

SB

475

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 30, 1990

FURTHER REFERRALS:

Date of Committee Action: 4/29/90

The JUDICIARY Committee considered:

SB 475

SENATE BILL NO. 475

PAYMENT OF COURT COSTS/ATTY FEES

"An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

RECOMMENDATIONS:

- be replaced with HCS SB 475 (Judiciary) the same title a new title
- have attached amendment(s)
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- fiscal impact _____
- zero fiscal note _____
- zero with analysis _____

- fiscal note(s) DoA Pub Def. 2/22/90
- zero fiscal note(s) CV System 3/2/90
- zero fn/analysis _____

SIGNING DO PASS:

Max F. Hunt

Larry Martin

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
<i>Peter Jones</i>	<input checked="" type="checkbox"/>		
<i>Mike Dennis</i>	<input checked="" type="checkbox"/>		
<i>Ellis</i>	<input checked="" type="checkbox"/>		

Max F. Hunt / *Peter Jones*

 Chairman's Signature

Original sponsor(s): SEN. FAIKS

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR SENATE BILL NO. 475 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to payment of legal services and
7 related costs by indigent persons using the services
8 of the Public Defender Agency, the office of public
9 advocacy, and court-appointed counsel."

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

11 * Section 1. AS 18.85.120(c) is repealed and reenacted to read:

12 (c) Upon the person's conviction, the court may enter a judgment
13 that a person for whom counsel is appointed pay for the necessary ser-
14 vices and facilities of representation and court costs, but execution
15 of the judgment may not commence until three years after release of
16 the defendant from incarceration unless for good cause shown, the
17 court considers it appropriate to execute earlier. Upon a showing of
18 financial hardship, the court shall allow a person subject to a judg-
19 ment entered under this subsection to make payments under a payment
20 schedule. Payments made under this subsection shall be paid into the
21 state general fund.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to payment of legal services by indigent persons . . ."
 Sponsor: Senator Faiks
 Requestor: Senate Judiciary

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary) FY90 impact is zero.

This bill represents a positive emphasis on mitigating the public cost for an increasingly expensive criminal justice system. There is no fiscal impact on the Public Defender system, nor does the executive branch keep data which would enable a prediction of revenue.

Prepared by: John B. Salemi, Public Defender Phone: 279-7541
 Division: Public Defender Agency Date: 2/21/90
 Approved by Commissioner: Frank S. Baxter Date: 2/22/90
 Agency: Department of Administration

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept. of Administration
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 Sponsor: Senator Faiks Components: Third Judicial District
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FJNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary) FY90 impact is zero.

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 Division: Public Defender Agency Date: 2/21/90
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 Agency: Department of Administration

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected:	Alaska Court System
Title: <u>An Act relating to payment of legal services and related costs...</u>	BRU:	<u>Trial Courts</u>
Sponsor: <u>Falks</u>	Components:	
Requestor:		

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
 Division: Alaska Court System
 Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

File #: 284-8228
 Date: 02/21/90
 Date: 02/21/90

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

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected:	<u>Alaska Court System</u>
Title: <u>An Act relating to payment of legal services and related costs...</u>	BRU:	<u>Trial Courts</u>
Sponsor: <u>Falks</u>	Components:	
Requestor:		

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Transp. & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
 Division: Alaska Court System
 Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

Phone: 284-3228
 Date: 02/21/90
 Date: 02/21/90

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



ALASKA CHAPTER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS

8923 Tanis Drive
Juneau, Alaska 99801
(907) 789-7099

Executive Director
William Diebels, ACSW

April 25, 1990

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The Honorable Max Gruenberg, Co-Chair
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Gruenberg,

The Alaska Chapter of the National Association of Social Workers strongly supports the House HESS CS SB 450. We believe that this bill, in its current version, will help protect Alaskan children by clarifying and strengthening the requirements for reporting the maltreatment of children.

The National Association of Social Workers represents more than 300 professional social workers throughout the state. Our statewide Social Action Committee voted unanimously to support this bill.

We urge you to support House HESS CS SB 450 soon to ensure its passage. Thank you for your time.

Sincerely,

Theresa Tanoury, LCSW
Chair, Social Action Committee

Teratology

BIAS AGAINST THE NULL HYPOTHESIS: THE REPRODUCTIVE HAZARDS OF COCAINE

GIDEON KOREN
HEATHER SHEAR

KAREN GRAHAM
TOM EINARSON

Motherisk Programme, Department of Pediatrics, Division of Clinical Pharmacology; Research Institute and Faculty of Pharmacy; and Departments of Pediatrics and Pharmacology, University of Toronto, Toronto, Ontario, Canada

Summary To examine whether studies showing no adverse effects of cocaine in pregnancy have a different likelihood of being accepted for presentation by a large scientific meeting, all abstracts submitted to the Society of Pediatric Research between 1980 and 1989 were analysed. There were 58 abstracts on fetal outcome after gestational exposure to cocaine. Of the 9 negative abstracts (showing no adverse effect) only 1 (11%) was accepted, whereas 28 of the 49 positive abstracts were accepted (57%). This difference was significant. Negative studies tended to verify cocaine use more often and to have more cocaine and control cases. Of the 8 rejected negative studies and the 21 rejected positive studies, significantly more negative studies verified cocaine use, and predominantly reported cocaine use rather than use of other drugs. This bias against the null hypothesis may lead to distorted estimation of the teratogenic risk of cocaine and thus cause women to terminate their pregnancy unjustifiably.

INTRODUCTION

IN biomedical research it can be hard to publish negative results in peer reviewed journals. Although such studies may be perceived as "not news", how can we quantify this impression when the data languish unpublished? Under-reporting of safe use of drugs and chemicals in pregnancy may be detrimental. Pregnant women exposed to non-teratogens perceive their teratogenic risk to be in the range of 25%, which is similar to that of thalidomide.¹ After the Chernobyl disaster it was estimated that half of the pregnant women in Greece terminated their pregnancy due to erroneous perception of teratogenic risk.²

TABLE 1—FETAL OUTCOME MEASUREMENTS*

Outcome measurement	No of studies	Outcome measurement	No of studies
Birth weight and/or length	24	Necrotising enterocolitis	3
Gestational age	20	Apgar score	3
Head circumference	11	Cardiovascular changes	2
Malformations	9	Auditory response	2
Intracranial haemorrhage	8	Spontaneous abortions	2
Neonatal neurobehavioural examination	6	Pneumogram pattern	2
SIDS	6	Apnoea	2
Neurological abnormalities	5	Sepsis	2
Bayley scale of infants development	3	Death	2
		Obstetric complications	2

*A study could report on more than one variable.

Placental haemorrhage, fetal breathing, neonatal withdrawal, eye vascularity, caesarean section, meconium staining, central-nervous-system structural damage, urinary tract infection, increased cerebral blood flow, pneumothorax, and hyaline membrane disease—1 each.

SIDS = sudden infant death syndrome.

Because young fecund adults are the greatest recreational users of cocaine, the drug's hazards to the fetus are of concern. The extent and potential severity of such adverse effects are controversial. Intrauterine growth retardation,^{3,4} abruptio placenta,^{5,6} prematurity,^{7,8} sudden infant death syndrome,⁹ and neonatal behavioural abnormalities^{9,10} have been reported. Interpretation of these results is hampered by clustering of other risk factors in pregnant women who use cocaine, such as use of other drugs of abuse, cigarettes, and alcohol and socioeconomic status.

When counselling pregnant women who have used cocaine we often reveal an unrealistically high perception of teratogenic risk, which often leads to requests for termination. Whilst many of our patients "know" that cocaine use is a serious risk to pregnancy, they are not aware of the controversy and of the many negative reports. We have investigated whether studies showing no adverse effects of cocaine in pregnancy have a different likelihood of being reported by a large scientific organisation than do studies showing adverse effects.

METHODS

All abstracts submitted to the annual meeting of the Society for Pediatric Research are published in the April issue of *Pediatric Research*. Unaccepted abstracts are also published, with those selected for presentation marked with a symbol. We identified all abstracts on cocaine in pregnancy submitted to the meeting between

T. CALANDRA AND OTHERS: REFERENCES—continued

- Klein JJ, Watanakunakorn C. Hospital-acquired fungemia: its natural course and clinical significance. *Am J Med* 1979; 67: 51-58.
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- Case records of the Massachusetts General Hospital (Case 20-1984). *N Engl J Med* 1984; 310: 1310-19.
- Rutledge R, Mandel SR, Wild RE. *Candida* species: insignificant contaminant or pathogenic species. *Am Surg* 1986; 52: 299-302.

TABLE II—ABSTRACTS ON FETAL OUTCOME AFTER COCAINE EXPOSURE IN PREGNANCY

Fetal outcome	Accepted	Not accepted	Totals
Adverse	28	21	49
Not adverse	1	8	9
Total	29	29	58

TABLE III—COMPARISON OF ABSTRACTS SHOWING ADVERSE OUTCOME WITH THOSE SHOWING NO ADVERSE OUTCOME

	Adverse (n = 49)	Non-adverse (n = 9)
<i>Cocaine users</i>		
Predominantly cocaine use	42 (86%)	9 (100%)
Verification of cocaine use	19 (39%)	6 (67%)
Sample size	105.5 (288.8)*	199.2 (184.7)
<i>Controls</i>		
Used controls	39 (80%)	8 (89%)
Matched for variables	17 (35%)	2 (22%)
Sample size	91.1 (198.4)	1767.6 (3622.9)†

*Mean (SD).

†1 abstract contained 8235 controls; without this abstract the mean sample size and standard deviation for the control non-adverse group would be 150.6 and 269.2, respectively.

1980 and 1989. The abstracts were evaluated by a reader who was blinded to the title and to the acceptance symbol. Abstracts that omitted measurements of pregnancy outcome were excluded.

The following items were extracted from each abstract: no effect or adverse pregnancy outcome; verification of cocaine use by history and/or urine analysis; involvement of polydrug users compared with cocaine users only; and inclusion of comparison groups and their size. Accepted and rejected abstracts showing adverse effects (positive) were compared with those showing no adverse effects (negative) by Fisher's exact or *t* tests for unpaired results as appropriate.

RESULTS

No abstracts on cocaine in pregnancy were submitted before 1985. From a total of 68 abstracts on cocaine use during pregnancy 10 did not report pregnancy outcome measurements (4 were epidemiological, 4 were animal studies, and 2 were analytical). The 58 studies reported various end-points (table 1). 49 abstracts were positive and 9 were negative. 28 of the positive abstracts (57%) but only 1 of the negative abstracts (11%) were accepted ($p = 0.013$) (table 2).

To examine whether the quality of the negative abstracts was poorer, thus leading to more frequent rejection, we compared them with the positive abstracts (table 3). The two groups did not differ significantly in involvement of polydrug users, inclusion of control groups or matched controls, and inclusion of socioeconomic status. Negative studies tended to verify cocaine use in pregnancy more

TABLE IV—COMPARISON OF POSITIVE AND NEGATIVE ABSTRACTS NOT ACCEPTED

	Adverse (n = 21)	Non-adverse (n = 8)
<i>Cocaine users</i>		
Predominantly cocaine use	16 (76%)	8 (100%)
Verification of cocaine use	4 (19%)	6 (75%)
Sample size	69.5 (148.4)	222.9 (269.0)
<i>Controls</i>		
Used controls	14 (67%)	7 (88%)
Matched for variables	7 (33%)	2 (25%)
Sample size	68.8 (124.5)	270 (25.9)†

Adverse vs non-adverse: * $p = 0.08$, † $p = 0.01$, and ‡ $p < 0.001$.

often, although not significantly so. Similarly such studies tended to have more cocaine and control cases.

We also compared the 8 rejected negative with the 21 rejected positive abstracts (table 4). Significantly more negative studies verified cocaine use ($p = 0.01$). The negative studies tended to be larger in numbers of cocaine-exposed patients, although not significantly so. Similarly almost all negative studies (7/8) had control groups whereas only 14/21 of the positive rejected studies were controlled (not significant).

DISCUSSION

Cocaine has gained a wide public reputation of being an "evil drug", because of its link with many illegal activities. The drug is almost "expected" to have adverse effects on the fetus. Indeed, published studies have stressed various adverse fetal outcome measurements.³⁻⁹ However, these effects occurred in women dependent on cocaine and who had a cluster of risk factors, including use of other illicit drugs, heavy alcohol and cigarette consumption, and poor medical follow-up. Attempts to control for these factors are difficult because cocaine users tend to consume more cigarettes and alcohol than those who abuse other drugs.^{10,11} Findings from this group have been widely publicised as being applicable to the mild, recreational user of cocaine, who often discontinues use during pregnancy. For example, a newspaper article in Toronto warned women that even one dose of cocaine in pregnancy can harm the baby.¹² Counselling women exposed to cocaine in early pregnancy in Greater Toronto led us to suspect that there is substantial distortion of medical information, which has led many women to terminations even when they were exposed briefly and mildly in early pregnancy.

