HB
396

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 14, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 1-27-91

The JUDICIARY Committee considered: HB 396

HOUSE BILL NO. 396 ANTI-VIOLENT CRIME ACT OF 1992

"An Act relating to violent crimes and criminal law and procedure."

RECOMMENDATIONS: [ ] the same title
be replaced with CS HB 396 (JUD) [ ] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[✓] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal impact Admin. [ ] fiscal note(s) _____

[✓] zero fiscal note Law, Corrections, Public Safety, Ots. [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Kevin Pat Purcell	✓	Jay Ellis		X	
Mike Miller	✓				
Terry Martin	X				
Mark Hanley	X				
Mike Thompson	—				
Dave Donley	✓				

Dave Donley
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 396 (JUD)

Revision Date: February 4, 1992
Title: An Act relating to violent crimes and criminal law and procedures.
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1 6 3 1

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	76.7	79.0	81.4	83.8	86.3	88.9
TRAVEL	2.0	2.1	2.2	2.3	2.4	2.5
CONTRACTUAL	20.0	20.6	21.2	21.8	22.5	23.2
SUPPLIES	1.5	1.6	1.7	1.8	1.9	2.0
EQUIPMENT	2.0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	102.2	103.3	106.5	109.7	113.1	116.6
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	102.2	103.3	106.5	109.7	113.1	116.6
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	102.2	103.3	106.5	109.7	113.1	116.6

POSITIONS:

FULL-TIME	1.0	1.0	1.0	1.0	1.0	1.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)
See Attached.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency
Phone: 279-7541
Date: February 4, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/5/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

ANALYSIS: (continued)

Many of the provisions contained in this bill are fiscally insignificant. Others, however, will have a fiscal impact on the Alaska Public Defender Agency. Additional cases, additional trials, more protracted sentencing hearings all add up to an increased work load. It should be noted that the statute of limitations provisions, for example, were introduced in this bill because police were complaining that many cases were going unprosecuted because they fell outside of the applicable statute of limitations. While neither the police nor the Department of Law have provided statistics concerning the additional cases which might be prosecuted, suffice it to say the work load is going to go up, not down.

It is difficult to project the amount of additional work which will be generated by the provisions of this bill. For that reason a very conservative approach is taken by this agency in terms of fiscal impact. It is anticipated that one additional attorney will be needed in Anchorage to absorb the work created through this bill. This lawyer would travel on an "as needed" basis to other office locations.

BUDGET ANALYSIS - CSHB 396 (JUD)

100 - Attorney III (Anchorage)		76.7
200 - Travel		2.0
300 - Contractual Office Space, Experts		20.0
400 - Supplies		1.5
500 - Equipment (One Time)		2.0
	Total	102.2

Position Title	No. of Positions	Range / Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months	Location	Election District
PFT	12.0	EBA	92

TYPE OF EXPENDITURE		AMOUNT
Salary	56.0	
Benefits	20.7	
Premium Pay		
Other		
Total Personal Services	76.7	76.7
Travel		2.0
Contractual		20.0
Commodities		1.5
Equipment		2.0
Other		
Total Cost		102.2
FUNDING SOURCE FOR TOTAL COST		
Federal Receipts 1002		
G.F. Match 1003		
General Fund 1004		102.2
I-A Receipts 1007		
CIP Receipts 1061		
Other		

Justification

CSHB 396 (JUD) will increase the workload of the Public Defender Agency. Its provisions will 1) elevate certain criminal conduct from misdemeanor level to a felony classification, 2) elevate certain felony conduct to a higher classficiation of offense, thereby increasing potential penalties, 3) extend significantly the statute of limitations for many criminal acts, including doubling the period for charging crimes against persons and increasing by 15 years the statute of limitations for sex offenses against persons under 16 years of age, 4) create a more severe criminal penalty for certain homicide offenses (99 years without parole), and 5) modify certain sentencing procedures which will restrict the court's ability to reduce sentences.

While it is difficult to quantify the extent to which these provisions will increase the Public Defender case/workload, a real increase will occur. The proposed budget increment (one attorney and associated expenses) represents a conservative estimate of the fiscal impact of CSHB 396 (JUD).

8/LEG92/02127B.KP/1

Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 93

Revised Date:

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 396

Revision Date:
Title: An Act relating to violent crimes and criminal law and procedure
Sponsor: Judiciary
Requestor: Judiciary

Department Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 01/23/92

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 01/23/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 396 (JUD)

Revision Date: February 20, 1992 **Department Affected:** Department of Law

Title: "An Act relating to crimes of assault, unlawful exploitation of a minor..." **BRU:** Prosecution

Component: All

Sponsor: House Judiciary Committee

Requestor: House Judiciary Committee **COMPONENT SERIAL NO.** [ ][ ][ ][ ] 85 through 91

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)

The Department of Law's analysis has been revised in accordance with the House Judiciary Committee substitute for HB 396.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director **Phone:** 465-3672

Division: Administrative Services **Date:** February 20, 1992

Richard I. Pegues /FOR/

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law **Date:** February 20, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 396 (JUD)

Title: "An Act relating to violent crimes and criminal law and procedures."

This bill makes numerous changes to Alaska's Criminal Code involving violent crimes. A section-by-section analysis follows below.

Section 1. Title.

Section 2. This section amends AS 11.41.200(a) to include within the crime of assault in the first degree recklessly causing serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury. This amendment is in response to the recent court of appeals decision in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991). It will not have an impact on the Department of Law because, where it is now necessary to prove several misdemeanors, the amendment will allow the state to prove a single class A felony, instead. This crime usually arises when a child is subjected to repeated physical abuse.

Section 3. This section amends AS 11.41.210(a) to include in the definition of the crime of assault in the second degree recklessly causing serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury. The result of this amendment is the same as Section 2, except that assault in the second degree is a class B felony because of the absence of a dangerous instrument.

Section 4. This section amends AS 11.41.220(a) to provide that a person, who is 18 years of age or older and who causes physical injury to a child and the injury requires medical treatment or causes physical injury on more than one occasion when the victim of the offense is under the age of 10, commits the crime of assault in the third degree. The amendment is unlikely to have a fiscal impact because of the infrequency of the offense.

Section 5. This section amends AS 11.41.410(a) to include in the crime of sexual assault in the first degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment of the victim. This amendment will have little impact on the department because of the infrequency of the offense.

Section 6. This section amends AS 11.41.420(a) to include in the crime of sexual assault in the second degree the conduct of engaging in sexual contact with a person who is unaware that a

sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment to the victim. The amendment also adds to the offense of sexual assault in the second degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed (when the offender is not a health care provider). These changes are not expected to have a fiscal impact on the department.

Section 7. This section amends AS 11.41.425(a) to include in the crime of sexual assault in the third degree the conduct of engaging in sexual contact with a person who is unaware that a sexual act is being committed. This section is not expected to have a fiscal impact on the department.

Section 8. This section amends AS 11.41.455(a) to include within the crime of unlawful exploitation of a minor the conduct of knowingly inducing or employing a child under 18 years of age to engage in, or photographing, filming, recording, or televising a child under 18 years of age engaged in sexual masochism or sadism. This change should have no fiscal impact on the department.

Section 9. This section provides definitions for the terms "health care worker" and "sexual act."

Section 10. This section amends AS 11.61.200(a) to include within the crime of misconduct involving weapons in the first degree the act of discharging a firearm from a moving propelled vehicle. Consequently, "drive-by" shootings would become a class C felony even when no one is injured or placed in fear by the conduct. This section is not expected to have a fiscal impact on the department.

Section 11. This section amends AS 11.61.200(d) to provide that as an exception to AS 11.61.200(a)(11), a peace officer acting within the scope and authority of employment may fire a weapon from a moving vehicle. This amendment will have no fiscal impact on the department.

Section 12. This section amends AS 11.61.200 to make it an affirmative defense to a prosecution under AS 11.61.210(a)(11) that the person who discharged the firearm from a moving vehicle was engaged in a lawful hunting or fishing activity at the time. This amendment will have no fiscal impact on the department.

Section 13. This section amends AS 11.61.210(a) to include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. This amendment will not have a fiscal impact.

Section 14. This section amends AS 11.61.220(a) to provide that a person commits the crime of misconduct involving weapons in the third degree if the person knowingly possesses a defensive weapon within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer. A person 21 years of age or older is exempted from this provision. This amendment will not cause a fiscal impact.

Section 15. This section amends AS 12.10.010, the state's general statute of time limitations for criminal prosecutions, to provide that the current 5-year limitation within which an indictment must be found or an information or complaint must be instituted, shall be extended to 10 years for the following felonies:

Manslaughter
Criminally Negligent Homicide
Assault in any degree
Kidnapping and Custodial Interference
Arson in the first degree
Sexual Assault in any degree
Sexual Abuse of a Minor in any degree
Incest
Unlawful Exploitation of a Minor
Robbery, Extortion, or Coercion

Consequently, there will be no fiscal impact for at least 5 years. Although information that would indicate how many crimes go uncharged under the current 5-year limitation is not available, the department does not anticipate that this amendment will have a significant fiscal impact.

Section 16. This section amends AS 12.10.020 to provide that even if the general time limitation for bringing a prosecution has expired, a prosecution for a sex offense committed against a person under the age of 18 may be commenced at any time.

Section 17. This section amends AS 12.55.025(e) to clarify that a person convicted of two or more crimes, including murder in the first degree, may be sentenced to consecutive sentences in excess of the term of imprisonment for the murder conviction. This is a sentencing provision and will not have an impact on the department.

Section 18. This section amends AS 12.55.025 to provide that the preponderance of the evidence standard of proof applies to

sentencing proceedings, except as provided by AS 12.55.125(a)(3), 12.55.125(k), 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment has the effect of reversing a recent Court of Appeals ruling. Because the amendment is a sentencing provision, it will not have a fiscal impact on the department.

Section 19. This section amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years would also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or homicide under the laws of another jurisdiction when the offense contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110. This section would also require a court to impose a mandatory 99 year sentence when the court finds clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture. These sentencing provisions are not expected to have a fiscal impact on the department.

Section 21. This section amends AS 12.55.125 to provide that a defendant sentenced to a mandatory term of 99 years may apply for a modification or a reduction in the sentence of one-half of the mandatory term. The section also provides that a first felony offender convicted on an offense for which a presumptive term is not specified may not be sentenced to a term of unsuspended imprisonment that exceeds the presumptive term for a second felony offender convicted of the same crime. These are sentencing provisions and they will not have an impact on the Department of Law.

Section 22. This section amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present. This sentencing provision will not have a fiscal impact on the department.

Section 23. This section amends AS 12.55.175 to provide that, except as provided in Section 22 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less

than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. This sentencing provision is not expected to have a fiscal impact on the department.

Section 24. This section amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term, under the amendment to AS 12.55.125(a) proposed in Section 19, shall not be eligible for discretionary parole during the entire term. This sentencing provision will not have a fiscal impact on the department.

Section 25 and Section 26. These sections amend AS 33.16.090 to provide that a prisoner may be eligible for discretionary parole during the second half of a sentence imposed under the amendment to AS 12.55.175(e) proposed in Section 23, above.

Section 27. This section makes the extension of the statute of limitations on criminal prosecutions, set out in Section 15 above, prospective.

Section 28. This section amends Alaska Rule of Criminal Procedure 35 to permit a court to reduce or modify a mandatory sentence of imprisonment of 99 years, in accordance with the sentencing provision contained in Sections 19 and 21.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. H.B. 396

Revision Date: _____ **Department Affected:** Department of Corrections

Title: "An Act relating to violent crimes and criminal law and procedures." **BRU:** Statewide Operations

Component: Various

Sponsor: House Judiciary

Requestor: House Judiciary **COMPONENT SERIAL NO.** | | | | |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analys.s.

Prepared By: Carl Nickel, Director **Phone:** 465-3376

Division: Administrative Services **Date:** 1-16-92

Approved by Commissioner: Lloyd Hames, Commissioner for

Agency: Department of Corrections **Date:** 1-16-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

HB 396: "An Act relating to violent crimes and criminal law and procedures."

This bill makes numerous changes to Alaska's Criminal Code involving violent crimes. By raising the seriousness of certain crimes from one class to another and by providing for mandatory sentences for certain crimes, the bill will impact the Department by increasing the prisoner population and lengths of sentences of some prisoners. However, most of the offenses addressed are anticipated to occur infrequently and some of the effects will not become apparent for at least five years. Therefor, no significant fiscal impact is expected. A sectional analysis follows:

Section 1: Title.

Sections 2-4: These sections amend the statutes addressing certain forms of assault, such as those which cause serious physical injury as a result of repeated, rather than single assaults, and those committed by an adult against a child under 10 years of age. Because of the infrequency of the offenses, these amendments are unlikely to have significant fiscal impact.

Sections 5-9: These sections amend the sexual offense statutes to include the conduct of engaging in sexual acts or contact with a person who is unaware that the sexual contact or act is being committed, and sexual offenses committed by a health care professional during professional treatment. Section 9 adds sexual sadism or masochism to the list of prohibited behaviors described under unlawful exploitation of a minor. The amendments are unlikely to have fiscal impact because of the infrequency of the offenses.

Sections 10-12: These sections address "drive by shootings" which would become Class C felonies even when no one is injured or placed in fear by the conduct. The amendments are unlikely to have fiscal impact because of the infrequency of the offenses.

Section 13: This section would include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. The amendment is unlikely to have significant fiscal impact because of the anticipated infrequency of the offense.

Section 14: This section prohibits persons under age 21 from possessing defensive weapons on the grounds of or on a parking lot immediately adjacent to a public or private school, without permission of the school administration. This offense would be a misdemeanor. This section is unlikely to have significant fiscal impact because of the infrequency of the offense being committed by adults.

HB 396

Sections 15, 24, and 25: These sections extend the statute of limitations from five to ten years for the following felonies: Manslaughter, Criminally Negligent Homicide, Assault in any degree, Kidnapping and Custodial Interference, Arson in the First Degree, Sexual Assault in any degree, Sexual Abuse of a Minor in any degree, Incest, Unlawful Exploitation of a Minor, Robbery, Extortion, or Coercion. The statute of limitations is extended from five to twenty years for felony sexual offenses involving a victim under age 16. The fiscal impact will not be felt for at lease five years. No information is available on how many crimes go uncharged because of the current five year limitation, however the fiscal impact is not expected to be significant.

Section 16: This section clarifies that a person convicted of two or more crimes, including murder in the first degree, may be sentenced to consecutive sentences in excess of the term of imprisonment for the murder conviction. There are already a number of prisoners within the Department who are serving such consecutive terms, so this amendment is not expected to have significant impact.

Section 17: This section provides that the preponderance of evidence standard of proof applies to sentencing proceedings, except as provided by AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment reverses a recent Court of Appeals ruling and is not expected to have significant fiscal impact.

Sections 18 & 21: These sections provide that a person convicted of Murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years and shall not be eligible for discretionary parole when the conviction is for the murder of a clearly identified peace officer, fire fighter, or correctional officer engaged in official duties, or when the person has been previously convicted of Murder in the first or second degree. Due to the infrequency of the offenses, no significant fiscal impact is anticipated.

Sections 19, 20, 22, and 23: These sections provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds certain factors in aggravation. If a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and also finds that the defendant has excellent potential for rehabilitation, the panel shall sentence the defendant to the presumptive term and order the defendant to engage in appropriate rehabilitation programs. The panel may then provide that the defendant is eligible for discretionary parole during the second

half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. There are not significant numbers of prisoners incarcerated at this time who had their sentences reduced by a three-judge panel, based on excellent potential for rehabilitation, therefor the fiscal impact is not expected to be significant.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____ Department Affected: Public Safety

Title: An Act relating to violent crimes and criminal law and procedure

BRU: Alaska State Troopers

Component: Detachments

Sponsor: House Judiciary

Requestor: House Judiciary

COMPONENT SERIAL NO. 7 9 9

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Gayle A. Horetski Phone: 465-4322

Division: Commissioner's Office Date: 1/21/92

Approved by Commissioner: Gayle A. Horetski for Richard L. Burton

Agency: Department of Public Safety Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____
Title: An Act relating to violent crimes and criminal law and procedures.
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 4 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	76.7	79.0	81.4	83.8	86.3	88.9
TRAVEL	2.0	2.1	2.2	2.3	2.4	2.5
CONTRACTUAL	20.0	20.6	21.2	21.8	22.5	23.2
SUPPLIES	1.5	1.6	1.7	1.8	1.9	2.0
EQUIPMENT	2.0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	102.2	103.3	106.5	109.7	113.1	116.6
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	102.2	103.3	106.5	109.7	113.1	116.6
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	102.2	103.3	106.5	109.7	113.1	116.6

POSITIONS:

FULL-TIME	1.0	1.0	1.0	1.0	1.0	1.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)
See Attached.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency
Phone: 279-7541
Date: January 17, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
0:\LEG92\021127.KP/1

Position Title	No. of Positions	Range / Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months		Location	Election District
PFT	12.0		EBA	92

TYPE OF EXPENDITURE		AMOUNT
Salary	56.0	
Benefits	20.7	
Premium Pay		
Other		
Total Personal Services	76.7	76.7
Travel		2.0
Contractual		20.0
Commodities		1.5
Equipment		2.0
Other		
Total Cost		102.2
FUNDING SOURCE FOR TOTAL COST		
Federal Receipts 1002		
G.F. Match 1003		
General Fund 1004		102.2
I-A Receipts 1007		
CIP Receipts 1061		
Other		

Justification

HB 396 will increase the workload of the Public Defender Agency. Its provisions will 1) elevate certain criminal conduct from misdemeanor level to a felony classification, 2) elevate certain felony conduct to a higher classficiation of offense, thereby increasing potential penalties, 3) extend significantly the statute of limitations for many criminal acts, including doubling the period for charging crimes against persons and increasing by 15 years the statute of limitations for sex offenses against persons under 16 years of age, 4) create a more severe criminal penalty for certain homicide offenses (99 years without parole), and 5) modify certain sentencing procedures which will restrict the court's ability to reduce sentences.

While it is difficult to quantify the extent to which these provisions will increase the Public Defender case/workload, a real increase will occur. The proposed budget increment (one attorney and associated expenses) represents a conservative estimate of the fiscal impact of HB 396.

8/LEG92/02127B.KP/1

Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 93

Revised Date:

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Title: "An Act relating to violent crimes and criminal law and procedures."

This bill makes a variety of changes in Alaska's Criminal Code, including changes in the definition of some crimes, changes as to the severity of certain offenses and significant revisions in sentencing procedures.

This analysis is not intended as a position paper by the Public Defender. Instead a short description of each of the sections of the bill follows along with the anticipated fiscal impact on the Alaska Public Defender Agency.

Section 1. Title.

Section 2. This section amends AS 11.41.200(a). It elevates repeated misdemeanor assaults to the level of a felony and apparently is a response to a recent court of appeals decision wherein the state initially successfully prosecuted an individual for a felony only to have the conviction reversed. (S.R.D. v. State (citation omitted). As an aside, if the state had initially proceeded on a theory of prosecution based on a "continuous course of conduct" as relates to the repeated assaults, the felony conviction would likely have been left undisturbed by the appellate court. It is not an area which necessarily needs new legislation in that the same result could be achieved adjusting prosecutorial tactics.

It is unlikely this section will have a fiscal impact on the Public Defender Agency in that it will not result in many additional felony cases.

Section 3. This section amends AS 11.41.210(a) with the same result as section 2 except the repeated assaults are only elevated to a class B felony as opposed to the A felony above. No likely fiscal impact.

Section 4. This section amends the assault in the third degree statute [AS 11.41.22(a)] by providing that a misdemeanor assault committed against a victim who is under the age of 10 can be charged with a felony assault. This amendment is based on criminal conduct defined as recklessly causing physical injury to another person, or with criminal negligence causing physical injury to another person by means of a dangerous instrument. The effect will be to considerably broaden felony assault conduct against children. In fact the revision may be overbroad and subject to a constitutional challenge. While any projection as to the number of cases which will be made under this section is speculative, there is a real possibility that such an amendment will have a fiscal impact on the Public Defender Agency.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Section 5. This amendment to AS 11.41.410(a) is in direct response to the Dr. Ake case wherein said health care worker was convicted of having sex with his patients while they were on the examining table. Because of a perceived loophole in the law this amendment has been proposed. In fact Dr. Ake was convicted and sentenced. it It is unlikely that this proposed change in the law will have fiscal impact on the Public Defender Agency.

Section 6. Similar to section 5 above. No impact.

Section 7. An amendment to AS 11.41.425(a). It amends the statute to create a felony offense for one who engages in sexual contact with a person who is unaware that a sexual act is being committed. These cases are exceedingly rare and would not likely have a fiscal impact on this agency.

Section 8. This section amends AS 11.41.455(a). The amendment adds sexual masochism or sadism to a list of proscribed sexual activities with children under the age of 18 years. No fiscal impact.

Section 9. Definitions only. No fiscal impact.

Section 10. This amendment to AS 11.61.200(a) modifies the crime of Misconduct Involving Weapons wherein someone discharges a firearm from a moving vehicle. It would change the offense from a class A misdemeanor to a class C felony. Apparently it is in response to "drive-by" shootings, although it would probably more commonly be committed in Alaska by people shooting at road signs from their cars. No fiscal impact.

Section 11. This allows peace officers to fire from their vehicles without violating the law. See section 10 above. No fiscal impact.

Section 12. This provides an affirmative defense for hunting and fishing (?) from a moving vehicle as relates to section 10 above. Apparently it is the snow machine or three wheeler exception to shooting from a moving vehicle. No fiscal impact.

Section 13. An amendment to AS 11.61.210(a). This proposed change in the law precludes someone from selling a firearm or defensive weapon to a person under 18 years of age. Unknown fiscal impact.

Section 14. This section deals with the creation of a new crime wherein an individual who possessed a defensive weapon on a school ground is subject to prosecution. No significant fiscal impact.

Section 15. This section increases the statute of limitations for many of the crimes against persons. For example under present law manslaughter, criminally negligent homicide, felony assaults,

sexual assaults, and other serious crimes against persons must be initiated within 5 years of their commission. The amendment contained in section 15 doubles the amount of time (to 10 years) available to prosecute these and other offenses. Furthermore the amendment extends to 20 years the statute of limitations for felony sexual offenses involving victims under the age of 16. Because this amendment was prompted by law enforcement complaints that many cases were lost because of the present statute of limitations it is expected that this change will have a real fiscal impact on the Public Defender Agency. Obviously the impact will be deferred somewhat in that Section 25 of this bill makes this proposed change prospective only. In other words, the amendment would not apply to offenses which may have occurred before the effective date of the change in the law.

