

HB

237

STATE OF ALASKA THE LEGISLATURE

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Mary Van Nimwegen

House Judiciary:

5/5/87

10/23/87 - Ketchikan City Council Chambers

1/21/88

1/26/88

2/10/88

2/19/88

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

1 IN THE HOUSE
2
3 CS FOR HOUSE BILL NO. 237 (HESS)
4 IN THE LEGISLATURE OF THE STATE OF ALASKA
5 FIFTEENTH LEGISLATURE - FIRST SESSION
6 A BILL
7 For an Act entitled: "An Act relating to murder, assault, and the physical
8 and sexual abuse of children; amending Rule 404 of
9 the Alaska Rules of Evidence; and providing for an
10 effective date."
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
12 * Section 1. AS 11.41.110(a) is amended to read:
13 (a) A person commits the crime of murder in the second degree if
14 (1) with intent to cause serious physical injury to another
15 person or knowing that the conduct is substantially certain to cause
16 death or serious physical injury to another person, the person causes
17 the death of any person;
18 (2) the person knowingly engages in conduct [INTENTIONALLY
19 PERFORMS AN ACT] that results in the death of another person under
20 circumstances manifesting an extreme indifference to the value of
21 human life; [OR]
22 (3) acting either alone or with one or more persons, the
23 person commits or attempts to commit arson in the first degree, kid-
24 napping, sexual assault in the first degree under AS 11.41.410(a)(1)
25 or (2), sexual assault in the second degree, burglary in the first
26 degree, escape in the first or second degree, or robbery in any degree
27 and, in the course of or in furtherance of that crime, or in immediate
28 flight from that crime, any person causes the death of a person other
29 than one of the participants; or
30 (4) under circumstances manifesting an extreme indifference

Covington.

Physical and physical

1 to the welfare of a child under the age of 16, the person engages in a
2 pattern or practice of abuse or gross neglect of the child that re-
3 sults in the death of the child. *directly causes*

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

5 (c) In this section, "abuse or gross neglect" includes inten-
6 tional bodily impact, restraint, confinement, administration of lethal
7 chemicals or drugs that create a substantial and unjustifiable risk
8 that the child will suffer serious physical injury, or knowingly
9 exposing the child to conditions which create a substantial risk that
10 the child will suffer serious physical injury due to burns, hypother-
11 mia, or suffocation.

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

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

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

16 (2) with intent to cause serious physical injury to anoth-
17 er, the person causes serious physical injury to any person; [OR]

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

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

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

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

1 exposing the child to conditions which create a substantial risk that
2 the child will suffer serious physical injury due to burns, hypo-
3 thermia, or suffocation.

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

5 Sec. 11.41.441. REPEATED SEXUAL ABUSE OF A MINOR IN THE FIRST
6 DEGREE. (a) A person commits the crime of repeated sexual abuse of a
7 minor in the first degree if, being 16 years of age or older and
8 having authority over a child under the age of 13, the person engages
9 in a pattern or practice of sexual penetration with a child who is
10 under 13 years of age or aids, induces, causes, or encourages a person
11 who is under 13 years of age to engage in a pattern or practice of
12 sexual penetration with another person.

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

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

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

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

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

1 class A felony.

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

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

6 (1) being 16 years of age or older and having authority
7 over a child under the age of 16, the person engages in a pattern or
8 practice of sexual contact with a child who is 13, 14, or 15 years of
9 age and at least three years younger than the person, or aids, in-
10 duces, causes, or encourages a child who is 13, 14, or 15 years of age
11 and at least three years younger than the person to engage in a pat-
12 tern or practice of sexual contact with another person; or

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

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

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

20 Sec. 11.41.445. AFFIRMATIVE DEFENSES [GENERAL PROVISIONS]. (a)
21 In a prosecution under AS 11.41.434 - 11.41.444 [AS 11.41.434 - 11.-
22 41.440] it is an affirmative defense that, at the time of the alleged
23 offense, the victim was the legal spouse of the defendant unless the
24 offense was committed without the consent of the victim.

25 (b) In a prosecution under AS 11.41.410 - 11.41.444 [AS 11.-
26 41.410 - 11.41.440], whenever a provision of law defining an offense
27 depends upon a victim's being under a certain age, it is an affirma-
28 tive defense that, at the time of the alleged offense, the defendant
29 reasonably believed the victim to be that age or older, unless the

1 victim was under 13 years of age at the time of the alleged offense.

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

3 ARTICLE 6. GENERAL PROVISIONS.

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

7 (1) it is not necessary that the person be separately
8 charged with specific incidents of prohibited conduct; however, prose-
9 cution for separate incidents is not precluded;

10 (2) to support a conviction, each juror in a jury trial
11 must be convinced beyond a reasonable doubt that at least three inci-
12 dents of prohibited conduct occurred, but the jury need not be unani-
13 mous as to particular incidents;

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

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

22 Sec. 11.41.610. DEFINITIONS. In this chapter

23 (1) "having authority over a child" means

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

26 (B) the child is the person's son or daughter, includ-
27 ing an illegitimate or adopted child, or a stepchild;

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

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

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

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

6 (a) For purposes of sentencing under AS 12.55, all offenses
7 defined in this title, except murder in the first and second degree,
8 sexual assault in the first degree, sexual abuse of a minor in the
9 first degree, repeated sexual abuse of a minor in the first degree,
10 misconduct involving a controlled substance in the first degree, and
11 kidnapping, are classified on the basis of their seriousness, accord-
12 ing to the type of injury characteristically caused or risked by
13 commission of the offense and the culpability of the offender. Except
14 for murder in the first and second degree, sexual assault in the first
15 degree, sexual abuse of a minor in the first degree, repeated sexual
16 abuse of a minor in the first degree, misconduct involving a con-
17 trolled substance in the first degree, and kidnapping, the offenses in
18 this title are classified into the following categories:

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

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

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

29 (4) class A misdemeanors, which characteristically involve

1 less severe violence against a person, less serious offenses against
2 property interests, less serious offenses against public adminis-
3 tration or order, or less serious offenses against public health and
4 decency than felonies;

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

9 (6) violations, which characteristically involve conduct
10 inappropriate to an orderly society but which do not denote criminal-
11 ity in their commission.

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

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

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

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

25 (1) \$75,000 for murder in the first or second degree,
26 sexual assault in the first degree, sexual abuse of a minor in the
27 first degree, repeated sexual abuse of a minor in the first degree,
28 kidnapping, or misconduct involving a controlled substance in the
29 first degree;

- 1 (2) \$50,000 for a class A, B, or C felony;
2 (3) \$5,000 for a class A misdemeanor;
3 (4) \$1,000 for a class B misdemeanor;
4 (5) \$300 for a violation.

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

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

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

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

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

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

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

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

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

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

1 this Act; and

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

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

PUBLIC DEFENDER AGENCY

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October 20, 1987

Representative Fran Ulmer
1700 Angus Way
Juneau, Alaska 99801

Re: House Bill 237

Dear Representative Ulmer,

Thank you for giving me the opportunity to meet with you last Wednesday on House Bill 237. Following is the specific information which I offered to provide to assist you in your work on the bill. I have also noted some of the suggested drafting changes in the first few sections of the bill. I will provide a copy of these to the House Judiciary Committee so that they are aware of modifications in my position on these provisions.

A. Second Degree Murder -- Extreme indifference to the welfare of a child under 16.

As we discussed, my concerns over this section would be alleviated by some drafting changes. I understand the desire for a statute which involves a "pattern or practice of abuse," particularly since it solves perceived evidentiary problems regarding past abuse of that child victim. First, I suggest changing the circumstances to those manifesting an "extreme indifference to the health and physical welfare" of a child under 16, in order to narrow the focus to physical rather than psychological or mental abuse.

Second, actions exhibiting this extreme indifference must directly cause the death to avoid covering accidental deaths. The phrase "results in" should be deleted and replaced by "directly causes."

Finally, my concerns regarding the broad application of this section would be quelled by a much more narrow and specific definition of abuse in Sections 2 and 4. Abuse is currently defined in the proposed legislation as "bodily impact, restraint or confinement." This broad definition could include many normal disciplinary actions taken by parents, including spanking and

"time-out" in the child's bedroom. I 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. Assault in the First Degree -- Extreme indifference to the welfare of a child.

The sections regarding Assault in the First Degree closely track the second degree murder sections, discussed above. Similar changes should be made in these sections. Thus, Section (a)(4) of AS 11.41.200 should provide "the person engages in a pattern or practice of abuse of a child under the age 16 that directly causes serious physical injury to the child." Section 4 should define abuse in a manner identical to my suggested revisions in Section 2.

C. Repeated Sexual Abuse of a Minor (RSAM)

I understand your purpose for suggesting a repeated sexual abuse of a minor statute, particularly in that evidentiary issues regarding prior bad acts of a perpetrator against the victim would automatically come in to prove "pattern and practice." If such a statute is adopted for these evidentiary reasons, I have

three major areas of concern:

1. Exhanced Presumptive Sentence (Removed by HESS)

First, the presumptive term for this offense should not exceed the already severe presumptive for those convicted under the current child sexual assault statutes. Virtually all family sexual abuse cases involve repeated abuse and prosecutors would have unbridled power to determine a higher sentence simply by selecting this charge. As we discussed the other day, although there may be some offenders who deserve lengthy periods of incarceration, others who willingly admit their conduct, seek treatment and exhibit remorse and a wish to avoid putting the victim through legal proceedings, may not require a lengthy presumptive term, particularly on a first offense. The HESS committee's removal of an increased presumptive term allays my concern in this area.

2. Unanimous Jury Verdict

My second concern with this portion of the bill relates to unanimous jury verdicts. Your bill would remove the requirement for a unanimous jury verdicts in that the jury need not be unanimous as to any particular incident of sexual abuse. Unanimous jury verdicts are constitutionally required. In State v. James, 698 P.2d 1161, 1165 (Alaska 1985), the Alaska Supreme Court interpreted the unanimity requirement to require unanimity as to the single criminal incident involved. James was applied in Bell v. State, 716 P.2d 1004 (Alaska App. 1986). Evidence at trial showed Bell had assaulted his wife on May 2nd and May 6th. The state was allowed to argue that believing the evidence as to either incident would support the verdict. The jurors were not told that they had to agree unanimously on which assault Bell committed. The Court of Appeals reversed, finding a violation of the unanimous jury requirement.

The fact that a pattern and practice of abuse forms the basis of the crime does not allow circumvention of the constitutional requirement of unanimity. In the federal RICO (racketeering) cases which involve "pattern and practice" language, there is an implicit assumption that all the jurors must agree on the individual acts establishing the criminal pattern. For example, United States v. Brown, 583 F.2d 659, 669 (3rd Cir. 1978); United States v. Peacock, 654 F.2d 339, 348 (5th Cir. 1981); and United States v. Boffa, 688 F.2d 919, 933-34 (3rd Cir. 1982), all refer to "the jury" collectively having found the defendant guilty of the particular acts which established the alleged criminal pattern. Further, in Boffa, the trial court apparently had the jurors specifically indicate which particular acts they agreed upon. 688 F.2d at 924.

United States v. Morse, 785 F.2d 771 (9th Cir. 1986), which you mentioned in your letter last spring, although not directly on point for the present dispute, supports a requirement of unanimity. Morse holds explicitly that jury unanimity is required, citing United States v. Echeverry, another 9th Circuit decision, which interprets unanimity as referring to agreement on the "particular set of facts."

Finally, as we discussed in our meeting last week, nothing in Covington requires a child to name a specific date of a sexual assault. A victim can testify that step-dad assaulted her many times, including in particular one time in the living room, one time in the bedroom and one time in the bathroom. Often children will state that one assault happened before Christmas while the other occurred at Easter time. I am not aware of a single acquittal based upon the victim's inability to describe separate specific incidents. Furthermore, despite the literally dozens of sex abuse cases which have been appealed since Covington, only one has been reversed due to a problem with jury unanimity. This was not a case where a victim could not specify separate incidents of assault. Instead at trial, there was testimony describing several separate assaults, but the jurors received no instruction requiring them to agree unanimously that at least one of the specific alleged acts was proved. Strehl v. State, 722 P.2d 226, 229 (Alaska App. 1986).

3. Definition of "Authority Over Child"

The last troublesome portion of the Repeated Sexual Abuse of a Minor provision involves the definition of "having authority over a child." This language is broad and potentially problematic, particularly with respect to a romantic relationship between a young teenager and an exchange student or step-sibling who is three years older and living in the family unit.

As I mentioned, I worked a bit with Maureen Weeks of Senator Halford's office in an attempt to resolve a similar problem in SB 231. The resolution was to require the child to be under the authority of the member of the social unit. AS 11.41.434(a):

[(C) at the time of the offense, is
residing as a member of a social unit
in the same household with the offender
and is under the authority of the offender.]

D. 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.

Brower held that if the only evidence at trial is a victim's prior inconsistent statement, some corroboration of that out-of-court statement is necessary. As I mentioned the other day, the Court of Appeals recently clarified the type of corroborating evidence it had in mind. In Bodine v. State, ___ P.2d ___, Op. No. 708 (Alaska App., May 29, 1987), the court stated that the specificity with which a young child was able to describe the perpetrator's acts in and of itself provided "intrinsic assurance of the reliability of her statement..." Slip Op. at 8-9. Other types of corroborating evidence were permitted to substantiate a prior inconsistent statement which formulated the only direct evidence of the charge. They involved the mother's lack of cooperation with the authorities when told that her husband would have to go to jail and psychological opinions that the victim was an abused child despite lack of any details as to the type of abuse or by whom she had been abused. There need not be other witnesses to or physical evidence of the abuse to satisfy the corroboration requirement. Thus, the Court of Appeals' adoption of a flexible standard of corroboration to support a prior inconsistent statement should remove many concerns regarding the impact of the Brower decision.

E. Rule 404 Alaska Rules of Evidence

As we discussed the other day, 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 justification 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 covering a 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

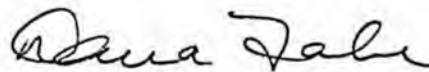
had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

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 shield 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. This body of case law, when combined with the new evidentiary freedom in your proposals of pattern and practice offenses for murder in the second degree, assault in the first degree, and repeated sexual abuse of a minor, will hopefully alleviate your concerns that the jury is not hearing all evidence which is relevant to the charge.

Again, I appreciate your willingness to discuss various provisions of this bill with me, and I hope that this letter provides you with additional information which may be helpful to you. I will provide a copy to House Judiciary so that they are aware of my modified position on the first sections of your bill. I look forward to working with you in the future.

Very truly yours,



Dana Fabe
Public Defender

DF:cs

cc: ✓ Representative John Sund
Chairman, House Judiciary Committee
2504 2nd Street
Ketchikan, Alaska 99901

1 IN THE HOUSE

BY HUDSON, ULMER, LARSON,
MENARD, HOFFMAN AND GOLL

2

HOUSE BILL NO. 229

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to homicide by abuse."

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

8 * Section 1. AS 11.41 is amended by adding a new section to read:

9

Sec. 11.41.105. HOMICIDE BY ABUSE. (a) A person commits the
10 crime of homicide by abuse if, under circumstances manifesting an
11 extreme indifference to the life of a child under 16 years of age, the
12 person engages in a pattern or practice of assault or torture of the
13 child that ~~results~~ ^{directly causes} the death of the child.

14 (b) Homicide by abuse is an unclassified felony and is punish-
15 able as provided in AS 12.55.

16 * Sec. 2. AS 12.55.125(a) is amended to read:

17 (a) A defendant convicted of murder in the first degree or
18 homicide by abuse shall be sentenced to a definite term of imprison-
19 ment of at least 20 years but not more than 99 years.

DOMESTIC VIOLENCE*

Statement of Position

1. The League of Women Voters of Alaska believes all individuals have the right to be safe from physical abuse and neglect in their own homes and the right to live in a fear-free environment. A special degree of protection is needed for vulnerable, dependent people regardless of age or geographic location.
2. Intervention by public agencies should take place when there is evidence of physical abuse of one family member by another. Domestic violence requires a coordinated response by law enforcement officials, prosecutors, judges, and social service agencies. All people, especially crisis intervention professionals, who work with domestic violence incidents should receive special training. When necessary to separate family members, it is preferable to remove the perpetrator rather than the victim from the home, particularly if the victim is a child. Physical assault should be prosecuted whether or not the victim presses charges.
3. Federal, state, and local governments should share community responsibility for the health and safety of family members. Costs should be shared by all levels of government and by contributions from private sources.

Amplification

Special attention should be paid to groups who have been inadequately served in the past, such as adolescents, the elderly, and rural residents.

We should explore the option of a special fund into which perpetrators would be obliged to pay.

Public services available in the state should include:

- Educated police intervention and protection
- Rehabilitation and treatment for incarcerated offenders
- Alternatives to incarceration
- Shelter for victims and their dependents
- * Preventive education, especially in the schools, on the issues of psychological, physical, and sexual abuse
- Counseling of victims, ~~perpetrators~~, and other affected family members
- Medical care and legal aid for victims
- Alcohol and drug abuse treatment
- Coordinated social services delivery
- Anger control training
- Alternative housing for perpetrators

*Definition: Domestic Violence is physical harm or the threat of physical harm between household or family members. Physical harm includes abuse, neglect, and sexual assault.

Established 1986
League of Women Voters of Alaska

Child Case Position on reverse →

STATEMENT OF POSITION: The League of Women Voters of Alaska supports the availability of child care for everyone who needs or wants it with priority to those children whose need is greatest. The members of the League believe users should be primarily responsible for child care financing. Supplemental financial and regulatory responsibilities should be shared by all levels of government to insure that child care is of high quality and available to those who need it.

AMPLIFICATION: Child care objectives include providing enriching and varied experiences for children of parents who must or choose to work, or parents who are physically handicapped or who need emotional relief from childrearing. Child care might also provide social, emotional and developmental experiences which may be lacking in the home or provide protective service, emergency care or drop-in care.

Parents determination of whether to send their child or where to send them for child care should in all instances be voluntary. Parental involvement should be strongly encouraged in any child care situation. An important consideration is the availability of parent training and counseling. To provide a choice, different types of care should be available with an emphasis on center care and family home child care, but including in-home child care. Facilities are acceptable in any safe place, e.g., a storefront, public or private building, portable unit, or other location.

Nurturing care, that in which the caregiver is aware of and attempts to meet the individual needs of each child, is the minimum each child should receive on a full time or regular basis. Custodial care, meeting physical safety needs alone, is unacceptable for child care. Emphasis should be placed upon comprehensive care, i.e., care provided by a person educated, experienced, and/or trained in dealing with the special needs of young children and able to meet those needs on an individual basis. Child care for the handicapped or developmentally deprived child requires specially trained staff. Specific child care requirements should be related to the number of hours per day a child is in attendance and qualifications of teachers.

Regulations and standards appropriate to the locale and involving health, nutrition, safety, space per child, low staff-child ration, and staff training should be maintained by state and local governments. Coordination of local, state, and federal standards is essential. Regulations and standards should be regularly reviewed.

The League of Women Voters of Alaska believes there should be differentiation between child care and pre-school programs. All programs dealing with pre-school age children should meet standards of early childhood growth principles. Pre-school programs should be taught by qualified teachers.

Users should have primary responsibility for day care financing based upon the ability of the parent to pay. Available public funding should go to those children whose need is greatest: children of parents who must work or are physically or emotionally incapable of full-time child care. Governments may provide for partial subsidies of start-up and operational costs.

Members suggest that local schools could be involved in providing space and training for child care needs. This might be in the form of summertime or after school use of facilities, parent education, and educating older children in the care of younger children.

School-aged children who have no adult supervision available to them prior to or after school present other significant problems and would benefit from special programs designed to meet their needs.

Established 1976
Updated 1986
League of Women Voters of Alaska

Domestic Violence Position on reverse →

BECAUSE I'VE INVESTIGATED OVER 50 CASES OF CHILD ABUSE AND INTERVIEWED OVER 60 VICTIMS,
DURING THE LAST 3 YEARS, I FEEL THAT I CAN OFFER SOME INSIGHT INTO THE ISSUE OF CHILD ABUSE

I THINK THAT THERE ARE TWO QUESTIONS THAT NEED TO BE ADDRESSED:

WHY SHOULD THIS PARTICULAR CRIME GET SPECIAL RECOGNITION?

WHY DO WE NEED NEW LEGISLATION CONCERNING CHILD ABUSE?

THE NECESSITY FOR SPECIAL RECOGNITION IS EVIDENT BY THE INTERAGENCY PROTOCOL AGREEMENTS
WHICH HAVE BEEN IMPLEMENTED BY SEVERAL CITIES IN ALASKA. THE PROTOCOL FOR KETCHIKAN
WAS AGREED TO BY 11 STATE AND COMMUNITY AGENCIES OVER TWO YEARS AGO. IT IS A GUIDELINE
FOR ALL AGENCIES WHO DEAL WITH REPORTS OF CHILD ABUSE INCLUDING: THE SCHOOL DISTRICT,
HEALTH PROFESSIONALS, VICTIM'S ASSISTANCE PROGRAMS, LAW ENFORCEMENT, CHILD PROTECTIVE SERVICES
AND THE COURT SYSTEM. - I'VE BROUGHT COPIES OF THIS PROTOCOL FOR EACH COMMITTEE
MEMBER.

ALSO ADDRESSED IN THIS PROTOCOL IS THE NEED FOR SPECIFIC TRAINING IN RECOGNIZING AND
DEALING WITH CHILD ABUSE VICTIMS. THIS IS AN AREA WHERE SEVERAL AGENCIES HAVE FOLLOWED THROUGH
BY HAVING INTER AGENCY TRAINING SESSIONS AND SENDING PERSONNEL TO TRAINING SEMINARS.

THE HEADS OF EACH AGENCY OR THEIR REPRESENTATIVE MEET ONCE A MONTH TO DISCUSS ANY PROBLEMS
IN AN EFFORT TO COORDINATE EACH AGENCIES PART IN DEALING WITH CHILD ABUSE.

SPECIFICALLY FOR LAW ENFORCEMENT, THE POLICE OFFICER AND SOCIAL WORKER INVESTIGATE ABUSE
REPORTS AS A TEAM, THEREBY LIMITING THE NUMBER OF TIMES THE CHILD HAS TO BE INTERVIEWED.
THE INTERVIEWS DONE WITH CHILD ABUSE VICTIMS ARE TAPE RECORDED WHICH CAN LATER BE USED
AS EVIDENCE IN COURT, OR FOR LATER TREATMENT OF THE VICTIM OR OFFENDER.

WHEN POSSIBLE, INTERVIEWS ARE CONDUCTED AT THE CHILD INTERVIEW ROOM, AT THE POLICE DEPARTMENT
WHICH HAS A TELEVISION MONITOR AND A ONE WAY MIRROR SO THAT THE DISTRICT ATTORNEY OR PARENTS
CAN OBSERVE THE INTERVIEW FROM AN ADJOINING ROOM.

I'D LIKE TO INVITE ANY OF THE COMMITTEE MEMBERS TO VIEW THE INTERVIEW ROOM AT THE POLICE DEPARTMENT.
IF AND WHEN YOU GET TO KETCHIKAN

I BELIEVE THAT THIS CRIME SHOULD HAVE SPECIAL RECOGNITION BECAUSE THE VICTIMS OF THIS CRIME CANNOT PROTECT THEMSELVES. BY VIRTUE OF THEIR STATUS AS CHILDREN, THEY MUST OBEY ADULTS AND THOSE IN AUTHORITY OVER THEM, EVEN THOUGH THOSE PEOPLE MAY ABUSE, EXPLOIT AND MISUSE THEM. BECAUSE THEY ARE CHILDREN, THEIR STATEMENTS AND COMPETENCY ARE AUTOMATICALLY QUESTIONED. THIS IS A CRIME CONCERNING SOCIAL, MORAL, AND LEGAL ISSUES. IT AFFECTS FAMILY RELATIONSHIPS, PEOPLE'S REPUTATIONS, AND LIFE LONG CONSEQUENCES FOR THE VICTIM, AND THE PERSON ACCUSED.

I'D LIKE TO QUOTE SOME LOCAL STATISTICS FOR CHILD ABUSE CASES REPORTED TO THE POLICE DEPARTMENT
IN 1967, THERE WERE 7 REPORTS OF CHILD PHYSICAL AND SEXUAL ABUSE
IN 1977, THERE WERE 10 REPORTS OF CHILD PHYSICAL AND SEXUAL ABUSE
IN 1987, THERE HAVE BEEN TO DATE, OVER 50 REPORTS OF CHILD PHYSICAL AND SEXUAL ABUSE

1984
IN THE THREE PERIOD FROM 1984 TO DATE, I'VE INVESTIGATED OVER 50 CASES OF CHILD SEXUAL AND PHYSICAL ABUSE, INTERVIEWING OVER 60 VICTIMS.

OVER 75% OF THOSE CASES WERE REPORTS OF SEXUAL ABUSE 25% WERE PHYSICAL ABUSE REPORTS
THERE WAS ONLY ONE CASE WHERE THE SUSPECT WAS NOT KNOWN BY THE VICTIM
APPROXIMATELY 2/3 OF THE SUSPECTS WERE RELATED TO THE VICTIM AND 1/3 WERE KNOWN BY THE VICTIM
10 PEOPLE HAVE BEEN CHARGED - 3 ADULTS PLEAD OUT AND ARE WAITING ON SENTENCING
CHARGES WERE DROPPED ON 2 ADULTS BECAUSE A VICTIM WOULD NOT TESTIFY AGAINST A PARENT OR
WAS NOT COMPETENT TO TESTIFY.

5 JUVENILES HAVE BEEN ADJUDICATED OR HANDLED INFORMALLY BY JUVENILE PROBATION
THE OTHER CASES WERE NOT REFERRED FOR LACK OF EVIDENCE, DECLINED BY THE DISTRICT ATTORNEY,
VICTIMS DECLINED TO TESTIFY OR RECANTED THEIR STATEMENTS, ARE PENDING CASES, OR PROSECUTION
WAS NOT WARRANTED.

IN TWO PARTICULAR CASES WHERE DEFENDANTS HAVE PLEAD OUT, DEFENDANTS WERE ONLY CHARGED WITH
ONE COUNT EVEN THOUGH THERE WERE MULTIPLE OFFENSES OVER A PERIOD OF MONTHS AND YEARS,
BECAUSE THE VICTIMS COULD NOT REMEMBER SPECIFIC DATES FOR EACH OFFENSE

IN ANOTHER CASE, A GRAND JURY CAME BACK WITH NO TRUE BILL EVEN THOUGH THEY BELIEVED THAT THE 15 YEAR OLD VICTIM HAD BEEN SEXUALLY ABUSED. THEY FELT SHE SHOULD HAVE STOPPED THE 35 YEAR OLD MAN FROM ASSAULTING HER. THEY ALSO ASSUMED THAT THIS WAS AN ISOLATED INCIDENT. THERE WERE IN FACT, SEVERAL OTHER INCIDENTS ON FILE CONCERNING OTHER VICTIMS, AND TWO RECENT CONVICTIONS FOR FURNISHING ALCOHOL TO MINORS, HOWEVER THIS INFORMATION COULD NOT BE PRESENTED.

I HAVE SEEN MUCH IMPROVEMENT WITH REGARD TO CHILD PROTECTION ISSUES IN THE STATE OF ALASKA, AND THRO'GHOUT THE COUNTRY DURING THE LAST 5 YEARS. I GUESS WHAT I'M TRYING TO SAY IS THAT I FEEL THAT WE'VE RECOGNIZED THE IMPORTANCE OF CHILD PROTECTION IN KETCHIKAN, THAT WE'RE WORKING ON IMPROVING HOW WE DEAL WITH VICTIMS, SUSPECTS, AND THE INVESTIGATION AND PROSECUTION OF CHILD ABUSE CASES.

TO ~~ANSWER~~ ANSWER THE QUESTION - WHY DO WE NEED NEW LEGISLATION? / WOULD SAY:

WE'VE RECOGNIZED THAT WE HAVE A PROBLEM, WE'VE REFINED METHODS FOR DEALING WITH THE PROBLEM, WE'VE DEFINED WHAT THE CRIME OF ABUSE IS BY PAST LEGISLATION IN 1980, 1982 AND 1983, AND NOW WE NEED TO RECOGNIZE THE DYNAMICS OF CHILD ABUSE WHICH OFTEN MANIFESTS ITSELF IN PATTERNS OF LIFE THREATENING, SERIOUS PHYSICAL AND PSYCHOLOGICAL DAMAGE. THIS NEW LEGISLATION DOES THAT AND UNDERSCORES THE MESSAGE THAT CHILD ABUSE IS NOT ACCEPTABLE.

PROTOCOL

I.

Preamble

This protocol has been designed by the participating, represented agencies to facilitate the investigation of reports of the sexual and physical abuse of children. Effective investigation of such reports will aid the successful criminal prosecution, where warranted, of perpetrators. Effective investigation of such reports will also aid the treatment both of victims of child sexual and physical abuse, and of perpetrators of such abuse. The agencies participating in the creation of this protocol recognize that effective protection of victims of child sexual and physical abuse requires inter-agency cooperation and coordination. The participating agencies also recognize that the protection of victims of child sexual abuse is the primary goal of this protocol.

II.

Goals

The goals of this protocol are:

- 1) to provide protection, treatment and continuing support for child sexual and physical abuse victims and their family members;
- 2) to ensure that child sexual and physical abuse cases are immediately and properly investigated and, if appropriate, effectively prosecuted;
- 3) to increase reporting of child sexual and physical abuse cases; and
- 4) to provide treatment, when appropriate, to perpetrators.

III.

Definition of Terms

For purposes of this agreement:

"child sexual abuse" means any sexual assault, sexual contact, or sexual exploitation of a person under the age of 18 which appears to be a violation of Alaska's criminal laws, whether the offense occurred within or outside of a family relationship;

"incest" means a special form of child sexual abuse in which the child and perpetrator are members of the same extended family; and

"report of sexual abuse" means an initial report of sexual abuse of a child which has been preliminarily verified in some way by the agency receiving the initial report. A report is always to be considered verified if it came directly or indirectly from the victim or the offender.

"child physical abuse" means any physical assault or physical maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is threatened thereby.

"report of physical abuse" means an initial report of physical abuse of a child which has been preliminarily verified in some way by the agency receiving the initial report. A report is always considered verified if it came directly or indirectly from the victim or the offender.

IV.

Underlying Premises

This agreement is based on the following premises:

1. Sexual and physical abuse of children is a serious and pervasive social and legal problem in Ketchikan;
2. Sexual and physical abuse may cause serious and long lasting physical, mental, and emotional harm to a child;
3. An alarmingly high proportion of both girls and boys will be sexually abused by the time they are 18 years old;
4. Most victims of child sexual and physical abuse are abused by family members or people known to them;
5. Recent studies have shown that sexual abuse of children is grossly under-reported to authorities; it is important to increase the reporting rate;
6. The child's immediate and continuing physical and emotional welfare is paramount;
7. Positive and effective intervention, treatment, and support procedures must be developed and implemented on a state and local level for the child and appropriate family members;
8. When dealing with child sexual and physical abuse, a properly functioning criminal justice system requires the integration and coordination of state and community agency services involving a variety of disciplines: police, legal, social services, corrections, medical, educational, private

and non-profit counselling, and peer support;

9. Child sexual victimization is a crime; it is always morally wrong;

10. Perpetrators are responsible for their actions and the consequences of those actions; and

11. Prosecution, where warranted, of perpetrators is a child protective function.

V.

Mutual Reporting Responsibilities

A. Intent and Purposes: The criminal justice system should be involved in every reported instance of child sexual or physical abuse, whether that abuse was committed by a stranger, acquaintance, or family member.

All parties to this agreement will immediately report cases of child sexual or physical abuse to the appropriate agencies. Each agency which receives reports will develop a practical and efficient system to monitor the reports, any action taken, and the disposition of cases.

B. Notification to Individual Agencies

1. Division of Family and Youth Services. Whenever any party to this agreement has cause to believe that a child has been sexually or physically abused by a family member, or as a result of conditions created by the child's parent, guardian or custodian, or as a result of the failure of a parent, guardian or custodian to adequately supervise the child, the appropriate Division of Family and Youth Services (DFYS) office is to be immediately notified. AS 47.17.020. and AS 47.17.070.

2. Police. Whenever any party to this agreement receives a report of child sexual or physical abuse, whether the abuse occurred within or outside of a family relationship, the appropriate police agency is to be immediately notified.

3. Department of Law. Whenever the Division of

Family and Youth Services receives a report of child sexual or physical abuse, whether the abuse occurred within or outside of a family relationship, it shall provide written notice of the report to the District Attorney's Office within 72 hours of receipt. Whenever a police agency receives a report of child sexual abuse, it shall immediately notify the District Attorney's Office of the report.

VI.

Actions of Agencies and Organizations

A. Intent and Purposes: Sexually abused children often suffer serious and long lasting trauma as a result of the sexual abuse. If cases are not handled wisely and with compassion, abused children may suffer further harm during the criminal justice process. Every effort should be made to prevent additional emotional hardship on a child and non-offending members of a child's family. Enlightened and humane consideration of a child's welfare requires interagency cooperation. Additional trauma to a victim of child sexual abuse can be substantially reduced by minimizing the number of times the victim is required to re-live the abuse. Therefore, the number of victim interviews should be held to a minimum. However, the goal of child protection may require more than one interview. Participating agencies will balance the trauma of additional victim interviews against the goals of child protection in determining whether to conduct additional victim interviews.

Timely and coordinated legal intervention may provide a therapeutic effect for the victim. Legal intervention also communicates to both the child and the offender that further abuse will be prevented. Coordinated intervention efforts will reduce unnecessary and wasteful duplication of effort, and may result in increased witness cooperation.

B. Development of Internal Policies and Procedures.

Every agency which is a party to this agreement shall develop and implement written internal policies and procedures to be used in response to the report of a child sexual or physical abuse case. At a minimum, each agency's policy guidelines should address reporting requirements, proper interviewing and intervention techniques, record-keeping, periodic and ongoing program evaluation, and communication and coordination with other appropriate state and local agencies and organizations. Policies should stress cooperation among agencies and integration of resources to the maximum extent possible within legal and privacy constraints. These policies and procedures are to be developed through consultation with other agencies affected by this agreement.

The policies and procedures are to be developed within 30 days after this protocol is signed, and implemented within 30 days thereafter. A copy of each agency's policy guidelines are to be attached to this agreement as appendices.

C. Training of Agency Members.

Every agency which is a party to this agreement will provide, within budget constraints, ongoing training to appropriate personnel aimed at effective intervention, investigation, prosecution, and/or support and treatment. Where possible, participating agencies will provide appropriate training to other participating agencies.

D. Intervention and Investigation.

All agencies should attempt to complete their investigation and take appropriate action in a case as quickly as possible. All reasonable efforts to minimize trauma to the victim and non-offending family members should be taken.

Pursuant to the Mutual Reporting Procedures outlined above, the appropriate police agency will be notified of all reports of child sexual abuse, and the police agency will immediately notify the District Attorney's Office of such notification. The District Attorney's Office will then coordinate the investigation into the report. The appropriate police agency has primary responsibility for conducting the criminal investigation. Representatives of the police agency and the District Attorney's Office will be present, when possible, at all formal interviews of victims of child sexual assault. Other agencies may be represented at the interview of the victim, either observing or conducting the interview. The interview will be conducted by the agency representative having the greatest rapport with the victim.

The number of interviews of child victims is to be minimized. The preferred method of interviewing the child victims shall be the formal, joint interview described herein. Children are to be interviewed in the least threatening atmosphere possible. Whenever available, the specially designed child interview room at the Ketchikan Police Department should be used. Parents should ordinarily not be

present during the interview. Parents should not be notified before the victim is interviewed unless it is certain that the parent supports reporting the crime. This is especially true if the parent does not appear to be supportive of the child. Interviews with children will be recorded. If possible, the interviews will be recorded by both audio and video means. Interviews with children will be transcribed, if possible.

Whenever a victim of child sexual or physical abuse initiates discussion of the abuse prior to the formal, joint interview referred to above, any agency personnel present shall permit the victim to discuss the abuse to the extent the victim desires. The agency personnel shall immediately reduce as much of the discussion as possible to writing. That written report shall be immediately provided to the appropriate police agency.

In all cases of child sexual abuse, the victim shall be examined by a physician as soon as feasible. The police agency arranging the physical examination shall obtain the required releases so that the results of the physical examination may be provided to the police agency. The physical examinations of victims of child sexual abuse will be conducted in a medically accepted manner and shall be performed so as to minimize any possible trauma to the victim.

The appropriate police agency has primary responsibility for interviewing the perpetrator. Whenever a police

officer is readily available to conduct an investigation, DFYS should not interview the perpetrator until the officer has completed the initial investigation and interviewed the perpetrator.

All interviews of perpetrators shall be recorded. When possible, the interview will be recorded by both video and audio means. Interviews with perpetrators shall be transcribed, if possible. The perpetrator shall be interviewed as soon as possible in the course of the criminal investigation, and if possible, before the CINA probable cause hearing.

Prosecution of child sexual abuse perpetrators should occur whenever sufficient evidence exists. Consistent with the child's safety, all reasonable efforts to secure and preserve evidence should be made.

Whenever a child has been sexually abused by a family member, or as a result of conditions created by the child's parent, guardian or custodian, or as a result of the failure of a parent, guardian or custodian to adequately supervise the child, the Division of Family and Youth Services shall assume primary protective responsibility for the child. The Department of Law will provide assistance to DFYS in carrying out its child protection functions. The DFYS should also protect siblings of child sexual abuse victims.

The preferred placement choice in incest cases is to allow the child to remain in the care of a supportive

non-offending party. Ordinarily, the offender should not be allowed contact with the child victim during the time a criminal prosecution is being considered or is pending. The no contact requirement may be imposed by agreement, through civil court order, or as a condition of bail in the criminal case. If the preferred placement is not possible, DFYS will assist the non-offending parent to arrange alternate housing for the child victim, or will seek to remove the child from the home. DFYS will take emergency custody of a sexually abused child when appropriate. If the DFYS worker believes it necessary, a law enforcement officer will assist in taking emergency custody.

Whenever a child in need of aid (CINA) proceeding and a criminal prosecution arise out of the same events, the Division of Family and Youth Services and the Department of Law shall coordinate efforts to provide a unified, consistent and systematic approach.

E. Sharing of Information.

Each agency which is a party to this agreement will develop written procedures providing for the flow of pertinent information to other agencies which need the information for official purposes. To the extent legally permissible, information is to be freely shared. Reports of harm and police and DFYS investigative reports are confidential, and may only be used for appropriate governmental purposes.

Unless disclosure would jeopardize a pending criminal investigation, law enforcement agencies shall disclose information regarding the investigation of a child sexual or physical abuse case to the Division of Family and Youth Services upon request.

In connection with a pending investigation or prosecution of a criminal case involving a child who is alleged to have been sexually or physically abused, the district attorney, upon request, will be allowed access to information contained in the Division of Family and Youth Services file regarding that child or another child in the same family.

Any participating agency having knowledge of exculpatory information concerning a report or investigation of child sexual or physical abuse shall immediately report such exculpatory information to the District Attorney's Office. Exculpatory information is information tending to negate the guilt or mitigate the punishment of a perpetrator of child sexual or physical abuse. Exculpatory information includes, but is not limited to, recanting, accusations of child sexual or physical abuse by third persons, alibi information, and medical evidence that does not corroborate the abuse.

VII.

Limitations

This agreement is intended to establish guidelines for interaction between agencies, and to preserve statutory duties. Nothing in this agreement shall be construed to limit an agency in the performance of its duties; provided, however, that the immediate protection and safety of a child is always paramount. Every reasonable effort to achieve the goals set out in this agreement shall be made.

VIII.

Rights of Victim and Family Members

Children who are victims of child sexual and physical abuse are entitled to receive legal protection. They should be treated sensitively by criminal justice system personnel. Children and their families often face emotional crises after sexual or physical abuse has been disclosed. Family members should be given ongoing support to help them meet these crises. Protection and ongoing support should be provided to all victims of child sexual or physical abuse, regardless of the outcome of any criminal proceedings against an offender. Services should be provided for as long as necessary to enable the child and family members to recover from the trauma created by the abuse. The development of appropriate methods of institutional and community based treatment for offenders should also be encouraged.

In recognition of the goals set forth in this protocol, and to further the realization of those goals, the undersigned participating agencies hereby ratify this protocol in the spirit of cooperation reflected herein.

DATED this 29TH day of MARCH, 1985.

CLOSE ENCOUNTERS

By [Signature]

STATE OF ALASKA
DEPT. OF PUBLIC SAFETY
ALASKA STATE TROOPERS
KETCHIKAN DETACHMENT

By [Signature]

KETCHIKAN GENERAL HOSPITAL

By Sister Barbara Dase

W.I.S.H.

By [Signature]

STATE OF ALASKA
DEPT. OF HEALTH AND SOCIAL
SERVICES

KETCHIKAN D.F.Y.S. OFFICE

By [Signature]

JUVENILE PROBATION

By [Signature]

CITY OF KETCHIKAN
KETCHIKAN POLICE DEPT.

By [Signature]

STATE OF ALASKA
DEPARTMENT OF LAW
DISTRICT ATTORNEY'S OFC.

By [Signature]

KETCHIKAN GATEWAY BOROUGH
SCHOOL DISTRICT

By [Signature]

GATEWAY COMMUNITY MENTAL
HEALTH

By [Signature]

FAMILY COUNSELING SERVICES

By [Signature]

VOCAL NATIONAL OFFICE
PO Box 11335
Minneapolis, MN 55411
(612) 521-9714

Victims Of Child Abuse Laws

OUR VIEWPOINT

WHO WE ARE

We are a group of individuals who believe we and our families and friends have been victimized by the child abuse laws. We are not guilty people trying to escape judgment; we are innocent people demanding justice.

AIM AND PURPOSE

We wish to see children protected from all forms of abuse, including that which is being inflicted upon them as a result of so-called "child protection" agencies. We want to see due process accorded to all. We wish to see preservation of the family unit made a priority in the handling of suspected child abuse cases.

WHO WE REPRESENT

Our present membership includes individuals from all 50 states (as well as Canada and Australia) who have experienced this nightmare. Our NATIONAL ORGANIZATION recognizes over 150 chapters and contact persons.

SOME OF OUR CONCERNS AND PROBLEM AREAS

PRESENT CHILD ABUSE HYSTERIA

The current child abuse laws are basically good. However, we strongly believe that disregard for the intent behind these laws has put us in our current situations. The present child abuse hysteria has reincarnated the ignorance of the Salem Witch Hunts. The system emotionally abuses and financially drains the alleged child abuser during the fight to prove innocence. If you manage to survive within the system of "justice," as presently constituted, the best you can ever expect is a finding of "unsubstantiated." You are, and always will be a potential child abuser in the eyes of the government. You are not alone! There were over 1,500,000 accusations of child abuse in 1986, and of those, approximately 65% were unfounded.

PRESENT LAWS VAGUE

In addition to the intent of the child abuse laws being lost, many of these laws are written so vaguely that they are easily misinterpreted or are intentionally used to advance the immature philosophies of those implementing the laws.

LACK OF DUE PROCESS

Due to the sensitive and innovative nature of these laws, individual due process rights are not being accorded the importance they are due. As a result, laws that are set up to protect the individual and the family are being used to tear families apart and to sever family bonds.

IMMEDIATE PRESUMPTION OF GUILT

After one has been "hot-lined," regardless of how believable or ludicrous the accusation may seem, there is automatically an immediate presumption of guilt. The only crime more heinous than the intentional abuse of a child, is to be unjustly accused and branded for life as a child abuser. There is no other crime prosecuted with such malicious disregard for the accused and the alleged victim's constitutional and civil rights.

UNETHICAL INVESTIGATIVE TECHNIQUES

In the interest of convicting an accused child abuser, ethical investigative techniques are set aside. Prosecutorial information to corroborate a verbal allegation takes precedence over the gathering of factual information. Child protection workers, investigators, prosecutors and law enforcement officers have convinced themselves to be judge and jury without a trial. Custodial parents and individuals considered "loco parentis" are often instructed to repeatedly interrogate the alleged victim about the alleged incident.

OPINION IN LIEU OF FACT

Child protection officials and county hired *mental health professionals* are presently at liberty to inject into both written and oral reports their "personal opinions" of an event. These "opinions" are then presented and accepted as a basis for fact in legal proceedings.

REMOVAL OF CHILDREN FROM FAMILIES

The abrupt and often unnecessary removal of children is traumatic. It destroys a child's trust in the parents as protectors, and leaves tremendous emotional scars. If a child is truly being abused, the added trauma of being abruptly removed from the home and family can often make matters worse.

EFFECTS ON FAMILIES UNDER INVESTIGATION

The stigma of child abuse allegations creates feelings of fear and shame, and introduces other negative factors into parenting techniques--leading to problems in exhibiting parental affection and problems in discipline.

DEPENDENCY RESULTING FROM COUNTY INTERVENTION

When charges of abuse/neglect are dropped often the county then files charges claiming dependency--a dependency that *its own* intervention created.