In the present study we used the rare opportunity created by the Society for Pediatric Research, which publishes not only accepted but also rejected abstracts. Our analysis revealed that the likelihood of a negative study being selected for presentation was negligible, whereas a positive study was likely to be accepted in 57% of cases. It is generally assumed that studies are selected for presentation or publication based on objective scientific criteria. In selecting criteria for this assessment we tried to identify those elements in an abstract that reviewers are likely to use. The data indicated that negative abstracts were similar to or better than positive abstracts. In particular negative abstracts tended to verify cocaine use more frequently, which is probably the most important independent variable in such studies.

The positive abstracts, being a substantially larger group than the negative, are likely to include both scientifically sound and flawed papers. In a comparison of the 21 rejected positive with the 8 rejected negative abstracts, we found the negative studies to be superior in almost every variable studied. This strengthens the suggestion that most negative studies were not rejected because of scientific flaws, but rather because of bias against their non-adverse message. The subconscious message may be that if a study did not detect an adverse effect of cocaine when the common knowledge is that this is a "bad drug", then the study must be flawed.

To study the impact of this bias, consider the association between cocaine use and SIDS. There are published studies to suggest higher rates of SIDS with gestational use of cocaine,⁸ although some investigators could not detect such a relation.¹³ We found 6 abstracts on SIDS; 3 claimed association with cocaine use and 3 did not. 2 of the positive

abstracts but none of the negative abstracts were accepted for presentation.

We were recently consulted about a case that highlighted a detrimental effect of this reporting bias. Foster parents brought to the Motherisk Clinic a baby exposed in utero to cocaine, to find out whether he needs to continue to be monitored for apnoea. At birth the attending physician told the natural mother, who was unmarried but wanted to keep the child, that there is a high risk for SIDS and therefore the baby should be monitored during sleep for apnoea. Neighbours had complained to a children's aid group that the "monitor goes on too frequently", and the child was taken from the natural mother against her will. The history revealed that the child had never had apnoea and was healthy. 1 of the negative abstracts had actually detected a lower frequency of respiratory distress syndrome in children exposed in utero to cocaine than in controls.¹⁴ This paper was not accepted for presentation.

Bias by journals, scientific societies, and funding agencies against negative results may have far-reaching detrimental effects: scientists, realising their slim chance of having such data acknowledged, may be thus discouraged from submitting negative results. Rosenthal¹⁵ identified a tendency of psychology journals to publish only significant findings—the file drawer problem. Even more alarming, this bias may lead scientists to massage or misrepresent data to obtain positive results.¹⁶

It is the duty of editorial boards, scientific committees, and funding agencies to acknowledge this serious bias and to indicate clearly that research results are not more important if they are positive. Rather importance should be dictated by the relevance of the scientific questions and by the ways they are answered.

This study was supported in part by a grant from Health and Welfare Canada. G. K. is a career scientist of Ontario Ministry of Health and K. G. receives an Ontario Graduate Studies award.

Correspondence should be addressed to G. K., Division of Clinical Pharmacology, Hospital for Sick Children, 555 University Avenue, Toronto, M5G 1X8 Ontario, Canada.

REFERENCES

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- Ewing T. Thalidomide scientists "guilty of fraud" says committee. *Nature* 1988; 336: 101.

Screening

ANTENATAL TESTING FOR HUMAN IMMUNODEFICIENCY VIRUS

Results from the Royal College of Obstetricians and Gynaecologists' National Study of HIV Infection in Pregnancy

C. F. DAVISON¹
C. N. HUDSON²

A. E. ADES¹
C. S. PECKHAM¹

Department of Paediatric Epidemiology, Institute of Child Health, London WC1¹; and Department of Obstetrics and Gynaecology, St Bartholomew's Hospital, London EC1²

Summary Current policies on antenatal testing for human immunodeficiency virus (HIV) in the main obstetric units of the United Kingdom and the Republic of Ireland were surveyed by postal questionnaire; 294 of 299 units responded. HIV testing was available at 192 (65%) of the 294 units that responded. 414 HIV-positive pregnancies in 386 women were reported from 74 (25%) units. Most were from Scotland, the four Thames Regions, and Ireland. In 46% of the HIV-positive women the infection was identified by antenatal testing; the remainder had been tested previously and knew that they were infected. The findings support the view that selective antenatal testing should be established in areas where no testing is offered at present and possibly that testing should be offered to all pregnant women in high-prevalence areas.

INTRODUCTION

By July, 1989, in the United Kingdom 82 cases of acquired immunodeficiency syndrome (AIDS) in women had been reported to the Communicable Disease Surveillance Centre or Communicable Diseases (Scotland) Unit, and there had been 1057 laboratory reports of women seropositive for human immunodeficiency virus (HIV).¹ However, it is not known how many of these women were pregnant at the time of reporting. In addition, 316 children under 15 years were known to be positive for HIV antibody by July, 1989.¹ 126 were children of infected mothers; since at least 99 of the children were younger than 18 months, the number infected remains unknown because maternal antibody can persist until this age.²

Of 558 cases of AIDS in children reported from the European Community, Finland, Sweden, and Switzerland to the World Health Organisation AIDS centre in Paris, 76% had acquired infection from their mothers. Of these 426 women, 48% were intravenous drug users, 33% were partners of HIV-positive men, 3% were blood transfusion recipients, and the risk category for transmission in the remainder was either a combination of the above or unknown.³

This study was set up under the auspices of the Royal College of Obstetricians and Gynaecologists (RCOG) to collect confidential information on the numbers and geographical distribution of HIV-positive pregnant women seen antenatally and to record antenatal testing policies.

METHODS

299 obstetric units in the UK and the Republic of Ireland were identified from the Joint Planning Advisory Committee Census,

North Slope Borough School District



April 27, 1990

Representative Peter Goll
Representative Max Gruenberg
Co-Chairmen, House Judiciary Committee
Alaska State Legislature
Box V
Juneau, Alaska 99811

Dear Representative Goll and Representative Gruenberg:

The North Slope Borough School District has been a strong advocate of child protection services as you can see in the enclosed Policies JHG, JHG-R and JHG-E, related to child abuse and neglect. We have reviewed SB 450 regarding Child Abuse and Neglect, and while we appreciate the intent of this bill, the proposed amendments and additions cause some concern which may deter a faster response method from other agencies in dealing with child abuse cases that the District reports to other agencies.

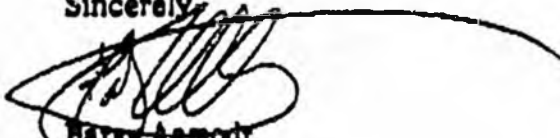
- This bill would require teachers to report directly to an investigating agency (i.e., Health and Social Services or Public Safety Officers). Many of our teachers are relieved of this responsibility by reporting first to their direct supervisor, which is our standard operating procedure.
- This bill targets school districts as the main reporters of child abuse cases, and its requirements intensify teachers' responsibilities as "social workers". It is another State program that will chip away important instructional time.
- What needs to be addressed in this Legislation is the obvious lack of human resources for Health and Social Services agencies and the Public Safety Officers to investigate and intervene AFTER a report has been made in a time-efficient manner.
- The bill also requires school districts to provide specialized training to all new employees and to all personnel on a five-year cycle. No State funding is mentioned for support of this requirement which can be very costly in a District like ours whose eight villages are widespread over 88,000 square miles.

Representative Peter Goll
Representative Max Gruenberg
April 27, 1990
Page Two—

- The expected results of intensifying child abuse reporting by school districts are that, there will probably be a large increase in the number of reports made in order to protect employees against the possibility of criminal penalties. These penalties might include charges of reporting in an untimely manner or "should have known that the circumstances gave rise to the need for a report" (class B misdemeanor).
- SB 450 does not include any provision for funding an increase in resources to investigate these reports, nor does it address the need to speed up investigations once teachers report child abuse cases. For example, it took over a month for social service agencies, who are undermanned, to respond to District child abuse reports, coupled with the problem that most Public Safety Officers are undertrained in this subject and understaffed as well.
- The addition of "mental injury" as a form of child abuse is very loosely defined and requires that reporters make very subjective decisions about their observations.

In closing, I appreciate the efforts of the Legislature to strengthen child protection services. I would appreciate your serious consideration to address our concerns stated above before passing the bill. As a suggestion, if HCR 46, the establishment of an Interagency Coordinating Committee is passed, perhaps SB 450 can be reviewed by this Committee to help resolve our concerns; then make recommendations to the Legislature on another version of SB 450 to better meet the needs of our students and teachers.

Sincerely,



Patsy Aamodt
Superintendent

Enclosure

cc: Senator Al Adams
Representative Eileen MacLean
NSBSD Lobbyist, Ashley Reed

CHILD ABUSE AND NEGLECT

Students have the right to live in an environment which will enable them to develop into emotionally and physically healthy, productive adults. District employees are regarded as having an ethical and legal responsibility to report all suspected cases of child abuse (including sexual abuse) or neglect in accordance with provisions of law.

Adopted: 09/10/84
Reviewed: 12/85

CHILD ABUSE REPORTING PROCEDURES

1. In compliance with AS 46.17.020., any teacher, nurse, or administrator who, in the performance of his/her professional duties, has cause to believe that a child has suffered harm as a result of abuse or neglect shall report the suspected abuse or neglect to the office of the Department of Health and Social Services in Barrow (852-3397), to the North Slope Borough Department of Public Safety, to his/her superior, and to the superintendent or designee by telephone.
2. Whether or not the Department of Health and Social Services has been contacted by telephone or whether or not a peace officer has been notified, the teacher, nurse, or administrator will complete form AD700-12D and submit it to the superintendent.
3. Upon contact by the Department of Health and Social Services the reporting person and supervisors will cooperate fully with the Department staff investigating the alleged abuse or neglect, and make available all necessary information in the possession of the district. The child may be interviewed at school by the social worker without prior permission of the parent or guardian. An appointed staff member may attend the interview.

Effective: 09/10/84

Reviewed: 7/16/86

Revised: 8/11/87

Frank H. Wasmer
P.O. Box 231
Skagway, Alaska 99840

SB
450

907-983-2131

March 26, 1990

Representative Peter Goll
Alaska State Legislature
Pouch V, (MS3100)
Juneau, Alaska 99811

Dear Peter,

I have reviewed SB 450, Child Abuse Reporting, and have a point or two that I would like to share with you and the other members of the House Judiciary Committee.

Although the intent of the bill seems to be to correct problems of delayed reporting, as in the incident in Anchorage involving Mr. Carlson, the obvious result will be a dramatically increased level of reporting. If you will review the audit of DFYS activities in southeastern Alaska, (OMB Audit, March 1989) there is some question of investigative skills of department personnel. I would suggest you pay particular attention to orientation and continuation training. That, coupled with the fact that the system is saturated, raises questions in my mind concerning the capability of the state to properly investigate and respond to increased reporting. I was speaking with teachers from the lower Kuskokwim area some weeks ago. They relate a total inability of DFYS and Public Safety to respond in their area. They tell me that when they report child abuse that nothing happens. They work with the children and try their best to help them.

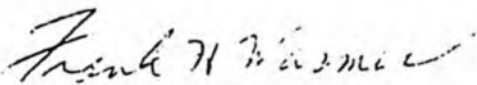
Another concern is the provision for interviews held in the school without parental permission. Unless total immunity is granted the school district, a potential liability is incurred with every report. In my view, permission to interview under such terms should only be allowed by court order. I would think that it would be similar to obtaining a search warrant. If the state can show cause, the court would approve the action. This would shield the districts while reducing the number of frivolous investigations. In any case, there must be a better way than that contained in SB-450.

In situations involving school personnel, the administration should be notified of allegations whether they occur at school or not. The current bill has language to the extent that reports are limited to schools in which the child is enrolled. This should be broadened to be all inclusive. If a school employee is involved in an incident of child abuse, particularly of a criminal nature, the school administration should be made aware.

It is my understanding that the current statute was written with foster parents primarily in mind. As you know, I believe that foster parents should be held to a higher standard and have never had any objection to being held accountable. I must confess disappointment that Mr. Carlson was not held to the same standard.

For the moment, I believe the current statute satisfactory. It does need attention but should be well thought out and considered rather than the result of over zealous pursuit of the Satch Carlson's of the world. I am deeply concerned that the investigative capabilities of the workers assigned to the Division of Family and Youth Services are far from acceptable and that many families will suffer intrusion that they do not deserve while others who should be investigated are not.

