HB

122

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would prohibit the "civil compromise" of criminal cases arising from domestic violence situations. This proposed legislation was requested by the Council on Domestic Violence and Sexual Assault and is supported by the Alaska Network on Domestic Violence and Sexual Assault.

Under existing law (AS 12.45.120 -- 12.45.140), a misdemeanor crime for which the injured party has a civil remedy may, except under certain circumstances, be ordered dismissed by the court if the defendant and the victim reach a civil compromise (in other words, if the defendant pays the victim money in recompense). This bill amends AS 12.45.120 to add crimes that arise from a domestic violence situation to the list of crimes that may not be civilly compromised.

Alaska's civil compromise statute, originally adopted in 1900, is modelled upon an 1813 New York statute. The statute apparently was based on the belief that there are some minor cases (such as libel, trespass, or simple assault) that, while technically public offenses, are, in reality, primarily private disputes between two parties. In such cases, it was believed, the public interest would be better served if the parties could reach an amicable resolution of their private dispute outside of the courtroom. Although such provisions were widespread at the turn of the century, many states, including New York, have since repealed their civil compromise statutes. There are only about 15 states, including Alaska, which now retain some form of civil compromise statute.

Unfortunately, in recent years the civil compromise statute has been used by abusive spouses as an easy and cheap way of obtaining the dismissal of criminal charges pending against them. In the recent case of State v. Nelles, 713 P.2d 806 (Alaska App. 1986), the Alaska Court of Appeals upheld a Fairbanks judge's decision to dismiss criminal charges against a man who had struck his girlfriend in the face

with his fist, injuring her and requiring stitches. Nonetheless, the court expressed concern "that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur." 713 P.2d at 810. The court was unwilling to judicially create an additional exception to the civil compromise statute, however. The court stated:

> The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.

713 P.2d at 810; footnote omitted.

In recent years, there has been an increasing awareness in our society of the pervasive problem of domestic violence: the physical and sexual abuse of women, children, and the elderly. In 1980, the Alaska legislature adopted a tough new domestic violence law that allows the victim of domestic violence to go to court to obtain a restraining order for protection against an abusive spouse or family member (AS 25.35.010 -- 25.35.060). Under certain circumstances, violation of such a court order is a crime (see, e.g., AS 11.61.120(a)(6)). Because of the need to protect victims from domestic abuse, the legislature amended the state's criminal procedure code in 1978 to allow a peace officer to arrest an offender for certain types of domestic crimes, even if the crime was a misdemeanor not committed in the officer's presence. This is an exception to the general rule. See AS 12.25.030(b).

Battered wives, young children, and elderly parents are often in an extremely precarious position. The victim may be dependant upon the offender for food, shelter, and emotional support, and may therefore be particularly vulnerable to threats or coercion. In recent years, state prosecutors have handled several homicide and felony assault cases where the victims had been repeatedly beaten by their husbands or boyfriends. In some of these cases, criminal charges had been filed, only to be later dismissed at the victim's request. It makes little sense to toughen the state's civil and criminal laws against domestic violence on one hand but, on the other hand, to continue to allow abusers to pressure their victims into "civilly compromising" the charges against them.

This bill recognizes that we have an obligation to protect those who are too young, too old, or too emotionally vulnerable to be able to effectively protect themselves. The abuse of women, children, and the elderly is an offense against every member of a civilized society; it is emphatically not a "private dispute" for which a civil compromise is appropriate. I urge your prompt and favorable action on this bill.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
Published date: 2/11/87

REQUEST
Bill/Resolution No.: 773-87-0072
Title: An Act relating to the authority to compromise certain misdemeanors.

Sponsor:
Requestor:
Date of Request 12/16/86

FISCAL DETAIL
Agency Affected: Public Safety
BRU: Council on Domestic Violence & Sexual Assault

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: Attach a separate page if necessary

Prepared by: Nina Keeler, Program Coordinator
Phone: 465-4356
Division: Council of Domestic Violence & Sexual Assault
Date: 12/16/86

JNR 12/16/86 Approved by Commissioner:
Date: 12/16/86
Agency: Public Safety

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

STATE OF ALASKA, 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 122
Publish Date: HOUSE 3/20/87

REQUEST:

Revision Date:
Title: An Act relating to the authority to compromise certain misdemeanors
Sponsor: Rules/Governor
Requestor: House Finance

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

JNR 3/12/87

Prepared by: Barbara Miklos, Executive Director
Division: Council on Domestic Violence & Sexual Assault
Phone: 465-4356
Date: 3/5/87

Approved by Commissioner:
Agency: Department of Public Safety
Date: 3/12/87

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

CIVIL COMPROMISE: Law's use worries prosecutors

By SHEILA TOOMEY
Daily News reporter

Men who beat their wives can escape prosecution as long as their victim says it's all right under an old, rarely used law that now has Anchorage prosecutors and family counselors worried.