POSSIBLE SOLUTIONS

ON-SITE CONTACT WITH FAMILY

The family should be immediately notified of any charge of child abuse. Appointments should be set up for immediate interviewing of all persons involved. No child should be removed before an on-site contact with the family has been made. If a child is doing the reporting, other siblings, if any, should also be questioned as to the reliability of the child making the allegations.

MANDATORY TAPING OF ALL INVESTIGATIVE INTERVIEWS

Investigators must be required by law to conduct each investigation based solely on the facts and must be required to not insert their personal opinion of the accused. To do anything less, seems to invite injustice for the accused and contempt for the law. All interviews should be taped to insure an honest report. Reports must not include statements that suggest expertise in the area of psychology or psychiatry, since child protection workers do not have degrees in these areas. Tapes must be available to defendant's counsel.

EMPHASIS ON REMOVING ACCUSED INSTEAD OF ALLEGED VICTIM

It would be less stressful on the child if the alleged perpetrator were first asked to leave the home during the investigation. Also, a mandatory time schedule for the investigation must be implemented at the outset, so as not to abuse the rights of the accused and the alleged victim by needless separation from the family.

PLACING CHILDREN

No child should be placed in foster care when the parent(s) can offer an alternative placement. If removal is the only solution, supervised family visitation must be mandatory. Siblings removed from the home must be kept together unless countermanded by the Juvenile Court (with written explanation); a recommendation by the Child Protective Services case worker, for separation of siblings, is insufficient cause for separation.

BETTER TRAINING OF SOCIAL WORKERS

If social workers are allowed such unlimited and life-altering powers over us, we believe they should be competent and compassionate enough to handle this responsibility. We demand social workers be required by law to be tested at least once a year on the current child abuse laws, including the policies and procedures of their agency. They must be aware of the long term severe emotional damage inflicted upon innocent children and innocent adults as a result of overzealous intervention. In cases where a child is not in a life threatening situation, and where there is no evidence to substantiate the alleged abuse and/or neglect, the worker must by law allow the family the right to remain together.

REPRESENTATION ON TASK FORCES

Any task force set up by the state to better the child protection system must include a victim of the system-- to insure representation of all viewpoints and to maximize informational input. We must stress that our input is essential and must be heard.

REVIEW BOARD

We believe a review board is imperative for individuals to air their grievances (without repercussion). In our system of democracy there are checks and balances, which attempt to insure that the inherent power of government units does not corrupt their purposes. Child protection units cannot be excepted from these checks and balances.

State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
HOUSE JUDICIARY
HOUSE RULES



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

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August 14, 1987

For your information.

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The Monitor

American
Psychological
Association

CHILD ABUSE REPORTING LAWS

**Are they
a barrier
to helping
troubled
families?**

By Laurie Denton
Monitor Staff

Child abuse reporting laws present potential landmines for psychologists, who must weave a path between the role of child advocate and therapist, between the law that requires them to report suspected abuse, and their ethical code, which demands confidentiality. Because psychologists are often a primary source of help for both abuser and abused, they may be forced to choose between what they believe is best for the client and risking arrest for failing to report abuse.

"It seems like the therapist is getting the short end of the stick because of a problem society has a difficult time dealing with. The law is a reflection of that," said Russ Newman, director of professional affairs at APA. "Therapists tend to be ready targets to deal with the impossible."

Two years ago, a North Carolina psychologist was treating a family who came to him for help, concerned that the time-outs they used to discipline one of their two adopted children had become excessive. Four months into treatment, someone in the community told the Department of Social Services they thought the parents were abusing the children. The department investigated and

found enough evidence to warrant a custody hearing.

The psychologist, Arne Gray, volunteered to testify at that hearing. He told the court the parents had informed him of the time-outs in the basement and that what they were doing was not reportable abuse or neglect. He said the adopted children were not at risk, that the parents were highly motivated and that treatment was going well.

But the next day, the judge issued two warrants for Gray's arrest on two charges of contributing to the delinquency of a minor. Three days later, he issued two more warrants for Gray's arrest on charges of failure to report suspected abuse and neglect.

Today, the two adopted children are each in their third foster home and the older boy is awaiting placement in a state hospital, Gray said.

"There's no good solution for the practicing clinician," said Bryant Welch, associate executive officer of the American Psychological Association's Office of Professional Practice. "They are caught in a 'Catch-22' Kafkaesque environment. It's not clear what standards they are supposed to uphold. And even if it is clear, they are supposed to do something that is counter-therapeutic."

Child abuse reporting laws are

thorny for mental health professionals not only for the conflict they create between ethical and legal obligations, many are vaguely worded, yet carry the threat of potential liability.

"Child abuse laws as applied to mental health professionals are wishful thinking," Welch said. "It's natural to want to find some way of knowing when child abuse is going on and intervene, but the cure in this case doesn't work and compounds the disease."

The result, commonly, is that mental health professionals fail to report suspected child abuse.

One of the most common rea-

sons, said Sherry Skidmore, a forensic psychologist in California who has worked with battered children for the past 20 years, is "this sometimes naive conception that in spite of the law, they're really protecting their patient/client and even the child and they just don't think the allegation has substance."

Last year, California passed a law requiring licensed psychotherapists to complete at least eight hours of training in child abuse assessment and reporting. Two therapists who have presented those training workshops

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Drawing by Thomas Tibbo

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have found other reasons for non-reporting.

Writing in *AHP Perspective*, the newspaper of the Association for Humanistic Psychology, Sue Carroll said that indications of abuse or neglect may be submerged by countertransference or over-identification with the parent clients. Therapists also mistrust the system and fear further intrusion into the "family." Lennis Lyon, who is a professional in treating child abuse, wrote that once clinicians do resolve to report abuse, they must still decide how to tell their clients they are doing so, and how to keep them in treatment and handle their own discomfort with the situation.

Skidmore said she has seen a few cases where mental health professionals adamantly refuse to divulge information and disrupt the therapeutic relationship, in spite of clear-cut abuse.

In other cases, said Maryland-based forensic psychologist Dennis Harrison, psychologists don't report because they fear reprisals from the family, aren't sure how to assess whether abuse has occurred, or equate reporting with conviction.

Douglas Beharov, of the American Enterprise Institute and first director of the National Center on Child Abuse and Neglect, said the problem is not underreporting, but over-reporting, as a result of "a protect-your-tail syndrome."

Beharov contends that 60 to 65 percent of all reports of abuse



prove to be unfounded. Those are clogging up the system, he said, and detracting resources from children in real danger.

State law, however, requires psychologists to file a report with child protective services if they have a reasonable suspicion that child abuse or neglect has occurred.

"The law supercedes the ethics," said Ruth Ochroch, who teaches an ethics course at New

York University. "It's a real dilemma many mental health professionals feel very caught up in. It's relatively new. We don't have precedents, we don't have enough history to understand how it's being used, but psychologists have no choice. The professional doesn't have a decision to make."

Psychologists disagree on whether therapists should have more discretion.

In Newman's view, "To simply bar any decision-making by a qualified therapist is counter-productive."

One way to both protect the child and get the family in treatment, he said, might be to allow psychologists to coordinate intervention efforts. For instance, they might still have to immediately report suspicions of child abuse, but state agencies could delay intervening if the psychologist continued to work with the family. This, Newman suggested, might even strengthen the therapeutic relationship.

Gray said he bases his own decisions to report on whether an investigation by the state would be more abusive than what is already going on in the family. Gray has classified various types of abuse on a scale from one to 10. He rates a well-conducted investigation by the Department of Social Services at level three abuse. Therefore, he will not report abuse he sees on a same level or less severe. And in the case for which he was prosecuted, he would not do anything differently. "Part of my training is to make some judgment and do some screening," he said. "It's the same with suicide and homicide

threats. That's what society pays us to do."

Harrison said, however, that higher standards for mental health professionals would be accompanied by more responsibility and potential culpability. "Why should psychologists be more responsible than anyone else in the state?" he asked.

Psychologists are more likely to wind up in court for failing to report than for reporting abuse. In the latter case, they are on safer ground. Most reporting laws do provide immunity from civil or criminal liability to those who report child abuse or neglect "in good faith."

For instance, said Skidmore, when a California psychologist

out of the home or break up the marriage. On the other hand, if a three-year-old says, "Daddy has been putting snakes in my body," she must be taken seriously, he said.

Harrison said psychologists often lack the education, experience or training to recognize sex abuse.

For instance, he said, one therapist brought a small child into the same room with the abusing parent, expecting the child to be horrified and start to cry. When that was not the reaction, the therapist used that as evidence that the abuse did not occur.

In another instance, several psychologists testified that an

CE for California license

All psychologists licensed to practice in California are now required to complete a mandatory eight-hour course in the recognition, treatment, prevention, and reporting of child abuse, and to provide evidence that they have completed such a course through an California-approved organization when they renew their licenses.

As a service to APA members licensed in California but who do not live or practice there, this required workshop will be offered, in co-sponsorship with the California State Psychological Association, at the 1987 New York convention. The workshop will cover the 28 mandated topics in the area of child abuse; participants who attend the entire course will receive a certificate verifying its completion.

For information about the date, fee, and content of this workshop, contact: APA CE Workshops Office, 1200 17th St. N.W., Washington, DC 20036, or call (202) 955-7719 (8 a.m.-5 p.m. EDT) and request a copy of the Child Abuse Workshop Information.

was sued by a parent for reporting abuse that he became aware of during treatment, he won the case on appeal because the court ruled that he had carried out his responsibility.

"If you're going to be within the law, you have to report," Newman said, "and as long as the reporting is done in good faith, you're never going to be found to have behaved unethically."

But there's another side to the issue, he noted: There will be times when a therapist will believe that reporting the abuse will not help the family, but make their problems worse.

Because a parent has to be reported for even making an appointment for therapy related to abuse, some argue that troubled people won't seek help.

"If therapy can help and the family has taken the initiative to get help," Newman said, "then you're supposed to do the very thing that will destroy that relationship."

Beharov of the American Enterprise Institute contended, "We have to provide immunity for people who decide in good faith not to report."

Jenny Boyce, who coordinates a treatment program for legal offenders in Oklahoma, informs clients at their first visit about the limits to their confidentiality and tells them she will report any current incidents of child abuse a client reveals to her.

Consequently, she said, "I'm sure there's child molestation I'm not aware of. If I were trickier, maybe I'd find out about it. But I'm trying to prevent many child molestations through treatment."

Harrison is adamant that psychologists always report, "unless they have good, solid evidence that it is not true," for instance, if a teen-ager who claims her stepfather fondled her actually admits that she was trying to get

alleged abuse was not occurring and advocated that a girl be allowed to continue visiting her father, who then admitted the abuse under oath.

Nor should psychologists fear that the social services/legal system will be unfair to the parent charged with abuse, he said, arguing that any unfairness in the system is toward the child and protective parent.

In addition, he said, most child protective agencies are understaffed and overworked. Rather than sweep in and take over a case, they welcome a relationship with someone in the community.

"My experience has been that it's harder to get them to act than to get them to stop from acting," he said. He added that the child is only taken from the home if the protective parent is not actually protecting the child.

"If you are known as a child advocate, straightforward, unbiased, the abuser who wants help will go to you," Harrison said. "Psychologists shouldn't be afraid of that."

However, many abusive parents must be forced to seek help and to cooperate with therapy. "Maybe the first week or two they feel repentant and scared, but once they realize there's no teeth to the law they don't care," Harrison said.

Harrison said one abusive father told him, "I can outlast you. I will do what I want with that child." The case was an extreme one, Harrison said, "but he was right. He's only on probation for so long. A lot of abuse, and bag therapy. They come in the door, but they won't talk."

Harrison said he is now advocating lawsuits in the names of abused children against "any professional who didn't do what he or she was supposed to do, what the law or the literature said to do."

He has also established the

Emotional abuse hardest to evaluate

By Laurie Denton
Monitor staff

It is the least discussed form of abuse and perhaps the most difficult to define, yet many psychologists believe emotional abuse is at least as devastating as its physical counterpart.

"As surely as one can break a child's bones, one can break a child's spirit," wrote James and Anne C. Garbarino in a pamphlet entitled "Emotional Maltreatment of Children," published by the National Committee for Prevention of Child Abuse.

The committee has begun a national media campaign on emotional abuse in cooperation with the Advertising Council. "Words hit as hard as a fist," one ad reads. "Next time, stop and listen to what you're saying. You might not believe your ears."

Research in the area of psychological maltreatment is sparse in the basic—a definition of the term, identification of preventive and intervention strategies. That makes assessing or reporting such cases even more troublesome.

Forensic psychologist Sherry Skidmore, who has had to assess cases of emotional abuse and psychological maltreatment as a court-appointed examiner, commented, "The means of observing whether such abuse occurred are more flimsy."

She does a full psychological

evaluation and a thorough background history, including talking with as many possible witnesses as she can, including neighbors, family members and teachers.

"To make any conjecture without that comprehensive evaluation would be off base," she said.

Bryant Welch, associate director of the American Psychological Association's Office of Professional Practice, questioned how psychologists could determine something as vague as emotional abuse or neglect.

"A lot of what we deal with are the effects of suboptimal parenting," he said. "At what point do we say it's child abuse? A mother is an alcoholic and emotionally unavailable—is that abuse? Do we report it? How about the father who works 80 hours a week, who's not there—is that abuse? For the therapist who deals with all kinds of gradations in human behavior, at what point is it child abuse is very tricky. And how much is one supposed to be looking for it? That is contrary to the therapeutic relationship."

Neither harmful effects nor parental intent alone can be used to define psychological treatment, the Garbarinos contend. "A good definition will include both a value judgment and a scientific

assessment," they wrote.

"They define it as 'acts of omission or commission by a parent or a guardian that are judged by a mixture of community values and professional expertise to be inappropriate and damaging to the development of personality.'"

A child's lack of competence in social relationships and a parent or guardian who treats the child in ways that violate common sense should be strong signals to professionals, they say.

Gary Melton of the University of Nebraska-Lincoln and Howard Davidson of the American Bar Association warn in the February *American Psychologist* that because of the imprecise nature of any definition of psychological maltreatment, caution should be used in assessing whether state intervention is appropriate.

They question whether state intervention would even be beneficial in such cases and recommend a "go-slow" policy. However, they said, the concept could be useful in regulating institutions that care for children.

"People need some rules," commented Douglas Beharov of the American Enterprise

Institute. "Just because a parent says in a shopping center, 'I'm going to kill you,' that shouldn't be reported. If you want to add a million cases to the Department of Social Services a year, that's the way to do it."

Children's forensic institute, with Louisiana lawyer Richard Ducote, to provide information on child sexual abuse.

States vary in their reporting requirements, but Alabama is typical, specifying "reasonable cause to suspect that a child is being abused or neglected." Connecticut asks for "reasonable cause to suspect or believe that any child under the age of 18 is in danger of being abused."

California law defines "reasonable suspicion" as meaning "that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse."

Some states, such as Oklahoma, limit the law to physical injury that appears to have been caused by physical abuse or neglect. Others, such as Kansas, specifically include physical, mental or emotional abuse or neglect or sexual abuse.

Penalties for failure to report vary from liability for damages to fines and/or imprisonment. Some laws do not include penalties for failure to report.

That is the case in North Carolina, and for that reason, the charges against Gray of failure to report were dropped on appeal in January. In dropping the charges, the Superior Court judge pointed to "substantial public policy questions that are conflicting" between a law that requires reporting child abuse and one that provides for confidentiality of psychologist-client relationships, according to the *Durham Morning Herald*.

In another recent case, an Alaska psychologist treating a family for child abuse was ordered to turn his records over to a court that was trying the father on child abuse charges. Prosecution lawyers were after confessions that might have come out during treatment. The family had voluntarily sought treatment after the father was reported, and then, at a hearing for probable cause, was ordered to continue therapy.

Alaska's case against psychologist Mitchel Wetherhorn was decided in Wetherhorn's favor on the basis of therapist-client confidentiality. On appeal, the Superior Court judge ruled that court-ordered therapy to help preserve the family should not be considered a court-ordered examination. Further, the judge wrote, since the patient was not warned of possible criminal prosecution nor told that any statements made in therapy could be used against him, release of the psychologist's files would be tantamount to self-incrimination.

The majority opinion made an almost-obvious observation: "The average person facing an eight-year presumptive term for sexual abuse of a minor will not confess to a psychotherapist and seek treatment if he knows that the psychotherapist will testify against him."

In a case still to be decided, Alfred Cavaiani, a limited-license psychologist and marriage counselor in Michigan, has been charged with failure to report a teen-aged girl's allegations that her stepfather had fondled her breasts. Cavaiani had counseled

the family three years earlier after they had been referred to him by the Department of Social Services.

Then in January 1986, the mother called about her daughter's claim, which she believed to be false. The stepfather, who has freely admitted to the prior problem, said it was untrue. Cavaiani had been counseling the daughter individually for about a week and believed that the allegation was greatly exaggerated due to her emotional problems. At that point, the daughter reported the incident to her school counselor, who reported it to Social Services.

Lawyers in that case, *People v. Cavaiani*, are challenging the constitutionality of reporting laws. In final arguments in March, Robe Mueckenheim, Cavaiani's attorney, said, "We are claiming that when a family goes in for therapy, that is an area of privacy protected by the First Amendment."

If that argument is accepted, Mueckenheim said, it would have national implications, because it would mean that therapist/client confidentiality is a right, not a privilege, and therefore cannot be waived. A decision was expected in late May.

Originally, child abuse reporting laws were aimed primarily at emergency room physicians.

Some of those early laws made reporting optional, and were later changed to make it mandatory.

Then the laws were expanded to require reporting by psychologists, social workers and ministers. And the definition of abuse was expanded to include not only physical abuse and neglect, but sexual abuse and emotional neglect and abuse.

Skidmore, disturbed by what she has seen as unprofessional behavior by professionals in child abuse cases, developed guidelines for receiving and making reports, which she presented in testimony before a recent California senate subcommittee hearing.

In most of the cases where professionals have been sued for failing to report or for wrongful arrest and prosecution, Skidmore found, adequate records were not kept, or professionals were practicing outside their boundaries of competence.

She advocates more care, and less zealotry, in processing allegations. She advises colleagues to know the local laws, read the ethical code and educate both the judicial and child care systems about what psychologists actually can and cannot do.

For instance, there are common misconceptions that a psychologist could guarantee that abuse would not occur or state absolutely whether abuse has occurred. Alternatively, people in the judicial and child care systems often do not realize that the psychologist could give valuable information about, for example, how psychologically stable or how leadable the child is. ■

More information on child abuse reporting laws and child abuse can be obtained from Clearinghouse on Child Abuse and Neglect, P.O. Box 1182, Washington, DC 20013, (301) 251-5157; and Children's Forensic Institute, (301) 740-5418 or (504) 525-1399.

October 23, 1987

Testimony given to the House Judiciary Committee by Floyd Richmond, Executive Director of Women In Safe Homes, Ketchikan.

I would like to begin my testimony by making it clear that I recognize the complex nature of child abuse and how difficult it is to deal with as a social problem. I feel we must remember that HB 237 and 229 deals with only one facet, an important facet from our point of view, but only one. It would be my hope that the Judiciary committee would maintain that focus and not let other issues influence their consideration of this legislation.

What I mean by that is such things as "false allegations" which lead to dismissals of cases of alleged child abuse. That's an important matter, but another issue. False allegations have little or nothing to do with this legislation in my view. It's important to clean up our act on reported abuse, investigation of abuse and the system that is charged with that responsibility, but again it's a separate issue from what these bills speak to. For me, the issue boils down to - DO WE FEEL CHILDREN NEED SPECIAL ATTENTION AND PROTECTION? If we do, then we have to change the rules of evidence to convict an offender of repeated child abuse. Our goal should be to protect children who are victims or future victims - not continue to protect an individual who has no control over their behavior and we have very limited ways to help them gain control.

Who are we talking about?

- a) Children and Adults, most often parents, or someone they know.

In 1986, 1,200 child deaths were reported as the result of child abuse. One study found the number to be closer to 5,000. These studies further indicate that many of the children had been victims of repeated abuse. Finally, the average age at death was 2.6 years.

Experts in the field who study sexual offenders never use the word cure, they talk about some offenders gaining control and/or a reduction in offenses committed.

In a study done on non-incarcerated sex offenders, 411 individuals who volunteered information here is what was found.

- a) 44% of incest offenders, offended outside of the home.
- b) 50% had multiple deviances.
- c) 232 molesters were responsible for 17,585 victim assaults.
- d) In a study done at the Oregon State Hospital 53 incarcerated offenders committed 25,757 sexual crimes.

What is the issue?

- a) The commission of a crime against the most vulnerable group of people on this planet, children. Children who trust, trust, trust and trust adults even after they have been victimized.

Who is responsible?

- a) First- the person who after due process is found guilty of the crime.
- b) Second each one of us when we don't say long and hard enough that crimes against children are intolerable and back up such statements with laws that hold adults responsible for their behavior.

Recently, while viewing an F.B.I. video conference on Profiles of Sexual Offenders, one of the panel was asked about society's attitude toward child sexual abuse. Among other things he said it appeared to him that we don't want to deal with it. Although people in the larger community pay lip service to how horrendous such crimes are, until it happens to them personally or very close to home, we don't seem really motivated to solve the problem. This attitude was further reinforced when I read an article recently in Ms. Magazine by a male who was sure a daycare center teacher was innocent of child sexual abuse just because he the writer "knew this to be true." We as a society, and, in my view males in particular, continue to deny that crimes against children are as prevalent as they are and they only happen to the "other person." We think these mostly male adults are "sick" in the case of sexual offenders and parents who have let discipline get out of control when we talk of adults who physically abuse their children.

What can be done?

- a) First we can begin to bring the level of awareness on this issue up to where it belongs by passing legislation that clearly holds adults responsible for their behavior. I am not an advocate of punishment being used as a deterrent. I am an advocate of laws that hold adults responsible for their behavior.
- b) Next, we can provide justice for all victims by recognizing that an adult who repeatedly offends against a child is a different person who has violated a child's rights so severely, sometimes by murder, that their rights as individuals are a secondary issue. Society, children, must be protected from these individuals.

- c) When you are dealing with those offenders who repeat their behavior you have someone that we don't know how to treat very well at all, much less cure. If on the streets in a few months or years they will offend again. Therefore we as a society then, must look at the broader view and that is, what must we do to protect other vulnerable children from these individuals. Until we have more answers, cures or treatment methods, we must keep these individuals off the streets and away from children. There is data available that indicates pedophiles are seeking younger and younger children to molest because they know there is less risk of being caught and convicted due to the age of the child. I think this speaks to the nature of the offender and makes a strong case for what we must do to protect children.

By viewing these offenders as "sick" or adults who let discipline get out of control, we can excuse their behavior and the status quo is maintained. Our system currently recognizes the rights of the offender above the rights of children to a life free of abuse and violence. This has to change. It should be noted that the F.B.I. has never found a sex offender who was legally insane and/or sick; and there is no data that child abusers in general are legally "sick", yet we maintain this attitude.

If we don't break the cycle of abuse, we will have generation after generation of abused children who grow up to be abusing adults. This legislation will help break that cycle, not cure it, but help break it.

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DEATHS DUE TO MALTREATMENT

Variations in the reporting practices and investigative procedures across the fifty states make it difficult to determine the exact numbers and scope of the problem.

In 1986, at least 1,200 fatalities due to child abuse and neglect were reported. At least one study which reviewed official death certificates and clinical records suggests that the actual number may be as high as 5,000. Many fatalities are mis-diagnosed as "SIDS", homicides, or accidents when the circumstances indicate fatal maltreatment.^{1,3}

Compared to a slow down in the growth rate for child abuse reports, the number of child death due to maltreatment increased dramatically in 1986. Confirmed or suspected deaths rose 29% compared to 1984-1985 comparisons when the number of child deaths declined 2%.³

For many of 1,200 reported cases, death occurred after the child was reported to local child protective services. In some cases the child died in protective custody as a result of abuse or neglect by foster parents.²

Children reported as fatalities are much younger on average than those reported for maltreatment. (7.2%) The average age of death is 2.6 years.¹ Children ages 0-5 are 28% of the general child population, but sustain a disproportionately high, 74% of fatalities. This age group is the most vulnerable due to language skills, intellectual development and dependency needs to request assistance.⁴

In some instances this dramatic increase in fatalities may reflect a more accurate identification system. However, the size and frequency of this increase suggests that maltreatment is on the rise and that this statistic is consistent with current trends noted in infant mortality rates and levels of serious family violence and violent crimes.^{1,2}

Data from American Humane Association states that approximately half of the children die as a result of battering. In some, death is the accumulative result of repeated beatings while in other cases death results from a single violent episode. The other half die as a result of child neglect.¹ Abuse is the second leading cause of death behind SIDS for children 0-5 years old.^{1,5}

Child abuse and neglect may permanently or seriously damage the physical, emotional and mental development of the child. Physical effects may include damage to the brain, vital organs, eyes, ears, arms or legs. These injuries may result in mental retardation, blindness, deafness, loss of limbs and death.⁵

- 1 National Committee for Prevention of Child Abuse.
July/August 1987 NCPCA Memorandum.
- 2 First National Symposium on Preventing Child Abuse and
Neglect Fatalities, July 1987.
- 3 Deaths due to Maltreatment Soar: The Results of the 8th
Semi-Annual Fifty State Survey, 1987. NCPCA research.
- 4 National Committee for Prevention of Child Abuse and
Neglect Supplement, 1986.
- 5 Committee for Children: Physical Abuse and Neglect
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CHILD SEXUAL ASSAULT

A pedophile, fixated offender and regressed offender are three typologies that have been assigned to child sexual offenders in recent years.

Specialists who are veterans of treating adult sexual offenders do not use the word "cure" only "control" or "reduction". Because of the problem of chronicity in sexual offenses, these compulsive behaviors are compared often to other addictive, habitual behaviors such as alcohol abuse, drug abuse and gambling. The behaviors are continuous, repetitious and heavily patterned. The strongest predictor of future sexual offenses is past offenses.

In a unique study drawn from 411 non-incarcerated sex offenders who volunteered for the study under conditions of strict confidentiality:

- 44% of incest offenders offended outside the home.
- 50% had multiple deviances.
- 232 molesters were responsible for 17,585 victims. These molesters produced more than 10 times the number of victims than rapists.
- According to this research, the average adolescent male sex offender may be expected to affect 380 victims during his lifetime.^{1,2}
- At another study at Oregon State Hospital 53 incarcerated offenders reportedly committed 25,757 sexual crimes.²

1 Self-Reported Sex Crimes of Non-Incarcerated Paraphiliacs
Gene Abel, Journal of Interpersonal Violence, Vol.2 No.1,
March 1987.

2 Changing a Lifetime of Sexual Crime, Psychology Today,
March 1986.

Studies to date clearly indicate that child sexual assault is a repetitive, chronic and addictive behavior. Through treatment offenders can learn skills and methods to control their deviant behavior. The statistics do not appear to be available nationally indicating the number of children that have died specifically as a result of sexual abuse. We know there are children that have been victims of continuous and repetitive sexual abuse that have died as a result of this abuse.

Children who are raped and then murdered are listed only as homicides. In most cases, child sexual assault does not physically injure a child to a degree that death results, but it is also a repeated and continued pattern of child abuse that must be considered as dangerous to the child as physical abuse and neglect.

Patty Barnes, M.A. Children's Program Coordinator
Women In Safe Homes

Women In Safe Homes
P.O.BOX 6552
Ketchikan, Ak 99901

The most notable large scale study done by Diana Russell found that 38% of a sample of 930 San Francisco women reported at least one experience of intrafamilial or extrafamilial sexual abuse before reaching the age of 18.¹ 28% reported one such experience before reaching 14 years of age. 12% had been abused by a relative before the age of 14 and 4.5% had been abused by a father or step-father. Only 4 of these cases were ever reported to the police.

In the survey, 43% of the cases were reported as having occurred once, 31% reported as 2-5 times, 17% 6-20 times, 10% over 20 times. With regard to time period over which multiple abuse occurred, 35% occurred over a period of less than 6 months, 31% over a period of more than six months, but less than 2 years, 28% occurred over a period of more than 2 years, but less than 10 years and 6% over a period of more than 10 years.

Patty Barnes, M.A.
Children's Program Coordinator

1 The Secret Trauma, Incest in the Lives of Girls and Women, Diana E.H. Russell, Basic Books, Inc., 1986.

**STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: Revision Date: 1-6-88 Title: An act relating to sexual abuse of children Sponsor: Requestor: Ulmer	Bill Version: HB 237 Publish Date: Agency Affected: Alaska Court System BRU: Trial Courts Components:

EXPENDITURES/REVENUES:	(Thousands of Dollars)					
	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
OPERATING						
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: <i>Jan Strandberg</i> Division: Alaska Court System	Phone: 264-8228 Date: 1-6-88
Approved by: <i>Stephanie Cole, for</i> Agency: Arthur H. Snowden, II, Administrative Director Alaska Court System	Date: 1-6-88

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M E M O R A N D U M

February 1, 1988

TO: Judiciary Committee
FROM: Representative Fran Ulmer
SUBJECT: Recidivism

I'd like to share with you a statement I received from Patty Barnes, a Children's Counselor at Women in Safe Homes, pertaining to the subject of recidivism.

Attachment

Prepared by Patty Barnes
Children's Counselor
Women In Safe Homes
January 29, 1988

Recidivism

When we combine the data from offender/victim studies, clinical observations, treatment/program evaluations and criminal justice statistics it is apparent that there is a serious short coming in the sex-offender literature given to the study of sex-offender recidivism. Only a few efforts have been made to follow up identified child molesters over a period of time to find out under what conditions they continue to reoffend. With incarcerated offenders investigators routinely use as their criterion of recidivism subsequent offenses that came to the attention of the authorities or in many cases only if a conviction occurred. The serious flaw in these studies is that it only measures the types of offenders most likely to reoffend in the first place. The vast majority of sexual offenders are never reported and never come to the attention of the authorities (Russell study). Because very few offenders ever get caught and sent to prison, those men that do are men who have patterns of repetitive offending. The mean for 10 of these incarceration studies was about 20% recidivism rate.

Two recent studies have been conducted on nonincarcerated individuals, one at Northwest Treatment Associates (1985) and the other by Gene Abel et al (1984). The Northwest Treatment Associates study reported reoffense at 3% for a group of 126 child molesters who had been ordered to treatment and followed up for an average of 24 months. Knowledge of new offenses was not based on a systematic record check, but rather on self-reports or reports from family members. Experts in this field know from the evidence that offenders do not self-report, especially when they are in the criminal justice system. Abel et al. reported a 21% recidivism rate for his group (a mixture of convicted, nonconvicted and publicly undetected offenders) of 24 followed for 12 months after treatment. Abel relied on self-reports, but unlike N.T.A. promised offenders complete confidentiality for their admission. Both of these groups were receiving intensive treatment and up to date therapeutic assistance unlike those offenders who are not caught or who are treated in less sophisticated settings.(Finkelhor, 1986)

Another serious problem with recidivism studies is the short time span which offenders are followed. It is widely accepted in this field today that child molesting is an addictive behavior that is reinforced over long periods of time and cannot be cured, but only controlled by the offender. A child molester may appear reformed while he is under observation, but later will revert to the original pattern. This is supported by one of the longest follow up studies (22) years that found the longer period dramatically increased their rates of recidivism (Soothill and Gibbons, 1978). (Finkelhor, 1986)

In summary, based on the most recent studies of offender behavior and dynamics and on retrospective surveys conducted with adult women and men, recidivism rates are almost impossible to determine. The only two realistic and valid methods to measure recidivism is the offenders decision to self-report an offense and the victims willingness to report the abuse. As offenders rarely self-report on a voluntary basis and victims do not report a large majority of assaults, little reliance can be placed on recidivism rates. As most child sexual assault offenders are never caught, let alone prosecuted, we are left with the national statistics that 25% to 38% of females are victims of sexual abuse by the time they are 18 years old. Either 1 out of every 3 males (and a small minority of females) in this country are sexual assault offenders or a small minority of males are molesting hundreds and hundreds of children during their lifetime.

Exerts From The Experts

1. Faye Knopp, The Rational and Goals of Early Intervention

Offenders begin deviant sexual interests at an early age, through fantasy and reinforcement by orgasm. The deviant themes continue over and over again. This is the key to persistent deviant arousal. When the problem becomes chronic it takes on life of its own. Specialists who are veterans of treating sex offenders never mention "cure" only control and reduction. These compulsive behaviors are compared to addictive, habitual behaviors such as alcohol, gambling and eating.

Offenders learn through observation and direct experience (molestation), cultural influences, socialization process, chaotic, enmeshed or rigid families and sexual trauma as a child. These all contribute to the dynamics that are used to rationalize abusive behaviors.

2. Gene Abel, Judith Becker, Characteristics of Men Who Molest Young Children, 1983 presentation to World Congress of Behavior and Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs, Journal of Interpersonal Violence, March 1987.

Most unique study and data gathered because 561 paraphiliacs were interviewed who were voluntary subjects not under court order to receive evaluations or treatment (nonincarcerated).

Results show that nonincarcerated sex offenders are:

- Well-educated and socioeconomically diverse.
- Report an average number of crimes and victims that is substantially higher than represented in current literature.
- Sexually molest young boys with an incidence that is 5 times greater than the molestation of girls.
- *- 44% of incest fathers admitted to offending outside the home.
- 50% of men had multiple deviations.
- 232 molesters were responsible for a total of 17,585 victims. (Knopp)
- According to a study of adolescent males they may be expected to have contact with 380 victims during lifetime. (Knopp)
- Offender does not outgrow sexually exploitive preferences. Begin deviant fantasies as early as 12 years old. (Knopp)

3. Nicholas Groth, responsible for fixated-regressed typology, author of Men Who Rape and numerous publications on offenders.
 - In study of incarcerated rapists and child molesters, (1982), offenders admitted committing up to 5 times as many sexual offenses for which they were apprehended. Child molesters committed first offense as early as eight years, rapists at nine.
 - A similar population, 1982 study reflects potential for escalation. Of incarcerated sex offenders interviewed, 35% reported progression from compulsive masturbatory activity, repetitive exhibition to the more serious crimes for which they were convicted as an adult.
 - Groth reports in Psychology Today, The Unspeakable Family Secret, 1984 that "sexual abuse is a chronic problem like alcoholism. Offenders shouldn't think of themselves as cured. It's something they have to work on every day of their lives." In evaluating current data on offenders, it appears dangerous to identify intrafamilial offenders as regressed offenders and therefore unlikely to offend outside the home. According to Abel and others almost half of incest fathers admit to pedophilia. Also of interesting note is David Finkelhor's data that reveals girls with a step-father are 6 times more likely to be abused than those without. Pedophiles can enter families with ease.
4. Robert Freeman-Longo, director of Sex Offender Unit, Oregon State Hospital, lecturer, researcher, administrator, therapist, Changing a Lifetime of Sexual Crime, Psychology Today, 1986 and Life Magazine, Special Report, The Offenders, 1984.
 - Sexually deviant behavior is usually deeply engrained and most sex offenders need extensive psychological help to change deviant thought and behavior patterns.
 - No responsible professional in our field would claim that sexual deviancy can now be cured. We can give sex offenders skills and methods for controlling their deviant behavior, but it seldom can be eliminated.
 - Sex offenders may adapt their behavior superficially, but unless they develop noncriminal, even empathetic thinking patterns they are likely to revert to their deviant patterns.
 - There are no cures in this business. We tell these men they will need to work on their problem everyday for the rest of their lives.
 - Estimates of the recidivism rate among untreated sex offenders range between 35 and 80%. These offenders not only commit more sex crimes, but their behavior may help to create a future generation of sex offenders.

- A total of 53 offenders treated at Oregon State Hospital reportedly committed 25,757 sexual crimes.
- 5. Dr. Irwin Dreiblatt, Ph.D, Pacific Psychological Services, WA, Issues in the Evaluation of Sex Offenders, 1982.
- Sexual Assault is often a chronic behavior problem. Even with only 1 victim. We are unable to predict what his future sexual behavior will be or how it will be managed.
- Strongest predictor of future sexual offense is past offenses.
- Sexual deviant behavior must be viewed as a highly, habitual sexual preference, a habit not very dissimilar than alcohol abuse. One must view the offender as vulnerable to his deviant sexual preference indefinitely. He will fall prey to reoffense if he does not respect his vulnerability and cease to manage his life in ways necessary to prevent reoffense. Such a vulnerability model emphasizes that there is no cure, but rather mastery of a serious behavioral problem.
- 6. Stephen Wolf, director, Northwest Treatment Associates, Seattle; editor of Sexual Violence Quarterly, Fall 1985, Evaluation and Treatment: Characteristics of Adult Sexual Offenders.

Sexual offenders act out their deviances at high rates. Behavior does not show the pattern of decline in frequency with age as found in property offenders. It appears they do not outgrow their sexually exploitive preferences. Recidivism rates are high and increase in relation to the number of previous sex offenses and with attraction to male (non-incest child victim). Sexual offenders are motivated to act out their deviances as a sexual preference. In simple terms, they like what they do. They are not in any large numbers psychotic or schizophrenic. Once their sexual preference is established they tend to continue to pursue it. They will most often at the time of discovery have more than one victim and probably more than one deviant sexual focus. In incest cases they molest children outside the home almost half the time.

Offenders tend to return to deviance shortly after they feel safe from criminal justice sanctions. In their histories.

- 7. Diana Russell, researcher and author, The Secret Trauma, in widely utilized study of 930 women in San Francisco survey found that only 2% of intrafamilial abuse and only 6% of extrafamilial abuse was reported. 38% of women admitted to having been sexually abused, 152 abused by family member.

Women In Safe Homes
Ketchikan, Alaska

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STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

APR 13 1987

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April 9, 1987

Jim - pls read

✓ 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 engaging 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); Oksohtaruk 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).

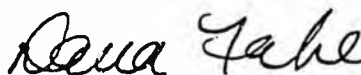
Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, 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

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
207 465 1800

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)).

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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

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DEPARTMENT OF LAW

CRIMINAL DIVISION/FOURTH JUDICIAL DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

December 29, 1987

Representative Fran Ulmer
P.O. Box V
Juneau, Alaska 99811

Re: HB 237

Dear Representative Ulmer:

As District Attorney Harry Davis is consumed in the trial of State v. McKay, I was asked to comment for him on HB 237. I circulated the packet of materials provided with your letter of November 13, 1987 as well as these comments among those attorneys in the Fairbanks District Attorney's Office who have specialized in sexual abuse and assault cases, and have incorporated their input. Our comments are as follows:

1. Amendment of A.S. 11.41.110(a)(2) and 11.41.200(a)(3).

This amendment changing the mental element of "reckless murder" and certain serious assaults appears to be really a housekeeping amendment. It merely reflects the current interpretation of the statute.

2. The Additional Theory of Murder II and Assault I:

It should be first noted that the proposed statute only protects children under the age of 16. In 1980 for Title 47 proceedings the legislature redefined "child" as a person under the age of 18 rather than under 16. It would seem that even older children should be protected by the criminal statutes. Note the crimes of sexual abuse of a minor (hereinafter SAM) I as well as SAM II protect those children under age 18 who have a special relationship to the abuser.

The definition of abuse or gross neglect in sections 2 and 4 fails to include failure to provide necessary medical treatment, sexual abuse, or subjecting a child to a risk of injury due to frostbite. I would suggest the following definition (written in legislative style):

In this section, "abuse" [OR GROSS NEGLECT] includes intentional bodily impact, restraint, confinement, sexual contact or penetration, or 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 and unjustifiable risk that the child will suffer serious physical injury due to burns, frostbite, hypothermia, or suffocation, or knowingly or unjustifiably failing to provide medical treatment to a child.

It is troubling to call the behavior abuse or gross neglect and then require a pattern or practice. Neglect is rarely a single incident, but a pattern or practice consisting of a failure to provide for the child in various ways, usually a combination of physical, emotional or mental deprivation and abuse. For example, leaving a child with an abusive babysitter once would not necessarily be neglect. However, to do so frequently and knowingly could be neglect. A review of the Title 47 definitions of abuse, child and neglect may assist in the definitions for the proposed statute.

Proposed A.S. 11.41.110 and 200 do not define the phrase "pattern or practice." However, I suspect there would be a tendency to adopt the definition in proposed A.S. 11.41.510 which speaks of "three or more incidents of prohibited conduct." It appears this definition was drafted with the Repeated Sexual Abuse of a Minor (hereinafter RSAM) offenses in mind. In applying that definition to the proposed assault and murder statutes confusion may arise with the phrase "prohibited conduct." Surely we do not want to say the child must be burned, restrained, confined, etc. three or more times.

3. The Offense of Repeated Sexual Abuse of a Minor

Is a repeat sex offender statute really necessary? It appears the purpose of the proposed statutes is to punish more severely those persons who repeatedly abuse children; to provide greater protection for children who are abused by those persons with whom they have a special relationship; to punish those persons who abuse within those relationships more severely; and, to circumvent the perceived problems associated with Covington v. State, 703 P.2d 436 (Alaska App. 1985).

I would respectfully suggest a new set of offenses entitled RSAM I-III are not really necessary to accomplish these goals. A few minor amendments to the present SAM statutes and the sentencing provisions of A.S. 12.55.155 could accomplish the same

purposes without raising some of the constitutional issues the repeat offender statutes may.

For example A.S. 11.41.434(a)(2) (SAM I) and A.S. 11.41.436(a)(3) (SAM II) already contain the language "entrusted to the offender's care by authority of law." I suggest changing that phrase to simply "authority over," and then include in A.S. 11.41.470 a definition of the phrase. I would suggest the following (in legislative style):

11.41.434 SEXUAL ABUSE OF A MINOR IN THE FIRST DEGREE. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

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

(2) being 18 years of age or older the offender engages in sexual penetration with a person who is under 18 years of age with whom the person had authority over. [WITH A PERSON WHO IS UNDER 18 YEARS OF AGE AND WHO]

[(A) IS ENTRUSTED TO THE OFFENDER'S CARE BY AUTHORITY OF LAW, OR

(B) IS THE OFFENDER'S SON OR DAUGHTER, INCLUDING AN ILLEGITIMATE OR ADOPTED CHILD, OR A STEPCHILD].

b) Sexual abuse of a minor in the first degree is an unclassified felony and punishable as provided in A.S. 12.55.

11.41.470. DEFINITIONS. For purposes of A.S. 11.41.410-11.41.470, unless the context requires otherwise.

(1) "having authority over a child" means

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

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

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

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

(The definitions of incapacitated, victim and without consent would remain as defined and would be simply renumbered).

In conjunction with the above suggestions A.S. 12.55.155(c)(18), which is the aggravator for offenses perpetrated against persons of the same social unit, could be amended to include those defendants who abuse persons they have authority over. For example:

12.55.155(c)(18)

The offense was a crime specified in A.S. 11.41 and was committed against a spouse, former spouse, [OR] a member of the social unit comprised of those living together in the same dwelling as the defendant[.], or a person over whom the defendant had authority.

While the original bill punished repeated sexual abusers more severely than SAM did, the committee substitute (with the exception of the lesser degrees) does not. However, another way to accomplish that goal with minimal tinkering within the present statutory scheme is to make evidence of repeated sexual abuse an aggravating factor. For example:

() The defendant is convicted of an offense specified in A.S. 11.41.434-440 and the defendant's conduct indicated the defendant engaged in a pattern or practice of sexual abuse.

However, if the legislature is desirous of enacting a separate repeat sex offender statute, I have the following comments on the proposal:

I would first note that this statute requires the offender to be over the age of 16 and the victim to be under the age of 13. Contrast that to the analogous sections in SAM I and SAM II, which simply require the defendant be over age 18 and the victim under 18. The ages should be the same whether the charge is violation of A.S. 11.41.434(a)(2) (SAM I) or proposed A.S. 11.41.441(a) (RSAM I). If we are protecting children who have a special relationship with the adult, the age of 18 is more appropriate.

Second, why is RSAM limited to those persons who "have authority over a child"? The definition of authority is good for it includes persons like babysitters, but it does not include those who have no specific authority or relationship to the child or who live in the same social unit but nonetheless may abuse a child repeatedly. The neighbor, boy/girl friend, family friend, relative or other person who has frequent contact with the child should be included in the repeat offender statute.

Perhaps the statute could be drafted like the current SAM I and SAM II statutes. Children under the age of 18 are protected from repeated abuse by someone with authority over them, while children under 16 are protected from repeated abuse outside that relationship.

Finally, I would note the offense of RSAM II is a class "A" felony while SAM II is a "B" felony and RSAM III is a "B" felony while SAM III is a "C" felony. The scheme made sense under the original draft of the bill when the offense of RSAM I carried a presumptive jail term of 13 years. However, as the committee substitute reduced the presumptive term for RSAM I to 3 years it would seem appropriate to reduce the sentences for RSAM II and III accordingly.

4. Evidence Rule 404(b) and (c)

This amendment certainly clears up a somewhat confusing morass in the law regarding the admission of prior bad acts. The amendment will be of assistance to prosecutors. However, people should not be convicted on rumor, reputation or speculation. Perhaps something akin to the rape shield statute could be devised which would allow the state to use those acts after a showing of relevance at a hearing outside the jury's presence.

Proposed Evidence Rule 404(c) contains some potentially confusing language. I would suggest it be written as follows:

(c) Notwithstanding (b) of this rule, in a prosecution for a crime involving a physical assault upon a child or for the sexual abuse of a minor in any degree, evidence of prior acts of the defendant toward the same or another child victim is admissible to show the defendant's disposition to commit the offense.