Section 16. This section amends AS 12.55.025(e) and relates to the rules concerning consecutive sentences in the context of murder convictions. No fiscal impact.

Section 17. This is another amendment to Title 12 and concerns sentencing procedure. It is an effort to reverse a Court of Appeals decision concerning the applicable standard of proof in sentencing hearings. If passed it is expected to generate additional litigation related to sentencing hearings as well as additional appeals based on the challenged use of prior bad acts, convictions, etc. It is expected to have an effect on public defender work.

Section 18. This amendment to Title 12 provides that an individual convicted of murder in the first degree, where the victim was a peace officer, fire fighter, or correctional officer engaged in the performance of official duties, will receive a 99 year sentence without parole. This amendment in essence resurrects the sentence of life imprisonment for this character of crime. This mandatory sentence would also apply to an individual convicted of murder in the first or second degree who has a prior murder conviction. In terms of fiscal impact it is anticipated that these cases would put a significant drain on the public defender contractual budget in that they would carry the highest sanction possible under Alaska law and would therefore demand a disproportionate amount of attorney time, investigative time and contractual resources. Fortunately it is not anticipated that there would be many of these cases on a per year basis. Still there would be some fiscal impact, on both attorney resources and the contractual budget.

Section 19. This section modifies the sentencing laws of Alaska through an amendment of AS 12.55.165. This amendment proposes to severely restrict referral of cases to the three judge panel for consideration of rehabilitation potential of a defendant. With reduced hope of getting a referral to the three judge panel, many defendants who are subject to presumptive sentencing may elect to

take their case to trial. In effect they will have nothing to lose by exercising their right to a jury trial. Furthermore sentencing hearings themselves will become more adversarial and the calling of witnesses will become more frequent at such hearings in an effort to avoid the finding of certain aggravators which would preclude referral to the three judge panel under the proposed amendment. This translates into some increase in the public defender work, although it is difficult to quantify.

Section 20. This section, to a lesser extent, will have the same fiscal impact on the Public Defender Agency as section 19 in that it restricts the ability of the three judge panel to reduce presumptive sentences. The trial option for a defendant facing presumptive jail time would look more attractive if sections 19 and 20 are passed in to law. As trials are by far the most time consuming and expensive form of litigation for the Public Defender Agency the fiscal impact could be significant.

Section 21. This section amends the parole statute so as to make it consistent with section 18 above.

Section 22 and 23. These sections make amendments to the parole statute consistent with the changes in the three judge panel procedure outlined in section 20.

Section 24. This section repeals AS 12.10.020(c) for purposes of extending the statute of limitation in certain sex cases as discussed in section 15 above.

Section 25. This section contains the prospective application of the expanded statute of limitations amendments contained in section 15 above.

SUMMARY

The discussion above indicates that many of the provisions contained in HB 396 are fiscally insignificant. Others, however, will have a fiscal impact on the Alaska Public Defender Agency. Additional cases, additional trials, more protracted sentencing hearings all add up to an increased work load. It should be noted that the statute of limitations provisions, for example, were introduced in this bill because police were complaining that many cases were going unprosecuted because they fell outside of the applicable statute of limitations. While neither the police nor the Department of Law have provided statistics concerning additional cases which might be prosecuted, suffice it to say the work load is going to go up, not down, if HB 396 passes. No reasonable person would conclude otherwise.

It is difficult to project the amount of additional work which will be generated by HB 396. For that reason a very conservative

ANALYSIS: (continued)

Approach is taken by this agency in terms of fiscal impact. It is anticipated that one additional attorney will be needed in Anchorage to absorb the work created through this bill. This lawyer would travel on an "as needed" basis to other office locations.

BUDGET ANALYSIS - HB 396

100 - Attorney III (Anchorage)	76.7
200 - Travel	2.0
300 - Contractual Office Space, Experts	20.0
400 - Supplies	1.5
500 - Equipment (One Time)	2.0
Total	102.2

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____ Department Affected: Department of Law

Title: "An Act relating to violent crimes and criminal law and procedure." BRU: Prosecution

Component: All

Sponsor: House Judiciary Committee

Requestor: House Judiciary Committee COMPONENT SERIAL NO. [ ][ ][ ][ ]

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: January 13, 1992

Approved by Commissioner: Richard I. Pegues /FOR/ Charles E. Cole, Attorney General

Agency: Department of Law Date: January 13, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Title: "An Act relating to violent crimes and criminal law and procedures."

This bill makes numerous changes to Alaska's Criminal Code involving violent crimes. A section-by-section analysis follows below.

Section 1. Title.

Section 2. This section amends AS 11.41.200(a) to include within the crime of assault in the first degree recklessly causing serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury. This amendment is in response to the recent court of appeals decision in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991). It will not have an impact on the Department of Law because, where it is now necessary to prove several misdemeanors, the amendment will allow the state to prove a single class A felony, instead. This crime usually arises when a child is subjected to repeated physical abuse.

Section 3. This section amends AS 11.41.210(a) to include in the definition of the crime of assault in the second degree recklessly causing serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury. The result of this amendment is the same as Section 2, except that assault in the second degree is a class B felony because of the absence of a dangerous instrument.

Section 4. This section amends AS 11.41.220(a) to provide that a person, who is 18 years of age or older and who violates AS 11.41.230(a)(1) or (a)(2) when the victim of the offense is under the age of 10, commits the crime of assault in the third degree. This conduct, recklessly causing physical injury to another person, or with criminal negligence causing physical injury to another person by means of a dangerous instrument, is usually a class A misdemeanor. Under this amendment, however, the offense is increased to a class C felony when it is committed by an adult against a child under 10 years of age. The amendment is unlikely to have a fiscal impact because of the infrequency of the offense.

Section 5. This section amends AS 11.41.410(a) to include in the crime of sexual assault in the first degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment of the victim. This amendment will have little impact on the department because of the infrequency of the offense.

Section 6. This section amends AS 11.41.420(a) to include in the crime of sexual assault in the second degree the conduct of

engaging in sexual contact with a person who is unaware that a sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment to the victim. The amendment also adds to the offense of sexual assault in the second degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed (when the offender is not a health care provider). These changes are not expected to have a fiscal impact on the department.

Section 7. This section amends AS 11.41.425(a) to include in the crime of sexual assault in the third degree the conduct of engaging in sexual contact with a person who is unaware that a sexual act is being committed. This section is not expected to have a fiscal impact on the department.

Section 8. This section amends AS 11.41.455(a) to include within the crime of unlawful exploitation of a minor the conduct of knowingly inducing or employing a child under 18 years of age to engage in, or photographing, filming, recording, or televising a child under 18 years of age engaged in sexual masochism or sadism. This change should have no fiscal impact on the department.

Section 9. This section provides definitions for the terms "health care worker" and "sexual act."

Section 10. This section amends AS 11.61.200(a) to include within the crime of misconduct involving weapons in the first degree the act of discharging a firearm from a moving propelled vehicle. Consequently, "drive-by" shootings would become a class C felony even when no one is injured or placed in fear by the conduct. This section is not expected to have a fiscal impact on the department.

Section 11. This section amends AS 11.61.200(d) to provide that as an exception to AS 11.61.200(a)(11), a peace officer acting within the scope and authority of employment may fire a weapon from a moving vehicle. This amendment will have no fiscal impact on the department.

Section 12. This section amends AS 11.61.200 to make it an affirmative defense to a prosecution under AS 11.61.210(a)(11) that the person who discharged the firearm from a moving vehicle was engaged in a lawful hunting or fishing activity at the time. This amendment will have no fiscal impact on the department.

Section 13. This section amends AS 11.61.210(a) to include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. This amendment will not have a fiscal impact.

Section 14. This section amends AS 11.61.220(a) to provide that a

person commits the crime of misconduct involving weapons in the third degree if the person knowingly possesses a defensive weapon within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer. A person 21 years of age or older is exempted from this provision. This amendment will not cause a fiscal impact.

Section 15. This section amends AS 12.10.010, the state's general statute of time limitations for criminal prosecutions, to provide that the current 5-year limitation within which an indictment must be found or an information or complaint must be instituted, shall be extended to 10 years for the following felonies:

Manslaughter
Criminally Negligent Homicide
Assault in any degree
Kidnapping and Custodial Interference
Arson in the first degree
Sexual Assault in any degree
Sexual Abuse of a Minor in any degree
Incest
Unlawful Exploitation of a Minor
Robbery, Extortion, or Coercion

However, the section also provides that the current 5-year limitation shall be extended to 20 years after the commission of a felony sexual offense, including those listed above, involving a victim under the age of 16. As provided in Section 25 of the bill, the amendment of the statute of limitations will be prospective only. Consequently, there will be no fiscal impact for at least 5 years. Although information that would indicate how many crimes go uncharged under the current 5-year limitation is not available, the department does not anticipate that this amendment will have a significant fiscal impact.

Section 16. This section amends AS 12.55.025(e) to clarify that a person convicted of two or more crimes, including murder in the first degree, may be sentenced to consecutive sentences in excess of the term of imprisonment for the murder conviction. This is a sentencing provision and will not have an impact on the department.

Section 17. This section amends AS 12.55.025 to provide that the preponderance of the evidence standard of proof applies to sentencing proceedings, except as provided by AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment has the effect of reversing a recent Court of Appeals ruling. Because the amendment is a sentencing provision, it will not have a fiscal impact on the department.

Section 18. This section amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years would also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or homicide under the laws of another jurisdiction when the offense contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110. This sentencing provision is not expected to have a fiscal impact on the department.

Section 19. This section amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present. This sentencing provision will not have a fiscal impact on the department.

Section 20. This section amends AS 12.55.175 to provide that, except as provided in Section 19 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. This sentencing provision is not expected to have a fiscal impact on the department.

Section 21. This section amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term, under the amendment to AS 12.55.125(a) proposed in Section 18, shall not be eligible for discretionary parole during the entire term. This sentencing provision will not have a fiscal impact on the department.

Section 22 and Section 23. These sections amend AS 33.16.090 to provide that a prisoner may be eligible for discretionary parole during the second half of a sentence imposed under the amendment to AS 12.55.175(e) proposed in Section 20, above.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____

Section 24. This section repeals AS 12.10.020(c), relating to the statute of limitations for certain sex offenses, which are amended in Section 15 above.

Section 25. This section makes the extension of the statute of limitations on criminal prosecutions, set out in Section 15 above, prospective.

SECTIONAL ANALYSIS - CSHB 396 (JUD)

Anti-Violent Crime Act of 1992

Section 1: Short title.

Section 2: The bill section clarifies that a person commits first degree assault whenever the person recklessly causes serious physical injury to another person by using a dangerous instrument. The amendment is in response to S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), in which the court held that the current assault statute does not allow injuries inflicted over the course of several separate assaults to be cumulated for purposes of establishing that a first degree assault had been committed. First degree assault is a class A felony.

Section 3: The bill section clarifies that a person commits second degree assault whenever the person recklessly causes serious physical injury to another person. The amendment is in response to S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), discussed under bill section 2. Second degree assault is a class B felony.

Section 4: The bill section elevates what is currently classified as fourth degree assault to third degree assault if an offender is 18 years of age or older and repeatedly assaults a child under the age of 10, or assaults a child under 10 and the assault requires medical treatment. This amendment is in response to several recent Anchorage cases including one in which an infant had 56 different bruises on its body caused by a series of beatings committed over a three week time period and one in which a 5 year old child was intentionally burned by being placed in a bath of scalding water. Because there was not a substantial risk that either child would die and neither child was permanently disfigured, the offenders could only be charged with misdemeanors. Third degree assault is a class C felony.

Section 5: The bill section amends the first degree sexual assault statute to make it illegal for a health care worker to engage in sexual penetration with a patient who the offender knows is unaware that a sexual act is being committed. By specifically including this conduct within the statute, the amendment closes the door on a technical legal defense to a charge of sexual assault in a future case similar to the one involving Dr. Ake. First degree sexual assault is an unclassified felony.

Section 6: The bill section amends the second degree sexual assault statute to make it illegal for a health care worker to engage in sexual contact with a patient, and for anyone to engage in sexual penetration with a person, who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the amendment closes the door on a technical legal defense to

a sexual assault charge. Second degree sexual assault is a class B felony.

Section 7: The bill section amends the third degree sexual assault statute to make it illegal for anyone to engage in sexual contact with a person who the offender knows is unaware that a sexual act is being committed. As with bill sections 5 and 6, the amendment closes the door on a technical legal defense to a sexual assault charge. Third degree sexual assault is a class C felony.

Section 8: The bill section amends the unlawful exploitation of a minor statute by making it illegal to induce or employ a child under 18 to engage in sexually masochistic or sadistic behavior in written or recorded materials. The amendment closes a gap in the statute that was brought to light as a result of the prosecution of former Anchorage police officer Feichtinger. Unlawful exploitation of a minor is a class B felony.

Section 9: The bill section defines the term "health care worker" as used in bill sections 5 and 6. The definition includes those persons who are employed in jobs in which it is possible to the person to sexually assault a patient without the patient's knowledge.

Section 10: The bill section amends the misconduct involving weapons in the first degree statute to make it a crime to discharge a firearm from a moving vehicle. The amendment is in response to a series of "drive-by" shootings that have occurred in the past year, and prohibits inherently dangerous conduct. Misconduct involving weapons in the first degree is a class C felony.

Section 11: The bill section clarifies that the crime created by bill section 10 does not apply to a peace officer acting within the scope and authority of the officer's employment.

Section 12: The bill section clarifies that the crime created by bill section 10 does not apply to a person using a firearm while hunting, trapping, or fishing in a manner not prohibited by law.

Section 13: The bill section amends the misconduct involving weapons in the second degree statute to make it illegal to sell firearms and defensive weapons to people under 18. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the second degree is a class A misdemeanor.

Section 14: The bill section amends the misconduct involving weapons in the third degree statute to make it illegal for people under the age of 21 to possess defensive weapons on school property. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors in the

schools. Misconduct involving weapons in the third degree is a class B misdemeanor.

Section 15: The bill section extends the statute of limitations for violent felony crimes from five years to ten years. The amendment removes a technical legal defense to charges that a person has committed a serious violent felony.

Section 16: The bill section eliminates the statute of limitations for felony crimes involving child sexual abuse. As with bill section 15, the amendment removes a technical legal defense to child sexual abuse charges and eliminates a practical barrier to prosecuting child abusers.

Section 17: The bill section makes a technical amendment to conform to the changes made by bill section 19.

Section 18: The bill section clarifies that, unless the legislature has provided otherwise, the "preponderance of the evidence" standard of proof applies in sentencing proceedings. The amendment codifies Brakes v. State, 796 P.2d 1368 (Alaska App. 1990) and codifies the standard of proof that is generally applied to sentencing issues under current law.

Section 19: The bill section requires a sentence of 99 years, without possibility of probation or parole, to be imposed on persons convicted of first degree murder who have previously been convicted of murder; who murder a peace office, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder; or who commit a torture murder.

Section 20: The bill section clarifies that by imposing the mandatory 99 year prison term in the circumstances listed in bill section 19, the legislature does not intend to limit the court's discretion to impose this type of sentence in other circumstances.

Section 21: The bill section adds a new subsection (j) to AS 12.55.125 to allow a person who has been sentenced to a mandatory 99 year prison term under bill section 19 to apply for modification or reduction of sentence under Criminal Rule 35(b) after having served half of the mandatory term (49.5 years). In order to actually receive a sentence reduction under Criminal Rule 35(b), an offender would need to prove "that conditions or circumstances have changed since the original sentencing hearing such that the purposes of the original sentence are not being fulfilled."

The bill section also adds a new subsection (k) to AS 12.55.125 to codify Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991) and Austin v. State, 627 P.2d 657 (Alaska App. 1981).

Section 22: The bill section prohibits referring certain aggravated cases to the three judge panel based on the defendant's potential for rehabilitation. The presence of any of the following aggravators triggers the prohibition: the defendant's conduct manifested deliberate cruelty, the defendant has a history of aggravated or repeated instances of assaultive conduct, the defendant's conduct was among the most serious conduct included in the definition of the offense, the defendant was on bail, probation, parole, or furlough release for another crime at the time of the offense, the defendant has three or more prior felony convictions, the offense was one of a continuing series of criminal offenses, the offense was a crime against a minor and the defendant has engaged in the same or similar conduct against another minor, or the offense was committed in retaliation against someone who had previously testified against the defendant.

Section 23: The bill section changes the powers of the three judge panel in cases where it finds that manifest injustice would result from imposition of the presumptive term, that the defendant has an exceptional potential for rehabilitation, and that a sentence of less than the presumptive should be imposed. Under current law, the three judge panel can reduce a sentence based on its prediction of whether the defendant will be rehabilitated. Instead of this approach, the bill section allows the three judge panel to make it possible for the defendant to be released from jail early if the defendant succeeds in being rehabilitated and requires the three judge panel to order the defendant to engage in appropriate programs of rehabilitation. The amendments made in this bill section and in bill section 26 change the focus from predicting the defendant's future behavior to evaluating the defendant's past behavior.

Section 24: The bill section makes two technical amendments to conform to the changes made by bill section 19 and bill section 23.

Section 25: The bill section makes a technical amendment to conform to the changes made by bill section 23.

Section 26: The bill section makes an amendment to conform to the changes made by bill section 23.

Section 27: The bill section clarifies the applicability of bill sections 15 and 16 to be consistent with the Alaska and United States Constitutions.

Section 28: The bill section acknowledges that the addition of AS 12.55.125(j) in bill section 21 has the effect of amending a court rule.

SECTIONAL ANALYSIS

Anti-Violent Crime Act of 1991

Section 1: Short title.

Section 2: The bill section clarifies that first degree assault is committed whenever a person recklessly causes serious physical injury to another person by using a dangerous instrument. In so doing, the amendment defines the crime by the nature of the injury caused by the defendant to the victim. This amendment is in response to the Court of Appeals opinion in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), in which the court held that the current assault statute did not allow injuries inflicted over the course of several separate assaults to be cumulated for purposes of establishing that a first degree assault had been committed. First degree assault is a class A felony.

Section 3: The bill section clarifies that second degree assault is committed whenever a person recklessly causes serious physical injury to another person by using a dangerous instrument. In so doing, the amendment defines the crime by the nature of the injury caused by the defendant to the victim. This amendment is in response to the Court of Appeals opinion in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), discussed under bill section 2. Second degree assault is a class B felony.

Section 4: The bill section increases the penalty from an A misdemeanor to a C felony for a person 18 years of age or older who assaults a child under the age of 10. This amendment is in response to several recent cases investigated by the Anchorage Police Department, including one in which an infant child had 56 different bruises on its body caused by a series of beatings committed over a three week time period. Because there was not a substantial risk that the child would die and the child was not permanently disfigured, despite the egregious conduct, the offender could only be charged with a misdemeanor.

Section 5: The bill section amends the first degree sexual assault statute to make it illegal for a health care worker to engage in sexual penetration during the course of professional treatment with a person who the offender knows is unaware that a sexual act is being committed. By specifically including this conduct within the statute, the legislation closes the door on a technical legal defense to a charge of sexual assault in a future case similar to the one involving Dr. Ake. First degree sexual assault is an unclassified felony.

Section 6: The bill section amends the second degree sexual assault statute to make it illegal for a health care worker to

engage in sexual contact during the course of professional treatment, and for anyone to engage in sexual penetration, with a person who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the legislation closes the door on a technical legal defense to a charge of sexual assault. Second degree sexual assault is a class B felony.

Section 7: The bill section amends the third degree sexual assault statute to make it illegal for anyone to engage in sexual contact with a person who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the legislation closes the door on a technical legal defense to a charge of sexual assault. Third degree sexual assault is a class C felony.

Section 8: The bill section amends the unlawful exploitation of a minor statute by making it illegal to induce or employ a child under the age of 18 to engage in sexually masochistic or sadistic behavior in written or recorded materials. The amendment closes a gap in the statute that was brought to light as a result of the prosecution of former Anchorage police officer Feichtinger. Unlawful exploitation of a minor is a class B felony.

Section 9: The bill section defines the term "health care worker" as used in bill sections 5 and 6. The definition includes those persons who are employed in a job in which it is possible to engage in sex with a patient without the patient being aware that sex is occurring.

Section 10: The bill section amends the misconduct involving weapons in the first degree statute to make it a crime to discharge a firearm from a moving vehicle. The amendment is in response to a series of "drive-by" shootings that have occurred in Anchorage and Fairbanks in the past year, and prohibits conduct that is inherently dangerous. Misconduct involving weapons in the first degree is a class C felony.

Section 11: The bill section clarifies that the crime created by bill section 10 does not apply to a peace officer acting within the scope and authority of the officer's employment.

Section 12: The bill section clarifies that the crime created by bill section 10 does not apply to a person using a firearm while hunting or fishing in a manner not prohibited by law.

Section 13: The bill section amends the misconduct involving weapons in the second degree statute to make it illegal to sell firearms and defensive weapons to people under 18. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the second degree is a class A misdemeanor.

Section 14: The bill section amends the misconduct involving weapons in the third degree statute to make it illegal for people under the age of 21 to possess defensive weapons on school property. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the third degree is a class B misdemeanor.

Section 15: The bill section extends the statute of limitations for violent crimes from five years to ten years, and for child sexual abuse from five years to twenty years. The amendment removes a technical legal defense to charges that a person has committed a serious violent felony, and eliminates a practical barrier to prosecuting child abusers.

Section 16: The bill section makes a technical amendment to conform to the changes made by bill section 18.

Section 17: The bill section clarifies that, unless the legislature has provided otherwise, the "preponderance of the evidence" standard of proof applies in sentencing proceedings. This amendment has the effect of reversing the court of appeals recent ruling in Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991), and of codifying the standard of proof that is currently applied for "prior verified criminal conduct."

Section 18: The bill section requires a sentence of 99 years, without possibility of probation or parole, to be imposed on persons convicted of first degree murder who have previously been convicted of murder, or who murder a peace office, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder.

Section 19: The bill section prohibits referring aggravated cases to the three judge panel based on the defendant's potential for rehabilitation. The presence of any of the following aggravators triggers the prohibition on referring a case to the three judge panel: the defendant's conduct during the offense manifested deliberate cruelty, the defendant has a history of aggravated or repeated instances of assaultive actions or of a juvenile felony adjudication other criminal behavior, the defendant's conduct was among the most serious conduct included in the definition of the offense, the defendant was on bail, probation, parole, or furlough release for another crime at the time of the offense, the defendant has three or more prior felony convictions, the offense was one of a continuing series of criminal offenses, the offense was a crime against a minor and the defendant has engaged in the same or similar conduct against another minor, or the offense was committed in retaliation against someone who had previously testified against the defendant.