The procedure, called a civil compromise, is routinely used to kill Fairbanks domestic violence cases, according to the district attorney's office there. It is rarely used at all in Anchorage, but has been invoked in a domestic violence case now pending in District Court.

"It could have some serious effects," said Assistant Municipal Prosecutor John McConnaughy.

The prosecutor's office has a four-year-old policy of taking domestic assault cases to court even if the victim — usually a battered woman — changes her mind about wanting to prosecute her attacker. Professionals in the field believe nearly all such victims are physically or emotionally coerced into dropping charges.

The usual deal offered a first offender is to complete a year of counseling in return for having his record wiped clean.

Benito Mendoza was arrested on June 21 and charged with fourth-degree assault, the misdemeanor charge used in most domestic violence cases. The victim, Virginia Slatts, told police Mendoza punched her in the face and kicked her in the thigh. Police photographed her injuries, including what turned out to be a broken nose.

On June 27, defense attorney Ron Offret asked Judge Michael Wolverton to dismiss the charge against Mendoza because Slatts had signed a civil compromise agreement.

"For $1 and other valuable consideration," the agreement reads, "Virginia R. Slatts does herby release and forever discharge Benito Mendoza from any and all acts and actions and damages as a result of the incident occurring on June 21 . . . and agrees that she does not wish to pursue the above matter."

By law, filing the agreement took the decision of whether the case should be prosecuted out of the hands of the prosecutor and gave it to the judge.

McConnaughy asked for a hearing to present evidence that civil compromise is generally not appropriate in domestic violence cases, and would be particularly inappropriate in this case, where there is a history of abuse.

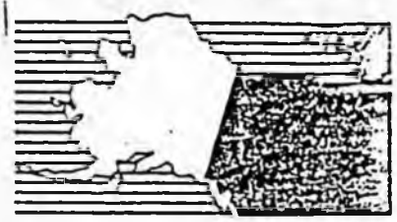
At an Aug. 5 hearing, he produced evidence of two other assaults against Slatts by Mendoza from August 1985 to June 1986. There was no prosecution, but hospital personnel testified to the extent of Slatts' injuries. Police were called regarding an assault on Aug. 24, 1985 when Slatts was pregnant, according to testimony. She was treated but no charge was filed.

At the hearing, Wolverton delayed making a decision because Slatts did not show up and he could not ask her if she had been pressured. When Slatts failed to show for a second hearing, he issued a bench warrant for her arrest.

So now the victim is technically a fugitive, a situation both sides say they deplore.

Few cases go this far, but Fairbanks District Court Judge Ed Crutchfield says this is one of the reasons he "compromises" about six domestic violence cases a year. His use of civil compromise was upheld earlier this year by the Alaska Court of Appeals. However, the court included a warning in its opinion:

"In cases of domestic violence that appear to involve a continuing danger



of injury to the victim, it could well be an abuse of discretion for the trial court to order dismissal."

Crutchfield said Fairbanks judges generally follow this guideline and civil compromises are not used "if someone had any type of history of domestic violence, whether convicted or not convicted."

"I would think I should be nailed to the yardarm if I have compromised a case where there was a history and a chance it will reoccur."

Ken Roosa, head of the special assault unit in the Fairbanks district attorney's office, sees it differently. "It's unusual for the court to refuse to accept" a compromise, he said. As soon as charges are filed, defendants "make an effort to contact the victim and offer her a little money to settle."

Even if restricted to first offenders, the law should not be available in domestic violence cases, said Anchorage Municipal Prosecutor Jim Ottinger. "The whole point is to get the first offender into treatment so there won't be second offense."

Frances Purdy, head of the city's abuse prevention program, testified for the prosecution at the Mendoza hearing. "I don't believe someone who lives in viole as a victim can make a f choice about what a rem is," she said later.

When abusers kn victims can't get the char dropped, prosecutors a counselors said, they st pressuring the victim ab the case and start thinki about accepting t counseling "deal." T availability of civ compromise short-circui this, McConnaughy said.

Purdy and others tried get the civil compromise la changed during the la legislative session, but t Fairbanks judges objecte partly, Crutchfield sai because he and his colleagu were angry at charges th were abusing their discretio "That's completely not true he said.

"We don't just sign the because someone sticks the in front of us . . . I thin every one of these cas should be addressed on i own merits."

Meanwhile, defens attorney Offret, the man wh started all the fuss b presenting the civ compromise in the Mendo case, said he realizes "th problem that's raised by th whole thing." But the law ha been on the books since 196 he said, and prosecutors' fea have not materialized.

