's daughter watched. All of the described incidents occurred when the witnesses were spending the night at Bolden's home when Bolden's wife was away and appeared to have occurred within a three year period.

The trial court admitted the evidence of the acts of sexual misconduct which were not specifically set out in the indictment under Evidence Rule 404(b) which says:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to

> show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Bolden appealed his conviction claiming that the trial court was wrong in allowing in the evidence of his sexual activity except for the very specific incidents charged in the indictment. The state contended that the acts were admissible under Evidence Rule 404(b) to show a common scheme or plan. This is the accepted rule in California. People v. Thomas, 20 Cal. 3rd 457, 143 Cal. Rptr. 215, 573 P.2d 433 (Calif. 1978). The Alaska Court of Appeals found that admissions of the defendant's previous similar sexual acts, with another victim, constituted inadmissible propensity evidence and therefore reversed his conviction.

By far the most troubling case is Brower v. State, ____ P.2d _____, Ct. App. Op. No. 656 (November 28, 1986), because this case changes the rules of evidence as they relate to sexual abuse of minor cases but to no other offense. The court of appeals appears to be holding the state to a different standard, and a higher standard in sexual abuse cases than in any other type of criminal prosecution. The facts as set out by the court of appeals in Brower are:

John Brower was charged with several counts involving sexual misconduct. The convictions from which Brower appeals involves J.L.

J.L. testified to the grand jury that she was 16 years old at the time of the incidents. J.L. lived with Brower in Barrow.

J.L. testified before the grand jury about several incidents involving Brower. J.L. testified about an incident which occurred when he was watching TV in the living room of Brower's home. J.L. testified that Brower entered the room, approached J.L., and began to rub J.L. on the back and legs. J.L. allegedly told Brower to stop, but Brower continued, unbuckling J.L.'s belt. J.L. became scared and began wrestling with Brower. Brower then purported threw J.L. on the floor. J.L. picked up a metal coffee cup and threatened Brower, who then discontinued his advances. J.L. stated that he received a bruise from the fall. J.L. moved out of Brower's house for three days, then returned. The incident gave rise to Count IX, charging attempted first degree sexual assault, for which the jury convicted Brower of the lesser included offense of attempted second degree sexual assault.

J.L. also testified that Brower approached J.L. on one night as J.L. was going to sleep. Brower allegedly began to rub J.L.'s penis. No further testimony was presented. This incident gave rise to Count XI (second degree sexual assault).

At trial, J.L. testified regarding another incident describing Brower's actions: "he tried to hump on me so I told him no." However, J.L. totally recanted his description of the incident which had given rise to the sexual assault charge. The state successfully impeached J.L. with his grand jury testimony.

It is a longstanding rule in the prosecution of all forms of criminal activity that a witness, including the victim, may be impeached by his or her prior inconsistent evidence. The

impeachment evidence is to be considered by the jury as substantive evidence in the trial. The court of appeals recognized this rule in Van Hatten v. State, 666 P.2d 1047, 1050-51 (Alaska App. 1983), but decided in Brower that a new rule should prevail for sexual abuse cases. In Brower the court found that J.L.'s uncorroborated prior sworn testimony before the grand jury was an inconsistent statement with his testimony at trial and hence insufficient to convict Brower. The court reached this conclusion despite the evidence of witness tampering by Brower in sending J.L. a note prior to trial attempting to influence J.L.'s testimony.

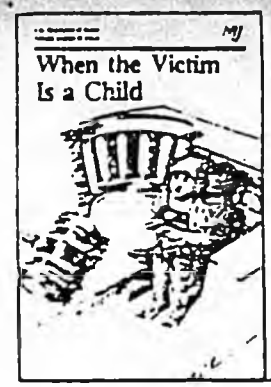
The combination of budgetary cuts and changes in the procedural law by the court of appeals over the last three years has resulted in a decline in the number of child sexual abuse cases accepted for prosecution by the district attorney's offices across the state and it can be expected that the reduced budget

of the Criminal Division of the Department of Law will substantially impair the state's ability to bring child abusers to justice.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Richard Svobodny
District Attorney



SPEC

Society to Prevent Exploitation of Children

P.O. Box 3027 *Homer, Alaska 99603*

To HESS
RE: Written testimony on H.B. 237

Dear sir or Madame,

I am sorry that I was not able to testify on behalf of SPEC's members and affiliates on 4/22/87 regarding HB237 due to an oversight on the moderaters part. I would like the opportunity however to let you know how we feel on HB 237.