Section 20: The bill section changes the powers of the three

judge panel in cases where it finds that manifest injustice would result from imposition of the presumptive term, that the defendant has an exceptional potential for rehabilitation, and that a sentence of less than the presumptive should be imposed. Under current law, the three judge panel can simply reduce a sentence based on its prediction of whether the defendant will be rehabilitated. Instead of this approach, the bill section allows the three judge panel to make it possible for the defendant to be released from jail early if the defendant succeeds in being rehabilitated. The bill section also requires the three judge panel to order the defendant to engage in appropriate programs of rehabilitation. The amendments made in this bill section and in bill section 23 change the focus from predicting the defendant's future behavior to evaluating the defendant's past behavior.

Section 21: The bill section makes two technical amendments to conform to the changes made by bill section 18 and bill section 20.

Section 22: The bill section makes a technical amendment to conform to the changes made by bill section 20.

Section 23: The bill section makes an amendment to conform to the changes made by bill section 20.

Section 24: The bill section makes a technical amendment to conform to the changes made by bill section 15.

Section 25: The bill section clarifies the applicability of bill section 15 in a manner that is consistent with the requirements of the Alaska and United States Constitutions.

Alaska State Legislature

House of Representatives
House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

M E M O R A N D U M

TO: Representative Dave Donley, Chair
House Judiciary Committee

FROM: Laurie H. Otto, Staff Counsel

RE: HB 396 - Section 17
Standard of Proof at Sentencing Hearings

DATE: June 15, 1991

Under Section 17 of HB 396, the "preponderance of the evidence" standard of proof applies to sentencing hearings. This provision is intended to clarify the law relating to the type of evidence that the court can consider during sentencings. Imposition of a "preponderance of the evidence" standard of proof is supported by public policy considerations, the ABA standards, and the clear weight of federal authority.

General Legal Authority

The United States Supreme Court has concluded that the preponderance of the evidence standard satisfies due process under the federal constitution in the context of state sentencing proceedings, noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." McMillan v. Pennsylvania, 477 U.S. 79, 91-93, 106 S.Ct. 2411, 2419-20, 91 L.Ed.2d 67 (1986). Moreover as the Alaska court of appeals noted in Brakes, the federal courts have uniformly held that the preponderance of the evidence is the appropriate standard for making factual determinations under the new federal sentencing guidelines and that no greater standard of proof is required by due process.[1]

---

[1] See e.g., United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990); United States v. Fredericks, 897 F.2d 490 (10th Cir. 1990); United States v. Fernandez-Vidana, 857 F.2d 673 (9th Cir. 1988); United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989); United States v. Guerra, 888 F.2d 247 (2nd Cir. 1989).

The ABA Standards also declare that proof by a preponderance of the evidence is sufficient for resolving factual disputes that would arise in the context of non-presumptive sentencing cases:

> In reaching its findings on all controverted issues ..., the sentencing court should employ the preponderance of the evidence standard and may treat the contents of a verified presentence report as presumptively accurate, provided however, that material factual allegations made in the presentence report and effectively challenged by the defendant should not be deemed to satisfy the government's burden of persuasion unless reasonable verification of such information can be shown to have been made ... or adequate factual corroboration otherwise exists in the sentencing or trial record.

III ABA Standards for Criminal Justice 18-6.4(c) (2d ed. 1980).

Notably, the ABA Standards recognize that a higher standard of proof by "clear and convincing evidence" may be applicable in cases where a disputed fact, if established, may be relied upon to impose an enhanced penalty. See III ABA Standards for Criminal Justice 18-6.5(b)(ii) (2d ed. 1980). This is consistent with Alaska's requirement that, in presumptive sentencing cases, disputed issues involving prior convictions, statutory aggravating and mitigating factors, and extraordinary circumstances are to be determined under a more rigorous standard than preponderance of the evidence.

Current Alaska Law

Although the legislature has set the standard of proof with respect to elements of presumptive sentencing, the statues are silent as to the standard of proof that otherwise applies to sentencing proceedings.[2] The Alaska appellate courts have

---

[2] See e.g., AS 12.55.145(d) (disputed prior convictions must be proved beyond a reasonable doubt); AS 12.55.155(f) (aggravating and mitigating factors must be proved by clear and convincing evidence); AS 12.55.165 (extraordinary circumstances justifying referral to the three-judge panel must be proved by clear and

traditionally allowed the widest possible range of information to be presented during sentencing hearings.

In the leading case of Nukapigak v. State, 562 P.2d 697, 701 N.2 (Alaska 1977), aff'd on rehearing, 576 P.2d 982 (Alaska 1978), the Alaska Supreme Court stated that a sentence will not be disturbed "if ... the information relied on by the sentencing judge was sufficiently verified to appear trustworthy and the defendant was given the opportunity to deny it or present contrary evidence of his [or her] own." In this context, the court defined "verified" as meaning "corroborated or substantiated by supporting data or information." Id. at 701 n.2. This language, which has been quoted or referred to in many Alaska cases in the years since Nukapigak was decided, is more consistent with the preponderance of the evidence standard than with the clear and convincing standard. If Section 17 of HB 396 is adopted, the defendant would still have the opportunity to challenge any adverse information in the sentencing or trial record as contemplated in Nukapigak.

Recently, however, the court of appeals has veered away from the test used in Nukapigak, and has specifically articulated a standard of proof for certain disputed factual issues at sentencing. For example, in Brakes v. State, 796 P.2d 1368 (Alaska App. 1990), the court of appeals held that "preponderance of the evidence" is the appropriate standard of proof in misdemeanor sentencings. On the other hand, in Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991), the court of appeals held that in certain felony cases, the "clear and convincing" standard of proof applies.

There are countless issues presented during sentencing proceedings that do not fall into the categories addressed in Brakes and Buoy. And, unlike the type of findings for which the legislature has set a higher burden of proof, most disputed facts considered during sentencing are not specifically relied upon in and of themselves to adjust a sentence up or down. Instead, the finding of a disputed fact is only one factor among the totality of the circumstances which the judge must weigh in exercising discretion within the available sentencing range.

Even in presumptive sentencing cases after statutory aggravating and mitigating factors have been established, the judge is required to determine the weight given these factors in deciding whether to adjust the presumptive term up or down. Ordinarily, the decision whether to adjust the presumptive term will be based upon findings of fact related to such matters as the defendant's

---

convincing evidence).

background and character, the defendant's need for or amenability to treatment for a drug or alcohol problem, the danger the defendant poses to the public, and the defendant's potential for rehabilitation.

To require such basic findings to be made by more than the preponderance of the evidence goes far beyond the requirements of due process and would severely limit the traditionally broad discretion given to judges to fashion an appropriate sentence based on the needs of the individual defendant and the need to protect the public. Moreover, requiring the state to prove any and all disputed factual issues by greater than a preponderance of the evidence would, in effect, turn the sentencing hearing into a second trial. The public interests of judicial economy and the already over-burdened trial courts will be greatly disserved by such a result.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

☑ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

January 14, 1992

The Honorable Dave Donley, Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 396 (Violent Crimes and Criminal Law and Procedure)

Dear Representative Donley:

At your request, we have reviewed HB 396 and by this letter we wish to indicate our support for the bill. We particularly favor those sections that are in response to recent appellate and trial court decisions.

Sections 2 and 3 cure the problem noted by the court of appeals in S.R.D. v. State, 817 P.2d 484 (Alaska 1991); namely, that under existing law the state cannot prosecute as felons those adults who ultimately cause serious physical injury to a child by subjecting the child to repeated assaults over a period of time. Section 4 amends AS 11.41.220(a) to make it a felony when an adult either recklessly causes physical injury to a child under ten years of age or causes physical injury to such a child by means of a dangerous instrument.

Sections 5, 6, and 7 amend the state's sexual assault statutes to make it a crime for a person to engage in sexual contact or penetration with a person known by the offender to be unaware that a sexual act is occurring. The level of offense is elevated one class if the offender is a health care provider, as defined in section 9 of the bill, and if the conduct occurs while the offender is providing professional treatment to the victim.

Section 8 amends AS 11.41.455(a), another of the state's sexual offenses ("Unlawful Exploitation of a Minor") to prohibit a person from inducing or employing a child under 18 years of age to engage in acts of sexual masochism or sadism. The amendment also prohibits a person from photographing, filming, recording, or televising a child engaged in such acts.

The next five sections of the bill amend the state's laws relating to weapons offenses. Section 10 amends AS 11.61.200(a) to include within the crime of misconduct involving weapons in the first degree the act of discharging a firearm from a moving propelled vehicle. Consequently, "drive-by" shootings will be at least a class C felony offense even if no one is injured or placed in fear by the conduct. Section 11 amends AS 11.61.200(d) to provide that, as an exception to AS 11.61.200(a)(11), a peace officer acting within the scope and authority of employment may fire a weapon from a moving vehicle. Section 12 amends AS 11.61.200 to make it an affirmative defense to a prosecution under AS 11.61.210(a)(11) that the person who discharged the firearm from a moving vehicle was engaged in a lawful hunting or fishing activity at the time.

Next, section 13 amends AS 11.61.210(a) to include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. The last amendment relating to weapons, section 14, amends AS 11.61.220(a) to provide that a person commits the crime of misconduct involving weapons in the third degree if the person knowingly possesses a defensive weapon within the grounds of or on a parking lot immediately adjacent to a public or private school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer. A person 21 years of age or older, however, is exempted from this provision.

Section 15 amends AS 12.10.010, the state's general statute of limitations for criminal prosecutions, to extend to ten years the current five-year limitation within which an indictment must be found or an information or complaint must be instituted for the following felonies: manslaughter; criminally negligent homicide; any felony assault; kidnapping and custodial interference; arson in the first degree; sexual assault in any degree; sexual abuse of a minor in any degree; incest; unlawful exploitation of a minor; and robbery, extortion, or coercion.

In section 24, the bill repeals current AS 12.10.020(c), relating to the statute of limitations for sexual offenses involving victims under the age of 16. In its stead, section 15 extends the limitations period for these offenses to 20 years. As specified in section 25 of the bill, these amendments to the statutes of limitations will have prospective effect only.

Section 17 amends AS 12.55.025 to make clear that the preponderance of the evidence standard of proof applies to sentencing proceedings, except as provided in AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment, effectively reversing the court of appeals' decision in Buoy v. State, ___ P.2d ___ (Op. No. 1169 Alaska Oct. 25, 1991), codifies both the court's decision

in Brakes v. State, 796 P.2d 1368 (Alaska App. 1990), and current practice on verified prior criminal conduct. It is also consistent with practice in federal courts and with the American Bar Association standards for criminal justice. III Standards for Criminal Justice § 18-6.4(c) (2d ed. 1980).

Section 18 amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years will also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or of a similar offense under the laws of another jurisdiction. Section 16 amends AS 12.55.025(e) to clarify that nothing in AS 12.55.125(a) limits the court's ability to impose consecutive sentences; i.e., a defendant may be given consecutive sentences that exceed the term of imprisonment specified for murder in the first degree. Section 21 amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) is not eligible for discretionary parole during that entire term.

Sections 19, 20, 22, and 23 relate to the nonstatutory mitigator of "extraordinary potential for rehabilitation." Section 19 amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present.

Section 20 amends AS 12.55.175 to specify that, except as provided in section 19 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then designate the defendant as eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all of the rehabilitative programs ordered by the panel. Sections 22 and 23 amend AS 33.16.090 to make provision for the discretionary parole authorized by section 20.

As previously indicated, we support this legislation and we appreciate the opportunity to comment on the bill.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

ALASKA PUBLIC DEFENDER AGENCY

POSITION PAPER

RE: HB 396 "An Act Relating to Violent Crimes and Criminal Law and Procedure"

Analysis This position paper will only cover selected sections of the proposed legislation.

Sec. 4. This section increases assault from a misdemeanor to a felony when an adult causes physical injury to a child under the age of 10. Previously charged as assault in the fourth degree, this section makes it a class C felony assault in the third degree.

The likely effect of this proposal is that minimal or non-injuries to children under 10 will now only be able to be charged as felonies. The definition of physical injury is "a physical pain or an impairment of physical condition." AS 11.81.900(b)(41). An example might best serve to show the broad range of conduct that will now be a felony offense. A parent is driving in Anchorage on icy roads. Negligently not realizing the slickness of the streets, the parent slides through a stop sign and is bumped or bumps another car. The child in the car seat bumps his head and cries because it hurts, it is a physical pain. This is now a felony crime because the parent has negligently caused physical injury to another person by means of a dangerous instrument (the car).

Other examples abound. There has recently been discussion among educators as to the use of corporal punishment as a reasonable disciplinary technique. AS 11.81.430 permits the use of force "when and to the extent reasonably necessary and appropriate to promote the welfare of the child..." Do we want parents and teachers to face felony charges of assault when there is uncertainty as to the reasonableness of their discipline?

In sum, this section broadly increases the possibilities of felony assault charges based simply upon the age of the complaining witness. This conduct already appears to be adequately addressed and punished under the assault in the fourth degree statutes. It appears unnecessary to make this a felony offense. Even the Department of Law in their fiscal note claims that this offense is "infrequent." Any parent who loses his temper momentarily and spanks his child could become a convicted felon. The criminal justice system is not the best choice for teaching proper parenting techniques.

TO: House Judiciary Committee

emo 7671	# of pages ▸ 10
From	B. Brink
Co.	
Phone #	
Fax #	

Sec. 15. This section amends the current statute of limitations with regard to criminal prosecution. Subsection 1 extends the statute of limitations to 10 years for what can be classified as crimes against a person.

Subsection 2 provides that the statute of limitations is extended to 20 years for any sex offense or promoting prostitution, former sex offense or former contributing to the delinquency of a minor charges where the complaining witness was under the age of 16. The five year period of limitations on sexual abuse of a minor offenses for victims under the age of 16 has already previously once been extended. In 1983, the statute changed to provide that charges could be commenced within one year after the crime is reported to a peace officer or the person reaches age 16 whichever occurs first, operating to extend the limitation an additional five years. (AS 12.10.020(c)).

Both of these extensions are objectionable and overbroad when one understands the basic purposes of statutes of limitations. The United States Supreme Court has recognized that statutes of limitation provide "the primary guarantee against bringing overly stale criminal charges." United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

> The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanction. Such limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time limit may also have the salutary affect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Commentators have recognized other useful purposes served by these statutes of limitation. These statutes prevent prosecution of those who have been law-abiding for many years, they avoid prosecution after the community's retributive impulse is lessened and they have been recognized to lessen the possibility of blackmail. However, foremost of all of the goals is the desirability of requiring that prosecutions be based upon reasonably fresh evidence in order the lessen the horrendous possibility of an erroneous conviction. These statutes therefore share important purposes with other speedy trial protections, and are grounded in the constitutional rights to due process and speedy

trial. The Alaska Supreme Court has also recognized the importance of statutes of limitation, even in the civil context.

> It is generally recognized that the purpose of statutes of limitation is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from prosecution of stale claims. Statutes of limitations attempt to protect against difficulties caused by lost evidence, faded memories, and disappearing witnesses.

Byrn v. Ogle, 488 P.2d 716, 718 (Alaska 1971). Therefore, any statute of limitation is intended to assure fairness in the court process. It limits the circumstances in which guilt may be found and is aimed at preserving the accuracy and basic integrity of the adjudicative process where the guilt or the innocence of a person is ultimately decided.

Under the due process clauses of the 15th and 14th Amendments, a person may argue that an excessive delay in his trial has caused his evidence and witnesses to disappear and his case to be compromised. A defendant does not have an adequate remedy to argue a violation of his constitutional speedy trial guarantees by demonstrating such prejudice. The real problem arises when the case is so stale, the information so cold, and the ability to investigate so hampered that the delay has also prevented the possibility of proving the prejudice.

The public has a strong interest in determining the truth of a criminal charge and a prompt conviction of the guilty party. The statute of limitations is not a "loophole." It is not a "technicality." Limitations are for the benefit both of the public and those accused. The report prepared by the Legislative Research Agency regarding statutes of limitations (dated December 4, 1991) recognizes that even with no change in the statute of limitations, an adult survivor of child abuse still has the capacity to initiate a civil cause of action, which "may offer several advantages over a criminal proceeding for the state, the victim, and society ..." (p.3).

The time limits are to some extent clearly arbitrary line drawing. Where there is a problem, it may make sense to alter the lines. The 20 years for any of the enumerated crimes in Section 15 is unjustified by any showing that crimes are not being prosecuted. To the extent that changes in limitations for child sex-abuse crimes should be made, the lines should be drawn as narrowly as possible.

A proposal to modify AS 12.10.020(c) to change to "a person under the age of 18 [16] may be commenced within one year after the crime is reported to a peace officer", eliminating the

language of "or the person reaches the age of 16." The five year extension already provided by AS 12.10.020(c) for a total of 10 years would appear to be adequate given the cases sought to be included. This would allow these reasons for non-reporting (still in the hands of the abusers, unawareness or criminal nature, repressed memories) to be taken care of.

Sec. 17. This section amends AS 12.55.025 to provide that proof by a preponderance of the evidence standard applies to sentencing proceedings except as already explicitly provided by law. This section is unfair, inconsistent with the legislative scheme so far, specifically disfavored by the Court of Appeals, and is strenuously opposed. The legislature has already recognized that in the presumptive sentencing context there should be high burdens of proof of specific facts that affect the sentence a person will receive. Prior convictions that will automatically enhance a sentence are required to be proven beyond a reasonable doubt. Aggravating factors that allow a judge to increase a sentence and mitigating factors that allow a judge to decrease a sentence must be proven by clear and convincing evidence. Extraordinary circumstances warranting referral to the three-judge panel must be proven by clear and convincing evidence. Any other facts to be proven at a sentencing proceeding (in particular allegations of "prior bad acts") that would reflect upon the person's character, rehabilitation potential, should also be reliable determinations. In non-presumptive sentencing situations, the consequences of finding certain "bad acts" as true can be as great or greater than the consequences of finding prior convictions, aggravators, mitigators, or extraordinary circumstances.

The majority of the Criminal Rules Committee for the State of Alaska in drafting tentative rules regarding sentencing proceedings reached the same conclusion, that the relatively strict standard of clear and convincing evidence should apply, given the seriousness of the potential consequences. Austin v. State, 627 P.2d 657 (Alaska App. 1981) provides that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. The Austin rule can be deviated from only in exceptional cases and is recognized as promoting uniformity in sentencing, one of the legislative goals of the presumptive sentencing statutes. In determining the sentence for a first felony offender, aggravating and mitigating factors do not specifically apply by statute. However, they are used by sentencing courts to determine whether or not these are the kinds of exceptional cases that warrant exceeding the Austin rule.

In Buoy v. State, __ P.2d __ (Alaska App. 1991), the Court of Appeals recognized that unless the standard was clear and convincing evidence in these situations, the Austin rule would be

meaningless. If the preponderance of the evidence standard applies to determining aggravating factors or extraordinary circumstances in first offender cases, the first felon may in fact receive a more serious sentence than the same person with the same background committing the same offense would have received as a second felony offender. The higher burden of proof keeps the Austin rule intact and lends uniformity to sentencing. This clear and convincing standard does not make sentencing hearings unnecessarily cumbersome. Given the very broad sentencing ranges for both unclassified felonies as well as first felony offenders not governed by presumptive sentencings, often far greater consequences will attach in a non-presumptive case. Given such potentially drastic consequences, and the goal of achieving uniformity in sentencing, the legislature should not allow non-presumptive aggravators to be established by some burden of proof less than clear and convincing evidence. Sentences should be imposed based upon proven, reliable information not suspicion, conjecture, rumor, speculation, and unsupported allegations. See e.g., Note, A Proposal to Insure Accuracy in Presentence Investigation Reports, 91 Yale Law Journal 1225, 1245 n. 115-117 (1982). It is recommended that existing laws not be tampered with, and this section be deleted.

Sec. 19 and 20. This section proposes modifications to the way that the three-judge panel is referred cases, and the exercise of discretion by the three-judge sentencing panel. Section 19 specifically limits the discretion of a court to refer a case to a three-judge panel based upon the nonstatutory mitigating factor of the defendant's potential for rehabilitation if in addition to that finding the court has also found one of several specific factors in aggravation already set out in the statutes.

Section 20 is another limitation on the discretion of the sentencing court, this time on the three-judge panel. If the case is referred to the three-judge panel based upon manifest injustice and the defendant's exceptional potential for rehabilitation, the three-judge panel's power to sentence to less than the presumptive term is eliminated. The three-judge panel is still required to give the defendant the presumptive term, and is required to order the defendant to engage in "appropriate programs of rehabilitation." The only discretion left to the three-judge panel is that they may provide that during the second half of the presumptive sentence required to be imposed, the defendant may be eligible for discretionary parole if "the defendant successfully completes all rehabilitation programs ordered under Section 2 of this subsection."

Making any major modifications to the sentencing provisions as a whole is fraught with peril and a piecemeal approach which should be avoided. In fact, the Alaska Sentencing Commission is in the middle of its three year life span. This Commission is engaging in exhaustive research, taking testimony of experts and lay people,

gathering information, and compiling data bases in order to reach consensus upon what the appropriate changes to the sentencing law should be. The Alaska Sentencing Commission is a diverse group representing every aspect of law enforcement, criminal justice, and victim's rights. Major proposals are expected from the Commission based on its exhaustive study. It is unwise to make minor changes to portions of the statutory scheme when an exhaustively researched and prepared report and proposals are forthcoming. Therefore, it is recommended that no changes be made to the sentencing statutes.

Additionally, the specific changes proposed here appear to attempt to fix problems that in fact do not exist and create more problems than will be rectified. For example, under Section 19, it is a rare instance that where the sentencing court has found an aggravating factor the case will still be referred to the three-judge panel. However, there may be cases where this is appropriate (e.g. juvenile felony joy-riding conviction 20 years ago.) It is not necessary to limit the sentencing judge's jurisdiction, since it is already subject to further review and evaluation by the three-judge sentencing panel.