Alaska's civil compromis law derives from an 1813 Ne York law meant to ge private nuisance cases out c court. In Oregon, wher Offret first ran into such law, it was used primarily i shoplifting cases, he said.

THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. BRUCE NELLES, Appellee.	File No. A-995. OPINION [No. 578 - February 7, 1986]

Appeal from the District Court of the State of Alaska, Fourth Judicial District, Fairbanks, H. E. Crutchfield, Judge.

Appearances: Jeffery O'Bryant, Assistant District Attorney, Harry L. Davis, District Attorney, Fairbanks, and Harold M. Brown, Attorney General, Juneau, for Appellant. Raymond Funk, Assistant Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for Appellee.

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

BRYNER, Chief Judge.

The state appeals from a district court dismissal of a misdemeanor assault charge against Bruce Nelles. Judge H.E. Crutchfield dismissed the charge pursuant to the misdemeanor civil compromise statute. We affirm.

BACKGROUND

While intoxicated, Nelles struck his girlfriend, Mary M. Henry, on the mouth with his fist. Henry's injury required four stitches. She filed a citizen arrest form seeking Nelles' arrest.

At a bail hearing before Judge Crutchfield, Nelles' attorney moved for dismissal. He submitted a statement titled "Compromise of Criminal Action," which was signed by Henry and stated:

> Comes now the injured party in the above-entitled action, Mary Henry, and hereby acknowledges that he/she has received satisfaction for the injury to his/her person and further states that he/she does not wish to proceed with this action, since he/she has received satisfaction for injury to his/her person from the Defendant, Bruce Nelles.

The state opposed Nelles' motion for dismissal. The court allowed Nelles' counsel to examine Henry under oath. Henry testified that she and Nelles intended to marry, that he had never assaulted her on any other occasion during their one year together, that none of her clothes had been torn, that she had not incurred any medical expenses, that she was unemployed at the time of the assault, had lost no wages, and that she did not want any civil compensation from Nelles.

Judge Crutchfield further questioned Henry:

Court: (to witness) I don't know whether Mr. Wildridge, in taking this written statement from you, explained the provisions of Title 12.45.120-130, which I'm obviously looking at. And, I think the basis for this is to not prosecute some cases but by the same time the legislature recognizes that the court system and the police, and the prosecutor should not be some type of a buffer zone and have their time taken up with boy-girl relations, okay?

Henry: I understand.

Court: And, there's some provisions for costs and I've never been clear about who the costs should be assessed against, whether it's the defendant or the witness who brings the charges, and, then -- you are aware, of course, that there's a possibility that if I grant it, that I may, based upon the court's time and everybody's time, I may have to assess some costs -- before it would be dismissed? Did you understand that?

Henry: (inaudible)

Court: Okay.

Court: You're not frightened of Mr. Nelles I take it then, you, he didn't try to talk you into doing this or threatening you in any way?

Henry: No.

Judge Crutchfield initially denied Nelles' motion to dismiss. After Nelles moved for reconsideration, however, Judge Crutchfield ordered the case dismissed "pursuant to the civil compromise provisions" and "upon payment of $100 costs." The state has appealed the order of dismissal.

DISCUSSION

"In theory there should be no compromises of criminal cases." Miller, The Compromise of Criminal Cases, 1 So. Cal. L. Rev. 1 (1927). And in practice, "the civil and criminal law operate independently of one another so that resolution of a victim's civil rights and remedies has no effect upon criminal prosecution." People v. Moulton, 182 Cal. Rptr. 761, 766 (Cal. App. Dep't. Super. Ct. 1982). "An exception to this principle exists, however, where a statute specifically authorizes a compromise of the criminal, as well as the civil, liability arising out of certain conduct." Annot., 42 A.L.R.3d 315, 318, § 2[a]. Many states, including Alaska, have adopted such statutes, allowing judicially-sanctioned compromises and dismissals of criminal charges.[1]

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[1]. AS 12.45.120-.140; Ariz. Rev. Stat. Ann. § 13-3981 (1978); Cal. Penal Code § 1377-79 (West 1982); Idaho Code Ann. § 19-3401-3403

(footnote continued)

It appears that Alaska's civil compromise statutes derived from the same source as most other similar statutes, a 1813 New York statute that read:

> That in all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of surety, be committed, or shall be indicted for an assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done riotously or with intent to commit a felony, or not being an infamous crime, and for which there shall aiso be a remedy by civil action, if the party complaining shall appear before the magistrate who may have taken the recognisance, or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate in his discretion to discharge the recognisance, &c. or for the court also in their discretion, to order a nolle prosequi to be entered on the indictment.[2]

(footnote 1 continued)

(1979); Mass. Gen. Laws Ann. ch. 276, § 55 (West 1972); Nev. Rev. Stat. § 178.564-568 (1983); Okla. Stat. Ann. tit. 22, § 1291-94 (West 1958); Or. Rev. Stat. § 135.703-709 (1983); Pa. Stat. Ann. tit. 19, 26 (Purdon 1964); Utah Code Ann. §§ 77-50-1 to -3 (1978).