We are most concerned about victims and lack of justice on their part and/or the inability of the victim to have his/her "day in court". This is especially true of children as when they are victims the court system seems to put special road blocks in their way making it extremely difficult to be heard. According to the N.I.J. publication "When the Victim is a Child" over 90% of known sexual abuse cases do not go forward to prosecution.

In the Homer area of the 38 reported sexual abuse cases in 1986 three were unfounded and 35 were either partially or fully substantiated according to D.F.Y.S. Of those 35 cases only two went forward to prosecution. There are a number of reasons for this to include fear of the defendant, delayed reporting, children not able to pinpoint dates or times, age of the child, etc.

The upshot of all this is that we have in the State of Alaska a very big fiscal note in treating these victims and in a continuing cycle of crime. Since the average sexual abuser can molest up to 80 victims we have a problem in not identifying the abuser to the public thus not making it more difficult for him to continue his crime.

We therefore support HB 237 and others that make it possible for increased evidence to be entered into the courts. This hopefully will result in a greater number of prosecutions.

I would like to take the opportunity now to adress Dana Fabes' remarks. I would suggest that she has misinterpreted the intent of section 6 or the "pattern of abuse aspect" of the legislation as she states it is "unconstitutional". Obviously this is not true as the jury still needs a unanimous decision that the act occured at least three times. In fact the act may haveoccured fifteen to two hundred times. We victims of crime are tired of hearing the twenty five cent catch word "unconstitutional" when we speak of equal rights for the victim under the law.

Where is the victim in the process? Why don't they have a constitutional right to be heard? Why is there no parity or justice for the child victim in our system?

She also stated in her testimony that legislation regarding a "pattern of abuse" is not necessary because seperate counts can be brought by establishing seperate dates and times She is disregarding a major stumbling block in the ability to prosecute as ve y young children do not orient well to dates and times and many times it takes up to two years or more before disclosure is made on the part of the child.

In adressing her remarks on the need to diffferentiate between incest and other offenders, it is true that there appears to not be much difference in offenders, however "incest is not best". As the research and common sense dictates, incest is much more devistating to the victim than non-incestuous offenses. I can tell you from first hand experience about the "non-violent" crime of incest and how it creates the runaways on the streets of Alaska and how it puts 16 year old girls in the hospital with drug overdoses and attempted suicide by knife wounds. Non-violent? Give me a break. When a childs universe i.e. parent or parents or gaurdian turns against them they have no where to go. There is no way out, the adult-child trust relationship has been totaly breeched. A child may suffer very much who has been abused by a friend of the family, neighbor, baby sitter, etc. but usually they have the support of the parents. Because of the greater responsibility of parent and or gaurdian I feel this bill is a step in the right direction.

Lastly, when she states there is "no problem" regarding the ability to prosecute these cases, and cites the full prisons as her documentation it is obvious she is not informed on the issue. Many of the three hundred people in the Homer area affiliated with SPEC can document the national statistics of only one in ten known sexual assault cases going forward to prosecution. We can document first hand the difficulties of this type of prosecution in a system that treats children with mistrust and expects them to perform as adults. Our statistics are much worse than the national average on lack of prosecution and on the frequency of abuse. These two things are undenyably linked.

Thank you for your time. Please find enclosed a brochure introducing SPEC and some legislative proposals we are currently working on.

