HB

237

STATE OF ALASKA

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

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April 9, 1987

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

Dear Representatives Ellis and Koponen:

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

Following is my analysis of the bill.

A. SECOND DEGREE MURDER

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

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

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

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

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

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

B. FIRST DEGREE ASSAULT

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

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

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

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

C. REPEATED SEXUAL ABUSE OF A MINOR

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

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

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

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

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

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

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

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

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

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

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

D. PRIOR INCONSISTENT STATEMENTS AS SOLE EVIDENCE AT TRIAL

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

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

E. NONUNANIMOUS JURY VERDICTS

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

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

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

F. CHANGES TO EVIDENCE RULE 404

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

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

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

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

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

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

Very truly yours,

Dana Fabe
Public Defender

DF:rjb

The Fairbanks Child Sexual Abuse Task Force

1423 Peger Road
Fairbanks AK 99709

APR 29 1988

April 21, 1988

Senate Judiciary Committee Members:
Senators Kerttula, Sturgulewski, Josephson, Faiks and Rodey
Interior Delegation Members:
Representatives Boyer, Davis, Frank, Koponen, Miller, Shultz
Senators Coghill, Fahrenkamp, and Fanning
P.O. Box V
Juneau, AK 99811

Re: House Bill 237

Dear Legislators,

We are writing on behalf of the Fairbanks Child Sexual Abuse Task Force, a coalition of agencies, organizations and associations involved in prevention and treatment of child sexual abuse.

The CSATF wants to express its support for the current version of HB 237, the "omnibus" child sexual abuse bill. It appears to us that a great deal of effort has gone into formulating and revising this bill, which strikes an appropriate balance between the rights of criminal defendants and the need for our society to protect itself and its children from child sexual abuse.

We would urge that the bill be enacted into law. Thank you for your consideration.

Sincerely,

Theresa Tanoury
Coordinator

Ruth Lister
Chair

Chair
V. Chair-Judiciary
Telecommunications
Special Ethics
Legislative Council
Finance Subcommittee
for the University of Alaska
Joint Committee
on Economic Recovery

P.O. Box V
Juneau, Alaska 99811
(907) 465-4947

REPRESENTATIVE FRAN ULMER

M E M O R A N D U M

APR 15 1988

April 15, 1988

TO: Senator Jalmar Kerttula, Chair
Senate Judiciary Committee

FROM: Representative Fran 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

I respectfully request a hearing on House Bill 237. As you know, HB 237 was heard in Senate HESS and is now in your committee.

HB 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.

HB 237 tightens the prosecution for 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.

I have attached a copy of a letter from the Child Advocacy Network in support of House Bill 237, as well as a page from the Child Sexual Abuse Working Group Report regarding this bill.

Thank you for your prompt consideration of this request.

Attachments

Child Advocacy Network

c/o MOA, Abuse Prevention Unit, P.O. Box 196650, Anchorage, AK 99519-6650

343-6533

April 11, 1988

Senate Health and Social Services Committee
P.O. Box V
Juneau, Alaska 99811

RE: Letter of Support for HB 237

Dear Senator Paul Fischer, Chairman;
Senator Joe Josephson, Vice-Chairman;
Senator Lloyd Jones,
Senator Jay Kerttula,
Senator Rick Halford:

The Child Advocacy Network is an organization whose primary interest is the care and welfare of children in the state. As professionals who work with children, we would like to share our knowledge and expertise. Our opinions on selected legislation, relating to children, are in the enclosed pamphlet.

Although our position for support on HB 237 is included in this pamphlet, its pending status in the Senate HESS Committee has prompted this letter. The bill proposes amendments to criminal law and Rules of Procedure and Evidence. If passed, the bill would enhance existing child protection laws and lessen the prospect of child victimization in the courtroom.

We support HB 237 and urge its passage from your Committee. Our specific comments on the merits of HB 237 are outlined in the pamphlet. Your consideration in reading over these comments would be greatly appreciated. Call upon us to answer questions or concerns related to our position.