This does not substantially change the proposed rule; it makes application of the rule more explicit.

In considering this amendment, Section 15 of Article IV of the Alaska Constitution should be noted. That section empowers the Alaska Supreme Court to promulgate rules of procedure. Any changes of those rules require a super-majority of two-thirds of the legislature. Further the desirability of making such a change must be evident and the bill must specifically state that the legislature intends to alter the rule. Leege v. Martin, 379 P.2d 447 (Alaska 1963).

Thank you for considering these comments. Please let me know if I can provide further input or if any of the suggestions herein require amplification.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

HARRY L. DAVIS
DISTRICT ATTORNEY

By: Gayle L. Garrigues
Gayle L. Garrigues
Assistant District Attorney

GLG/tmh

STATE OF ALASKA

STEVE COWPER, GOVERNOR

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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.

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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 had 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.

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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, CPA 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

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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

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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

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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 13 years of age and the

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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

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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 1973 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 criminal prosecution. The facts as set out by the court in 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

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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

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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



STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS

DEPARTMENT Health and Social Services	DIVISION Family and Youth Services	BILL NUMBER HB 237	SPONSOR Ulmer, et al.
DEPARTMENT POSITION Support concept			
PREPARED BY Yvonne M. Chase, Director <i>YMC</i>	DATE 4/22/87	COMMISSIONER'S SIGNATURE <i>Theresa H. Munson</i>	DATE 4/22/87

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Department of Law	CONSTITUENT GROUP(S) AFFECTED BY BILL 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.

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.

STATE OF ALASKA



REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

April 27, 1987

Mr. Jeffrey Feldman
Gilmore & Feldman
Attorneys at Law
310 K Street, Suite 308
Anchorage, AK 99501-2095

Dear Mr. Feldman:

Thank you for your letter expressing your opinion on House Bill 237.

You raised several objections to the bill: that the present criminal code adequately protects children from physical and sexual abuse; that the bill emphasizes punishment rather than rehabilitation of persons who engage in a pattern or practice of child abuse or child sexual abuse; that it raises the possibility of prosecutors unfairly charging offenders with multiple offenses; and that criminal convictions should not be allowed based on prior inconsistent statements.

After conversations with police officers, troopers, social workers, guardians ad litem, prosecutors, and parents, I am convinced that the current law does not provide adequate means of prosecuting persons who abuse children. The difficulty children often have in remembering specific dates and times in the past makes it hard to prove abuse that has occurred many times over a long period of time. A recent opinion of the Alaska Court of Appeals, Covington v. State, 703 P.2d 436, opin. on reh. 711 P.2d 1183 (Alaska App. 1985), is an example of this difficulty. The court in Covington required that the jury unanimously agree on specific incidents before returning a verdict of guilty, which makes it more difficult to convict an individual who has engaged in multiple abuse of the victim. Under the Court of Appeals' interpretation of the unanimous jury requirement, the younger the victim and the more frequently the victim is abused, the

more difficult it is to obtain a conviction. Although the conviction of the defendant was ultimately upheld in the opinion on rehearing, similar cases of frequent sexual abuse may not result in convictions in the future. By making it an offense to engage in a pattern or practice of abuse, it would not be necessary for the young witness to recall the exact time and date of each individual assault or to distinguish among individual incidents in a long pattern of abuse. The jury can still decide unanimously that the defendant engaged in the unlawful conduct, the pattern of abuse.

The bill does provide stiff penalties for persons convicted of a pattern or practice of abuse, and for good reason. Persons who repeatedly abuse children physically or sexually are especially culpable because they are often in a position of special trust -- either a family member or good friend. Not only does the victim suffer the injury and pain from the assaults, but also must endure the fear, betrayal, and guilt so often connected with these cases. Further, I cannot agree that many of these offenders should be treated rather than penalized. Experts in the area of treatment tell me that child sexual abusers are extremely difficult to treat, and that they resist treatment unless ordered to do so by a court as a result of prosecution and conviction. I certainly agree that other steps must be taken to break the cycle of child victimization. However, the conviction of offenders is an important part of the process; their punishment and treatment are important for everyone: for the offenders, for their victims, and also for society as a whole.

In regard to your fear of unfair, multiple charges brought against offenders, it is true that Section 8 allows a person to be charged both with a pattern or practice of conduct and with separate incidents during the time of the alleged pattern or practice. This is a part of the bill which may need refinement, and I welcome your constructive suggestions. But, as you know, prosecution for criminal acts is often based on multiple counts and alternate theories; sentencing is based on one of the theories if there are convictions on more than one.

Finally, you state that convictions should not be based on unsworn, uncorroborated statements. I believe that only rarely would a case go to trial where the only evidence of child sexual abuse or assault is an unsworn, uncorroborated statement. However, in the rare case where that evidence is sufficiently persuasive, it ought to be left to the trier of fact to decide if proof beyond a reasonable doubt has been

Mr. Jeffrey Feldman

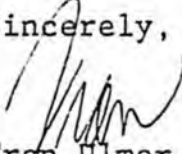
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April 27, 1987

presented. Prior inconsistent statements are admissible now; the question raised by Brower v. State is whether they can be sufficient to convict. That sufficiency should be determined by the jury or trial judge in each individual case, not by the Court of Appeals as a matter of general law.

The tragedy of child abuse is of great concern to me and to other Alaskans. House Bill 237 was introduced to help stop the cycle of abuse. I am not persuaded by your letter that it is either "unnecessary" or "unfair", and I hope that, upon reflection, you may be willing to support this legislation.

Sincerely,



Fran Ulmer
Representative

TESTIMONY OF DR. SMITH
LANGDON CLINIC
JUDICIARY COMMITTEE
JANUARY 26, 1988

I testified last week just with some facts and figures with respect to sexual offenders and what you can expect in terms of past sexual offenses when there was a certificate of total confidentiality. And then I had to leave the proceedings and I understand that there has been a question with respect to the issue of treatment and how treatment might be affected by something like consecutive sentencing. So I wanted to be available to this committee for that, also to any questions you might have in more depth or detail with respect to the nature of the sexual offendent.

So I think that maybe to provide a stimulus for that, if I could just speak to the issue of how the sexual offender presents themselves. It's always a question of whether it's a difference between someone who would be "a common criminal" in the criminal justice system, and a sexual offender. In some cases, obviously, none at all, in terms of appearance or method of operation, but in some other cases there are very, very wide differences. We've seen that overall in the facility at Highland Mountain where our predominant treatment program, that is the largest number of offenders is located in the state. The complexion of that institution has changed in the five years that we moved from a treatment base of 20 to a treatment base of 90, because of the fact that the predominant sexual offender in the system is sexual assault of a minor charge, a pedophile by diagnosis, as opposed to rapists. Rapists get longer sentences and are either in more maximum security institutions here in Alaska or else in the FBP, Federal Bureau of Prisons.

But, in addition to that, the method of operation, the method of presentation of someone who has been generally convicted of a child sexual assault is such that they will seem very much like you and me, from the perspective that they will hold the same values in terms of the Protestant work ethic. They will work very hard in the institution; they work very hard, in fact, out of the institution. They don't have an itinerant history, either in relationships or in vocational, in terms of their job history, as you often find with a criminal background where they move geographically every one or two years, they engage in short-term relationships, they are unable to hold down a job. The sexual abuser that we see is someone who establishes himself in a job, establishes himself in the community, establishes himself, often, in a family; who, in fact, uses his ability to work his way into those situations, those groupings, for their own reasons. So, in a way, he has the same value structure as you or I, but it's for the wrong reasons. His reasons have to do with gaining access, first of all gaining trust, gaining the trust of his family or of the neighborhood or

of the community and, second of all, using that trust for his own purposes which have to do with an underlying deviant sexual arousal. I don't have to but allude to the kind of cases that get a lot of notice in certain geographic areas in the state, the man of the year, in a particular state. We have physicians, we have psychologists, we have ministers, we have police officers. They cut across a wide swath of vocational and job strata or social strata, in terms of who it is who is charged and ultimately convicted and comes through the program. That's one major difference that we do see is that on the surface you can't necessarily tell.

Certainly the other point I was trying to make was that in terms of personality profiles, you also can't necessarily tell. What is uncontrovertable evidence for any sexual abuser is their past history of sexual abuse and behavior. That, and really nothing else.

The only other thing I might add with respect to sexual abuse is the difference in the impact of the crime. If someone enters your home and steals from your property, takes property from you, we all feel a sense of intrusion when that has happened. There's a sense of a personal investment in our objects and so there's a sense of intrusion in having someone come into our castle, so to speak, in your home. But that is external to us physically. We can get over that by replacing those articles, by buying into a sophisticated security system or just changing the locks. When your body's invaded, as occurs in a sexual abuse case, you can't change the body that you live in. The impact on the victim is so much different that that's where the crime really does become something that is qualitatively quite different on the impact on those that are the victims of it.

I think at that point, I'll stop, with respect to that, and ask if there's any questions the committee might have about the characteristics of the sexual offender.

Ulmer: Thank you, Dr. Smith. Are there any questions? Representative Barnes.

Barnes: Thank you, Madam Chairman. I'm not sure that I heard you correctly so I'd like to have you repeat it, if you would, please. The population that you have at Highland Mountain, would you state again exactly what that's made up of? Did I understand you to say that those that have committed sexual abuse are more likely to be in a more long-term prison than the ones that are at Highland Mountain, and those that have gotten lesser sentences are the ones that have abused children?

Smith: Thank you. That needs clarification. What I was saying there was that generally with an offense that involves rape, that there's the use of a weapon and/or use of enough force

where the sentencing reflects that. The longer the sentence, the higher the security level within the Department of Corrections, and therefore, the higher the security level, the more that they're going to be incarcerated in a maximum security setting. Highland Mountain is a minimum to moderate security institution; therefore, the prisoners that we get are prisoners that are the end of their sentences who are a much lower risk on that matrix.

The other part of that is that the complexion of the sexual offender in the state is that we have more sexual abusers of children than we do rapists, in terms of relative numbers, even though, statistically, we're in the top five in the country for both rape and sexual abuse of minors.

So it's two-fold. It's the complexion issue in terms of who is, in fact, in the system, and then it's also, to a lesser extent, the fact that a man is not going to be long-term, is not going to be housed, if he has an extremely long sentence. But, with the presumptive eight year sentence, we certainly have a majority, at this point I think, of the offenders in the system have the presumptive eight.

Ulmer: Any other questions for Dr. Smith? Thank you very much for joining us. We appreciate it. Representative Taylor.

Taylor: Dr. Smith, do you have any figures that would give us some idea of recidivism rates, rehabilitative effects of the program that you're running?

Smith: Yes, I do. They're preliminary. First of all, you need to have about five years worth of treatment program in order to have recidivism statistics that are valid, for the very fact that again, there's a difference between rapists and child molesters in that rapists will generally re-offend, if he's going to, in the first year post-incarceration; whereas, a child molester will re-offend up to five years, post-incarceration. So he's much slower in his method of operation. So you need to have that kind of data. In addition, you simply need to have people that have cycled out of the system. So having said that, we have the three-and-one-half-year recidivism rate, to date, which shows that for the people that complete the program, not one of them has re-offended to date. I'm quoting only sexual re-offenses, actually, for the people that have concluded the program. Out of that total number that have gone through our program since September 1983, we've had 231 people. Out of that 231, 23 have successfully completed the incarcerated component, meaning they have gone through the complete two years and they are now in the follow-up after-care setting. That comprises 10%. In addition to that, there's also another 76 who have been released who were still in the program, so we consider them to be a group that was continuing to work. So, in other words, 43% of the men who have come to the program continue with us in after-care follow-up, and 57% of the men who come to the program drop out. They fail or

they're asked to leave, for one reason or another, which may sound high but across the nation, it's relatively low compared to other programs of equal rigor or intensity. So you have to break it down into three categories to answer that question of recidivism.

In the first category, Group A, which is the people that completed, we have had two re-offenses which were alcohol-related probation violations, but no sexual re-offenses. So that's a statistic of either zero or nine percent of the total, depending on whether you include the two alcohol related offenses or not. Out of that group of 57% that have dropped out, they have an overall recidivism rate of 25%. In relative terms, we're talking about, at this point, 9% versus 25%. But, again, out of that Group C, of the 132 that dropped out so far, only 64 have actually been released. So you see you have 68 men still in jail who we can't necessarily say anything about. Because they're still incarcerated, we don't have any idea what their overall recidivism is going to be. So it's a preliminary kind of recidivism statistic. All we can say is that at this point for the men that complete the program, none of them are re-offending. So that's a very heartening statistic and one that we hope will continue. But it will take another year-and-one-half before we'll have the kind of statistic where I sit and answer that question completely.

Ulmer: Thank you very much. Any other questions? Thank you for joining us.

PUBLIC DEFENDER AGENCY

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October 20, 1987

Representative Fran Ulmer
1700 Angus Way
Juneau, Alaska 99801

Re: House Bill 237

Dear Representative Ulmer,

Thank you for giving me the opportunity to meet with you last Wednesday on House Bill 237. Following is the specific information which I offered to provide to assist you in your work on the bill. I have also noted some of the suggested drafting changes in the first few sections of the bill. I will provide a copy of these to the House Judiciary Committee so that they are aware of modifications in my position on these provisions.

A. Second Degree Murder -- Extreme indifference to the welfare of a child under 16.

As we discussed, my concerns over this section would be alleviated by some drafting changes. I understand the desire for a statute which involves a "pattern or practice of abuse," particularly since it solves perceived evidentiary problems regarding past abuse of that child victim. First, I suggest changing the circumstances to those manifesting an "extreme indifference to the health and physical welfare" of a child under 16, in order to narrow the focus to physical rather than psychological or mental abuse.

Second, actions exhibiting this extreme indifference must directly cause the death to avoid covering accidental deaths. The phrase "results in" should be deleted and replaced by "directly causes."

Finally, my concerns regarding the broad application of this section would be quelled by a much more narrow and specific definition of abuse in Sections 2 and 4. Abuse is currently defined in the proposed legislation as "bodily impact, restraint or confinement." This broad definition could include many normal disciplinary actions taken by parents, including spanking and

"time-out" in the child's bedroom. I 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. Assault in the First Degree -- Extreme indifference to the welfare of a child.

The sections regarding Assault in the First Degree closely track the second degree murder sections, discussed above. Similar changes should be made in these sections. Thus, Section (a)(4) of AS 11.41.200 should provide "the person engages in a pattern or practice of abuse of a child under the age 16 that directly causes serious physical injury to the child." Section 4 should define abuse in a manner identical to my suggested revisions in Section 2.

C. Repeated Sexual Abuse of a Minor (RSAM)

I understand your purpose for suggesting a repeated sexual abuse of a minor statute, particularly in that evidentiary issues regarding prior bad acts of a perpetrator against the victim would automatically come in to prove "pattern and practice." If such a statute is adopted for these evidentiary reasons, I have

three major areas of concern:

1. Exhanced Presumptive Sentence (Removed by HESS)

First, the presumptive term for this offense should not exceed the already severe presumptive for those convicted under the current child sexual assault statutes. Virtually all family sexual abuse cases involve repeated abuse and prosecutors would have unbridled power to determine a higher sentence simply by selecting this charge. As we discussed the other day, although there may be some offenders who deserve lengthy periods of incarceration, others who willingly admit their conduct, seek treatment and exhibit remorse and a wish to avoid putting the victim through legal proceedings, may not require a lengthy presumptive term, particularly on a first offense. The HESS committee's removal of an increased presumptive term allays my concern in this area.

2. Unanimous Jury Verdict

My second concern with this portion of the bill relates to unanimous jury verdicts. Your bill would remove the requirement for a unanimous jury verdicts in that the jury need not be unanimous as to any particular incident of sexual abuse. Unanimous jury verdicts are constitutionally required. In State v. James, 698 P.2d 1161, 1165 (Alaska 1985), the Alaska Supreme Court interpreted the unanimity requirement to require unanimity as to the single criminal incident involved. James was applied in Bell v. State, 716 P.2d 1004 (Alaska App. 1986). Evidence at trial showed Bell had assaulted his wife on May 2nd and May 6th. The state was allowed to argue that believing the evidence as to either incident would support the verdict. The jurors were not told that they had to agree unanimously on which assault Bell committed. The Court of Appeals reversed, finding a violation of the unanimous jury requirement.

The fact that a pattern and practice of abuse forms the basis of the crime does not allow circumvention of the constitutional requirement of unanimity. In the federal RICO (racketeering) cases which involve "pattern and practice" language, there is an implicit assumption that all the jurors must agree on the individual acts establishing the criminal pattern. For example, United States v. Brown, 583 F.2d 659, 669 (3rd Cir. 1978); United States v. Peacock, 654 F.2d 339, 348 (5th Cir. 1981); and United States v. Boffa, 688 F.2d 919, 933-34 (3rd Cir. 1982), all refer to "the jury" collectively having found the defendant guilty of the particular acts which established the alleged criminal pattern. Further, in Boffa, the trial court apparently had the jurors specifically indicate which particular acts they agreed upon. 688 F.2d at 924.

United States v. Morse, 785 F.2d 771 (9th Cir. 1986), which you mentioned in your letter last spring, although not directly on point for the present dispute, supports a requirement of unanimity. Morse holds explicitly that jury unanimity is required, citing United States v. Echeverry, another 9th Circuit decision, which interprets unanimity as referring to agreement on the "particular set of facts."

Finally, as we discussed in our meeting last week, nothing in Covington requires a child to name a specific date of a sexual assault. A victim can testify that step-dad assaulted her many times, including in particular one time in the living room, one time in the bedroom and one time in the bathroom. Often children will state that one assault happened before Christmas while the other occurred at Easter time. I am not aware of a single acquittal based upon the victim's inability to describe separate specific incidents. Furthermore, despite the literally dozens of sex abuse cases which have been appealed since Covington, only one has been reversed due to a problem with jury unanimity. This was not a case where a victim could not specify separate incidents of assault. Instead at trial, there was testimony describing several separate assaults, but the jurors received no instruction requiring them to agree unanimously that at least one of the specific alleged acts was proved. Strehl v. State, 722 P.2d 226, 229 (Alaska App. 1986).

3. Definition of "Authority Over Child"

The last troublesome portion of the Repeated Sexual Abuse of a Minor provision involves the definition of "having authority over a child." This language is broad and potentially problematic, particularly with respect to a romantic relationship between a young teenager and an exchange student or step-sibling who is three years older and living in the family unit.

As I mentioned, I worked a bit with Maureen Weeks of Senator Halford's office in an attempt to resolve a similar problem in SB 231. The resolution was to require the child to be under the authority of the member of the social unit. AS 11.41.434(a):

[(C) at the time of the offense, is
residing as a member of a social unit
in the same household with the offender
and is under the authority of the offender.]

D. 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.

Brower held that if the only evidence at trial is a victim's prior inconsistent statement, some corroboration of that out-of-court statement is necessary. As I mentioned the other day, the Court of Appeals recently clarified the type of corroborating evidence it had in mind. In Bodine v. State, ___ P.2d ___, Op. No. 708 (Alaska App., May 29, 1987), the court stated that the specificity with which a young child was able to describe the perpetrator's acts in and of itself provided "intrinsic assurance of the reliability of her statement..." Slip Op. at 8-9. Other types of corroborating evidence were permitted to substantiate a prior inconsistent statement which formulated the only direct evidence of the charge. They involved the mother's lack of cooperation with the authorities when told that her husband would have to go to jail and psychological opinions that the victim was an abused child despite lack of any details as to the type of abuse or by whom she had been abused. There need not be other witnesses to or physical evidence of the abuse to satisfy the corroboration requirement. Thus, the Court of Appeals' adoption of a flexible standard of corroboration to support a prior inconsistent statement should remove many concerns regarding the impact of the Brower decision.

E. Rule 404 Alaska Rules of Evidence

As we discussed the other day, 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 justification 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 or 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 Garrer 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 covering a 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

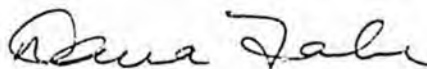
had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

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 shield 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. This body of case law, when combined with the new evidentiary freedom in your proposals of pattern and practice offenses for murder in the second degree, assault in the first degree, and repeated sexual abuse of a minor, will hopefully alleviate your concerns that the jury is not hearing all evidence which is relevant to the charge.

Again, I appreciate your willingness to discuss various provisions of this bill with me, and I hope that this letter provides you with additional information which may be helpful to you. I will provide a copy to House Judiciary so that they are aware of my modified position on the first sections of your bill. I look forward to working with you in the future.

Very truly yours,



Dana Fabe
Public Defender

DF:cs

cc: ✓ Representative John Sund
Chairman, House Judiciary Committee
2504 2nd Street
Ketchikan, Alaska 99901

The Propensity to Misunderstand the Character of Specific Acts Evidence

Richard B. Kuhns*

Proof that a criminal defendant has committed specific bad acts other than those included in a current charge may be relevant to prove the defendant's guilt. For example, if the factfinder knows that an assault defendant has committed numerous assaults in the past, the factfinder could reasonably conclude that it is more likely that the defendant behaved violently on the occasion in question than it would be if nothing were known about the defendant's past behavior.¹

There are, however, important factors that militate against the use of such evidence. First, in at least some cases, the probative value of the inference from conduct on other occasions to conduct on the occasion in question may be relatively weak. Evidence that a defendant has been violent once or twice in the past, for example, shows that the defendant has the capacity for violence, but such evidence is not very probative of the issue whether the defendant was in fact violent on a particular occasion.² Second, particularly if there is a dispute about whether the defendant committed the other acts, introduction of evidence concerning those acts could be time-consuming and distract the factfinder from the central issues in the case. Finally, and most importantly, other acts evidence may have a prejudicial impact on the factfinder. For example, if the

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The author wishes to express appreciation to his colleague, Ronald J. Allen, for helpful comments on earlier drafts of this Article and particularly for insightful observations about the nature of the inferential process of proof, discussed in part I *infra*. The author is also grateful for research assistance provided by Arthur Zulick, a former law student at Cleveland State University and now a member of the Pennsylvania Bar; Robert Wilson, a third year law student at the University of Iowa; and Jeffrey Borns, a second year law student at the University of Iowa. Although the extent of their work is not directly reflected in this Article, their thoughtful case analyses provided the author with invaluable background information.

1. See FED. R. EVID. 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

2. This assertion, like most statements about the probative value of any particular item of evidence, is primarily intuitive. The question whether evidence is relevant or probative of the fact it is offered to prove must be answered, in the absence of empirical data, on the basis of one's common experience and judgment about the relationship among various phenomena in the real world. See C. MCCORMICK, LAW OF EVIDENCE § 185, at 438 (2d ed. E. Cleary 1972).

prosecution were permitted to prove that an assault defendant had committed violent acts in the past, the factfinder might view the defendant as deserving of punishment and be willing to convict even if there were a reasonable doubt about the defendant's guilt.³ Because of these concerns,⁴ courts uniformly prohibit the use of specific acts to prove a person's character for the purpose of showing action in conformity with character.⁵

3. Prejudice can operate in a positive as well as a negative manner. For example, if a criminal defendant were permitted to prove that he had engaged in a number of humanitarian acts, the factfinder might be inclined to acquit him despite overwhelming evidence of guilt. As a practical matter, however, the problem of prejudice with respect to specific acts evidence most often arises in the context of an offer by the prosecutor to prove bad acts committed by a defendant. Thus, the discussion of prejudice in this Article is couched in terms of prejudice against a criminal defendant.

Whether or to what extent an item of evidence may be prejudicial, like the question whether or to what extent an item of evidence is probative of a particular proposition, see note 2 *supra*, is one that must be answered intuitively on the basis of one's common sense and judgment.

For excellent theoretical discussions of the concept of prejudice, see R. LEMPert & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 147-53 (1977); Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977).

4. There are at least three additional concerns: a fear that the party against whom the evidence is offered will be surprised by the evidence and unprepared to rebut it; a sense that proof of prior acts which resulted in convictions would be inconsistent with the notion that the defendant had "paid his debt to society," see R. LEMPert & S. SALTZBURG, *supra* note 3, at 213; and a fear that the jury may overestimate the probative value of the evidence, see Lempert, *Modeling Relevance*, MICH. L. REV. 1021, 1027-28 (1977). See also P. LEMPert & S. SALTZBURG, *supra* note 3, at 211-12.

The surprise problem can be dealt with simply by granting a continuance, see Advisory Committee's Note, FED. R. EVID. 403, 56 F.R.D. 183, 218 (1972), and the notion that a convicted defendant has paid his debt to society, even if it were generally accepted as the basis for an exclusionary rule, has no bearing on the propriety of using specific acts that have not resulted in convictions. Thus, neither of these concerns is addressed in this Article.

The fear that the factfinder may overestimate the probative value of specific acts evidence is also not addressed for two reasons. First, it is at best speculative and at worst incongruous to assume that the judge, as a reasonable person, would find an item of evidence to have only a certain degree of probative value and, at the same time, to assume that jurors, as supposedly reasonable people, would not reach roughly the same conclusion. Second, even if one concedes that a judge, by virtue of his training and experience, may in some instances have a more accurate sense of probative value than the jury, the potential overestimation problem with respect to specific acts evidence is not likely to exist independently of the concerns noted in the text of this Article. The problem is likely to seem most acute when the judge perceives the evidence to be of low probative value. Moreover, admitting the evidence and permitting the opposing party, in closing argument or perhaps by introduction of evidence, to expose the low probative value could be time-consuming and distract the jury from the central issues of the case. Finally, although the concepts of overestimation and prejudice are theoretically distinct, there may be a direct relationship between them with respect to specific acts evidence. For example, specific bad acts offered against a criminal defendant are prejudicial because they show he is a bad person; and because the defendant is viewed as a bad person, the jury may overestimate the probability that he in fact committed the crime with which he is charged.

5. See C. MCCORMICK, *supra* note 2, § 188, at 444-45. See generally Stone, *The Rule*

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Although the various formulations of the specific acts prohibition do not attempt to define the term "character," it appears to have two commonly understood attributes. First, "character" probably includes only those qualities of personality that have some moral overtone, which connotes something good or bad about a person. The term frequently has this meaning as a matter of common usage,⁶ and ascribing such a meaning to it for the purposes of the specific acts prohibition is consistent with the concern over the potentially prejudicial impact of specific acts evidence.⁷ Pursuant to this understanding of character, morally neutral acts could never fall within the specific acts prohibition because they would not be relevant to prove character.

The second attribute of character is suggested by the fact that the prohibition against specific acts evidence to prove character is limited to showing action in conformity with character.⁸ This limitation implies a belief that character has an impact on how one behaves.⁹ Or, to put it

of Exclusion of Similar Fact Evidence: America, 51 HARV. L. REV. 988 (1938).

This prohibition applies only to the use of specific acts to prove facts that are relevant to the substantive issues in the case. Many jurisdictions permit inquiry on cross-examination about specific acts relevant to a witness' character for trustworthiness for the purpose of impeaching the credibility of the witness. See FED. R. EVID. 608(b); C. MCCORMICK, *supra* note 2, § 42, at 82-84; cf. FED. R. EVID. 609 (use of prior convictions to impeach credibility of a witness). This Article does not deal with the use of specific acts evidence for impeachment purposes.

6. See C. MCCORMICK, *supra* note 2, § 195, at 462 ("character is a generalized description . . . of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness"); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 225 (College ed. 1969) (defining character, *inter alia*, as a "moral or ethical quality" and as "qualities of honesty, courage, or the like").

7. The notion that character connotes a moral quality is buttressed by the fact that evidentiary rules traditionally make a distinction between inadmissible specific acts evidence offered to prove "character" and potentially admissible specific acts evidence offered to prove "habit." See C. MCCORMICK, *supra* note 2, § 195, at 462-64. Compare FED. R. EVID. 404(b) (precluding specific acts to prove character to show action in conformity with character) with FED. R. EVID. 406 (acknowledging absence of specific limitations on use of habit evidence to show action in conformity with habit). The feature most commonly attributed to habit for the purpose of distinguishing character and habit is that a habit is a relatively more routine, regularized response to a particular situation. See C. MCCORMICK, *supra* note 2, § 195, at 462. Therefore, habit evidence is more probative than character evidence. A second feature that tends to distinguish habit evidence from character evidence, however, is the often morally neutral and, therefore, nonprejudicial, nature of the former. See R. LEMPert & S. SALTZBURG, *supra* note 3, at 242; C. MCCORMICK, *supra* note 2, § 195, at 462-63.

8. The prohibition against specific acts evidence to prove character is not applicable when the person's character is itself an essential element of a claim or defense. See FED. R. EVID. 405(b); C. MCCORMICK, *supra* note 2, § 187, at 443-44. On the question whether specific acts can be used to prove character when character is not an essential element and when the character evidence is used for some purpose other than showing action in conformity with character, see Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle with Missing Pieces*, 48 U. CIN. L. REV. 1, 6-11 (1979).

9. The notion that character has an impact on how one behaves is further manifested in the rules regulating the use of opinion or reputation evidence to prove

somewhat differently, proof of a person's character trait is proof that a person has a propensity to behave in a particular manner. Indeed, the terms "character" and "propensity" are often used interchangeably, and the prohibition against specific acts evidence is frequently described as a prohibition against the use of specific acts for propensity purposes.¹⁰

Apparently content with this general notion of what constitutes character, courts and commentators have been primarily concerned with articulating how the prohibition against specific acts evidence should be implemented.¹¹ Some jurisdictions follow the so-called "exclusionary rule," which prohibits the proof of specific acts unless they are relevant for some specifically designated noncharacter purpose, such as to prove motive, identity, or intent.¹² If a court in an exclusionary rule jurisdiction is persuaded that the evidence is relevant for one or more of the permissible purposes, it may admit the evidence without giving careful consideration to the questions of probative value and prejudice.¹³

Other jurisdictions follow the "inclusionary rule," which permits the use of specific acts evidence for all purposes *except* to prove character to show action in conformity with character.¹⁴ This latter formulation of the rule, it is argued, is preferable for two reasons. First, it precisely states the underlying basis for excluding some specific acts evidence.¹⁵ Second, the absence of a limited list of permissible purposes should contribute to a more rational analysis of specific acts evidence. Rather than ruling on questions of admissibility in a mechanical, pigeonholing fashion, courts are likely to deal directly with the problems of probative value and prejudice in those instances in which the narrow rule of absolute exclusion is not applicable.¹⁶

character for the purpose of showing action in conformity with character. See *Michelson v. United States*, 335 U.S. 469, 475 (1948); FED. R. EVID. 404(a), 405(a). See generally Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939).

10. See, e.g., *United States v. Beechum*, 582 F.2d 898, 909 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); R. LEMPERT & S. SALTZBURG, *supra* note 3, at 210, 220, 226; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1004 (1938).

It is well recognized that specific acts evidence offered to prove a "habit" to show action in conformity with the habit does not fall within the "propensity evidence" prohibition, even though the use of such evidence concededly requires the factfinder to make a propensity inference. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 241-43; C. MCCORMICK, *supra* note 2, § 195, at 462-64.

11. See, e.g., *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974); C. MCCORMICK, *supra* note 2, § 190, at 452-54; Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 403-05 (1952). See generally Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

12. See, e.g., *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979).

13. See C. MCCORMICK, *supra* note 2, § 190, at 453-54.

14. See, e.g., FED. R. EVID. 404(b).

15. See Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 405 (1952).

16. See G. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* 130 (1978); C.

character trait is proof that a particular manner. Indeed, the two are used interchangeably, and character is frequently described as a propensity for purposes.¹⁰

The notion of what constitutes specific acts evidence should be primarily concerned with the so-called "exclusionary rule" unless they are relevant for purpose, such as to prove an exclusionary rule jurisdiction for one or more of the purposes without giving careful value and prejudice.¹³

any rule," which permits the exception to prove character to This latter formulation of reasons. First, it precisely the specific acts evidence.¹⁵ possible purposes should constitute specific acts evidence. Rather than mechanical, pigeonholing the problems of probative which the narrow rule of

ty with character. See Michelson ID. 404(a), 405(a). See generally 24 IOWA L. REV. 498 (1939). 8, 909 (5th Cir. 1978) (en banc), ALTZBURG, *supra* note 3, at 210, Evidence: America, 51 HARV. L.

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27, 134 (4th Cir. 1973), *cert.* 2, § 190, at 452-54; Trautman, ND. L. REV. 385, 403-05 (1952). Evidence: America, 51 HARV.

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OF EVIDENCE 130 (1978); C.

Federal Rule of Evidence 404(b) is a codification of the inclusionary rule, and judicial opinions applying the rule tend to support the claimed benefits of this approach to specific acts evidence. In increasing numbers, federal courts are careful to articulate the precise purpose for which specific acts evidence is relevant and, more importantly, to follow this articulation with an analysis of whether the potentially prejudicial impact of the evidence should nonetheless result in its exclusion.¹⁷

There are, however, some fundamental problems with both traditional approaches to specific acts evidence that transcend the question whether the exclusionary rule or the inclusionary rule is preferable. The thesis of this Article is that neither the concept of propensity nor the concept of character is helpful to an understanding of how courts have ruled or should rule on the admissibility of specific acts evidence. To support this thesis, part I of this Article will demonstrate that no useful purpose can be served by attempting to distinguish admissible from inadmissible specific acts evidence on the ground that the latter involves a "propensity inference."¹⁸ Part II will show that any independent content that might be given to the concept of "character" for the purpose of the specific acts prohibition does not adequately address the concerns that justify the exclusion of some specific acts evidence.

Part III deals with the Federal Rules of Evidence provisions regulating the admissibility of specific acts evidence. The analysis will point out that the drafters of the Federal Rules, by failing to come to grips with the problems discussed in parts I and II of this Article, created a rule that is inconsistent with the basic approach of the Federal Rules to questions of admissibility. More importantly, the analysis will suggest that the Federal Rules of Evidence may have inadvertently expanded the extent to which specific acts evidence is admissible in federal courts. Finally, part IV will offer several alternative ways to restructure the rules dealing with the admissibility of specific acts evidence.

I. PROPENSITY EVIDENCE

To substantiate the proposition that the concept of "propensity inference" does not provide a viable basis for distinguishing between admissible and inadmissible specific acts evidence, the analysis in this part will examine the nature of the inferential process of proof involved

MCCORMICK, *supra* note 2, § 190, at 453; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1006-07 (1938); Trautman, *Logical or Legal Relevancy—A Conflict of Theory*, 5 VAND. L. REV. 385, 403-05 (1952).

17. See, e.g., *United States v. Beechum*, 582 F.2d 898, 910-11, 913-18 & nn.18-23 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); *United States v. O'Connor*, 580 F.2d 38, 40-43 (2d Cir. 1978); *United States v. Ring*, 513 F.2d 1001, 1003-09 (6th Cir. 1975).

18. For an articulation of this proposition in a manner that is similar to but more limited than the method of analysis in this Article, see Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 220-36 (1954).

in the use of specific acts evidence. To facilitate this examination, the inferential process is divided into five categories:¹⁹ (1) traditionally prohibited propensity inferences; (2) permissible individualized propensity inferences from a defendant's bad conduct; (3) permissible generalized propensity inferences from a defendant's bad conduct; (4) permissible generalized propensity inferences from a defendant's neutral conduct; and (5) permissible generalized inferences from the conduct of third persons.²⁰ The analysis will show that the inferential process is identical in the first two categories and that the remaining categories present only minor variations of the same basic inferential process.²¹

A. Traditionally Prohibited Propensity Inferences

An initial difficulty in comparing the inferential process involved in the supposedly prohibited use of specific acts for propensity purposes with the inferential processes involved in the legitimate uses of specific acts evidence is that there are relatively few examples of impermissible "propensity evidence." The question whether specific acts evidence is admissible arises most frequently in the context of a prosecutor's offer to prove that a criminal defendant has committed various bad acts. A published opinion addressing the question of admissibility is likely to exist only if the defendant is convicted and appeals on the ground that the evidence was improperly admitted. An appellate court, however, may simply state that the admission of the evidence, if improper, was harmless error.²² Moreover, even an opinion holding that the specific acts should not have been admitted can avoid the question whether the evidence required an impermissible propensity inference. The court may simply explain that regardless of whether the evidence should have been excluded on that ground, the trial judge abused his discretion in admitting marginally probative, extremely prejudicial evidence.²³

Nonetheless, there would probably be a general consensus that the following example illustrates an impermissible propensity inference: The defendant is charged with murdering his wife by stabbing. He admits being present at the time of the fatal incident, but claims that a third

19. The categories have been devised solely to facilitate the analysis. In terms of the nature of the inferential process of proof, each category is substantially similar to the others. See note 21 *infra* and accompanying text.

20. A sixth category, permissible individualized propensity inferences from a defendant's neutral conduct, is discussed briefly in note 32 *infra*.

21. Because each category is so similar to the others, there may be disagreement over whether a particular illustrative example has been properly classified. Such a disagreement, however, would support rather than detract from the central point of the analysis: The nature of the inferential process involved in the use of specific acts evidence is so similar in all cases that it cannot be used as a device to distinguish between admissible and inadmissible specific acts evidence.

22. See *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980).

23. See *United States v. Shavers*, 615 F.2d 266, 270-71 (5th Cir. 1980).

person stabbed his wife. To show that the defendant was the assailant, the prosecutor offers to prove that on several previous occasions the defendant had become involved in fistfights with neighbors.²⁴

The relevance of the fistfight evidence is clearly dependent upon a propensity inference: The fact that the defendant has been violent on previous occasions shows that he—at least in comparison to people who have not been violent—has a propensity for violence, and from this propensity the factfinder is asked to infer that the defendant was violent on the occasion in question. Moreover, all of the factors that justify excluding some specific acts evidence are present.²⁵ If the defendant disputes his involvement in the fistfights, there may be time-consuming and distracting litigation of collateral issues. The factfinder may be more willing to return a guilty verdict after hearing the evidence simply because the defendant appears to be a bad person. Finally, the probative value of several fistfights with neighbors to prove a deadly assault with a knife against one's spouse is not great.²⁶

For the purpose of comparing the fistfight hypothetical with other uses of specific acts evidence, it is important to note three aspects of the inferential process of proof involved in linking the prior assaults to assault on the occasion in question. First, the factfinder is asked to make an "individualized" propensity inference in the sense that the defendant's propensity for violence is not a propensity shared by the populace at large. Rather, it is the defendant's prior violent behavior which shows that he, unlike most other people, tends to be violent.

Second, the relevance of this individualized propensity inference, like the relevance of any other inference from evidentiary facts to proof of ultimate facts at issue in litigation, depends on an assumption about the relationship among various phenomena or events in the real world. Consider, for example, a murder prosecution in which the homicide occurred at 10:00 p.m. in Fresno, California, and the defendant shows that at 8:00 p.m. Pacific Standard Time on the same day he was in Bangor, Maine. The defendant's evidence is relevant to prove that he did not commit the crime because of the assumption, based on common experience, that a person cannot travel from Bangor to Fresno in only two hours. Similarly, if a witness testifies that he saw the defendant stab her husband, that evidentiary fact is relevant to prove the ultimate fact that the defendant indeed did stab her husband because of the assumption that it is more likely that on any given occasion a person is speaking truthfully rather than falsely.²⁷ This assumption about truth-telling is

24. Cf. E. KIMBALL, PROGRAMMED MATERIALS ON PROBLEMS IN EVIDENCE 46-47 (1978) (improper to admit evidence of threats directed against third persons to prove aggressiveness or hottheadness to show improper aggression on occasion in question).

25. See text accompanying notes 2-3 *supra*. See also note 4 *supra*.

26. See note 2 *supra*.

27. People, of course, are not always truthful, careful with their words, or accurate in their perceptions and memories. Indeed, the hearsay rule with its various exceptions, see

based on our common experience in dealing with people and the conclusion from that experience that people are more often than not truthful. In like manner, the individualized propensity inference in the fistfight hypothetical is based on the assumption, derived from common experience, that a person who has been violent on some occasions is more likely than a person who has not been violent to behave violently on any given occasion.

Finally, in some instances the underlying assumption about the relationship among various phenomena or events in the real world is itself dependent upon a propensity inference. For example, the assumption that an individual is more likely than not to tell the truth is based on common experience which demonstrates that people generally have a propensity for truth-telling. Similarly, in the fistfight hypothetical, the defendant's prior violence is relevant to show violence on a particular occasion only if the factfinder assumes that people generally—or at least people similarly situated with the defendant in an identifiable manner—who have been violent on some occasions have a propensity to be violent on other occasions. Indeed, whenever the relevance of a piece of evidence is dependent upon an assumption about how people behave, the assumption necessarily encompasses a propensity inference: The behavior of third persons generally or of a particular individual on other occasions is relevant to show the individual's behavior on the occasion in question only if the factfinder assumes that the behavior is of a type that people have a propensity to repeat.

B. Permissible Individualized Propensity Inferences from a Defendant's Bad Conduct

Courts traditionally have permitted the use of specific acts evidence to show intent or absence of accident.²⁸ Thus, in order to show malice, the prosecutor may be able to introduce evidence that a murder defendant had previously beaten the victim.²⁹ Or in a theft prosecution in which the defendant claims to have picked up an apparently lost wallet, the prosecutor may be able to show that in similar circumstances the defendant had in fact stolen wallets from other individuals.³⁰

In both examples the prior acts evidence may have a prejudicial

FED. R. EVID. 801-804, is based on the premise that when a person's statement is offered to prove the truth of the matter asserted, there are substantial dangers of insincerity, misstatement, inaccurate perception, or inaccurate memory. Unless there are circumstances, described in the hearsay exceptions, that appear to minimize these dangers, or unless the statement is made in court where it can be subjected to immediate cross-examination, the statement will not be admissible. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 330-38.

28. See C. McCORMICK, *supra* note 2, § 190, at 450-51.

29. See *Dunson v. State*, 202 Ga. 515, 522, 43 S.E.2d 504, 508 (1947).

30. See *People v. Williams*, 6 Cal. 2d 500, 502-03, 58 P.2d 917, 918 (1936); cf. *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), discussed at text accompanying notes 101-25 *infra*.

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a person's statement is offered partial dangers of insincerity, memory. Unless there are circumstances to minimize these dangers, subjected to immediate cross-examination. LEMPERT & S. SALTZBURG.

impact on the factfinder, and a dispute about the defendant's involvement in the prior acts could result in time-consuming, distracting litigation of collateral issues. Nonetheless, the probative value of prior assaults on the same victim to show malice or prior similar thefts to rebut the defendant's claim that he found a lost wallet is probably somewhat greater than the probative value of prior fistfights in the previously discussed hypothetical. It would arguably be appropriate, therefore, to conclude that the greater probative value justifies admitting the evidence.

One cannot, however, distinguish the fistfight hypothetical from the malice and theft cases on the ground that only the former involves a propensity inference, for the inferential process of proof is identical in all three situations. From the defendant's prior fistfights, assaults on the victim, or thefts the factfinder is asked to make an individualized propensity inference: Because the defendant committed the bad acts in the past, he has a propensity to commit the kind of act in question (or to do so with the requisite criminal intent).³¹

Moreover, in each case, the individualized propensity inference is based on an assumption about human behavior that encompasses a more general propensity inference. Just as people who have committed violent acts on some occasions are more likely than people who have not been violent to act violently on other occasions, people who have manifested a culpable mental state on some occasions are more likely than people who have not manifested such a mental state to behave culpably on other occasions.³²

C. Permissible Generalized Propensity Inferences from a Defendant's Bad Conduct

The preceding fistfight and intent hypotheticals have been

31. See C. MCCORMICK, *supra* note 2, § 188, at 445 ("[S]pecific acts will generally not be received to prove that the person whose character is sought to be shown, engaged in certain conduct, or did so with a given intent, on a particular occasion.") (emphasis added).

32. On some occasions specific acts evidence that requires the factfinder to make an individualized propensity inference may pose no threat of prejudice. Consider, for example, a case in which the defendant is charged with a liquor store robbery which occurred at 6:00 p.m. To show that the defendant was probably in the vicinity of the store at the time of the robbery, the prosecutor offers to prove that the defendant regularly rode home from work on a bus that passes by the liquor store shortly before 6:00 p.m. From the fact that the defendant had ridden the same bus in the past, the factfinder is asked to infer that the defendant has a propensity, not shared by people generally, for riding on the same bus. This individualized propensity inference, is based on the more general propensity inference that people who ride the same bus on some occasions are likely to do so on other occasions. Because the act of riding a bus is morally neutral, there is no potential for prejudice. Cf. text accompanying notes 48-54 *infra* (discussion of permissible generalized propensity inferences from neutral conduct). Indeed, the morally neutral quality of the activity coupled with its apparently routine, regularized nature would probably lead courts to place the evidence in the habit rather than the character category. See notes 7, 10 *supra*.

44, 508 (1947).

1 P.2d 917, 918 (1936); cf. (en banc), cert. denied, 440 5 *infra*.

characterized as involving an "individualized" propensity inference because the propensity ascribed to the defendant is not a propensity ascribed to the populace at large or to any independently identifiable group. Rather, at least from the immediate perspective of the factfinder, the propensity is ascribed to the defendant *because* of his specific acts.