Sincerly,

Timothy F. Bean
President Board of Directors

When the Victim
Is a Child

Society to Prevent the Exploitation of Children

A group of parents and concerned citizens in Homer have formed a non-profit organization called Society to Prevent the Exploitation of Children (SPEC). Our fundamental purpose is to decrease the alarming number of child sexual abuse cases in our state. Our primary tool for accomplishing this will be public eduation and development of public awareness. Some of our specific goals are:

--Arranging workshops and seminars for professionals and lay people.
--Developing resource material for professionals and parents.
--Publicizing the unique plight of sexually victimized children.
--Advocating child safety and the child's absolute right to be free from sexual abuse and sexual exploitation.
--Monitoring the handling and disposition of child sexual abuse cases within the court system.
--Working to make the public and the legislature aware of legislation that will lessen the trauma of child victims in the courtroom and legislation that will help ensure that truly guilty offenders don't escape justice if at all possible.

Recent nationwide statistics show that one in every three or four children will become a victim of some type of sexual abuse or assault. This is alarming information, but even more appalling is the knowledge that more than ninety percent of all reported child sexual abuses cases never go forward to prosecution (according to the National Institute of Justice in Washington, D.C.). Since the average pedophile molests approximately eighty victims, the children are indeed between a rock and a hard place.

Legislative reform is an absolute necessity if we are to see a change in the way our children are handled in the courts. Other states are already ahead of Alaska in addressing this problem. Within our judicial system children are specially handicapped. First, the criminal justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the system seems indifferent to the legitimate special needs that arise from a childs participation in the courtroom.

We have researched child abuse legislation from many other states and have examined studies and recommendations from a variety of groups and governmental agencies. Legislation that we support for the 1987 session follows

(1) Remote closed-circuit testimony for child victims. Child sexual abuse victims would be allowed to testify from a room adjoining the courtroom and they would be present via live closed-circuit television. An advocate could be present with the child, but no one else. The judge, jury, defendant and attorneys could still observe the child and question her or him. The child would still see the courtroom scene. The only difference would be that the child would not be physically present; but this can mean all the difference in the world to an abused child. A "face to face" courtroom confrontation between a child victim and an adult defendant is inherently intimidating and unfair. This legislation can be written so as not to abridge the rights given in the 14th and 6th Amendments to the Constitution. As a part of this legislation we strongly support a competency law that would deem children automatically competent to testify and would leave in the hands of the jury the question of the childs veracity and the weight to be given to the child's testimony.

(2) Hearsay exception law for certain statements. This law would allow the introduction at trial of certain types of statements made by the victim that, because of their very nature, are inherently reliable. This law would require a set of carefully crafted guidelines outlining the types of hearsay that would be admissable.

(3) Sex offender registration. We support legislation that would result in all convicted sex offenders being required to report to local authorities their whereabouts within thirty days of moving. California has had this law since the 1950's. We know that offenders move often and this law would be a deterrant to their re-offending. We feel that this law would be especially important in a state as spread out as Alaska but with such a small population base. Coupled with this legislation would be a law requiring a check for sex offense convictions for professionals working with children (i.e. this check would be required before a teacher could be certified by the state certification board to teach in Alaska).

Please help us accomplish our goal of child safety. Let your legislator know that you support such laws. Many of our members are parents of children who have been victimized by sexual abuse; if you need to talk to someone who has experienced this pain please contact us. And if you are able, support our effort by joining SPEC.

S.P.E.C.

SOCIETY TO PREVENT THE EXPLOITATION OF CHILDREN

Summary of goals and objectives in the area of legislation dealing with child sexual abuse.

The following issues represent a random compilation and are not intended to be presented in any order of perceived importance.

MANDATORY RECORD CHECKS

Professionals dealing with child molesters have learned that offenders will often seek out activities which will bring them into frequent contact with children. Criminal history checks should be required for all teachers in Alaska (before they are allowed into the classroom) and for all licensed day care providers. This criminal history check must be accomplished through the use of fingerprint cards in order to be effective. The only truly reliable way to check a person's criminal record is by having a set of applicant fingerprint cards which can be sent to the F.B.I. We feel that it would be possible to implement a system whereby other criminal history entries (for crimes other than sex offenses) are not disclosed to the school district.

EXTENDING THE STATUTE OF LIMITATIONS FOR CHILD ABUSE

It is common for victims of child sexual abuse to hide the fact of the molestation for years. Offenders freqently use threats or intimidation to ensure the victim's silence. Prosecution should not be impossible merely because the offender was successful in silencing the victim for a period of time. Although most other crimes cannot be prosecuted unless an arresthas occured within a certain amount of years (usually 3 to 5 years for felonies) the reality of molestation requires a much longer period (perhaps 10 years) within which charges may be brought against an offender.