Sincerely,



Frank H. Wasmer

A M E N D M E N T # 1

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ". Upon a showing of financial hardship, the court shall allow a person subject to an order entered under this subsection to make payments under a payment schedule. ~~the payment schedule may not exceed five years.~~

Payments made under this subsection shall"

Page 1, lines 15 - 16:

Delete "]. The payments shall"

Insert ". THE PAYMENTS SHALL]"

A M E N D M E N T # 2

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 11, after "(c)":

Delete "The"

Insert "Upon the person's conviction, the"

A M E N D M E N T

3

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ", but execution may not commence until three years after release of the defendant from incarceration unless, for good cause shown, the court considers it appropriate to execute earlier"

Alaska State Legislature



Senate Judiciary Committee

MEMORANDUM

April 24, 1990

TO: Representative Max Gruenberg, Co-Chairman
Representative Peter Goll, Co-Chairman

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. The courts have interpreted this to mean that a hearing must be held before an indigent person can be ordered to pay any expenses; calculating the value of the representation is difficult, and the ability of the court to fully consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender, regardless of the person's ability to pay some of the expenses at the time of the representation or in the future.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses (a copy of this schedule can be found in proposed Criminal Rule 39, which you will find attached). An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a

criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is enforceable, the state could pursue the judgement if the defendant had the ability to pay some of the fees at the time of the representation, or in the event that the defendant ever obtained a financial windfall in the future. Obviously, the state could not enforce the judgement in cases where the defendant was truly indigent and remained so.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Criminal Rule 39
concerning appointment of
counsel for indigents.

IT IS ORDERED:

Criminal Rule 39 is amended to provide:

Criminal Rule 39: Appointment of Counsel.

(a) Informing Defendant of Right to Counsel. The court shall advise a defendant who appears for arraignment or trial without counsel of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) Appointment of Counsel for Persons Financially Unable to Employ Counsel.

(1) If the defendant desires the aid of counsel but claims a financial inability to employ counsel, the court shall inquire of the defendant under oath as to his or her financial status in order to determine whether the defendant is an "indigent person," as defined by statute. The court shall advise the

defendant that a judgment will* be issued against the defendant to cover the costs of an appointed counsel. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court. The court also may require the defendant to sign an assignment of the defendant's permanent fund dividend check to the state and may enter such orders as appear reasonably necessary to prevent the defendant from fraudulently dissipating assets to avoid a repayment order.

(2) Information provided by the defendant concerning eligibility for appointed counsel may not be used against the defendant in any criminal proceedings, except that such information may be used in a prosecution for perjury or at a hearing for determining the defendant's ability to pay a fine or make restitution. Upon request, the defendant must be allowed to present the requested financial information in a confidential setting, outside the presence of the prosecuting attorney. The court may have the financial inquiry conducted by pretrial services.

(3) If the court determines that the defendant is an "indigent person," the

* The alternative draft, under which the court would hold an "ability to pay" hearing if requested before imposing costs, would substitute "may" for "will" here.

court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment. The court may require the defendant to attempt to arrange private representation before making a final decision on indigency.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies the defendant's request for appointed counsel, the defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days of the trial court's denial of representation. The trial court shall forward the motion, relevant materials from the court file and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) Cost of Counsel.

(1) At the conclusion of the criminal proceedings in the trial court, the court or the clerk shall issue a judgement against a defendant represented by appointed

counsel for the cost of representation. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e).**

(2) The court may require payment in installments or in any manner which the court finds is reasonable. The judgment of repayment must be in writing and a copy must be provided to the defendant.

(3) All proceedings to enforce a repayment judgment are civil in nature. The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution. The judgment is not enforceable by contempt, nor may repayment be made a condition

** The alternative draft would replace this subparagraph with two subparagraphs which would provide:

(1) At the beginning or conclusion of the criminal proceedings in the trial court, the court may order a defendant represented by appointed counsel to pay all or part of the costs of representation in an amount not to exceed the defendant's ability to pay for these costs. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e). A defendant with only a partial ability to pay costs may be ordered to pay one-half of the amount specified in the fee schedule.

(2) Prior to entering an order of repayment, the court shall advise the defendant that he or she may present testimonial and documentary evidence concerning an ability to pay for representation.

of a defendant's probation. Default or failure to make repayment may not affect or reduce the rendering of services on appeal or any other phase of the defendant's case in any way. The defendant does not have a right to be represented by appointed counsel in connection with any repayment proceeding.

(d) Appointment in the Interest of Justice. The court may appoint counsel for a criminal defendant in any case in which appointment best serves the interest of justice.

(e) Cost of Representation Schedule. The following schedules govern the assessment of the cost of representation under subparagraph (c)(1):

Misdemeanors

Trial	\$ 500.00
Change of plea	200.00
Dismissal after substantive motion	200.00
Dismissal without substantive motion	50.00

Felonies

Final Disposition	Class B & C	Class A and Unclassified (Except Murder)	Murder in the 1st and 2nd Degrees
Trial	1,500	2,500	5,000
Change of plea after substantive motion work and hearing	1,000	1,500	2,500
Dismissal after substantive motion work and hearing	500	1,000	2,000
Change of plea post- indictment but prior to substantive motion work and hearing	500	1,000	2,000
Change of plea prior to indictment	300		
Dismissal without substantive motion	200		

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Appellate Rule 209(b)
concerning appointment of
counsel for indigents in
criminal appeals.

IT IS ORDERED:

Appellate Rule 209(b) is amended to provide:

(b) Criminal Matters.

(1) In criminal matters the trial court shall authorize appeals by appointed counsel in accordance with Criminal Rule 39 and Administrative Rule 12 [AT PUBLIC EXPENSE ON BEHALF OF PERSONS FINANCIALLY UNABLE TO PAY THE COSTS OF APPEAL IN ACCORDANCE WITH THE RULES AND DECISIONS OF THE APPELLATE COURTS OF ALASKA AND WHERE SUCH APPEALS ARE REQUIRED TO BE PROVIDED BY STATE COURTS BY DECISIONS OF THE SUPREME COURT OF THE UNITED STATES]. Where such appeals are authorized [BY THE TRIAL COURT] the costs which shall be borne at public expense [BY THE STATE SHALL] include those of providing counsel and of preparing a transcript and briefs. [CRIMINAL RULE 39 SHALL BE FOLLOWED IN MAKING THE DETERMINATION OF FINANCIAL INABILITY.]

(2) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to proceed at public expense on appeal.

(3) The action of the trial court in authorizing or declining to authorize an appeal at public expense is reviewable by a motion in the appellate court, ancillary to the appeal.

(4) Counsel appointed to represent the defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. In addition, an attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant on appeal. If an appeal is to be taken, in no event will trial counsel be permitted to withdraw until the notice of appeal and the documents required to be filed therewith by Rule 204(b) have been accepted for filing by the clerk of the trial courts [COMPELLING REASONS].

(5)* At the conclusion of the appellate proceeding, the Appellate clerk shall issue a judgment against a defendant represented by appointed counsel for the cost of representation on appeal. The cost of

* This paragraph would be deleted in the alternative version.

representation will be determined based on the following schedule:

<u>Type of Appellate Proceeding</u>	<u>Misdemeanor</u>	<u>Felony</u>
<u>Sentence Appeal</u>	<u>250</u>	<u>500</u>
<u>Merit Appeal</u>	<u>750</u>	<u>1,500</u>
<u>Combined Merit and Sentence Appeal</u>	<u>1,000</u>	<u>2,000</u>
<u>Other Appellate Actions (Petition for Review, Petition for Hearing, etc.)</u>	<u>500</u>	<u>1,000</u>

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

December 14, 1989

The Honorable Warren Matthews
Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Dear Chief Justice Matthews:

We understand that the Supreme Court will soon consider a proposal to amend Criminal Rule 39 that would allow the recovery of some of the costs of defense services to indigent citizens.

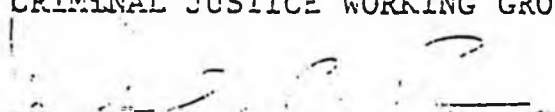
We support this concept, especially where the charges are directly related to the level of service provided to clients by the Alaska Public Defender's Agency and the Office of Public Advocacy. The fee schedule contained in the proposed amendment accomplishes this goal by setting out charges that are generally proportionate to the professional work required in individual cases.

We are particularly concerned that any recovery system include provisions designed to streamline the administrative and legal process for collection of these funds. The creation of an efficient and effective system holds the promise of recovering a significant portion of the high costs of defense services.

Finally, it is clear that the current mechanism of cost recovery has not worked. We applaud your efforts to develop a fair and effective recovery plan.

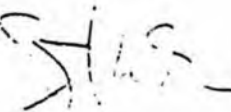
Respectfully submitted,

CRIMINAL JUSTICE WORKING GROUP



Douglas S. Bailly
Attorney General

Date



Grant McGee, Director
Office of Public Advocacy
Department of Administration

Date

[Handwritten initials/signature]

John Salemi, Director Date
Public Defender Agency
Department of Administration

Myra Mynson Dec 14, 1989
Myra Mynson, Commissioner Date
Department of Health and Social Services

Susan Humphrey-Barnett 12/27/89
Susan Humphrey-Barnett, Commissioner Date
Department of Corrections

Art English 12-14-89
Art English, Commissioner Date
Department of Public Safety

Duane Udland 12-20-89
Duane Udland, Representative Date
Alaska Association of Chiefs of Police

BM/gh

The Alaska School Nurse Association does not support Senate Bill 450 regarding reporting and investigation of child abuse and neglect. This bill does not encourage cooperation between school districts, law enforcement agencies, and social services agencies. These agencies need to work closely together to benefit and protect students.

Senate Bill 450 does not improve the clarity of definitions and still needs more revision. The following terms need to be defined: immediately, maltreatment, investigations. The social service agency needs school nurses who are trained to identify child abuse and neglect to conduct appropriate and effective investigations to gather the facts to report to the Division of Family and Youth Services. If school nurses were not available to gather this information then DFYS would be even more overwhelmed than they are today. Now school nurses are talking to answering machines because they cannot get an intake screener and sometimes must wait two days to get a call back. Teachers cannot wait for DFYS to call back when they must be in class with 30 students.

Please reconsider better definitions for this important Senate Bill.

that a "high degree of certainty" is a significantly stricter standard than the proposed "substantial certainty," it fails to cite convincing or binding authority for this assertion. Before we can find misdirection of the jury, we must be convinced from the entire record that the trial's result would probably have differed. See *Bohlman v. American Family Mutual Insurance Co.*, 61 Wis.2d 718, 729, 214 N.W.2d 52, 58-59 (1974). Because we determine that the difference, if any, between the two standards would have had no effect on the trial's outcome, we uphold the trial court's version of the intent instruction.

Judgment and order affirmed.



135 Wis.2d 266

STATE of Wisconsin,
Plaintiff-Respondent,

v.

Richard HURD, Defendant-Appellant.

No. 86-0558-CR.

Court of Appeals of Wisconsin.

Submitted on Briefs Aug. 1, 1986.

Opinion Released Nov. 18, 1986.

Opinion Filed Nov. 18, 1986.

Defendant was convicted in the Circuit Court, Trempealeau County, Robert W. Radcliffe, J., of failing to report suspected child abuse, and his motion for postconviction relief was denied. Defendant appealed. The Court of Appeals, Myse, J., held that: (1) statute prohibiting failure to report suspected child abuse is not unconstitutionally vague; (2) failure to instruct jury that State was required to prove that defendant acted wilfully in failing to report suspected child abuse relieved State of portion of its burden of proof, thus denying defendant due process so as to require new

trial; but (3) whether defendant wilfully failed to report suspected child abuse was question for jury.

Reversed and remanded.

1. Constitutional Law §48(1)

There is strong presumption favoring constitutionality of statute, and, if possible, reviewing court will interpret statute to preserve it.

2. Constitutional Law §258(2)

Due process mandates that criminal statute be sufficiently definite to give person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law §13.1(1)

To avoid being impermissibly vague, statute need not define with absolute clarity and precision what is and what is not unlawful.

4. Criminal Law §13.1(1)

Statute is not void for vagueness simply because there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease; it is enough if statute alerts person of ordinary intelligence to type of conduct, active or passive, that is proscribed.

5. Infants §13

Reasonable cause requirement, under statute requiring person who has reasonable cause to suspect child abuse to report suspected abuse, examines totality of facts and circumstances actually known to, and is viewed from standpoint of, person possessing suspicion; thus, test becomes whether prudent person would have reasonable cause to suspect child abuse if presented with same totality of circumstances as that acquired and viewed by defendant. U.S.C.A. Const. Amends. 5, 14; W.S.A. 48.981.

6. Infants §12

Use of reasonableness standard under statute requiring reporting of child abuse

"reasonable cause to suspect" - ok
see p 95 46

by person having reasonable cause to suspect that child has been abused or neglected does not itself render statute unconstitutionally vague. W.S.A. 48.981.

7. Infants ⇌12

Use of term "suspicion" in statute requiring reporting facts and circumstances contributing to suspicion of child abuse does not itself create unconstitutionally vague statute. W.S.A. 48.981.

8. Infants ⇌12

Phrase "reasonable cause to suspect" in statute requiring reporting of child abuse by person who has reasonable cause to suspect abuse is readily ascertainable and understandable standard involving belief that ordinary person would reach as to existence of abuse, and thus, statute sufficiently alerts person of ordinary intelligence as to what conduct is required so that statute is not unconstitutionally vague. W.S.A. 48.981.

9. Criminal Law ⇌847

Objection to jury instructions is not waived where instructions misstate law.