In contrast to these examples of individualized propensity inferences, some traditionally permissible uses of specific acts evidence involve what might be characterized as a "generalized" propensity inference. In these latter cases, it seems appropriate to regard the factfinder as beginning with the assumption that individuals in some identifiable group have a propensity to behave in a particular manner.³³ Proof of the defendant's specific act merely identifies the defendant as being included in or specifically excluded from the relevant group.³⁴

Consider, for example, the commonly recognized use of specific acts evidence to prove the identity of the defendant as the perpetrator of a crime.³⁵ Evidence that a defendant had previously assaulted another victim by forcing the victim to disrobe, binding the victim's hands and feet with vines of ivy, tying the ivy in an unusual knot, and with a silver penknife proceeding to inflict stab wounds that formed the letter "V" on the victim's chest would probably be admissible to identify the defendant as the perpetrator of an assault carried out in a similar manner.³⁶

There are two ways to characterize the relevance of this other crime evidence. First, one might regard the similar assault as showing that the defendant has an individualized propensity for committing assaults in a unique manner. The inferential process of proof involved in viewing the evidence in this manner is identical to the inferential process of proof in the previously described uses of specific acts evidence.³⁷ Alternatively, one might argue that, regardless of the defendant's propensities, the other crime is relevant to identify the defendant simply because no other person would be likely to commit the crime charged in the same unusual manner. In other words, the similarity in methods of perpetration is better explained by the theory, derived from common experience, that one

33. The "group" can, but need not, be the entire population. Compare text accompanying note 27 *supra* (propensity of people generally to be truthful) with text accompanying notes 40-41 *infra* (propensity of guilty defendants to obstruct justice).

34. Compare note 41 and text accompanying notes 40-41 *infra* (defendant included) with text accompanying note 38 *infra* (defendant excluded).

35. See C. MCCORMICK, *supra* note 2, § 190, at 449 (characterizing this use of specific acts as proving that the crime in question was the "handiwork" of the defendant).

36. Cf. *Durns v. United States*, 562 F.2d 542, 544-45, 548 (8th Cir.), *cert. denied*, 434 U.S. 959 (1977) (evidence of attempted kidnapping of third person by similar means admissible in kidnapping prosecution).

37. Because the defendant has committed one unusual assault, the factfinder is asked to infer that the defendant has a propensity, not shared by people generally, to commit such assaults. This individualized propensity inference is based on the more general propensity inference that people who are violent on some occasion are more likely than people who have not been violent to behave violently on the occasion in question.

individualized" propensity inference: defendant is not a propensity of any independently identifiable group from the perspective of the factfinder, but *because* of his specific acts. Individualized propensity inferences of specific acts evidence involve "realized" propensity inference. In so regard the factfinder as beginning with individuals in some identifiable group in a particular manner.³³ Proof of the defendant as being included in a relevant group.³⁴

Recognized use of specific acts evidence of defendant as the perpetrator of a crime previously assaulted another victim, including the victim's hands and feet tied in an unusual knot, and with a silver key that formed the letter "V" on the key, is possible to identify the defendant in a similar manner.³⁵

The relevance of this other crime is shown by the fact that the defendant's propensity for committing assaults in a particular manner is a part of the proof involved in viewing the evidence. Alternatively, the defendant's propensities, the defendant simply because no other crime charged in the same unusual manner of perpetration is between common experience, that one

in the population. Compare text accordingly to be (truthful) with text accompanying the defendant to obstruct justice).

Notes 40-41 *infra* (defendant included) (excluded).

449 (characterizing this use of specific acts evidence of the defendant).

544-45, 548 (8th Cir.), *cert. denied*, 100 S. Ct. 1000 (1980) (finding of third person by similar means).

Unusual assault, the factfinder is asked to decide whether the defendant is more likely than people on the occasion in question.

individual (who we happen to know is the defendant) probably committed both crimes, rather than the theory that two individuals may have fortuitously perpetrated the crimes in the same manner. This view of the evidence, however, necessarily requires a generalized propensity inference. The only factor that makes commission of the other crime relevant to identify the perpetrator of the charged crime is the assumption that some individual had a propensity to commit both crimes, and this assumption is dependent upon the inference that people generally have a propensity *not* to perpetrate a crime in the same unusual manner in which another person has perpetrated a crime. Thus, proof that the defendant committed the prior crime places him outside the universe of people who share this generalized propensity. At the same time, such proof identifies the defendant as the individual having a propensity to commit the crime in an unusual manner.³⁸

A similar inferential process of proof is involved in cases in which the prosecutor offers to prove that a criminal defendant has intimidated a witness or attempted to obstruct justice in some other manner.³⁹ In one sense the obstruction evidence may be marginally relevant in a manner that would require the factfinder to make an individualized propensity inference. Proof that the defendant committed an illegal act by obstructing justice shows a propensity to act illegally, from which one can infer that the defendant acted illegally by committing the crime charged. Traditionally, however, obstruction evidence is not admitted for that purpose. Rather, it is admitted because the obstruction is viewed as an admission by the defendant that he is guilty of the crime charged.⁴⁰ Yet, the obstruction evidence is relevant as an admission only if one assumes that guilty criminal defendants in general have a propensity to obstruct justice in order to avoid the consequences of a possible guilty verdict. Proof of the defendant's obstruction identifies the defendant as belong-

38. Cf. Carter, *The Admissibility of Evidence of Similar Facts*, 70 LAW Q. REV. 214, 229 (1954):

[T]he similar fact evidence shows only that the accused had the common characteristic at [the time the prior crime was committed]. The commission of the crime [charged] shows only that the [perpetrator of the crime charged] had that characteristic at a particular but different time. . . . The accused is "identified" [as the perpetrator of the crime charged] . . . because the accused had the characteristic on previous occasions and he therefore is likely to have still had it on the instant occasion.

39. In contrast to the preceding hypotheticals, in which the specific act evidence involved conduct engaged in prior to the commission of the charged crime, the act of obstruction will have occurred subsequent to the charged crime. The timing of the crime charged and the other acts, however, has no necessary bearing on the nature of the inferential process of proof. In the preceding identity hypothetical, for example, it would not matter which of the two similar crimes was committed first. See *People v. Massey*, 196 Cal. App. 2d 230, 235, 16 Cal. Rptr. 402, 405-06 (1961) (similar burglary perpetrated subsequent to crime charged).

40. See G. McCORMICK, *supra* note 2, § 190, at 451.

ing to the class of people—in this case, 'guilty defendants—who share generalized propensity.⁴¹

For several reasons, the fact that the preceding identity and obstruction hypotheticals may appropriately be characterized as involving only generalized propensity is not a sufficient basis for distinguishing them from impermissible uses of specific acts evidence. First, the distinction between individualized and generalized propensity inferences obviously cannot account for the existing state of the law. As the analysis in the preceding section demonstrated,⁴² courts sometimes admit specific acts evidence that requires the factfinder to make an individualized propensity inference.

Second, the factors that justify exclusion of some specific acts are not necessarily minimized simply because the propensity inference is a generalized one. The problems of prejudice, time-consumption, and distraction of the factfinder from the central issues of the case exist because bad acts evidence is offered against the defendant, not because of the nature of the propensity inference.⁴³

Moreover, the probative value of the bad acts evidence is not dependent upon the nature of the propensity inference. Of course, in the absence of empirical data, one can make only an intuitive guess based on common experience about the probative value of any propensity inference. It seems plausible, however, to view the individualized propensity inference in the previously discussed intent hypotheticals⁴⁴ as at least as strong, if not stronger, than the generalized propensity inference underlying the use of specific acts of obstructing justice to show guilt. Innocent defendants may have nearly as great a propensity as guilty defendants to obstruct justice simply because they fear possible conviction.

41. An almost identical propensity inference is often the key to the relevance of specific acts evidence offered to show motive. *See id.* at 450-51. Consider, for example, a case in which the defendant is charged with the murder of a police officer who was approaching the defendant on the street. To show that the defendant had a motive for the killing and, therefore, committed the act or did so intentionally, the prosecutor offers evidence that 15 minutes before the killing the defendant had broken into a house. *See State v. Simborski*, 120 Conn. 624, 630, 182 A. 221, 224 (1936). To the extent that the evidence is relevant to show motive and not merely that the defendant is the type of individual who engages in antisocial behavior, the relevance of the evidence is dependent upon the assumption that people generally have a propensity to avoid situations that they perceive as the first step toward arrest and possible conviction. Or, on a more general level, the propensity to avoid arrest may be characterized as a propensity to maximize freedom of action. Proof of the robbery does not ascribe an individualized propensity to the defendant but rather it identifies him with a group of people, *see note 33 supra*, who have a propensity to avoid contact with the police.

42. *See text accompanying notes 28-32 supra.*

43. Some generalized propensity inferences can be characterized in terms that are sufficiently broad to make them appear on their face neutral. *See note 41 supra.* If the propensity inference cannot be articulated in neutral terms, however, it is only because the specific act which gives rise to the propensity inference is itself not neutral.

44. *See text accompanying and following notes 28-30 supra.*

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tion. On the other hand, when a prior crime is offered to prove the defendant's identity as the perpetrator of the crime charged, the unusual manner in which both crimes were committed may make the evidence highly probative.⁴⁵

Finally, although the distinction between individualized and generalized propensity inferences may be helpful in describing the manner in which the factfinder is likely to view specific acts evidence,⁴⁶ the distinction itself is in one important sense illusory. In terms of the nature of the inferential process of proof, there is simply no qualitative difference between an individualized and a generalized propensity inference. Rather, the distinction is solely a function of how one initially describes the relevant inference. For example, in the previously discussed fistfight hypothetical,⁴⁷ the characterization of the inference from prior assaults to violence on the occasion in question as an individualized propensity inference was based on the premise that the factfinder is likely to view the evidence as showing that the defendant, unlike most other people, has a propensity for violent behavior. As the analysis pointed out, however, this view of the evidence is necessarily dependent upon the assumption, derived from common experience, that people who have been violent on some occasions have a propensity to be violent on other occasions. If one initially focuses on this general assumption, then proof of defendant's prior violence merely identifies the defendant as being within the relevant group of people sharing a generalized propensity. In short, the necessary inferences in the process of proof are identical regardless of whether one initially focuses on a generalized or an individualized propensity inference.

D. Permissible Generalized Propensity Inferences from a Defendant's Neutral Conduct

In some instances, traditionally admissible specific acts evidence that requires the factfinder to make a generalized propensity inference poses, at least in theory, no threat of prejudice. Consider, for example, a situation in which a prison escapee claims that his flight was a spontaneous response to duress, and the prosecutor then offers to prove that the prisoner had arranged to have a car waiting outside the prison wall at the time of the escape.⁴⁸ The specific acts involved in arranging for the

45. The probative value of similar crimes evidence to identify the defendant as the perpetrator of the crime charged probably depends not only on the uniqueness of the manner in which the crimes are perpetrated but also in part on the degree of publicity given to the means of perpetrating the crime or crimes that occurred earlier in time. The fact that an unusual method of perpetrating a crime is a matter of public knowledge may increase the likelihood that two or more individuals would perpetrate crimes in the same unusual manner.

46. See text accompanying notes 33-34 *supra*.

47. See text accompanying note 24 *supra*.

48. See *United States v. Cluck*, 542 F.2d 728, 736 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976).

car constitute plans made in preparation for the escape, and to rebut the duress claim the factfinder is asked to infer that individuals who plan a certain course of action tend to follow through with those plans.

This propensity inference is similar to the generalized propensity inferences discussed in the preceding section: The propensity for acting in conformity with one's intentions is an attribute that the factfinder, on the basis of common experience, would tend to ascribe to people generally, and the defendant's actions merely suggest what the particular intention is. In contrast to the specific acts in all of the previously discussed hypotheticals, however, making arrangements for a car to be at a particular location at a specified time is "neutral." It is not a crime to engage in such conduct, nor is the conduct morally blameworthy. Thus, proof of the specific acts would not have a prejudicial impact on the factfinder.⁴⁹ Moreover, since the specific acts that show the defendant's propensity are themselves neutral, the characterization of the propensity manifested by those acts—in this case a generalized propensity to follow through with one's intentions—is also necessarily neutral and, therefore, nonprejudicial.⁵⁰

A similar situation may arise when the prosecutor offers specific acts evidence to show a defendant's knowledge.⁵¹ If a defendant accused of heroin possession claims that he did not know that the substance was heroin, the prosecutor would be permitted to rebut this claimed lack of knowledge by showing that the defendant on previous occasions had knowingly possessed heroin.⁵² From knowledge on a previous occasion, the factfinder is asked to infer knowledge on the present occasion, and this is a type of generalized propensity inference: A person who has obtained knowledge of some fact has a propensity to retain that knowledge.⁵³ As was true in the escape hypothetical, the propensity

49. Evidence is prejudicial only if it may lead the factfinder to reach a decision on the ground that an individual is a bad (or good) person rather than solely on the strength of the proof that the individual engaged in the conduct in question. See note 3 *supra* and accompanying text.

50. The particular intent—the intent to escape—inferred from the planning activity is not "neutral" in the sense of being nonculpable, but it is neutral in the sense of being nonprejudicial. Proof of this intent is essential to establish the defendant's guilt.

51. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 220.

52. See *United States v. Wixom*, 529 F.2d 217, 219-20 & n.2 (8th Cir. 1976), discussed in S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 141-42 (2d ed. 1977).

53. One might argue either (1) that possession is not an *act* or (2) that obtaining knowledge is not a *physical* act, and that, therefore, the specific acts evidence rules should be inapplicable to this situation. The first argument should be rejected because it is the mental process of obtaining knowledge that is relevant to the case, and the second argument is only another way of stating that the activity in question is neutral: one does not normally associate moral culpability with the mere acquisition of knowledge. As the following textual analysis will point out, the theoretically neutral nature of the prior activity is not a sufficient basis for distinguishing between admissible and inadmissible evidence of prior activity.

In fact, courts and commentators traditionally treat prior possession—at least if it is

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for the escape, and to rebut the inference that individuals who plan a through with those plans.

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inference here is a neutral one, and at least if the act of prior possession occurred in the defendant's capacity as a former narcotics officer or in some other legal context, evidence of the prior possession would not itself be prejudicial.

Despite the absence of a potential for prejudice in the preceding examples, the concerns underlying the exclusion of some specific acts evidence are not diminished simply because the relevant specific acts and, therefore, the relevant propensity inferences are neutral. If there is a dispute about the act or nature of the defendant's involvement in the act, the problem of distracting the factfinder with possibly time-consuming litigation of a collateral matter remains. More importantly, the specific acts that give rise to the neutral propensity inference may not themselves be neutral. The specific instances of prior possession by the heroin defendant are likely to have been instances of illegal possession, and the prison escapee's activity in arranging for a car may have included a plan to have a stolen car at the prison wall. Although the illegal nature of these prior acts is not itself relevant to the required propensity inference, informing the factfinder of the illegality of the acts creates the same potential for prejudice that inheres in the other uses of specific bad acts.

There may, of course, be instances in which the illegality of the specific act is sufficiently incidental that the illegality need not be mentioned to the factfinder. Perhaps, for example, the escapee's plan to have a car outside the prison wall could be adequately explained without any reference to the car theft. In other cases, however, it may be impossible to present adequate proof of the acts without at least an implicit suggestion of their illegality. Consider, for example, the possibility of introducing evidence of prior heroin possession without specific details showing that the possession was illegal. The factfinder may in any event assume that the possession was illegal, in which case avoiding more detailed information about the incident would not minimize the potential prejudice. Alternatively, the factfinder may expect that any proof of prior possession will encompass details of the possession. In such a situation, the unexplained failure to present the details may lead the factfinder to disbelieve a truthful assertion of prior possession.⁵⁴

There undoubtedly will be instances in which the probative value of a neutral propensity inference coupled with the practical necessity of explaining the illegal nature of the prior act that gives rise to the inference will outweigh the countervailing concerns of prejudice, consumption of time, and distraction from the central issues of a case. The point

illegal—as being governed by the specific acts evidence rules. See authorities cited in notes 51-52 *supra*. See also FED. R. EVID. 404(b) (defining specific acts evidence rule in terms of "other crimes, wrongs, or acts") (emphasis added).

54. See generally Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011 (1978).

to be made here is simply that the existence of a theoretically neutral specific act and propensity inference does not necessarily minimize any of the concerns that exist in contexts in which bad acts are relevant in a propensity sense.

E. Permissible Generalized Inferences from the Conduct of Third Persons

In a relatively small number of cases in which specific acts evidence is offered, the relevance of the evidence arguably is not dependent on a propensity inference. Consider, for example, a murder prosecution in which the state's theory is that the victim was killed with a .38-caliber pistol, and the prosecutor offers to prove that two days prior to the murder the defendant stole such a pistol.⁵⁵ Or consider a prosecution for theft from a liquor store in which the prosecutor offers evidence that two hours before the theft the defendant held up a filling station in the same neighborhood.⁵⁶

The evidence in each case is admittedly relevant in a propensity sense. The factfinder might infer that people who steal guns have a propensity to murder or that people who hold up filling stations have a propensity to steal from liquor stores. The relevance of the evidence, however, is not dependent upon these propensity inferences. Mere possession of the weapon shows the ability of the murder defendant to commit the homicide. Similarly, presence in the neighborhood shows the ability of the theft defendant to commit the crime.

If evidence in either of these examples is offered solely to show that the defendant had the ability to commit the crime, there are two bases for characterizing evidence as falling outside the propensity prohibition. First, the prohibition is applicable only to specific acts evidence,⁵⁷ and possession or presence arguably is not an "act" within the meaning of the prohibition.⁵⁸ Second, evidence that shows only the physical capability of committing an act does not show a tendency to commit the act and, therefore, is arguably not "propensity" evidence.

55. *Cf. United States v. Waldron*, 568 F.2d 185, 187 (10th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978) (prosecution for bank robbery; to show defendant had possession of weapons used in robbery and found in getaway car, prosecution permitted to introduce evidence of defendant's prior theft of the weapons); *United States v. Leftwich*, 461 F.2d 586, 589 (3d Cir. 1972) (prosecution for bank robbery in which prosecutor permitted to show that three days prior to robbery defendant stole getaway car).

56. *Cf. United States v. Cover*, 560 F.2d 1010, 1013 (8th Cir. 1977) (prosecution for interstate transportation of stolen automobile in which prosecutor permitted to show that several days before theft defendant escaped from prison located near place of theft).

57. *But see* FED. R. EVID. 404(b) (rule applicable to "other crimes, wrongs, or acts") (emphasis added).

58. *Cf. note 53 supra* (discussion of illegal possession offered to prove mental activity in acquiring knowledge).

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Nonetheless, the relevance of the evidence ultimately depends upon an inference that is at least very similar to the previously described propensity inferences. For example, just as the factfinder may be asked to infer, on the basis of common experience, that people who behave violently on some occasions are more likely than other people to behave violently on a specific occasion, the factfinder is asked to infer, on the basis of common experience, that people who possess the instrumentalities for committing a crime or who are near the scene of a crime are more likely than other people to commit the crime.⁵⁹

Even if one does not attach the propensity label to evidence offered to show the ability of a defendant to commit a crime, there is no practical justification for distinguishing such evidence from the previously discussed proof of theoretically neutral acts that require a neutral generalized propensity inference. In both instances, the evidence shares the following characteristics: First, there are potential problems of time consumption and distraction of the factfinder in litigating possibly disputed collateral issues; second, the illegal or "bad" nature of the specific acts is not critical to the relevance of the evidence; third, it may nonetheless be practically impossible to explain adequately the relevance of the evidence without reference to the illegal nature of the acts; fourth, if the illegality is explained to the factfinder, the evidence is potentially prejudicial; and fifth, in some instances the probative value of the evidence may outweigh the countervailing concerns of prejudice, consumption of time, and distraction of the factfinder.⁶⁰

The frequent characterization of the specific acts evidence rule as a prohibition against the use of specific acts for propensity purposes suggests that the scope of the prohibition depends upon the nature of the inferential process of proof involved in the use of specific acts evidence. Thus, the preceding discussion classified specific acts evidence in terms of the inferential process in which the factfinder must engage to find the evidence relevant. As the analysis pointed out, many of the traditionally permissible uses of specific acts evidence necessarily require the factfinder to make a propensity inference. Moreover, although there are minor variations in the process of proof among the different uses of specific acts evidence, these variations do not correspond with the tradi-

59. Cf. text preceding note 27 *supra* (discussion of alibi evidence).

60. These same factors are present in one type of situation in which specific acts evidence is offered for what is clearly in theory a nonpropensity purpose. Occasionally, courts will admit evidence of other crimes committed in close physical and temporal proximity to the crime charged to help complete the story of the crime charged. See *State v. Villavicencio*, 95 Ariz. 199, 201, 388 P.2d 245, 246 (1964). Apparently the theory underlying this use of specific acts evidence is that in the absence of the evidence, the factfinder would have an incomplete and possibly misleading picture of the nature of the defendant's involvement in the crime charged. See *United States v. Carrillo*, 561 F.2d 1125, 1127 (5th Cir. 1977). See generally note 54 *supra* and accompanying text.

tional distinctions between admissible and inadmissible specific acts evidence, nor do they relate to the underlying rationales for excluding some specific acts evidence. Therefore, neither the existence of a propensity inference nor any other factor inherent in the inferential process of proof provides a viable basis for giving content to a rule prohibiting the use of some specific acts evidence.

II. THE MEANING OF CHARACTER

The initial discussion of the prohibition against the use of specific acts to prove character to show action in conformity with character suggested two attributes inherent in the concept of character: a connotation of some moral quality and an implication about the manner in which an individual is likely to behave.⁶¹ As the preceding analysis has shown, however, there is not and probably should not be an absolute prohibition against the use of specific bad acts for propensity purposes. Thus, in giving content to the prohibition against the use of some specific acts evidence, one cannot simply equate character evidence with propensity evidence. All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence. The question, therefore, necessarily arises whether one can give some additional independent content to the term character or character trait.

There would appear to be only two substantially overlapping factors that may be helpful in distinguishing character evidence from other bad acts propensity evidence. First, case law and scholarly commentaries dealing with specific acts evidence suggest that the character label is used when the evidence has an indirect bearing on an issue and, therefore, a relatively low probative value.⁶² For example, evidence of a defendant's previous assaults on third persons offered to prove that the defendant was the first aggressor would probably be regarded as impermissible character evidence.⁶³ Evidence of previous assaults by the defendant on the murder victim, however, might not be regarded as character evidence.⁶⁴ Second, simply as a matter of common usage, describing a particular propensity as a character trait may seem more appropriate in some instances than in others. Thus, an individual's propensity for violence demonstrated by assaults on various third persons might readily be described as a character trait for violence. In contrast, violence directed only against a particular individual arguably does not manifest a propensity that is commonly thought of as a "character trait."

61. See text accompanying notes 6-10 *supra*.

62. See, e.g., *United States v. Beechum*, 582 F.2d 898, 910-11 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), discussed at text accompanying notes 101-25 *infra*; R. LEMPERT & S. SALTZBURG, *supra* note 3, at 211-12; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 124-25 (1978).

63. See text accompanying notes 22-24 *supra*.

64. See note 29 *supra* and accompanying text.

This general sense of what constitutes character is an inadequate basis for distinguishing between permissible and impermissible uses of specific acts evidence for propensity purposes. First, it is simply too imprecise for meaningful application on a case-by-case basis. For example, even if one concludes that in a murder prosecution evidence of the defendant's assaults on random third persons would be regarded as inadmissible character evidence but that previous assaults on only the victim would be viewed as noncharacter and, therefore, potentially admissible evidence, how should the following evidence be classified: previous assaults against only those third persons who, like the murder victim, are (a) all redheads, (b) all members of the same family, (c) all between the ages of four and six, or (d) all between the ages of twenty and twenty-five? Perhaps it would be appropriate to view the fact that the various victims happened to be between the ages of twenty and twenty-five as fortuitous and, therefore, to place the character label on this evidence. It is less clear, however, which, if any, of the other proofs of specifically directed violence should be regarded as manifesting a character trait.

Second, and more importantly, the general sense of what constitutes a character trait is not sufficiently related to the factors which justify excluding some specific acts evidence.⁶⁵ The prohibition against use of specific acts to prove character to show action in conformity with character encompasses one of these factors: Specific act character evidence tends to have a relatively low probative value. There is no necessary relationship, however, between some independently derived notion of what constitutes a character trait and problems of prejudice, time consumption, and distraction of the factfinder from the central issues of the case. The time consumption and distraction concerns arise whenever the prior acts are numerous or there is a dispute about the nature of the act or a party's participation in it. These potential problems are in no way dependent upon whether the acts tend to show something that might be labeled a character trait.

Similarly, the potential for prejudice from specific acts evidence is not related to the question whether the evidence is offered to prove character or to show some other fact. Potential prejudice exists whenever there is a danger that the factfinder will be influenced not simply by the probative value of the evidence but also by its conclusion that a party is a bad person and, therefore, particularly deserving of punishment.⁶⁶ Any bad act, of course, has the potential for influencing the factfinder's decision in such a manner, and thus in one sense any specific bad act is evidence of a general character for badness. Yet, it is clear from the established precedent for permitting bad acts to be used in a propensity sense to prove such issues as motive, intent, or identity that this general

65. See note 4 and text accompanying notes 2-3 *supra*.

66. See note 3 *supra* and accompanying text.

way in which bad acts tend to show character is not sufficient to place the acts within the character evidence prohibition.

The primary determinants in applying the character prohibition appear to be the probative value of the specific acts evidence and whether the relevant propensity can, as a matter of common usage, readily be labeled as a character trait. Prejudice, however, is not a function of either of these factors. The degree of prejudice associated with any specific act evidence is a function of how the factfinder is likely to respond to the badness of the act. Consider, for example, two prosecutions for heroin possession. In one case the defendant claims he did not know the substance was heroin. In the other the defendant claims that the heroin was in the sole possession of his companion. To rebut the first defendant's claimed absence of knowledge, the prosecutor offers to prove that the defendant had previously sold heroin to school children. To establish the second defendant's possession the prosecutor offers to prove that on two previous occasions the defendant had possessed heroin. The latter evidence is more likely than the former to fall within the character evidence prohibition,⁶⁷ but in the eyes of the factfinder the sale of heroin to school children is likely to be more prejudicial.

Although the term character is frequently the focal point of the rules governing the admissibility of specific acts evidence, the preceding analysis has shown that the concept of character does not adequately embrace the justifications for exclusion of some specific acts evidence. To illustrate this proposition more fully and to demonstrate the potential consequences of the failure on the part of rule drafters to deal with this problem, the analysis will now turn to an evaluation of the specific acts evidence provisions in the Federal Rules of Evidence.

III. THE FEDERAL RULES APPROACH TO SPECIFIC ACTS EVIDENCE ⁷

Federal Rule of Evidence 404(b) is a typical formulation of the inclusionary approach to specific acts evidence.⁶⁸ It provides an absolute prohibition against the use of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." It further provides that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, [etc.]."⁶⁹

67. Compare *United States v. Bloom*, 538 F.2d 704, 711 (5th Cir. 1976) (Tuttle & Clark, JJ., concurring specially), *cert. denied*, 429 U.S. 1074 (1977) (prior narcotics sales evidence offered to show "a willingness of the defendant to deal in drugs generally" is improper character evidence) (quoting trial judge) with *People v. Cervantes*, 177 Cal. App. 2d 197, 190, 2 Cal. Rptr. 107, 109 (1960) (evidence of other similar narcotics offenses admissible to show "defendant's knowledge of the narcotic nature of the substance").

68. See text accompanying notes 14-17 *supra*.

69. The full text of FED. R. EVID. 404(b) reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the

As a traditional statement of the inclusionary approach, rule 404(b) is commendable for several reasons. First, the rule has the virtue of dealing with the admissibility of specific acts evidence in terms that are likely to be familiar to trial attorneys and judges, who have primary responsibility for their application. Second, whether by design or not, the rule avoids the term "propensity." Third, the prohibition against specific acts to prove character provides at least symbolic recognition that it is important to be cautious about the use of specific acts evidence. Fourth, by providing that specific acts evidence may be admissible "for other purposes, such as proof of motive,"⁷⁰ rule 404(b) makes it clear that its list of permissible purposes is not exclusive and that there is no need to pigeonhole the evidence into one of the traditional permissible categories.⁷¹ Finally, by providing that the evidence "may" be admissible for other purposes, the rule suggests that admissibility for some legitimate purpose is not automatic.⁷² Rather, as the Advisory Committee's Note explicitly states,⁷³ the admissibility decision should be made in light of rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁷⁴

Despite these positive features of rule 404(b), serious consideration should be given to amending it. As the preceding analysis has shown, neither the frequent equation of "character evidence" with "propensity evidence"⁷⁵ nor the term "character" itself⁷⁶ provides a viable basis for

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.

70. *Id.* (emphasis added).

71. See text accompanying note 16 *supra*.

72. See text accompanying note 16 *supra*.

73. Advisory Committee's Note, FED. R. EVID. 404(b), 56 F.R.D. 183, 221 (1972); see note 74 *infra*.

74. FED. R. EVID. 403.

It is not clear whether the rule 404(b) Advisory Committee's Note reference to rule 403 is intended to suggest that the rule 403 balancing test itself, which favors admissibility, see text accompanying and following notes 98-99 *infra*, should be applied to specific acts evidence. The rule 404(b) Advisory Committee's Note states:

The determination must be made whether the danger of undue prejudice outweighs [not substantially outweighs] the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.

Advisory Committee's Note, FED. R. EVID. 404(b), 56 F.R.D. 183, 221 (1972); see *United States v. Beechum*, 582 F.2d 898, 923 n.16 (1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979) ("The Note's reference to Rule 403 is only to the kinds of facts 'appropriate' under Rule 403, not to that rule's 'substantially outweighed' test.").

75. See text accompanying notes 19-60 *supra*.

76. See text accompanying notes 61-67 *supra*.

distinguishing between the permissible and impermissible uses of specific acts evidence. Particularly because the Federal Rules of Evidence have been utilized and probably will continue to be utilized as a model for state evidentiary rules,⁷⁷ it is unfortunate that the Federal Rules do not provide a more satisfactory approach to the problem.

A second problem with rule 404(b) is its inconsistency with the basic approach of the Federal Rules to questions of admissibility. Rule 404(b) contemplates the use of a balancing test to evaluate the admissibility of specific acts evidence falling outside the character prohibition,⁷⁸ and as a result, the rule recognizes that on some occasions specific acts evidence which is not character evidence will be inadmissible. Therefore, the term character cannot be simply a label attached to all inadmissible specific acts evidence. As noted previously,⁷⁹ however, if "character" is given some independent content, the only thing that is likely to distinguish specific act character evidence from other specific act propensity evidence is the relatively low probative value of the former. In short, the only functional purpose served by the prohibition against specific acts to prove character to show action in conformity with character is to exclude evidence of low probative value.

No other federal rule of evidence serves a similar purpose. Rather, the entire thrust of the Federal Rules is to favor the admissibility of even marginally probative evidence unless there is some important reason to exclude it. The basic definition of relevance in rule 401 requires only a minimal relationship between an item of evidence and the proposition it is offered to prove,⁸⁰ and rule 402 provides that "all relevant evidence is admissible, except as otherwise provided" by the Constitution, a statute, or court rule.⁸¹ Rule 403 provides that relevant evidence "may be excluded if its probative value is *substantially outweighed*"⁸² by countervailing considerations such as prejudice or consumption of time, and each of the specific exclusionary provisions in the Federal Rules, except the provision in rule 404(b), is based primarily on factors other than low probative value. For example, the hearsay rule⁸³ is based on the premise that the factfinder may not fully appreciate the extent to which out-of-court declarations may be fabricated or inaccurate;⁸⁴ the prohibition against introducing evidence of offers of compromise to show liability⁸⁵ is

77. See, e.g., NEV. REV. STAT. §§ 27-101 to -1103 (1979); N.M. STAT. ANN. §§ 101-1102 (1978); N.D. CENT. CODE §§ 101-1102 (1974 & Supp. 1979).

78. See text accompanying notes 72-74 *supra*.

79. See text accompanying notes 62-64 *supra*.

80. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 140-50. For the text of rule 401, see note 1 *supra*.

81. FED. R. EVID. 402.

82. FED. R. EVID. 403 (emphasis added), reproduced in part at text accompanying note 74 *supra*.

83. FED. R. EVID. 801-802.

84. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 330-37.

85. FED. R. EVID. 408.

based primarily on the ground that exclusion of this evidence facilitates out-of-court settlements;⁸⁶ the restrictions on the use of prior convictions to impeach a witness⁸⁷ are based on large measure on the potentially prejudicial impact of such evidence.⁸⁸

A third reason for reevaluating rule 404(b) is the fact that the rule may inadvertently have liberalized the extent to which specific acts evidence is admissible. The primary purpose of the prohibition against the use of specific acts evidence to prove character traditionally has been to protect against the use of prejudicial specific acts evidence except in those situations in which the specific acts have a fairly direct bearing on some critical issue in a case.⁸⁹ There is no substantial indication that the drafters of the Federal Rules intended to depart from this purpose.⁹⁰ Nonetheless, rule 404(b), when it is applied in conjunction with other rules to concrete issues of admissibility, may in fact offer very little protection against the use of specific acts evidence.

As noted previously,⁹¹ the question of admissibility is most likely to arise in a criminal prosecution when the prosecutor offers specific bad act evidence against the defendant. Since the defendant's culpability will in some sense almost always be an issue, a prosecutor should have no difficulty in overcoming the minimal relevance hurdle of rule 401⁹² with respect to almost any bad act allegedly committed by the defendant. Moreover, given the elusive nature of the term "character"⁹³ and the fact that the list of permissible uses for specific acts evidence in rule 404(b) is not exclusive,⁹⁴ it should be relatively easy for an imaginative prosecutor to articulate some noncharacter purpose for which any particular specific act is relevant.

Once the relevance and character hurdles have been overcome, there are likely to be only two bases for excluding the evidence. First, the

86. See R. LEMPert & S. SALTzBURG, *supra* note 3, at 191-93.

87. FED. R. EVID. 609.

88. See R. LEMPert & S. SALTzBURG, *supra* note 3, at 272-77.

89. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979); *id.* at 918-19 (Goldberg, J., dissenting); *United States v. Fosher*, 568 F.2d 207, 212 (1st Cir. 1978); C. MCCORMICK, *supra* note 2, § 188, at 445, § 190, at 447-48.

90. Congress amended the beginning of the second sentence of the Supreme Court's proposed rule 404(b) by replacing the words "this subdivision does not exclude evidence when offered" with "[i]t may, however, be admissible." See H.R. REP. NO. 93-650, 93d Cong., 1st Sess. (1973) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081. According to the Report of the House Judiciary Committee, this amendment "properly placed greater emphasis on admissibility than did the final Court version." *Id.* It is not clear, however, whether this concern with "emphasis of admissibility" was one of substance or form. See note 74 *supra*. See also 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 47-49 (1975).

91. See note 3 and text preceding note 22 *supra*.

92. See note 1 and text accompanying note 79 *supra*.

93. See text accompanying notes 6-10, 61-65 *supra*.

94. See text accompanying notes 70-71 *supra*.

defendant may object that he did not in fact commit the prior act or that his involvement with it was not as culpable as the prosecutor's evidence suggests. This objection, however, is itself a relevance objection: If the defendant did not commit the prior act or did not do so with the culpability suggested by the prosecutor's evidence, the specific act is simply not probative or at least not as probative as it otherwise would be.

When the relevance of evidence "depends upon the fulfillment of a condition of fact"⁹⁵—in this case showing the culpable nature of the defendant's involvement in the prior act—Federal Rule of Evidence 104(b) provides that the condition is satisfied by "the introduction of evidence sufficient to support a finding of the fulfillment of the condition."⁹⁶ Thus, the court would overrule the defendant's objection if the factfinder could reasonably believe the prosecutor's version of the defendant's involvement with the prior act.⁹⁷ In a case involving conflicting evidence on this issue, the rule 104(b) test is likely to be satisfied.

The defendant's final, and probably best, argument for excluding specific acts evidence would be that the judge should apply rule 403⁹⁸ to exclude relevant but prejudicial, distracting, and time-consuming evidence.⁹⁹ In contrast to the traditional notion that prejudicial specific acts evidence should not be admitted unless there is a good reason to do so, however, rule 403 provides that a court may exclude relevant evidence only if its probative value is "substantially outweighed" by the countervailing factors. Thus, the balance is likely to be struck in favor of admissibility.

Although some courts have taken the position that the Federal Rules of Evidence merely codified the existing law with respect to specific acts evidence,¹⁰⁰ a recent Fifth Circuit case, *United States v.*

95. FED. R. EVID. 104(b).

96. *Id.*

97. See R. LEMPERT & S. SALTZBURG, *supra* note 3, at 1133-37. See generally Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978).

98. FED. R. EVID. 403, reproduced in part at text accompanying note 74 *supra*.

99. The existence of a dispute regarding the defendant's involvement in the prior acts could strengthen or provide an independent basis for the defendant's rule 403 objection. Even if the rule 104(b) preliminary fact test is satisfied, see text accompanying notes 95-97 *supra*, doubt about the defendant's involvement in the prior acts tends to diminish the probative value of the evidence, and litigating the question of the defendant's involvement could be distracting and time consuming.

100. See, e.g., *United States v. Jacobson*, 578 F.2d 863, 866 (10th Cir.), cert. denied, 439 U.S. 932 (1978); *United States v. Long*, 574 F.2d 761, 765 (3d Cir.), cert. denied, 439 U.S. 985 (1978); *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977).

In some circuits there appears to be no substantial difference between the method of analysis employed prior to the adoption of the Federal Rules and method of analysis mandated by a literal reading of the Federal Rules. See, e.g., *United States v. Long*, 574 F.2d 761, 765-66 (3d Cir.), cert. denied, 439 U.S. 985 (1978). Compare *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974) with *United States v. Masters*, 622 F.2d 83, 85-86 (4th Cir. 1980). Other circuits, however, continue to

Beechum,¹⁰¹ illustrates how a literal reading of the Federal Rules may increase the extent to which specific acts evidence is admissible. *Beechum*, a substitute letter carrier, was suspected of stealing items from the mail, and in an attempt to verify this suspicion, postal inspectors placed an envelope containing a silver dollar in a mailbox on *Beechum*'s route. When the envelope was brought to the post office, the inspectors found the silver dollar missing and subsequently arrested *Beechum*. A search incident to his arrest revealed that *Beechum* was in possession of the silver dollar and two unsigned credit cards issued in the names of people on *Beechum*'s mail route. *Beechum* was charged with possession of the silver dollar with knowledge that it had been stolen from the mail. He based his defense on the claim that he had found the silver dollar in the mailbox and had planned to return it.¹⁰² The question before the Fifth Circuit was whether the trial judge erred in admitting evidence showing *Beechum*'s possession of the two credit cards.

The court began its analysis by equating rule 404(b) with the "venerable principle" that specific acts evidence "should not be admitted solely to demonstrate the defendant's bad character."¹⁰³ At the same time, the court acknowledged that specific acts evidence "relevant to an issue such as intent" may be admissible,¹⁰⁴ and concluded that the credit card evidence was relevant to show intent *if* *Beechum* had stolen the credit cards.¹⁰⁵ Although there was no direct evidence that *Beechum* had wrongfully acquired the cards, the question of the defendant's wrongful acquisition was simply one of relevance.¹⁰⁶ The court found that the evidence was sufficient to permit the factfinder to infer wrongful acquisition¹⁰⁷ and, therefore, concluded that the evidence should be admissible unless, pursuant to rule 403, its probative value was substantially outweighed by the danger of unfair prejudice.¹⁰⁸ After an extensive and thoughtful consideration of the factors relevant to balancing probative value and prejudice, the court held that it was proper to admit the credit card evidence.¹⁰⁹

The court's conclusion that the question whether *Beechum* wrongfully possessed the credit cards was simply a question of relevance—although consistent with a literal reading of the Federal Rules¹¹⁰—consti-

apply limitations on the use of specific acts evidence that are inconsistent with a literal reading of the Federal Rules. See, e.g., authorities cited at note 112 *infra*.

101. 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

102. *Id.* at 903-05.

103. *Id.* at 910 (emphasis added).

104. *Id.*

105. *Id.* at 912-13.

106. *Id.* at 913; see text accompanying notes 95-96 *supra*.

107. 582 F.2d at 916.

108. *Id.* at 913, 916.

109. *Id.* at 914-15 & nn.18-20, 917.

110. See text accompanying notes 95-97 *supra*.

tuted an explicit departure from precedent. Prior to *Beechum*, the Fifth Circuit had taken the position,¹¹¹ still adhered to in some circuits,¹¹² that the relevant aspects of the specific acts evidence must "be established by plain, clear, and convincing evidence."¹¹³ *Beechum's* rejection of this requirement will permit proof of specific acts that might not previously have been admitted because of a dispute about the nature of the defendant's involvement in those acts.

Even in cases in which the defendant's culpability with respect to the prior acts is clearly established, *Beechum's* analysis may have expanded the permissible uses of specific acts evidence. The court assumed that rule 404(b) "establish[es] two watertight compartments: extrinsic acts evidence which relates 'solely to . . . the defendant's character' . . . and that which is relevant for other purposes."¹¹⁴ As the dissent in *Beechum* pointed out, however, "there simply are no such watertight compartments to be found . . ."¹¹⁵ Indeed, "evidence which is probative 'solely' of bad character and not of any fact related to the elements of the crime . . . is irrelevant."¹¹⁶ Moreover, specific acts evidence offered against a defendant is unlikely to be irrelevant, for "it is nearly impossible to imagine any 'extrinsic offense' which . . . did not . . . have at least some tendency to make it less probable than it would be without the evidence" that the defendant was innocent.¹¹⁷ Evaluating the admissibility of such evidence solely in terms of the rule 403 balancing test,¹¹⁸ which favors admissibility,¹¹⁹ would, in the dissent's view, substantially increase the extent to which prejudicial specific acts evidence is admissible.¹²⁰

The impact of *Beechum* on cases in which the defendant's culpability with respect to prior acts is clearly established depends ultimately on how courts apply the rule 403 balancing test in individual cases. In terms of the question of admissibility, it does not appear from the published opinions that the Fifth Circuit subsequent to *Beechum*¹²¹ has departed substantially from its prior case law or from the law in circuits which view the Federal Rules as merely incorporating the traditional approach to

111. See *United States v. Broadway*, 477 F.2d 991, 995 (5th Cir. 1973).

112. See, e.g., *United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980); *United States v. Herrera-Medina*, 609 F.2d 376, 379-80 (9th Cir. 1979); *United States v. Dolliole*, 597 F.2d 102, 106-07 (7th Cir.), cert. denied, 442 U.S. 946 (1979). See also *United States v. Maestas*, 554 F.2d 834, 836-37 n.2 (8th Cir.), cert. denied, 431 U.S. 972 (1977).

113. *United States v. Beechum*, 582 F.2d at 910 & n.12.

114. *Id.* at 920 (Goldberg, J., dissenting).

115. *Id.* (Goldberg, J., dissenting).

116. *Id.* (Goldberg, J., dissenting).

117. *Id.* at 921 (Goldberg, J., dissenting) (emphasis original).

118. See text accompanying note 108 *supra*.

119. See text accompanying and following notes 98-99 *supra*.

120. 582 F.2d at 921 (Goldberg, J., dissenting); see note 74 *supra*.

121. See, e.g., *United States v. Shavers*, 615 F.2d 266, 271 (5th Cir. 1980); *United States v. Foshee*, 606 F.2d 111, 112 n.3 (5th Cir. 1979); *United States v. Smith*, 605 F.2d 839, 845 (5th Cir. 1979).

specific acts evidence.¹²² Nonetheless, as the *Beechum* dissent correctly pointed out, the majority's "venerable principle"¹²³ that specific acts are inadmissible to prove character to show action in conformity with character rests on the premise "that extrinsic acts evidence is fraught with dangers of prejudice—extraordinary dangers not presented by other types of evidence."¹²⁴ The analytical approach of the majority, however, would make all specific acts evidence admissible unless its prejudicial impact "*substantially outweighed*"¹²⁵ its probative value.

IV. A RATIONAL APPROACH TO SPECIFIC ACTS EVIDENCE

Since neither "propensity"¹²⁶ nor "character"¹²⁷ is a concept that provides a viable basis for distinguishing between permissible and impermissible uses of specific acts evidence, the prohibition against use of specific acts to prove character to show action in conformity with character can serve only two functions. First, it provides a seemingly convenient label—character (or propensity)—that can be used in a shorthand fashion to describe inadmissible specific acts evidence. Some formulations of the specific act prohibition, however, explicitly contemplate that a balancing of probative value and prejudice may result in the exclusion of noncharacter specific acts evidence.¹²⁸ Thus, the utility of the term character as a label for inadmissible specific acts evidence is marginal. Moreover, whatever convenience the label may have is more than offset by the fact that it is derived from a rule that on its face appears to impose an independent substantive limitation on the use of specific acts evidence. Finally, there is simply no need for an evidentiary rule the function of which is only to provide a label for describing some inadmissible evidence.

Second, the prohibition against use of specific acts to prove character constitutes a symbolic recognition of the need to be cautious about admitting specific acts evidence.¹²⁹ It would be preferable, however, to have a rule which addresses the problems inherent in the use of specific acts evidence directly rather than symbolically. The analysis here will suggest that such a rule could easily be formulated.