VICTIM ADVOCATE PROVISION

A child victim should be allowed to have a person present during any testimony (including Grand Jury) for moral support. Legislation should also allow the courtroom to be cleared of spectators, in legally appropriate cases, while a child victim is testifying.

REMOTE VICTIM TESTIMONY

The United States Constitution gives all criminal defendants the right to confront and cross-examine all witnesses against them. Nevertheless, child abuse cases are unique in that the victim is a child and children are obviously going to be traumatized by the ordeal of facing their abuser in an intimidating courtroom

REMOTE VICTIM TESTIMONY, (cont.)

setting and then undergoing cross-examine, often more than once. We recognize that a fair trial requires that the child provide testimony and undergo examination by defense counsel and be visible and audible to the judge, jury, defendant and counsel. We feel that the requirements of the Constitution, and of a fair trial, would be met by having the child victim give testimony from a room adjacent to the courtroom and via closed circuit television. The only difference here is that the person is not physically present on the witness stand; the witness can be seen and heard and questioned remotely. Conversely, the witness can also see the attorneys, defendant, jury and judge. Many courts throughout the country now utilize closed-circuit television for court proceedings, including the arraignment of defendants (who remain in the correctional facility and are arraigned by a judge via closed circuit television).

OFFENDER REGISTRATION

Some states require convicted sex offenders to register with local police wherever they go and both statewide and local records are kept. Only law enforcement and the courts have access to these records. California has had such a law since the 1950's and it has withstood constitutional challenges. This law becomes more important as we realize that treatment specialists still do not know the underlying root cause of child sexual abuse. We know that offenders frequently reoffend and tend to be very mobile, traveling to avoid detection and come into contact with other victims.

PAYMENTS FOR VICTIM TREATMENT

If payment is not a means of avoiding imprisonment, convicted molesters should be required by statute to reimburse the victim or the state for the cost of victim counseling or treatment made necessary by the abuse.

QUALIFICATION OF CHILDREN AS WITNESSES (COMPETENCY)

Children of any age should not have to "qualify" at a hearing before being allowed to testify. A child's competency should be a matter for the jury to weigh. Currently, adults who may be murderers, perjurers or habitual liars do not have to specially qualify in order to provide testimony; nor should children. Legislation should establish that all child victims are competent to testify. Only the jury should decide the truthfulness and accuracy of a witnesses' testimony.

CHILD VICTIM HEARSAY

In situations where a child victim made a statement describing a sexual act, under circumstances strongly indicating the statements reliability, the statement should be used as evidence, particularly where the child is too psychologically traumatized to testify.

PRESUMPTIVE SENTENCING

The State of Alaska should retain, in it's original form, mandatory jail sentences for first degree offenses. The State Court of Appeals has recently begun handing down reversals of major child abuse cases involving presumptive sentencing. The Court of Appeals has said that the presumptive sentencing legislation is not clear on several issues. The legislature should act speedily to clean up any problem areas in the legislation so that the intent of the original legislation is carried out by the courts. Additionally, the legislature should recognize that eight year presumptive sentences have had the side effect of causing numerous plea bargains resulting in second degree convictions. While this is often a desireable disposition (frequently sparing the victim the trauma of a trial and ensuring a conviction), it also frequently results in little or no jail time. Recognizing that treatment programs generally take at least two or three years, and that jail time can be an effective deterrant, we advocate a presumptive sentencing law that would require jail sentences of two to three years for convictions of sexual abuse of a minor in the second degree (AS11.41.436). This would have the added benefit of separating the offender from any children at least for the period of time that the offender is in custody.

MANDATED PUBLIC SCHOOL PROGRAMS

Legislation should require and fund school programs which involve educating children to recognize, report and avoid sexual abuse and abduction. Educating children about sexual abuse and what to do about it is our best way of breaking the cycle of child sexual abuse.