10. Criminal Law ⇌1039.1(2)

Notwithstanding waiver of objection to instruction, reviewing court in its discretion may consider whether error is so plain or fundamental that it affects defendant's substantial rights and so mandates reversal. W.S.A. 901.03(4).

11. Criminal Law ⇌1165(1)

Reviewing court may find error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that error contributed to conviction.

12. Constitutional Law ⇌266(7)

Due process clause protects against conviction except upon proof beyond reasonable doubt of all elements of charged offense.

13. Infants ⇌20

To convict defendant of failing to report child abuse that defendant had reasonable cause to suspect, State is required to prove beyond reasonable doubt that de-

fendant not only failed to report suspected child abuse, but that defendant did so willfully. W.S.A. 48.981.

14. Constitutional Law ⇌268(11)

Criminal Law ⇌1038.2

Infants ⇌20

Failure to instruct jury that State was required to prove that defendant acted willfully in failing to report suspected child abuse relieved State of portion of its burden of proof, allowing jury to convict defendant simply because he failed to report abuse, thus denying defendant due process and affecting substantial right so as to require remand for new trial, even though defendant failed to object to lack of instruction. U.S.C.A. Const.Amends. 5, 14; W.S.A. 48.981.

15. Statutes ⇌176

Interpretation of statutory words is question of law.

16. Statutes ⇌181(1)

Primary goal of statutory interpretation is to ascertain and give effect to legislature's intent.

17. Statutes ⇌208

"Willfully" must be defined within context of statute in which it was used.

18. Infants ⇌13

"Willfully" requirement for conviction of failing to report suspected child abuse allows defendant to raise defenses such as mistake, neglect, or misadventure that caused failure to report, but does not allow defense that defendant was unaware of statutory duty to report child abuse. W.S.A. 48.981, 48.981(6), 939.23(3, 5), 939-43.

See publication Words and Phrases for other judicial constructions and definitions.

19. Infants ⇌20

Evidence that counselor at youth ranch told defendant, the administrator at ranch, on several occasions that another employee was making "advances" toward boys and that defendant had previously expressed his low opinion of competency of law en-

forcement and social service agencies raised jury question as to whether defendant wilfully failed to report suspected child abuse. W.S.A. 48.981.

Richard Hurd, Glenn L. Cushing, asst. state public defender, Madison, for defendant-appellant.

LaVerne Michalak, dist. atty., Whitehall, for plaintiff-respondent, State of Wisconsin.

Before CANE, P.J., LaROCQUE and MYSE, JJ.¹

MYSE, Judge.

Richard Hurd appeals from a judgment convicting him of failing to report suspected child abuse and from an order denying his motion for postconviction relief. Hurd argues that the charging statute is unconstitutionally vague, that the trial court erred by failing to instruct the jury on an element of the offense, and that there was insufficient evidence to convict. We conclude that the challenged statute is constitutional and that there was sufficient evidence to convict. However, because the trial court's error in failing to instruct on an element of the offense violated Hurd's constitutional right to due process, the judgment and order are reversed and the cause remanded for a new trial.

Richard Hurd is the administrator of the Berean Christian Ranch and the Berean School. In 1984, six boys resided at the youth ranch with ages ranging from seven to nineteen. Also residing at the ranch were two adults, Kenneth Murray, a young counselor, and Tom Chrystal. Chrystal was convicted of sexually assaulting certain boys at the youth ranch. Hurd was

1. Upon order of the Chief Judge, this has been issued as a three-judge opinion pursuant to sec. 809.41(3), Stats.

2. Hurd challenges the constitutionality of sec. 48.981 on other grounds. He claims that the statute's undefined phrase "reason to believe" is also vague and fails to notify a person of ordinary intelligence of the conduct required by the statute. The statute's use of "reason to believe"

charged with failing to report suspected child abuse contrary to sec. 48.981, Stats.

At Hurd's trial, Murray testified that he had informed Hurd several times that Chrystal was making "advances" toward the boys. Murray stated further that after witnessing an incident in which Chrystal was lying on top of one of the boys with his pants down, he told Hurd that he had personally observed one of the "advances" and that he wanted something done about it. One of the boys also testified that he had informed Hurd of a sexual assault by Chrystal. The jury convicted Hurd of the offense.

Hurd first challenges the constitutionality of the charging statute, sec. 48.981. He claims that the statute's undefined phrase "reasonable cause to suspect" is ambiguous and vague.² As a result, he argues that the statute fails to notify a person of ordinary intelligence of the conduct required by the statute. We disagree.

[1, 2] There is a strong presumption favoring the constitutionality of a statute, and if possible, a reviewing court will interpret a statute to preserve it. *State v. Popanz*, 112 Wis.2d 166, 172, 332 N.W.2d 750, 753 (1983). Nevertheless, due process mandates that a "criminal statute must be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of the conduct required or prohibited." *Id.* at 173, 332 N.W.2d at 754. The proper test for determining whether a statute is impermissibly vague was recently set forth by our supreme court in *Popanz*:

Before a court can invalidate a statute on grounds of vagueness, it must conclude that "some ambiguity or uncertainty in the gross outlines of the duty im-

is distinctly tied to those circumstances in which it is probable a child is threatened with abuse. Section 48.981(2), (3)(a), Stats. Hurd was neither charged nor convicted under this aspect of sec. 48.981. Consequently, this issue need not be addressed. See *State v. Courtney*, 74 Wis.2d 705, 713, 247 N.W.2d 714, 719-20 (1976); see also *State ex rel. Deisinger v. Treffert*, 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978).

posed or conduct prohibited" appears in the statutes, "such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule."

Id. (quoting *State v. Courtney*, 74 Wis.2d 705, 711, 247 N.W.2d 714, 719 (1976)).

[3, 4] Section 48.981 states in part:

(2) [A]n ... administrator ... having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with an injury and that abuse of the child will occur shall report as provided in sub. (3)....

(3)(a) Referral of report of suspected child abuse or neglect. Persons required to report ... shall immediately contact, ... and shall inform the agency or department of the fact and circumstances contributing to a suspicion of child abuse or neglect or to a belief that abuse will occur.... [Emphasis added.]

It is true that the statute does not define "reasonable cause to suspect." However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Courtney*, 74 Wis.2d at 710, 247 N.W.2d at 718. A statute is not void for vagueness simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease." *Id.* at 711, 247 N.W.2d at 719. It is enough if the statute alerts a person of ordinary intelligence to the type of conduct, active or passive, that is proscribed. *Id.* at 713, 247 N.W.2d 719.

Section 48.981's use of the phrase "reasonable cause to suspect" fairly notifies a person of ordinary intelligence that if there is a reasonable basis to suspect that child

3. A similar analysis has been applied in other contexts. See *State v. Wilks*, 117 Wis.2d 495, 501-02, 345 N.W.2d 498, 501 (Ct.App.1984), cert.

abuse has occurred, that person must make a report to the appropriate agency. Whether a person possesses a reasonable suspicion that child abuse has occurred is not subject to misunderstanding. This requirement examines the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, that person.³ See, e.g., *State v. Lossman*, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984). Thus, the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse.

[5] The use of the standard of reasonableness does not in itself render sec. 48.981 unconstitutionally vague. This standard is employed in a number of statutes including disorderly conduct (unreasonably loud), refusing to aid an officer (reasonable excuse), arrest without warrant (reasonable grounds to believe), and the statutory definition of "reasonably believes." See secs. 947.01, 946.40, 800.02(6), and 939.22(32), Stats. Testing information actually possessed by a defendant against the standard of reasonableness is not so ambiguous or vague as to preclude a citizen from conforming his conduct to that required by the law.

[6] Nor does use of the term "suspicion" create an unconstitutionally vague statute. This is a nontechnical term commonly used and understood by the general populace. It is not a term of art that requires legal expertise to comprehend its meaning. Absent statutory definition, the common and approved meaning of a nontechnical word may be ascertained by reference to a recognized dictionary. *State v. Ehlenfeldt*, 94 Wis.2d 347, 350, 288 N.W.2d

denied, 471 U.S. 1067, 105 S.Ct. 2144, 85 L.Ed.2d 501 (1985); *State v. Boggess*, 115 Wis.2d 443, 445-56, 340 N.W.2d 516, 519-21 (1983).

786, 790 (1980); see also sec. 990.01(1), Stats. "Suspicion" is defined as a "belief or opinion based upon facts or circumstances which do not amount to proof." Black's Law Dictionary 1298 (5th ed. 1981); see also *Gordon v. Gordon*, 270 Wis. 332, 343, 71 N.W.2d 386, 392 (1955). It is a concept dealing with the degree of certainty with which one holds a belief or opinion.

[7] The phrase "reasonable cause to suspect" is a readily ascertainable and understandable standard that involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse. Therefore, sec. 48.981 sufficiently alerts a person of ordinary intelligence as to what conduct is required. See *Courtney*, 74 Wis.2d at 713, 247 N.W.2d at 719.

Next, Hurd argues that the trial court erred by failing to instruct the jury on the element of "wilfully." The penalty provision of sec. 48.981 states:

(6) Penalty. Whoever wilfully violates this section by failure to report as required may be fined not more than \$1,000 or imprisoned not more than 6 months or both. [Emphasis added.]

The state concedes that "wilfully" is an element of the offense of failing to report suspected child abuse under sec. 48.981. However, the state argues that Hurd has waived this error by failing to timely object at trial to the jury instructions as given. See secs. 972.10(3) and 805.13(3), Stats. Alternatively, the state claims that this error was harmless.

[8-11] A trial court has broad discretion in instructing the jury. *State v. Danforth*, 125 Wis.2d 293, 297, 371 N.W.2d 411, 414 (Ct.App.1985). Nevertheless, instructions should fully and fairly state the law that applies to the case. *Id.* it is well established that an objection to jury instructions is not waived where the instructions misstate the law. *State v. Moriarty*, 107 Wis.2d 622, 630, 321 N.W.2d 324, 329 (Ct.App.1982). Moreover, notwithstanding waiver, a reviewing court in its discretion may consider whether an error in instruction is so plain or fundamental that it af-

fects a defendant's substantial rights and so mandates reversal. *Id.*; sec. 901.03(4), Stats. A reviewing court may find an error of constitutional dimension harmless only if it is able to determine that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231-32 (1985).

[12-14] The due process clause of the United States Constitution protects against conviction except upon proof beyond a reasonable doubt of all elements of the charged offense. *State v. Ivy*, 119 Wis.2d 591, 608, 350 N.W.2d 622, 631 (1984). Here, the state was required to prove beyond a reasonable doubt that Hurd had not only failed to report suspected child abuse, but that he had done so wilfully. Under the instructions given by the trial court, the state was relieved of the latter burden. See *Moriarty*, 107 Wis.2d at 631, 321 N.W.2d at 329. Thus, the jury was allowed to convict Hurd simply because he had failed to report. This is neither the offense with which he was charged nor the legislature's intent in enacting sec. 48.981 as indicated by the inclusion of "wilfully" within the statute. Hurd was denied an opportunity to present defenses negating the wilfulness element because the jury was not advised that this was an element of the offense. The error in instruction violated Hurd's right to due process and so affected his substantial rights. *Id.*; see also *Morissette v. United States*, 342 U.S. 246, 274-76, 72 S.Ct. 240, 255-56, 96 L.Ed. 288 (1952). Accordingly, we conclude that there is a reasonable possibility that the error in instruction contributed to Hurd's conviction. Hurd is therefore entitled to a new trial.

[15, 16] Having determined that the trial court erred by failing to instruct on the wilful element, this court must next address the meaning of this term within the context of sec. 48.981. The interpretation of statutory words is a question of law. *State ex rel. Brockway v. Milwaukee County Circuit Court*, 105 Wis.2d 341, 344, 313 N.W.2d 845, 847 (Ct.App.1981). The primary goal of statutory interpreta-

tion is to ascertain and give effect to the legislature's intent. *Id.*

Hurd contends that "wilfully" should be construed to mean that a defendant intentionally violated a known legal duty. It is well established that ignorance of the law is no defense to a violation thereof. *State v. Kemp*, 106 Wis.2d 697, 712, 318 N.W.2d 13, 21 (1982); *State v. Britzke*, 108 Wis.2d 675, 683, 324 N.W.2d 289, 292 (Ct.App. 1982). If the legislature had wished to make ignorance of the law a defense to a crime, it would have done so more clearly and less ambiguously than simply using the term "wilfully." Rules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory. *Rose v. Schantz*, 56 Wis.2d 222, 227, 201 N.W.2d 593, 597 (1972); see also sec. 939.10, Stats.

[17] "Wilfully" must be defined within the context of the statute in which it is used. *State v. Cissell*, 127 Wis.2d 205, 210-13, 378 N.W.2d 691, 694 (1985), cert. denied, — U.S. —, 106 S.Ct. 1651, 90 L.Ed.2d 194 (1986). Section 48.981 creates an offense for certain individuals who fail to report possible child abuse if they have reason to suspect that such child abuse has occurred. By adding the term "wilfully," the legislature made the offense punishable only if such individuals "wilfully violate this section by failure to report as required...." Section 48.981(6), Stats.