The first step in a rational approach to the admissibility of specific acts evidence would be to abolish the purported distinction between

122. See note 100 *supra* and accompanying text.

Given the intuitive manner in which one must evaluate both probative value and prejudice, see notes 2-3 *supra*, this conclusion is necessarily impressionistic.

123. 582 F.2d at 910.

124. *Id.* at 920 (Goldberg, J., dissenting).

125. FED. R. EVID. 403 (emphasis added).

126. See text accompanying notes 19-60 *supra*.

127. See text accompanying notes 61-67 *supra*.

128. See FED. R. EVID. 404(b), discussed at text accompanying notes 78-79 *supra*.

129. See *United States v. Beechum*, 582 F.2d 898, 920 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting), cert. denied, 440 U.S. 920 (1979).

character and noncharacter or propensity and nonpropensity evidence, and to state simply and directly that the admissibility of specific acts evidence depends on a careful balancing of probative value against the concerns with prejudice, time consumption, and distraction of the factfinder. There is ample precedent for use of such a balancing test in a variety of contexts.¹³⁰ Moreover, specific acts that are currently inadmissible pursuant to the character evidence prohibition would presumably continue to be inadmissible because their generally low probative value¹³¹ would not be sufficient to outweigh the specifically articulated countervailing concerns. Finally, such a formulation of the rule governing admissibility of specific acts evidence would have the benefit of specifically focusing on the criteria that should be used in evaluating the admissibility of *all* specific acts evidence.

The precise form that should be given such a rule depends primarily upon two factors. First, evidentiary rules have their primary application in the trial context, where there may be only a limited amount of time to prepare and present arguments concerning admissibility.¹³² Thus, to promote ease and consistency of application at the trial court level, a specific acts evidence rule should be set forth as clearly and briefly as possible in familiar, unambiguous terms.

The concern with consistency of application may suggest the desirability of attempting to restrict trial judges' discretion by replacing or at least augmenting the relevant factors set forth in a provision like rule 403¹³³ with more specific language mandating exclusion or admissibility. With one possible exception discussed below,¹³⁴ however, such an approach would probably be undesirable. There are simply too many varieties of specific acts evidence with varying degrees of probative value and prejudice. An attempt to account for all of these situations would, at best, make the rule lengthy and cumbersome. At worst, the failure to anticipate a particular situation could create an erroneous impression

130. Courts traditionally have had the discretionary power to exclude otherwise admissible evidence of all types on the basis of factors such as undue prejudice, confusion of the issues, or unwarranted time consumption. See C. MCCORMICK, *supra* note 2, § 185, at 438-41. Moreover, both the drafters of the Federal Rules of Evidence, see text accompanying notes 72-74 *supra*, and other proponents of the inclusionary rule approach to specific acts evidence, see text accompanying and following notes 14-15 *supra*, have urged courts to utilize a balancing approach in determining the admissibility of specific acts evidence falling outside the "character" prohibition.

131. See text accompanying notes 62-64 *supra*.

132. Moreover, even an improper evidentiary ruling by the trial court may not provide a basis for reversal on appeal. See FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ."); R. LEMPERT & S. SALTZBURG, *supra* note 3, at 2 (noting reluctance of appellate courts to reverse trial courts on the basis of erroneous nonconstitutional evidentiary rulings).

133. FED. R. EVID. 403, reproduced in part at text accompanying note 74 *supra*.

134. See text accompanying notes 146-50 *infra*.

about how that situation should be dealt with. Moreover, any concern with possible inconsistent application of the rule should be at least partially offset by the fact that trial courts are accustomed to utilizing a general balancing test in numerous contexts.¹³⁵

The second, and more difficult, issue to consider in formulating a specific acts evidence rule is how to define the relationship between the probative value of such evidence and the countervailing factors that may justify exclusion. The most significant of these countervailing factors is likely to be prejudice. Probative value and prejudice, however, are not opposite sides of the same coin. Rather, they exist independently and in varying degrees in different types of specific acts evidence. Moreover, in the absence of adequate empirical data, one can make only an intuitive, common sense estimate about the extent to which any item of evidence is probative or prejudicial. In short, the nature of the balancing process is inherently imprecise. Thus, the most important aspect of a balancing test is whether it is phrased in a manner that tends to favor admissibility or exclusion of the evidence.

One might, for example, begin with the intuitive premises that specific acts evidence frequently has a relatively high degree of probative value and that factfinders are not likely to be substantially prejudiced by such evidence. If these premises are sound, it would arguably be appropriate to formulate a balancing test that, like rule 403, favors admissibility.¹³⁶

135. See note 130 *supra*.

136. If the Federal Rules of Evidence were to take this approach to the admissibility of specific acts evidence, the present Rules should be amended in the following manner:

First, since rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided . . .," and since rule 403 sets forth a balancing test that favors admissibility, rule 404(b) should be eliminated.

Second, it may be desirable to have a provision stating that specific acts evidence may, subject to rule 403, be admissible. *Cf.* FED. R. EVID. 406 (acknowledging that habit evidence may be admissible). Such a provision, although technically unnecessary if the rules are literally applied, would clarify the purpose underlying the elimination of the current rule 404(b). In the absence of this type of provision or a clear statement of legislative purpose, failure of the Federal Rules to deal directly with the specific acts issue could be interpreted as an acceptance of the traditional common-law approach to specific acts evidence. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 735-44 (2d ed. 1977).

Third, there should be clarifying amendments to rules 404(a), 405(a), and 405(b). Rule 404(a) precludes proof of character to show action in conformity with character except in limited, specifically designated situations, and rule 405(a) provides that whenever character evidence is admissible, it may be proved by reputation or opinion evidence. Rule 405(b) provides that character may also be proved by specific acts when character is "an essential element of a charge, claim, or defense." The effect of these rules is to permit reputation and opinion evidence to prove character to show action in conformity with character only in the limited situations set forth in rule 404(a), and to permit proof of character by all three types of evidence—reputation, opinion, and specific acts—whenever character is an essential element of a claim or defense.

Use of the term "character" in these contexts has not presented major theoretical or

On the other hand, as noted previously,¹³⁷ the traditional prohibition against use of specific acts to prove character to show action in conformity with character manifests a belief that there is a need to be particularly concerned about prejudicial impact of specific acts evidence. If this intuitive belief seems sound, it would be more appropriate to articulate the balancing test in a manner favoring exclusion of the evidence. For example, the rule might provide:

Except as otherwise provided by Act of Congress or by these rules, evidence of other crimes, wrongs, or culpable acts is not admissible for any purpose unless the court determines that the probative value of such evidence outweighs the danger of prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹³⁸

practical problems, and the substance of these rules could be maintained with the following amendments: (1) delete rule 405(a) and amend rule 404(a) to provide that *reputation or opinion evidence* cannot be used to prove character to show action in conformity with character except in the limited situations there specified; (2) delete rule 405(b), or perhaps, for the sake of clarity, retain the substance of 405(b) and provide that when character is an essential element, "proof may [also] be made [of] by *reputation, opinion, or specific instances of his conduct.*" FED. R. EVID. 405(b) (with proposed deletion of "also" and "of" and insertion of italicized language).

One final clarifying amendment, which is not related to the proposed deletion of rule 404(b), may also be desirable. The Federal Rules, as currently drafted, appear to contemplate only two situations in which character evidence may be relevant: when character is an essential element of a claim or defense or when character is relevant to show action in conformity with character. There may, however, be other purposes for which character evidence is sometimes relevant. For example, in an alienation of affection action, the defendant may wish to prove the bad character of the plaintiff to show that this bad character, rather than the conduct of the defendant, was the cause of the alienation. See 1 J. WIGMORE, EVIDENCE § 54 (3d ed. 1940). See generally Weissenberger, *Character Evidence Under the Federal Rules: A Puzzle With Missing Pieces*, 48 U. CIN. L. REV. 1 (1979). To account for this type of situation, the amended version of rule 405(b) could be phrased in terms that, subject to other provisions, permitted specific acts, opinion, or reputation evidence to be used in *all* instances in which a party offers to prove a person's character. Such an amendment would have the added benefit of demonstrating the absence of an explicit prohibition against the use of specific acts to prove character to show action in conformity with character. Moreover, the amendment would not affect the traditional rule 404(a) limitations on the use of reputation or opinion evidence to prove character to show action in conformity with character. Those limitations, as noted previously, can be retained simply by stating them in terms of restrictions on the use of reputation and opinion evidence.

137. See note 90 and text accompanying notes 89-90, 125-25 *supra*.

138. The factors to balance against probative value are identical to the factors set forth in Federal Rule of Evidence 403, and except for addition of the term "culpable," the language describing the kinds of evidence to which the proposed rule is applicable is identical to the language in Federal Rule of Evidence 404(b).

The limitation of the proposed rule to "culpable" acts probably does not represent a change—or at least not a substantial change—from existing law. Such a limitation, for example, is arguably implicit in rule 404(b), which uses the unmodified term "acts" in conjunction with "crimes" and "wrongs." In any event, the limitation is consistent with

In contrast to the rule 403 balancing test, which provides for exclusion only if prejudice and the other countervailing factors outweigh probative value,¹³⁹ this proposed balancing test would permit the admission of specific acts evidence only if its probative value outweighs the countervailing factors.¹⁴⁰ The effect of this reversal of the rule 403 balancing test is to replace a policy favoring admissibility¹⁴¹ with one

the primary basis for the traditional restrictions on the use of specific acts evidence—a fear that proof of a criminal defendant's bad acts will be prejudicial. If one fears that courts will read the term "culpable" too narrowly or believes that the proposed rule should be equally applicable to nonculpable acts that present time consumption and distraction concerns, the term culpable could simply be eliminated.

The "except as otherwise provided" clause is designed to serve several purposes. First, it may be desirable to have somewhat different provisions governing the use of specific acts or prior convictions offered to impeach the credibility of a witness. See, e.g., FED. R. EVID. 608(b), 609. The "except" clause prevents the proposed balancing test from affecting these impeachment provisions.

A second possible exception to the proposed specific acts balancing test could exist for situations in which character is an essential element of a claim or defense. Since specific acts evidence has traditionally been admissible for this purpose, see FED. R. EVID. 405(b); C. MCCORMICK, *supra* note 2, § 187, at 443-44, one should arguably apply a balancing test in this context that tends to favor admissibility. On the other hand, the relatively high probative value of specific acts evidence when character is itself an essential element may mean that the balance under even the proposed rule would almost always be struck in favor of admissibility.

Finally, if a defendant is charged under a recidivist statute, prior crimes that establish the recidivism element obviously should be admissible. The essential nature of the prior crimes evidence in this situation should lead to the conclusion that the probative value of the evidence outweighs the countervailing concerns. Moreover, a statutory recidivism provision arguably should be viewed as an implicit exception to the balancing rule. Nonetheless, for the sake of clarity it may be desirable to have an explicit evidentiary rule that exempts prior crimes offered to prove a recidivism charge from the proposed balancing test.

The adoption of the proposed balancing test would require some clarifying amendments to existing evidentiary rules. See note 136 *supra*.

139. The rule requires that the countervailing factors "substantially" outweigh probative value. See text accompanying note 74 *supra* (quoting rule 403). On the significance of the term "substantially," see text accompanying and following notes 144-45 *infra*.

140. Cf. FED. R. EVID. 609(a) (prior felony convictions not involving dishonesty or false statement admissible to impeach credibility only if "probative value . . . outweighs . . . prejudicial effect to . . . defendant"); FED. R. EVID. 609(b) (if ten years have elapsed from date of conviction or release from confinement, whichever is later, probative value of prior conviction offered to impeach credibility must "substantially" outweigh prejudice).

The fact that the rule 609(a) balancing test is phrased in terms of prejudice "to the defendant" creates some difficulties. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 330-32 (2d ed. 1977). Compare *United States v. Thorne*, 547 F.2d 56, 57-58 (8th Cir. 1976) (suggesting that rule 609(a) does not protect government against prejudicial impact of prior convictions), with *United States v. Jackson*, 405 F. Supp. 938, 942-43 E.D.N.Y. 1975) (granting of defendant's motion *in limine* to exclude evidence of his prior convictions conditioned on defendant's not suggesting pristine personal background and not using prior convictions to impeach prosecution witnesses).

141. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 115 (2d ed. 1977).

favoring exclusion. As a practical result, whereas rule 403 makes the task of obtaining an exclusionary ruling relatively difficult, the proposed rule would place a greater burden on the proponent of specific acts evidence.

Since the nature of the balancing process is inherently imprecise,¹⁴² additional protection against the use of prejudicial specific acts evidence could be obtained by requiring that the trial judge, as a condition of admissibility, be firmly convinced that the probative value outweighs the countervailing factors. This requirement could be set forth in a separate sentence specifically stating, for example, that the judge must be "firmly convinced" or "convinced beyond a reasonable doubt" that the probative value outweighs the countervailing factors.¹⁴³

An alternative, but less desirable, method of articulating the need for the trial judge to be firmly convinced that probative value outweighs prejudice would be to provide in the balancing test itself that the probative value must "*substantially* outweigh" the countervailing factors. Because this language is common in other balancing test formulations,¹⁴⁴ it has the virtue of being familiar to trial lawyers and judges. The term "substantially," however, is subject to misinterpretation. It suggests, for example, that evidence which is slightly more probative than prejudicial may be excluded because the evidence is not *substantially* more probative. Yet, in a rational evidentiary system any evidence that is in fact even slightly more helpful than harmful should be admitted.¹⁴⁵ If, for the sake of familiarity, the term "substantially" is used in the balancing test, the accompanying advisory committee note or other legislative history should point out that the purpose of the term is solely to emphasize the need for the trial judge to be firmly convinced that the evidence is at least slightly more helpful than harmful.

In addition to the nature of the balancing test, there is one further issue that merits consideration in drafting a rule governing the admissibility of specific acts evidence. In the context of discussing the use of bad acts against a criminal defendant, a number of courts have taken the position that, as a condition of admissibility, the prosecutor must establish the defendant's involvement and culpability in the prior acts by clear and convincing evidence.¹⁴⁶ In contrast, as noted previously,¹⁴⁷ a literal reading of the Federal Rules would treat the question of the defendant's involvement in the prior acts simply as a relevance issue. As a result, the specific acts evidence may be admissible if a reasonable person

142. See text following note 135 *supra*.

143. See generally Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

144. See, e.g., FED. R. EVID. 403, 609(b).

145. See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 115 (2d ed. 1977); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1787-90 (1980).

146. See C. MCCORMICK, *supra* note 2, § 190, at 451-52; text accompanying notes 111-13 *supra*.

147. See text accompanying notes 95-97, 106-09 *supra*.

could conclude from the evidence that the defendant was culpably involved in the acts.

One might argue that the latter result is desirable because if the factfinder believes the defendant's version of the events, it will simply disregard the evidence. There are, however, at least two countervailing concerns. First, the factfinder may discount the probative value of the prosecutor's evidence but nonetheless be prejudiced against the defendant. For example, the mere possibility that the defendant may have engaged in the act, if it involved particularly dangerous or blameworthy conduct, may lead the factfinder to be less favorably disposed to the defendant than it would otherwise be.¹⁴⁸ Second, the defendant may not be able to present adequately his version of the prior act without electing to testify in his own defense. Yet, the defendant may prefer to exercise his fifth amendment¹⁴⁹ right not to testify. A defendant, of course, may feel pressured to testify simply because of the strength of the prosecutor's case or for any number of other reasons. If the introduction of potentially prejudicial evidence is the primary motivating factor for this choice, however, it arguably would be desirable to have a more stringent check against admissibility of the evidence in the first instance.¹⁵⁰

Such a check could be incorporated into a general balancing test by adding to the proposed rule a sentence setting forth the nature of the determination that must be made as a condition of admissibility. Alternately, the rule could be phrased as conditioning admissibility on two factors: First, proof, by some designated standard, of the preliminary fact of the individual's involvement in the prior act; and second, satisfaction of the balancing test.¹⁵¹

148. If the prosecution seeks to introduce disputed evidence of several bad acts, there is also a potential "cumulative effect" problem. For example, even if the nature of the defendant's involvement in each of the acts is subject to substantial doubt, the factfinder may conclude simply from the number of incidents allegedly involving the defendant that the defendant probably was culpably involved in at least one such incident.

149. U.S. CONST. amend. V.

150. Cf. FED. R. EVID. 608(b) (providing, *inter alia*, that "the giving of testimony . . . does not operate as a waiver of [the] privilege against self-incrimination when examined with respect to matters which relate only to credibility"). The Advisory Committee's Note to rule 608 explains the purpose of this provision as follows:

While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that the accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality.

Advisory Committee's Note, FED. R. EVID. 608(b), 56 F.R.D. 183, 269 (1972). Similarly, the right to remain silent may not possess much vitality if evidence of a defendant's unsubstantiated involvement in prior crimes is readily admissible.

151. Although the proposed balancing test, *see* text accompanying note 138 *supra*, is

V. CONCLUSION

The traditional prohibition against the use of specific acts evidence to prove character to show action in conformity with character is based on the premise that the probative value of such evidence is not sufficiently great to outweigh the countervailing concerns of prejudice, time consumption, and distraction of the factfinder from the central issues of a case. Under both the exclusionary and inclusionary formulations of the specific acts evidence rule, however, potentially prejudicial bad acts are frequently admissible. Thus, there is substantial merit to any formulation of the rule which, like rule 404(b), recognizes the importance of balancing probative value against prejudice and the other countervailing concerns that may warrant exclusion of concededly relevant evidence.

Nonetheless, recognizing the need to balance probative value against prejudice and other countervailing concerns is only the first step in a rational approach to the admissibility of specific acts evidence. As this Article has demonstrated, neither the concept of "character" nor the fact that the relevance of specific acts evidence depends upon a "propensity" inference provides a viable basis for distinguishing between admissible and inadmissible specific acts evidence. It would be desirable, therefore, to eliminate the traditional prohibition against the use of specific acts to prove character, and to evaluate the admissibility of *all* specific acts evidence in terms of a balancing test.

The concerns underlying the traditional character evidence prohibition suggest the desirability of articulating the balancing test in a manner less favorable to admissibility than the test in Federal Rule of Evidence 403. Moreover, it may be desirable to provide, as independent conditions of admissibility, that a trial judge must be firmly convinced both that the probative value of specific acts evidence outweighs the countervailing factors and that a criminal defendant whose bad acts are otherwise admissible was culpably involved in those acts. Regardless of how one thinks the specific acts evidence rule should be formulated, however, the critical task from the standpoint of a rule drafter should be to focus specifically on the nature of the balancing test. Since the balancing process is inherently imprecise, the most important function of a rule setting forth a balancing requirement is to give an indication whether and under what circumstances there should be a preference for admission or exclusion of the evidence.

applicable to specific acts evidence generally, the justifications for imposing this preliminary fact requirement relate primarily to problems arising in the use of specific acts evidence against criminal defendants. Thus, it may seem appropriate to limit the requirement to this type of situation. If the preliminary fact requirement is to have limited applicability, it probably should be set forth, for the sake of clarity, as a separate sentence in the rule rather than as a limited condition of admissibility in the balancing test itself.

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

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 237 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to physical and sexual offenses
7 against children; amending the definitions of the
8 crimes of murder in the second degree and assault in
9 the first degree; relating to the joinder of offenses
10 of the same or similar character and the admissibil-
11 ity in a criminal proceeding of evidence of prior
12 acts; amending Rule 8(a) of the Alaska Rules of
13 Criminal Procedure; amending Rule 404(b) of the
14 Alaska Rules of Evidence; and providing for an effec-
15 tive date."

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

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

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

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

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

27 (3) acting either alone or with one or more persons, the
28 person commits or attempts to commit arson in the first degree, kid-
29 napping, sexual assault in the first degree under AS 11.41.410(a)(1)

1 or (1), sexual assault in the second degree, burglary in the first
2 degree, escape in the first or second degree, or robbery in any degree
3 and, in the course of or in furtherance of that crime, or in immediate
4 flight from that crime, any person causes the death of a person other
5 than one of the participants.

6 * Sec. 2. AS 11.41.200(a) is amended to read:

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

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

10 (2) with intent to cause serious physical injury to another,
11 the person causes serious physical injury to any person; or

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

16 * Sec. 3. AS 11.41.434(a) is amended to read:

17 (a) An offender commits the crime of sexual abuse of a minor in
18 the first degree if

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

23 (2) being 18 years of age or older, the offender engages in
24 sexual penetration with a person who is under 16 years of age and who

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

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

29 (3) being 18 years of age or older, the offender engages in

1 sexual penetration with a person who is under 16 years of age, and the
2 victim at the time of the offense is

3 (A) residing as a member of the social unit in the
4 same household as the offender and the offender is in a position
5 of authority over the victim; or

6 (B) temporarily entrusted to the offender's care.

7 * Sec. 4. AS 11.41.436(a) is amended to read:

8 (a) An offender commits the crime of sexual abuse of a minor in
9 the second degree if

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

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

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

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

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

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

29 (5) being 18 years of age or older, the offender engages in

1 sexual contact with a person who is under 16 years of age, and the
2 victim at the time of the offense is

3 (A) residing as a member of the social unit in the
4 same household as the offender and the offender is in a position
5 of authority over the victim; or

6 (B) temporarily entrusted to the offender's care.

7 * Sec. 5. AS 12.55.025(e) is amended to read:

8 (e) Except as provided in (g) and (h) of this section, if the
9 defendant has been convicted of two or more crimes, sentences of
10 imprisonment shall run consecutively. If the defendant is imprisoned
11 upon a previous judgment of conviction for a crime, the judgment shall
12 provide that the imprisonment commences at the expiration of the term
13 imposed by the previous judgment.

14 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

15 (h) If the defendant has been convicted of two or more crimes
16 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455 in which the
17 victim or victims of the crimes were minors and the judgment on any of
18 the convictions has not been entered, the court shall impose some
19 consecutive period of imprisonment for each conviction.

20 * Sec. 7. AS 12.55.155(c) is amended to read:

21 (c) The following factors shall be considered by the sentencing
22 court and may aggravate the presumptive terms set out in AS 12.55.125:

23 (1) a person, other than an accomplice, sustained physical
24 injury as a direct result of the defendant's conduct;

25 (2) the defendant's conduct during the commission of the
26 offense manifested deliberate cruelty to another person;

27 (3) the defendant was the leader of a group of three or
28 more persons who participated in the offense;

29 (4) the defendant employed a dangerous instrument in

1 furtherance of the offense;

2 (5) the defendant knew or reasonably should have known that
3 the victim of the offense was particularly vulnerable or incapable of
4 resistance due to advanced age, disability, ill health, or extreme
5 youth or was for any other reason substantially incapable of exercising
6 normal physical or mental powers of resistance;

7 (6) the defendant's conduct created a risk of imminent
8 physical injury to three or more persons, other than accomplices;

9 (7) a prior felony conviction considered for the purpose of
10 invoking the presumptive terms of this chapter was of a more serious
11 class of offense than the present offense;

12 (8) the defendant's prior criminal history includes conduct
13 involving aggravated or repeated instances of assaultive behavior;

14 (9) the defendant knew that the offense involved more than
15 one victim;

16 (10) the conduct constituting the offense was among the most
17 serious conduct included in the definition of the offense;

18 (11) the defendant committed the offense pursuant to an
19 agreement that the defendant either pay or be paid for the commission
20 of the offense, and the pecuniary incentive was beyond that inherent
21 in the offense itself;

22 (12) the defendant was on release under AS 12.30.020 or
23 12.30.040 for another felony charge or conviction or for a misdemeanor
24 charge or conviction having assault as a necessary element;

25 (13) the defendant knowingly directed the conduct constituting
26 the offense at an active officer of the court or at an active or
27 former judicial officer, prosecuting attorney, law enforcement officer,
28 correctional employee, fire fighter, emergency medical technician,
29 paramedic, ambulance attendant, or other emergency responder

1 during or because of the exercise of official duties;

2 (14) the defendant was a member of an organized group of
3 five or more persons, and the offense was committed to further the
4 criminal objectives of the group;

5 (15) the defendant has three or more prior felony convic-
6 tions;

7 (16) the defendant's criminal conduct was designed to obtain
8 substantial pecuniary gain and the risk of prosecution and punishment
9 for the conduct is slight;

10 (17) the offense was one of a continuing series of criminal
11 offenses committed in furtherance of illegal business activities from
12 which the defendant derives a major portion of the defendant's income;

13 (18) the offense was a crime

14 (A) specified in AS 11.41 and was committed against a
15 spouse, a former spouse, or a member of the social unit comprised
16 of those living together in the same dwelling as the defendant;
17 or

18 (B) specified in AS 11.41.410 - 11.41.460 and was
19 committed against a minor, and the defendant has engaged in the
20 same or similar conduct involving the same or another victim who
21 was a minor;

22 (19) the defendant's prior criminal history includes an
23 adjudication as a delinquent for conduct that would have been a felony
24 if committed by an adult;

25 (20) the defendant was on furlough under AS 33.30 or on
26 parole or probation for another felony charge or conviction;

27 (21) the defendant has a criminal history of repeated in-
28 stances of conduct violative of criminal laws, whether punishable as
29 felonies or misdemeanors, similar in nature to the offense for which

1 the defendant is being sentenced under this section;

2 (22) the defendant knowingly directed the conduct constitut-
3 ing the offense at a victim because of that person's race, sex, color,
4 creed, physical or mental disability, ancestry, or national origin;

5 (23) the defendant is convicted of an offense specified in
6 AS 11.71 and the offense involved the delivery of a controlled sub-
7 stance under circumstances manifesting an intent to distribute the
8 substance as part of a commercial enterprise;

9 (24) the defendant is convicted of an offense specified in
10 AS 11.71 and the offense involved the transportation of controlled
11 substances into the state;

12 (25) the defendant is convicted of an offense specified in
13 AS 11.71 and the offense involved large quantities of a controlled
14 substance;

15 (26) the defendant is convicted of an offense specified in
16 AS 11.71 and the offense involved the distribution of a controlled
17 substance that had been adulterated with a toxic substance.

18 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
19 read:

20 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
21 the same indictment or information in a separate count for each of-
22 fense if the offenses charged, whether felonies, misdemeanors or both,

23 (1) are of the same or similar character and it can be
24 determined before trial that it is likely that evidence of one charged
25 offense would be admissible to prove another charged offense,

26 (2) [OR] are based on the same act or transaction, or

27 (3) are based on two or more acts or transactions connected
28 together or constituting parts of a common scheme or plan.

29 * Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

1 (b) Other Crimes, Wrongs, or Acts.

2 (1) Evidence of other crimes, wrongs, or acts is not admissible
3 to prove the character of a person in order to show that he acted in
4 conformity therewith. It may, however, be admissible for other pur-
5 poses, such as proof of motive, opportunity, intent, preparation,
6 plan, knowledge, identity, or absence of mistake or accident.

7 (2) In a prosecution for a crime involving a physical or sexual
8 assault or abuse of a minor, evidence of other acts by the defendant
9 toward the same or another child is admissible to show a common scheme
10 or plan if admission of the evidence is not precluded by another rule
11 of evidence and if the prior offenses

12 (i) are not too remote in time;

13 (ii) are similar to the offense charged; and

14 (iii) were committed upon persons similar to the pros-
15 ecuting witness.

16 * Sec. 10. Section 9 of this Act is retroactive and applies

17 (1) to evidence of acts committed before the effective date of
18 this Act; and

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

21 * Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

DRAFT

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

The changes to AS 11.41.110(a)(2) and 11.41.200(a)(3) are solely intended as technical amendments to make it clear that the language "intentionally performs an act" means "knowingly engages in conduct". This amendment thus conforms the statutes to the interpretation provided in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982).

Sections 3 and 4

The addition of AS 11.41.434(a)(3) and 11.41.436(a)(5) recognizes that the most serious forms of child sexual abuse are often committed by those who live in the same household as the victim or who are temporarily entrusted with the victim's care. Despite having no legal authority over the victim, such persons are nonetheless in a position of power such that even older children often find it impossible to thwart their advances. Because other subsections of these statutes already cover sexual misconduct with persons under the age of 13, the new changes apply only to victims from 13 to 15 years old. The cutoff at 16 years of age was specifically chosen instead of the 18-year-old cutoff in other subsections dealing with persons with legal or biological ties to the victim.

Sections 5 and 6

In enacting these sections, which require judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose whatever consecutive time as it decides is appropriate pursuant to the sentencing considerations in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children is to express the Legislature's preference for judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense. In some cases, the court may find that only a minimal period of consecutive time to serve may be necessary while in other cases the court may find that a lengthy consecutive term is required. Another purpose of this amendment is to allow judges to fashion some consecutive period of suspended time, with conditions of probation, to assure that offenders being released from prison have an adequate period of supervision by the court or the Department of Corrections.

Section 7

AS 12.55.155(c)(18)(B) has been amended to create a new aggravating factor for repeated sexual misconduct toward minors. This change reflects the Legislature's intent that, although most judges already take into account prior misconduct in sentencing, it should be specifically recognized as a statutory aggravating factor. It is not necessary that a conviction have been entered to constitute this aggravating factor. This factor is also intended to apply to incidents not resulting in convictions. Prior convictions already trigger imposition of presumptive sentencing, or can constitute a separate aggravating factor if there are three or more felonies (AS 12.55.155(c)(15)) or if there are repeated instances of similar conduct (AS 12.55.155(c)(21)). Convictions used for those purposes are not intended to trigger this aggravating factor. As used in this aggravating factor, the phrase "same or similar conduct" is not intended to require a strict analysis of statutory elements of offenses.

Section 8

The amendment to Rule 8 of the Alaska Rules of Criminal Procedure is specifically intended to reverse the decision in Johnson v. State, 730 P.2d 175 (Alaska App. 1986) to permit multiple offenses to be joined for trial when evidence of one offense is admissible to prove another. It is intended that the determination that evidence will likely be cross-admissible be made before trial. This determination depends to a large extent on the state of the prosecution's evidence. The courts should be given great latitude to structure these pretrial proceedings to rely as much as possible on offers of proof and other non-testimonial showings, so as to avoid conducting a mini-trial, and to avoid situations where defendants use this procedure to obtain pretrial depositions to which they are not otherwise entitled. The determination on cross-admissibility may also turn on the precise parameters of a person's defense. A defendant who declines, in an *ex parte in camera* hearing, to disclose a defense, which could have been anticipated at this point in the proceedings and which would render evidence of other offenses inadmissible, should be deemed to have waived any objection to joinder.

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." *Id.* at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct,

particularly as to non-family members, and that it is appropriate to re-draw the line. The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. Although specific statutory citations are not included in the language of the rule, it is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

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); Oksotkaruk 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).

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 shield 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.

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 justification 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



Official Business

Alaska State Legislature

House

P.O. BOX V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

March 2, 1988

TO: All Members of the House

FROM: Representative Alan Ulmer

SUBJECT: House Bill 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"

Child sexual assault and child abuse in Alaska have reached epidemic proportions. While we would like to ignore these problems because they make us so uncomfortable, we have to recognize that they do exist. Newspaper stories, radio and TV news provide daily reminders. These are problems which need our resources, not only in terms of protection for the victims, but treatment of the abusers. We need to assure that our criminal justice system doesn't victimize the abused. Our laws and procedures must send a clear message that abusive, violent behavior against children will not be tolerated. Your favorable consideration of House Bill 237 can be a part of the solution to protecting our children.

House Bill 237 was introduced to make it easier to obtain successful convictions in child abuse and child sexual assault cases. My goal in introducing this bill is to pass legislation that will assure that the criminal justice system is able to fully and fairly prosecute those individuals who repeatedly engage in abusive behavior against children. Recent court of appeals decisions have narrowly restricted the admission of evidence of an offender's patterns of behavior, and prevented the joinder of related cases. These restrictions have resulted in fewer cases being charged, cases being charge-reduced and others being brought and lost.

March 2, 1988

Page 2

House Bill 237 tightens the prosecution of these offenses. It allows related cases to be tried together, includes an aggravating factor for repeated sexual misconduct toward minors, and includes babysitters and live-in boyfriends in the class of person covered in the first degree sexual abuse of a minor definition, clarifies the legislature's preference for consecutive sentencing for multiple offenders, and expands the admissibility of evidence of similar abusive behavior.

The House Judiciary Committee Substitute represents a careful balance between protections for the accused and protections for the victims. It is a compromise bill that is supported by the Department of Law, the Public Defender, Office of Advocacy, Department of Health and Social Services, Department of Public Safety, the Council on Domestic Violence and Sexual Assault, the Fairbanks Sexual Abuse Task Force, the Anchorage Sexual Abuse Task Force, the Homer Society to Prevent Exploitation of Children, Alaska Juvenile Crime Commission, KIDPAC, Victims for Justice, and the League of Women Voters. I would sincerely appreciate your support of House Bill 237.

STATE OF ALASKA



REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

M E M O R A N D U M

February 4, 1988

TO: Representative John Sund, Chair
House Judiciary Committee

FROM: Representative Fran Ulmer

SUBJECT: House Bill 237

As Dana Fabe and I indicated to you the other day, the latest draft of CSHB 237 has been approved by representatives of both the Public Defender Agency and the Department of Law. The new draft has been substantially rewritten to provide some degree of judicial discretion in consecutive sentencing for child abuse (Section 6), a pretrial procedure for trial joinder determinations (Section 8), and a compromise provision to allow limited evidence of prior acts of child abuse (Section 9). It is this last topic that is specifically addressed in this memorandum.

Last week committee staff prepared and circulated a memo discussing Evidence Rule 404 and the change which I have proposed in HB 237. Most of the memo is an accurate discussion of the rationale behind the general rule that excludes the admissibility of prior bad acts of the defendant. However, it totally omits any discussion of the long-standing exception to that general rule of exclusion, the admissibility of prior lewd and lascivious conduct by the defendant. That and that alone is what is at issue in Section 9 of the bill, the proposed amendment to Rule 404.

In many jurisdictions, as well as in the federal courts, Rule 404(b) (which on its face is identical to the federal rule), is interpreted as a rule of inclusion, not exclusion. That means that in spite of the general rule of excluding evidence of bad acts, courts at common law have always recognized that one of the permissible purposes of such evidence is "[t]o show a passion or

propensity for unusual and abnormal sexual relations". McCormick on Evidence, E. Cleary (3rd ed. 1984) at page 560. Although such evidence was once confined to prior acts with the particular victim, "a number of jurisdictions now admit other sex offenses with other persons." Id. at 561, especially cases and articles cited in footnote 24.

The basis for this exception is that in prosecutions for depraved acts . . . the prosecuting witness is not likely to be believed, since the evidence standing alone and entirely unconnected with anything which led to or brought it about would appear . . . unnatural or improbable in itself . . . Thus the evidence lends credence to the testimony of the prosecution that might otherwise be disbelieved.

Grey v. State, 404 N.E. 2d 1348, 1352 (Ind. 1980) (quoting from other cases; citations omitted).

Under Alaska Rules of Evidence 404(b), which is similar to the rules in other states, prior acts by a defendant are admissible to prove things such as motive, plan, scheme, or intent. In other states, prior sexual misconduct is admissible to show that the defendant has pedophile tendencies and therefore a "motive" to commit another similar offense. As the Wyoming Supreme Court stated, when there is a conflict in the testimony between the victim and the defendant, this kind of evidence is important.

Given this evidentiary conflict a finder of fact would be extremely interested in other information that might be available to help resolve the issue. Evidence of motive would be such information. One who is a paraphiliac, whose preference or addiction for unusual sexual practices occurs in the form of pedophilia, could well be recognized as having a motive to commit the acts complained of by the victim.

Elliott v. State, 600 P.2d 1044, 1048-9 (Wyo. 1979).

Other courts admit such evidence to show a "depraved sexual instinct", McKim v. State, 476 N.E.2d 503 (Ind. 1985), or a "common design". People v. Thomas, 573 P.2d 433 (Calif. 1978). Some courts are much more direct and recognize a specific exception for evidence of an "emotional propensity for sexual aberration". State v. McFarlin, 517 P.2d 87 (Ariz. 1973). Even in Alaska the courts recognize the importance of evidence of a "lewd disposition" when the prior conduct concerns the same

victim, Burke v. State, 624 P.2d 1240 (Alaska 1980), or members of the same family. Soper v. State, 731 P.2d 587 (Alaska App. 1987).

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, the Legislature believes that the judiciary has drawn the line much too narrowly in excluding other evidence of prior misconduct, particularly as to non-family members, and that it is appropriate to re-draw that line. This new provision is specifically intended to overturn decisions such as Bolden v. State., 720 P.2d 947 (Alaska App. 1986), which reversed a conviction because the trial judge permitted the introduction of evidence of prior instances of abuse against young girls outside of the victim's immediate family.

Whether such evidence is described as "motive", "instinct", "intent", "common design", or simply an exception to the general rule, it should be admitted unless there is some other specific reason under Rules 401-403 for its exclusion or limitation. Trial judges will still have the discretion to exclude evidence if it is otherwise prejudicial, unduly misleading, or cumulative under Rule 403, or is irrelevant under Rules 401-402. Although evidence of prior abuse would be admissible under new Rule 404(b)(2), the trial judge would still have authority under Rule 403 to preclude, as unfairly prejudicial, detailed and explicit evidence of the prior victim's injuries, for example. Similarly, the trial judge would have the discretion under Rule 403 to cut off evidence of other abuse when it reaches the point of causing delay, wasting time, or being cumulative.

The trial judge's determination of relevance is specifically required by new Rule 404(b)(2)(i), (ii), and (iii). The decision on relevance turns on remoteness, similarity of offenses and similarity of victims. For example, a judge would probably determine that a prior physical assault on a 17-year old should not be admitted in a prosecution for assault on an infant because neither the offenses nor the victims are similar. The judge might also determine that an offense committed twenty years earlier is too remote to have any probative value.

I sought assistance from the National Center for State Courts in finding material which could shed additional light upon this evidentiary debate. Today I received a copy of one chapter of a report from the American Bar Association, Child Sexual Abuse and the Law (4th ed. 1983). The conclusion of the report is that, although courts should weigh probative value against prejudicial impact (as in Evidence Rule 403), ". . . such evidence represents an essential aspect of the crime, about which the jury or judge should have knowledge in reaching an informed decision."

Evidence of prior criminal acts by the accused is therefore generally inadmissible to show that the defendant committed the crime of which he is currently charged. However, most jurisdictions have recognized a special exception to this rule in prosecutions for sexual offenses. This special exception allows evidence of prior sexual acts to be admitted "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial".

The admission of prior sexual acts also tends to dispel the notion that the present charge or accusation is fabricated or the product of the child's fantasy.

Finally, evidence of prior sexual acts clearly demonstrates the continuing nature of child sexual abuse committed by a parent. While a criminal prosecution must focus on specific occurrences, it is the long duration of the abuse which is the essence of this offense. To deprive the trier of fact of key information relating to the fundamental nature of the crime seems irrational.

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

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to crimes against persons, and to the physical and sexual assault and sexual abuse of children; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) 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.

* Sec. 2. 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.

* Sec. 3. AS 11.41.434(a) is amended to read:

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

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

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

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

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

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

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

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

NOTES PAGE 1

see comment p3

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455; in which the
13 victim or victims of the crimes were minors and the judgment on any of
14 *OK gives broad discretion to the judge* the convictions has not been entered, the court shall impose some
15 consecutive period of imprisonment for each conviction.

16 * Sec. 7. AS 12.55.155(c) is amended to read:

17 (c) The following factors shall be considered by the sentencing
18 court and may aggravate the presumptive terms set out in AS 12.55.125:

19 (1) a person, other than an accomplice, sustained physical
20 injury as a direct result of the defendant's conduct;

21 (2) the defendant's conduct during the commission of the
22 offense manifested deliberate cruelty to another person;

23 (3) the defendant was the leader of a group of three or
24 more persons who participated in the offense;

25 (4) the defendant employed a dangerous instrument in fur-
26 therance of the offense;

27 (5) the defendant knew or reasonably should have known that
28 the victim of the offense was particularly vulnerable or incapable of
29 resistance due to advanced age, disability, ill health, or extreme

1 youth or was for any other reason substantially incapable of exercis-
2 ing normal physical or mental powers of resistance;

3 (6) the defendant's conduct created a risk of imminent
4 physical injury to three or more persons, other than accomplices;

5 (7) a prior felony conviction considered for the purpose of
6 invoking the presumptive terms of this chapter was of a more serious
7 class of offense than the present offense;

8 (8) the defendant's prior criminal history includes conduct
9 involving aggravated or repeated instances of assaultive behavior;

10 (9) the defendant knew that the offense involved more than
11 one victim;

12 (10) the conduct constituting the offense was among the most
13 serious conduct included in the definition of the offense;

14 (11) the defendant committed the offense pursuant to an
15 agreement that the defendant either pay or be paid for the commission
16 of the offense, and the pecuniary incentive was beyond that inherent
17 in the offense itself;

18 (12) the defendant was on release under AS 12.30.020 or
19 12.30.040 for another felony charge or conviction or for a misdemeanor
20 charge or conviction having assault as a necessary element;

21 (13) the defendant knowingly directed the conduct constitut-
22 ing the offense at an active officer of the court or at an active or
23 former judicial officer, prosecuting attorney, law enforcement offi-
24 cer, correctional employee, fire fighter, emergency medical techni-
25 cian, paramedic, ambulance attendant, or other emergency responder
26 during or because of the exercise of official duties;

27 (14) the defendant was a member of an organized group of
28 five or more persons, and the offense was committed to further the
29 criminal objectives of the group;

1 (15) the defendant has three or more prior felony convic-
2 tions;

3 (16) the defendant's criminal conduct was designed to obtain
4 substantial pecuniary gain and the risk of prosecution and punishment
5 for the conduct is slight;

6 (17) the offense was one of a continuing series of criminal
7 offenses committed in furtherance of illegal business activities from
8 which the defendant derives a major portion of the defendant's income;

9 (18) the offense was a crime

10 (A) specified in AS 11.41 and was committed against a
11 spouse, a former spouse, or a member of the social unit comprised
12 of those living together in the same dwelling as the defendant;
13 or *OK*

14 (B) specified in AS 11.41.410 - 11.41.460 and was
15 committed against a minor, and the defendant has engaged in the
16 same or similar conduct involving the same or another victim who
17 was a minor;

18 (19) the defendant's prior criminal history includes an
19 adjudication as a delinquent for conduct that would have been a felony
20 if committed by an adult;

21 (20) the defendant was on furlough under AS 33.30 or on
22 parole or probation for another felony charge or conviction;

23 (21) the defendant has a criminal history of repeated in-
24 stances of conduct violative of criminal laws, whether punishable as
25 felonies or misdemeanors, similar in nature to the offense for which
26 the defendant is being sentenced under this section;

27 (22) the defendant knowingly directed the conduct constitut-
28 ing the offense at a victim because of that person's race, sex, color,
29 creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance.

* Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies, misdemeanors or both,

(1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense,

and no unfair prejudice to the A would result from the joinder of charges

(2) [OR] are based on the same act or transaction, or

(3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

(b) Other Crimes, Wrongs, or Acts.

(1) 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

1 purposes, such as proof of motive, opportunity, intent, preparation,
2 plan, knowledge, identity, or absence of mistake or accident.

3 (2) In a prosecution for a crime involving a physical or sexual
4 assault or abuse of a minor, evidence of other acts by the defendant
5 toward the same or another child ^{may be} is admissible to show a common scheme
6 or plan if the prior offenses

7 (i) are not too remote in time;

8 (ii) are similar to the offense charged; and

9 (iii) were committed upon persons similar to the pros-
10 ecuting witness.

11 * Sec. 10. Section 9 of this Act is retroactive and applies

12 (1) to evidence of acts committed before the effective date of
13 this Act; and

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

16 * Sec. 11. This Act takes effect immediately under AS 01.10.070(c).
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Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

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* 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

1 than one of the participants.

2 * Sec. 2. AS 11.41.200(a) is amended to read:

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

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

6 (2) with intent to cause serious physical injury to another,
7 the person causes serious physical injury to any person; or

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

12 * Sec. 3. AS 11.41.434(a) is amended to read:

13 (a) An offender commits the crime of sexual abuse of a minor in
14 the first degree if

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

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

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

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

25 (3) being 18 years of age or older, the offender engages in
26 sexual penetration with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

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

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

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

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

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

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

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455; in which the
13 victim or victims of the crimes were minors ~~and the judgment on any of~~
14 ~~the convictions has not been entered,~~ the court shall impose some
15 consecutive period of imprisonment for each conviction.