Similarly, limiting the discretion of the three-judge panel is not necessary nor useful. The three-judge panel has only rarely modified a presumptive term in those most exceptional cases. A recent Memorandum to Members of the Alaska Sentencing Commission specifically discussed three-judge panel referrals based on the Non-Statutory Mitigator "Extraordinary Potential for Rehabilitation." This memo analyzed the data and found that only 75 total cases in the State of Alaska were referred to the three-judge panel on that basis from January 1986 to October 1991. The three judge panel accepted the trial court's conclusion of extraordinary prospects for rehabilitation in 39 cases, but rejected that finding in 36 cases. Even in those cases where the mitigator was accepted, the three-judge panel did not always reduce the sentence. Since 1988 there have been only 15 referrals to the three-judge panel in cases involving sexual abuse. In 8 of those cases the three-judge panel rejected the finding of unusual prospects for rehabilitation. Even when it was accepted, the three-judge panel generally recommended sex offender treatment during incarceration and as a condition of probation. Therefore, the Sentencing Commission reviewed the data specifically regarding referrals to the three-judge panel for unusual rehabilitation potential, generally found in favor of the status-quo, and proposed taking no action. The minutes of that meeting show that many members of the commission found the decisions of the three-judge panel to be consistent, uniform, and fair. Only a single member wanted to eliminate the non-statutory mitigator, which in effect is what this section does.

Therefore, the three-judge panel reduces sentences only extremely rarely. Most sentences that are reduced simply have the amount of jail time that previously was required to be imposed, suspended

over the defendant's head. The defendant is ordered to be released on probation for an extensive period of time and required to participate in any kind of counseling and program that the court may think is appropriate. The only difference is that the counseling and programming is conducted outside of the Department of Corrections' prison system. Counseling and participation is closely monitored by parole and probation officers. It is true the court cannot go back and increase his sentence, but the court has absolute power to consistently evaluate performance and impose the entire suspended terms of imprisonment.

The other major problem with the proposal as listed here is that it assumes that the Department of Corrections will have appropriate programs of rehabilitation available to each and every individual person and their individual rehabilitative needs in every custodial setting. This is a false assumption. The quality and variety of programming varies widely within the prison system of the Department of Corrections. Even though a judge may recommend appropriate programs of rehabilitation, the judge may not order a prisoner to a particular institution and may not order that the institution provide specific things for him. That invades the province of the Department of Corrections. If, based upon the Department of Corrections' regulations, prisoner needs, bed space, and other concerns, a prisoner is designated to a facility that does not offer any of the appropriate programs, he will not be able to engage in the rehabilitation deemed appropriate. He will have no ability to try to prove that he has been rehabilitated and he will end up serving an entire sentence not because of any lack of initiative or rehabilitative desire on his part, but because of factors completely outside of his control.

It is also important to know that the Department of Corrections has limited space in the programs that it does offer. In part, due to this, the Department of Corrections has a policy of not sending a prisoner to a rehabilitative program until that prisoner is near the end of their incarcerative period. For example, a prisoner with an eight year presumptive sentence on a sex offense who is found to have excellent prospects for rehabilitation, an extreme desire and potential for successful treatment in a sex offender program will not be classified by the Department of Corrections to the Hiland Mountain Correctional Center for placement in the sex offender program immediately. Because of limited space in that program a waiting list is maintained. Because the program is approximately 18 months to two years in duration, and because part of the goal of the program is to teach people rehabilitative skills and non-criminal behavior that they can utilize in life on the outside world, the Department of Corrections will not send anybody to that program until they only have approximately two to three years left on the time that they need to serve. Therefore, it is impossible for a prisoner to participate in his own rehabilitation until the second half of his sentence. All the time he has done initially in the first half of

his sentence is dead time where he may not avail himself of rehabilitative programs. This is not in the interest of the defendant nor in the interests of society. Why should a person be warehoused with no treatment when he is ready, willing, and eager to participate? Remember again, this is the unusual offender. Why should a person be warehoused in jail if there has been a factual finding that he is not dangerous, that rehabilitation can be accomplished in an out-patient setting?

This legislation is unnecessary, and will not accomplish rehabilitation. It will greatly increase the numbers of people incarcerated who do not need to be incarcerated to protect the public or to rehabilitate themselves.

Sec. 18. Section 18 modifies the sentencing provisions with regard to the charges to Murder in the First Degree. It provides that the sentence shall be a mandatory term of imprisonment for 99 years when the deceased is a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who is engaged in the performance of his official duties at the time he was murdered or if the person being sentenced has previously been convicted of Murder in the First Degree, Murder in the Second Degree or similar offenses under the laws of another jurisdiction.

Sec. 21. Section 21 amends AS 33.16.090(b) to provide that anybody who receives the mandatory 99 year term under those pre-existing conditions shall not be eligible for discretionary parole during the entire 99 year term.

The combined effect of the mandatory nature of the maximum term, and the absolute prohibition of any possible future relief through discretionary parole is troubling.

A. The Principle of Reformation Article I, Section 12 of the Alaska Constitution provides in pertinent part:

"Penal administration shall be based upon the principle of reformation and upon the need for protecting the public."

Nall v. State, 642 P.2d 1361 (Alaska App. 1982) specifically upheld the current presumptive sentencing scheme because it restricted judicial discretion but did not eliminate it. If a judge's discretion is so limited that the trial court is prevented from carrying out the constitutional goals of reformation and rehabilitation, the sentencing statute may be subject to constitutional challenge. A mandatory 99 year sentence without any possibility of parole provides absolutely no basis for or incentive for rehabilitation.

B. Due Process and Equal Protection. A mandatory 99 year sentence without the possibility of parole may deny the constitutional rights to due process and equal protection. United States Constitution Amendment XIV; Alaska Constitution Article I, §§ 1, 3. While similar arguments were rejected in the analysis of presumptive sentencing for first offenders, none of those cases dealt with sentences of this magnitude. Martin v. State, 664 P.2d 612, 620 (Alaska App. 1983) (upheld the 20 year minimum sentence for murder in the first degree.) It is unclear whether a maximum mandatory term with no possibility of parole will satisfy due process.

C. Separation of Powers.

In Nell v. State, 642 P.2d 1361 (Alaska App. 1982) the current presumptive sentencing scheme survived a constitutional challenge that it violated the separation of powers doctrine by infringing on the power of the judiciary to sentence an offender on the particular facts of the case and the nature of the particular offender. The reasons presumptive sentencing did not violate the constitution were "safety valves" provided by the mitigating factors and the three-judge panel. The court specifically noted that the statute limited, but did not eliminate judicial discretion. Without the ability to exercise any discretion, Article IV, § 1 of the Alaska Constitution may be violated by this absolute infringement on the power of the judiciary.

To avoid these claims of constitutional violation which might arise should a mandatory 99-year sentence be automatically imposed for all these individuals, the Legislature might add a provision whereby individuals subject to the mandatory sentence could, after serving a portion of their sentence, apply for modification of the sentence under Criminal Rule 35(b) provisions. This safety valve could provide a mechanism for review in the future only if warranted, and save the statute from Constitutional challenge.

The American Bar Association's Standards for Criminal Justice specifically deal with the ideal role of the legislature with respect to sentencing. While recognizing the wisdom of providing sentencing authorities with the range of alternatives, the American Bar Association recommends that the legislature should not specify a mandatory sentence for any sentencing category or for any particular offense. Criticism of legislatively required mandatory sentences includes the tendency to produce rigidity, the inflation

of the penal code whose authorized sentence lines are already believed to be the longest in the western world, a pattern of covert nullification by judges, prosecutors and juries as they decline to enforce penalties they consider overly harsh, and transferring all of the power from the court to the prosecutor whose discretion, charge bargaining, and initial charging decisions would take on enhanced significance.

It appears wiser to try to tame discretion than to abolish it. It has been the experience of the Federal District Court Judiciary that the straight-jacket approach represented by the federal sentencing guidelines is not a workable solution and is not fair. At the recent Judicial Conference of the 9th Circuit, including both District and Appellate court judges, Resolution Number 5 calling for the repeal of mandatory minimum sentences was passed unanimously. The resolution noticed the actual effect of hampering the cause of justice, the extreme injustice in allocating all of the power and the initial charging decision to the prosecutor and the federal experience of backlogs of cases, demands for trial and the resultant impact on the civil calendar as well as the criminal. It is also important to notice that this resolution is identical to a resolution passed unanimously previously by the 7th Circuit also calling for the repeal of all mandatory minimum sentences. It appears that Alaska should be able to benefit from the experience of the federal guidelines and should gain wisdom from that experience.

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT
419 6th Street, No. 116 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC); Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC);
Maniilaq Regional Women's Crisis Program; Parent Aid Family Support Center;
Safe & Fear-Free Environment (SAFE); Seward Life Action Council (SLAC);
Sisters Against Family Violence (SAFV); South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR);
Tongass Community Counseling Center; Tundra Women's Coalition (TWC);
Unalaskans Against Sexual Assault & Family Violence (USAFV);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

HB396
CRIME ACT 1992

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit organization with 22 member programs around Alaska which serve victims and their families. The Network would like to testify in favor of HB396, specifically would like to address the following sections:

Sections 2 and 3 of the bill address a problem domestic violence programs have seen when working with both child abuse victims and adult victims of domestic violence. Repeated assaults causing great physical damage cannot be prosecuted as felonies because no one assault can be proven to have caused the injuries. Domestic violence often involves this kind of chronic battering. The Network believes that this provision will aid in providing a better response to such cases by the criminal justice system.

The Network also supports the provisions of Sections 5, 6, 7 and 9, which clarify current statute regarding sexual assault by persons in the health care field. Women should not be forced to choose between caring for their basic health needs and their physical safety. Clearly no consent exists when victims are unaware of the act taking place due to deception. In the wake of the Ake case, the Network believes that these changes are vital to ensure that health care workers understand that rape laws apply to them as well.

Section 15 includes a provision that would increase the statute of limitations for child sexual assault. The Network is very supportive of this provision and, in fact, would advocate that the statute of limitation be extended even further or eliminated.

According to a study by Harborview Sexual Assault Center in Seattle, about 2/3rds of child victims are pre-teens, and almost 1/4 are younger than six years old at the time abuse is disclosed -- though obviously it may have begun at significantly younger ages. Under the proposed 20-year limit in this bill, many victims will only be

in their early to mid-twenties at the time the limit expires. While this is a significant improvement, research indicates that many victims do not begin to deal with their victimization, or actually feel its most debilitating impacts until they are in their twenties and thirties. This is echoed in a survey of Network programs that work with adult survivors. Median age in these groups tends to be about mid-thirties.

For these reasons, the Network recommends that either the 20 year statute be amended to begin tolling when the victim reaches the age of majority, or that it be eliminated. One example of a State with a similar statute is that of New Hampshire which amended its child sexual assault statute in 1990 to 22 years past the victim's 18th birthday.

Since child molesters have many victims per offender, and since they tend to offend against children over very long periods of time, some one who was molesting children twenty years ago is most likely still molesting them now. Offenders rely on the very fact of the age of their victims as protection against the consequences of their actions. The Network believes that by allowing victims to act in their own behalf as adults will only aid in combatting this crime.

The provisions of Section 17 are important in sexual assault cases, where statements from other victims who may not have pressed charges are important in determining appropriate sentence length. It is also important to know the defendant's background in determining appropriate treatment and rehabilitation programs.

ANCHORAGE TASK FORCE ON SEXUAL ASSAULT

Testimony for HB 396
"An act relating to violent crimes and
criminal law and procedure."
January 22, 1992

Good afternoon Chairman Donley and House Judiciary Committee members.

My name is Carrie Longoria, and I am here this afternoon to testify on HB 396. I am representing the Anchorage Task Force on Sexual Assault (ATFSA), a group of professionals coordinated by the Municipal Department of Health and Human Services, Abuse Prevention Program. The ATFSA includes representatives from various governmental and private agencies, which include the Anchorage Police Department, the Anchorage District Attorney's office, local hospitals (Humana, Providence, ANS), victim-support agencies (STAR, Victim's for Justice, South Central Counseling), private professionals (mental health counselors), the Department of Corrections (Hiland Mt.), and McLaughlin Youth Center.

Members of the ATFSA would like to extend their appreciation to the Committee & Committee's staff for the effort and serious consideration which has already gone into the development of HB 396. Today, the ATFSA will be providing testimony on a few key provisions of the bill, but will provide testimony on the other important provisions of this bill at a later date.

Section 5 & 6., where an "offender engages in sexual penetration or contact with a person who the offender knows is unaware that a sexual act is being committed, and (A), the offender is a health care worker; and (B) the offense takes place during the course of professional treatment of the victim.

This is a particularly timely provision in lieu of a recent physician/patient case where victims were in a trusting position and subjected to physical examinations, which were in fact, incidents of sexual offenses. These examinations were the doctor's guise to perform unwanted sexual acts on them. This provision would hold certain professionals, such as physicians, accountable for their sexual violations, and allow for efficient prosecution.

Section 9., defines "health care worker" and "sexual act."

ATFSA is particularly pleased with the broad inclusion of various professionals who would have access to "bodies" of individuals.

Rep. Boyer's HB 370

Section 15., where the "general time limitations for sexual offenses against minors are extended."

The ATFSA commends the bill's twenty-year limitation, but requests that "NO LIMITATION" be enacted so that a victim at <u>any age, whenever recall is possible,</u> may come forward and bring criminal charges against their offender.

Section 19., where the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation.

The ATFSA applauds the special emphasis which this provision provides by prohibiting referrals to a three judge panel based on the defendant's potential for rehabilitation.

Section 20., where "the three-judge panel determines that manifest injustice would result from imposition of the presumptive term..."

The ATFSA supports the concept behind this provision, where the defendant is eligible for discretionary parole during the second half of the sentence imposed, if the defendant successfully completes all rehabilitative programs ordered to do so.

Section 21, which reads, "as provided in this section", a prisoner is not eligible for discretionary parole during the term of presumptive sentence..."

Consistent with sections 19-20, this provision has unanimous support.

House Judiciary

Thank you for considering comments presented by the ATFSA, and the committee members' individual dedication to making our communities violent free.

Prepared by Carrie Longoria, MOA/DHHS/Abuse Prevention Program, P.O. Box 196650, Anchorage, AK 99519-6650, Teleph: 343-4876

Barbara Burke

Public defender's

- Greenberg (Parnell)

Martin Wade Hanley -

BOB ANDRES—TIMES TRIBUNE

SAL VEDER—AP

A family divided by tragedy: *Franklin in court last week and his daughter*

MIND

Forgetting to Remember

In California, a glance unlocks a horrific secret

For two decades, the murder of 8-year-old Susan Nason was a mystery. Police in the San Francisco suburb of Foster City, Calif., ran out of leads not long after finding Susan's decomposed body in a wooded ravine. Then, in January 1989, Eileen Franklin-Lipsker, Susan's best friend at the time of the murder, looked into her 6-year-old daughter's eyes and suddenly remembered. The murderer, she claims, was her father, George Franklin Sr. Franklin-Lipsker, now 30, says she watched helplessly as her father molested Susan and then smashed the child's skull with a rock. When her father threatened to kill her if she told anyone, Franklin-Lipsker locked the horror deep in her subconscious, a traumatic response psychiatrists label "repressed memory." Years later her daughter's blue eyes—the same color as Susan's—triggered the flood of remembrances.

As incredible as the story seems, Franklin-Lipsker's recollections were vivid enough to convince a jury that her father was guilty. Last week Franklin, now 51, was sentenced to life in prison. "This may be the only case in which someone is convicted of murder solely on the basis of repressed memory," says Elizabeth Loftus, a professor of psychology at the University of Washington who testified for the defense.

No other eyewitnesses nor any other physical evidence tied Franklin to the crime. Instead, the trial hinged on a complex debate over the validity of the concept of repressed memory. The prosecution's expert witness, San Francisco psychiatrist Lenore Terr, believes that traumatic memories can be "far clearer, more detailed and more long-lasting" than ordinary memory—even when repressed for so many years. But Loftus contends that memories of terrible events are often distorted by shock or fear. Both experts agreed, however, that repressed memory is a real phenomenon that can be unblocked spontaneously by an unrelated event.

Even without Susan's murder, Franklin-Lipsker says she had a nightmarish childhood. She testified that her father sexually abused her numerous times and that she learned to protect herself by "forgetting" what had happened. Defense lawyers presented other possible motives for Franklin-Lipsker's sudden recall. They claimed that she could have unconsciously woven a false memory out of her anger and fear of her father. Or, they suggested, she might have made up the whole story for the $500,000 book and movie deal she has signed.

Franklin's probation report, not part of the trial but given to the judge before sentencing, corroborates some of his daughter's testimony. An ex-girlfriend interviewed by police said Franklin asked if he could have sex with her 8-year-old daughter. He also reportedly told the woman he belonged to a society whose motto was "Sex before 8 or it's too late." Franklin's lawyer, Douglas Horngrad, says his client will appeal.

Whatever the outcome, it won't be the final verdict on repressed memory. Psychiatrists still aren't certain whether such cases represent fact or fantasy—or both. For now, the phenomenon remains as mysterious as Susan Nason's murder once was.

BARBARA KANTROWITZ *with* NADINE JOSEPH *in San Francisco*

HEALTH

A Grim Legacy for Longtime Smokers

Although fewer Americans are smoking now, more are dying from tobacco-related illnesses—the result of past smoking habits. In a report issued last week, the federal Centers for Disease Control said that in 1988, more than 434,000 Americans died from health problems caused by smoking. That's an 11 percent increase over 1985, the CDC said. In that same period, the number of Americans who smoke declined slightly, from 30 to 29 percent. "The problem is, we are now paying for what happened 20, 30 years ago when large numbers of people smoked in large amounts," said Dr. William Roper, director of the CDC. He added that it can take up to 20 years for cancer caused by smoking to develop. In 1965, the year of the surgeon general's landmark warning against smoking, 40 percent of Americans smoked.

Smoking is the nation's leading cause of preventable deaths and is believed to be responsible for a wide variety of diseases. The CDC count for 1988 included 111,985 deaths from lung cancer, 30,860 deaths from other smoking-related cancers such as mouth and pancreatic cancer, 197,820 deaths from cardiovascular diseases and 82,857 deaths from lung diseases such as emphysema. An additional 1,303 people died in fires caused by smoking and 2,552 babies' deaths were attributed to their mothers' smoking habits. The CDC report also said that that 3,825 nonsmokers died from lung cancer caused by passive smoking—inhaling others' smoke.

In spite of these grim statistics, there's still some hope for smokers. Roper said that kicking the habit at any age lowers the risk. "It's never too late to quit," he said. "People at whatever age—25 or 85—will benefit from stopping smoking."

ANCHORAGE TASK FORCE ON SEXUAL ASSAULT

Testimony for HB 396
"An act relating to violent crimes and
criminal law and procedure."
January 22, 1992

Good afternoon Chairman Donley and House Judiciary Committee members.

My name is Carrie Longoria, and I am here this afternoon to testify on HB 396. I am representing the Anchorage Task Force on Sexual Assault (ATFSA), a group of professionals coordinated by the Municipal Department of Health and Human Services, Abuse Prevention Program. The ATFSA includes representatives from various governmental and private agencies, which include the Anchorage Police Department, the Anchorage District Attorney's office, local hospitals (Humana, Providence, ANS), victim-support agencies (STAR, Victim's for Justice, South Central Counseling), private professionals (mental health counselors), the Department of Corrections (Hiland Mt.), and McLaughlin Youth Center.

Members of the ATFSA would like to extend their appreciation to the Committee for the effort and serious consideration which has already gone into the development of HB 396. Today, the ATFSA will be providing testimony on a few key provisions of the bill, but will provide testimony on the other important provisions of this bill at a later date.

Section 5 & 6., where an "offender engages in sexual penetration or contact with a person who the offender knows is unaware that a sexual act is being committed, and (A), the offender is a health care worker; and (B) the offense takes place during the course of professional treatment of the victim.

This is a particularly timely provision in lieu of a recent physician/patient case where victims were in a trusting position and subjected to physical examinations, which were in fact, incidents of sexual offenses. These examinations were the doctor's guise to perform unwanted sexual acts on them. This provision would hold certain professionals, such as physicians, accountable for their sexual violations, and allow for efficient prosecution.

Section 9., defines "health care worker" and "sexual act."

ATFSA is particularly pleased with the broad inclusion of various professionals who would have access to "bodies" of individuals.

Section 15., where the "general time limitations for sexual offenses against minors are extended."

The ATFSA commends the bill's twenty-year limitation, but requests that "NO LIMITATION" be enacted so that a victim at <u>any age, whenever recall is possible,</u> may come forward and bring criminal charges against their offender.

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 I Street, Suite 104 • Anchorage
(907) 258-4040

MEMORANDUM

January 26, 1992

TO: Rep. Dave Donley, Chairman; Rep. Max Gruenberg, Vice Chair; and Honorable Members of the House Judiciary -- Johnny Ellis, Pat Parnell, Mark Hanley, Terry Martin, Mike Miller

FROM: Christine Schleuss, Steering Committee
Alaska Action Trust

RE: Proposed Amendments to HB 396

Enclosed is the Position Paper of the Alaska Action Trust.

Please feel free to call me at 258-7807 if you have any questions, or if I can provide you with further information.

Christine S. Schleuss

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 I Street, Suite 104 • Anchorage
(907) 258-4040

POSITION PAPER REGARDING HOUSE BILL 396
The Anti-Violent Crime Bill of 1992

This position paper is prepared on behalf of the Alaska Action Trust. It is prepared by the Criminal Section of the Trust. The Alaska Action Trust suggests that the following revisions to the Bill be adopted before it is passed out of Committee.

(Sections 1-4) The purpose of the proposed amendments to AS 11.41.200(a), .210(a), and .220 is to provide broader protection to children who are victims of physical assaults. Certainly that is a laudable purpose. The changes to AS 11.41.200(a) and .210(a) are appropriate. However, we suggest that the proposed change set out in AS 11.41.220(a)(3) is too broad and should not be adopted. Apparently, the Legislature's concern in amending AS 11.41.220(a) to include (a)(3) is to make it a felony rather than a misdemeanor to repeatedly or severely beat a child. While we agree that it may well be appropriate to make repeated or severe beatings of a child a felony, the proposed amendment would make it a felony even to cause pain to a child without actual injury or to bruise a child. That lesser conduct should not be punishable by a felony conviction.

Our concern about this proposed amendment is that it would make a convicted felon of a person who one time "recklessly causes physical injury" to a child under the age of 10, or who "with criminal negligence" causes physical injury to a child under

the age of 10 by means of a dangerous instrument. The difficulty with the proposed revision is that physical injury is very broadly defined as "a physical pain or an impairment of a physical condition." AS 11.81.900(b)(40). Therefore, if this amendment becomes law, any person can be a convicted felon for recklessly causing a pain to a child, even when the child suffers no actual injury whatsoever or when a person with criminal negligence causes pain to a child by means of a dangerous instrument.