Sincerely,

Elizabeth Kennedy
President
Child Advocacy Network

Enclosure

EK/sjj

V. LEGISLATIVE ISSUES

The Child Sexual Abuse Working Group discussed proposed legislation and areas needing legislative change. While concluding that it would not be appropriate to comment on all proposed legislation affecting child sexual abuse, the group felt that it was important to mention two pieces of pending legislation.

HB 237 is the most important piece of legislation proposed in 1988 to protect child victims. This bill, as revised by House Judiciary, should be actively supported.

HB 405, introduced at the request of the Governor, is very important, particularly its provisions to allow for victim input before modification of sentences and clemency decisions.

Other needed legislation includes:

(1) Mandating personal safety curricula in schools.

(2) Allowing an advocate, relative or friend to accompany a child witness in grand jury proceedings. This procedure should be automatic for all children 13 years old or younger. This could also be accomplished through change of court rules.

(3) Increasing the maximum period of probation that may be imposed on child sexual abuse offenders to seven years.

#B 237

MEMORANDUM State of Alaska

TO: Rep. Fran Ulmer
State Capitol
Juneau

DATE: 15 April 1988

FILE NO: APR 1 1 1988

TELEPHONE NO:

THRU: Larry R. Weeks
Dir. of Criminal Prosecutions
CDCO - Juneau

SUBJECT: Update to My Memo of April 12th ref: Burden of Proving Othe Crimes under Evidence Rule 404(b)

FROM: David Mannheimer
Asst. Attorney General
OSPA - Anchorage

The United States Supreme Court recently heard oral argument in Huddleston v United States, a case which presents the question of what level of proof must be adduced to support the admission of evidence that a criminal defendant committed another crime under Federal Evidence Rule 404(b). I have attached the Criminal Law Reporter's summary of that argument.

As you can see, the defendant conceded -- on the basis of Bourjaily v United States, ___ U.S. ___, 107 S.Ct. 2775 at 2778-2779 (1987) -- that the proper burden of proof was "preponderance of the evidence", even though several circuit courts of appeal had previously ruled that the burden was "clear and convincing evidence". The government took the position described in my previous memo as "theory (1)" -- that admissibility of this evidence is governed by Evidence Rule 104(b), and that the other crime evid e should be admitted whenever there is sufficient evid support a reasonable inference that the defendant C e other crime.

Caldwell claim is barred because of failure to exhaust, procedural default or otherwise."

The standard under which we consider motions to vacate stays of execution is deferential, and properly so. Only when the lower Courts have clearly abused their discretion in granting a stay should we take the extraordinary step of overturning such a decision. In the present case, however, there is no evident legal basis whatsoever for a stay. The State has presented an apparently meritorious argument that Johnson's attempt to raise a Caldwell claim at this time is an abuse of the writ, and Johnson's suggestion that his previous abandonment of the claim was a "concession of defeat on the merits," rather than a "conscious abandonment" seems altogether specious. If the District Court refused to consider the State's apparently meritorious argument, that was certainly an abuse of discretion. If the District Court considered the argument but deemed it too insubstantial to require any comment, that too must be considered an abuse of discretion unless and until we are informed of reasons that would justify the implicit rejection of the State's position. The Eleventh Circuit articulated no such reasons, and in fact appeared to indicate that it knew of none.

The Eleventh Circuit seems to have thought that the proper course was to leave the stay in effect, but to indicate that the State was free to return to the District Court and repeat the argument it had sought to present earlier. I disagree. When a stay of execution has been granted without an apparent legal basis, and the Court of Appeals cannot articulate a reason for leaving the stay in effect, the proper course is to vacate the stay. Because neither the District Court nor the Court of Appeals has articulated an adequate legal basis for entering a stay in this case, I would grant the State's application to vacate. Johnson would, of course, remain free to return to the District Court and seek a stay based on adequate legal grounds, if there are any.

The majority of this Court has previously expressed its disapproval of the litigation tactics that seem to have been employed in this case:

> "This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ." Woodward v. Hutchins, 464 U.S. 377, 377-378 (1984) (Powell, J., joined by Burger, C.J., and Blackmun, Rehnquist, and O'Connor, JJ., concurring).