16 * Sec. 7. AS 12.55.155(c) is amended to read:

17 (c) The following factors shall be considered by the sentencing
18 court and may aggravate the presumptive terms set out in AS 12.55.125:

19 (1) a person, other than an accomplice, sustained physical
20 injury as a direct result of the defendant's conduct;

21 (2) the defendant's conduct during the commission of the
22 offense manifested deliberate cruelty to another person;

23 (3) the defendant was the leader of a group of three or
24 more persons who participated in the offense;

25 (4) the defendant employed a dangerous instrument in fur-
26 therance of the offense;

27 (5) the defendant knew or reasonably should have known that
28 the victim of the offense was particularly vulnerable or incapable of
29 resistance due to advanced age, disability, ill health, or extreme

1 youth or was for any other reason substantially incapable of exercis-
2 ing normal physical or mental powers of resistance;

3 (6) the defendant's conduct created a risk of imminent
4 physical injury to three or more persons, other than accomplices;

5 (7) a prior felony conviction considered for the purpose of
6 invoking the presumptive terms of this chapter was of a more serious
7 class of offense than the present offense;

8 (8) the defendant's prior criminal history includes conduct
9 involving aggravated or repeated instances of assaultive behavior;

10 (9) the defendant knew that the offense involved more than
11 one victim;

12 (10) the conduct constituting the offense was among the most
13 serious conduct included in the definition of the offense;

14 (11) the defendant committed the offense pursuant to an
15 agreement that the defendant either pay or be paid for the commission
16 of the offense, and the pecuniary incentive was beyond that inherent
17 in the offense itself;

18 (12) the defendant was on release under AS 12.30.020 or
19 12.30.040 for another felony charge or conviction or for a misdemeanor
20 charge or conviction having assault as a necessary element;

21 (13) the defendant knowingly directed the conduct constitut-
22 ing the offense at an active officer of the court or at an active or
23 former judicial officer, prosecuting attorney, law enforcement offi-
24 cer, correctional employee, fire fighter, emergency medical techni-
25 cian, paramedic, ambulance attendant, or other emergency responder
26 during or because of the exercise of official duties;

27 (14) the defendant was a member of an organized group of
28 five or more persons, and the offense was committed to further the
29 criminal objectives of the group;

1 (15) the defendant has three or more prior felony convic-
2 tions;

3 (16) the defendant's criminal conduct was designed to obtain
4 substantial pecuniary gain and the risk of prosecution and punishment
5 for the conduct is slight;

6 (17) the offense was one of a continuing series of criminal
7 offenses committed in furtherance of illegal business activities from
8 which the defendant derives a major portion of the defendant's income;

9 (18) the offense was a crime

10 (A) specified in AS 11.41 and was committed against a
11 spouse, a former spouse, or a member of the social unit comprised
12 of those living together in the same dwelling as the defendant;
13 or

14 (B) specified in AS 11.41.410 - 11.41.460 and was
15 committed against a minor, and the defendant has engaged in the
16 same or similar conduct involving the same or another victim who
17 was a minor;

18 (19) the defendant's prior criminal history includes an
19 adjudication as a delinquent for conduct that would have been a felony
20 if committed by an adult;

21 (20) the defendant was on furlough under AS 33.30 or on
22 parole or probation for another felony charge or conviction;

23 (21) the defendant has a criminal history of repeated in-
24 stances of conduct violative of criminal laws, whether punishable as
25 felonies or misdemeanors, similar in nature to the offense for which
26 the defendant is being sentenced under this section;

27 (22) the defendant knowingly directed the conduct constitut-
28 ing the offense at a victim because of that person's race, sex, color,
29 creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance.

* Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies, misdemeanors or both,

(1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense,

(2) [OR] are based on the same act or transaction, or

(3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

(b) Other Crimes, Wrongs, or Acts.

(1) 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.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if the prior offenses

(i) are not too remote in time;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

* Sec. 10. Section 9 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. 11. This Act takes effect immediately under AS 01.10.070(c).

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, No. 501 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG);
Cordova Women's Resource Center (CWRC); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRC); MEN, Inc.;
Men's Support Network (MSN); Safe & Fear-Free Environment (SAFE);
Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPSA);
South Peninsula Women's Services (SWPS);
Tundra Women's Coalition (TWC); Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

Testimony House Judiciary HB 237

Tuesday May 5, 1987

Margot Dick
Coordinator

Alaska Network on Domestic Violence and Sexual Assault

The Network is a membership organization comprised of 20 dv/sa programs throughout the state. 2500 of the 10,000 clients who will come through our programs this year are children. They have either been witnesses to violence, the object of violence and/or sexually assaulted.

Our programs are also responsible for the introduction of personal safety curriculums in schools throughout state. In addition, some of our programs provide treatment for child sexual assault victims.

I want to give you some context in order to explain our position on this bill. The response to the victimization of children is a crisis, in and of itself in this state, not just in our legal system but in our communities. This is an issue that clearly, we are not very adept at handling. It is a terribly emotional issue because abuse of the type this bill addresses has been a hidden problem that has terrible and long-term repercussions on its victims.

In cases of child sexual assault, we are seeing more and more of what I call the worst case scenarios. This is the situation where a child discloses, and the police response is inadequate because they are not properly trained in obtaining a report; the social worker's response is inadequate because their caseload is approaching 100 to 1; prosecution is inadequate because our legal system is not structured to deal with small children and crimes committed against them by people who are in some cases supposed to be looking out for their well being. Treatment is usually not available. When it is, it is wholly inadequate because it is looked to to heal a child who has not only been victimized repeatedly, often by someone entrusted with the child's care, but to heal a child who has been abused by the total ineptitude of the system set up to intervene upon the child's behalf.

If the child's family, or at least some family members are supportive, then at least the child has that support. But, sometimes these children are not supported by their families, and then they must suffer through that trauma along with the trauma caused by such clumsy intervention. I am not blaming police, social workers, prosecutors, or counselors.

These people are some of the most dedicated of any you will find. But, they are stretched too thin, they lack training and the institutional structure they operate in is not prepared to handle with these kinds of cases. So, when the system fails, as it too often does, then these children must go back to an abusive situation with an abuser who has not been treated or punished. And, then these children really have been wronged, not only by the abuser, but by their family, and by their community. And, the possibility of that child ever disclosing again is about zero.

This worst case, but not uncommon, scenario must be balanced, on the other hand, by the defendant's rights to a fair trial, to be protected from wrongfully being punished for a crime if they did not commit it. The basis of our legal system is founded upon principles that protect defendants' rights to a greater degree than anywhere else in the world, and for good reason. You, as legislators, for better or for worse, are faced with attempting to balance these two important demands of justice.

This bill is an attempt to chip off one part of the problem we face in dealing with the issue of abuse of children and address to it. Even if this bill passes, I think it is important to acknowledge that we still have a long way to go, and it is not going to be easy. But, this is an inroad to a part of the problem.

The concept of "pattern or practice of abuse" is soundly based in what we know about the conduct of an offender who abuses a child. This conduct is repeated behavior, it is not a single incident. We really are not talking about a simple assault, we are talking about a practice of assaulting. Sharon Brogan, who directs the sex offender treatment program at MEN Inc., has stated that she has never seen a sex offender who offended just one time. Doctor Gene Abel, one of the country's leading experts conducted a study in New York State Prison System that showed offenders offended both inside and outside of the family; and that the number of victims they had ranged from dozens to in the hundreds.

Suzanne Segroi, another leading expert on sex offenders, last year completed a study on the treatability of them. She believes that of the population she studied, approximately 20% are too dangerous to release, 40% may be treatable, and 40% may not be treatable at all. Some sex offenders may need to be monitored for the rest of their lives.

Ask anyone who works with physically abused and neglected children, and they will tell you that the abusive behavior these children are subjected to is repeated, and that it is generational. Abused children come the next generations abusers and victims. Sons of abusers have a 100% greater chance of being abusers when they grow up, than sons of non-abusers.

The question has been raised as to why not simply continue to charge offenders with separate counts rather than create a new law codifying the concept of a "pattern or practice of abuse or neglect". The answer is because we are talking about something that is fundamentally different from simple assault. We are talking about a violation of trust and an abuse of power created by an adult who is following a pattern of conduct that leads to the repetitious abuse of a child.

Adults have to be held responsible for their behavior around children. There is no alternative to this. The adult is the responsible party, not the child. When an adult repeatedly acts so irresponsibly as to violate that trust of responsibility, abuse and exploit the power that is inherent in it, by physically assaulting a child in order to vent uncontrollable anger or manipulating a child by using them sexually, we are talking about a different crime than a single assault charge.

Whatever some of you may think of this bill, one thing that it is serving to do, which I think is very important, is to hold the nature of these crimes up to the light. More people need to understand why they are so difficult to deal with. It is also important to acknowledge, that while this bill can serve as a big step in developing the dialogue on this issue and could go a long way in addressing prosecution of these crimes, it is not a panacea. We have a lot of work ahead of us. We urge your favorable consideration of this bill, and we look forward to additional careful consideration and thought given to this issue, because it is so important and it is complex.

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____ Bill Version: HB 229
Publish Date: _____

Revision Date: _____ Agency Affected: Alaska Court System
Title: An act relating to homicide by BRU: Trial Courts
abuse
Sponsor: Hudson, Ulmer, Larson, ... Components:
Requestor: House Judiciary

EXPENDITURES/REVENUES	(Thousands of Dollars)				
	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING					
Personal Services	.	.	.	.	.
Travel	.	.	.	.	.
Contractual	.	.	.	.	.
Supplies	.	.	.	.	.
Equipment	.	.	.	.	.
Land & Structure	.	.	.	.	.
Grants & Claims	.	.	.	.	.
TOTAL OPERATING	1.0	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
Federal Funds	.	.	.	.	.
Other	.	.	.	.	.
TOTAL	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
Division: Alaska Court System
Approved by: *Stephanie J. Cole* Deputy Director
Agency: Alaska Court System

Phone: 264-8228
Date: 5-5-87
Date: 5-5-87

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January 24, 1988

MEMORANDUM

TO: Rep. John Sund, Chair,
House Judiciary Committee

FROM: John Hartle, PA, *JH*
House Judiciary Committee Staff

RE: Amendments to Alaska Rule of Evidence 404; HB 237

Section 10 of the proposed draft Committee Substitute for House Bill 237¹ amends the Alaska Rules of Court, adding a new subsection (c) to Alaska Rule of Evidence 404. The new subsection would allow presentation to trial juries evidence of prior crimes, wrongs, or acts of the defendant in order to show a propensity to commit crimes of physical and sexual assault against children.

Alaska Evidence Rule 404(b) prohibits the use of prior acts evidence to show propensity:

(b) 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,

¹ 1/22/88 Chenoweth Work Draft # 5-08090X, offered by Rep. Ulmer

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The draft amendment to rule 404 adds a new subsection:

(c) Notwithstanding (a) and (b) of this rule, in a prosecution for a crime involving

- (1) a physical assault upon a child, evidence of other acts of physical assault by the defendant toward the same or another child is admissible; and
- (2) a violation of AS 11.41.434 - 11.41.460, evidence of other acts described in AS 11.41.434 - 11.41.460 by the defendant toward the same or another child is admissible.

Issues presented by the proposed new Court Rule center on the relevance of propensity evidence, its probative value, and prejudicial effect against the defendant. Also presented is the trial court administration issue of admitting evidence of issues collateral to the issues at trial. The proposed rule of evidence raises Constitutional due process issues of fundamental fairness, and proof beyond a reasonable doubt.

The present Alaska Rule of Evidence 404, which is identical to the Federal rule, does not allow admission of evidence of other crimes, wrongs, or acts for the purpose of proving a

propensity by the defendant to offend. Evidence of other crimes, wrongs, or acts is admitted in the prosecution case-in-chief when relevant to other issues at trial. The present rule lists other purposes for which prior bad act evidence will be admitted, including for example, evidence that the crime charged is of a common plan or scheme with an earlier crime.

Evidence of prior acts by the defendant is always admissible in the sentencing hearing, including hearsay evidence of uncharged acts in the Presentence Report, where it is used to aggravate or mitigate the sentence, once guilt has been determined. The question here is to what extent the defendant's prior crimes should be used by the prosecution to show guilt of the specific crime charged.

"In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused.²"

"Showing that a [defendant] is generally bad has never been under our system allowable. The defendant has a right to be tried on the truth of the specific charge contained in the indictment."³

² Williams v. New York 337 U.S. 241 (U.S. Supreme Ct. 1949)

³ U.S. v. Burkhart 458 F.2d 201 (10th Circuit 1972)

The reasons for excluding prior bad act evidence are, first, because the defendant would be required to answer to charges not stated in the indictment. Second, the inference of guilt of the crime charged could be outweighed by the prejudice the evidence may generate against the accused. Third, the rule guards against turning every trial into a series of mini-trials on prior charged and uncharged acts of the defendant.

If the State has evidence of prior criminal acts, normally, the most appropriate course of action is to charge the defendant with them. If the evidence is of acts which the defendant has been previously charged and acquitted, the matter properly should rest there, and the accused should not have to defend against these charges again. If the evidence is of acts for which the defendant has been previously charged and found guilty, his or her debt to society has been paid, and the appropriate use for evidence of prior convictions is, after conviction in the present case, as a factor in aggravation of sentence, not at trial as proof of guilt or innocence of the crime charged.

The proposed new Court Rule does not limit the newly-admissible evidence to convictions; "acts" include uncharged wrongs and other behavior. The prosecution and defense would thus be free to bring in evidence corroborating and refuting

each alleged prior act offered to prove the accused acted in conformity with character, i.e. did or did not have a propensity to commit the crime. The trial lawyers could thus debate the accused's entire life history for evidence of his or her tendencies. Evidence could, for example, be brought in from custody actions decided years before the crime alleged. This could lengthen trials substantially.

Under the proposed Evidence Rule 404(c), the court would have no authority to keep from the jury evidence of any prior crimes, wrongs, or acts.

Admitting this type of evidence is the exact opposite of the approach taken in Alaska's rape shield law,⁴ which strictly limits admission of evidence of the victim's history as it may be unfair or prejudicial.⁵

In 1931, Judge McDermott wrote, regarding propensity evidence of prior bad acts:

"The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay

⁴ AS 12.45.045

⁵ Susan Orlanski, Public Defender, Appellate Division, testified to the example of a prostitute victim in a sexual assault trial where consent to the act is at issue. The fact that the prostitute may have consented to certain acts in the past has little bearing on whether there was consent in the instance at trial.

attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible.⁶"

Judge Friendly, in United States v. Kahner⁷, wrote on the question of relevancy, that evidence of prior bad acts should be excluded

"where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."

⁶ Coulston v. United States, 51 F.2d 178 (10th Cir. 1931) 51 F.2d at 180 n.1.

⁷ 317 F.2d 459, (CA 1963) cert. denied

FINAL REPORT OF RECOMMENDATIONS
STATE OF ALASKA
DIVISION OF FAMILY AND YOUTH SERVICES
INTERNAL REVIEW TASK FORCE

Submitted to:

Yvonne M. Chase, Director, DFYS

December 18, 1987

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BACKGROUND

In October, 1987, Division of Family and Youth Services Director Yvonne M. Chase initiated an internal review of DFYS operations by creating an Internal Review Task Force. Seven field office staff members were appointed to the Task Force, and two state office staff members were assigned to provide support, to examine the agency's protective services system and to develop recommendations for improvements.

The Internal Review Task Force was directed to survey and consult with other DFYS staff, to examine previous reports and audits, to identify problem areas and to propose solutions which would fall into three major categories: those which would require legislative sanction or action; those which could be implemented immediately by adjusting or adding to agency policy; and those which would require further analysis.

Working within a two and one-half month timeframe, Task Force members solicited information, ideas, and suggestions from other DFYS staff, studied previous reports, and prepared written materials which were the topic of the three meetings of the group. Decisions of the Task Force, while not always initially unanimous, were reached by consensus.

Robert J. Hunner, Executive Director of Northwest Resource Associates, facilitated the meetings of the Task Force and prepared the final report.

STATE OF ALASKA

DIVISION OF FAMILY AND YOUTH SERVICES
INTERNAL REVIEW TASK FORCE

Michelle Decker, Community Care Licensing Specialist I, Anchorage

Floy MacPhee, Staff Manager, Fairbanks

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Laurie Richardson, Social Worker III, Sitka

Kathleen Stout, Social Worker III, Dillingham

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TASK FORCE SUPPORT:

Robert J. Hunner, Northwest Resource Associates, Seattle
(Task Force Facilitation and Report Preparation)

Frank Barthel, Social Services Program Coordinator, State Office
(Staff Support)

Russell Webb, Social Services Program Coordinator, State Office
(Staff Support)

VII. Legal Issues

Major Premises:

A significant portion of DFYS work is prescribed by law. When the law is used with a family, it should be recognized that we are dealing with a complex and formal system that has many statutes and precedents and that the laws on the books can and do change.

Therefore, the Task Force carefully examined the DFYS interface with the legal system to address an identified need to improve communications between DFYS staff and legal staff to ensure that we more often provide a united front to meet the best interests and needs of children and families. In some cases, regulations and statutes need simple revisions; in others, the Task Force recommends that particular regulations or statutes be promulgated or eliminated.

Recommendations:

- A. DFYS should seek legislation to eliminate the mandated Report of Abuse/Harm, the report from DFYS to the Department of Law required under AS47.17.025(a). The proposed Management Information System will satisfy the needs which were intended to be met by the Report of Harm.
- B. Due to the large number of inappropriate referrals received by DFYS during custody disputes, the Task Force recommends an amendment to AS 47.10.010(c) to read, "In a controversy concerning custody of a minor, the court may appoint a guardian of the person and property of a minor and may order support from either or both parents. Custody of a minor may only be given to the Department of Health and Social Services when conditions covered under AS 47.10.010(a) (2)(A-F) exist." This will not prohibit the court from remanding a child to the custody of DFYS if there are child protection concerns.
- C. DFYS should seek an amendment to AS 47.10.141(b), to add the sentence, "If an authorized representative of the Department of Health and Social Services or a facility or contract agency of the department assesses that there is no risk of harm to the child if returned to parental care, the peace officer shall transport that child to parental care." This change is necessary because sometimes police require DFYS to assume custody of runaways taken into "protective custody."

- D. In some jurisdictions, D.A.'s provide inadequate representation in DFYS matters. In addition, A.G.'s often refuse to initiate proceedings desired by social workers, substituting their judgment for the social worker's. To address these problems:
1. A formal protocol should be established which addresses the role and expectation of the A.G., and the role and expectation of the social worker.
 2. Letters to the A.G. and to the D.A. should be sent from the Commissioner's office which address the concerns presented.
 3. State Office should survey all social workers, supervisors, line workers and A.G.'s to assess and evaluate relationships between social workers and A.G.'s. This information should be used in the development of training.
- E. Under current regulations, pre-school programs may be legally exempt from both DFYS licensing and Department of Education certification by identifying their programs as "primarily educational." This exemption should be eliminated. Such programs should be required to be either licensed by DFYS or certified by the Department of Education.
- F. Youth Services should handle all cases involving delinquent youth (including those under the age of 12), unless identified CPS issues exist. If both delinquency and CPS apply to a case, the nature of the intake should be the primary issue, unless the child is endangered, and then, the current joint case staffing policy between Family Services and Youth Services should be implemented.
- G. DFYS staff are experienced in dealing with the effects of presumptive sentencing, particularly on child victims. The present statute results in fewer confessions, unnecessarily disrupts families, prevents treatment and may further victimize child victims. As a result, the Task Force is strongly opposed to presumptive sentencing in incest cases.
- DFYS must take a vocal stance against presumptive sentencing. DFYS should initiate an interagency study of presumptive sentencing in incest cases with the goal of allowing more flexibility for treatment where the threat of incarceration is a disincentive to treatment.
- H. DFYS should give further consideration to seeking an amendment to AS11.41.436(a) to add "(5) is of any age and is a sibling or person accepted as a member of the familial unit."

- I. There is a need for a clear, written definition of community standards on what constitutes abuse and neglect, including specific criteria and guidelines for screening cases, to be developed by DFYS with local input. The Task Force recommends that State Office provide guidelines for the regions to begin to develop these standards.
- J. Alaska statutes may need to be promulgated to meet Federal requirements regarding a situation of intervention on behalf of siblings of an identified abused or neglected child. The Task Force recommends that DFYS undertake a study of this issue.
- K. Alaska statutes do not meet Federal requirements regarding abuse and neglect in out-of-home care, such as foster care. The Task Force recommends further study of this issue.
- L. New funds should be provided to the Department of Law in order to provide litigation support funding for DFYS cases.



alaska judicial council

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November 24, 1987

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

M E M O R A N D U M

TO: Hal Brown

FROM: Teri Carns *TC*

RE: 3-Judge Panel

Attached is a preliminary analysis of the data that are currently available from the three-judge sentencing panel. The data have been revised to include the ten July through November, 1987 cases that are in draft form. Please let me know if you would like additional analysis.

TABLE 1

Types of Offenses Referred to 3-Judge Panel
(November 23, 1987)

<u>Offense</u>	<u>No. of Offenders</u>	<u>% of Offenders</u>
Sexual Assault I/ Sex Abuse I (Victim is minor)	18	26.5%
Sexual Assault I (adult victim)	5	7.4%
Robbery I	16	23.5%
Assault I	14	20.6%
Manslaughter	6	8.8%
Misc. involving Controlled Substance II	2	2.9%
MICS III	1	1.5%
Misconduct involving Weapons I	2	2.9%
Custodial Interference	1	1.5%
Arson I	1	1.5%
Unknown Offense	<u>2</u>	<u>2.9%</u>
	68	100.0%

TABLE 2

Year Originally Filed, Cases Referred to 3-Judge Panel
(November 23, 1987)

<u>Year Filed</u>	<u>N</u>
1981	1
1982	1
1983	3
1984	- 12
1985	26
1986	23
1987	1
Unknown	<u>1</u>
	68

TABLE 3

Court Location of Cases Referred to 3-Judge Panel
(November 23, 1987)

<u>Court Location</u> *	<u>N</u>	<u>%</u>	<u>% of 1984 Convictions by</u> <u>Court Location**</u>
Anchorage	40	58.8%	42.6%
Fairbanks	14	20.6%	19.6%
Kenai	1	1.5%	N/A
Ketchikan	4	5.9%	3.3%
Kodiak	1	1.5%	4.4%
Barrow	2	2.9%	3.8%
Palmer	5	7.4%	8.5%
Unknown	<u>1</u>	<u>1.5%</u>	<u>--</u>
	68	100.1%	

* Superior Court locations with no referrals to the 3-judge panel during this period were Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez.

** Comparison data taken from Alaska Felony Sentences: 1984, published by the Alaska Judicial Council in 1987. The comparison data did not include cases from Kenai, Nome and Kotzebue.

TABLE 4

3-Judge Panel Sexual Offense Cases
(November 23, 1987)

	<u>Sexual Assault I/Abuse I (Minor)</u>	<u>Sexual Assault I (Adult)</u>
Anchorage 1984	4	
1985	3	3
1986	2	
Unknown Year	1	
Fairbanks 1984	1	
1985		
1986	4	
Kodiak 1984	1	
Palmer 1985		1
1986	1	
Ketchikan 1985		1
Unknown Location 1985	<u>1</u>	<u>1</u>
	18	5

<u>N of Sexual Assault I/ Sexual Abuse I Convictions Statewide of Cases Filed in 1984</u>	<u>N of Cases Filed in 1984 with Sexual Assault/ Abuse Convictions that were referred to 3-Judge Panel</u>	<u>% of 1984 Comparable Convictions</u>	<u>N & % with Same Sentence (e.g., the pres.)</u>	<u>N & % w/reduced Sentence</u>
64	6	9.4% of 64	2 (33%)	4 (67%)
Same for Robbery I, <u>1985 (0 referred 1984)</u>				
(1984) 34	(1985) 6	17.6% of 34	1 (17%)	5 (83%)

TABLE 5

Panel Action

<u>Type of Offense</u>	<u>Sentence Reduced</u> *	<u>Original Sentence Imposed</u> **	<u>Sentenced Increased</u>
Sexual Assault I (minor)/ Sexual Abuse I	15 (83.3% of 18)	3 (16.7%)	
Sexual Assault I (adult)	3 (60.0% of 5)	2 (40.0%)	
Robbery I	11 (68.8% of 16)	5 (31.2%)	
Assault I	12 (85.7% of 14)	2 (14.3%)	
Manslaughter	5 (83.3% of 6)	1 (16.7%)	
Misc. re Controlled Subs. II	1 (50.0% of 2)	1 (50.0%)	
MICS III	(0.0% of 1)	1 (100.0%)	
Misconduct re Weapons I	2 (100%)	(0%)	
Custodial Interference I	1 (100%)	(0%)	
Arson I	1 (100%)	(0%)	
Unknown Offense	— (0% of 2)	— (0%)	<u>2 (100%)</u>
	51 (75.0% of 68)	15 (22.1%)	2 (2.9%)

* "Sentence reduced" includes all instances where the sentence imposed by the 3-judge panel was shorter than the presumptive sentence for the offender; and sentences in which the length was the same as the presumptive but the sentence was made non-presumptive.

** "Original" sentence is the presumptive sentence applicable to the offender being considered, taking into account prior record and offense.

TABLE 6
Comparison of 3-Judge Panel Cases to Other Cases
in Same Period
 (November 23, 1987)

Type Offense	N ref. to 3-Judge 1. 1985-1987	% of Panel Cases 2. 1985-1987	% of all cases this type, 3. 31-month period*	Est. N, this type case, 4. 31-month period**	Est. this type case as % of all convictions 5. for 31-month period***
Sex. Asslt. I/ Abuse I	18 23	26.5% 33.9%	14.4%)	160	4.8%
Sex. Asslt. I (adult)	5	7.4%			
Robbery I	16	23.5%	18.8%	85	2.5%
Assault I	14	20.6%	46.7%	30	0.9%
Manslaughter	6	8.8%	24.0%	25	0.7%
Misconduct re Control. Subs. II	2	2.9%	4.4%	45	1.3%
MICS III	1	1.5%	0.4%	275	8.2%
Misconduct re Weapon I	2	2.9%	8.7%	23	0.7%
Custodial Interference I	1	1.5%	33.3%	3	0.1%
Arson I	1	1.5%	33.3%	3	0.1%
Unknown Offense	2 68	2.9% 100.0%	N/A 10.5%	N/A 649	-- 19.3%

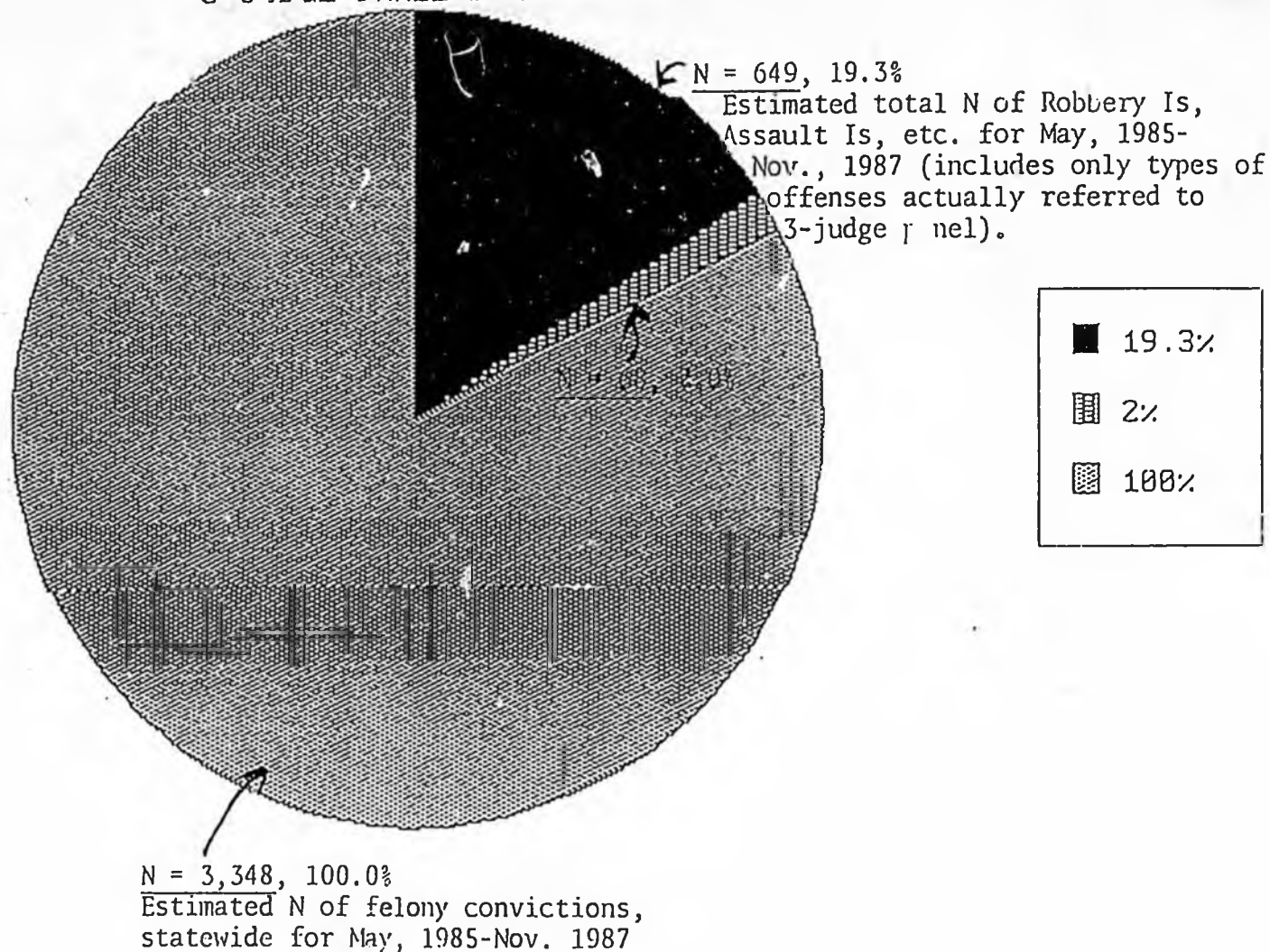
* The percentages in Column 3 were derived by dividing the N from column 1 (N referred to 3-judge panel in 1985-1987) by the N from Column 4 (the estimated N of the same type of cases for the entire 31-month period). For example, 16 Robbery I cases were decided by the 3-judge panel during the study. For approximately the same period, there were an estimated 85 Robbery I convictions statewide. Thus an estimated 18.8% of the Robbery I convictions were referred to the 3-judge panel by the sentencing judge.

** The N (number) of convictions for this offense in 1984 (see Alaska Felony Sentencing 1984, Appendix A for base data) was multiplied by 2.5 to obtain a conservative estimate of the number of convictions for the same offense in the period May, 1985-November, 1987 covered by the available 3-judge panel convictions.

*** The N of all convictions for the 31-month period May, 1985-November, 1987 was estimated by a) increasing the N of 1984 cases studied (N=1128) by 13% to account for Kenai, Nome and Kotzebue cases not on PROMIS (N=1275); b) increasing 1275 by 2% (the % of increase in felony dispositions in the 1986 Court Report between FY'84 and FY'85) (new N = 1300); c) 31 months = 108 (1300 / 12 to obtain N of cases/mo.) x 31 = 3348 cases in the May, 1985 to November, 1987 period.

The two periods do not overlap entirely, of course. The cases are reported in the period during which they were decided by the 3-judge panel. Typically, the offenses actually occurred a year or more prior to that time. The data presently available indicate that the number of convictions levelled off in 1986 and have declined very slightly in 1987. Therefore, these estimates are reasonable approximations of the numbers and types of felony

3-JUDGE PANEL-FIGURE 1



3-Judge Panel

Sixty-eight cases (68) were decided by the three-judge panel between May, 1985 and November 1987. Table 1 shows the types of offenses involved. Almost equal numbers of Robbery I (16 cases) and Sexual Abuse I/Sexual Assault I (minor) (18 cases) were considered by the panel, with lesser numbers of Assault I (N = 14), Manslaughter (N = 6) and Sexual Assault I (adult victim) (N = 5). One or two each of a variety of other offenses were also reviewed by the panel.

The majority (58.8%) of the cases were from Anchorage, although Anchorage felony convictions were only 42.6% of the statewide felony convictions studied in 1984 (Anchorage's percentage would have been noticeably lower if 1984 cases for Kenai, Kotzebue and Nome had been available for study). Fairbanks cases constituted 20.6% of the 3-judge panel's work and 19.6% of the 1984 felony convictions (comparison data is taken from the Council's report, Alaska Felony Sentences: 1984 unless otherwise noted). Ketchikan had 4 cases before the panel (5.9% of the panel's cases), but only 3.3% of the 1984 felony convictions. Six court locations--Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez--appeared to have no cases before the panel (however, the location of one of the panel's 68 cases was not recorded in the summaries).

The panel's action on each case is summarized on Table 5. In 75.0% of the 68 cases, the offender's sentence was reduced, at least to the extent of making the sentence non-presumptive. Usually the reduction also involved a reduction in the length of jail time to serve. The percentages of sentences reduced varied among the different types of offenses. Only 60% of the Sexual Assault I (adult victim) offenders had reduced sentences, and 68.8% of the Robbery I offenders. A higher percentage of the sexual cases involving minors received reduced sentences (83.3%) as did the typical Assault I (85.7%) and Manslaughter (83.3%) cases being heard by the panel.

In 22.1% of all cases, the 3-judge panel found that the original presumptive sentence should be imposed. Those cases were remanded to the trial judge with instructions to impose the presumptive sentence. In 2 cases (2.9% of the 68 cases), the 3-judge panel increased the presumptive sentence. In one of the 2 cases (Wickman, FAS86-2327), the panel said the judge had the authority to specify aggravating factors and increase the sentence. In the other case (Kuvaas, KN84-299), the panel agreed with the sentencing court that the 7-year presumptive was too lenient and increased the sentence to 12 years with 5 suspended and 5 years probation.

Table 6 and Figure 1 show how the number and type of cases decided by the 3-judge panel during the 31-month period (May, 1985-November, 1987) compare to the estimated numbers of these types of convictions during the same period. For example, Assault I convictions are less than one percent (0.9%) of the estimated total number of convictions, but 20.6% of the cases decided by the panel. These data indicate that only a few types of offenses are likely to be referred by trial judges to the 3-judge panel. Typically, these offenses are Class A or Unclassified offenses that have lengthy presumptive sentences for first offenders and proportionately longer sentences for repeat felony offenders. Other types of offenses subject to presumptive sentencing (e.g., repeat felony offenders convicted of Class B or C offenses) are very unlikely to be referred to the panel.

Table 6 shows that among the felony offenses likely to be referred to the 3-judge panel only an estimated 10.5% (68 of 649) actually were decided by the panel during the two-year period. This finding emphasizes the fact that only a small percentage of offenders are considered by the sentencing judge to be appropriate subjects for the panel. Table 6 also shows that the percentages referred vary by type of offense. Only 14.4% of Sexual Assault I/Abuse I offenses go to the 3-judge panel, as compared to 18.8% of Robbery I offenses, 46.7% of Assault I offenses, and 24.0% of Manslaughters.



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Representative Fran Ulmer
1700 Angus Way
Juneau, Alaska 99801

RE: Presumptive Sentencing/Child Abuse/3-Judge Panel

Dear Fran:

Thank you for buying breakfast.

Suggestions have surfaced recently to the effect that Superior Court judges and 3-judge panels have been unlawfully avoiding presumptive sentencing standards--especially in the area of sexual abuse. To get a feel for this we decided to make a "thumbnail sketch" of 3-judge panel activity. Teri Carns reviewed and analyzed what data was available and talked with Dana Fabe. I spoke with Judges Carlson and Shortell, chief judges of the 3-judge panel since inception and Anchorage District Attorney Dwayne McConnell. We also reviewed previous studies on sentencing and in-house data collected from a number of state and municipal agencies.

As a preliminary matter, you should know that District Attorney McConnell states that there has been no change of policy in his office concerning the prosecution of sexual assault cases. There is no more or no less "charge bargaining" occurring in these cases. The standards for prosecution are the same. About the same number of cases are being brought to their attention and the same number of prosecutors are assigned to prosecute the cases as in prior years. In summary, there has been no change in policy or in resources dedicated by the state to the prosecution of sexual abuse cases.

During the first 5 years that the 3-judge panel was in existence few cases were referred--maybe 8 to 10 per year--and no permanent record was kept of the cases heard. Judge Shortell became chief judge of the 3-judge panel in 1985 and started the practice of publishing summaries for each case heard. The analysis therefore includes only cases from May of 1985 through November of 1987.

Sixty-eight cases were decided by the 3-judge panel from May of 1985 through November of 1987. Only 18 of these cases involved sexual assault or abuse in the first degree where a minor was the victim. In 15 of the 18 cases the sentence was reduced in some fashion (occasionally that occurred by imposition of a sentence of the same length but making it non-presumptive). The 18 cases represent less than 12% of the total number of serious sexual cases (approx. 160) over the same 31-month period. In other words, superior court judges determined that manifest injustice would not result if the presumptive sentence were imposed in approximately 88.8% of the estimated 160 serious sex abuse cases involving a minor that went to conviction.

Interestingly, the largest number of referrals to the 3-judge panel fell into the violent crime category. Nearly half (44.1%) of the referrals were either first-degree assault or first-degree robbery. I am enclosing Teri's analysis for your information. Table 1 reflects the types of offenses referred to the 3-judge panel from May of 1985 through November 23, 1987. Table 2 shows the dates on which the charges were originally filed. Table 3 provides the location of the court from which the case was referred to 3-judge panel consideration. Note that there were no referrals from Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez. Table 4 provides a breakdown of the serious sexual abuse and assault cases by court of referral by year. Please note that the date does not reflect the date upon which the panel rendered its decision but, rather, the date the case was originally filed. For example, only 6 of the 64 cases involving convictions for sex abuse of either a minor or an adult that were filed in 1984 were referred to a 3-judge panel. Only 4 received a reduced sentence. Only 7 of such cases filed in 1986 were referred to the 3-judge panel. Table 5 reflects the action taken by the 3-judge panel on each category of crime.

Table 6 uses estimated data to reflect the relation between the number and type of cases referred to the panel and the number of all such types of cases in superior court going to conviction during that period. In other words, using standard acceptable means to project overall filing rates we can estimate that Sexual Assault I/Abuse I cases involving a minor represented 26.5% of all cases referred to the panel during the 31-month period between May 1, 1985 and November 30, 1987. The number of cases referred to the panel involving that crime, whether the victim was a minor or an adult, accounted for only 14.4% of the total number of estimated convictions (160) for that type of crime during the 31-month reporting period. We estimate that the number of Sex Assault/Abuse I cases involving a minor referred to the panel represented approximately 1/2 of 1% of the estimated 3,348 convictions during the reporting period.

Sixty-eight cases were decided by the 3-judge panel during the 31-month reporting period. Currently 10 cases are pending before the panel with 4 scheduled to be heard on December 4, 1987. We do not have sufficient data to accurately assess the trends in the numbers and types of cases referred to the panel. However, a breakdown in the numbers of cases decided during the 31-month period would indicate that the number of cases being decided by the 3-judge panel during each subsequent calendar year is increasing, but that the percentage of cases involving

Representative Fran Ulmer
December 1, 1987
Page 3

sexual assault/abuse remains a relatively constant 33% over the entire reporting period. It would be interesting and informative to examine the data in more detail. We are enclosing proposed budgets necessary to accomplish that project and a more comprehensive one dealing with an analysis of convictions in general for calendar years 1985 and 1986.

Having had occasion to review HB237 since our breakfast meeting I thought I would pass along a few observations and comments. I represented approximately two dozen persons charged with crimes involving some form of sexually deviant behavior during the 11 years between 1974 and 1985. These years were a time of great changes, all of which affected the treatment of sexual cases and offenders. A policy banning plea bargaining was implemented in 1975. The criminal code was rewritten in 1978. Presumptive sentencing was instituted in 1980 and subsequently modified in 1982 and 1983 by increasing the length of certain presumptive sentences and making presumptive sentences applicable to first felony offenders in certain categories of crimes. The budgets of criminal justice agencies (both state and municipal) multiplied geometrically over the years until just recently. Prison populations between 1980 and 1987 grew from approximately 770 in January of 1980 to 2,245 in January of 1987. This represented a growth of 292%. Today (or at least as of October 28, 1987) there are 2,368 inmates in institutions under the custody of Alaska's Department of Corrections. As of December 31, 1986, 564 of 2,245 inmates were confined on charges of sexual assault or abuse.

Prior to the passage in early 1986 of HB104 (the good time bill) the net gain in prison population was approximately 29 per month or 348 annually. According to recent information from the Department of Corrections, the post-HB104 net increase per month approximates 7, or 84 prisoners per year. It is likely that prisoners will have to be released under the Early Conditional Commutation Release Plan in the near future.

In 1986, I am advised by Corrections, it cost \$87.56 per day to house each prisoner. It would be cheaper to send them to Harvard. I can only assume that it is more expensive today than it was a year ago. Right now, approximately fifty thousand dollars a day is spent housing and feeding sex offenders in Alaska. Given the finite resources of the Department of Corrections, if there is a way consistent with the public safety to take advantage of less expensive alternatives than long term incarceration, then it should be done.¹

¹An analysis of prison versus probation in California was published by the Rand Corporation in July of 1986. The report presented the findings and recommendations of the second phase of a Rand study funded by the National Institute of Justice, U.S. Department of Justice that examined the use of prison and probation for felony offenders. They found that the correctional system, generally, spent about twice as much on supervising and reprocessing prisoners as it did on probationers over a three-year period. This was after including in the cost of supervising probationers the correction costs of the initial confinement in jail, the costs of post-release probation or parole supervision, police and court costs associated with processing post-release arrests, and costs of any post-release incarcerations resulting from new crimes.

The proposition has been often stated that there is no known cure for persons who fit the topologies of the pedophile, a fixated offender or a regressed offender. If that is true, then we have been going to a lot of expense to create a system whereunder a perfect balance will at some point in the future, be achieved. That is, the number of "uncured sex offenders" being released from prison will be equivalent to those entering the institution and a state of equilibrium will have been achieved. It is more likely, I think, that sexual offenders, like other criminal types, come in all shapes and sizes and that some will respond to treatment (even if it is learning to "control" their behavior) and some will not. While it is difficult to separate those that have the capacity and will to respond to treatment from those that do not, we simply cannot afford to do otherwise.

HB237 would make it easier to convict an offender and put him or her in jail for a longer period of time. However, it does nothing for the victim of child abuse. Our juvenile system is a mess despite the efforts of many good people. Decent treatment programs for juvenile sex offenders are almost nonexistent. If it is true that the victims of child abuse are tomorrow's child abusers, then it would seem to me that a top priority amongst others, should be approved community-based out-patient therapy programs that would offer individual, peer and family therapy to victims and appropriate offenders. Given the tough quality of life decisions precipitated by a declining budget, I do not feel that the State can afford to increase the number of offenders in jail and the length of their sentences and at the same time institute new and beneficial programs for victims and juvenile offenders.

I appreciate the efforts of dedicated people like Floyd Richmond. He makes no bones about the lengths that he would go to to protect children who are vulnerable to abuse. But it seems to me that he is willing to advance the cause of increased protection for children even at the expense of important civil liberties. There is no need to make it easier to convict or to increase the length of sentences to protect and provide greater support for children. The remedies are not mutually exclusive. I would urge you to review the Alaska Corrections Master Plan that was issued in 1979 after revision of the Criminal Code and adoption of a presumptive sentencing scheme but before its institution in 1980. This plan was developed at considerable expense and effort by Moyer Associates, Inc., Justice System Planning Consultants and other advisors, including the Alaska Corrections Master Plan Advisory Committee. A number of observations made in the executive summary of the Alaska Corrections Master Plan deserve repeating:

1. "Incarceration of both presentence and post-sentence offenders should be used as a last resort, and then for as short a period as possible, only for offenders who present a demonstrable risk to public safety and/or who are convicted of crimes for which society demands punishment through imprisonment." (See page 6)

2. "In many ways, community corrections services offer the brightest hope for the future of corrections. Probation and parole are indisputably less costly than incarceration, and are no less effective in reforming offenders." (See page 8)

3. "In general, expansion of the total institutional system's bedspace capacity should not outpace the Division's and the State's efforts to maximize diversion from incarceration (both pre and post-sentence). The State of Alaska should not make the costly mistake of overbuilding to accommodate a temporary "bulge" in the growth rate of the inmate population." (See page 12)

4. "Since the Alaska inmate population ratio (inmates per 100,000 population) is currently very high in comparison to other states, it is most likely to fall moderately rapidly towards the national average (77:100,000). Any long term projections for Alaska's prison population should thus reflect a gradually declining inmate population ratio rather than a rising ratio due to "normalizing" of the age and sex distribution of Alaskan population." (Emphasis supplied) (See page 13)

5. "Equity in sentencing is a goal which most would agree is essential. This was a primary motivation for enactment of Alaska's new Criminal Code, which will take effect January 1, 1980, and which provides for determinate sentences (prescribed minimum incarceratory sentences) for selected classes of felons. There is some reason to believe that this new Code will result in an increased prisoner population in the long run (perhaps as much as 40 percent by the year 2000), due to increases in average lengths of stay for the affected categories of offenders. The actual impact of the Code should therefore be carefully and continuously monitored to ascertain whether average daily population increases result from its implementation. If so, and if this is considered an undesirable side effect of equity in sentencing, the State could consider several approaches: 1) shortening the length of prescribed minimum sentences for repeat felons, 2) specifying in greater detail the weight (in months and/or years) which each aggravating or mitigating factor should be given in modifying the prescribed term, and/or, 3) appointment of a Sentencing Commission to develop a "matrix" approach to sentencing which would include consideration not only of current offense and prior record, but also of the risk-level presented by each offender....In any case, it is essential to balance concerns for equitable punishment with the realistic limits of Alaska's correctional resources (particularly its institutions)." (Emphasis supplied) (See page 23)"

Representative Fran Ulmer
December 1, 1987
Page 6

The opinions expressed herein are my own and not those of the Judicial Council. Despite my personal opinions, I hope you understand that the Judicial Council has in the past, and will in the future, exert every effort necessary to maintain its reputation for objective, neutral and detached information gathering and analysis. The Judicial Council has a long-standing commitment to provide sentencing and disposition data to the legislature for its use in making the types of policy decisions embodied in HB237. With that in mind, please review the two enclosed budgets. We would be delighted to have the opportunity to further analyze the areas of concern to all of us.

