BILL NO: SB 231

DATE: April 10, 1987

TITLE: An Act relating to sexual abuse of a minor

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence & Sexual Assault

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports the concept of SB 231 which adds a provision to the sexual abuse of a minor statutes to include an offense against a victim who is residing as a member of a social unit in the same household with the offender. Such a relationship is not covered in statutes describing first and second degree sexual abuse of a minor, yet a notable number of minors are sexually assaulted by live-in partners of the parent who are recognized by the child as a parental or authoritative figure. In many instances, encouragement is given to accept live-in partners as surrogate parents and to comply with any parental authority which may be extended. In essence this "sets up" a child to yield to an adult who is not the legally-recognized custodian, but who is in a position to exert a great degree of control and influence. Therefore, the child is vulnerable to this authority and should be specifically protected in statute.

The language in Section 11.41.434(a)(2)(C) is too broad because it could include consensual sexual penetration of a 15-year-old by a 19-year-old. Also the Council feels that the word illegitimate in Section (B) should be replaced with a term with less stigma on the child. It could read "a child born out of wedlock".

William R. Nix
Acting Commissioner

Backup

Official Business

COMMITTEE: House HESS Committee

DATE: May 16, 1987

SIGN-IN

Subject of meeting:

CS SB 231 (HESS) - Sexual Abuse of a Minor

CS SB 212 (HESS) - Special Education Service Agency

NAME	ADDRESS	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY? & Which Bill
Barbara Nikolai	P.O. Box N Juneau 99811	4356	CDVSA	SB 231
Margot Dick	130 Seward St. Room 301	6-3650	ANDVSA	SB231 if necessary

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/15/87

FURTHER REFERRALS: Judiciary
Finance

DATE: May 16, 1987

The Health, Education and Social Services Committee has considered CSSB 231(Hess)

"An Act relating to sexual abuse of a minor."

RECOMMENDS:

[ ] replace with ______________ [ ] 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

[ ] 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:

[signature] No Rec

[signature] No Rec

[signature] Ellis No Rec.

[signature] no rec

[signature] no rec

[signature] No Rec.

[signature] no rec

[signature]

Chairman's signature

[signature] Ellis

Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

OFFICIAL BUSINESS

POUCH V
JUNEAU, AK 99811
465-3759

M E M O R A N D U M

TO: REPRESENTATIVE JOHN SUND
CHAIR, HOUSE JUDICIARY COMMITTEE

FROM: REPRESENTATIVE NIILO KOPONEN
REPRESENTATIVE JOHNNY ELLIS
CO-CHAIRS, HOUSE HESS COMMITTEE

RE: CSSB 231 (HESS) "Sexual abuse of a minor"

DATE: 5/16/87

We request the Judiciary Committee consider this bill over the interim as it considers the other child abuse bills, HB 229 and HB 237.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: CSSB 231/HESS
Publish Date: 4-8-87

REQUEST:

Revision Date:
Title: "An Act related to sexual abuse of a minor
Sponsor: Halford, Jones, Duncan
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						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	Ø	Ø	Ø	Ø	Ø	Ø
CAPITAL	Ø	Ø	Ø	Ø	Ø	Ø
REVENUE	Ø	Ø	Ø	Ø	Ø	Ø

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	Ø	Ø	Ø	Ø	Ø	Ø

POSITIONS:

FULL-TIME	Ø	Ø	Ø	Ø	Ø	Ø
PART-TIME						
TEMPORARY						

ANALYSIS:

This legislation should have minimal impact on the Department of Corrections.

SR

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

Approved by Commissioner: Susan Humphrey-Barnett SH-B
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

CORRECTIONS

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: CS SB 231 HES-S
Publish Date:

REQUEST:

Revision Date:
Title: An Act relating to sexual abuse of a minor
Sponsor: Halford, Jones, etc.
Requestor: Senate HESS

Agency Affected: Public Safety
BRU: Council on Domestic Violence & Sexual Assault
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						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS

JNR 4/17/87

Prepared by: Barbara Miklos, Executive Director
Division: Council on Domestic Violence & Sexual Assault
Phone: 465-4356
Date: 4-10-87

Approved by Commissioner:
Agency: Public Safety
Date: 4/13/87

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

Public Safety

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version CS SB 231 (FIN)
Publish Date: 4/2/87

REQUEST:

Revision Date: 4/10/87
Title: "An Act relating to sexual abuse of a minor."
Sponsor: Halford, Jones, et.al.
Requestor: Senate 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:

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 4/10/87

Approved by Commissioner: Garrey Peska
Date: 4/13/87
Agency: Department of Administration

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

Public Advocacy

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: CS SB 231/HESS
Publish Date:

REQUEST:

Revision Date: April 10, 1987
Title: "An Act relating to sexual abuse of a minor"
Sponsor: Sen. Halford
Requestor: Senate Judiciary

Agency Affected: Department of Administrat
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

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: April 10, 1987

Approved by Commissioner: Garrey Peska
Agency: Department of Administration
Date: 4/13/87

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

Public Defender

POSITION PAPER

SB 231

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 impact. 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 below X

Constitutional impact: ____ None See analysis below X

This bill is apparently designed to expand the offense of sexual abuse of a minor in the first degree to include persons who have authority over a child in the household but are not legally related to that child. Unfortunately, this bill is drafted so broadly that it could apply to a number of situations which may not merit the eight-year presumptive term for a first offender of this offense.