[18] "[W]ilfully" as used in sec. 48.981(6) means "intentionally" as defined in sec. 939.23(3).⁴ See *Cissell*, 127 Wis.2d at 210-13, 378 N.W.2d at 694; see also *Black's Law Dictionary* 1434 (5th ed. 1981); *Webster's New World Dictionary* 1627 (2d ed. 1980). Section 939.23(3) defines "intentionally" as: "[T]he actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result." Thus, a defendant charged under sec. 48.981 may raise defenses such as mistake, neglect, or misadventure that caused the failure to report. See sec. 939.43, Stats. It is not a

defense to this offense, however, that the defendant was unaware of the statutory duty to report suspected child abuse. *Id.*; see also sec. 939.23(5), Stats.

Such a construction of sec. 48.981 is consistent with the legislature's intent. When created in 1965, sec. 48.981(6) originally stated, "Anyone knowingly and wilfully violating this section by failing to report...." Laws of 1965, ch. 333, sec. 3 at 584. In the statute's 1977 revision, the legislature deleted "knowingly." Laws of 1977, ch. 355, sec. 4 at 1412. Additionally, the legislature stated that sec. 48.981 was intended to "protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect...." *Id.*, sec. 1 at 1409. The legislature's deletion of "knowingly" and the stated purpose of sec. 48.981, indicate that the legislature did not intend ignorance of the statute to be a defense. Rather, this demonstrates that the legislature intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies.

Finally, Hurd argues that the evidence adduced at trial was insufficient to support his conviction. He asserts that the state failed to prove an element of the offense, that is, that he wilfully failed to report suspected child abuse. See *Ivy*, 119 Wis.2d at 607, 350 N.W.2d at 631. This argument rests on Hurd's erroneous definition of "wilfully," as an intentional violation of a known legal duty. Nevertheless, because this argument raises a double jeopardy issue, this court must determine whether under the correct definition of "wilfully," there was sufficient evidence to convict. *Id.*

The test for sufficiency of the evidence is whether a reviewing court can conclude that a reasonable trier of fact could be convinced of a defendant's guilt beyond a reasonable doubt by the evidence that it had a right to believe and accept as true. *State v. Wyss*, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985). Evidence is to be considered in a light most favorable to the

4. The legislature has recently deleted the term "wilfully" from sec. 48.981(6) and inserted the

term "intentionally." 1985 Wis. Act 29, sec. 926 at 237.

state and the conviction. *Id.* The credibility of the witnesses and the weight of the evidence is exclusively for the trier of fact to determine. *Id.*

[19] The evidence adduced at Hurd's trial was sufficient to prove that he had a reasonable cause to suspect child abuse and that he willfully failed to report this suspicion. At trial, Murray testified that he had told Hurd on several occasions that Chrystal was making "advances" toward the boys. One of the boys testified that he had told Hurd of a sexual assault by Chrystal. Chrystal testified that Hurd had stated that he had heard Chrystal was sexually abusing the boys. Additionally, Murray testified that Hurd had previously expressed his low opinion of the competency of law enforcement and social service agencies. From this testimony, the jury could have reasonably inferred that Hurd had willfully failed to report suspected child abuse.⁵

Judgment and order reversed and cause remanded for a new trial.



135 Wis.2d 280

In re the PATERNITY OF J.S.C.

B.A.C., Petitioner-Respondent,

v.

T.L.G., Respondent-Appellant.

No. 85-2343.

Court of Appeals of Wisconsin.

Argued Oct. 2, 1986.

Opinion Released Nov. 19, 1986.

Opinion Filed Nov. 19, 1986.

Review Denied.

Paternity action was brought. The Circuit Court, Waukesha County, Patrick

5. Hurd also argues that he is entitled to a new trial in the interest of justice pursuant to sec. 752.35, Stats. Because Hurd is entitled to a new trial on other grounds, this court need not address this issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

L. Snyder, J., declared alleged father to be father of child whose paternity was in dispute, and alleged father appealed. The Court of Appeals, Nettlesheim, J., held that: (1) testimony of mother was sufficient to establish that conceptive period occurring during period of sexual activity between mother and alleged father, even though statutory presumptive period of conception did not apply due to low birth weight of child; (2) statute governing admissibility of expert testimony relating to blood test results in paternity case did not contemplate or require technicians who assisted in blood testing process to be experts in examining genetic markers; and (3) evidence was sufficient to render it improbable that blood test samples were exchanged, contaminated, or tampered with, so expert's testimony and report relating to probability of paternity of alleged father were properly admitted.

Affirmed.

1. Children Out-of-Wedlock ⇄53

Proof of conceptive period of child is essential element of paternity case.

2. Children Out-of-Wedlock ⇄53

If child who is subject of paternity proceeding is not full-term child, conceptive period must be established by competent evidence other than statutory presumption as to conceptive period, but it is not essential that exact date of conception be proven. W.S.A. 891.395.

3. Children Out-of-Wedlock ⇄53

Testimony of mother of child who was subject of paternity proceeding that she experienced her last menstrual period prior to birth of child before she met alleged

1. Judge Snyder presided over all the hearings in this case and his rulings form the basis for the issues raised upon appeal. Judge Marianne Becker, however, signed the judgment.

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PEOPLE v. CAVAIANI

Mich. 409

Cite as 32 N.W.2d 409 (Mich.App. 1988)

172 Mich.App. 706

PEOPLE of the State of Michigan,
Plaintiff-Appellant,

v.

Alfred CAVAIANI, also known as Lam-
bert Cavaiani, Defendant-Appellee.

Docket No. 101942.

Court of Appeals of Michigan.

Submitted June 21, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

A psychologist was charged with failing to comply with statute requiring him to report suspected child abuse. The 52nd District Court refused psychologist's motion to quash complaint and warrant. The Oakland Circuit Court, Fred M. Mester, J., granted the psychologist leave to appeal and reversed. After granting the State leave to appeal, the Court of Appeals, Kaufman, J., held that: (1) statute requiring reporting of suspected child abuse was not overbroad or vague; (2) section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege; and (3) abuse reporting requirement did not violate any party's Fourth or Fifth Amendment rights.

Reversed and remanded.

1. Constitutional Law ⇨48(3)

Where a statutory provision would otherwise be unconstitutional, it is court's duty to give statute narrow construction so as to render it constitutional if such construction is possible without doing violence to legislature's interest in enacting statute.

2. Constitutional Law ⇨82(4)

A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on First Amendment right of others impinged upon by statute, even though under a narrower, properly drawn statute, his own be-

havior could be punished because it is not so protected. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇨90.1(1)

To support an overbreadth challenge, overbreadth of statute must not only be real, but substantial as well, judged in relation to statute's plainly legitimate sweep where conduct and not merely speech is involved. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇨82(10)

Infants ⇨12

Section of statute requiring psychologists and family therapists to report suspected child abuse was a constitutionally permissible invasion of a family's First Amendment right of privacy since a family did not have a protected First Amendment right to seek treatment for offender. M.C. L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇨42.2(1)

A person generally lacks standing to challenge overbreadth of statute where his own conduct is clearly within contemplation of statute, even where some marginal application of statute might infringe on First Amendment activities. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇨42.2(1)

Defendant has standing to raise vagueness challenge to statute only if statute is vague as applied to his conduct. U.S.C.A. Const.Amend. 14.

7. Constitutional Law ⇨48(4)

Even though statute may be susceptible to impermissible interpretations, reversal is not required if statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and defendant's conduct falls within that prescribed by the properly construed statute. U.S.C.A. Const.Amend. 14.

8. Statutes ⇨47

A statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, common law, dictionaries, treatises, or even the words themselves, if they possess a common and generally ac-

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9. Infants ⇐12

Words "reasonable cause to suspect" in statute requiring psychologists to report suspected child abuse provided psychologist fair notice of conduct expected and, therefore, were not vague, in light of fact that psychologist was told by his patient that her father was fondling her breasts. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 14.

10. Statutes ⇐142

Section of child protection law which abrogated all privileged communications except attorney and client communications did not unconstitutionally amend by implication statute creating psychologist-patient privilege. M.C.L.A. Const. Art. 4, § 25; M.C.L.A. §§ 330.1750, 722.631.

11. Infants ⇐12

Statute requiring psychologist to report suspected child abuse did not violate psychologist's asserted Fourth Amendment right to privacy from unreasonable seizure of oral evidence. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 4.

12. Witnesses ⇐306

Psychologist convicted of violating statute requiring reporting of suspected child abuse had no standing to assert a Fifth Amendment privilege. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const. Amend. 5.

13. Criminal Law ⇐393(1)

Any information a patient chose to divulge to psychologist convicted of violating statute requiring him to report suspected child abuse was not protected by the Fifth Amendment, since psychologist was not agent of government. M.C.L.A. §§ 722.623, 722.633(2); U.S.C.A. Const.Amend. 5.

Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., L. Brooks Patterson, Pros. Atty., Robert C. Williams, Chief, Appellate

* NATHAN J. KAUFMAN, former Court of Appeals judge, sitting on the Court of Appeals by

Div., and Paul J. Fischer, Asst. Pros. Atty., for the People.

Mueckenheim & Mueckenheim, P.C., by Robert C. Mueckenheim, Detroit, for defendant-appellee.

James Gregard by Jerold Schrotenboer, Jackson, for amicus curiae Pros. Attys. Ass'n of Michigan.

Tom Downs, Lansing, for amicus curiae Michigan Society for Psychoanalytic Psychology.

Colleen V. Ronayne, Pontiac, amicus curiae Guardian ad Litem.

Before WAHLS, P.J., and HOOD, and KAUFMAN,* JJ.

KAUFMAN, Judge.

We granted the people leave to appeal from the circuit court's order declaring M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2) unconstitutional and dismissing the complaint and warrant charging that defendant failed to report an instance of suspected child abuse, a misdemeanor.

Originally charged in the 52nd District Court with failing to report as required by § 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), defendant moved to quash the complaint and warrant on the grounds that the statute was unconstitutionally vague, overbroad, and that it violated Const.1963, art. 4, § 25. After the district court denied defendant's motion, the Oakland Circuit Court granted defendant leave to appeal and reversed. In turn, this Court granted the people leave to appeal on February 11, 1988, and we reverse the order of the circuit court.

The victim's mother initiated family therapy with defendant after suspecting that her husband had sexually molested their 9-year-old daughter. Defendant, a psychologist and family therapist, rendered therapy and treatment to the victim, the victim's mother and the victim's father.

During individual therapy sessions in early 1986, the victim told defendant about

assignment.

recurring incidents in which her father fondled her breasts. When defendant questioned the victim's father about these allegations at a therapy session, defendant claims that the victim's father made it clear to defendant that if he had touched the victim, such touchings were completely accidental and not done for the purpose of sexual arousal or gratification.

The victim herself later reported her father's conduct to a school counselor, who reported the incident to Protective Services. A petition based on the victim's allegations of sexual abuse was filed in the probate court. Contending that defendant had reasonable cause to suspect that the victim had been molested but had failed to report the suspected child abuse as required by M.C.L. § 722.623; M.S.A. § 25.248(3) of the Child Protection Law, the county prosecuting attorney's office brought the disputed misdemeanor charge of failure to report, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), against defendant.

Section 3 of the Child Protection Law, M.C.L. § 722.623; M.S.A. § 25.248(3), requires that

"(1) A physician, coroner, dentist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or duly regulated child care provider who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make ... [a] report ... of the suspected child abuse or neglect to the department....

"(2) The ... report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person which might establish the cause of the abuse or neglect and the

manner in which the abuse or neglect occurred.

"(4) The ... report required in this section shall be mailed or otherwise transmitted to the county department of social services of the county in which the child suspected of being abused or neglected is found.

"(5) Upon receipt of a ... report of suspected child abuse or neglect, the department may provide copies to the prosecuting attorney and the probate court of the counties where the child suspected of being abused or neglected resides and is found.

"(6) If the report indicates a violation of section ... 750.145c of the Michigan Compiled Laws, and the department believes that the report has basis in fact, the department shall transmit a copy of the ... report to the prosecuting attorney of the counties in which the child resides and is found."

Section 3 of the Child Protection Law was amended by 1984 P.A. 418, § 1 to require psychologists and family therapists to report. Prior to March 29, 1985, the effective date of this amendment, practitioners such as defendant were under no statutorily imposed duty to report.

Section 13 of the Child Protection Law, M.C.L. § 722.633(2); M.S.A. § 25.248(13)(2), provides:

"A person required to report an instance of suspected child abuse or neglect who knowingly fails to do so is guilty of a misdemeanor."

Defendant first claims, as he did below, that the Child Protection Law, M.C.L. § 722.621 *et seq.*; M.S.A. § 25.248(1) *et seq.*, is unconstitutionally overbroad because it violates defendant's First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems. Defendant argues that there is no compelling state interest in "suspicious" behavior, whether or not the suspicion is reasonable.