While the details of this case are somewhat different, we are faced once again with a last-minute effort to obtain a stay of execution on the basis of a claim that appears to be procedurally barred. Allowing this stay to remain in effect creates incentives that will almost surely lead to similar problems in the future:

> "If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, Barefoot v. Estelle's statement that stays of execution are not automatic in capital cases, 463 U.S., at 895, would effectively be overruled." Wainwright v. Booker, 473 U.S. 935, 936, n.3 (1985) (Powell, J., concurring).

Accordingly, I respectfully dissent from the Court's denial of the State's application in this case.

ARGUMENTS HEARD

SIMILAR ACTS EVIDENCE — STANDARD OF PROOF

Huddleston v. U.S., No. 87-6; argued 3/23/88.

The Supreme Court heard oral arguments recently concerning the standard of proof governing the admissibility of evidence of prior bad acts. Defense counsel, forced by an intervening decision to scale down the claim he made in his certiorari petition and brief, argued that such evidence is admissible only when the government demonstrates by a preponderance of the evidence that the defendant committed the act. The government contended it is admissible as long as there is a basis for finding that the defendant committed the act. The government views similar acts evidence as no different from other evidence, whereas the defendant argues that because the degree of prejudice is comparable to that of a confession, the same standard and procedure should apply to its admissibility.

At the defendant's trial for possessing and selling stolen blank videotapes, the government moved in limine to introduce evidence of both prior and subsequent similar acts. The prior act evidence showed that, a month before the tape sales, the defendant sold 40 12-inch black and white television sets to a particular witness for $28 each. Defense counsel told the trial court that the defense would consist of claiming lack of knowledge that the tapes were stolen, whereupon the court ruled that the evidence concerning the television sets was relevant and therefore admissible. After two days of deliberations, the jury convicted the defendant of possessing 500 stolen tapes over a three-day time span but acquitted him of selling 4,000 tapes on an earlier date.

The U.S. Court of Appeals for the Sixth Circuit, reasoning that the evidence concerning the television sets failed to meet the "clear and convincing" standard and that the erroneous admission of the evidence was not harmless, reversed the conviction, 802 F2d 874 (1986). But on rehearing it vacated its earlier ruling and reinstated the conviction, this time deciding that the preponderance standard applied and holding that the government had met that standard, 40 CrL 2450 (1986).

PREPONDERANCE STANDARD APPLIES

Don Ferris, of Ann Arbor, Mich., counsel for the defendant, told the justices that the Seventh, Eighth, Ninth, and D.C. Circuits have adopted the "clear and convincing" standard, whereas six others have adopted the "preponderance of the evidence" standard. Counsel's brief asked the court to use the higher standard, but at oral argument he said that the preponderance test is the correct one. For this position he cited Fed.R.Ev. 104(a) and (b), and also *Bourjaily v. U.S.*, 41 CrL 3351 (US SupCt 1987), which held that the preponderance test applies in determining, for purposes of the coconspirator exception to the hearsay rule, whether the conspiracy exists and whether the nonoffering party was involved in it. This concession did not leave defense counsel and the government in agreement, however, for the government would have the court admit prior bad acts evidence when there is a basis for finding that the defendant did the act. There is no basis for this standard, Ferris maintained.

Chief Justice William H. Rehnquist said there was common-law support for the government's argument.

"Rules 104(a) and (b) stand as a sentinel," Ferris continued; 104(a) says that preliminary questions on

admissibility of evidence are to be decided by the court subject to (b), and (b) deals with conditional relevancy.

Rehnquist said Rule 104 doesn't even deal with the standard of proof, but Ferris said the Sixth Circuit held that it does.

The language of the rule doesn't require a preponderance, Justice Antonin Scalia said; it supports the government's standard—"sufficient to support a finding."

But Ferris characterized other crimes evidence as "fraught with prejudice" and "evidence that has always been disfavored." "Unless there is a 51% certainty that it occurred, it shouldn't go to the jury," he contended.

You're saying it's the same as a confession where the judge decides whether it's voluntary before letting the jury hear it, Justice Anthony M. Kennedy observed. He sought to clarify whether counsel arrived at this conclusion from the nature of the evidence or the rule.

Ferris responded that Professor Charles Alan Wright gets it from Rule 104(a) and (b), read as a whole, but Rehnquist again said it wasn't there. Other circuits also equate the rule with the preponderance standard, Ferris added.