[2]. In large part, the laws of Alaska are derived from those of Oregon. F. Brown, The Sources of the Alaska and Oregon Codes, Part I, 2 U.C.L.A.-Alaska L. Rev. 15, 16 (1972). The Alaska civil compromise statutes appear to first have been adopted in 1900 and to have been derived from the Oregon Civil Compromise Statutes. See Ann. Alaska Codes, Pt. II, ch. 28, §§ 253-256 (Carter 1900) (the Alaska statute refers to the Oregon law, presumably as its source). See infra. n.3. The Alaska statutes also had virtually identical wording to the Oregon statutes. Compare Ann. Alaska Codes, Pt. II, ch. 28, §§ 253-256 (Carter 1900) with Gen. Laws of Or., Code of Crim. Proc., ch. XXX, §§ 315-318 (Deady 1845-1864); renumbered, Ann. Laws of Or., Crim. Code. tit. I, ch. XXX, §§ 1519-1522 (Hill 1892); renumbered, Or. Laws, tit. XVIII, ch. XV, §§ 1696-1699 (Lord 1910).

The laws of Oregon, and therefore Alaska, are derived in large part from those of New York. Although, "[t]he major borrowing took place in Oregon in 1853-1854 . . . . Oregon's celebrated Judge Matthew P. Deady and others reworked the Oregon law in 1862-1864, using as their major sou[illegible] the 1854 codes and the draft codes prepared for New York by a commission by David Dudley Field. The Field Commission had also relied heavily on the older New York statutes . . . . ." F. Brown, The

(footnote continued)

1 N.Y.R.L. § 19 (1813), quoted in People v. Moulton, 182 Cal. Rptr. 761, 765 (Cal. App. Dep't. Super. Ct. 1982). The purpose of the statute was to encourage the amicable resolution of disputes that were primarily private in nature:

> The policy underlying compromise statutes was explained by the New York Commissioners on Practice and Pleading in 1849 as follows:
>
> > There are many cases, which are technically public offenses, but which are in reality rather of a private than a public nature, and where the public interests are better promoted by checking than by encouraging criminal prosecutions. Of this class are libels, and simple assaults and batteries; or those which according to [the civil compromise statute], are not committed by or upon an officer of justice, while in the execution of the duties of his office, or riotously, or with an intent to commit a felony. With these exceptions, cases of this nature have by the policy of our statutes, always been considered fit subjects of compromise . . . ; a policy which has been carried by the courts, still further than the terms of the statute.

People v. Moulton, 182 Cal. Rptr. at 766 (citations omitted).

Alaska's civil compromise statutes are contained in AS 12.45.120-12.45.140, which state:

> Sec. 12.45.120. Authority to compromise misdemeanors for which victim has civil action. When a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed
>
> (1) by or upon a peace officer, judge or magistrate while in the execution of the duties of that office;

(footnote 2 continued)

Sources of the Alaska and Oregon Codes, Part II, 2 U.C.L.A. - Alaska L. Rev. 87 (1973).

(2) riotously;
(3) with an intent to commit a felony;
(4) larcenously.

Sec. 12.45.130. Acknowledgment of satisfaction by injured party. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that satisfaction has been received for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime.

Sec. 12.45.140. Compromise or stay upon compromise by other means prohibited. A crime may not be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law.[9]

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[9]. The statutes, as originally adopted in 1900, read:

Sec. 253. What crimes may be compromised. That when a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in the next section, except when it was committed--

First. By or upon an officer of justice while in the execution of the duties of his office;
Second. Riotously; or
Third. With an intent to commit a felony; or
Fourth. Larcenously.

Laws. Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1519.

Sec. 254. Compromise by permission of the court; order thereon. That if the party injured appear before the court at which the defendant is bound to appear, at any time before trial on an indictment for the crime; and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs and expenses incurred, order all further proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom; but the order and the reasons therefor must be entered on the journal.

Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s.

(footnote continued)

In this case, the state initially contends that these statutes violate the separation of powers doctrine. The state relies upon State v. Carlson, 555 P.2d 269, 271-72 (Alaska 1976), and Public Defender Agency v. Superior Court, 534 P.2d 947, 951-52 (Alaska 1975). It argues that the district court's order of dismissal amounts to "a usurpation of the executive power residing in the state district attorney's office to bring charges and determine their disposition." We find this argument to be without merit.