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[1] Legislative enactments are cloaked with a presumption of constitutionality. Where a statutory provision would otherwise be unconstitutional, it is the Court's duty to give the statute a narrow construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's interest in enacting the statute. *People v. O'Donnell*, 127 Mich.App. 749, 757, 339 N.W.2d 540 (1983).

[2] The doctrine of overbreadth is primarily applied to First Amendment cases where an overbroad statute prohibits constitutionally protected conduct. *People v. McCumby*, 130 Mich.App. 710, 714, 344 N.W.2d 338 (1983), lv. den. 419 Mich. 911 (1984). A successful overbreadth challenge allows a person charged with violating a statute to escape punishment based on the First Amendment right of others impinged upon by the statute although under a narrower, properly drawn statute, his own behavior could be punished because it is not so protected.

[3] However, not every First Amendment right supports an overbreadth challenge. *Woll v. Attorney General*, 409 Mich. 500, 534-535, 297 N.W.2d 578 (1980). The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep where conduct and not merely speech is involved. *Broadrick v. Oklahoma*, 413 U.S. 601, 614-615, 93 S.Ct. 2908, 2917-2918, 37 L.Ed.2d 830 (1973).

[4] While § 3 does not prevent a psychologist or family therapist from treating those of his patients who have engaged in child abuse, there is little doubt that it places such a patient at greater risk that her or his misconduct will be discovered and prosecution will follow. In the context of a family, § 3 invades its privacy to the extent that the family members' collective desire to seek treatment for the offender and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy.

A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.

The United States Supreme Court has long recognized that a state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent well-developed citizens. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Even assuming that the reporting requirement does invade the protected rights of defendant and his patients, the state has the constitutional power to regulate for the well-being of its children. 390 U.S. at 637-639, 88 S.Ct. at 1279-1280.

We distinguish the cases cited by defendant in support of his overbreadth argument from the issue presented here. Rather, we find this case to be analogous to *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), where physicians and patients challenged the constitutionality of New York statutes requiring that the state be provided with the names and addresses of all persons obtaining certain prescription drugs. The United States Supreme Court found that the statutes did not deprive individuals of their right to seek medical advice from their physician and obtain needed medication. Accordingly, the Court held that the patient-identification requirements did not invade any of the plaintiffs' constitutional rights or liberties.

[5] Further, a person generally lacks standing to challenge overbreadth where his own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). In this case, the victim told defendant, and the victim's father did not deny, that the abuse occurred. Therefore, defendant had more than a "reasonable suspicion" of its occurrence. The Legislature intentionally used "reasonable cause to suspect" as the

threshold for requiring a report in the belief that public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred. Such an interpretation is consistent with the remedial history of the statute, which the Legislature amended to include psychologists and family therapists following the Attorney General's suggestion that these professionals were not covered by the terms of the original statute. See OAG 1979-1980, No 5815, p 1075.

[6,7] Defendant next claims that the Child Protection Law is void for vagueness because it offers no reasonably precise standard to those charged with adhering to or enforcing the law. Defendant contends that the phrase "reasonable cause to suspect" is not clearly defined and does not give him fair notice of what conduct the statute prescribes. A vagueness challenge must be examined in light of the facts at hand. *People v. Harbour*, 76 Mich.App. 552, 558, 257 N.W.2d 165 (1977), lv. den. 402 Mich. 832 (1977). A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct. *People v. Mitchell*, 131 Mich.App. 69, 74, 345 N.W.2d 611 (1983). Even though a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where defendant's conduct falls within that prescribed by the properly construed statute. *Harbour, supra*.

[8] A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *People v. Gilliam*, 108 Mich.App. 695, 699, 310 N.W.2d 843 (1981); *People v. Herron*, 68 Mich. App. 381, 382, 242 N.W.2d 584 (1976). However, a statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words them-

selves, if they possess a common and generally accepted meaning. *McCumby*, 130 Mich.App. at 714, 344 N.W.2d 338.

[9] We find that the words "reasonable cause to suspect" speak for themselves and provide fair notice of the conduct expected in reporting suspected child abuse. Based upon the fact that defendant was told by his patient, the victim, that her father was fondling her breasts, the § 3 reporting provisions are not vague.

In this case, the circuit court suggested that defendant, in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy. That hardly makes the statute vague or overbroad. Defendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to defendant's legal obligations under § 3, it was not for him to make this determination, but for the responsible investigative agencies, such as the Department of Social Services, to make. While defendant is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse.

[10] Defendant next contends that § 11 of the Child Protection Law, M.C.L. § 722.631; M.S.A. § 25.248(11), which abrogates all legally recognized privileged communication except that between attorney and client for purposes of reports required to be made, or the admission of evidence in a civil child protection proceeding resulting from such a report, also amends by implication the psychologist-patient privilege, M.C.L. § 330.1750; M.S.A. § 14.800(750), in violation of our Michigan Constitution, Const. 1963, art. 4, § 25. This claim is without merit. Amendment by implication is not constitutionally prohibited in every instance, e.g., where, as here, an act is complete within itself. *People v. Stimer*, 248 Mich. 272, 292-293, 226 N.W. 899 (1929);

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Wayne County Prosecutor v. Recorder's Court Judge, 92 Mich.App. 433, 444, 285 N.W.2d 318 (1979), lv. den. 408 Mich 905 (1980).

Defendant's last claim is that the Child Protection Law is unconstitutional because it violates his Fourth Amendment and Fifth Amendment rights, as well as those of his patients.

[11] The first prong of this argument is that defendant and his clients have a Fourth Amendment right to privacy from unreasonable seizure of oral evidence, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, this case is readily distinguishable from *Katz*; here, no governmental eavesdropping or intrusion or electronic surveillance was involved.

[12, 13] With regard to the second prong of the argument, we find the defendant has no standing to assert a Fifth Amendment privilege. *United States v. Goldfarb*, 328 F.2d 280, 281-282 (CA 6, 1964), cert. den. 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *Paramount Pictures Corp. v. Miskinis*, 418 Mich. 708, 715, 344 N.W.2d 788 (1984); *In re Moser*, 138 Mich. 302, 305, 101 N.W. 588 (1904). Moreover, defendant is not an agent of the government, therefore any information a patient chooses to divulge to him is not protected by the Fifth Amendment.

We are concerned with the difficulty pointed out by the circuit court of child abusers in need of psychological counseling who are dissuaded by the § 3 reporting provisions from obtaining unfettered access to psychiatric services due to the risk of prosecution for any abuse they have perpetrated. However, as noted by the United States Supreme Court in *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the difficulty in analyzing this problem under the Fifth Amendment is that this approach fails to recognize the essential link between coercive activity of the state on the one hand and a resulting confession by a defendant on the other hand. In this regard, the *Connelly* Court held that the flaw in this constitutional argument is that it would expand the

previous line of voluntariness cases into a far ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there is no claim that governmental conduct coerced his decision. 479 U.S. at 165, 107 S.Ct. at 521.

We congratulate the parties and amicus curiae on their excellent briefs.

REVERSED and REMANDED.



172 Mich.App. 718

Brian MONTGOMERY and Jill Montgomery Plaintiffs-Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellee,

and

Department of Transportation, Defendant.

Docket No. 102480.

Court of Appeals of Michigan.

Submitted May 4, 1988.

Decided Nov. 7, 1988.

Released for Publication Dec. 16, 1988.

Snowmobile operator who was injured when snowmobile collided with motor vehicle at intersection of snowmobile trail and public roadway brought suit against state Natural Resources Department which provided funds to maintain snowmobile trail. The Court of Claims, John D. Payant, J., granted Department's motion for summary disposition based on defenses of governmental immunity and recreational use act. Driver appealed. The Court of Appeals, Weaver, J., held that: (1) Department was not grossly negligent and did not engage in willful and wanton misconduct, so as to remove it from protection of Recreational Use Act providing that landowner is not

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO:

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March 28, 1990

The Honorable Johnny Ellis
Alaska State Representative
P.O. Box V
Juneau, Alaska 99811

Re: Proposed Amendments to SB 450

Dear Representative Ellis:


As you know, SB 450 was drafted by the Department of Law to address a number of perceived ambiguities in the child abuse reporting statute that were brought to light as a result of the well-publicized controversy between the Anchorage School District, the Anchorage Police Department, and the Department of Law. After SB 450 passed the Senate, a grand jury investigating the Anchorage controversy issued a report making a number of recommendations for amendments to the child abuse reporting statute.

Although most of the amendments recommended by the grand jury are already included in SB 450, an additional two amendments are necessary to fully comply with the grand jury recommendations. In addition, as a result of discussing the bill with representatives of several school districts, we recommend that an additional two amendments be made to SB 450.

We look forward to working with you on SB 450, and are hopeful that the House will act expeditiously on this important piece of legislation.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Laurie H. Otto
Assistant Attorney General

Attachment

LHO:me-191

AMENDMENTS TO SB 450
Proposed by the Department of Law
March 27, 1990

AMENDMENT #1

Reason for amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(1)(e) on pages 8 - 9 of the grand jury report.

Page 3, line 23, following "adding":

Delete "a new section"

Insert "new subsections"

Page 4, following line 11:

Insert

(g) A person required to report child abuse or neglect under (a) of this section is not relieved of the obligation to make a report to the department by reporting the abuse or neglect to a job supervisor, or other individual working for the agency or organization that employs the person required to make a report of child abuse or neglect.

AMENDMENT #2

Reason for Amendment: The proposed amendment was recommended in "Part I of Grand Jury Investigation Concerning Reporting of Sexual Abuse of School Children" in Section (B)(2) on pages 11 - 12 of the grand jury report.

Page 4, line 5, following "mination." - line 11:

Delete all material.

Insert:

"If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall provide a copy of the notification required under this section to the Professional Teaching Practices Commission."

AMENDMENT #3

Reason for amendment: The amendment was requested by several school districts because the current wording of SB 450 limits the obligation of law enforcement agencies to report only those incidents of child abuse or neglect having a connection to the school in which the child is enrolled. The districts point out that harm to a student can occur in connection with activities conducted at district facilities other than the one the child attends, or by employees other than those employed at the particular school a child attends, and suggest expanding the scope of the section as set out in Amendment #3.

Page 3, line 26, following "school":

Insert "or district"

Page 3, line 28, following "school":

Insert "or district"

Page 4, line 1, following "student":

Insert "or on the premises of a school within the district in which the child is enrolled as a student"

AMENDMENT #4

Reason for Amendment: The proposed amendment was requested by several school districts in order to provide immunity for school officials who permit a child to be interviewed on school property without obtaining parental consent. In addition, the proposed amendment clears up several ambiguities in the immunity section that were identified by the school districts.

Page 7, lines 4 - 12:

Delete all material.

Insert:

Sec. 47.17.050. IMMUNITY. Except as provided in (b) of this section, a [A] person who, in good faith, makes a report under this chapter, permits an interview pursuant to AS 47.17.027. or who

participates in judicial proceedings related to the submission of reports under this chapter, is immune from [ANY] civil or criminal liability that [WHICH] might otherwise be incurred or imposed, except that a person who makes an untimely report is not immune from civil or criminal liability based on the delay in making the report.

Page 7, line 16, following "liability":

Insert "for the child abuse or neglect"

ANCHORAGE SCHOOL DISTRICT'S ANALYSIS
AND COMMENTS ON SENATE BILL 450
AND PROPOSED CHANGES TO AS 47.17.010 ET SEQ.

The recently issued report from the grand jury which has been investigating the issues arising out of the Carlson incident in Anchorage contains two basic conclusions, both of which have been previously and consistently asserted by the Anchorage School District: (1) it is essential that there be inter-agency cooperation between school districts, law enforcement authorities, and social services agencies if the common goal of protecting children from abuse and neglect is to be realized, and (2) that the provisions of AS 47.17.010 et seq. are vague and confusing as presently written.

Unfortunately, Senate Bill 450 frustrates, instead of promotes, inter-agency cooperation. Instead of providing mechanisms which would encourage greater cooperation, the Bill resorts to imposing additional legal duties, pretty much unilaterally upon school districts. Instead of improving the clarity of existing legislation by providing clear definitions, the Bill uses more vague language and adds terms even more confusing than those already contained in the statute. The only clearly discernable intent of the proposals contained in Senate Bill 450 is the desire to increase and make easier the prosecution of persons who make judgment calls concerning when to report suspected abuse and neglect through second-guessing by police and prosecutors. The amendments do nothing to increase protection of children, nothing to facilitate cooperation between agencies, and nothing to assist

the persons required to report to better understand their obligations.

In the remainder of this Memorandum, the Anchorage School District presents its analysis of Senate Bill 450, and proposes, instead, provisions which would facilitate inter-agency cooperation and remove, rather than increase, uncertainty and confusion in the meaning of statutory terms.