I thought you argued for a clear and convincing standard, Justice Sandra Day O'Connor told counsel. Your argument is so different from what we thought we were to decide here.

Counsel explained that his petition for certiorari was in the mail when *Bourjaily* was decided.

O'Connor noted that the Sixth Circuit applied the preponderance test, which counsel asserts is the correct standard. But Ferris reminded her that he was also arguing that the standard was not applied correctly. He explained that he was continuing to argue concerning the standard of proof because the government is arguing for a more lenient standard.

Doesn't Rule 403 require the court to determine whether the probative value outweighs the prejudicial effect? O'Connor asked. You didn't raise the improper application of Rule 403 in your petition, she pointed out. Should the strength of the evidence be considered by the court in its Rule 403 balancing? she wanted to know.

Ferris indicated that the balancing shouldn't occur until after the court has decided whether the evidence meets the preponderance standard.

Justice John Paul Stevens turned the questioning to the evidence at the issue in the case—the television sets. Ferris said the only thing the government knew about the television sets was that they were sold for $28 from a store owned by a lawyer. It knew nothing about their origin.

Ferris estimated that the question in this case comes up in only about 20% of other acts cases because the government can usually satisfy the preponderance test.

HARMLESS ERROR STANDARD

Turning to the question of what harmless error standard applies to the erroneous admission of similar acts evidence, Ferris conceded that the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967)—harmless beyond a reasonable doubt—has been applied only to constitutional error. He noted that the Sixth Circuit applied both the Chapman standard and a plain error standard. His position, he said, is that the plain error standard applies; that is, the test set forth in *Kotteakos v. U.S.*, 328 U.S. 750 (1946)—whether the error affected substantial rights. The defendant's case was close as evidenced by his acquittal for the earlier sale of tapes and the fact that the jury was out two days, Ferris reminded the court.

ADMISSIBLE IF RELEVANT

William C. Bryson, Deputy Solicitor General, characterized the government's argument as "simple." Rule 404(b) does only one thing, he said: prohibit the admission of similar acts to show propensity. Once the judge decides that the evidence doesn't show propensity, it becomes like any other evidence and is admissible if it is relevant (Rule 401) and not too prejudicial (Rule 403).

Does the strength of the evidence have to be considered in the Rule 403 balancing? O'Connor repeated.

Yes, Bryson answered.

Might the court have had trouble with the balancing question given the slender nature of the evidence in this case? O'Connor asked. When Bryson responded that there was enough evidence, O'Connor asked him to "run through that with us."

Bryson said the initial contact concerning the sale of television sets was made in a bar; the defendant announced he had a "truckload"; his asking price of $28 and the price he had paid, about $13-$16 per set, were extremely low; and in other instances in which the defendant was dealing with the same people, he admitted to an FBI agent that the goods were "hot."

You say that if the evidence is relevant it comes in without any other finding by the judge, Justice Byron R. White observed. Then you have no business arguing sufficiency of the evidence, he told counsel.

The judge may have to make a finding under Rule 104(b) if there is conditional relevance, Bryson responded.

But Rehnquist asserted that "that's not what the rule means at all. Judges don't make findings of fact as the trial goes along under Rule 104(b); 104(b) covers the situation when an attorney wants to excuse a witness and asks a question not yet connected up. Rule 104(b) simply articulates a basic principle of relevancy."

Bryson attempted to clarify his answer. The judge doesn't make a finding of fact; rather, the judge looks at the evidence and decides, as he or she does with every piece of evidence, whether the jury *could* find the television sets were stolen, he said.

Why are they relevant even if they're not stolen? Stevens inquired.

They show that he's much more involved than he claimed, Bryson explained. The jury could infer that his defense didn't wash. Bryson said he thinks this is so powerful an inference that the second theory of relevancy propounded by the government—that there was sufficient evidence for a jury to find they were stolen—is not necessary.

Bryson submitted that there are two types of preponderance test. In one, the judge has to find a preponderance before the evidence is admitted; in the other, the

judge admits the evidence on the ground that a jury could find by a preponderance that it is true.