Sincerely,



Harold M. Brown
Executive Director

HMB/jmz

Enclosures



Alaska Court System

State of Alaska

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ARTHUR W. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-6411

February 9, 1988

Representative Sund
Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

I am writing to express some of my concerns about the procedures used to amend court rules. As you know, court rules can be amended both through the legislative process and through action by the supreme court. For the reasons I have outlined below, I suggest that the legislature consider sending a request for a rule change to the supreme court, prior to any direct action by the legislature to change a rule.

The procedure that the court has now adopted to change court rules is designed to provide a careful, structured review of any proposed rule change. The procedure allows those persons who would be affected by a proposed change to express their opinions to the supreme court. The procedure also insures that any change will be consistent with other court rules.

Let me outline the procedure the court follows when a proposed rule amendment is received. First, the court rules attorney researches the legal and practical consequences of the proposed amendment. The attorney reviews the court's historical file on the rule in question, to determine if the problem which generated the proposal has been previously addressed. The attorney also compares the proposal to the corresponding federal court rule, and in some cases, researches comparable rules from other states.

After this research is completed, the proposal is referred to a rules committee for a recommendation. There are presently five rules committees, which review civil, criminal, appellate, childrens' (delinquency, CINA, adoptions), and probate rules proposals. The committees hold telephonic meetings to allow for

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stakeholder participation. These committees are composed of attorneys and judges appointed by the chief justice. The appropriate committee evaluates the merits of the proposal and also attempts to anticipate any unintentional consequences of the proposal, whether legal or practical. The committees and the court rules attorney strive to determine the effects of proposed amendments on other court rules. For example, the argument in favor of changing a particular civil rule may also apply to a criminal rule. Often one rule change may require that several other rules also be amended.

After the appropriate rules committee makes a recommendation about the proposed change, the court solicits comments by sending notices of proposals (in legislative form and usually including commentary) to all attorneys and court clerks. Depending on the proposal, the court may also request comments from other persons who may be affected. The court rules attorney analyzes and consolidates all recommendations and comments in a memorandum which is forwarded to the supreme court. The supreme court then decides whether to adopt the proposal, based on the background research, the rules committee recommendation and other comments as well as the court's own experience and research.

There may be circumstances in which the supreme court declines to amend a rule, and yet the legislature may feel that the proposed change is desirable. In such a circumstance, if the supreme court's rulemaking procedure has been completed prior to legislative action, the legislature will be able to obtain the results of the court's research and review of the proposed change.

I appreciate your consideration of the court's concerns in this matter.

Very truly yours,



Arthur H. Snowden, II
Administrative Director

Original sponsors: Swackhammer, Gruenberg,
Rieger, et al.

IN THE HOUSE

BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 367 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act altering the composition, membership, and duties of the Alaska Police Standards Council; providing for certification of probation and parole officers and correctional officers by the Alaska Police Standards Council; and providing for an effective date."

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

* Section 1. AS 18.65.130 is amended to read:

Sec. 18.65.130. POLICY. The administration of criminal justice affects the health, safety and welfare of the people of this state, and requires education and training of a professional quality. It is a primary public interest that applicants meet minimum standards for employment as police officers, probation and parole officers, and correctional officers, and that criminal justice education and training be made available to police officers, probation and parole officers, and correctional officers serving in a probationary capacity and police officers, probation and parole officers, and correctional officers already in regular service. It is of secondary public interest to encourage the establishment of preliminary training programs for persons seeking to become police officers, probation and parole officers, and correctional officers.

* Sec. 2. AS 18.65.150 is amended to read:

Sec. 18.65.150. COMPOSITION OF COUNCIL. The council consists of the following persons:

1 (1) four chief administrative officers or chiefs of police
2 of local governments;

3 (2) the commissioner of public safety or a designee of the
4 commissioner;

5 (3) the commissioner of corrections or a designee of the
6 commissioner;

7 (4) one probation or parole officer;

8 (5) [(3)] four members of the public at large with at least
9 two from the communities of 2,500 population or less.

10 * Sec. 3. AS 18.65.160 is amended to read:

11 Sec. 18.65.160. APPOINTMENT. The commissioner of public safety
12 or a designee and the commissioner of corrections or a designee shall
13 serve during each [THE] commissioner's continuance in office. Other
14 members of the council shall be appointed by the governor for stag-
15 gered terms of four years, except that a member may not serve beyond
16 the time the member holds the office that established eligibility for
17 appointment. A vacancy on the council shall be filled for the remain-
18 der of a member's unexpired term in the same manner as the original
19 appointment.

20 * Sec. 4. AS 18.65.220 is amended to read:

21 Sec. 18.65.220. POWERS. The council has the power to

22 (1) adopt regulations for the administration of AS 18.65.-
23 130 - 18.65.290;

24 (2) establish minimum standards for employment as a police
25 officer, probation or parole officer, and correctional officer in a
26 permanent or probationary position [POSITIONS] and certify persons to
27 be qualified as police officers, probation or parole officers, and
28 correctional officers under AS 18.65.130 - 18.65.290;

29 (3) establish minimum criminal justice curriculum

1 requirements for basic, specialized, and in-service courses and pro-
2 grams for schools operated by or for the state or a political sub-
3 division of the state for the specific purpose of training police
4 recruits, [OR] police officers, probation and parole officers, and
5 correctional officers;

6 (4) consult and cooperate with [BOROUGHES,] municipalities,
7 agencies of the state, other governmental agencies, universities,
8 colleges, and other institutions concerning the development of police,
9 probation and parole officer, and correctional officer training
10 schools and programs of criminal justice instruction;

11 (5) employ an administrator and other persons necessary to
12 carry out its duties under AS 18.65.130 - 18.65.290;

13 (6) investigate when there is reason to believe that a
14 police officer, probation or parole officer, or correctional officer
15 does not meet the minimum standards for employment; in connection
16 with the investigation the council may subpoena persons, books, re-
17 cords, or documents related to the investigation and require answers
18 in writing under oath to questions asked by the council or the admin-
19 istrator.

20 * Sec. 5. AS 18.65.230 is amended to read:

21 Sec. 18.65.230. [POLICE] TRAINING PROGRAMS. The council shall
22 establish and maintain police training programs, probation and parole
23 officer training programs, and correctional officer training programs
24 through those agencies and institutions that the council considers
25 appropriate.

26 * Sec. 6. AS 18.65 is amended by adding new sections to read:

27 Sec. 18.65.242. STANDARDS FOR CORRECTIONAL, PROBATION, AND
28 PAROLE OFFICERS. (a) The council shall establish qualifications for
29 employment of persons as correctional, probation, and parole officers,

1 including

2 (1) minimum age, physical and mental standards, citizen-
3 ship, moral character, and experience; and

4 (2) minimum education standards.

5 (b) The council shall

6 (1) prescribe the means of presenting evidence of fulfill-
7 ment of the requirements set out in (a) of this section; and

8 (2) issue a certificate evidencing satisfaction of the
9 requirements of (a) of this section to an applicant who

10 (A) satisfies the requirements of (a)(1) of this
11 section; and

12 (B) meets the minimum education standards of (a)(2) of
13 this section by satisfactorily completing a training program for
14 correctional, probation, or parole officers established under
15 AS 18.65.230 or a course of instruction in another jurisdiction
16 equivalent in content and quality to that required by the council
17 for approved correctional, probation, or parole officer education
18 and training programs in this state.

19 Sec. 18.65.245. DENIAL OR REVOCATION OF CERTIFICATE. The coun-
20 cil may

21 (1) deny a certificate to an applicant for a correctional
22 officer certificate or a probation or parole officer certificate if
23 the applicant does not meet the standards adopted by the council under
24 AS 18.65.242(a);

25 (2) revoke the certificate of a correctional officer or a
26 probation or parole officer who, having been issued a certificate,
27 fails to meet the standards adopted by the council under AS 18.65.-
28 242(a).

29 Sec. 18.65.248. EMPLOYMENT OF CORRECTIONAL, PROBATION, AND
CSHB 367(Jud)

1 PAROLE OFFICERS. (a) A person may not be appointed as a correctional
2 officer or as a probation or parole officer unless the person has a
3 valid certificate issued by the council under AS 18.65.242.

4 (b) The provisions of (a) of this section do not apply to a
5 person employed on a probationary basis, except that employment on a
6 probationary basis may not exceed the period authorized for probation-
7 ary employment determined by the council.

8 * Sec. 7. AS 18.65.280 is amended by adding a new subsection to read:

9 (c) A municipality that employs persons in a municipal correc-
10 tional facility may, by ordinance, require that those persons meet the
11 requirements of AS 18.65.150 - 18.65.290 that are applicable to cor-
12 rectional officers.

13 * Sec. 8. AS 18.65.290 is amended by adding new paragraphs to read:

14 (4) "correctional officer" means a person employed by the
15 state in a correctional facility established for the custody, care,
16 and discipline of persons charged or convicted of offenses against the
17 state or held under authority of state law to control those persons;

18 (5) "parole officer" means a person appointed by the com-
19 missioner of corrections to supervise a prisoner's parole under
20 AS 33.16;

21 (6) "probation officer" means a person appointed to super-
22 vise probation who has the duties assigned by AS 33.05.040.

23 * Sec. 9. APPLICATION TO PERSONS WHO ARE CURRENTLY EMPLOYED AS CORREC-
24 TIONAL OFFICERS. (a) Notwithstanding AS 18.65.248, added by sec. 6 of
25 this Act, a person employed by the state as a correctional, probation, or
26 parole officer on the effective date of AS 18.65.248, may continue to be
27 employed as an officer without a certificate issued by the Alaska Police
28 Standards Council.

29 (b) A person continuing in employment under the exemption provided in
-5- CSHB 367(Jud)

1 (a) of this section who terminates that employment after the effective date
2 of AS 18.65.248 may be reemployed by the state as a correctional, pro-
3 bation, or parole officer only if the person holds a valid certificate
4 issued by the Alaska Police Standards Council.

5 * Sec. 10. AS 18.65.248, added by sec. 6 of this Act, takes effect six
6 months after the date on which the Alaska Police Standards Council adopts
7 regulations establishing training programs for correctional, probation, and
8 parole officers under AS 18.65.230, as amended by sec. 5 of this Act, and
9 defining qualifications for employment as those officers under AS 18.65.-
10 242, added by sec. 6 of this Act.

11 * Sec. 11. Except for AS 18.65.248, added by sec. 6 of this Act, this
12 Act takes effect July 1, 1988.
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MEMORANDUM

State of Alaska

TO: Representative Fran Ulmer

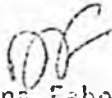
DATE: February 3, 1988

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: PB 237

FROM: 
Dana Fabe
Public Defender

The bill looks fine to me. As we discussed in our meeting, essential to my agreement to any mandatory sentencing scheme is the intent that judges be free to give any amount of consecutive time which they deem appropriate. Since this was the premise of our agreement, I have drafted commentary which I believe necessary to clarify this intent for future judicial interpretation of the statute.

I have also drafted commentary on the prior bad acts rule to reflect our agreement that the provision, while broadening existing appellate case law to cover other similarly situated victims, still requires a probative versus prejudicial balancing under Evidence Rule 403.

With your adoption of this intent language to reflect the agreement which we reached in our meeting, I withdraw my opposition to the bill and support passage of this Committee Substitute. I would be happy to work with you on refining this language if you feel it is necessary. I am pleased that we were able to reach a compromise on this bill. I will send a copy of this memo to Representative Sund to confirm that agreement.

DF:sh

cc: Representative John Sund

COMMENTARY TO SECTIONS 6 AND 9 OF HB 237

Section 6 (Consecutive Sentencing Provision). By enacting this section, which requires judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose as much or as little consecutive time as it decides is appropriate pursuant to the sentencing considerations contained in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children, is to express the legislature's preference for judges to fashion some consecutive period of suspended time with conditions of probation to help solve the problem of presumptive offenders being released from prison without an adequate period of supervision by the court or Department of Corrections. A second purpose of mandatory consecutive sentences is to encourage lengthy periods of incarceration for those offenders with a poor prognosis for rehabilitation and a high risk of reoffending.

Section 9 (Alaska Rule of Evidence 404(b)). This section clarifies the application of Evidence Rule 404(b) in physical and sexual assault cases against children. The intent of this section is to permit admission of evidence of prior offenses against similar children where those offenses are sufficiently recent and similar to the present offense that a common scheme or plan is shown. The legislature intends that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. Although specific statutory citations are not included in the scope of the rule, it is the intent of the legislature that this evidentiary provision will apply not only to sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and criminal exploitation of children.

FISCAL NOTE

REQUEST:

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

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
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 scenarios. This fiscal note represents the 10% scenario.

Prepared by: Susan E. Knighton, Director
Division: Administrative Services

Phone: 465-3376
Date: 2-2-88

Approved by Commissioner: Susan Humphrey-Barnett
Agency: Department of Corrections

Date: 2-2-88

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS 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	\$77,376.0	\$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.



S. T. A. R.

Bus: 276-7279
24-Hour Crisis:
276-STAR (7827)

BEFORE HOUSE JUDICIARY COMMITTEE
ORAL TESTIMONY ON HB 237
January 25, 1987

Good afternoon Representative Ulmer, and committee members. My name is Carrie Longoria, and I thank you for the opportunity to comment on behalf of STAR. STAR is a sexual assault crisis agency, based in Anchorage which provides a 24-hour crisis line, counseling, medical and legal accompaniment, and prevention programs.

STAR supports HB 237 and has particular interest in the provisions designed for the joinder, severability and evidence rules. STAR contends the criminal and evidentiary rules do not always do full justice for victims. The legal issues related in the drafting of HB 237 are complex and many-sided, but careful consideration must be made to recognize and balance the rights of victims.

As many of you may already know, Alaska's rate of rape in 1985 was the highest in the nation, being 2.1 times greater than the national rate. Reported child sexual abuse in Alaska in 1986 was 5 times greater than the national rate. National child sexual abuse figures also show that more than 85% of child victims are abused on a recurring basis, by someone they know and oftentimes trust. And while these figures alone may be disturbing, the emotions and trauma a victim must endure from an assault are far more devastating.

In child sexual abuse cases, apart from the one-time sexual abuse by a stranger, which accounts for 5-10% of child sexual abuse cases, almost all children are "groomed" or prepared for the abuse. The abuser often has caretaking responsibility, or has assumed a position of trust or authority. Trust and time are used by the offender. Once abuse has occurred, the child feels responsible, guilty and betrayed by the trusted figure. A long list of symptoms recognized by clinicians for sexually abused children include, to name a few, phobias, withdrawal, guilt, depression, suicidal ideation, nightmares, loss of appetite, and somatic complaints. Long term effects of child sexual abuse, show that victims are at a higher risk than average for severe mental disorders such as disassociative and multiple-personality disorders, psychoneurosis, somatic anxiety, suicidal gestures, and a tendency to abuse alcohol and chemicals. In short, rapidly mounting research and study indicate child sexual abuse is a serious risk factor for a wide variety of mental and social health outcomes.

STANDING TOGETHER AGAINST RAPE

3925 Reka • Anchorage, Alaska 99508



A United Way Agency

HOUSE JUDICIARY COMMITTEE
TESTIMONY ON HB 237
January 25, 1987
Page Two

For sexually assaulted adults there is an equal array of behavioral affects. These include, to name a few, depression, suicidal ideation or attempts, substance or chemical abuse, eating and sleeping disorders, nightmares, somatic complaints, and feelings of guilt, fear, shame, stigmatization and betrayal by society. Medical attention may also be necessary, as well as counseling the remainder of the victims' life. Studies also show sexual assault victims suffer a greater economic loss than other violent crime victims.

Family members and loved ones of the adult and child victim also suffer a myriad of similar feelings and behaviors. And while the victim and family suffer, society also suffers in the harm borne by its citizens.

According to David Finklehor, a nationally recognized leader in the child sexual abuse field, societal efforts to respond to the problem of sexual abuse can be grouped into four categories:

- 1) to provide public and professional education to increase the detection and disclosure of sexual assault;
- 2) to work towards efforts in assisting people to learn to protect themselves against victimization;
- 3) to provide treatment programs to help victims overcome the aftermath of the assault; and
- 4) to reform the criminal justice system in reducing the trauma to victims, insure more effective sanctions against offenders, and to protect society from further harm.

The last category cannot be fully comprehended without judicial or legislative action. So while the Committee deciphers the proper and orderly legal craftwork for HB 237, consider the impact of lessening the trauma inflicted on victims, and weigh the serious sexual assault problem our state offers its citizens.

Thank you.

STATE OF ALASKA



REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNE, ALASKA 99811
[907] 465-4947

May 11, 1987

Dana Fabe, Public Defender
900 W. 5th Avenue
Suite 200
Anchorage, AK 99501

Dear Ms. Fabe:

Thank you for your analysis of House Bill 237. I have carefully reviewed it, but after serious consideration, have concluded that the bill is necessary and advisable for the protection of children from physical and sexual abuse. I will answer your objections below in the order you raised them.

Second Degree Murder

The bill proposes a new subsection defining the offense of Murder in the Second Degree -- AS 11.41.110(a)(4). This provides that murder in the second degree is committed by engaging in a pattern or practice of abuse of a child under 16 years of age which results in the death of the child, under circumstances manifesting extreme indifference to the welfare of the child. You claim that this provision is not necessary because the conduct is prohibited by AS 11.41.110(a)(2). I don't agree. AS 11.41.110(a)(2) provides:

A person commits the crime of murder in the second degree if

(2) the person intentionally performs an act that results in the death of another person under circumstances manifesting extreme indifference to the value of human life.

Under the quoted section a person, to be convicted, must act with extreme indifference to human life -- the example I have often heard is shooting into an occupied tent. Child abuse often consists of a series of acts which, although all

May 11, 1987

reasonable discipline three times and the child was accidentally seriously injured there. One should attribute some common sense to the criminal justice system. The commentary to the legislation could make it clear that such an extreme interpretation was not intended, if this fear is legitimate.

Repeated Sexual Abuse of a Minor

Sections 5-8 of the bill set forth new statutes which prohibit repeated sexual abuse of a minor. You raise several objections to these provisions: that the penalties are too high, that the prohibitions are not necessary, and that they are too broad.

I agree that the penalties for repeated sexual abuse of a minor are high, and in my opinion properly so. For example, a person over 16 years of age convicted of repeated sexual penetration of a person under 13 years of age would be subject of a 13 year presumptive term as the bill was originally drafted. This is a higher term than that provided for (to use your example) the bike path stranger rapist. I believe the former conduct to be more serious and thus deserving of a longer sentence, because of the particular vulnerability of the child victim. Persons who repeatedly abuse children are often in a position of special trust -- either a family member or a close friend. Thus, not only does the child suffer the sexual assault, but also endures the fear, loss of trust, and guilt so often connected with these cases.

You also state that the sentences should not be so high because the typical offender will be a middle class person with no criminal record and otherwise an upstanding member of the community. To me, however, the fact that an offender can manage other aspects of his or her life in a creditable way does not make his or her victimization of children any less deserving of punishment. Additionally, experts in the area of treatment of sexual offenders tell me that these offenders often abuse people outside the home as well as those subject to their domination at home, that they rarely seek treatment on their own, and that treatment for them is very difficult.

Thus, I believe high sentences for these offenders to be justified. In the committee substitute by the House HESS committee, however, the sentences were lowered, perhaps in response to your comments.

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You claim that the proposed statutes are not necessary because, if the state can prove three incidents of sexual abuse, a convicted defendant could be sentenced to consecutive terms totalling more than the sentences originally drafted for repeated sexual abuse of a minor. In some cases of repeated sexual abuse, however, the state is not able to obtain convictions on separate counts. The problem arises in some cases involving abuse over a long period of time where the young victim may not be able to specifically recall particular incidents of abuse. In Covington v. State, 703 P.2d 436 (Alaska App. 1985), the defendant began abusing his daughter when she was 9 or 10 years old. When she was 15 years old he began having sexual intercourse with her. The abuse occurred so often that the victim was not able to testify to a specific date on which individual acts occurred. The Court of Appeals sua sponte reversed the convictions because of the possibility that the jury had not agreed on specific incidents when reaching their verdicts. Although the court reinstated the convictions on rehearing because the issue had not been raised at trial, the principle applies in future cases. The possibility of such a situation arising again convinces me that the proposed statute is necessary.

Finally, you claim that the proposed statutes are too broad because the definition of a person "having authority over a child" would include people such as stepbrothers and siblings who live in the same home with the child. It is true that the definition is broad, but I believe it to be appropriately so. It includes persons whom a child must trust and rely upon, even if temporarily. The stepbrother or babysitter, if he or she engages in a pattern or practice of sexual abuse of a child over 3 years younger, has seriously victimized the child and should be subject to prosecution, if the high standards for waiver from juvenile court are met. I agree, however, that careful attention should be given to this part of the bill, and I welcome suggestions for improvement.

Prior Inconsistent Statements

Section 11 of the bill was an attempt to alter a Court of Appeals decision in Brower v. State, 728 P.2d 645 (Alaska App. 1986), which held that a prior inconsistent statement, on its own, cannot support a conviction. Unfortunately, this section was deleted in the committee substitute passed by the House HESS committee. I think the original language is a good idea. I believe that it would be only the rare case which would go to trial where the only evidence of child sexual abuse or assault is an uncorroborated statement. In the rare case

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where such evidence was sufficiently persuasive, however, it should be left to the trier of fact to decide if proof beyond a reasonable doubt has been presented to convict the defendant. It should not be held as a matter of law, by an appellate court, that in all cases such evidence is insufficient.

Unanimous Jury Verdicts

You assert that there is a constitutional problem with the section which allows, in connection with a charge of a pattern or practice of child abuse, the jurors to unanimously decide that a pattern or practice occurred without necessarily agreeing on specific incidents of abuse. While I agree that if a person is charged with a particular incident of abuse our constitution requires a unanimous verdict to convict, the bill makes a pattern or practice of abuse an element of the crime. If the jury is able to unanimously agree that a pattern or practice occurred (under the definition provided by statute), the constitutional requirement is met.

A careful consideration of the authority cited by your office at the teleconference on April 28, 1987, has not persuaded me that this aspect of the bill is flawed. For example, United States v. Morse, 785 F.2d 771 (9th Cir. 1986), involved a conviction for a scheme to defraud which was based upon evidence of four tax shelter/investment programs. The court held that the indictment was not duplicitous and that there was no violation of the unanimous verdict requirement. The court said:

The law of this circuit, however, takes a broad view of a single scheme: "the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme." (Citations omitted.)

United States v. Morse, at 774. The court held that as long as the jury unanimously agrees that the defendants participated in a single particular scheme, the verdict is unanimous as required by the sixth amendment. This case, it seems to me, supports my position that if an offense is charged as a pattern or practice a jury may constitutionally convict a defendant if the jurors unanimously agree that the pattern or practice occurred.

May 11, 1987

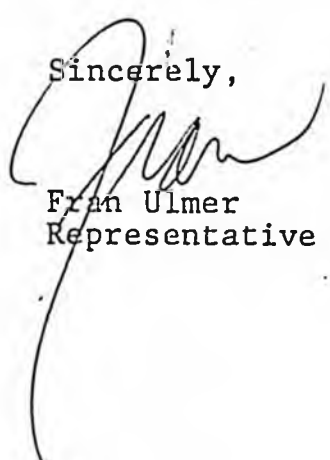
Evidence Rule 404

Finally, you argue that the proposed change to Evidence Rule 404 is both unnecessary and arguably unconstitutional. Generally, the rule excludes evidence of prior bad acts unless the evidence qualifies as an exception as set forth in the rule. While it is true that the courts have admitted evidence of prior sexual abuse in some cases (e.g., Burke v. State, 624 P.2d 1240 (Alaska 1980); and Soper v. State, 731 P.2d 587 (Alaska App. 1987)), in other cases such evidence has not been allowed. Bolden v. State, 720 P.2d 957 (Alaska App. 1986).

The argument against the admission of prior acts of the defendant is that, though highly probative, the evidence is simply too prejudicial. It seems to me that because children are in need of special protection, and because of their vulnerability both as victims and as witnesses of child abuse cases, an exception is justified, and evidence of prior acts should as a general principle be allowed. The trial court could still exclude the evidence under Evidence Rule 403, which allows the trial court to exclude evidence if the probative value is outweighed by unfair prejudice or other considerations. No authority has been shown to me that would support a conclusion that such an approach would be unconstitutional. Moreover, the proposed change brings this rule closer to conformity with the federal rule and to the rule prevailing in many other states.

I encourage you to reconsider your position on this bill and to become a supporter of this effort to increase our ability, through the criminal justice system, to adequately protect children.

Sincerely,



Fran Ulmer
Representative

/Ng

M E M O

TO: Representative John Sund,
Chairman,
House Judiciary Committee

DATE: April 8, 1987

FROM: *Dana Fabe*
Dana Fabe
Public Defender

RE: House Bill No. 237

I have received your request for an analysis of H. 237. 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 variety of appellate decision unfavorable to the state 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

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 endangering 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.

It is 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. Diaz, Schuch v. State, 711 P.2d 1191 (Alaska App. 1983); see also Alaska v. State, 705 P.2d 1261, 1264 & n.1 (Alaska App. 1985).

P. 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" accepted in Wetters 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, 906-09 (Alaska App. 1985), aff'd, 723 P.2d 85 (Alaska 1986); see Benhoe 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 0 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, Andrew 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); Oksotkaruk 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 issue 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); Qawel 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), rev. 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.

Thank you for requesting my input on this bill. Please feel free to contact me if I can provide you with further information on this or any other proposed legislation.

5-0809X
Chenoweth
1/21/88

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

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 237 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to crimes against persons, and to
7 the physical and sexual assault and sexual abuse of
8 children; amending Rules 8(a) and 14 of the Alaska
9 Rules of Criminal Procedure; and amending Rule 404 of
10 the Alaska Rules of Evidence; and providing for an
11 effective date."

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

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

14 (a) A person commits the crime of murder in the second degree if
15 (1) with intent to cause serious physical injury to another
16 person or knowing that the conduct is substantially certain to cause
17 death or serious physical injury to another person, the person causes
18 the death of any person;

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

23 (3) acting either alone or with one or more persons, the
24 person commits or attempts to commit arson in the first degree, kid-
25 napping, sexual assault in the first degree under AS 11.41.410(a)(1)
26 or (2), sexual assault in the second degree, burglary in the first
27 degree, escape in the first or second degree, or robbery in any degree
28 and, in the course of or in furtherance of that crime, or in immediate
29 flight from that crime, any person causes the death of a person other

1 than one of the participants; or

2 (4) under circumstances manifesting an extreme indifference
3 to the welfare of a child under the age of 16, the person engages in a
4 pattern or practice of abuse or gross neglect of the child that re-
5 sults in the death of the child.

6 * Sec. 2. AS 11.41.200(a) is amended to read:

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

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

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

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

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

19 * Sec. 3. AS 11.41.434(a) is amended to read:

20 (a) An offender commits the crime of sexual abuse of a minor in
21 the first degree if

22 >16 <13 (1) being 16 years of age or older, the offender engages in
23 sexual penetration with a person who is under 13 years of age or aids,
24 induces, causes, or encourages a person who is under 13 years of age
25 to engage in sexual penetration with another person; or

26 >18 <18 (2) being 18 years of age or older, the offender engages in
27 sexual penetration with a person who is under 18 years of age and who

28 (A) is entrusted to the offender's care by authority of

29 law; or

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the offender at the time of the offense

(A) is residing as a member of the social unit in the same household as the person; or

(B) has real or apparent authority, influence, or control over the person. *changed in 12/88 version.*

does this relate to SB
* Sec. 4. AS 11.41.436(a) is amended to read:

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

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

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

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

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

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

(4) being 16 years of age or older, the offender aids,

induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) - (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the offender at the time of the offense

(A) is residing as a member of the social unit in the same household as the person; or

(B) has real or apparent authority, influence, or control over the person. *changed in 12/1/88 unit*

* Sec. 5. AS 12.55.025(e) is amended to read:

(e) Except as provided in (g) and (h) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment shall provide that the imprisonment commences at the expiration of the term imposed by the previous judgment.

* Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

SA minors
charge beginning
(h) If the defendant has been convicted of two or more crimes under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which the victim or victims of the crimes were minors and the judgment on any of the convictions has not been entered, the court shall impose a sentence of imprisonment for the convictions in which at least one-half of the sentence for each of the convictions is served consecutively with the sentence for the other conviction or convictions. *corrections fiscal note*

* Sec. 7. AS 12.55.155(c) is amended to read:

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

1 (2) the defendant's conduct during the commission of the
2 offense manifested deliberate cruelty to another person;

3 (3) the defendant was the leader of a group of three or
4 more persons who participated in the offense;

5 (4) the defendant employed a dangerous instrument in fur-
6 therance of the offense;

7 (5) the defendant knew or reasonably should have known that
8 the victim of the offense was particularly vulnerable or incapable of
9 resistance due to advanced age, disability, ill health, or extreme
10 youth or was for any other reason substantially incapable of exercis-
11 ing normal physical or mental powers of resistance;

12 (6) the defendant's conduct created a risk of imminent
13 physical injury to three or more persons, other than accomplices;

14 (7) a prior felony conviction considered for the purpose of
15 invoking the presumptive terms of this chapter was of a more serious
16 class of offense than the present offense;

17 (8) the defendant's prior criminal history includes conduct
18 involving aggravated or repeated instances of assaultive behavior;

19 (9) the defendant knew that the offense involved more than
20 one victim;

21 (10) the conduct constituting the offense was among the most
22 serious conduct included in the definition of the offense;

23 (11) the defendant committed the offense pursuant to an
24 agreement that the defendant either pay or be paid for the commission
25 of the offense, and the pecuniary incentive was beyond that inherent
26 in the offense itself;

27 (12) the defendant was on release under AS 12.30.020 or
28 12.30.040 for another felony charge or conviction or for a misdemeanor
29 charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime

Why is this being deleted?
(A) specified in AS 11.41 and was committed against a spouse or [,] a former spouse; [,] or [A MEMBER OF THE SOCIAL UNIT COMPRISED OF THOSE LIVING TOGETHER IN THE SAME DWELLING AS THE DEFENDANT]

clear and convincing
clear and convincing
(B) specified in AS 11.41.410 - 11.41.460 and the court finds, on the basis of reliable evidence, that the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor;

clear and convincing
clear and convincing
(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

1 (20) the defendant was on furlough under AS 33.30 or on
2 parole or probation for another felony charge or conviction;

3 (21) the defendant has a criminal history of repeated in-
4 stances of conduct violative of criminal laws, whether punishable as
5 felonies or misdemeanors, similar in nature to the offense for which
6 the defendant is being sentenced under this section;

7 (22) the defendant knowingly directed the conduct constitut-
8 ing the offense at a victim because of that person's race, sex, color,
9 creed, physical or mental disability, ancestry, or national origin;

10 (23) the defendant is convicted of an offense specified in
11 AS 11.71 and the offense involved the delivery of a controlled sub-
12 stance under circumstances manifesting an intent to distribute the
13 substance as part of a commercial enterprise;

14 (24) the defendant is convicted of an offense specified in
15 AS 11.71 and the offense involved the transportation of controlled
16 substances into the state;

17 (25) the defendant is convicted of an offense specified in
18 AS 11.71 and the offense involved large quantities of a controlled
19 substance;

20 (26) the defendant is convicted of an offense specified in
21 AS 11.71 and the offense involved the distribution of a controlled
22 substance that had been adulterated with a toxic substance.

23 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to

24 read:

25 *not limited to sexual abuse* (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
26 the same indictment or information in a separate count for each of-
27 fense if the offenses charged, whether felonies, misdemeanors or both,

28 (1) are of the same or similar character and it is likely
29 that evidence of one charged offense would be admissible to provide

1 another charged offense,

2 (2) [OR] are based on the same act or transaction, or

3 (3) are based on two or more acts or transactions connected
4 together or constituting parts of a common scheme or plan.

5 * Sec. 9. Rule 14, Alaska Rule of Criminal Procedure, is amended by
6 adding a new subsection to read:

7 (b) Notwithstanding (a) of this rule, if joinder of offenses
8 charged under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in
9 which one or more victims were minors is permissible under Rule
10 8(a)(1), Rules of Criminal Procedure, prejudice is not established for
11 purposes of (a) of this section if the court determines after the
12 trial has begun that evidence of one of the charged offenses will not
13 be admitted to prove another of the charged offenses.

14 * Sec. 10. Rule 404, Alaska Rules of Evidence, is amended by adding a
15 new subsection to read:

16 (c) Notwithstanding (a) and (b) of this rule, in a prosecution
17 for a crime involving

18 (1) a physical assault upon a child, evidence of other acts
19 of physical assault by the defendant toward the same or another child
20 is admissible; and

21 (2) a violation of AS 11.41.434 - 11.41.460, evidence of
22 other acts described in AS 11.41.434 - 11.41.460 by the defendant
23 toward the same or another child is admissible.

24 * Sec. 11. Section 10 of this Act is retroactive and applies

25 (1) to evidence of acts committed before the effective date of
26 this Act; and

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

29 * Sec. 12. This Act takes effect immediately under AS 01.10.070(c).

5-0809X
Chenoweth
1/22/88

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

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 237 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to crimes against persons, and to
7 the physical and sexual assault and sexual abuse of
8 children; amending Rules 8(a) and 14 of the Alaska
9 Rules of Criminal Procedure; and amending Rule 404 of
10 the Alaska Rules of Evidence; and providing for an
11 effective date."

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

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

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

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

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

23 (3) acting either alone or with one or more persons, the
24 person commits or attempts to commit arson in the first degree, kid-
25 napping, sexual assault in the first degree under AS 11.41.410(a)(1)
26 or (2), sexual assault in the second degree burglary in the first
27 degree, escape in the first or second degree, or robbery in any degree
28 and, in the course of or in furtherance of that crime, or in immediate
29 flight from that crime, any person causes the death of a person other

1 than one of the participants.

2 * Sec. 2. AS 11.41.200(a) is amended to read:

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

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

6 (2) with intent to cause serious physical injury to another,
7 the person causes serious physical injury to any person; or

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

12 * Sec. 3. AS 11.41.434(a) is amended to read:

13 (a) An offender commits the crime of sexual abuse of a minor in
14 the first degree if

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

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

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

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

25 (3) being 18 years of age or older, the offender engages in
26 sexual penetration with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender; or

1 (B) entrusted to the offender's care by authority of
2 law, or is temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

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

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

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

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

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

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

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender; or

1 (B) entrusted to the offender's care by authority of
2 law, or is temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which the
13 victim or victims of the crimes were minors and the judgment on any of
14 the convictions has not been entered, the court shall impose a sen-
15 tence of imprisonment for the convictions in which at least one-half
16 of the sentence for each of the convictions is served consecutively to
17 the sentence for the other conviction or convictions.

18 * Sec. 7. AS 12.55.155(c) is amended to read:

19 (c) The following factors shall be considered by the sentencing
20 court and may aggravate the presumptive terms set out in AS 12.55.125:

21 (1) a person, other than an accomplice, sustained physical
22 injury as a direct result of the defendant's conduct;

23 (2) the defendant's conduct during the commission of the
24 offense manifested deliberate cruelty to another person;

25 (3) the defendant was the leader of a group of three or
26 more persons who participated in the offense;

27 (4) the defendant employed a dangerous instrument in fur-
28 therance of the offense;

29 (5) the defendant knew or reasonably should have known that

1 the victim of the offense was particularly vulnerable or incapable of
2 resistance due to advanced age, disability, ill health, or extreme
3 youth or was for any other reason substantially incapable of exercis-
4 ing normal physical or mental powers of resistance;

5 (6) the defendant's conduct created a risk of imminent
6 physical injury to three or more persons, other than accomplices;

7 (7) a prior felony conviction considered for the purpose of
8 invoking the presumptive terms of this chapter was of a more serious
9 class of offense than the present offense;

10 (8) the defendant's prior criminal history includes conduct
11 involving aggravated or repeated instances of assaultive behavior;

12 (9) the defendant knew that the offense involved more than
13 one victim;

14 (10) the conduct constituting the offense was among the most
15 serious conduct included in the definition of the offense;

16 (11) the defendant committed the offense pursuant to an
17 agreement that the defendant either pay or be paid for the commission
18 of the offense, and the pecuniary incentive was beyond that inherent
19 in the offense itself;

20 (12) the defendant was on release under AS 12.30.020 or
21 12.30.040 for another felony charge or conviction or for a misdemeanor
22 charge or conviction having assault as a necessary element;

23 (13) the defendant knowingly directed the conduct constitut-
24 ing the offense at an active officer of the court or at an active or
25 former judicial officer, prosecuting attorney, law enforcement offi-
26 cer, correctional employee, fire fighter, emergency medical techni-
27 cian, paramedic, ambulance attendant, or other emergency responder
28 during or because of the exercise of official duties;

29 (14) the defendant was a member of an organized group of

1 five or more persons, and the offense was committed to further the
2 criminal objectives of the group;

3 (15) the defendant has three or more prior felony convic-
4 tions;

5 (16) the defendant's criminal conduct was designed to obtain
6 substantial pecuniary gain and the risk of prosecution and punishment
7 for the conduct is slight;

8 (17) the offense was one of a continuing series of criminal
9 offenses committed in furtherance of illegal business activities from
10 which the defendant derives a major portion of the defendant's income;

11 (18) the offense was a crime

12 (A) specified in AS 11.41 and was committed against a
13 spouse, a former spouse, or, except as to offenses under AS 11.-
14 41.434(a)(3)(A) or 11.41.436(a)(5)(A), a member of the social
15 unit comprised of those living together in the same dwelling as
16 the defendant; or

17 (B) specified in AS 11.41.410 - 11.41.460 and the
18 court finds, on the basis of reliable evidence, that the defen-
19 dant has engaged in the same or similar conduct involving the
20 same or another victim who was a minor;

21 (19) the defendant's prior criminal history includes an
22 adjudication as a delinquent for conduct that would have been a felony
23 if committed by an adult;

24 (20) the defendant was on furlough under AS 33.30 or on
25 parole or probation for another felony charge or conviction;

26 (21) the defendant has a criminal history of repeated in-
27 stances of conduct violative of criminal laws, whether punishable as
28 felonies or misdemeanors, similar in nature to the offense for which
29 the defendant is being sentenced under this section;

1 (22) the defendant knowingly directed the conduct constitut-
2 ing the offense at a victim because of that person's race, sex, color,
3 creed, physical or mental disability, ancestry, or national origin;

4 (23) the defendant is convicted of an offense specified in
5 AS 11.71 and the offense involved the delivery of a controlled sub-
6 stance under circumstances manifesting an intent to distribute the
7 substance as part of a commercial enterprise;

8 (24) the defendant is convicted of an offense specified in
9 AS 11.71 and the offense involved the transportation of controlled
10 substances into the state;

11 (25) the defendant is convicted of an offense specified in
12 AS 11.71 and the offense involved large quantities of a controlled
13 substance;

14 (26) the defendant is convicted of an offense specified in
15 AS 11.71 and the offense involved the distribution of a controlled
16 substance that had been adulterated with a toxic substance.

17 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
18 read:

19 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
20 the same indictment or information in a separate count for each of-
21 fense if the offenses charged, whether felonies, misdemeanors or both,

22 (1) are of the same or similar character and it is likely
23 that evidence of one charged offense would be admissible to prove
24 another charged offense,

25 (2) [OR] are based on the same act or transaction, or

26 (3) are based on two or more acts or transactions connected
27 together or constituting parts of a common scheme or plan.

28 * Sec. 9. Rule 14, Alaska Rule of Criminal Procedure, is amended by
29 adding a new subsection to read:

1 (b) Notwithstanding (a) of this rule, if joinder of offenses
2 charged under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in
3 which one or more victims were minors is permissible under Rule 8(a)-
4 (1), Rules of Criminal Procedure, prejudice is not established for
5 purposes of (a) of this section if the court determines after the
6 trial has begun that evidence of one of the charged offenses will not
7 be admitted to prove another of the charged offenses.

8 * Sec. 10. Rule 404, Alaska Rules of Evidence, is amended by adding a
9 new subsection to read:

10 (c) Notwithstanding (a) and (b) of this rule, in a prosecution
11 for a crime involving

12 (1) a physical assault upon a child, evidence of other acts
13 of physical assault by the defendant toward the same or another child
14 is admissible; and

15 (2) a violation of AS 11.41.434 - 11.41.460, evidence of
16 other acts described in AS 11.41.434 - 11.41.460 by the defendant
17 toward the same or another child is admissible.

18 * Sec. 11. Section 10 of this Act is retroactive and applies

19 (1) to evidence of acts committed before the effective date of
20 this Act; and

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

23 * Sec. 12. This Act takes effect immediately under AS 01.10.070(c).
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28
29

Municipality of Anchorage



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 264-4111

Tom Fink
MAYOR

MUNICIPAL HEALTH & HUMAN SERVICES COMMISSION

MAR 16 1988

March 9, 1988

Representative John Sund, Chair
House Judiciary Committee
Alaska State Legislature
POB V
Juneau, Alaska 99811

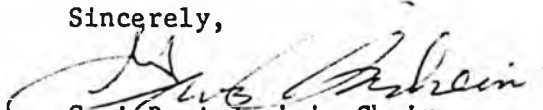
Dear Representative Sund,

The Municipal Health and Human Services Commission would like to lend their support to passage of HB237. Child abuse and neglect is ranked as the highest behavioral health problem priority in the Anchorage Health and Human Services Plan (January 1988).

Child sexual abuse agencies in Anchorage are reporting increasing numbers of offenders committed by non-familial, custodial adults who reside in the same home as the child. Inclusion of non-familial, custodial adults as perpetrators of child sexual abuse is an important measure in Alaska's continuing efforts to control child sexual abuse. Passage of HB237 is consistent with objective #3 (Child Abuse and Neglect, Page 4-35) in Volume 3 of the plan, Policy Recommendations and Objectives for Anchorage's Service Delivery System which promotes adequate funding of treatment services for child sexual abuse victims and their families and the prevention of child abuse and neglect. Broadening the definition of perpetrator and strengthening existing laws which address child sexual abuse will increase the state's ability to reduce child sexual abuse.

If you have any questions, don't hesitate to call me (562-2828) or our staff staff at 343-4674.

Sincerely,


Gary B. Andreini, Chair
Municipal Health and Human Services Commission

cc: ✓ House Judiciary Committee
Representative Fran Ulmer, Sponsor
Anchorage Municipal Assembly
Tom Fink, Mayor, Municipality of Anchorage
Ron Garzini, Manager, Municipality of Anchorage
Robert A. (Bert) Hall, Director, Department of Health and Human Services,
Municipality of Anchorage

SJ27/dPD20

HOUSE AMENDMENT

#1

(failed)

TO: CS HB 237 Jud

BY:

PettyjohnPage 1 Line 13

after "404", delete: "(b)"

Page 7 line 29 through Page 8 line 15:

delete Sec. 9

Page 7, line 29 insert ~~the~~ new

Section 9:

" Sec. 9. 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. "

Submit original amendment to the Chief Clerk.

It will then be numbered and duplicated.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/4/87

FURTHER REFERRALS: Finance

DATE: Feb 10, 1988

The Judiciary 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 404 of the Alaska Rules of Evidence; and providing for an effective date."

RECOMMENDS:

- ☒ replace with CS HB 237 (Jud) ☐ 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 ☐ same as previous fiscal note published _____
☐ zero fiscal note ☐ same as previous zero fiscal note published _____
☐ zero with analysis

SIGNING DO PASS:

[Handwritten signatures: Mr. Warner, Mr. Hunter, Pamela A. Baskin, Mike Varano, Jim Galt]

SIGNING OTHER RECOMMENDATIONS:

[Handwritten signature: Adrian L. Taylor (No Rec)]

[Handwritten signature]
Chairman's signature

Adopted
w/ Amendments
2-19-88

DRAFT

LETTER OF INTENT
CSHB 237 (Judiciary)

Sections 1 and 2

The changes to AS 11.41.110(a)(2) and 11.41.200(a)(3) are solely intended as technical amendments to make it clear that the language "intentionally performs an act" means "knowingly engages in conduct". This amendment thus conforms the statutes to the interpretation provided in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982).

Sections 3 and 4

The addition of AS 11.41.434(a)(30) and 11.41.436(a)(5) recognizes that the most serious forms of child sexual abuse are often committed by those who live in the same household as the victim or who are temporarily entrusted with the victim's care. Despite having no legal authority over the victim, such persons are nonetheless in a position of power such that even older children often find it impossible to thwart their advances. Because other subsections of these statutes already cover sexual misconduct with persons under the age of 13, the new changes apply only to victims from 13 to 15 years old. The cutoff at 16 years of age was specifically chosen instead of the 18-year-old cutoff in other subsections dealing with persons with legal or biological ties to the victim.