SECTION 1 (AMENDMENT TO AS 47.17.010)

The purported expression of intent added to AS 47.17.010 which concerns the distinction between reporting and investigating child abuse and neglect requires further comment.¹ As drafted, the Senate Bill ignores the fact that school districts, as well as social services and law enforcement authorities, have lawful and legitimate needs to investigate suspected child abuse or neglect. In the case of school districts, it is imperative that as an employer, the District to be able to identify, substantiate, and provide a basis for action against any employees who may have committed reportable acts against students. Indeed, the school district's interest is even broader. As in the Carlson case, the District needs to be able to develop information which may appropriately be used to terminate employment status even though it may not constitute a criminal act or be otherwise reportable under Title 47. Teacher tenure statutes and procedures require that the school district, as employer, develop its own independent factual

¹ The inclusion in the purpose section of references to "mental injury" and to "maltreatment," will be addressed in the remarks pertaining to Section 20, below.

basis for taking personnel action. AS 14.20.180. These statutes place a heavy burden on school districts to prove misconduct in terminating a tenured teacher. The District also has an obligation to protect students.

The school district cannot legally rely upon investigations done by other agencies and have any hope of prevailing in contested employment proceedings. Accordingly, the implication in the Senate Bill that social services and law enforcement authorities are the only agencies which should be investigating child abuse or neglect does not accommodate a school district's important interest in removing an abuser from contact with students and terminating the employment relationship. Instead, school districts have vital interest in developing information which will enable them to take effective employment action to protect students. Hopefully, in cases involving criminal wrongdoing, such investigations can be done jointly with appropriate law enforcement agencies.

The suggestion that school districts are incapable of conducting appropriate and effective investigations in this area for purposes of successfully undertaking employment action is contradicted by Section 7 of the Bill which requires school districts to conduct training programs of their employees concerning the laws relating to abuse and neglect, techniques for recognizing and detecting abuse and neglect and other related subjects. Additionally, the school district has counselors, nurses, and administrators who have experience in and responsibility for investigating a range of matters that require

fair and effective interview techniques. In addition to employment matters, school district personnel must investigate student misconduct that might result in serious discipline or suspension.

It is clear that there is a distinction between the right and necessity of investigating on the one hand and the obligation to report on the other. This is the valid point which should be made clear in an Amendment to AS 47.17.010. Accordingly, that section should be amended to read as follows:

[In lieu of the language in Senate Bill No. 450 beginning, "it is not the intent . . .", AS 47.17.010 should be amended to read as follows:

The Legislature recognizes that social service agencies, law enforcement authorities, and school districts, all share the common goal of protecting children and all have different primary purposes whose achievement is designed to promote that common goal. The Legislature further recognizes that in achieving their primary purposes, social service agencies, law enforcement authorities, and school districts must be able to obtain accurate and reliable information concerning child abuse and neglect, and that such information frequently must be obtained from the same source or sources. It is the intent of the Legislature that all social service agencies, law enforcement authorities, and school districts should recognize the legitimacy of each others' functions, accept the commitment of each other to the common goal of protecting children, and do everything possible to facilitate a professional and cooperative working relationship among themselves. It is the intent of the Legislature that persons required to report under this Title shall make such reports after the earliest time at which they develop the basis and belief required by law that abuse or neglect has occurred. Thereafter, whatever investigations are necessary should be undertaken in a cooperative spirit and in the best interest of the children concerned.

SECTION 2 (AMENDMENT TO AS 47.17.020(a))

The "Cause to believe" standard contained in present AS 47.17.020(a) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" standard should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 3 (AMENDMENT TO AS 47.17.020(b))

The "Cause to believe" standard contained in present AS 47.17.020(b) should be retained, and the Senate Bill's proposal of "reasonable cause to suspect" should be rejected. The reasons for retaining cause to believe standard, as well as a definition of that standard which provides some guidance to the persons who have to apply it, are fully discussed in the remarks to Section 20 below.

SECTION 4 (AMENDMENT AS 47.17.020(c))

No comment required.

SECTION 5 (REPEAL AND RE-ENACTMENT as 47.17.020(e))

No comment required.

SECTION 6 (AMENDMENT ADDING NEW SECTION (f) TO AS 47.17.020)

There are two major problems with this proposed subsection. First, if a law enforcement agency knows of school-related abuse or neglect of a child, no legislation should suggest that it is appropriate for the agency to wait until the conclusion of its investigation to notify the Chief Administrative Officer of the school or district in which the child is enrolled. Yet, that

is precisely the implication contained in the proposed subsection. This implication flies in the face of the grand jury's recognition of the need for inter-agency cooperation. It also threatens substantial harm to other students in cases where law enforcement agencies are conducting a confidential investigation of school-related abuse or neglect without notifying school authorities so they can take immediate personnel action to suspend, reassign, or remove the cause of the suspected abuse or neglect. Accordingly, the first sentence of proposed subsection (f) should be modified to read as follows:

. . . "The Law Enforcement Agency shall [delete "At the conclusion of its investigation"] notify the Chief Administrative Officer of the school or district in which the child is enrolled at the earliest possible time after the agency determines that a child has been abused or neglected and the circumstances set forth above, and in no event later than 24 hours after having made such a determination."

The second problem with proposed subsection (f) is that it inefficiently places a burden upon the Chief Administrative Officer of the school or district in which the child is enrolled to forward the law enforcement agency's information to Professional Teaching Practices Commission. This is an unnecessary step since the law enforcement agency, or any other person or organization, can and should make a report to PTPC in the event it believes a person involved in the teaching profession has committed an act of child abuse or neglect. Administrators in school districts should, of course, file reports with PTPC when, in their professional judgment, they believe such reports are warranted. If a law enforcement agency, or some other person or agency, feels a report

is warranted, then they should make such a report. But it is unnecessary to obligate one individual to forward the report of another, particularly since the proposed legislation does not take account of circumstances in which the Chief Administrative Officer might have reason to doubt the accuracy or creditability of the "determination" made by some law enforcement officer. Simply put, whoever has a reason to believe their referral to PTPC would be appropriate should make such a referral.

SECTION 7 (AMENDMENTS TO AS 47.17.022)

The Anchorage School District concurs in the amendments to the statute which specifically set forth the obligation of school districts to provide appropriate training in this area. Indeed, the Anchorage School District has been providing such training for years at the direction of the Department of Education.

The only problem with the amendments arises from the addition of new subparagraph (6) which purports to obligate school districts to instruct their employees concerning "the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies after a report of suspected abuse or neglect." The manner of investigation by other agencies is, of course, something known to them and not within the immediate knowledge of school districts. Subsection (d) provides that a department or school district may seek technical assistance from the Department of Health & Social Services in the development of its training program, but does nothing to insure the Department of Health & Social Services will provide assistance when it is requested. Moreover, no such obligation is created with respect to

law enforcement agencies. School districts cannot very will be required to train employees concerning the manner in which DFYS and police investigate without being provided information as to how those agencies conduct their investigations. Accordingly, either AS 47.17.022(c)(6) should be deleted from the amended statute, or AS 47.17.022(d) should be amended to add the following sentences after the language contained in the Senate Bill:

"If a department or school district makes such a request, the Department of Health & Social Services shall respond by providing the necessary or requested technical assistance within 45 days of the filing of the request. Additionally, the department and law enforcement agencies shall prepare and disseminate to the school district in the jurisdictions in which they operate written materials describing the manner in which cases of child abuse or neglect are investigated by them after reports of suspected abuse or neglect have been made. These materials shall be prepared and disseminated to the appropriate school districts within 60 days of the effective date of this legislation, and in the event any modification, amendment, or change occurs with respect to the manner of investigation conducted by the department or law enforcement agencies, they shall provide written notification of the change and of the new current procedures for investigations in such cases to the appropriate school districts within 30 days of the making of any such changes."

SECTION 8 (AMENDMENTS TO AS 47.17.023)

The reason to believe standard should be retained, and the proposed "reasonable cause to suspect" standards should be rejected for the reasons discussed fully in the remarks to Section 20 below. Moreover, use of the term "immediately" should be deleted for the reasons discussed in the remarks to Section 20 below.

SECTION 9 (AMENDMENTS TO AS 47.17.025(a))

No comment required.

SECTION 10 (AMENDMENT BY ADDING NEW SECTION AS 47.17.027)

This new section is another good example of the Bill's failure to promote cooperation in favor of the imposition of legal obligations. If the Legislature elects to proceed in that manner, then it should impose obligations in a fair fashion which take due regard of the interests of all of the agencies with a common stake in the information to be obtained concerning child abuse or neglect and to share in the common goal of protecting children. Instead, this proposed section of the Senate Bill disregards the legitimate interest and the role of school districts, providing social services and law enforcement investigators to use children in the school setting for pursuit of their own purposes without regard for the legitimate interest and functions of the schools. Accordingly, Section 47.17.027 should not be enacted. Instead, social services and law enforcement agencies should work out Memoranda of Understanding with school districts at the local level.

If the legislature is intent upon replacing cooperation with legal requirements, then the proposed Section 47.17.027 should be discarded in favor of the following provisions, derived from a Memorandum of Understanding between the Anchorage School District and the Division of Family and Youth Services of the Department of Health & Social Services:

In cases where the department or a law enforcement agency determines that there is cause to believe that a child has been abused or neglected by a person responsible for the child's welfare, or as a result of conditions created by a person responsible for the

child's welfare, and based upon information and reports which did not originate with school district employees, then school officials shall permit an interview of the student without prior permission having been obtained from a parent/guardian, if the parent/guardian, is the person responsible for the child's welfare who is suspected of committing the abuse or neglect. Before such an interview is authorized, the department or law enforcement agency shall provide written certification to the school official of the following:

- a. That the department or agency has cause to believe that the student is a victim of abuse or neglect by a person responsible for the child's welfare or as a result of conditions created by a person responsible for the child's welfare;
- b. That the interview is necessary to determine the existence of the alleged abuse or neglect;
- c. That the proposed interview is in the best interest of the child;
- d. That the department or law enforcement agency will make a diligent effort to notify the parent/guardian that the interview occurred as soon as feasible after the conclusion of the interview, but in no event later than 10:00 p.m. on the day on which the interview occurs.

A representative of the school district shall be permitted to be present at any such interview unless the department or law enforcement agency provides case-specific reasons in writing specifically setting forth why the presence of a representative from the school would be detrimental to the interview. A student who is believed to possess information relative to child abuse or neglect, but who is not believed to be the object of such abuse or neglect may not be interviewed in school relative to such information without a court order or without prior notification to and approval from the student's parent/guardian.

SECTION 11 (AMENDMENTS TO AS 47.17.040(b))

The amendment to subsection (b) should be expanded to include the provision of investigative reports and reports of harm to school districts as well as to "governmental agencies with child-protection functions." If the legislature opts to impose legal obligations and limits on the roles to be played by various agencies in the area of child abuse and neglect, then it must make provision for sharing of information between agencies. The grand jury's report specifically recommends that this subsection be amended to permit the sharing of information beyond governmental agencies with the child-protection functions. Accordingly, subsection (b) should be amended to include the following sentence prior to the sentence beginning . . . "a person, not acting . . . :

". . . investigation reports of harm filed under this chapter which involves (1) suspected abuse or neglect caused by a teacher or other employee of the school district, (2) which occurred during an activity sponsored by a school, or (3) which occurred on the premises of a school shall be provided to the Chief Administrative Officer of the school or school district at the earliest possible time after the information or reports are prepared."

SECTION 12 (AMENDMENTS TO AS 47.17.050)

The proposed amendment to the immunity provision of the statute renders the provision of the criminal penalty for failing to report unconstitutional. The United States Supreme Court has recognized for decades that legislation which requires an individual to make a report which is then used as the first step in prosecuting the individual for a law violation constitutes a clear violation of the privilege against self-incrimination.

Accordingly, such statutes are unconstitutional unless they provide immunity from prosecution which is co-extensive with the privilege. Under the Senate Bill, a teacher could make a good faith report on Friday, believing that she has cause to believe that child abuse or neglect has occurred. DFYS could then forward the report to a law enforcement agency, and if some police officer concluded that the teacher should have had enough information to report on Tuesday, then the report could be deemed "untimely." Assuming a prosecutor agreed with this assessment, the teacher could then be prosecuted for failing to report "immediately" or "promptly" as required by the statute. Of course the prosecution of the teacher would not have occurred but for the teacher's making a good faith report. Essentially, the teacher incriminates herself by making a report in good faith, only to be second-guessed by the police and prosecutors later who, in hindsight, concluded that she had sufficient information to make the report at an earlier point. According to the Senate Bill, this teacher lacks immunity from prosecution, can be hauled into court, prosecuted, convicted of a crime, sentenced to jail, and suffer the ignominy of a criminal record, all because she made a good faith report, the timing of which was second-guessed by others in hindsight. The Alaska and the United States Constitutions will not permit such a result.

The Anchorage School District believes that the purpose of the statute is to encourage people to make reports so that intervention can occur to protect children. This provision in the Senate Bill creates a priority in prosecution of reporters over the

creation of incentives to promote reports to protect children. AS 47.17.050 should be amended to read as follows:

(a) a person who makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed, unless the person makes a report which the person knows to be false at the time the report is made, or unless the person intentionally delays making a report for the purpose of preventing the discovery of child abuse or neglect which the person believes to have occurred.