Bryson maintained that the issue is purely a question of relevancy; accordingly, Rule 104(b), not 104(a), applies. He said only the Seventh Circuit has adopted the defendant's view that 104(a) applies, and this view rests on the assumption that the clear and convincing test applies.

REBUTTAL

Ferris said the government admits that Rule 104(b) comes into play. Although he continued to maintain that 104(a) applies, he noted that six circuits have said that 104(b) means a preponderance standard must be met. Ferris reiterated that it is the judge who must first find a preponderance because of the prejudicial nature of the evidence.

SUMMARIES OF DOCKETED CASES

87-1363 KELLY v. WILKINSON

Search and seizure — Frisks of persons attending public meetings.

Ruling below (*Wilkinson v. Forst*, CA 2, 832 F2d 1330, 42 CrL 2162 (1987)):

Indiscriminate weapon frisks of attendees at Ku Klux Klan rallies, conducted without individualized suspicion under auspices of injunctions banning carrying of weapons, were impermissible; police may frisk attendee only if less intrusive magnetometer search first detects presence of metal and situation cannot be resolved by other means, such as attendee's departure from site.

Question presented: Are pat-down searches for weapons conducted on all persons entering public forum reasonable under Fourth Amendment where searches (1) are authorized by neutral and detached magistrate, (2) have public safety and non-investigatory purpose, (3) afford subject opportunity to decline to enter area, (4) are supported by evidence establishing substantial likelihood that persons in attendance will be armed and dangerous, and (5) protect exercise of First Amendment rights?

Petition for certiorari filed 2/8/88, by John M. Massameno, Senior App. Atty., Office of Chief State's Atty. for Wallingford, Conn.

87-1373 BOWERS v. U.S.

Electronic surveillance — Application for wiretaps — Bias of judge.

Ruling below (CA 6, 9/17/87):

Claims that judge who authorized wiretap of defendant's telephone lacked required neutrality and detachment because of his supervision, as result of civil litigation, of municipal department with whom defendant contracted were properly rejected, in view of facts that judge had neither pecuniary interest in operation of department nor links to prosecution that would constitute "prosecutorial involvement," that authorization of wiretaps predated his involvement in department's affairs, and that ample evidence of probable cause for wiretap existed.

Question presented: Can federal district judge who, through supervision of pending litigation, has in effect been serving as "receiver" of municipal department and has become intimately involved through that supervision in department's affairs, serve as neutral and detached magistrate required by Fourth Amendment when wiretap applications seeking to investigate allegations of corruption within that department are presented to him?

Petition for certiorari filed 1/29/88, by N.C. Deday LaRene and Kenneth M. Mogill, both of Detroit, Mich.

87-1403 FREEMAN v. GEORGIA

Double jeopardy — Due process — Theft — Violation of oath of office — Sufficiency of evidence.

Ruling below (Ga CtApp, 10/16/87):

Although prosecution for violation of oath by public officer and theft by taking may involve overlapping proof, in that violation of oath may be proven by taking of funds belonging to county, essential elements for each offense are nonetheless different, since former requires state to prove that public officer violated oath by taking more than lawful fees, whereas latter requires proof that defendant unlawfully appropriated county funds with intent to deprive county of said funds; evidence showing that amounts equal to payments from certain sources were diverted from county and that defendant, as sheriff, received and was responsible for all checks delivered to his department was sufficient proof of corpus delicti, which does not require that stolen property be recovered; state provided sufficient evidence from which jury could infer defendant's intent.

Questions presented: (1) Do defendant's convictions and cumulative punishments for violation of oath of office and multiple theft by taking violate double jeopardy and due process guarantees of Fifth Amendment as interpreted in *Blockburger v. U.S.*, 284 U.S. 296 (1931), and its progeny? (2) Did prosecution for crimes in which neither corpus delicti nor intent was proved, looking at facts in light most favorable to state, violate Due Process Clause?

Petition for certiorari filed 2/13/88, by Virgil L. Brown, of Zebulon, Ga., Bentley C. Adams III, of Thomaston, Ga., and Tamara Jacobs, of Barnesville, Ga.

87-1405 GONZALES v. LEAL

Civil rights action — Police officers — Arrest — Standard of conduct.