Sections 5 and 6

In enacting these sections, which require judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose whatever consecutive time as it decides is appropriate pursuant to the sentencing considerations in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children is to express the Legislature's preference for judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense. In some cases, the court may find that only a minimal period of consecutive time to serve may be necessary while in other cases the court may find that a lengthy consecutive term is required. Another purpose of this amendment is to allow judges to fashion some consecutive period of suspended time, with conditions of probation, to assure that offenders being released from prison have an adequate period of supervision by the court or the Department of Corrections.

Section 7

AS 12.55.155(c)(18)(B) has been amended to create a new aggravating factor for repeated sexual misconduct toward minors. This change reflects the Legislature's intent that, although most judges already take into account prior misconduct in sentencing, it should be specifically recognized as a statutory aggravating factor. It is not necessary that a conviction have been entered to constitute this aggravating factor. This factor is also intended to apply to incidents not resulting in convictions. Prior convictions already trigger imposition of presumptive sentencing, or can constitute a separate aggravating factor if there are three or more felonies (AS 12.55.155(c)(15)) or if there are repeated instances of similar conduct (AS 12.55.155(c)(21)). Convictions used for those purposes are not intended to trigger this aggravating factor. As used in this aggravating factor, the phrase "same or similar conduct" is not intended to require a strict analysis of statutory elements of offenses.

Section 8

The amendment to Rule 8 of the Alaska Rules of Criminal Procedure is specifically intended to reverse the decision in Johnson v. State, 730 P.2d 175 (Alaska App. 1986) to permit multiple offenses to be joined for trial when evidence of one offense is admissible to prove another. It is intended that the determination that evidence will likely be cross-admissible be made before trial. This determination depends to a large extent on the state of the prosecution's evidence. The courts should be given great latitude to structure these pretrial proceedings to rely as much as possible on offers of proof and other non-testimonial showings, so as to avoid conducting a mini-trial, and to avoid situations where defendants use this procedure to obtain pretrial depositions to which they are not otherwise entitled. The determination on cross-admissibility may also turn on the precise parameters of a person's defense. A defendant who declines, in an ex parte in camera hearing, to disclose a defense, which could have been anticipated at this point in the proceedings and which would render evidence of other offenses inadmissible, should be deemed to have waived any objection to joinder.

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct,

Add Cite i.e. name of case
(SOP)

particularly as to non-family members, ~~and that it is appropriate to re-draw the line.~~ The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. ~~Although specific statutory citations are not included in the language of the rule,~~ it is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

Changes
Adopted

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

Adopted

W/ title change
& Amended to 778

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to crimes against persons, and to the physical and sexual assault and sexual abuse of children; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) 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

1 than one of the participants.

2 * Sec. 2. AS 11.41.200(a) is amended to read:

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

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

6 (2) with intent to cause serious physical injury to another,
7 the person causes serious physical injury to any person; or

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

12 * Sec. 3. AS 11.41.434(a) is amended to read:

13 (a) An offender commits the crime of sexual abuse of a minor in
14 the first degree if

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

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

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

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

25 (3) being 18 years of age or older, the offender engages in
26 sexual penetration with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 4. AS 11.41.436(a) is amended to read:

4 (a) An offender commits the crime of sexual abuse of a minor in
5 the second degree if

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

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

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

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

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

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

25 (5) being 18 years of age or older, the offender engages in
26 sexual contact with a person who is under 16 years of age, and the
27 victim at the time of the offense is

28 (A) residing as a member of the social unit in the
29 same household as the offender and the offender is in a position

1 of authority over the victim; or

2 (B) temporarily entrusted to the offender's care.

3 * Sec. 5. AS 12.55.025(e) is amended to read:

4 (e) Except as provided in (g) and (h) of this section, if the
5 defendant has been convicted of two or more crimes, sentences of
6 imprisonment shall run consecutively. If the defendant is imprisoned
7 upon a previous judgment of conviction for a crime, the judgment shall
8 provide that the imprisonment commences at the expiration of the term
9 imposed by the previous judgment.

10 * Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

11 (h) If the defendant has been convicted of two or more crimes
12 under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455; in which the
13 victim or victims of the crimes were minors and the judgment on any of
14 the convictions has not been entered, the court shall impose some
15 consecutive period of imprisonment for each conviction.

16 * Sec. 7. AS 12.55.155(c) is amended to read:

17 (c) The following factors shall be considered by the sentencing
18 court and may aggravate the presumptive terms set out in AS 12.55.125:

19 (1) a person, other than an accomplice, sustained physical
20 injury as a direct result of the defendant's conduct;

21 (2) the defendant's conduct during the commission of the
22 offense manifested deliberate cruelty to another person;

23 (3) the defendant was the leader of a group of three or
24 more persons who participated in the offense;

25 (4) the defendant employed a dangerous instrument in fur-
26 therance of the offense;

27 (5) the defendant knew or reasonably should have known that
28 the victim of the offense was particularly vulnerable or incapable of
29 resistance due to advanced age, disability, ill health, or extreme

1 youth or was for any other reason substantially incapable of exercis-
2 ing normal physical or mental powers of resistance;

3 (6) the defendant's conduct created a risk of imminent
4 physical injury to three or more persons, other than accomplices;

5 (7) a prior felony conviction considered for the purpose of
6 invoking the presumptive terms of this chapter was of a more serious
7 class of offense than the present offense;

8 (8) the defendant's prior criminal history includes conduct
9 involving aggravated or repeated instances of assaultive behavior;

10 (9) the defendant knew that the offense involved more than
11 one victim;

12 (10) the conduct constituting the offense was among the most
13 serious conduct included in the definition of the offense;

14 (11) the defendant committed the offense pursuant to an
15 agreement that the defendant either pay or be paid for the commission
16 of the offense, and the pecuniary incentive was beyond that inherent
17 in the offense itself;

18 (12) the defendant was on release under AS 12.30.020 or
19 12.30.040 for another felony charge or conviction or for a misdemeanor
20 charge or conviction having assault as a necessary element;

21 (13) the defendant knowingly directed the conduct constitut-
22 ing the offense at an active officer of the court or at an active or
23 former judicial officer, prosecuting attorney, law enforcement offi-
24 cer, correctional employee, fire fighter, emergency medical techni-
25 cian, paramedic, ambulance attendant, or other emergency responder
26 during or because of the exercise of official duties;

27 (14) the defendant was a member of an organized group of
28 five or more persons, and the offense was committed to further the
29 criminal objectives of the group;

1 (15) the defendant has three or more prior felony convic-
2 tions;

3 (16) the defendant's criminal conduct was designed to obtain
4 substantial pecuniary gain and the risk of prosecution and punishment
5 for the conduct is slight;

6 (17) the offense was one of a continuing series of criminal
7 offenses committed in furtherance of illegal business activities from
8 which the defendant derives a major portion of the defendant's income;

9 (18) the offense was a crime

10 (A) specified in AS 11.41 and was committed against a
11 spouse, a former spouse, or a member of the social unit comprised
12 of those living together in the same dwelling as the defendant;
13 or

14 (B) specified in AS 11.41.410 - 11.41.460 and was
15 committed against a minor, and the defendant has engaged in the
16 same or similar conduct involving the same or another victim who
17 was a minor;

18 (19) the defendant's prior criminal history includes an
19 adjudication as a delinquent for conduct that would have been a felony
20 if committed by an adult;

21 (20) the defendant was on furlough under AS 33.30 or on
22 parole or probation for another felony charge or conviction;

23 (21) the defendant has a criminal history of repeated in-
24 stances of conduct violative of criminal laws, whether punishable as
25 felonies or misdemeanors, similar in nature to the offense for which
26 the defendant is being sentenced under this section;

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28 ing the offense at a victim because of that person's race, sex, color,
29 creed, physical or mental disability, ancestry, or national origin;

1 (23) the defendant is convicted of an offense specified in
2 AS 11.71 and the offense involved the delivery of a controlled sub-
3 stance under circumstances manifesting an intent to distribute the
4 substance as part of a commercial enterprise;

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7 substances into the state;

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10 substance;

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12 AS 11.71 and the offense involved the distribution of a controlled
13 substance that had been adulterated with a toxic substance.

14 * Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to
15 read:

16 (a) JOINDER OF OFFENSES. Two or more offenses may be charged in
17 the same indictment or information in a separate count for each of-
18 fense if the offenses charged, whether felonies, misdemeanors or both,

19 (1) are of the same or similar character and it can be
20 determined before trial that it is likely that evidence of one charged
21 offense would be admissible to prove another charged offense,

22 (2) [OR] are based on the same act or transaction, or

23 (3) are based on two or more acts or transactions connected
24 together or constituting parts of a common scheme or plan.

25 * Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

26 (b) Other Crimes, Wrongs, or Acts.

27 (1) Evidence of other crimes, wrongs, or acts is not admissible
28 to prove the character of a person in order to show that he acted in
29 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.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if the prior offenses

(i) are not too remote in time;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

* Sec. 10. Section 9 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. 11. This Act takes effect immediately under AS 01.10.070(c).

if admission or the ev. is not
Precludes by ^{considerations raised} motion Rule
and

House Judiciary Committee

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

The changes to AS 11.41.110(a)(2) and 11.41.200(a)(3) are solely intended as technical amendments to make it clear that the language "intentionally performs an act" means "knowingly engages in conduct". This amendment thus conforms the statutes to the interpretation provided in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982).

Sections 3 and 4

The addition of AS 11.41.434(a)(30 and 11.41.436(a)(5) recognizes that the most serious forms of child sexual abuse are often committed by those who live in the same household as the victim or who are temporarily entrusted with the victim's care. Despite having no legal authority over the victim, such persons are nonetheless in a position of power such that even older children often find it impossible to thwart their advances. Because other subsections of these statutes already cover sexual misconduct with persons under the age of 13, the new changes apply only to victims from 13 to 15 years old. The cutoff at 16 years of age was specifically chosen instead of the 18-year-old cutoff in other subsections dealing with persons with legal or biological ties to the victim.

Sections 5 and 6

In enacting these sections, which require judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose whatever consecutive time as it decides is appropriate pursuant to the sentencing considerations in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children is to express the Legislature's preference for judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense. In some cases, the court may find that only a minimal period of consecutive time to serve may be necessary while in other cases the court may find that a lengthy consecutive term is required. Another purpose of this amendment is to allow judges to fashion some consecutive period of suspended time, with conditions of probation, to assure that offenders being released from prison have an adequate period of supervision by the

court or the Department of Corrections.

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AS 12.55.155(c)(18)(B) has been amended to create a new aggravating factor for repeated sexual misconduct toward minors. This change reflects the Legislature's intent that, although most judges already take into account prior misconduct in sentencing, it should be specifically recognized as a statutory aggravating factor. It is not necessary that a conviction have been entered to constitute this aggravating factor. This factor is also intended to apply to incidents not resulting in convictions. Prior convictions already trigger imposition of presumptive sentencing, or can constitute a separate aggravating factor if there are three or more felonies (AS 12.55.155(c)(15)) or if there are repeated instances of similar conduct (AS 12.55.155(c)(21)). Convictions used for those purposes are not intended to trigger this aggravating factor. As used in this aggravating factor, the phrase "same or similar conduct" is not intended to require a strict analysis of statutory elements of offenses.

Section 8

The amendment to Rule 8 of the Alaska Rules of Criminal Procedure is specifically intended to reverse the decision in Johnson v. State, 730 P.2d 175 (Alaska App. 1986) to permit multiple offenses to be joined for trial when evidence of one offense is admissible to prove another. It is intended that the determination that evidence will likely be cross-admissible be made before trial. This determination depends to a large extent on the state of the prosecution's evidence. The courts should be given great latitude to structure these pretrial proceedings to rely as much as possible on offers of proof and other non-testimonial showings, so as to avoid conducting a mini-trial, and to avoid situations where defendants use this procedure to obtain pretrial depositions to which they are not otherwise entitled. The determination on cross-admissibility may also turn on the precise parameters of a person's defense. A defendant who declines, in an *ex parte in camera* hearing, to disclose a defense, which could have been anticipated at this point in the proceedings and which would render evidence of other offenses inadmissible, should be deemed to have waived any objection to joinder.

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery."

Soper v. State 731 P.2d 537 (Alaska App. 1987) at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and

the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct, particularly as to non-family members. The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. It is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

BILL NO: CS HB 237 (Judiciary) DATE: February 26, 1988

TITLE: An act relating to the physical and sexual assault and sexual abuse of children; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) of the Alaska Rules of Evidence; and providing for an effective date.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence
and Sexual Assault
Dept. of Public Safety

DEPARTMENT OF
PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports CSHB 237(Judiciary).

Sections 1 and 2 changes the language of the present 2nd Degree murder and 1st Degree assault statutes, by substituting the phrase "knowingly engages in conduct" for "intentionally performs an act". This change simply brings the language of the statutes into accordance with the way it has been interpreted by the Alaska Court of Appeals.

Section 3 allows a charge of 1st Degree Sexual Abuse of a Minor (SAM I) to be brought against a person over 18 who engages in sexual penetration with someone under 16 who is living in the same household and is under the offender's authority, or who has been temporarily entrusted to the offender's care. Under current statute, this offense would be classified as SAM I only if the victim were under 13 years of age. Section 4 similarly amends the 2nd Degree Sexual Abuse of a Minor (SAM II) statute to include situations in which a person over 18 engages in sexual contact with someone under 16 who is living in the same household and under the offender's authority, or who has been temporarily entrusted to the offender's care. Currently, this offense is classified as 3rd Degree Sexual Abuse of a Minor (SAM III) if the victim is 13, 14 or 15 years of age. The kind of offense addressed by these amendments is more likely to be repeated or continuous in nature than a similar assault by someone who does not hold a position of trust and authority over the child. Children who have been abused by an authority figure often have long-term emotional and psychological problems which stem from the abuse of power and betrayal of trust in assaults of that nature. The same protection afforded to children who are abused by a parent should be extended to children who are abused by other authority figures.

Sections 5 and 6 amend AS 12.55.025 to require that a person convicted of two or more physical or sexual assaults committed against a minor will be sentenced to some consecutive period of imprisonment for each conviction. The length of the consecutive period is to be determined by the judge in each case.

Section 7 permits consideration of a defendant's previous sexual offenses against a minor as an aggravating factor in determining the presumptive sentence for a crime under AS 11.41.410 - 11.41.460. This enables the court to increase the sentences of those offenders who have repeatedly victimized children. The aggravating factor applies to conduct "similar" to the present offense; the defendant need not have been tried or convicted for the previous offense. This further protects child victims, since many sexual assaults against children do not result in criminal convictions.

Section 8 modifies Rule 8 of the Alaska Rules of Criminal Procedure to allow two or more offenses to be charged in the same indictment or information if the offenses are of the same or similar character and it can be determined before trial that evidence of one charged offense would likely be admissible to prove another charged offense, or the offenses are based on the same act, or two or more acts are connected together or constitute parts of a common scheme or plan. Currently, a child may be required to testify at numerous trials under certain circumstances, (e.g.: if there are multiple victims). Even under the best circumstances, testifying in court can be extremely difficult for a child, as s/he may be required to confront the defendant and relive the abuse again and again. This amendment will lessen the trauma of the court process for these victims.

Section 9 amends Rule 404(b) of the Alaska Rules of Evidence to allow the introduction of evidence, in a trial for physical or sexual assault or abuse of a minor, of other similar acts by the defendant towards children in order to show a common scheme or plan. This evidence is allowable only if the prior offenses are reasonably recent, similar to the offense charged, and committed against persons similar to the prosecuting witness. Many sex offenders follow a pattern in their offenses. Evidence of previous similar acts is important to establish a framework in which the jury may fairly evaluate the victim's testimony regarding the charged acts.

Section 10 provides that the changes to the evidence rules made in section 9 applies to acts and offenses committed before the effective date of the bill. Section 11 establishes an immediate effective date.

A handwritten signature in dark ink, appearing to read "Arthur English", is written over a horizontal line.

Arthur English
Commissioner

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 237(Jud)

PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____

Agency Affected: Public Safety

Title: An act relating to the physical & sexual assault & abuse of children
BRU: Council on Domestic Violence and Sexual Assault

Sponsor: Ulmer, Hudson, Grussendorf

Components: _____

Requestor: House Finance

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	0

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Executive Director Phone: 465-4356

Division: Council on Domestic Violence & Sexual Assault Date: 2/26/88

Approved by Commissioner: H. H. Nelson, Dep. Comm. Date: 2-29-88

Agency: Dept. of Public Safety

Distribution (by preparer):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Budget

Impacted Agency(ies)



Women In Safe Homes

*A Safe Alternative to
Family Violence*

P.O. Box 6552
Ketchikan, Alaska 99901
(907) 225-9474

MAR 23 1987

March 16, 1987

John Sund
P.O.Box V
Juneau, Ak 99811

Dear John:

The most current literature and research in the field of sexual assault offenders would be in serious conflict with the statistics and treatment methods proposed by Dorothy L. Peavey of Anchorage Parents United.

No responsible professional in this field today would claim that sexual deviancy can be cured. Parent's United claims that nationally 80% of their fathers return home and report less than 1% recidivism rate. The Anchorage program maintains that not one perpetrator has re-offended while participating in the program.

The philosophy of Parent's United (P.U.) is that incest is a family problem. Their treatment program is based on this belief and the goal is to reunite the family. Therapy to the family is offered in conjunction with the court system. Henry Giarrelto, the founder of P.U., states that if the offender is not threatened with prison he will not be motivated to stay in therapy. This is a sad commentary for incest offenders who are so eager and desirous to change their offending behavior! The least recidivism rate appears to be with offenders who voluntarily participate in treatment programs while incarcerated in prison.

A. Nicholas Groth, psychologist and director of the Sex Offenders Program for the Connecticut Department of Corrections and author and researcher of numerous books in this field, considers sexual abuse a chronic, repetitive problem like alcoholism. The most prominent view among veteran professionals is that the problem cannot be cured with traditional therapy and insight. This "addiction theory" has become the basis for treatment in offender treatment programs across the country. Authors and researchers such as David Finkelhor, Irwin S. Dreiblatt, Gene Abel, Judith Becker, Vernon L. Quinsey, Fay Knopp, Lucy Berliner and Robert Longo are respected pioneers in this

field that do not raise false hopes with statistics of a "cure rate." They acknowledge that sexual offenders can be given skills and methods for controlling their deviant behavior, but they agree it can seldom be eliminated. Behavior that is compulsive, heavily ritualized and patterned always will remain in the brain. It can be re-learned and re-energized, but it cannot be erased. Offenders are dependent on internal controls for the rest of their lives.

The family systems theory adhered to by P.U. can be dangerous if professionals, law makers, and society relax and accept the premise that incest fathers usually are not harmful to the rest of his family or to other children outside the home. The most notable study, by psychiatrist Gene Abel of Emory University involving non-incarcerated, out-patient volunteer offenders, reports that over 44% of all incest offenders will admit molesting other children and 18% will admit to forcible rape. Over 2/3 reported multiple deviances. Studies also indicate that over 67% of incestuous assaults occur for the duration of 1 to 3 years. The largest study to date done by Diana Russell of Mills College found that 32% of incest offenders sexually abused other family members also when the older daughter left home or refused their advances. Incest offenders are not basically harmless men that have been lead astray by a dysfunctional family.

New knowledge and research is indicating that the family is not the cause nor responsible for the sexual assaults. Contributing factors within the family can hasten and precipitate the offense, but the responsibility for the act lies totally with the offender. Parent's United believes that if the family is treated as a dysfunctional unit the incest will stop. Yes, the offender must admit that he sexually abused his child, but unlike other treatment programs working with the addiction model P.U. does not demand that the offender list all his other victims.

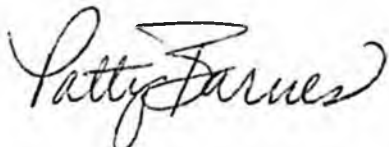
The more an offender voluntarily admits his responsibilities and displays empathy for his victims the greater the opportunity is for treatment to control his deviant fantasies and relearn appropriate arousal patterns. Offenders are experts at hiding or covering up their sexual deviancy problems. How then does Parent's United, utilizing forced treatment without collective responsibility, claim their astounding success rate? The recidivism rate for sex offenders who have completed state run treatment programs is estimated to be up to 25%. This does not take into account the 50% who drop out of the program.

If sexual offenders are addicted to children and maintain this chronicity throughout their lives it is almost impossible to state with any accuracy the degree of recidivism. As with the alcoholics we have only their word

that they did not "slip" and have a drink. It is well documented that a majority of children do not disclose on the family member so children cannot be utilized as a measurement to document recidivism.

In summary, Parents' United cannot claim for purposes of funding that they report only 1% recidivism rate of the 80% of offenders that return home. The most current literature and research contradict these assertions, clearly showing how this young field cannot guarantee absolute change in behavior or complete rehabilitation of sex offenders. The offenders crime is his and his alone. Family treatment will not prevent the crime from reoccurring. The purpose of family treatment should be for support, insight and verification that they were not responsible. Parent's United does not "cure" the incestuous family nor does it prevent future sexual assaults upon family members or other children.

Sincerely,



Patty Barnes
Children's Counselor



Floyd Richmond

References:

1. The Unspeakable Family Secret by Elizabeth Stark, Psychology Today, May 1984.
2. Child Sexual Assault: New Theory and Research by David Finkelhor, 1986.
3. The Silent Trauma by Diana Russell, 1986.
4. Issues in the Evaluation of the Sex Offender by Irwin S. Dreiblatt, Ph.D. A paper presented in May, 1982.
5. Changing a Lifetime of Sexual Crime by Robert E. Longo, Psychology Today, March 1986.
6. The Characteristics of Men who Molest Young Children by Gene Abel and Judith Becker, presented December 10, 1983 to the World Congress on Behavior.
7. Sexual Violence Quarterly, Characteristics of Adult Sexual Offenders, Northwest Treatment Association, Seattle, Fall 1985.
8. The Youthful Sex Offender by Fay Knopp, 1985.
9. The Offenders, Life Magazine by Cheryl McCall, December 1984.

APR 15 1987

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April 9, 1987

Representative John Sund
Alaska State Legislature
P.O. Box V
Mail Stop 3100
Juneau, Alaska 99811

Re: House Bill 237

Dear Representative Sund:

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

Representative John Sund
April 9, 1987
Page 3

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

Changes between HB 237 and CS HB 237 (Hess)

1. page 2, line 2 - adds "gross neglect",
2. page 2, line 4 - expanded definition of "abuse or gross neglect"
3. page 2, line 23 - adds "gross neglect"
4. page 2, line 25 - expanded definition of "abuse or gross neglect"
5. page 3, line 8 - changes age of having authority over a child from 16 to 13
change needs to be made page 3, line 18 and is also made on
page 4, line 14
6. page 7, line 20 - AS 12.45.025 - "Prior Inconsistent statements" deleted
7. page 6 - deletes ~~AS 12.55.125~~ (1) which allows up to 50 years sentence
adds ASAM to (1) = not more than 30 years
reduces the presumptions proposed from 13 to 8 yrs for first felony
from 15 to 10 yrs for first felony w/dangerous weapon^{etc.}
from 25 to 15 yrs for second felony
from 35 to 25 yrs for third felony



DISTRIBUTED FOR YOUR INFORMATION BY REP. FRAN ULMER

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 Madam,

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 moderators 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 these 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 address 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 occurred at least three times. In fact the act may have occurred 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.

(2)

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?

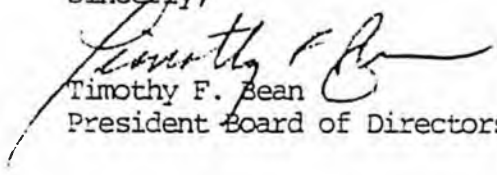
She also stated in her testimony that legislation regarding a "pattern of abuse" is not necessary because separate counts can be brought by establishing separate dates and times. She is disregarding a major stumbling block in the ability to prosecute as very young children do not orient well to dates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

In addressing her remarks on the need to differentiate 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 devastating 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 child's universe i.e. parent or parents or guardian turns against them they have nowhere to go. There is no way out, the adult-child trust relationship has been totally breached. 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 guardian 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 undeniably linked.

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

Sincerely,


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 education 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 child's 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:

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 frequently 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 arrest has occurred 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.

page three/SPEC legislative objectives

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 its 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 desirable 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 deterrent, 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.

page four/SPEC legislative objectives

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).

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

Fran Ulmer (March 27, 1987)

Safety of Our Children

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.

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 CS HB 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 [] same as previous fiscal note published _____
[4] zero fiscal note [] same as previous zero fiscal note published _____
[] zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

George Vanley - no Rec
Phyllis Ellis - no rec
Walter Kapanen no rec
Bill Hanks No - Rec
McK. Cunningham no rec.
Paul E. Gail N. Rec
David D. Bully no Rec

Walter Kapanen
CO-Chairman's signature
John D. O. O. O.

STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 5, 1987

SUBJECT: Constitutionality of CSHB 237(HESS)
 (Jury unanimity/ex post facto laws)

TO: Representative John Sund
 Chair, House Judiciary Committee

FROM: Keith B. Levy ^{KB}
 Legislative Counsel

You have asked for an analysis of the constitutional issues raised by CSHB 237(HESS). The two issues of which you should be aware relate to the constitutional requirement of jury unanimity to sustain a guilty verdict and the proscription against ex post facto laws.

I. JURY UNANIMITY.

CSHB 237(HESS) defines several new offenses to make illegal a "pattern or practice" of conduct. That term is defined to mean three or more incidents of the prohibited conduct. Section 8 of the bill adds a new provision of law which states, in part, that in a prosecution for an offense requiring a "pattern or practice" of prohibited conduct, "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 the particular incidents." The issue of jury unanimity was discussed in Covington v. State, 703 P.2d 436 (Alaska App. 1985). Overturning a conviction for sexual abuse of a minor, the court said:

. . . a conviction may properly be entered only if the jury unanimously finds that all essential elements of the offense charged were proved beyond a reasonable doubt. Thus all jurors must agree that the defendant committed a single offense. State v. James, 698 P.2d 1161 (Alaska 1985). Where one jury instruction may encompass two separate incidents, the trial judge must instruct the jury that if a guilty verdict is returned,

the jurors must be unanimous as to the incident or incidents of which they find the defendant guilty. Covington, at 440.

The provision in CSHD 237(HESS) permitting the jury to reach a verdict even though the individual jurors do not agree on the specific incidents necessary for the conviction appears to be in direct conflict with the court's holding in Covington.

It is my understanding that this provision was included in the draft by the Department of Law in the hopes of circumventing or overturning the Covington decision. While it is possible that the Alaska Supreme Court could take a different view of Covington in the future, there is nothing in existing Alaska case law to support a waiver of the jury unanimity requirement.

II. USE OF ACTS COMMITTED BEFORE EFFECTIVE DATE OF THE BILL TO ESTABLISH CRIMINAL PATTERN OR PRACTICE.

As noted above, CSHB 237(HESS) creates several new offenses requiring the prosecution to establish a "pattern or practice" of criminal activity, defined to mean at least three incidents. AS 11.41.600(4), added by sec. 8 of the bill, provides that as many as two of the three required incidents may have occurred before the effective date of the bill. As a general rule, making criminal an act which was not criminal when done, or increasing the penalty for the act, violates the constitutional proscription against ex post facto laws.

There is some precedent in the federal racketeering law (R.I.C.O.) for making criminal a pattern or practice of activity when some of the activity occurred before the law was enacted. The cases under the R.I.C.O. statutes do provide some support for using past activity to establish a crime. One commentator has found other support for this position citing a number of federal cases:

Although an act not unlawful when committed may not be made the basis of criminal liability, a statute prescribing punishment for continuing the action is not invalid as ex post facto. Sutherland, Statutory Construction, sec. 42.10 (4th ed. 1986).

However, there is an exception to this rule worth noting. Application of a perjury statute based on inconsistent statements, one of which occurred before enactment of the perjury statute, was held to be an impermissible ex post facto application. U.S. v. Bell, 371 F. Supp. 220 (E.D. Texas 1973).

In any case, the federal cases are not binding on the Alaska Supreme Court, and moreover, the R.I.C.O. statutes are distinguishable from the provisions of CSHB 237(HESS). Therefore, despite the possibility that the provision could be upheld, AS 11.41.600(4) still presents some constitutional problems.

Under 18 U.S.C. 1962, it is a crime to receive income from a "pattern of racketeering activity." The term "pattern of racketeering activity" is defined in 18 U.S.C. 1961(5) to require at least two acts of racketeering activity, one of which occurred after the effective date of the racketeering law. This law has been upheld against challenges based on the ex post facto clause of the federal constitution. In U.S. v. Campanale, 518 F.2d 352 (9th Cir. 1975), the court said:

The speculation that by relying to any extent on acts prior to its effective date the statute risks contravening the prohibitions of U.S. Const. art. I, sec. 9, cl. 3, against the passage of bills of attainder or ex post facto laws is not unreasonable. The same thought occurred to Congress, and the statute was drafted so as to avoid this possible unconstitutionality. This was done by defining "pattern of racketeering activity" to require one act of racketeering activity after the effective date of the chapter. Campanale, at 364.

However, the court did note that each incident of racketeering activity "must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute." Campanale, n. 34, at 364. The court also observed that the penalties imposed under R.I.C.O. are "no greater than the penalties imposed for many of the substantive offenses constituting racketeering activity." Campanale, n. 36, at 365.

The R.I.C.O. provisions that were upheld are very different from the provisions of CSHB 237(HESS). For example, sec. 1 of the bill amends AS 11.41.110(a) to add a new circumstance

under which a person may be guilty of murder in the second degree. The offense is committed 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 or gross neglect of the child that results in the death of the child." Under AS 11.41.600(4), as many as two of the three incidents of abuse or neglect required for conviction may have occurred before the effective date of the bill. Accordingly, a person may be convicted of murder in the second degree for acts which, when committed, were at most assault and possibly not criminal at all.

The argument in support of the validity of this result under the R.I.C.O. statute is that a person who has abused a child before the effective date of the bill is on notice that further abuse resulting in death will amount to murder in the second degree. The difficulty is that the final act after the effective date of the bill in and of itself is not murder in the second degree. The prior acts are an element of the offense even though they may not be independent offenses. If the court finds this to be a requirement for making the prior acts an element of the offense, it will have to find AS 11.41.600(4) unconstitutional.

The cases noted above are supportive of the questioned provisions of CSHB 237(HESS) but they are by no means conclusive. In my opinion, the validity of AS 11.41.600(4) remains an open question.

III. EX POST FACTO APPLICATION OF CHANGE IN RULES OF EVIDENCE.

Section 14 of CSHB 237(HESS) makes an amendment to Alaska Rule of Evidence 404 apply retroactively to acts and offenses committed before the effective date of the bill. That amendment, contained in sec. 13 of the bill, makes evidence of prior acts of the defendant involving the same or another victim admissible to prove the defendant's disposition to commit certain offenses. In Moor v. State, 709 P.2d 498 (Alaska App. 1985), the Alaska Court of Appeals specifically rejected the Department of Law's argument that incidents of sexual abuse with a different victim are admissible in sexual abuse cases to show "lewd disposition." Thus, the retroactive application of sec. 13 allows the state to introduce evidence in a criminal prosecution even

though the evidence would not have been admissible at the time the offense was committed.

The constitutional proscription against ex post facto laws includes laws which alter the legal rules of evidence and receive less or different testimony than was required when the offense was committed. As one commentator noted:

Changes in the law of evidence making it easier to prove guilt than was the case when an offense was committed is obviously prejudicial to the interests of the accused. Repeal of a law making certain evidence inadmissible is ex post facto to offenses committed prior to the repealing act. Sutherland, Statutory Construction, sec. 42.07 (4th ed. 1986).

Of course not all changes in the rules of evidence amount to illegal ex post facto laws. The United States Supreme Court summed up the issue this way:

. . . no ex post facto violation occurs if the change effected is merely procedural, and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 23, n. 12 (1981).

Thus, if sec. 13 of CSHB 237(HESS) alters or deprives a defendant of a substantial right, it may not constitutionally be applied retroactively. As noted below, there is substantial case law supporting the argument that a seemingly procedural amendment does in fact alter a substantial right, and therefore retroactive application of such a change is unconstitutional.

In a very recent case before the Alaska Court of Appeals, an attempt by the Department of Law to limit the application of the ex post facto clauses was firmly rejected. State v. Creekpaum, File No. A-1228, __ P.2d __ (Alaska App. 1987). The court held that an extension of the statute of limitations under which the defendant could have been prosecuted amounted to an unconstitutional ex post facto law.

The Creekpaum case dealt with the issue of whether the statute of limitations is merely a procedural issue or

substantive right which may not be applied retroactively.
The court concluded:

. . . although we find the issue to be a close one, we are persuaded that a criminal statute of limitations is not merely procedural, but operates as a substantive right for ex post facto purposes. While such a statute does not directly establish the elements of an offense, it is closely related thereto, since it limits the circumstances under which guilt may be found and is aimed at preserving the accuracy and basic integrity of the adjudicative process in which the guilt or innocence of the accused is ultimately decided. We hold, therefore, that the ex post facto clauses of the Alaska and United States Constitutions prohibit a retrospective change in the statute of limitations in a criminal case when the change operates to the detriment of the accused. Creekpaum, at 22.

The Department of Law argued that substantive criminal law refers only to statutes which define what acts are criminal or which prescribe the penalties for criminal acts: all other aspects of the law affecting criminal proceedings are procedural. Creekpaum, at 5. If this were true, then retroactive application of sec. 13 of CSHB 237(HESS) would probably not present a constitutional problem. However, the court rejected this argument and found that it is not supported by the holdings of the United States Supreme Court. Creekpaum, at 6. Instead, the court ruled:

In our view, a substantive change in the law is one that works a disadvantage to the accused either directly, by altering the requisite elements of the offense, or indirectly, by impairing important rights that are related to the substance of the offense -- those rights meant to assure fairness in the ultimate adjudication of guilt or innocence. As the Supreme Court has held: "It is sufficient now to say that a statute belongs to the protected class which by its necessary operation and in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage." Creekpaum, at 12 - 13. (Citations omitted.)

Other jurisdictions have also found that seemingly procedural changes were in fact substantive for ex post facto purposes. State v. Schreuder, 726 P.2d 1215 (Utah 1986)

involved a statute that prohibited a conviction based solely on uncorroborated accomplice testimony. The statute was in effect at the time the defendant committed the offense, but was subsequently repealed. The court ruled that retroactive application of the statute:

. . . would lessen the amount of proof necessary to convict defendant and thereby deprive defendant of a substantial right that the law gave her at the time of the murder. Therefore, application of section 77-17-7 would fall within the classes of changes prohibited by the ex post facto clause. Schreuder, at 1218.

In State v. Edwards, 701 P.2d 508 (Wash. 1985), the Washington Supreme Court ruled unconstitutional the retroactive application of an amendment to the murder statute defining the offense to require that the victim die within three years rather than the common law requirement of one year that was in effect when the offense was committed. The court found the retroactive application of the amendment offensive in several ways and specifically stated:

. . . the amendment alters the rules of evidence by receiving different testimony than required or permitted at the time of the crime since the State may prove different facts than it had to prove when the crime was committed. * * * Such an enactment violates state and federal constitutional prohibitions against ex post facto legislation. Edwards, at 512 - 513.

All of these cases clearly indicate that there is at least a significant possibility that the Alaska Supreme Court, if faced with the question, would find the retroactive application of the amendment to the Rules of Evidence contained in secs. 13 and 14 of CSHB 237(HESS) an unconstitutional ex post facto law. Substantive evidence that was not admissible at the time a defendant committed an offense would become admissible at that defendant's trial. The case law clearly indicates that the retroactive application of such a provision raises substantial constitutional questions.

If I may be of further assistance, please advise.

KBL:mkr
m11/117

Four issues have been raised regarding this bill which I would like to address with you this afternoon. They are as follows:

1. Evidence Rule 404 changes making prior acts of physical and sexual assault admissible;
2. The unanimous jury verdict question raised by the case of Covington v. State;
3. The prior inconsistent statements by a witness being sufficient to support a conviction; and
4. The higher presumptive sentence for first degree, first offense incest offenders.

1. Changes to Evidence Rule 404.

This is a question of whether the prior acts by the defendant of sexual abuse or child abuse toward this or another victim should be admissible in a case in which the defendant is charged with child abuse or child sexual abuse. Currently in Alaska, some of this kind of evidence is permitted by the court mainly for sexual abuse cases. It demonstrates that the defendant has a pattern of conduct or a habit associated with child sexual abuse. The courts have ruled in Alaska that

within certain very narrow limits, this evidence may be admissible. I seek to clarify the Rule so as to establish this kind of evidence is admissible in physical abuse cases as well as child sexual abuse cases. The rationale is that individuals who engage in this conduct do so time after time after time: it is a way of life. It is offered and should be admissible as evidence that shows the individual's propensity, habit, pattern of committing this kind of offense. It is for that reason that the balance between whether it is too prejudicial or whether or not it is sufficiently probative to bring into court, in my opinion, resolves in favor of allowing the court to consider this evidence. Obviously, in each individual case it will be up to the trier of fact to determine whether or not it is sufficiently relevant to the individual case to be determinative. But at least it will be admissible as part of the evidence presented to the court to show the defendant's disposition to commit the offense.

2. Unanimous jury verdicts. The Constitution requires that a jury come to a unanimous decision beyond a reasonable doubt that the defendant committed a particular criminal act. In a recent Court of Appeals case in Alaska, Covington v. State, the defendant had assaulted the victim (his daughter) literally hundreds of times; because the witness was not able to identify individual incidents of abuse, however, the

Appellate Court reversed the defendant's conviction¹ saying that they could not be sure that the jury was unanimous as to each particular incident of assault. I would argue that the Constitution does not require unanimity on each particular incident, but rather that the jury is unanimous as to the criminal conduct which has been charged. For that reason, this bill changes the definition of the criminal offense from one incident of abuse or assault, to a pattern or a series of incidents; and that the jury may reach the conclusion, unanimously, that the defendant has engaged in this criminal conduct (which is broader than a particular incident by including several of them in a pattern of abuse).

3. Prior inconsistent statements. The previous law in Alaska allowed prior inconsistent statements to be admissible. The decision in Brower v. State limited this kind of evidence, holding that it is admissible but not sufficient to support a conviction. This is a considerable limitation because in some instances the trier of fact, either the judge or the jury at the trial court level, may reach the conclusion that the prior inconsistent statement is sufficiently convincing to prove beyond a reasonable doubt that the defendant has committed the offense. This Court of Appeals decision limits the trier of

¹/On rehearing, Covington's conviction was reinstated, because he had not raised the issue below, but holding applies to future cases.

fact's discretion and limits the ability of the trier of fact to reach its own conclusion about the sufficiency of the evidence. I believe that the Constitutional requirement of proof beyond a reasonable doubt is maintained in this section because we are leaving it to the trier of fact to determine whether they are convinced beyond a reasonable doubt of the guilt of the defendant. I don't believe that appellate level should decide sufficiency where it is not possible to adequately assess the credibility of witnesses or all of the circumstances of the case.

4. Should sentences be increased for multiple child sexual abuse? Objection has been raised that the presumptive term for incest offenders is higher in HB 237 than for single assault sexual abuse. To quote from the public defender's memo:

"to penalize the family offender more harshly than a bike path rapist is an illogical and unfair result."

I challenge that statement. It is both logical and fair to punish these offenders more harshly. Some suggest that the family offender only offends within the family and can be treated successfully; however, the data and the experts in the field disagree. According to testimony received in the House HESS Committee, over 60 percent of those who abuse within the

home admit to sexual abuse outside the home.² Moreover, experts also agree that the emotional impact to the victim is considerably more damaging when the sexual abuse comes from a family member or trusted friend. Finally, the evidence accumulated by those who work in the field leads one to the conclusion that there is very rarely a cure for these individuals. Treatment helps, but the most important thing that can be done is for the state to intervene through a prosecution and protect the victim and other potential victims from the offender.

2/This is the percentage of voluntary admissions; experts believe that the actual percentage of those abusing outside the home is likely to be much higher.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 237

PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to murder, assault
and physical abuse of children."
Sponsor: Rep. Ulmer, Hudson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

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	0

CAPITAL	0	0	0	0	0	0

REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

This legislation, as revised, will have minimal impact on the Department if current sentencing practices continue. If sentencing practices change and large amounts of consecutive time are imposed, there would be a substantial impact on the Department.

Prepared by: Susan E. Knighton, Director of Admin. Svs. Phone: 465-3376
Division: Administrative Services Date: 2/18/88

Approved by Commissioner: Susan Humphrey-Barnett Date: 2/18/88
Agency: Department of Corrections

Distribution (by preparer):

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

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"

Agency Affected: Dept. of Corrections

BRU: _____

Sponsor: Dept. Ulmer, Madson

Components: _____

Requestor: _____

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	0	0	0	12,097.4	25,404.4	40,011.6
CAPITAL	0	130,500.0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	130,500.0	0	12,097.4	25,404.4	40,011.6
FEDERAL FUNDS						
OTHER						
TOTAL	0	130,500.0	0	12,097.4	25,404.4	40,011.6

POSITIONS:

FULL-TIME	0	0	0	219	438	657
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See Attached Analysis

Prepared by: Susan E. Knighton, Research Analyst IV
 Division: Statewide Programs

Phone: 465-3376

Date: 4-21-87

Approved by Commissioner: [Signature]
 Agency: Department of Corrections

Date: 4-21-87

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

Agency Affected: Administration

Title: "An Act relating to crimes against children..."

BRU: Office of Public Advocacy

Sponsor: Ulmer, Hudson

Components: _____

Requestor: House Judiciary

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

Phone: 274-1684

Division: Office of Public Advocacy

Date: 4/9/87

Approved by Commissioner: Garrey Peska

Date: 4/10/87

Agency: Department of Administration

Distribution (by preparer):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Budget

Impacted Agencies

Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION

FISCAL NOTE

REQUEST:

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

Bill Version: HB 237

Publish Date: _____

Agency Affected: Department of Administration
 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: George Pesta
 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
OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT Health and Social Services	DIVISION Family and Youth Services	BILL NUMBER HB 237	SPONSOR Ulmer, et al.
DEPARTMENT POSITION Support concept			
PREPARED BY Yvonne M. Chase, Director <i>YMC</i>	DATE 4/22/87	COMMISSIONER'S SIGNATURE <i>Megha K. Munson</i>	DATE 4/22/87

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Department of Law	CONSTITUENT GROUP(S) AFFECTED BY BILL 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 (j)(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.

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.

STATE OF ALASKA

PUBLIC DEFENDER AGENCY

STEVE COWPER, GOVERNOR

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

April 24, 1987

John Hartle
Committee Aide
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

RE: HB 237

Dear John:

Here are several of the cases which we have been discussing in relationship to HB 237.

Two of the cases, Burke v. State and Soper v. State, provide a clear indication that when an offender's prior bad conduct is relevant to the current charges, it can be admitted. In 1980, the Alaska Supreme Court decided in Burke v. State that prior assaults of the victim can be admitted. In Soper v. State, a 1987 Court of Appeals case, the court decided that this "lewd disposition" exception to the rule that prior bad acts should not be admitted can be extended to testimony regarding assaults of all victims in the same class as the defendant, in that case, other daughters of the defendant.

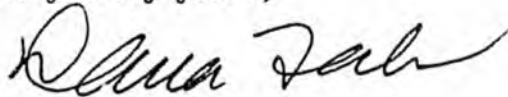
I am also enclosing Covington v. State, in which the Alaska Court of Appeals reaffirmed the defendant's right to a unanimous jury verdict. It was mentioned at the executive branch meeting on this bill that the repeated sexual abuse of a minor provision was specifically designed to "get around" Covington. In my opinion, Covington is founded upon an absolute constitutional right under Alaska's constitution as well as the federal constitution, and that right cannot be abrogated by the legislature.

Finally, I am enclosing Brower v. State, which is the case holding that although a victim's statement out-of-court can be introduced as substantive evidence in a case should the victim change his testimony, there must be some corroboration of that out of court statement to support a conviction. This case is based on a federal decision, U.S. v. Orrico, and no state has held otherwise. The basic reasoning underpinning the decision is that if the only evidence in a case is the victim's out of court statement and the victim changes his testimony on the stand, there is no ability to cross examine the victim on the statement. However, if there is any corroborating evidence, including physical evidence, psychological profiles indicating an abused victim, pressure on the victim to recant or change his testimony etc., then there is sufficient evidence to support a conviction.

I hope these are of some assistance to you. I am also enclosing a shorter memo highlighting the worst points in this bill, since my more complete memo takes a long time to read.

Thanks for your help on this. Again, Susan Orlansky is well informed on the issues involved in this bill and is available anytime next week to discuss it with you.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Dana Fabe".

Dana Fabe
Public Defender

DF:sh

Enclosures

M E M O

TO: John Hartle
Representative John Sund

DATE: April 23, 1987

FROM: Dana Fabe
Public Defender

RE: House Bill No. 237

Following is a brief analysis of the constitutional and policy issues raised by HB 237. 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 probative of sometime other than criminal disposition.

These are the most problematical of the bill's provisions. There are other problems with the bill which were outlined in greater detail in my earlier memo to you.

DF:sh