Even the most caring and loving person who is around a child might sometimes recklessly cause a pain to that child. A person who angrily briefly touches a child causing a pain but no actual injury would become a convicted felon. Under Alaska law, an automobile is a dangerous instrument. Even the most caring and loving person who is around a child might negligently cause a pain to a child by causing an automobile accident. Thus, a person involved in an accident in which there was no actual injury whatsoever to the child because the child was buckled in a seat belt would become a convicted felon. A person who slammed a child's finger in a car door would become a convicted felon under this law. A relatively minor lapse by an ordinarily caring parent or other person should not cause the person to suffer a felony conviction.

Instead, we suggest the Legislature could consider as an alternative the following:

AS 11.41.220(a)(3): Being 18 years of age or older repeatedly violates AS 11.41.230(a)(1) when the

victim of the offense is under the age of 10, or violates AS 11.41.230(a)(1) and causes physical injury that requires medical treatment when the victim of the offense is under the age of 10. Repeatedly means three or more times.

(Section 15) The Trust also has concerns about the proposed amendments to AS 12.10.010 regarding the criminal statute of limitations. It may well be true that the present statute of limitations is inadequate in cases of sexual assault or abuse of victims under the age of 16. Appropriately, the Legislature is concerned with cases where a victim under the age of 16 is unable to report the crimes for some years, either because the victim has repressed all memory of the crimes or perhaps because the victim remains under the control of the perpetrator. Protection for these victims could be achieved by amending AS 12.10.020 to allow that an offense committed against a victim under the age of 16 may be commenced within three years after the victim reports the crime to a peace officer. The present clause in AS 12.10.020 limiting prosecutions to the time when the victim turns 16 can simply be eliminated. In addition, provisions of AS 12.10.020 could be extended from the present five-year limit to ten or fifteen years.

Otherwise, the time limitations should remain as set. All people have a right not to be prosecuted when the case is so old that it is impossible to locate truthful evidence on which to base a defense of innocence.

(Section 17) We suggest that AS 12.55.025 not be amended. Present caselaw is that with the statutory exceptions and the exceptions in Buoy v. State, ___ P.2d ___ (Slip Op. No. 1169) (Alaska app. 1991), the preponderance of evidence standard of proof already applies to sentencing proceedings.

The clear and convincing evidence standard carefully thought out and adopted in presumptive sentences for determining whether mitigating or aggravating factors apply and the clear and convincing evidence standard which must be shown before a case can be referred to the three-judge panel for extraordinary circumstances should also apply to the Buoy situation.

Non-presumptive first offenders should not face sentences exceeding the presumptive term for repeat offenders unless the aggravating factors and extraordinary circumstances causing the increased sentences are based on facts proved by clear and convincing evidence. The unfair treatment to first offenders which would otherwise result was remedied by Buoy. that remedy should not be changed by the Legislature. If the Legislature feels amendment is appropriate to recognize this rule, the Trust suggests the following proposal:

> Except as provided in AS 12.55.145(d), 12.55.155(f) and 12.55.165, and in this section, the preponderance of the evidence standard of proof applies to sentencing proceedings. For a first offender subject to a non-presumptive sentence, aggravating factors or extraordinary circumstances which would cause the sentence to

exceed the presumptive sentence for a repeat offender must be proved by clear and convincing evidence.

(Section 18) We recognize that the proposed amendments to AS 12.55.020 providing for mandatory 99-year sentences for certain individual convicted of murder may be an appropriate alternative to the death penalty. The class of individuals must be narrowly and clearly drawn. It should not be expanded beyond the situation in this amendment, otherwise it may be held unconstitutional. Suggestions have been made to include a murder of a person under 18 or that manifests deliberate cruelty. Those proposals are unconstitutionally broad. For example, the Court of Appeals held that "talking dirty" may be deliberate cruelty. Peetok v. State, 655 P.2d 1308 (Alaska App. 1982). It is not the type of conduct which should appropriately result in a mandatory 99-year sentence.

To avoid potential claims of due process violations which might occur should a mandatory 99-year sentence be automatically imposed for all these individuals, and to conform with the constitutional requirements that sentences must take into consideration reformation of the individual as well as protection of the public, the Legislature might add a provision whereby individuals subject to the mandatory sentence could, after serving one-half their sentence, apply for modification of the second half of the sentence under Criminal Rule 35(b) provisions with the defendant being required to shoulder the burden for proving his or her full rehabilitation.

We suggest the following:

A defendant sentenced to a mandatory term of imprisonment of 99 years may apply for a modification of sentence when he or she has served one-half the mandatory term. The defendant bears the burden of proving his or her rehabilitation.

(Section 19) We urge that AS 12.55.165 not be amended as suggested. We strongly urge that the Legislature wait until the Sentencing Commission has completed its detailed study of sentencing in Alaska before amending one part of Alaska's sentencing law. Preliminary findings are that the three-judge panel is functioning very well and is not lowering inappropriately the sentences of dangerous defendants. We suggest that the Committee inquire of the Judicial Council as to the number of individuals who are referred to the three-judge panel for extraordinary potential for rehabilitation, the number of times the three-judge panel actually reduces the sentence, and the crimes for which referrals are made and granted. We believe the numbers are quite small.

Review of the sentencing summaries of the three-judge panel sent by the Judicial Council every six months indicates that very few individuals actually receive mitigated sentences for extraordinary potential for rehabilitation. Generally, these individuals are quite young and more likely can be turned into non-repeat offenders outside the prison system rather than inside the system. For this rare group of individuals, the public is more protected by a sentence under the presumptive sentence.

If amendment is deemed necessary, a suggested alternative to requiring the sentencing panel to impose the presumptive sentence and only make the defendant eligible for discretionary parole during the second half of his sentence if he completes all rehabilitation programs ordered would be to amend the statute so that the three-judge panel is given authority to impose the presumptive sentence, but to suspend one-half of the sentence and require as conditions of probation that the defendant enter into and complete rehabilitation programs both while incarcerated and while on probation. This suggested alternative would keep young offenders who do have high potential for rehabilitation from receiving lengthy sentences causing them to be incarcerated with career criminals who would inevitably have an extremely adverse influence on these youthful offenders.

Finally, the number of aggravating factors prohibiting referral altogether should be decreased. Particularly problematic is (19): the juvenile adjudication factor. Often times juvenile adjudications result only in informal probation and are for minor conduct. Many youths waive counsel. Because the consequences of adjudication are minimal, many do not contest them even when they are innocent just because their parents tell them to go along with the probation department. These people have not been through the system. They can be very good candidates for rehabilitation. They should not automatically be excluded from consideration by the three-judge panel.

Page 1 of 2

Not a Constituent
old or new

RECEIVED 1-21-92

Called 1/22/92 5:00 5:30

333-2920

1-17-1992

Mr. Jewel Walker
9121 Peck Ave #129C
99504

Dear Rep. Dave Donley.

This writing is going to go over the 50 Word guideline and you will not be pleased since you have gone off the trail and beyond your leagues of your knowledge on this making life long Criminals out of men only.

I never heard of you before now Ellis & Gruenberg I have written on other issues and was surprised-upset that they joined your party because they are reasonable people. Where you come out of is beyond me. I see you support our 2/3 ~~the~~ majority of Women leagues ERA, Women only Groups of excessive Clout in congress over these Child Support, abuse, AFDC, CSED, IRS illigal Gibings, that inhanely start with lies unfounded, false allegations subjected upon mostely Fathers-men. When a-any, Woman, goes for Energ. Temp, shelter she is required to lie !!, is abuse from there through Divorce custody Court and continued tolerated lies are instilled Brain Washed into mothers and Childrens, that abuse can be colored in many Colors, into adult Hoods, of this grudge hatred toward Ex husbands Boyfriends and after 6-10-20 or 50 years the man can become a Criminal in Jail no Proof submitted or questioned

page 2

1-17-97

These cases come through our Family Courts many each day. This matter is not nearly as minor as you would like to lead our peoples to believe. you call names and assert false beliefs and have no idea where you are heading with your ideals, we see where any & all correcting of Kids is now a criminal offense. Then ask why, our youth's are turning to crime. Then you're saying, we treat parents, men, Fathers especially, as murderers we black ball em we tar an feather em we put on our Cloaks & hoods send em all to Jail for life. you are on the ban wagon With ERA, Gay libbers, Women only movements, of men grudges most of which all hide behind children as shields to express their beliefs or as they call Rights. These groups actually abuse and suffer children beyond all human aspects. These could care less about Kids they want equality not Justice for all. This isn't gender here we speak of we are talking truth to your blind eyes and deft ears. you have over exerted your position on this issue you are un informed and on the 100% incorrect road. So some open eye searching of your sole.

333-2920 (PM's only) Mr Jewel Walker Sr,

Alaska Association Chiefs of Police

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 1
To Rep. Dave Donley	From Deputy Chief Udland
Co.	Co. APD
Dept.	Phone # 786-8552
Fax # 465-2399	Fax # 786-8638

January 21, 1992

Representative Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Donley,

On behalf of the Alaska Association of Chiefs of Police, I want to express our support for House Bill 396. We see this as extremely important legislation and we support your efforts in its passage.

This bill addresses a number of timely subjects that are important to public safety in Alaska. House Bill 396 would correct several deficiencies in current law and we would be willing to assist you in any way that we can to ensure that it becomes law.

Sincerely,

Duane S. Udland

Duane S. Udland, President
Alaska Association of Chiefs of Police
4501 South Bragaw
Anchorage, Alaska 99507

SOUTHEAST ISLAND SCHOOL DISTRICT

1621 TONGASS AVENUE SUITE 301
POST OFFICE BOX 8340
KETCHIKAN, ALASKA 99901
(907) 225-9658 OR 225-9659

Robert Weinstein
SUPERINTENDENT

November 21, 1991

Representative Jerry Mackie
P.O. Box 73
Craig, Alaska 99921

Dear Representative Mackie:

Enclosed you will find a copy of a resolution recently passed by the Southeast Island School District Board of Education, requesting that Alaska Statutes be amended to extend the present time limitation provided by AS 12.10.020 for the reporting of crimes involving child sexual abuse.

In my opinion, there is considerable data indicating that victims of such crimes often do not make reports to law enforcement agencies until well after the age of 17, oftentimes because there has not been a conscious recollection of the abuse until many years after it occurred. I would appreciate your support of legislation which assures that persons who commit crimes involving child sexual abuse are not allowed to escape criminal penalties due to inappropriately brief time limitations.

Sincerely,

Bob Weinstein

Robert Weinstein
Superintendent

RW:eb

encl: Resolution No. 92-2
cc: Board Members

SOUTHEAST ISLAND SCHOOL DISTRICT

RESOLUTION NO. 92-2

A RESOLUTION URGING THE ALASKA STATE LEGISLATURE TO EXTEND THE STATUTE OF LIMITATIONS FOR THE REPORTING OF CHILD SEXUAL ABUSE.

WHEREAS, child sexual abuse is a serious problem throughout the nation and the State of Alaska; and

WHEREAS, existing Alaska Statutes require a victim of such abuse to report the abuse within one year after the person reaches the age of 16; and

WHEREAS, reports of child sexual abuse often occur after a victim reaches the age of 17, and

WHEREAS, existing Alaska Statutes allow perpetrators of child sexual abuse to escape criminal prosecution;

NOW, THEREFORE, BE IT RESOLVED that the Southeast Island School District Board of Education urges the Alaska Legislature to significantly extend the time limitation provided by AS 12.10.020 for the reporting of such crimes.

APPROVED AND ADOPTED, Ketchikan, Alaska this 14th day of November, 1991.

Board President

Board Clerk

Submitted by Sgt. Joe Austin
Anchorage Police Department
on HB 396

HUMANA HOSPITAL-ALASKA

NAME: [redacted]
MR#:
CLINTON LILLIBRIDGE, M.D.

HISTORY AND PHYSICAL

ADMISSION: 06/12/91

REASON FOR ADMISSION: This 4-1/2-year-old child was brought in by the police for probable battering.

The police were called by customers at Northway Mall who suspected this child was being abused. The parents were oppositional, but police prevailed and brought the child to the emergency room. Dozens of injuries were noted on all parts of the child's body, of various colors, indicating the child had been hit on multiple occasions over many days' time. I was called by Dr. Diana Johnson to consult on the child. Also involved in the case are Dr. Tom Johnson, case officer, officer Ron Sponholz, initial officer, Virginia Daun (officer Sponholz' associate), Rob Huen, uniformed investigator, Sgt. Austin, investigator, Gary Epperson, investigator Linda Branchflower, and Jessie Allen of DFYS, case #91-82433. The police interviewed the child, with one person speaking gently and age appropriate sentences as the others listened at a distance. Multiple photographs were taken by police.

The child explains the lesions that she had a flap of skin on the end of her nose which mother cut with scissors and then put alcohol on it which burned. She states that her father's girlfriend's son, seven-year-old [redacted] "beats up on me." Also, "Mama spanks me with a spoon."

Parents describe the child as having fallen out of a swing about two weeks ago and has been limping on her right leg ever since, but have not sought medical attention. They corroborate had picked her nose and had a flap of skin which they cut off and put alcohol on. They state that the two-year-old is a real tough kid and picks up [redacted] and throws her on the ground. He is a two-year-old who doesn't know his own strength and plays pretty rough with her. Neither parent seemed concerned that she had unusual marks on her body. They think some of the spots might have been mosquito bites that she has scratched.

SOCIAL HISTORY: Father appears to be in his mid-20's, nicely dressed and groomed. He did most of the talking. [redacted] with a [redacted] woman who has three children, [redacted] (age 7),

CONTINUED...

[redacted] (age 4), and a two-year-old boy. They have been living in their present apartment about a month. They don't know other children in the area, but mostly play with one another.

PAST HISTORY: Had one or two ear infections when younger. Has had only one immunization.

PHYSICAL EXAMINATION:

Vital Signs: Temperature 98.7, pulse 104, respirations 24, blood pressure 105/62, weight 38.25 lbs. (50th percentile), height 42" (50th percentile), triceps fat 8 mm (30th percentile).

General: Sullen in parents' presence, and during the first few hours of hospitalization the child was extremely apprehensive, held very still, and frequently apologized for perceived indiscretions (which had not occurred). When being photographed by the police, she would assume whatever position the officer placed her extremities, and would hold that position absolutely motionless for 5-10 minutes or until she was told to relax or put it back down again. Similarly, on the x-ray table, she lay in extremely uncomfortable, awkward positions for extended periods of time like a statue, not complaining, until the technician realized the child was still holding still and told her it was okay to move again. When asked if she wanted something to eat, [redacted] said "Mommy says I can have bubble gum." Historically, she has not eaten for nine hours at this point. After the child was away from the parents and visiting with the police and nursing staff, she relaxed. Before engaging in any play on the pediatric floor, she would ask once or twice very politely if it was okay that she might use the color crayons, the paints, or pick up a teddy bear. When the police asked [redacted] if she wanted to see her mother or dad as they finished their interview, she replied, "No," to both. She now has been painting in the book for nearly an hour by herself and seems quite content. She smiles and seems quite happy to interact with the nursing staff.

Skin: Approximately 56 different marks, abrasions, bruises and lesions are noted, as follows:

1) The entire tip of the nose and areas surrounding both nostrils are red and excoriated with some fine yellow crystalloid material.
2) Dark pink line horizontally below the left eyelid.
3) Left cheek, dark blue area 3 cm in length, indurated. The lesion is horizontal on the side of the left cheek.
4) Red, 2 x 3-mm area within the left ear canal.
5) 3 x 5-cm round, dark purple bruise which is flat and indurated behind the left ear.

CONTINUED...

6) Blue-green horizontal 2 x 4-cm mark on the left forehead.
7) In the center of the forehead is a 1 x 2-cm blue-green, slightly raised area.
8) 3 x 4-cm diameter bluish-green area with dark red center on the right side of the forehead.
9) Small round, dark-brown scabbed lesion underneath the right side of the chin.
10) Light pink swelling, 1-2 cm in length running vertically across the right ear.
11) In the center of the neck, underneath the chin, is a 4-mm dark red bruise.
12) Anterior to the left ear is a 3 x 4-mm grayish-brown indurated area.
13) A rather prominent 5-cm diameter brownish-red mark present over the lower end of the left sternocleidomastoid, which is quite indurated.
14) Encircling the neck is a band about 3-4 cm wide which is dark green in the center and yellowish-brown at the edges, which goes all the way around.
15) At the nape of the neck, in the hairline, is a 3-cm round, greenish-blue area which is not indurated.
16) On the right anterior neck is a 0.5-cm teardrop-shaped light pink abrasion.
17) On the right lateral side of the neck are three scabbed-over light pink areas just above the clavicle with raw skin.
18) Over the left clavicle is a narrow linear light-pink abrasion 2 cm long.
19) A red bruise measuring 3 cm x 0.5 cm on the left shoulder.
20) Right upper arm has a 1-cm purplish bruise.
21) Over the right elbow is a 2 x 4-cm indurated, raised, blue-green bruise.
22) On the right forehead, a 0.5-cm round, dark-blue bruise.
23) On the palmar side of the right wrist is a dark pink, 1-cm round bruise which is surrounded by green undertone.
24) On the dorsum of the right hand are two round pink abrasions.
25) On the dorsum of the right hand is a 0.5-cm dark reddish-brown scab.
26) In the right axilla is a triangular abrasion with removal of upper layers of skin which is dark pink and contains three red 1-cm deeper gouges.
27) Over the right ulna is a 1-cm round dark purplish bruise.
28) Over the posterior part of the left deltoid are two perfectly round dark pink 4-mm sharply demarcated raised scaly areas.
29) Over the left olecranon is an oblong pink area with green surrounding it.

CONTINUED...

30) On the left forearm is a 1.5-cm L-shaped light pink bruise.
31) On the dorsum of the left hand is a light green 1.5-cm bruise.
32) On the left index finger at the first knuckle is a 1-cm scabbed pink lesion.
33) On the left upper arm is a light brown 4-mm sharply demarcated round lesion.
34) Over the left scapula is a linear pink excoriation which overlies a 1-cm round bruise at the upper end.
35) Over the lumbar spine is a 1 x 1.5-cm light brown area.
36) On the left thoracic posterior area is a 0.5-cm round light pink scab.
37) On the left thoracic area are two vertical narrow abrasions, pink and 2.5 and 3 cm in length.
38) At the center of the back at waist height is a light brown round mark.
39) On the right upper quadrant are a 4-cm linear dark pink scrape and a 2-cm round light pink bruise on the lateral side.
40) On the left upper quadrant is a 5-cm oblong light green bruise.
41) On the left lower quadrant, from the waist to the iliac crest, is a 7-cm, 2-cm wide brownish green area with overlying brown and two round 1-cm pink areas on top.
42) On the left iliac crest is a 2 x 3-cm light brown with a small round 0.5-cm pink area posterior to that, and another 1-cm blue-green bruise.
43) In the left axilla is a 2 x 2-cm horizontal light-brown scrape with a mark above it.
44) Over the left scapular area, a 1-cm round, brownish bruise with a 2-cm brown scrape just below it.
45) Left mid-axillary line, along the rib cage, are two round scrapes which are brownish-yellow.
46) On the left buttock are two linear 0.5 x 5-cm blue marks with surrounding pink. The lower bruise has a small pinpoint scab on it.
47) On the left lateral thigh is a 1-cm dark pink with surrounding dark-red scab, 2.5 x 1.5 cm area with light pink bruise, and three small 8-mm blue bruises beside that.
48) Over the pubic area is a 5 x 7-cm rhomboid purplish-blue area with vertical blue irregular marks extending up onto the abdomen.
49) The entire right iliac crest is swollen with an area 9 x 10 cm dark green with multiple darker purple spots in the center. The posterior part of the crest is light green. The entire area is indurated and tender.

CONTINUED...

50) On the right lateral thigh is a half circular linear brown mark 4-5 cm in length.
51) On the right knee is a 2 x 3-cm round bluish bruise.
52) On the right anterior shin is a 12-cm long 2 x 4-mm wide L-shaped dark blue-green area with red scrapes 2 cm across the lateral side.
53) On the left knee are five 1-2 cm round purplish bruises.
54) On the left anterior shin is a 1-cm round blue bruise.
55) On the left lateral ankle is a 1-cm round dark pink bruise.
56) On the left buttock are five round scabs 3 mm in diameter.
57) A 6 x 20-mm patch of purplish petechia in the left lower anterior chest margin.

HEENT: PERRLA. Fundi well seen with no hemorrhages. Disks appear sharp. Full extraocular movements. Tympanic membranes are gray and pearly translucent. No blood behind them. The bony part of the nose is straight. Slight purulent discharge present from the nose. Throat is pink, with tonsils filling 30% of the pharyngeal volume. Incisors have a cross-bite with anterior extension of teeth #25 and #26. No caries.
Chest: Good air exchange. No rales and no rhonchi. No palpable rib deformities.
Heart: Sinus arrhythmia.
Abdomen: Quite scaphoid. Liver down 1 cm. Small amount of firm stool felt in left lower quadrant.
Genitourinary: Tanner stage 0. Labia majora have a shrunken, shriveled appearance. With traction on the labia majora, the vestibule opens, which is dark pink. Hymen is redundant and with traction opens 2 x 3 mm. The posterior fourchette is intact.
Anus: Clean. No tears, no hemorrhoids.
Extremities: Rather slender, but good strength. No joint swelling. Full, active range of motion.
Back: Straight. Good range of motion.
Neurologic: Cranial nerves intact. Deep tendon reflexes 2+ and bilaterally symmetrical.

DIAGNOSIS: The various colors, textures, and degrees of induration in the multiple skin lesions indicate that they have occurred, some as recently as within the last few hours, others at various stages as long as two weeks ago. It would seem she has acquired new lesions almost daily over the past 2-3 weeks. The round, sharply demarcated lesions would be consistent with cigarette burns or perhaps excoriated mosquito bites. The latter seems unusual because of the very sharpness of the edges of these lesions. The area of the nose appears to be a pre-existing lesion which has

CONTINUED...

gotten impetigo. The child's holding absolutely motionless like a statue for approximately ten minutes when left unattended is extremely pathological, indicating the child has been severely disciplined and required to remain motionless as a survival technique. The marks around the neck indicate that she has been choked. The parroting stereotyped conversation of only accepting bubble gum at a time when she would most likely be very hungry indicates she has been fed only when the mother figure allows it.

In summary, this is a chronically, repetitively battered child who appears to be a scapegoat for this family system (Blizzard syndrome). This is indicated by the robust appearance of the other three children who had no apparent marks when observed by the emergency room staff. The explanations offered by the parents do not explain the lesions. Their lack of concern and their delay in seeking medical attention are also indicative of child abuse.