In State v. Carlson, the defendant was indicted for murder, but the trial court, against the state's opposition, agreed to accept a guilty

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(footnote 3 continued)

1520; Saxon v. Hill, 6 Oreg., 383.

Sec. 255. Order a bar to another prosecution. That the order authorized by the last section, when made and entered, is a bar to another prosecution for the same crime.

Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1521.

Sec. 256. No crime can be compromised, except. That no crime can be compromised, nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter.

Laws Oreg., Oct. 19, 1864; Hill's Ann. Laws, s. 1522.

The statutes appear unchanged from the original version in Comp. L. Ann., tit. XV, ch. 28, §§ 2362-2365 (1913); Comp. L. Ann., §§ 5431-5434 (1933), and Comp. L. Ann., tit. 66, ch. 18, §§ 66-18-1 to 66-18-4 (1948). In 1962, a number of minor amendments were made to the language of the statutes. See SLA, ch. 34, § 6.13 (1962). Additionally, the first exception in Sec. 253 was expanded from the original "an officer of justice" to "a peace officer or magistrate," in 1962, SLA, ch. 34, § 6.13 (1962), and expanded to "a peace officer, judge or magistrate," in 1971. SLA, ch. 8, § 15 (1971). Also, Sec. 255 was consolidated with Sec. 254 in 1962. SLA, ch. 34, § 6.13 (1962).

plea to the lesser offense of manslaughter. No statute or rule permitted the trial court to accept such a plea. The supreme court reversed, finding that the trial court's decision would "usurp the executive function of choosing which charge to initiate. . . ." 555 P.2d at 272. In Public Defender Agency v. Superior Court, the trial court ordered the state to prosecute a civil action for child support. The supreme court similarly concluded that the separation of powers doctrine had been violated, holding that "the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding." 534 P.2d at 950.

In the present case, there was no judicial interference with the prosecution's initial decision to charge Nelles. Judge Crutchfield did subsequently exercise his discretion to dismiss the case. Yet this dismissal was expressly authorized by the legislature. AS 12.45.120, 12.45.130. There is no suggestion in the civil compromise statutes that the court's power to dismiss is conditioned upon the agreement of the prosecutor. In fact, the contrary appears to be the case. See Annot., 42 A.L.R.3d 315, 319 (a common condition precedent under compromise statutes is the consent of either the court or the prosecutor). See also Hoines v. Barney's Club, Inc., 170 Cal Rptr. 42, 47 (Cal. 1980) (in explaining the civil compromise statute, the court stated that the prosecutor has no role in a dismissal of civil compromise). The state has cited no case purporting to hold that prosecutorial consent to a civil compromise is necessary as a matter of constitutional law, and we are aware of none. Because the court's authority to compromise misdemeanors has been expressly conferred by the legislature, we find the present case readily distinguishable from State v. Carlson and Public Defender Agency

v. Superior Court, and we conclude that there is no separation of powers violation made out here.

The state's next argument is that crimes arising from domestic disputes should not be amenable to civil compromise. Certainly, the state has a valid concern: that domestic assaults not go unpunished merely because the victims wish to withdraw their complaints in the hope that no further abuse will occur. However, the state cites no support for the argument that public policy mandates a judicially created exception to the civil compromise statute. The statute, in its current form, does not exempt domestic disputes. Amendment to create additional exceptions is clearly a matter of legislative, rather than judicial, concern.[4]

Moreover, we note that, under the Alaska civil compromise statute, the decision whether to dismiss or prosecute is vested in the sound discretion of the trial court, and no right to dismissal is conferred upon the accused. In cases of domestic violence that appear to involve a continuing danger of injury to the victim, it could well be an abuse of discretion for the trial court to order dismissal. In the present case, however, the state has not suggested any ongoing danger to the victim, and the record contains nothing to indicate that Judge Crutchfield abused his discretion in this regard.

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[4]. We note that California has amended the civil compromise statute to create an exception barring civil compromise when the injury arises from a second willful and knowing violation of a restraining order imposed to prevent domestic violence. Cal. Penal Code § 1377 (West 1982) (statute amended 1979). It should also be noted that any willful infliction of physical injury resulting in a "traumatic" condition upon a cohabitant of the opposite sex is a felony under California law. Cal. Penal Code § 273.5 (West 1970) (adopted 1977).

The state further argues that the civil compromise statute engenders conflict with the Alaska Code of Professional Responsibility, Disciplinary Rule 7-105(A), which states that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." See, e.g., MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970) (prosecutorial misconduct where charge of resisting arrest was introduced as "bludgeon" behind the attempt to defeat a possible civil action by the arrestee for false arrest). This rule is plainly inapplicable here. Dismissal of a case upon civil compromise simply does not imply that the case was prosecuted "solely to obtain an advantage in a civil matter."[5]

Judge Crutchfield's dismissal of the case is AFFIRMED.