Ruling below (CA 5, 10/7/87, unpublished):

Evidence supports findings of trial judge in 42 USC 1983 action, arising from injuries plaintiff received while resisting being handcuffed by arresting police officer, that, under analysis set forth in *Schillingford v. Holmes*, 634 F2d 263 (CA 5 1981), force used by officer was necessary and plaintiff failed to prove that officer acted with malice or used grossly disproportionate force.

Question presented: What standard of conduct is applied under 42 USC 1983 to arresting officer to determine whether arrestee has suffered violation of his constitutional rights?

Petition for certiorari filed 1/1/88, by James A. Kosub, of San Antonio, Texas.

87-1410 BANKS v. MISSISSIPPI

Other crimes evidence — Prejudice — Effective assistance of counsel.

Ruling below (Miss SupCt, 12/16/87, unpublished):

Record supporting defendant's conviction of aggravated assault reveals no error, and conviction is affirmed.

Questions presented: (1) Did trial court violate Fifth, Sixth and Fourteenth Amendments by admitting evidence of other crimes for which defendant had not been convicted, evidence to which defense counsel was not given prior access, and statement that was highly prejudicial and inflammatory? (2) Did defendant receive effective assistance of counsel at trial and appellate levels?

Petition for certiorari filed 2/22/88, by Samuel H. Wilkins, of Jackson, Miss.

87-1412 DAVIDSON v. ILLINOIS

Double jeopardy — State's midtrial appeal of evidentiary rulings — Court rules.

Ruling below (Ill AppCt, 5thDist, 9/9/87):

Defendant's contention that Illinois Supreme Court Rule 604(a)(1), which allows state to appeal order or judgment

0011-1341/88/$00.50

ANCHORAGE TASK FORCE ON SEXUAL ASSAULT
LEGISLATIVE COMMITTEE

c/o S.T.A.R., 3925 Reka Dr., Anchorage, AK 99508 (907) 276-7279

April 25, 1988

Senate
Judiciary Committee
P.O. Box V
Juneau, AK 99811

RE: Letter of support for HB 237

Dear Senator Jay Kerttula, Chairman;
Senator Arliss Sturguleweski, Vice-chairwoman;
Senator Joe Josephson;
Senator Rick Halford;
Senator Pat Rodey:

The Anchorage Task Force on Sexual Assault (ATFSA) is comprised of thirty individuals from the State Departments' of Law, Health and Social Services, and Corrrections, the Anchorage Police Department, Association of Stranded Rural Alaskans in Anchorage, Standing Together Against Rape (STAR), local hospitals, private mental health institutions, and concerned professionals. The purpose of the ATFSA is to heighten community awareness, enhance inter-agency communication and cooperation, identify resources for victims, and advocate for policies affecting sexual assault victims and their families.

The ATFSA legislative committee strongly supports HB 237 and urges the expeditious passage of the bill from Committee. The bill addresses flaws in our statutory fabric which fails to apprehend the needs of child sexual assault victims in the criminal justice system.

For instance, present law for sexual abuse of a minor, under AS 11.41.434 and AS 11.41.436, is based on the traditional family structure---adults and children living together who have a blood or custodial relationship. However, increasing reports of child sexual abuse by adults living in the home, who have no legal relationship, necessitates a change in the law. Section 2 and 3 of the bill proposes the change by definitively including, in sexual abuse of a minor in the first and second degree, non-legally related adults who live in the home and who have authority over the child.

Section 5 and 6 of the bill clarifies the terms for consecutive sentencing for felonious sexual assault offenses. This provision is clearly in stride with the state's existing strong sanctions against sexual assault of children and adults.

Section 7 is of the utmost importance in considering past assaults against a child by the defendant. Because children are not always able to remember specific times, dates, and places of reoccurring abuse, the opportunity to allow evidence indicating prior instances, without specifics, allows for a more equitable balance in child abuse cases. This is particularly true in cases where the trauma of the assault inhibits a clear recollection (i.e.,time and date), but where the assault is associated with a holiday, birthday, or other important event in the child's life. And the ability to recall abusive episodes, under this allowance, would be more age appropriate. The evidence would also have to be clear and convincing, if allowed under the aggravating factors.