PLAN: Evaluation for bleeding diathesis. Repeat documentation of changes of bruises in a protective environment. Protective incarceration. May not be discharged until a safe environment can be determined by DFYS.

CLINTON LILLIBRIDGE, M.D.
CL:kkt
RECORD# 8307
D: 06/12/91
T: 06/13/91
cc: Dr. Lillibridge
Jessie Allen, DFYS
Tom Johnson, Case Officer, Anchorage Police Department
Dr. Diana Johnson
Betsy Kaufmann, Humana Hospital Emergency Department

Submitted by Sgt. Joe Austin
Anchorage Police Department
on HB396

Michael A. O'Connell and Associates

Specialists in Evaluation and Treatment of Sexual Deviancy, Personality Disorders and Substance Abuse

8625 Evergreen Way, Suite 203
Everett, WA 98204 (206) 347-2366

Michael A. O'Connell, M.S.W.
Darlene Flowers, M.S.W.

January 6, 1992

CPS
840 N. Broadway, Building A
Everett, WA 98201

Re: Report of Child Abuse

The following information comes from my client, [redacted]

He was recently informed by his 32-year-old daughter, [redacted] that she had been sexually and physically abused by her step-father, [redacted] from her ages 8 to 14. (A listing of names, addresses and other information will follow at the end of this report.) [redacted] has just recently begun to retrieve some of the memories of this abuse and is scheduled to begin therapy with Dale Roberts of Olympic Mental Health Services in Everett. The abuse included vaginal intercourse from the age of 8, accompanied by enough pain that she was afraid she would die. She has recently learned that when she resisted sufficiently to stop the abuse at her age 14, that her stepfather then began to sexually abuse her younger sister, [redacted] reported that when she attempted, as a teenager, to report the abuse to authorities, she was not believed. She ended up on the streets at age 15. A third sister, [redacted] was also approached for sexual favors by the stepfather but resisted successfully.

Additional concern exists because the third sister [redacted] has an 11-year-old daughter [redacted] who frequently spends time with her grandparents, including the perpetrator. Her mother has believed that since she was able to successfully fend off the abuse, that her daughter is not in danger. The step-father, [redacted] is now semi-retired, but continues to work part-time as a fill-in school bus driver. He had worked for years as a full-time bus driver.

[redacted] (32) Victim
[redacted]
Everett, WA 98201 [redacted]

[redacted] (31) Victim
[redacted]
Sitka, AK 99835
[redacted]

[redacted](30)
[redacted]
Anchorage, AK 99508-1905
Mother of [redacted](11)

[redacted](Stepfather)
[redacted]
Eagle River, AK 99577

Sincerely,

Michael A. O'Connell, MSW

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

December 4, 1991

MEMORANDUM

TO: Representative Mark Boyer

FROM: Ceceile Kay Richter
Legislative Analyst

RE: **Statutes Of Limitation For The Prosecution Of Child Abuse**
Research Request 92.041

You requested information about what other states have done with respect to statutes of limitation for child abuse offenses, as well as a discussion of the pros and cons of these approaches. You also asked us to identify issues that need to be faced in drafting a new statute for Alaska.

We begin by establishing some common terminology. We then discuss the purposes and logic of statutes of limitation. Next, we describe the present statute of limitation in Alaska for offenses against children and follow this with an outline of what is done in the 50 states. We then provide information on the frequency of kinds of child abuse and evidence of and reasons for the under-reporting of offenses against children. This information may assist to justify enlarging the time period in which to prosecute offenses against children in Alaska. It is, after all, the adult survivors who were not served by the criminal justice system as children who will be served by legislation which enables individuals over the age of 18 to seek prosecution of those who abused them as children.

The next section of our memorandum examines several constitutional issues that are involved in enlarging the statutory time period in which to prosecute offenses against children. These include due process and rights of the accused, excessive punishment and the principles of penal administration, and *ex post facto* laws versus retroactive laws. We follow this with a note about discovery.

We then proceed to offer pros and cons of eleven approaches which we feel the State of Alaska could take with respect to enlarging the statutory time period in which to prosecute offenses against children. In selecting these approaches, we omitted any formula which places responsibility upon child victims under the age of 18 for the prosecution of their abusers. After this, we take up another side issue, the admission of hearsay evidence. We conclude by pointing to certain advantages of litigating in civil court claims that would be stale under the current Alaska statute of limitation for offenses against children.

SUMMARY

The term "statute of limitation" applies to any law which fixes the time within which parties may take judicial action to enforce existing claims or rights. A criminal statute of limitation is an act of legislative grace whereby the state surrenders its right to prosecute after the period of time specified has lapsed. Nationally, there is no consensus of an ideal limitation period for criminal prosecution or applicable exceptions to this period in order to prosecute offenses against children, nor is there agreement on what the offenses included in an exception should be. Despite variances in state laws, however, in the last ten years there has been a definite trend in the states to allow prosecutions for offenses against children to be commenced beyond the normal limitation of actions and after the victim reaches the age of 18.

Even though in 1983 and 1985 the legislature extended the time period in which to prosecute certain sexual offenses against children, Alaska has one of the most restrictive statutes with respect to the time period in which to prosecute abusers of children. A child turning 16 years old in Alaska has one year in which to deal with sexually related offenses which may have happened to her or him in this state between the ages of 6 and 12. However, as of February 1990, an individual who was sexually abused in this state before the age of 16 has the ability to file a civil claim against the perpetrator at any time. This makes Alaska one of the more progressive states in the civil arena.

Despite what seem to be higher than national rates of known child abuse in Alaska, using inferences from both national and in-state surveys, there are indications that child abuse in this state is underreported. Underreporting is significant because when child abuse is not disclosed to law enforcement agencies, offenders cannot be prosecuted within the normal statute of limitation. Because a law enlarging a statute of limitation can reach back to encompass only unexpired periods of limitation for offenses already committed, it is the children who are not now being served by the criminal justice system who will be served by legislation which enables adult survivors of child abuse to seek prosecution of those who abused them as children.

The prospect of legislative action to increase the statutory time period in which to prosecute offenses against children raises a number of constitutional issues which must be addressed. These include due process and rights of the accused, excessive punishment and the principles of penal administration, and *ex post facto* laws versus retroactive laws. If, with the passage of time, a person has refrained from further criminal activity, it is a likely presumption that the person has reformed and the necessity for imposition of the criminal sanction has diminished. If, instead, years have passed since the commission of an offense against a particular victim but the offender has repeated the criminal behavior, the offender can be prosecuted for recent offenses which are within the period of limitation. Penal administration which is based on the principles of reformation and upon the need for protecting the public may be at odds with private goals of retribution and punishment which are better served in a civil forum.

According to one expert, the principal determinant of the appropriate duration of a statute of limitation should be the seriousness of the crime. What offenses are serious enough to prosecute beyond the normal statutory limitation period is a legislative determination, albeit one which is influenced by a perception of the public's wishes. Should the legislature determine to enlarge the statute of limitation for certain offenses against children, it can do anything it wants with respect to the statute of limitation for crimes committed on or after the effective date of an act. If the legislature wants to retroactively extend any limitation period, it can do so provided it does not reach back to encompass crimes for which the statute of limitation has already run out.

Eleven approaches for enlarging the time period in which to prosecute offenses against children in Alaska, together with pros and cons of each approach, are identified and discussed. We omitted approaches which place responsibility upon child victims under the age of 18 for reporting the abuse. In establishing its choice, the legislature may wish to identify an approach which not only recognizes that children under a certain age need additional time to disclose the abuse but also recognizes that adults, too, need additional time to report the abuse they suffered as minors. In concert with considering measures to enlarge the period of time in which to prosecute offenses against children, the legislature might also wish to consider ways to ease the introduction of hearsay evidence by these victims.

With no change in Alaska law, an adult survivor of child abuse already has the capacity to initiate a civil cause of action against the perpetrator. A civil proceeding may offer several advantages over a criminal proceeding for the state, the victim, and society, regardless of what is done to enlarge the criminal statute of limitation for offenses against children.

ACHIEVING SOME COMMON TERMINOLOGY

The National Center on Child Abuse and Neglect, an office of the U.S. Department of Health and Human Services established by legislation in 1974 to conduct and disseminate information and research into the causes, identification, prevention, and treatment of child abuse and neglect, currently defines "child abuse and neglect" as:

> the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby. [Title 42 U.S. Code, Section 5106g(4)]

A "child" is defined by the center as:

> a person who has not attained the lesser of (a) the age of 18; or (b) except in the case of sexual abuse, the age specified by the child protection law of the state in which the child resides. [Title 42 U.S. Code, Section 5106g(3)]

The term "sexual abuse," as used by the center, includes:

> (a) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (b) the rape, molestation, prostitution, or other form of sexual exploitation of children, on incest with children. [Title 42 U.S. Code, Section 5106g(7)]

The terms "child abuse and neglect, "child abuse," and "child sexual abuse" are not widely used in state criminal statutes, however.[1] States which don't use any of these terms have a variety of terms to delineate related offenses and even states which do use those terms may use additional terminology.

In Alaska, no conduct constitutes a criminal offense unless it is defined by statute or by a regulation authorized by statute (AS 11.81.220). We do not have the crime of "child abuse" nor do we have crimes specific to the physical or mental injury of children, the negligent treatment of children, or the maltreatment of children. We do have the crimes of "unlawful exploitation of a minor" (which applies to the production of child pornography) and "sexual abuse of a minor." We also have the crimes of "sexual assault," "incest," and "indecent exposure" which are grouped with sexual abuse of a minor and unlawful exploitation of a minor in AS 12.10.020(c), the statute dealing with general

---

[1]Legislation pertaining to the National Center on Child Abuse and Neglect is under the federal civil code. Alaska and other states have incorporated similar definitions of "child abuse or neglect" and "child sexual abuse" in civil child protection statutes. Alaska's civil definition of "child abuse or neglect" is in AS Title 47, Chapter 17, Child Protection, which concerns persons required to report suspected child abuse or neglect to the Alaska Department of Health and Social Services.

Alaska Statute 47.17.290(2) defines child abuse or neglect as follows:

> "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health, or welfare, is harmed or threatened thereby; in this paragraph, "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function;

Chapter 17 utilizes a definition for the term "sexual exploitation," rather than "sexual abuse," to accommodate sexual offenses against children. Alaska Statute 47.17.290(16) defines sexual exploitation as:

> (a) allowing, permitting, or encouraging a child to engage in prostitution prohibited by [the criminal statutes regarding prostitution and promotion of prostitution in the first, second, and third degree], by a person responsible for the child's welfare; [and] (b) allowing, permitting, encouraging, or engaging in activity prohibited by [the criminal statute regarding unlawful exploitation of a minor], by a person responsible for the child's welfare.

time limitations for prosecution of offenses committed against a person under the age of 16.

Other states incorporate such crimes as battery, aggravated assault, kidnapping, false imprisonment, endangering the welfare of a minor, indecent solicitation of a child, rape, sodomy, oral copulation, genital or anal penetration, unlawful sexual offenses, carnal abuse, indecent liberties with a child, enticement of a child, sexual exploitation of a child, sexual battery, deviate sexual conduct, gross sexual imposition, fornication, crimes against nature, and child pornography into their statutes of limitation for offenses against children.[2] It is more common to leave out rather than include offenses which are not direct sexual offenses when enlarging the limitation of actions for the prosecution of offenses against children.

Despite the term "child abuse" in its name, the National Center for Prosecution of Child Abuse of the American Prosecutors Research Institute has adopted the term "offenses against children" to cover those crimes specifically mentioned in state laws which have enlarged or removed statutes of limitation with respect to crimes against children. Not included in the term "offenses against children" are those felony crimes which are without specific statutory reference to the age of the victim either in the definition of the offense or in the statutes of limitation.

When we use the terms "child physical abuse" or "child sexual abuse" below, we mean only offenses of that nature. When we use the terms "child abuse," "child abuse and neglect," or "offenses against children," we mean to denote the range of sexual, physical, and other offenses against children included in the litany of such offenses mentioned in state statutes, whether recited above or not.

THE PURPOSES AND LOGIC OF STATUTES OF LIMITATION

In a criminal context, the state and not the injured party prosecutes the action. State legislatures, expressing the norms of society, have enacted legislation providing criminal sanctions against offenders. In most states, however, enforcement is limited by another provision, generally titled "limitation of prosecution" or "limitation of actions." Commonly known as "statutes of limitation" or "statutes of limitations," these provisions are procedural rules, also enacted by state legislatures, which limit the period of time in which a prosecutor can bring the case to court. Thus, upon the

---

[2]In general, incest is not viewed as as serious a crime as other sexual offenses which themselves can be overlapping of incest. For example, in Alaska, the crime of incest is a class C felony whereas sexual assault in the first degree and sexual abuse of a minor in the first degree, which could include incest, are unclassified felonies. Sexual assault in the second degree and sexual abuse of a minor in the second degree, which could also include incest, are class B felonies.

expiration of the statutory limitation period, the state is prevented from prosecuting an alleged offender.

The term "statute of limitation" applies to any law which fixes the time within which parties may take judicial action to enforce claims or rights which have already accrued to them or else be barred thereafter from enforcing them in a court of law. A criminal statute of limitation is an act of legislative grace whereby the state surrenders its right to prosecute after the period of time specified has lapsed.

A statute of limitation provides predictability for both the defendant and the prosecution by prescribing the time period beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Statutes of limitation, in addition to prescribing periods within which action may be brought, may also include statutes which provide no time bar to prosecution.

Musing about the origins and applications of statutes of limitation, Justice Robert H. Jackson of the U.S. Supreme Court observed in *Chase Securities Corp. v. Donaldson* (325 *U.S.* 304, at 313, 1945) that "statutes of limitation always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law." Said Justice Jackson:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. (at p. 314)

As the drafters of the *Model Penal Code* concluded, "To the extent that length of periods of limitation can be rationalized at all, they, like penalty

provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law."[3]

THE PRESENT STATUTE OF LIMITATION IN ALASKA FOR OFFENSES AGAINST CHILDREN

In 1962, the Alaska legislature provided that no person should be prosecuted, tried, or punished for any criminal offense that was not murder unless the indictment is found or the information or complaint is instituted within five years of when the offense was committed (**AS 12.10.010**). Despite legislation in 1983 and 1985 which enlarged the time period in which to prosecute certain sexual offenses against children, Alaska is one of the most restrictive states with respect to the time period in which to prosecute abusers of children.

Effective October 1983, the Alaska legislature enlarged the period for bringing charges relating to sexual abuse and unlawful exploitation of a minor. In July 1985 charges relating to promoting prostitution were added. Alaska Statute **12.10.020(c)** now provides that even if the general time limitation (which is five years) has expired, a prosecution for an offense of sexual assault in the first, second, or third degree; sexual abuse of a minor in the first, second, third, or fourth degree; incest; unlawful exploitation of a minor; indecent exposure; or promoting prostitution in the first, second, or third degree, committed against a person under the age of 16 may be commenced within one year after the crime is reported to a peace officer or the person reaches the age of 16, whichever occurs first, *except that no period of limitation may be extended by more than five years*. In addition, through an enactment clause in the 1983 session law, the legislature expressly provided that the new statute of limitation would have retroactive effect for offenses committed during the five years immediately before the effective date of this act.[4]

The effect of **AS 12.10.020(c)** is that it adds five years to what was already a five-year statute of limitation on the above crimes, except that any extended limitation of action stops tolling at the victim's 17th birthday. Between the ages of 16 and 17, the victim, providing she or he reports the crime, can only ask for prosecution of crimes that occurred on or after her or his sixth birthday; and for those offenses that occurred between the ages of six and seven, the victim will only have part of the year between ages 16 and 17 to act. For those offenses committed before the victim was age six, the statute of limitation will have run out before the victim's sixteenth birthday. For those offenses which occurred after age 12, there is no second five-year period

---

[3]Advisory Committee comment on Tentative Draft No. 5, *Modern Penal Code*, quoted in Gerald F. Uelmen, "Making Sense Out Of The California Criminal Statute Of Limitations," *Pacific Law Journal*, Vol. 15, 1983, pp. 35-82, at p. 59.

[4]See **Section 11, Chapter 78, Session Laws of Alaska, 1983**, in the **Temporary and Special Acts.**

added to the statute of limitation. For those offenses occurring between ages seven and 12, the extension, because it runs out at age 17, is correspondingly less than five years.

What we have in Alaska is the dichotomy of civil legislation which requires persons outside the home to report suspected abuse and neglect of children under the age of 18 to the Alaska Department of Health and Social Services (AS Title 47, Chapter 17), and civil legislation which does not allow children under the age of 18 to marry without the consent of their parents or the court (AS Title 25, Chapter 5), and a criminal statute which gives the child turning age 16 one year in which to deal with sexually related offenses which may have happened to her or him between the ages of six and 12.

"The net effect of the Alaska statute of limitation for sexual offenses against children," explained Cindy Smith, executive director of the Alaska Network on Domestic Violence and Sexual Assault, "is that it still expects that some adult will be intervening on behalf of the child. If that fails to occur, it leaves child victims no recourse but to act in their own behalf."

"It is questionable," continued Smith, "that a 16-year old, let alone a younger child, has the capability to initiate a criminal action against the offender, particularly an offender who may be a member of that same household."

As of February 2, 1990, pursuant to AS 09.55.650, an individual who was sexually abused in this state before the age of 16 may file a civil claim against the perpetrator at any time. Because of the limitations of AS 12.10.020(c), however, the individual who discovers such abuse in his or her adult years has no ability to seek criminal prosecution of the offender.[5]

WHAT STATES HAVE DONE REGARDING STATUTES OF LIMITATION FOR OFFENSES AGAINST CHILDREN

It has been most common in criminal statutes to let the period of limitation run for a specific number of years commencing with the occurrence of the offense, regardless of the age of the victim. Generally, the fixed period in felony statutes of limitation ranges between 2 and 15 years; with respect to child sexual abuse offenses the limitation period has ranged from 4 years to

[5]Just this situation came to the attention of the Alaska Professional Teaching Practices Commission and the state attorney general's office this year with respect to adult survivors of child sexual abuse in western Alaska who realized the offenses against them subsequent to the expiration of the criminal statute of limitation. See Attachment A for copies of articles on this subject from the *Anchorage Daily News* of July 27 and November 3, 1991, as well as a related resolution from the Alaska Network on Domestic Violence and Sexual Assault of October 6, 1991, which supports changing the statute of limitation in child sexual assault cases.

10 years. Nationally, there is no consensus of an ideal limitation period for criminal prosecutions or applicable exceptions to this period in order to prosecute offenses against children, nor is there agreement on what the offenses included in an exception should be. State statutes of limitation vary in the number of years, the time at which the limitation period commences, and exceptions which toll the limitation period. In a few states, there is no statute of limitation for felonies and prosecution may be commenced at any time regardless of when the offense occurred.

Despite variances in state laws, in the last ten years there has been a definite trend in the states to allow prosecutions for offenses against children to be commenced beyond the normal limitation of actions and after the victim reaches the age of 18. At least three states, Maine, Minnesota, and Oregon, which each enlarged its statute of limitation in 1989, passed even more flexible legislation in 1991.

In one of the recent approaches utilized by some states, the normal statutory limitation of action does not begin tolling until the victim reaches a specified age, usually the age of majority. Another approach is that the victim has until a certain age, which is an age beyond the age of majority, for the offense to be prosecuted. A third approach is for the statute of limitation to begin tolling--or for a supplementary time period to run--with the "discovery" of the act by the victim, a law enforcement agency, or other responsible third party, or "disclosure" of the offense to a law enforcement agency.[6]

Almost every state has something which makes its statute of limitation with respect to offenses against children unique when compared to other states, however. Based on information we obtained from three secondary sources that describes statutes of limitation applicable to criminal offenses against children in the 50 states (included as Attachments B, C, and D to this

---

[6]The *Model Penal Code* offers no guidance in this matter as Section 1.06 of that code, which pertains to time limitations, has not been amended since the code was approved by the American Law Institute in 1962. Section 1.06 provides that a prosecution for a felony of the first degree must be commenced within six years after it is committed and a prosecution for any other felony must be commenced within three years after it is committed. An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed. (*Model Penal Code, Uniform Laws Annotated, Volume 10*, St. Paul: West Publishing Co., 1974 and 1991)

memorandum),[7] supplemented with information just gained on state legislative enactments in 1991, we have arrived at the following broad classification of states by type of statute of limitation:

- Two states have no statutes of limitation for any criminal offense: South Carolina and Wyoming.

- Five states have no statutory limitation provision applicable to the prosecution of felonies: Kentucky, Maryland, North Carolina, Virginia, and West Virginia.

- Four states impose no statutes of limitation for certain felonies, including felony sex offenses against children: Alabama, Maine (incest, rape, or gross sexual assault), Rhode Island, and Vermont (aggravated sexual assault).

- Twenty-four states have mandated that the period for sexual abuse and certain other offenses against children does not begin to run until an offense is discovered, or should have been discovered, or the victim reaches a minimum age, or the abuse is disclosed to law enforcement agencies, or they provide for a supplementary tolling of the statute for a defined time in recognition of one or more of these exceptions. Whatever the reason, the effect is that in these states prosecutions are allowed to be commenced for a period of time after the victim reaches the age of 18: Arkansas, Arizona, Florida, Idaho, Illinois, Iowa, Louisiana, Maine (sexual intercourse and certain other sexual acts), Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon,

---

[7]These attachments are as follows: (B) National Center for Prosecution of Child Abuse, American Prosecutors Research Institute; Beth Payne, project supervisor; *State Legislation Extending or Removing the Statutes of Limitation for Offenses Against Children*; Alexandria, Virginia: American Prosecutors Research Institute; 1991. (C) Durga M. Bharam, "Statute of Limitations For Child Sexual Abuse Offenses: A Time For Reform Utilizing The Discovery Rule," *The Journal of Criminal Law and Criminology*, Northwestern University School of Law, Vol. 80, 1989, pp. 842-865. (D) Jessica E, Mindlin, "Child Sexual Abuse And Criminal Statutes Of Limitation: A Model For Reform," *Washington Law Review*, Vol. 69, 1990, pp. 189-207.