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[5]. The state has also argued that Alaska's civil compromise statute is unconstitutionally vague. We find this argument to be frivolous.

463-3153 - Suzanne Tryck - JLO.

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: March 5, 1987

TO: Suzanne Tryck, Department of Intergovernmental Affairs

FROM: Frances Purdy, Program Manager, Abuse Prevention Program

SUBJECT: Testimony on HB 122 - Civil Compromise on Misdemeanors

This bill is the same bill that was introduced in the 1986 legislature. The Special Committee on Domestic Violence encouraged the Municipality of Anchorage to support its passage. The Municipality took an active role in supporting this bill, then HB 463; hopefully, we can continue to work for it becoming law..

The bill would delete the loophole in the current Alaska Statutes that allows a misdemeanor assault to be handled through a civil compromise in lieu of criminal prosecution. This is not the preferred method for closing a domestic violence case. When there is a civil compromise, the victim states to the court that she does not want the criminal action against her abuser pursued. If the judge rules that the compensation (usually a promise of no hitting in the future and a $1.00 renumeration for pain and suffering) offered by the abuser is adequate, the judge then dismisses the criminal case (not allowing the prosecutors to bring criminal charges) and rules favorably (approves) the terms of the (agreement) civil compromise..

The current method for handling these cases is for the prosecution to subpeona an expert witness, like myself, to testify. The expert testimony includes why the victim is unable to fully understand the implications of accepting this compromise. This involves testimony about the history of violence victim has been subjected to and/or the history of violence in this relationship, the level of blame the victim has internalized, the victimization pattern in this relationship, the probability of reoccurrence of the abuse, and the need for a public policy that includes the protection of the victim, children and the abuser from incurring future harm as a result of this progressively deteriorating behavior pattern. The reason for such extensive testimony is to establish grounds for an appeal should the judge grant the civil compromise.

As you can see handling these cases by establishing a record for appeal in each case is lengthy and costly. It is also quite difficult on the victim since she has to be in the court room to testify and explain in front of the abuser the reasons she has for believing that she will not be hurt again. Also, the experience gained in other jurisdictions is that the couple will be back in court later when the violence again erupts. Generally the violence is more traumatic to the victim and the alleged batterer the second time they have to appear in court.

It does not appear to be good public policy to wait for a repetition of harm before intervening. We changed the police procedure in Anchorage and in Alaska to not ignore the first call specifically because our experience had been that the violence generally does intensify over time. By having a judge rule that it is merely a "civil matter" between two "equal" parties, only reinforces that society condones domestic violence. It is also counterproductive to tell law enforcement personnel to respond to these calls and arrest whenever possible or at least take full reports, if on the other hand we legislatively allow a process that circumvents the criminal justice system.

By closing this loophole now we prevent this compromise to be utilized in settling child and elder abuse cases as well.

IDENTIFIED PROBLEM AREAS IN THIS BILL:

1. Absolutely no exclusion for dissolutions:
   There is absolutely no intermediary between the partners seeking a dissolution. Theoretically, the judge should not allow a dissolution that is the least bit slanted to favor an abuser if there is any history or hint of domestic violence. On the practical side, it is not always discernible that "joint custody" is a coerced arrangement if there is no paper trail of violence in the relationship.

2. No exclusion for divorces:
   Pending divorces (prior to the abuse) would continue to subject the victim to intimidation with threats of future violence if she doesn't agree to the conditions of divorce and a civil compromise. A problem already exist in divorces because the victim of domestic violence often agrees to many conditions that will later be found detrimental to the children, be an unjust property settlement, or unwanted even by the victim's partner once the power struggle of the divorce process is over.

   Ethical conduct for attorneys dictates that civil actions not be bargained against the threat or promise of criminal actions. To add an exclusion for a pending divorce case gives the appearance of one action being bargained against another. This could also raise some issues related to equal protection for persons in the process of divorces.

   If the existence of a pending criminal case does, in fact, delay the divorce proceeding, it is likely that the victim will not be penalized since the court can take judicial notice of the criminal case and save the victim's attorney the court time that would have been needed to present similar information for a contested divorce. It is also important that the court should be advised about the history of violence in its determination of child custody or visitation and the closing of case through civil compromise may not be drawn to the court's attention.

3. Inclusion of larcenously:
   In cases that involve the abuse of elderly individuals, a sizable percentage of the abuse is concurrent with the withholdin of monies belonging the the elderly person. To allow civil compromises in these cases of domestic violence would seriously hamper the intervention into elder abuse cases.