Specifically, the bill would allow conviction of an eighteen year old exchange student who has a romantic relationship with the seventeen year old daughter of the family with whom he is living. If sexual penetration including digital penetration were to occur, that eighteen year old would be subject to prosecution and conviction with an eight-year presumptive term. Similarly, if two adults with teenage children were to begin to live together, and the teenagers, age eighteen and seventeen were to have a romantic relationship which involved any sexual penetration, the eighteen year old could be convicted of this offense.

Since the apparent goal of this legislation is to make culpable persons in a quasi-stepparent relationship with a child victim, regardless of whether that adult is married to the victim's parent or guardian, the statute should be framed more specifically to target that population.

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

Dana Fabe, Director
Public Defender Agency — Date 4/10/87

Brant McGee, Director
Office of Public Advocacy — Date 4/10/87

Commissioner Garrey Peska
Department of Administration — Date 4/13/87

MEMO

TO: Senator Jay Kerttula
Chairman
Senate Judiciary Committee

DATE: April 24, 1987

FROM: Dana Fabe
Public Defender

RE: Senate Bill No. 229

I have prepared a brief analysis highlighting the most problematical constitutional and policy issues raised by SB 229. The bill appears to be designed to overrule a variety of appellate decisions unfavorable to the state in cases involving child victims. Since many of the decisions are constitutionally based, the corresponding provisions of the bill appear to be unconstitutional. In this analysis, I will try to pinpoint the most problematical sections of the bill.

1. 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 (Sections 5-8). 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.

A person who is convicted on the first offense of Repeated Sexual Abuse of a Minor in the First Degree, will be subject to a 13-year presumptive jail term. 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 25 years presumptively, even if the prior felony were a theft conviction when the defendant was a young adult.

Repeated Sexual Abuse of a Minor in the Second Degree is a Class A felony requiring an 8-year presumptive term for the first offender. The conduct proscribed in this statute is any sexual contact, including fondling conduct. Under this statute, the incest offender convicted of Repeated Sexual Abuse of a Minor in the Second Degree would receive an 8-year presumptive term. The current offense of Sexual Abuse of a Minor in the Second Degree is a Class B felony with no presumptive term for the first offender. Thus, an assailant who grabbed and fondled a child on the bike path would face no presumptive term since he would not meet the "repeated contact" requirement of Repeated Sexual Abuse of a Minor in the Second Degree, while the incest offender who fondled would receive 8 years.

In summary, the only impact of this statute is to significantly raise the presumptive term for an incest offender on his first conviction. The proposed bill is not necessary to ensure adequate punishment of incest offenders. If the state can prove three incidents under the current Sexual Abuse of a Minor statute, they are presently free to file three counts and argue for consecutive imprisonment, which could total 24 years if the judge found it to be necessary. The bill will be expensive in that it will cause higher jail populations, as well as more jury trials and appeals.

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 has reached a contrary result. This proposed provision is unconstitutional.

3. Prior inconsistent statements as sole evidence at trial. Section 11 of the bill attempts to change the current state of the law as announced in Brower v. State, a 1986 Court of Appeals case. The Brower decision covers situations where an alleged victim gives a statement about an offense but later recants or fails to remember the details of the offense. Under Brower, the prior inconsistent statement can come in as substantive evidence to support a conviction. However, there must be some evidence to corroborate the statement, since there is no ability to cross examine the inconsistent statement which was made out of court.

The bill's proposal, which would allow a prior inconsistent statement to support a conviction even if it were the sole evidence at trial, is constitutionally infirm, since the federal constitution prohibits conviction except upon proof beyond a reasonable doubt. The Court of Appeals' decision in Brower took no radical or novel approach; 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.

4. Prior bad acts--changes to Evidence Rule 404. This proposed section in the bill (Section 14) states that in a prosecution for physical or sexual assault on a child, evidence of prior bad acts of the defendant involving the same victim or other victims is admissible to show the defendant's disposition to commit the offense.

This provision is arguably not constitutional, since 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. The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. This change does not appear to be necessary since the existing rules of evidence, particularly as interpreted by the Alaska Courts, broadly opened the doors to evidence of prior bad acts when that evidence is probitive of sometime other than criminal disposition.

These are the most problematical of the bill's provisions. There are other problems with the bill which are outlined in greater detail in an earlier memo prepared for Representatives Ellis and Koponen on HB 237, an identical bill which was introduced in the House.

I appreciate this opportunity for input on this bill. Please do not hesitate to contact me if I can provide any further information on this or any other proposed legislation.

DF:sh

STATE OF ALASKA

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-7541

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
Public Defender

DF:rjb