Pennsylvania, Tennessee, Vermont (sexual assault, lewd and lascivious conduct with a child), Washington, and Wisconsin.[8]

Seventeen states impose statutes of limitation for child sexual abuse which start running at the commission of the offense. While some may extend the statute for offenses against children below a minimum age, they have no statutory or common-law provisions for tolling or supplementing the running of those statutes for any of the above exceptions: Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Mississippi, Missouri, Nebraska, New York, Ohio, South Dakota, Texas, Utah.[9]

Additionally, in several states, statutes of limitation as applied to certain offenses against children have been enlarged through nonlegislative means via

---

[8]In 1991, under **Maine Revised Statute Title 14, Section 752-C**, Maine provided that actions based upon sexual intercourse and certain other sexual acts with victims under the age of majority must be commenced by the later of 12 years after the cause of action arose or within six years after the person discovers or reasonably should have discovered the harm. In addition, under **Title 17-A, Section 8**, the statute of limitation was removed altogether for incest, rape, or gross sexual assault if the victim had not attained the age of 16 years at the time of the crime.

In Minnesota, under **Section 628.26** of the statutes, the 1991 legislature provided, that in the case of criminal sexual conduct, an indictment or complaint must be brought within seven years of the offense. However, where the victim was under the age of 18 years at the time the offense occurred and the victim failed to report the offense within this limitation period, the indictment or complaint may be brought within three years after the offense is reported to law enforcement authorities.

Also in 1991, under **Oregon Revised Statute Section 131.25**, Oregon provided that prosecution of sexual offenses must be commenced within six years after commission of the offense. However, if the victim was under age 18, prosecution may be commenced within whichever occurs first, anytime before the victim attains age 24 or within six years after the abuse is reported to law enforcement and certain other responsible government agencies.

[9]Most, if not all states, including these, contain a provision in their criminal code that a period of limitation does not run for up to a specified period of time during a period or periods when the accused is outside the state or absent from his or her normal domicile within the state with a purpose to avoid detection, apprehension, or prosecution. In Alaska, such extension may be up to three years [**AS 12.10.040(a)**]. An additional tolling provision in some states, based upon the *Model Penal Code*, is that the statute will not toll for any length of time in which a prosecution for the same conduct is pending. Thus, if an indictment or information is dismissed for a technical defect and the double jeopardy clause or a statute would not preclude prosecution, the statute of limitation will not have run during the duration of the prosecution.

the judicial system. For example, courts have applied a common-law doctrine that a crime continues and therefore is not complete so long as the offender engages in the criminal conduct. It is only when the crime is complete that the statute of limitation begins to run. Using this logic, a Minnesota court found that where the statute requires for prosecution for child sexual abuse that the defendant both be in a position of authority over the victim and use that authority to coerce the victim to submit to the abuse, as long as the same parental authority that was used to accomplish the sexual abuse was used to prevent the victim from reporting the abuse, the offense is continuous and the statute of limitation does not begin to run until the child is no longer subjected to that authority.[10] Just this year the Ohio Supreme Court ruled that the general statute limiting criminal prosecutions does not run on child sex abuse or neglect cases until a responsible adult, as listed in another statute requiring reporting of abuse or neglect, has knowledge of both the act and the criminal nature of the act.[11]

---

[10]*State v. Danielski*, 348 N.W.2d 352 (Minn. Ct. App. 1984), reported by Mindlin, previously cited, pp. 198-199, and Bharam, previously cited, pp. 856-857.

[11]The *Ohio Revised Code* provides the period of limitation of criminal prosecutions shall not run during any time when the *corpus delicti* remains undiscovered. Otherwise the statute of limitation for a felony other than aggravated murder or murder is six years (Section 2901.13, *Page's Ohio Revised Code Annotated*, as supplemented through January 1, 1991, Cincinnati: Anderson Publishing Co., 1987 and 1991). In the instant case [*State v. Hensley*, 571 N.E.2d 711 (Ohio 1991)], offenses alleged to have occurred as early as 1974 were included in an indictment filed on October 11, 1988. The question before it, the supreme court said, was when is the *corpus delicti* of a crime discovered. The court defined *corpus delicti* of a crime as being the body or substance of the crime, and usually having two elements, the act itself, and the criminal agency of the act. The *corpus delicti*, the court said, did not include the victims' knowledge of the events surrounding the case, even though they understood the wrongness of the defendant's acts, or the discovery of the acts by the parents. However, the court also rejected the state's argument that the statute of limitation begins to run only when the prosecutor or another law enforcement agency discovers the *corpus delicti* of the crime. Instead, citing a civil statute which contains a list of responsible adults who are under a legal duty to immediately report any known or suspected child abuse or neglect to certain governmental agencies, the court said the *corpus delicti* of crimes involving child abuse or neglect is discovered when a responsible adult, as listed in that statute, has knowledge of both the act and the criminal nature of the act.

ENLARGING STATUTES OF LIMITATION TO PROSECUTE OFFENSES AGAINST CHILDREN IS ONE WAY TO COMPENSATE ADULT SURVIVORS FOR THE UNDERrEPORTING OF OFFENSES AGAINST CHILDREN

The National Center on Child Abuse and Neglect has sponsored two surveys on the national incidence of child abuse and neglect, one in 1979-1980 and one in 1986. These surveys were unique in that they not only assessed how many cases of child maltreatment were known to state child protective service agencies, but also they included cases known to other investigatory agencies and the police, schools, hospitals, and social service agencies.[12]

The first study, commonly known as **National Incidence Study I**, revealed a rate of 0.7 cases of child sexual abuse per 1,000 children per year. This compared with a rate of 3.4 cases of other physical abuse, 2.2 cases of emotional abuse, 1.7 cases of physical neglect, 2.9 cases of educational neglect, and 1.0 case of emotional neglect per 1,000 children for the survey year.[13]

National Incidence Study II contained two sets of figures. One set included a requirement that the child had to have already experienced demonstrable harm as a result of the maltreatment. The other set lowered the level of harm to include the above categories as well as children seriously endangered by maltreatment.

According to amended figures released by the contractor in May 1990, a total of 15.98 children out of every 1,000 children had suffered demonstrable harm from child abuse or neglect in the survey year. The demonstrable harm figure included 1.9 cases of child sexual abuse, 4.3 cases of other physical abuse, 2.5 cases of emotional abuse, 2.7 cases of physical neglect, 4.5 cases of educational neglect, and .08 cases of emotional neglect per 1,000 children. When the level of harm was eased to include serious endangerment as well as demonstrable harm, the figures were 2.1 cases of child sexual abuse per 1,000 children, as compared with 4.9 cases of other physical abuse, 3.0 cases of emotional abuse, 8.1 cases of physical neglect, 4.5 cases of educational neglect, and 3.2 cases of emotional neglect. This was a total of 25.8 cases of serious endangerment per 1,000 children.

---

[12]Both surveys were conducted and analyzed by Westat, Inc., Rockville, Maryland. Results of the first survey were published in *Study Findings: National Study of the Incidence and Severity of Child Abuse and Neglect*, U.S. Department of Health and Human Services, 1981. Results of the second survey were published under the same title in 1988.

[13]This summary information is from Diana E.H. Russell, Ph.D., "The Incidence And Prevalence Of Intrafamilial And Extrafamilial Sexual Abuse Of Female Children," *Child Abuse And Neglect*, Vol. 7, 1983, pp. 133-146. For an overview of studies of child abuse, see also "Child Abuse--An Overview," by Richard Gelles, Ph.D., pp. xiii-xxix, in Robin E. Clark and Judith Freeman Clark, *The Encyclopedia of Child Abuse*, New York: Facts on File, 1989.

Using only the greater level of harm, 44 percent of the cases from National Incidence Study II were not known to child protective services; using the endangerment standard, 51 percent of the cases were not known to child protective services.[14]

According to a report of the Governor's Interim Commission on Children and Youth, January 1988, the Alaska Division of Family and Youth Services (DFYS) receives 20,000 child abuse and neglect reports a year, although many of these are unsubstantiated. The number of children actually receiving child protective services statewide was 9,200 in 1986.[15]

According to the introduction to the report *Into the '90s: The Strategic Plan for Service to Alaska's Families, Children and Youth*, published November 1, 1990, by DFYS, 9,214 children needed services from DFYS to protect them from harm in fiscal year 1990. Of these, 2,614 were under the category "physical abuse," 1,305 were under the category "sexual abuse," 3,797 were under the category "neglect," and 1,498 were under the category "other."[16] Using the DFYS numbers and its figure of 170,510 for children under the age of 18 in Alaska in 1990, there were 15.3 cases of child protective services for physical abuse per 1,000 Alaska children, 7.7 cases of services for sexual abuse per 1,000 children, 22.3 cases of services for child neglect per 1,000 children, and 8.8 cases of services for other child abuse and neglect per 1,000 children. (This would be 54 children per 1,000 children requiring child protective services.)

As we do not know the extent of underreporting in this state, we are unable to draw a meaningful comparison between the National Incidence Study data and DFYS's data. However, according to the introduction to *Into the '90s*:

---

[14]Andrea J. Sediak, Ph.D., "Technical Amendment to the Study Findings--National Incidence and Prevalence of Child Abuse and Neglect: 1988," Rockville, Maryland: Westat, Inc., May 23, 1990, for the National Center On Child Abuse And Neglect, U.S. Department of Health and Human Services. The amendment, as provided to us by the National Committee For Prevention Of Child Abuse, is included as Attachment E to this memorandum. As noted, the report itself is called *Study Findings, Study Of National Incidence And Prevalence of Child Abuse And Neglect, 1988*. As the report contains no incidence breakdowns by state, we did not refer to it directly.

[15]Dean Gottehrer, ed., *Our Greatest Natural Resource, Investing in the Future of Alaska's Children*, A Report of the Governor's Interim Commission on Children and Youth, January 1988, p. 67.

[16] *Into the '90s: The Strategic Plan for Service to Alaska's Families, Children and Youth*, Juneau: State of Alaska Department of Health and Social Services Division of Family and Youth Services, November 1, 1990, p. 6.

> Alaska ranks fourth highest in the nation in the rate of reported child abuse. Alaska's rate of 54 children per 1,000 reported as victims of abuse is more than 60 percent greater than the national rate of 34 per 1,000.[17]

Since 1971, Alaska has had a requirement under its civil child protection statutes (AS 47.17.10 - 47.17.290) that certain professionals who in their occupational duties would have reason to suspect that a child has suffered harm as a result of child abuse or neglect must report their suspicions to the state child protection agency for investigation. Persons required to report include medical personnel, school teachers and staff, social workers, peace officers, child care providers, paid employees of domestic violence and sexual assault programs, and paid employees of alcohol and drug counseling organizations. However, Nina Kinney, social services field administrator with the Alaska Department of Health and Social Services and former program coordinator with the State Council on Domestic Violence, recently confirmed in a conversation with this legislative analyst that she is of the impression, even today, that there is great underreporting in this state of child sexual abuse and other child abuse and neglect as well.[18]

Nationally (and it would appear in Alaska as well), many offenses against children go unprosecuted simply because the child did not reveal the abuse until years later, after the statute of limitation had expired. When the event is not reported at all to law enforcement agencies, or reported after the statute of limitation has expired (or reported after exceptions to the statute of limitation have expired), the state has no ability to prosecute the offense. As observed by the U.S. Attorney General's Task Force On Family Violence in its final report, because criminal statutes of limitation usually begin to run from the date of victimization, child sexual assault victims who are unable, either

---

[17]We do have some unanswered questions about the DFYS terminology and its conclusions which we just quoted. We have seen that the number of 54 per children per 1,000 children is based on the 9,214 children receiving DFYS protective services. We do not know where the U.S. statistic of 34 per 1,000 children came from. That figure is closest, however, to the National Incidence Study II figure of 25.8 children per 1,000 children under serious endangerment of child abuse and neglect. The U.S. figure purports to include child abuse and neglect both known and unknown to child protective services. Were Alaska's figure of 54 per 1,000 children to be compared with the National Incidence Study II figure of 25.8 children per 1,000, Alaska would have a rate of children seriously endangered by abuse and neglect over twice the U.S. rate. However, were Alaska to have any cases of child abuse and neglect not known to DFYS, the number of 54 children per 1,000 children would have to be increased accordingly prior to making a valid comparison with national figures.

[18]Personal communication, November 15, 1991.

emotionally or psychologically, to immediately disclose the abuse they have suffered are often precluded from appropriate legal action.[19]

While the public perception appears to be that incidents of physical abuse of children are more visible and therefore more likely to be prosecuted within the normal period of a statute of limitation than sexual offenses against children, the actual experience of the states does not bear this out. According to attorney Josephine Bulkley who for years has been a consultant on legal proceedings in child abuse and child sexual abuse cases to the Center on Children and the Law (formerly the National Legal Resource Center for Child Advocacy and Protection) of the American Bar Association, physical abuse or neglect of a child typically does not result in a criminal proceeding unless the child is permanently or severely injured or dies. Sexual abuse of a child more frequently forms the basis of a criminal prosecution, although many perpetrators likewise escape prosecution.[20]

According to Jessica E. Mindlin, there are no statistics documenting how often criminal child sexual abuse cases are barred by statutes of limitation. In a telephone conversation she had with the King County, Washington, Prosecutor's Office in late 1988, she was told that office receives approximately four cases per month where charges are time-barred, and this estimate does not include reports made to police officers who do not pursue cases barred by statutes of limitation.[21]

Statistical Evidence of Underreporting of Offenses Against Children

Because a law enlarging a statute of limitation can reach back to encompass only unexpired periods of limitation for offenses already committed, it is the adult survivors of child abuse[22] who were not served by the criminal justice system as children who will be served by legislation which enables individuals

---

[19]*Final Report, Attorney General's Task Force on Family Violence*, U.S. Department of Justice, September 1984, p. 103.

[20]Josephine Bulkley, J.D., "Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse Cases," *Behavioral Sciences And The Law*, Vol. 6, No. 2, 1988, pp. 153-180, at p. 153 (see Attachment E).

[21]Mindlin, cited above.

[22]Carol W. Napier points out that women incestuously abused as children describe themselves as survivors, not victims. This description is important, she said, because it emphasizes the strength, rather than any weakness, of these women and thus is empowering. See Napier, "Notes, Civil Incest Suits: Getting Beyond the Statute of Limitations," *Washington University Law Quarterly*, Vol. 68, 1990, pp. 995-1020, fn. 3 at p. 995.

over the age of 18 to seek prosecution of those who abused them as children.[23] Are there unidentified abused or neglected minor children and young adults in Alaska for whom the statutory time period in which to prosecute their abusers has not yet run out but who may not be known to the criminal justice system before it is too late, we questioned. If so, there are and will be adult survivors of child abuse who could be the beneficiaries of an enlarged statute of limitation for the prosecution of offenses against children in Alaska.

To answer our question, we found that we could draw inferences by looking at a number of studies. In so doing, we have reached the inevitable conclusion that as high as the rates are in Alaska for child protective services, these rates are still lower than incidence surveys of child abuse and neglect would least us to expect.

For example, a compilation by J. Herman, involving data from five surveys undertaken on the prevalence of sexual abuse of female children since 1940, indicated that one-fifth to one-third of all women had had some sort of childhood sexual encounter with an adult male.[24] In a study involving detailed interviews in 1978 of a probability sample of 930 women residents of San Francisco concerning any experience of sexual abuse they might have had at any time throughout their lives, 38 percent of the respondents reported at least one experience of sexual abuse before the age of 18 years; 28 percent reported at least one such experience before 14 years of age. (Sexual contact that was wanted and with a peer, i.e. sex play between siblings or cousins of approximately the same age, was not counted.)[25]

The survey, by Dianna E.H. Russell, Ph.D., considered two categories of childhood sexual abuse: intrafamilial and extrafamilial. Overall, it was determined that 29 percent of the perpetrators were relatives, 60 percent were known to the victims but were unrelated to them, and 11 percent were total strangers. Females represented four percent of all abusers. When noncontact

---

[23]See in this memorandum a discussion of retroactivity under the heading "*Ex Post Facto* Laws versus Retroactive Laws," in the analysis of constitutional considerations in Alaska in enlarging the statutory time period in which to prosecute offenses against children in Alaska.

[24]J. Herman, *Father-Daughter Incest*, Cambridge, Mass.: Harvard University Press, 1981.

[25]Russell, cited above. We have included a copy of this article as Attachment G to this memorandum. For background on father-daughter incest, although not included as an attachment, we would recommend Napier, cited above. We did not review another article which apparently reports that 75 to 90 percent of incest victims reach adulthood without revealing the incident. The citation for that article is DeRose, "Adult Incest Survivors And The Statute Of Limitations: The Delayed Discovery Rule And Long-Term Damages," *Santa Clara Law Review*, Vol. 25, 1985, beginning at page 191.

experiences such as being upset by someone exposing their genitals or extra-familial nongenital touching were added in with these other experiences of sexual abuse, 54 percent of the women reported unwanted sexual experiences before they reached the age of 18 years; 48 percent reported that at least one such experience had occurred before 14 years of age. *Only two percent of the cases of intrafamilial child sexual abuse and only six percent of the cases of extrafamilial child sexual abuse were ever reported to the police*, numbers the researcher calls powerful evidence that reported cases are only the very tip of the iceberg.[26]

Statistics presented at the U.S. Department of Justice's 1984 National Symposium On Child Sexual Abuse are equally astonishing. Those numbers indicate that *one in three females and one in four males* between the ages of

---

[26]Sixteen percent of the women reported at least one experience of intrafamilial sexual abuse before the age of 18; 12 percent had been sexually abused by a relative before 14 years of age. In 40 percent of the intrafamilial cases, the perpetrators were parents, step-parents, or siblings. (In the whole sample of 930 women, 4.5 percent had been abused by biological fathers or step-fathers, foster fathers, or fathers by adoption. More women, some 4.9 percent of the survey, had been abused by uncles.)* Forty-one percent of the cases of intrafamilial abuse involved force, with abuse by stepfathers likely to involve the most force.# In 32 percent of the cases of intrafamilial child sexual abuse the respondent reported that the perpetrator has also sexually abused one of more other relative, 16 percent could not say, and 53 percent said another relative had not been sexually abused by the person who abused them.

In contrast (and using a more stringent definition of sexual abuse), 31 percent of the sample reported at least one experience of sexual abuse by a nonrelative before the age of 18 years; 20 percent of these women had been sexually abused by a nonrelative before 14 years of age. Of these, 15 percent of the perpetrators were strangers, 42 percent were acquaintances, and 41 percent could be called more than just acquaintances. Abuse outside the family was likely to involve more force than abuse inside the family.

* It should be noted that it is most commonly stated in other literature that the most prevalent type of intrafamilial sexual abuse is father-daughter incest. According to a three-page "Analysis of Sex Offender Data" by the Alaska Department of Corrections Division of Statewide Programs, dated October 23, 1985, of victims who were related to the 354 sex offenders under sentence in the Alaska prison system on March 1, 1985, 62 percent were natural daughters or stepdaughters.

In a study of 40 survivors of father-daughter incest, Herman, previously cited, reported that over half the women had indicated that their fathers used violence repeatedly and that they had seen their fathers beat their mothers. In that study, 58 percent of the survivors did not tell anyone about the incest while living at home.

three to 18 years had been sexually abused. Of these, 36 percent were victims of incest.[27]

Closer to home but substantially similar to the above results is the information which was gathered from a questionnaire administered during 1988 and 1989 to 5,458 students in grades 7-12 at schools in rural areas, small towns, highway communities, and regional centers across Alaska. Representing 77 percent of the eligible students in the 27 participating school districts, and 13 percent of public school students in these grades statewide, the Alaskan Adolescent Health Survey showed that physical and sexual abuse were relatively common among Alaskan youths. Within the survey group, 23 percent of females and eight percent of males (representing 16 percent of the total survey group) reported having been physically abused. One-quarter of all girls and 3 percent of boys (representing 15 percent of the survey group) reported sexual abuse. When physical and sexual offenses against children were considered together, 22 percent of the youths and 34 percent of the girls reported having been abused. One in 20 youths described themselves as severely stressed: of these, one-third had been sexually abused and 40 percent had been physically abused. One-half of the severely stressed youths had attempted suicide. Moreover, many youths who were abused revealed that they had told no one of the abuse.

Thirty-one percent of those who had been physically abused and 29 percent of those who had been sexually abused reported that they had not discussed the abuse with anyone. One third of the female victims of either type of abuse had told no one; of male victims, nearly one-half had told no one.[28]

Reasons For The Underreporting Of Offenses Against Children

Why are offenses against children underreported? The answer appears to be a combination of concealment by the perpetrator and the unwillingness or inability of the child victim to report the offense. In a survey of prosecutors, judges, and defense attorneys to identify the crimes most likely

---

[27]These figures are attributed to the U.S. Department of Justice, "Notes from the National Symposium on Child Sexual Abuse," Unpublished, October 1984. We did not see the document first hand. Our source is Amy Wallace, *An Incidence Study Of Incest In Juneau*, Juneau: AWARE, ca. 1985.

[28]*The State of Adolescent Health in Alaska*, Juneau: Alaska Department of Health and Social Services and Anchorage: Alaska Area Native Health Service, May 1990.

to be concealed, child molesting was ranked seventh out of twenty-six crimes.[29] When child abuse victims are unable, either emotionally or psychologically, to immediately disclose the abuse they have suffered, they are often precluded by statutes of limitation from appropriate legal action.

An interplay of the superior power, knowledge, resources, and strength of the perpetrator over the victim commonly results in an unwillingness or inability of the child to report the offense. The power relationship alone between the adult offender and the child victim makes reporting of abuse by the victim within the statutory period very unlikely. The secret nature of these offenses, particularly child sexual abuse, makes detection of the offense by outsiders especially difficult. Perpetrators of child sexual abuse escape prosecution for their acts by assaulting victims too young to report the abuse within the statutory period[30] and by using physical force, threats, coercion, misrepresentation, and bribery to prevent the victim from reporting the offense until after the statute of limitation has expired.

---

[29]Gerald F. Uelmen, "Making Sense Out Of The California Criminal Statute Of Limitations," *Pacific Law Journal, Vol. 15*, 1983, pp. 35-82, at p. 53. The six crimes more likely to have been concealed than child molesting were payment of bribe, receipt of bribe, embezzlement of public funds, corporate securities fraud, falsifying public records, and fraudulent claims against government. A copy of Uelmen's article is provided as Attachment H to this memorandum.

[30]According to the research reviewed by Wallace for *An Incidence Study of Incest in Juneau* (previously cited, page 13), the literature has identified sexual-assault victims as young as one and one-half months old. The most common age when incest is initiated is between 4 and 12 years old, with particularly high risk periods at ages 4 and 9 years old. Considering children through the age of 16, the average age of sexually abused children is under 10 years old. (Note that this does not imply that sexual intercourse occurred or that if it did occur it was by the time the victim was 10. Given the young age at which such abuse may begin, other forms of sexual contact such as oral-genital contact by either party, contact of the abuser's genitals with other parts of the victim's body, digital penetration, and touching may be more likely until the victim reaches a certain age.)