4. Civil compromise erroneously assumes individuals have equal power.
Individuals involved in domestic violence do not enjoy a coequal relationship. One of the unfortunate results of domestic violence is that one individual becomes a victim or at least a person who is intimidated, coerced, and frightened (and often physically and/or sexually assaulted) into behaving in a manner more acceptable to the partner. The typical threats to the victim includes: no one will believe her version of the truth, people will believe her partner, and if they do believe her then he will have to go to jail or in some other way have his life ruined. It is not surprising that when his attorney approaches the victim with a civil compromise to avoid the court process, many victims will gullibly believe their problems to be over. Alas, this of course is not true!

5. Civil compromise should only occur when both parties are represented by independent counsel:
This is one method for attempting to restore the two parties to equal power for negotiating purposes. With independent counsel, the victim's attorney would be able to instruct her about all the consequences to this action and the realities of the criminal case outcome.
Only allowing individuals who can afford independent counsel is of course unconstitutional since it penalizes individuals who cannot afford their own attorneys. This would place the state in a position of having to provide counsel through a public agency such as the Public Defender's office. This would carry quite a fiscal note since the offender would have little to lose by trying a compromise each misdemeanor prior to preparing a defense in the criminal charges.
Currently, it is the prosecutor who must take this role. This is confusing for the victim since her partner's attorney has generally explained that the role of the prosecutor is to take her partner to court. It is also an unacceptable cost since it forces the prosecutor's office to bear the burden of first convincing a judge that the case should not be compromised and later having to prepare the criminal case.

6. Why can't judges continue to use their discretion?
Unfortunately most judges do not have the time to verify the past or current existance of restraining orders, arrests, diversions, Suspended Imposition of Sentence, or convictions regarding domestic violence and the individuals requesting a civil compromise. It is quite possible for these actions to have occurred in another court's jurisdiction and for the paperwork to be unavailable.
This places the judge in a position to cross examine the victim and determine the degree of coercion and determine the probability of future violence while the victim must speak "honestly" in front of the abuser. I do not believe a judge will be more capable of accomplishing this than has anyone else. Counselors know that lethality assessments are not reliable when done with both members of the couple present at the interview.

It is interesting to note that at least one of the cases compromised in Fairbanks in November 1985 has resulted four additional assaults culminating in State v. Wharton (4FA-S87-313). Other cases in Fairbanks have also had reoffenses, some have been reported to law enforcement and some have not.

7. What really happens in a civil compromise:

From the perspective of the alleged offender: The charges have been filed by the prosecutor. After the alleged offender is unable to convince the prosecutor to drop the charges. He attempts to convince the victim that nothing else will happen and that it is in both their interest not to have him go to court. He then finds an attorney that will explain to the victim why it is in her best interest to not have pursue criminal charges. Once the judge agrees to the compromise, the alleged offender continues to maintain his promise to not assault or intimidate the victim.
The difficulty with his maintaining that promise is his lack of skills to understand his emotional needs, communicate his needs, recognize the stress involved in getting what he wants, and nonviolently handle his disappointments. He will "grit his teeth" and "put up" with disappointments or rejection for a while but eventually will blame someone, generally his partner, for "making too many demands [on him] and not giving enough [to him]". As a last resort, he forces his partner to do what he wants her to do or punish her for not doing the "right thing".

From the perspective of the attorney: The alleged offender has explained that the violence was minimal, accidental or at least unintentional, and that it will not happen again. The attorney then encourages the victim to give the alleged offender another chance. The general objective is to add as little tension to this couple's relationship as possible. The victim is asked to sign a prepared statement about her wish to settle this because she believes her partner will not repeat the behavior. Attorneys generally attempt to present the signed document without having to bring the victim into court. When judges require her presence to substantiate the written document, the attorney limits the questions to issues related to the believability of the partner's statement that this will not occur in the future. The emphasis is placed on the harmony the couple has enjoyed since agreeing on this compromise.

From the perspective of the victim: The victim has given interviews to the police and the prosecutor's office. Her partner's attorney now states that all of this can be forgotten if she just signs a statement that she does not want the criminal charges to continue against her partner. Her partner has generally not been violent since the arraignment on the criminal charges and may have begun counseling (substance abuse, anger management, pastoral, self help). There doesn't appear to be much reason to not give him one more chance.