SECTION 13 (AMENDMENT BY ADDING NEW SUBSECTION TO AS 47.17.050)

No comment required.

SECTION 14 (AMENDMENT TO AS 47.17.064)

No comment required.

SECTION 16 (AMENDMENTS TO AS 47.17.068)

The proposed amendments to the criminal penalty section which applies to failure to report, can only be described as a punitive and misguided overreaction to the Carlson matter. Existing law, undoubtedly in recognition of the fact that the obligation to make a report on such a vague standard as cause to believe or, worse, reason to suspect, purports to impose a criminal penalty for failing to report only when an individual "knowingly" fails to make a required report. The section as amended purports to impose strict liability upon persons who fail to make reports, irrespective of their own good faith and absence of any criminal intent. The proposed amendments further evidence the peculiar agenda underlying many of the proposals contained in Senate Bill 450. Nothing in these modifications will improve the protection of children. However, they will make it infinitely easier for police

and prosecutors to target, investigate, and prosecute health practitioners, educators, and others required to report who, notwithstanding their good faith and best efforts, are determined through the hindsight of police and prosecutors to have miscalculated the moment at which cause to believe or reason to suspect arose. Unfortunately, the Anchorage School District must observe that in the face of a grand jury report calling for inter-agency cooperation, proponents of this section of Senate Bill 450 are apparently set on a course of hardening adversary relationships between law enforcement authorities and potential reporters. It is incomprehensible why the proponents of this section of the Senate Bill conclude that the radical step of imposing strict criminal liability could possibly be an appropriate response to an after-the-fact determination that somebody made a highly discretionary judgment call the wrong way or a little bit too late.

Imagine what the response of law enforcement agencies would be if such a punitive measure were focused on them. Let us suppose that the Legislature proposed a bill which would subject police officers and prosecutors to criminal prosecution if they authorized or made arrests or brought charges without adequate "probable cause." Assume that, like the proposed amendments to the criminal penalty in Title 47 no criminal intent was required. Accordingly, a police officer or prosecutor could successfully be charged and convicted of a crime for making or authorizing an arrest or filing a charge when a court later determined that there had not been probable cause to support the action. Police and prosecutors would flood the Legislature with appeals pointing out

that "probable cause" is a highly discretionary judgment, that it depends entirely upon the individual facts of a particular case, that courts are constantly disagreeing as to when probable cause exists or does not exist, and that it would be wholly unfair to subject dedicated law enforcement professionals to criminal prosecution because somebody, in hindsight, second guessed the accuracy of judgments which they made in good faith but which turned out to be erroneous. Exactly the same situation exists with respect to the proposed amendment to the penalty section of Title 47. The standard existing in the proposed Senate Bill is far lower, more discretionary, and more subject to disagreement than the well established concept of "probable cause" or the standard existing in the present law. If the Legislature would strike the criminal penalty section from Title 47 altogether, it would promote inter-agency cooperation, by having a direct effect on the normative messages concerning how people should perceive each other and their obligation. But if a criminal penalty is to remain in the statute for persons who fail to report under the vague and discretionary standards contained in this legislation, then it certainly should require at least a "knowing" failure to make a report, as exists in the present law.

Finally, adopting the amendment proposed in Senate Bill 450, and imposing strict criminal liability upon individuals who fail to make a report at the precise moment that a hopelessly discretionary standard is supposedly fulfilled will render the proposed penalty section unconstitutional. An attempt to enforce

such a section would plainly violate any accuseds' rights to due process under the Alaska and United States Constitution.

SECTION 17 (AMENDMENTS TO AS 47.17.070(2))

The inclusion of "mental injury" raises problems which are discussed in Section 20 below.

Additionally, there does not appear to be a rationale for expanding the scope of the reach of the statute beyond abuse or neglect occasioned by those who are responsible for the child's welfare, as provided for in present law.

SECTION 18 (AMENDMENTS TO AS 47.17.070(3))

No comment is required.

SECTION 19 (AMENDMENT TO AS 47.17.070(9))

No comment is required.

SECTION 20 (AMENDMENTS BY ADDING NEW PARAGRAPHS TO AS 47.17.070)

The proposed definition (12) concerning the term "immediately" is self-contradictory, vague, and fails to resolve the main source of uncertainty in the reporting statute. Immediately cannot mean both "as soon as is reasonably possible" and "within 24 hours" as suggested by the definition. Circumstances can be imagined where the report as soon as is reasonably possible could not occur within 24 hours. Additionally, the ability to charge someone with a crime because they reported at 23 hours 30 minutes and were determined by someone else to have been able "reasonably" to have reported sooner indicates that Senate Bill 450 has done nothing to limit the discretion of law enforcement officials, put persons on notice as to their obligations, or otherwise resolve the problems that exist in the

present statute. Most significantly, the concept of an "immediate" or "prompt" report will always be contentless given the highly discretionary standards which trigger this timing mechanism. However precise the definition of what "immediate" or "prompt" mean, the vagueness, uncertainty, lack of guidance, and difficulty which arises from the reporting statute is that the timing mechanism is triggered by the occurrence of "cause to believe" in the present statute or "reasonable cause to suspect" in the Senate Bill. It is the combination of an immediate reporting requirement with such a vague, ad hoc, discretionary standard which makes it virtually impossible to meaningfully inform people as to the obligations which the law imposes upon them. While a sense of the intent can be discerned from the language and from the overall legislative scheme, a requirement "immediately" to report a suspicion or cause to believe can never be defined with sufficient precision to permit the imposition of a criminal penalty for the good faith failure of a person to do so.

New subsection (13) finally offers a definition of "maltreatment," a term which has not previously been specifically defined in Title 47, and which appears nowhere else in the Alaska statutes. Unfortunately, the purported definition contained in Senate Bill 450 is so amorphous that it is virtually without content or definite meaning. The range of "behavior that harms or threatens a child's health or welfare," is potentially so large and all encompassing as to frustrate the ability of reasonable people to understand what would be included and what would not be included. For example, would otherwise lawful and consensual

sexual intercourse between teenage students over the age of consent constitute "maltreatment" in any case? Would it constitute "reportable maltreatment" if one of the parties felt uncomfortable after the fact about having engaged in the intercourse? If a student came to a teacher and said she felt guilty for having had intercourse with another student which was otherwise lawful, would a report have to be made? Moving out of the sexual context, if doctors or teachers see parents yelling at their children, criticizing them with sarcastic remarks, humiliating them in front of others in public, or engaging in other "behavior" which could conceivably "threaten the child's welfare," must a report be made? What is the scope of the term "a child's welfare." This term is unconstitutionally vague if any consequence, particularly a criminal one, can be imposed upon a person who fails to make a report when they supposedly have cause to believe or reason to suspect that such a vague occurrence has happened. It is vague because the concept of "health or welfare" is vague and undefined and also because behavior is supposedly reportable even if it has no actual, observable, or concrete effect on the child, but merely "threatens" health or welfare. No potential reporter can understand what his or her legal obligations are so long as such a definition of this term is included in the statute.

Significantly, the term "maltreatment" was originally included in Title 47 in order to maintain compliance with Child Abuse Prevention Treatment Act of 1974, 42 U.S.C. 5101 et seq., and thus to enable the state to continue to receive federal funds. Federal regulations define "maltreatment" for purposes of the

parallel federal statute as including the "failure to provide adequate food, clothing, shelter, or medical treatment." 45 CFR 1340.2(d)(2)(i). The term "maltreatment" does need to be defined if it is going to remain in Title 47. The appropriate definition is the one provided for in the CFR, which defines the same term in the federal legislation from which Alaska originally borrowed it.

In subparagraph 14, Senate Bill 450 expands the reporting requirement to cover "mental injury."

The Legislature has twice before considered the inclusion of "mental injury" in the reporting requirements of Title 47, Chapter 17. On both occasions, in 1976 and 1985, inclusion of "mental injury" in the reporting requirements was rejected by legislators. In 1985 the proposed amendment specifically defined "mental injury" as:

An injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment to the child's ability to function within a normal range of performance and behavior, with due regard to the child's culture."

See, Minutes of House Health, Education & Social Services Standing Committee, April 9, 1985.

In discussing whether to include "mental injury" in the reporting requirement a number of legislators were insightful in their recognition of the difficulties that the amendment created. The concerns expressed by legislators in 1985 under the working definition of "mental injury" provided above, are equally valid when considering the inclusion of "mental injury" as proposed in the current Senate Bill 450. A few of the concerns expressed in 1985 are as follows: (1) Representative Pettyjohn was concerned

that as defined the term "mental injury" could be very easily interpreted in an overly broad manner which he was not comfortable with; (2) Representative Thompson was concerned with the term "mental injury," specifically referring to the phrase "normal range of performance of range and behavior," used to define mental injury, believing these phrases to be too ambiguous; and (3) Representative Handley stated her concern was that the phrase "mental injury" was too broad as defined.

Each of these comments made concerning the proposed amendment to include "mental injury" in the reporting requirement, from 1985 are equally applicable to the present discussion concerning "mental injury." No potential reporter can understand what his or her legal obligations are so long as the definition of "mental injury" remains as currently drafted. Therefore, "mental injury" as defined should be left out of the reporting statute.

The discretionary standard at which point a report is required has been altered by Senate Bill 450 in proposed subparagraph (15) from "cause to believe" to "reasonable cause to suspect." The definition is meaningless and gives no guidance on the conduct required by one subject to the reporting obligation. According to the Bill, "reasonable cause to suspect" means when a "reasonable person [would] suspect that something might be the case." Obviously, the bill does not define this critical term, but simply repeats it. That is not an explanation of the content of the reporting standard. Yet, according to the bill, if a reporter fails to file a report within 24 hours from the moment at which this undefined standard is satisfied, then he or she is subject to

strict liability in a criminal prosecution. The notion that a standard depending so much on the facts of an individual case, hinging so much on individual professional judgment, and providing for such little direction in its definition could somehow be the basis of a criminal prosecution is a startling rejection of the most basic constitutional guarantees of fair notice, due process, and specificity which lie at the bottom of all criminal legislation.

Additionally, the dilution of the standard from cause to believe to "reasonable cause to suspect" raises further constitutional problems by imposing legal obligations upon citizens to make accusations against other citizens which they do not believe and which they do not believe have a minimally sufficient basis in fact. Such requirements are anathema in a free society, and abridge the state and federal rights of citizens to due process of law and to be free from unreasonable searches and seizures, and the specific right to privacy contained in the Alaska Constitution.

Although the School District does not believe that "reasonable cause to suspect" or "cause to believe" can be defined with sufficient precision to justify the imposition of criminal sanctions for miscalculating when that cause exists, it is apparent that if there is going to be such a standard and a criminal penalty, the standard must be defined. Accordingly, at a minimum, "reasonable cause to suspect" or "cause to believe" should be defined as existing; --

where, based on the total circumstances, including direct observation, knowledge and information gained from others, and the exercise through professional judgment, a

person has a good or adequate reason, supported by specific and identifiable facts, to believe that child abuse or neglect has occurred or is occurring. "Reasonable cause to suspect" or "cause to believe" is less than a probability, but more than a mere suspicion, conjecture, or inkling.

Finally, the proposal to define "sexual abuse" contained in subparagraph (17) is desirable, but the definition should end with the incorporation of the criminal provisions provided in AS 11.41.410-11.41.455. The purported definition contained in Senate Bill 450 becomes unconstitutionally vague when it extends to include "any other sexual behavior intentionally performed in the presence of a child that harms or threatens the child's health or welfare." "Sexual behavior" which is not contained within the criminal provision of Title 11 is nowhere defined. Nor is any definition given to the circumstances under which touch, otherwise lawful behavior, would be considered to harm or threaten a child's "health or welfare." By introducing such vague language, the Senate Bill virtually guarantees its rejection by courts of law. Perhaps the proponents of the legislation can explain or give examples of when sexual behavior intentionally performed in the presence of a child does not harm or threaten the child's health or welfare. Such vagueness in terms invites court challenges, but more seriously prevents the thousands of persons subject to the reporting requirements of Title 47 from reasonably being able to understand when they have an obligation to file a report under its provisions. Undefined "sexual behavior" which "threatens a child's welfare" contains if anything, less content than the phrase "crime against nature" which has been held unconstitutionally vague by the

Alaska Supreme Court. Harris v. State, 457 P2d 638, 647 (Alaska 1969).

CONCLUSION

Constructive amendments can and should be made to Title 47. The amendment should encourage inter-agency cooperation, not facilitate the prosecution of persons who may in good faith fail to make reports or make reports in a manner which, after the fact, someone else determines should have been made sooner. New provisions should be more specific, increase the clarity of definitions, and provide guidance so that the thousands of dedicated professionals subject to the law's provisions and who try their best to comply with them, be given some direction in making the judgment calls required of them. Senate Bill 450 not only fails to encourage cooperation and increase clarity, but represents a major step backwards.