DIVERSION OF CHILD MOLESTERS

Diversion should be specifically forbidden in all classes of child sexual abuse. Diversion involves the prosecutor agreeing to forego prosecution if the offender enters into an agreement where he/she promises to abide by certain conditions, i.e. receiving treatment.

SPECIALIZED INVESTIGATION AND PROSECUTION

Legislation should create and fund a task force(s) of specially trained investigators and prosecutors within the Department of Law who would be responsible for prosecution of most child abuse cases in the state. Such units would utilize "vertical prosecution" (the same prosecutor at all stages), limited plea bargaining and other techniques designed to increase the chances of conviction and imprisonment of the offender while minimizing the trauma to the victim(s).

HOUSE COMMITTEE REPORT

(7)

Date referred: 4/1/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 5/1/87

The Health, Education and Social Services **Committee has considered** HB 237

"An Act relating to murder, assault, and the physical and sexual abuse of children; the admissibility of certain evidence in criminal prosecutions; amending Rule of 404 of the Alaska Rules of Evidence; and providing for an effective date."

RECOMMENDS:

[ ] **replace with** CSHB 237 (HESS) [ ] **the same title**
[ ] **attached amendment(s)** [✓] **a new title**

[ ] **do pass**
[ ] **do not pass**
[✓] **no recommendation**
[ ] **individual recommendations**
[ ] **additional referral to the** _____ **Committee**

ADOPTS: [ ] _____ **letter of intent**

ATTACHES NEW FISCAL NOTE(s):

[/] **fiscal impact**
[4] **zero fiscal note**
[ ] **zero with analysis**
[ ] **same as previous fiscal note published** _____
[ ] **same as previous zero fiscal note published** _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Bruce Hanley - No Rec
Ed - no rec
Mike Kopp no rec
Bill Hudson No - Rec.
Mc Cavanaugh No rec.
Bill Phillips N. Rec
Dave Bruly No Rec

Mike Kopp
Co-Chairman's signature
Ed Rogers

HB 237 An Act relating to murder, assault, and the physical and sexual abuse of children; the admissibility of certain evidence in criminal prosecutions; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date.

File Contents

1) Copy of HB 237

2) Zero Fiscal Note, Public Defender Agency, 4/8/87

3) Zero Fiscal Note, Office of Public Advocacy, 4/9/87

4) Fiscal Note, Department of Corrections, 4/21/87, with analysis

5) Remarks to House by Representative Ulmer, 3/27/87

6) Department of Law letter, 2/11/87, re Impact of FY 88 budget on sexual abuse cases

7) Legislative Affairs Agency Memo, 4/1/87

8) Public Defender Agency letter, 4/9/87

9) Zero Fiscal Note, Department of Law, 4/23/87

10) Letter, Gilmore & Feldman to Niilo Koponen, 4/9/87

11) CS for HB 237 (HESS), Levy 4/30/87

5-0809L
Levy
4/30/87

Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 237 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to murder, assault, and the physical and sexual abuse of children; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

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

* Section 1. AS 11.41.110(a) is amended to read:

(a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; [OR]

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants; or

(4) under circumstances manifesting an extreme indifference

to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse or gross neglect of the child that results in the death of the child.

* Sec. 2. AS 11.41.110 is amended by adding a new subsection to read:

(c) In this section, "abuse or gross neglect" includes intentional bodily impact, restraint, confinement, administration of lethal chemicals or drugs that create a substantial and unjustifiable risk that the child will suffer serious physical injury, or knowingly exposing the child to conditions which create a substantial risk that the child will suffer serious physical injury due to burns, hypothermia, or suffocation.

* Sec. 3. AS 11.41.200(a) is amended to read:

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

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; [OR]

(3) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) the person engages in a pattern or practice of abuse or gross neglect of a child under the age of 16 that results in serious physical injury to the child.

* Sec. 4. AS 11.41.200 is amended by adding a new subsection to read:

(c) In this section, "abuse or gross neglect" includes intentional bodily impact, restraint, confinement, administration of lethal chemicals or drugs that create a substantial and unjustifiable risk that the child will suffer serious physical injury, or knowingly

exposing the child to conditions which create a substantial risk that the child will suffer serious physical injury due to burns, hypothermia, or suffocation.