From the perspective of the prosecutor: There was adequate grounds for a charge in this case. The victim wants to give her partner another chance and does not want anything on his record. The defendant's attorney contacts the prosecutor with information that she wants charges dismissed. After prosecutor refuses to dismiss charges, a motion is filed with a signed statement from the victim requesting dismissal of the charges based on the compromised reached between the defendant and the victim. Further investigation is ordered to determine the history of the relationship (restraining orders, arrests, police reports, child abuse reports, completion of counseling or other conditions on previous convictions or deferred prosecution cases, review of medical history of victim for unreported abuse incidents, etc.). A second interview with victim is scheduled to determine her level of understanding of the implications of her decision. If she still wants to have the civil compromise and the prosecutor believes there has been past violence or future violence is inevitable, the preparation for a trial is begun. Subpeonas are served for necessary witnesses and evidence. A trial date is requested and preparation is made to cross examine the victim about her ability to predict future violence. This preparation includes the need to bring out the level of victimization of the victim while not alienating her from seeking help from the criminal justice system in the future.
The expert witness is prepared to explain to the court the research available concerning the occurrence and reoccurrence of domestic violence, the characteristics of victims and offenders, the viability of an alleged offender voluntarily successfully completing treatment and positively changing his pattern of violence. Generally the trial is at least 3-4 hours .

From the perspective of the expert witness: Is this different from [redacted] times when victims called to drop charges when the criminal justice system believed domestic violence to be a private matter best settled by the two individuals without interference or monitoring by the court? Are the victim and her partner going to interpret the court's granting of a civil compromise as approval for this incident to reoccur since it carried no punishment or admonition? Is the alleged offender the type of person who will continue in counseling voluntarily and not drop out within a few months? Is the incident in this case a one time incident or a culmination of a pattern of psychological, sexual, and/or physical abuse? Do the individuals in the couple/family speak independently or is there an existing pattern of victimization that forces the victim to take responsibility for the alleged offender s needs and actions? What is the probability of the victim to assess danger in the relationship and call for assistance in the future? If there are children in the home, what effect has/ will this have on them? To what degree do other problems in the home impact the probability of future violence; e.g. substance abuse, mental illness, finances, family or social support, etc.?

From a public policy perspective: In the past six years, there has been a serious effort to change law enforcement and criminal justice response to domestic violence. Based on research that has been completed, there is good reason to believe that when domestic violence is made public the first few times it occurs, the individuals are less likely to continue in an escalating violence pattern.

It is not likely that the average battering partner will undergo and complete counseling voluntarily. The use of a fairly lengthy suspended jail term has been the most effective in screening and motivating individuals to utilize existing counseling or community/self help resources.

Arrest in domestic violence cases does not appear to be a sufficient deterrent. Arrest often needs to be combined with a realistic threat of jail or actual jail time, lengthy monitoring to ensure lack of reoffense, and rehabilitation of behaviors that culminate in abuse. The use of fines has not been as effective since it generally penalizes the victim and the children and not just the offender. The use of deferred prosecution also penalizes the victim by requiring her continued cooperation in testifying about her partner's behavior, leaving her open to further intimidation until the deferred time is over.

A victim of abuse who does not clearly hear from all resources that the abuse is not her fault and is not to be tolerated, will generally not leave the abusive relationship until the violence reaches the severity of risking her life or the lives of the children. By that time, the need for counseling for the entire family is so great that government will need to subsidize the majority of the cost (either through actual counseling services or support services such as welfare, medical payments, foster care, special education for the children, and/or jail)

Since the public policy goal in intervention in domestic violence cases is to stop the violence at its earliest discernible onset, the use of a civil compromise defeats this purpose. A civil compromise states clearly that the first time is not serious and should not be considered part of a pattern. This reinforces the partners to continue viewing the violence as a private concern that can best be handled in their own home. It reassures the alleged offender that his behavior is understandable and acceptable. It restates for the victim that "overreacted" since the judge now accepts a promise as a remedy for the harm done to her. It does nothing to stop the impression on the children that nothing will happen to you if you use violence in the home to get what you want.

It is unfortunate that by the time law enforcement and prosecutors have screened a domestic violence case, the event is not likely to be insignificant. The only advantage to this practice is that by the time the system does intervene, it is clear that the situation is out of the control of the individuals involved.

In order to restore the order, there is a current practice of offering "first time offenders" an alternative sentence of 60-90 days of suspended jail time, with perhaps a few to serve or credit for serving the day of the arrest, as long as he completes mandatory counseling or a court approved rehabilitation effort and has no similar violation for one year. This provides the offender with a method for changing his behavior with little negative impact from a criminal record. The victim has an opportunity to see if the violence will stop before she has to end the relationship. Each member of the family is made aware of the seriousness of the violence and where to receive counseling or self help support. If the victim wishes, the family remains intact as long as there is no reoccurrence of violence. There is a hold on the offender that is not dependent of the victim having to testify about the details of the original incident. Should rehabilitation not be successful and society needs to be protected from this offender, the suspended jail time can be reimposed.

This appears to be a successful method of intervening in the violence while still offering the individuals a chance to repair their lives/relationship with little present or future cost to the family and government.