Sections 8 and 9 of the bill are also of extreme importance. Section 8 allows for trial cases to be joined together whenever appropriate. This would avoid the revictimization of children involved in testifying in more than one trial to recant the same assault. Section 9 allows the admissibility of past similar conduct of a defendant in cases involving physical or sexual assault or abuse of a minor. Research indicates some sexual assault crimes correlate with behavior patterns which are prone to repeated behaviors. Child sexual abuse cases are among the most well documented of this type of repeated behavior.

In entirety HB 237 is one of the most comprehensive legislative documents filed this session which would effect sensitive and fair laws for those injured through sexual assault and child physical and sexual abuse. The ATFSA legislative committee forwards its highest regards for the documents well aimed objectives. We urge the Committee to give this bill its deserved passage. And we commend you in advance for taking this action.

Sincerely,

Richard Brodsky, M.D.
Co-Chair
ATFSA Legislative Committee

HB 235

MEMORANDUM State of Alaska

TO: Rep. Fran Ulmer
State Capitol
Juneau

DATE: 12 April 1988

FILE NO:

TELEPHONE NO:

THRU: Larry R. Weeks
Dir. of Criminal Prosecutions
CDCO - Juneau

SUBJECT: Burden of Proving Other Crimes under Evidence Rule 404(b)

FROM: David Mannheimer
Asst. Attorney General
OSPA - Anchorage

You have asked whether Alaska law defines the level of proof that must be adduced to support the admission of evidence under Evidence Rule 404(b) that a criminal defendant committed another crime. To my knowledge, the Alaska appellate courts have never defined that burden of proof.

Wigmore on Evidence (Chadbourn rev'n, 1979), Vol. III, § 307, n.5 on page 264, as supplemented in the 1987 pocket part, and McCormick on Evidence (3rd ed.), § 190, n.46 on page 564, as supplemented in the 1987 pocket part, list cases that have adopted three different tests:

> (1) Some courts view the matter as governed by Evidence Rule 104(b): "When the relevancy of evidence depends upon the fulfillment of a condition of fact [here, the fact that the defendant committed the other crime], the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Under this view, the trial judge's only role is to determine whether there is sufficient evidence to support a reasonable inference that the defendant committed the other crime. If so, then the evidence is admitted for whatever weight the jury decides to give it.
>
> (2) Other courts take the view that the question is to be decided by the trial judge under Evidence Rule 104(a): "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court, subject to the provisions of [Rule 104](b)." That is, the proponent of the evidence must convince the trial judge that the defendant committed the crime before the evidence is given to the jury. Of these courts, some hold that

(a) the defendant's commission of the other crime must be proved by a preponderance of the evidence (in plain English, "more likely than not");

while others hold that

(b) the defendant's commission of the other crime must be proved by "clear and convincing" evidence -- which is a higher standard of proof than "preponderance of the evidence", but less exacting than proof "beyond a reasonable doubt".

No court requires proof beyond a reasonable doubt; this burden of proof is reserved for the elements of the crime actually charged against the defendant in the indictment or complaint. Some courts use a combination of 2(a) and 2(b): they apply the higher "clear and convincing evidence" burden of proof when the evidence of the other crime is being admitted to prove identity, or intent, or motive, while using the lower "preponderance of the evidence" burden of proof when the evidence of the other crime is being admitted for other purposes.

Prof. Stephen Saltzburg was the consultant employed by the Alaska supreme court when the court revised the Alaska Rules of Evidence. In his text, Federal Rules of Evidence Manual (4th ed.), at page 185, Prof. Saltzburg states that the admissibility of other crimes evidence should be dealt with under the first test discussed above -- that the evidence should be admitted if a reasonable person could be convinced that the defendant committed the other crime. Prof. Saltzburg notes that the jury, not the trial judge, is the body generally entrusted with resolving questions regarding the credibility of witnesses and the weight to be given to evidence. Since a test such as "clear and convincing evidence", or "preponderance of the evidence", clearly requires someone to reach conclusions about credibility and weight, that someone should be the jury, Prof. Saltzburg argues. Thus, if the trial judge is convinced that a reasonable fact-finder could conclude that the defendant had committed the other crime, then the evidence should be admitted at trial.