* Sec. 5. AS 11.41 is amended by adding new sections to read:

Sec. 11.41.441. REPEATED SEXUAL ABUSE OF A MINOR IN THE FIRST DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the first degree if, being 16 years of age or older and having authority over a child under the age of 13, the person engages in a pattern or practice of sexual penetration with a child 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 a pattern or practice of sexual penetration with another person.

(b) Repeated sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 11.41.442. REPEATED SEXUAL ABUSE OF A MINOR IN THE SECOND DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the second degree if, being 16 years of age or older and having authority over a child under the age of 16, the offender

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

(2) engages in a pattern or practice of sexual contact with a child who is under 13 years of age or aids, induces, causes, or encourages a child under 13 years of age to engage in a pattern or practice of sexual contact with another person.

(b) Repeated sexual abuse of a minor in the second degree is a

class A felony.

* Sec. 6. AS 11.41 is amended by adding a new section to read:

Sec. 11.41.444. REPEATED SEXUAL ABUSE OF A MINOR IN THE THIRD DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the third degree if

(1) being 16 years of age or older and having authority over a child under the age of 16, the person engages in a pattern or practice of sexual contact with a child who is 13, 14, or 15 years of age and at least three years younger than the person, or aids, induces, causes, or encourages a child who is 13, 14, or 15 years of age and at least three years younger than the person to engage in a pattern or practice of sexual contact with another person; or

(2) being under 16 years of age and having authority over a child under the age of 13, the person engages in a pattern or practice of sexual penetration or sexual contact with a child who is under 13 years of age and at least three years younger than the person.

(b) Repeated sexual abuse of a minor in the third degree is a class B felony.

* Sec. 7. AS 11.41.445 is amended to read:

Sec. 11.41.445. AFFIRMATIVE DEFENSES [GENERAL PROVISIONS]. (a) In a prosecution under AS 11.41.434 - 11.41.444 [AS 11.41.434 - 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 the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 - 11.41.444 [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.

* Sec. 8. AS 11.41 is amended by adding new sections to read:

ARTICLE 6. GENERAL PROVISIONS.

Sec. 11.41.600. PATTERN OR PRACTICE. In a prosecution under this chapter for an offense that includes as one of its elements that a person engaged in a "pattern or practice" of conduct toward a child

(1) it is not necessary that the person be separately charged with specific incidents of prohibited conduct; however, prosecution for separate incidents is not precluded;

(2) to support a conviction, each juror in a jury trial must be convinced beyond a reasonable doubt that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to particular incidents;

(3) if a person who is separately charged with a specific incident of prohibited conduct is found not guilty of an incident, that incident may not be relied upon to establish the pattern or practice; and

(4) incidents occurring before the effective date of the law establishing the offense may be used to establish the pattern or practice as long as there was at least one incident that occurred after the effective date of the law.

Sec. 11.41.610. DEFINITIONS. In this chapter

(1) "having authority over a child" means

(A) the child is entrusted to the person's care by authority of law;

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

(C) the person resides as a member of a social unit in the same household as the child; or

(D) the child has been temporarily entrusted to the person's care;

(2) "pattern or practice" means three or more incidents of the prohibited conduct.

* Sec. 9. AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve

less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk or physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* Sec. 10. AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, is designated in the section defining it. A felony under Alaska law defined outside this title for which no penalty is specifically provided is a class C felony.

* Sec. 11. AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

(1) $75,000 for murder in the first or second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

* Sec. 12. AS 12.55.125(i) is amended to read:

(i) A defendant convicted of sexual assault in the first degree, repeated sexual abuse of a minor in the first degree, or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years.

* Sec. 13. Rule 404, Alaska Rules of Evidence, is amended by adding a new subsection to read:

(c) Notwithstanding (b) of this rule, in a prosecution for physical assault upon or sexual misconduct with a child under the age of 16, evidence of prior acts of the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

* Sec. 14. Section 13 of this Act is retroactive and applies

(1) to evidence of acts committed before the effective date of

this Act; and

(2) in trials involving offenses committed before the effective date of this Act.

* Sec. 15. This Act takes effect immediately under AS 01.10.070(c).