This legislative analyst reports attending two general self-development workshops where adult incest survivors reported being victimized as early as two-months old and one survivor of childhood physical and sexual abuse reported receiving blows when she was in the womb.

According to a three-page "Analysis of Sex Offender Data" by the Alaska Department of Corrections Division of Statewide Programs, dated October 23, 1985, involving the 354 sex offenders under sentence in the Alaska prison system on March 1, 1985, victims under the age of 16 were most likely to be relatives of the offender, victims over the age of 16 were most likely to be friends or acquaintances of the offender.

For other children, no force or threats are required to keep the abuse from being reported. Victims often remain silent, feeling ashamed and embarrassed. The child may feel personally responsible for the incident(s) and not blame the perpetrator. Because of youth and ignorance, the child may not fully comprehend the criminal nature of the defendant's behavior. Particularly for a child growing up in a family where there is a strong emphasis on right and wrong and where punishment is meted out for wrong acts, there is the compensatory logic that they would not have been forced to do something wrong by an authority and therefore what happened must be right.

The role of sexual and/or physical abuser is only one of the roles that the offender may play. The offender may also be a source of comfort and genuine affection to the child and to the family, and victims may fear losing this aspect of the relationship. Often, an incestuous father or stepfather is the only adult employed outside the home and the victim feels responsible for the welfare of other family members. The child may fear the break up of the family or fear that other family members who find out will be physically harmed by the abuser. Sometimes the child personally is in a caretaker or mediator role in the family and feels a responsibility for keeping the family together.

Sexual abusers outside the family are typically in a position of trust and authority over the child and use that authority to coerce the relationship and its nondisclosure. Many victims believe their parents will be angry and punish them for allowing the abuse. Sometimes, injury, death, or other harm to themselves, pets, or parents may be perceived if the perpetrator's identify is revealed.

What is emerging as a major cause of unreported sexual offenses stems from the child's own mental defense mechanisms. Child victims engage in repression, denial, avoidance, and dissociation to protect themselves from the trauma of the sexual abuse. As we have learned through the experiences of adult survivors of child sexual abuse, often these defense mechanisms continue into adulthood.[31] A victim who as a child mentally blocked out the abuse may not remember it for years until recall is triggered by another significant event

---

[31]The literature reports that mental health professionals and researchers have found that victims of incest and other forms of child sexual abuse often meet the diagnostic criteria for Post-Traumatic Stress Disorder as described in the *Diagnostic And Statistical Manual Of Disorders*, published by the American Psychiatric Association. Symptom's may include the victim's persistent avoidance of stimuli associated with the event and psychologic amnesia for an important aspect of the traumatic event. Multiple Personality Disorders stemming from childhood sexual abuse also have been diagnosed.

in the victim's life or through psychotherapy.[32] The victim may also have recall of the period during which the abuse occurred but, because of the psychological distress caused by the abuse and the mechanisms developed to cope with that distress, may not have been able to comprehend the nature of the injuries and their cause until after entering psychological counseling during adulthood.[33]

CONSTITUTIONAL CONSIDERATIONS IN ALASKA IN ENLARGING THE STATUTORY TIME PERIOD IN WHICH TO PROSECUTE OFFENSES AGAINST CHILDREN IN ALASKA

In a following section we offer several approaches that might be taken to enlarge the statutory time period in which to prosecute offenses against children in Alaska. However, the prospect of legislative action to increase the statutory limitation of actions for the prosecution of offenses against children raises a number of constitutional issues that should be addressed. These issues are discussed below.

A. Due Process And Rights Of The Accused

Article I, Section 7 of the *Alaska Constitution*, which is based on Amendment V of the *U.S. Constitution* provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

---

[32]Marilyn Van Derbur Atler, Miss America 1958, a woman now over 50 years old, revealed publicly last May that she had been sexually molested by her father from the time she was 5 until she was 18 and left home for college. She had no conscious knowledge of what had happened to her at night until she was 24 years old and a skilled counselor and minister led her to uncover long-repressed memories and feelings. After years in the recovery process, she now knows that she had mentally disassociated herself from those events, splitting herself into a "day child" and a "night child," so to speak. The day child knew nothing of the night child's existence until her recovery process. (See Marilyn Van Derbur Atler, "Say 'Incest' Out Loud," *McCall's*, Vol. 118, No. 12, September 1991, p. 78 ff.)

[33]In consequence, courts (at least civil courts) have held that the severe emotional trauma experienced by victims prevented them from discovering a cause of action during the applicable statutory limitation period. For a discussion of the application of the discovery rule in such situations, see Jocelyn B. Lamm, "Easing Access To The Courts For Incest Victims: Toward An Equitable Application Of The Delayed Discovery Rule," *The Yale Law Journal*, Vol. 100, No. 7, May 1991, pp. 2189-2208, at pp. 2200-2201.

Article I, Section 11 of the *Alaska Constitution*, which is based on Amendment VI of the *U.S. Constitution* provides, in part:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve....The accused is entitled...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Discussing the legislative goals and purposes underlying statutes of limitation, Durga M. Bharam observed that the main purpose of any statute of limitation is to protect the accused from the burden of defending against charges of long-completed misconduct. Likewise, criminal prosecution should be based on evidence that is reasonably fresh and trustworthy. To allow otherwise would infringe upon the accused's rights to a fair trial due to evidentiary problems of obtaining witnesses, forgotten events, and lost records. This general goal of a statute of limitation is further supplemented by a defendant's constitutional right to a speedy trial. However, as Bharam observed, statutes of limitation provide no assurance as to the time of the trial. A limitation period only assures that an indictment will be issued within a specified time.[34]

Josephine Bulkley points out that even within the normal period of limitation, problems exist with prosecuting child abuse cases because of the constitutional protections accorded defendants in the U.S. criminal justice system. These include the presumption that individuals are presumed innocent until proven guilty and that due process requires a high standard of proof to ensure that innocent persons are not convicted. The rights to a fair trial and to be proven guilty only by reliable and trustworthy evidence are also benchmarks of our criminal system. Thus, in the criminal justice system, the state has the burden of proof and is required to prove the accused guilty beyond a reasonable doubt. Consequently, there is strict adherence to rules of evidence in criminal court, particularly the rule against admitting a victim's out-of-court assertion to prove the truth of the matter asserted (called the hearsay rule).[35]

Gerald F. Uelmen, a professor of law at Loyola Law School of Los Angeles, writing in 1983, and Bharam, who attributed much of his thinking to Uelmen in

---

[34]Bharam, pp. 860-861. Uelmen points out that in *United States v. Marion* [404 U.S. 307 (1971)], the Supreme Court rejected a claim that the sixth amendment right to speedy trial had any application to delays prior to the institution of formal charges, noting the traditional role of a statute of limitation in preventing prejudice resulting from the passage of time between the commission of a crime and the filing of charges.

[35]Bulkley, p. 155.

a 1989 article, both offer a series of six factors which state legislatures could weigh to support shorter versus longer periods of limitation.[36] Factors which justify a shorter period of limitation are staleness of evidence, motivation, and repose (the length of time that must lapse before prosecution is no longer appropriate). Factors which support a longer period of limitation are concealment, investigation, and the seriousness of the offense. Using their arguments plus information we have assembled from other sources, we offer the following discussion.

Factors Which Justify A Short Period Of Limitation:

Staleness of evidence. Criminal defendants argue, as Justice Jackson implied, that the longer the period in which a crime may be prosecuted, the greater the possibility of stale claims, of citizens being put to their defense after memories have faded, of witnesses who have died or disappeared, and of evidence that has been lost. However, these same problems exist, even to a greater extent, for the prosecution as the victim must carry the burden of proof in a criminal setting. In a survey taken in California by Uelmen of 58 prosecutors, defense attorneys, and judges, all with long-term experience, the respondents identified child molesting and rape as the crimes which presented the greatest risk of preserving reliable evidence or losing exculpatory evidence. Child molesting was first on the prosecutors' list and rape was first on the defense lawyers' and judges' lists.[37]

The evidentiary problems in proving child sexual abuse in a criminal proceeding by an adult survivor, including the lack of eyewitnesses and the lack of physical or medical evidence, would likely have occurred even during the earlier statutory-limitation period, according to Josephine Bulkley. Bulkley points out that although there is no longer a legal requirement in any state for corroboration in criminal sex offense prosecutions, the lack of admissible evidence beyond the victim's testimony can still be an impediment at trial.[38]

The impediment might not be as severe as some think, however, cautions Cindy Smith. According to Smith, information coming from the Legal Defense Fund of the National Organization of Women is that in many cases, adult survivors who disclosed child sexual abuse had the ability to produce outside verification of their claims through such means as diaries, witness statements, and medical records from family physicians. But there is the reality, as pointed out by attorney Beth Payne of the National Center for Prosecution of Child Abuse, that

---

[36]Uelmen, pp. 44-58; and Bharam, pp. 861-862.

[37]Uelmen, p. 46.

[38]Bulkley, p. 166.

prosecutors may be reluctant to take cases when years and years have passed since the offense.[39]

It should be noted that in recent years, the constitutional right to due process of law has occasionally been utilized by courts to grant relief to a defendant when delays in the investigation or prosecution of the case prejudiced the defendant's ability to defend himself or herself or when the prosecution was responsible for the destruction or loss of vital evidence.[40]

Motivation. A shorter period of limitation could be viewed as motivating police and prosecutors to be efficient and not delay prosecuting criminal offenses (although, according to Uelmen, there is strong research which indicates investigators choose the cases on which they work by considering both the seriousness of the crime and whether sufficient leads are present to indicate that the chances of clearing the crime are high).[41] Law enforcement agencies would also be motivated by the economics of a lower cost investigation and prosecution. Payne observed that there are time and money considerations in any investigation and prosecution. "Prosecution is more likely," she said, "on cases which are easier to prove; people don't like complicated and expensive procedures."[42]

Repose. Having a definite limit to the time in which prosecution is appropriate fosters rehabilitation by assuring a past offender that any rehabilitative progress will not be shattered by the enforcement of some long-dormant claim. The repose period should not be shorter, however, than the maximum penalty, though it could be longer, contends Uelmen. "A statute of limitation shorter than the maximum penalty might be justified by the staleness

---

[39]Telephone conversation, November 1, 1991.

[40]Uelmen, p. 45.

[41]Uelmen, p. 49.

[42]Payne, November 1, 1991.

factor or the motivation factor, but it cannot be justified by the repose factor," he declared.[43]

Factors Which Support A Long Period Of Limitation.

Concealment. The very nature of certain crimes, particularly child sexual abuse, makes detection of the offense especially difficult. A long period of limitation insures that a perpetrator does not escape punishment simply by successfully concealing the acts.

Investigation. Concealed crimes generally require a longer period of investigation which further justifies a longer limitation period.

Seriousness Of The Offense. Uelmen and Bharam note that the seriousness of the offense should correlate with the duration of a limitation period. The lapse of the statute of limitation operates as a statutory grant of "amnesty" to an offender. Viewed in this light, it may be desirable to withhold amnesty from some crimes that are regarded as particularly serious.

According to Uelmen, the factors of seriousness and repose depend upon the specific crime, the other factors do not. Their applicability depends more upon the particular circumstances of a case and the evidence used than upon the nature of the crime itself. The repose factor is closely related to the seriousness factor since the residue of community outrage over a crime directly relates to its seriousness. Therefore, claims Uelmen, the principal

---

[43]Uelmen, previously cited, p. 52. It appears that in Alaska there are many situations under AS 12.55.125, Sentences of imprisonment for felonies, where the potential length of a sentence is greater than the statute of limitation. According to data on 354 sex offenders under sentence in the Alaska prison system on March 1, 1985, the average sentence for first degree sexual assault was six to eight years of jail time to serve ("Analysis of Sex Offender Data," previously cited). At present sexual assault in the first degree and sexual abuse of a minor in the first degree are unclassified felonies for which the presumptive sentence for a first felony conviction is 8 years, 10 years if a weapon was used or serious injury caused. If the offense is a second felony conviction, the presumptive sentence is 15 years; if the offense is a third felony conviction, the presumptive sentence is 25 years. Note the inconsistency whereby prosecution for an offense against a 12-year old would be barred 5 years after commission of the offense, yet someone apprehended and sentenced at the time of the offense, provided it was their first felony conviction, would regularly be under sentence for the 5-year statute of limitation plus 3 additional years. If it was not their first felony conviction, the sentence would be correspondingly longer.

determinant of the appropriate duration of a statute of limitation should be the seriousness of the crime.[44]

What offenses are serious enough to prosecute beyond the normal statutory limitation period is a legislative determination, albeit one which is influenced by a perception of the public's wishes.

Enlarging the statute of limitation merely extends the time in which prosecution is permissible. Victims would need to understand that allowing state prosecutors an enlarged time in which to begin proceedings against alleged perpetrators does not carry with it any entitlement to such proceedings. Prosecutorial offices and grand juries would have the burden of weighing the quality of the evidence and it is likely that many cases would not result in grand jury indictments despite the victim's desire to participate in the criminal justice process.

B. Excessive Punishment and Principles of Penal Administration

Article I, Section 12 of the *Alaska Constitution*, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

As pointed out by the Alaska Supreme Court in the case of *State v. Chaney* [477 P.2d. 441, at 443 (Alaska 1970)], multiple goals are encompassed within the above broad constitutional standard: rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender after release from confinement or other penological treatment, deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, i.e., the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

The *Chaney* criteria, as well as the legislature's goal of attaining reasonable uniformity in sentencing, were incorporated by the 1978 Alaska Legislature into the Alaska Code of Criminal Procedure. Under AS 12.55.005, the court needs to consider the following when imposing sentence: the defendant's present offense in relation to other offenses; the prior criminal history of the defendant and the likelihood of his rehabilitation; the need to confine the defendant to prevent further harm to the public; the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order; the effect of the sentence to be imposed in deterring the defendant

---

[44]Uelmen, p. 73.

or other members of society from future criminal conduct; and the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of society norms.

In extending the statute of limitation for various offenses against children, the criteria of AS 12.55.005 and *Chaney* serve well as a checklist to examine motives for prosecuting individuals beyond what is now an established five- to ten-year limitation on such actions. For example, do we want to prosecute someone who has committed a single offense or only those who have committed multiple offenses? For what category of past offender would prosecution and sentencing contribute to their rehabilitation? What about the past offender who is already functioning as a noncriminal member of society? Is society at risk of further harm from the offender so that confining the offender will prevent further harm to the public? Is there justification in exposing the past offender and his or her family to the loss of social status and respect which would accompany the entire family? Would the effect of sentencing the past offender be to deter that individual from similar conduct when released from confinement? Would the effect of sentencing the past offender deter other members of society from future criminal conduct? Would there be a beneficial effect to society from showing through the sentence that the community condemns

such an act or acts? Would the sentencing of the offender be a positive reaffirmation of societal norms?[45]

It should be kept in mind that if a person has refrained from further criminal activity with the passage of time, it is a likely presumption that the person has reformed and the necessity for imposition of the criminal sanction has diminished. If, instead, years have passed since the commission of an offense against a particular victim but the offender has repeated the criminal

---

[45]According to testimony by Maureen Saylor, M.S., Director of the Sex Offender Treatment Program of Western State Hospital, Fort Steilacoom, Washington, for the U.S. Attorney General's Task Force On Family Violence, January 19, 1984, the child molester is not distinguishable in society. The child molester is most frequently a known individual to the child who may be a father, relative, neighbor, friend, or other individual who has influence over the child's life and has access to the child (for example, the school teacher, scout leader, big brother, etc.). The average individual seen in their program who has molested a child differs very little from any cross section of any community or the society at large. On the face of things, the individual who commits child sexual abuse looks no different than anyone else. He (and the individual is generally a he) most frequently has held down a job for long periods of time, participates in community activities, relates (at least at a superficial level) to neighbors and friends, and in other areas of his life, conducts his life no differently than anyone else. He is not the proverbial "dirty old man" or some "crazed" individual who is readily identified and is the individual most of us grew up being told to stay away from. He is an individual who the child and the community trusts and generally believes will do them no harm.

According to a three-page "Analysis of Sex Offender Data" from the Alaska Department of Corrections Division of Statewide Programs, dated October 23, 1985, which includes information on the 354 sex offenders under sentence in the Alaska prison system on March 1, 1985, the average sex offender in Alaska is a white male between 20 and 40 years old. He has a high school education and was employed at the time of the offense. He could be either single or married. He has lived in Alaska since childhood. He committed the offense alone, without a weapon. He committed the offense in Anchorage and was under the influence of alcohol at the time of the offense. The victim was a female aged 16 or younger, who was a relative, friend, or acquaintance of the offender. Of the victims who were related to the offenders, 62 percent were natural daughters or stepdaughters.

behavior, the offender can be prosecuted for recent offenses which are within the period of limitation.[46]

As the advisory committee which drafted the **Model Penal Code** noted:

> As time goes by, the retributive impulse which may have existed in the community is likely to yield place to a sense

---

[46]According to Saylor's testimony, clinical experience with sex offenders does not bear out that there is a difference between the "child molester" and the "incest offender" in terms of the dynamics of the experience. Researchers have found when measuring arousal in the child molester and incest offender that there is no significant difference in the way that these two groups arouse to child items. For both, she said, there is the likelihood of the behavior recurring. It is not at all uncommon, she said, for an offender molesting within a family situation to serially molest several daughters as each approaches the particular age of incest. Saylor testified that child molesting does not seem to be an age-related phenomenon like rape.

"There are few rapists over the age of 40," she said. "However," she continued, "in the case of the child molester, he does seem to go on forever and we have personally seen individuals in their sixties, seventies, and eighties, who are still committing child molesting behavior and may have done so either intermittently or with regularity for thirty, forty, or fifty years of their lives."

This was born out in the experience of three daughters, a granddaughter, and other women family members who, during a 40-year period, had been sexually abused by Raymond W. Lewis, Jr. (One of the daughters had been molested separately by both Lewis and Lewis's father.) When Lewis was finally prosecuted for three counts of lewd acts involving his granddaughter under the normal six-year California statute of limitation for child molestation, and one count of incest, involving the molestation of a daughter over the age of 35 (who was the mother of the abused granddaughter), also under the normal California statute of limitation, he was 67-years old and a retired aerospace designer. (See Lynn Smith, "Forty Years of Incest," Los Angeles Times News Service, reprinted in the *Anchorage Daily News*, Sept. 5, 1991. It should be noted, as could be surmised from the article, that the two older daughters were approximately ages 37 and 35 when, memories triggered by an old box of family photos, they began to confront their concealed pasts.)

> of compassion for the person prosecuted for an offense long forgotten.[47]

In identifying those offenses against children to include in an enlarged statute of limitation, the legislature will need to consider the circumstances of such offenses and the extent to which they harm the victim or endanger the public safety or order. This gets into the matter of which crimes are so serious that their continued prosecution past the normal statute of limitation is warranted. Are there some offenses (in addition to murder) involving physical or sexual abuse against children that are so serious that the state should prosecute them at any time regardless of the individual's functioning in society? Are there some offenses which warrant a legislative determination to let some bye-gones be bye-gones?

We have already noted that in many states, including Alaska, only sexual offenses are included in enlarged statutes of limitation for offenses against children. In their book *Domestic Torts, Family Violence, Conflict and Sexual Abuse*, attorney Leonard Karp and Dr. Cheryl L. Karp note that the principal classifications of nonsexual abuse are physical punishment or physical beatings or hittings for other reasons, and emotional and mental abuse, with or without physical abuse. At least in the civil arena, a majority of courts hold the view that the parent (or other person in *loco parentis*) has a privilege to use physical force, which otherwise would constitute a civil cause of action, if the force is "reasonable" in view of the age, sex, and physical and mental condition of the child and the "offense" the child has committed.[48]

Society, on the other hand, appears more offended by crimes of sexual abuse. The public also, according to a conversation with Patricia A. Toth, director of the National Center for Prosecution of Child Abuse, holds a perception that child physical abuse is less hidden than child sexual abuse. "We don't expect to learn about sexual abuse at the time it occurs; we expect there to be a

---

[47]Advisory committee on tentative draft five of the Model Penal Code as quoted in Uelmen, p. 51. The complete quote is:

> If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing *pro tanto* the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitations. As time goes by, the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.

[48]Leonard Karp and Cheryl L. Karp, Ph.D., *Domestic Torts, Family Violence, Conflict and Sexual Abuse*, Family Law Series, Colorado Springs: Shepard's/McGraw-Hill, Inc., 1989, p. 143.

delay in the telling," Toth said. "On the other hand," she continued, "people expect to see evidence of physical abuse at the time it occurred. Thus, for delayed prosecutions, law enforcement agencies are more likely to take the cases of survivors of sexual abuse than the cases of survivors of physical abuse."

Pointing out that a responsible prosecutor has to make an assessment of the chances of getting a conviction, Toth said "what we are more likely to get convictions on is basically a reflection of society's attitudes. It would be irresponsible to spend public resources where you don't have a chance of getting a conviction."[49]

The Karps also indicated that incidences of mental retardation and neurological impairment are disproportionately high among physically abused and neglected children and delayed intellectual development has been found when mental retardation and neurological impairment were not diagnosed.[50] Assuming these effects carry-on in adulthood, there could be evidence to support allegations of child physical abuse. However, we might also conclude that such individuals may be less able as adults than survivors of sexual abuse to confront their pasts and to assist in the criminal prosecution of their abusers. It would also seem that a criminal forum would be less agreeable to those who cannot help themselves.

It should also be noted that many adult survivors of physical abuse are dysfunctional as adults and carry on the cycle of abuse. It is easy to speculate that with extended statutes of limitation, individuals who themselves are being charged with criminal offenses against children would request that law enforcement authorities bring charges against those who abused them.[51]

Chaney pointed out that under **Article 1, Section 12** of the *Alaska Constitution*, the principles of reformation and the necessity of protecting the public constitute the touchstones of penal administration. Absent from the criteria in the *Alaska Constitution* and *Chaney* (although we are not quite so certain

---

[49]Personal communication, November 20, 1991.

[50]Karp and Karp, p. 131.

[51]The analysis of 354 sex offenders under sentence in the Alaska prison system on March 1, 1985, revealed that 26 percent of the offenders, all male, admitted to being victims of sexual abuse as children themselves. This figure may actually be an understatement for 13 percent of the offenders did not respond to this question. Of the 26 percent who admitted to being victims of sexual abuse as children, 50 percent were victimized by relatives, 41 percent by friends or acquaintances, and 9 percent by strangers.

about AS 12.55.005) is a primary objective of punishing the offender.[52] If the state's only motive for prosecution is retribution or punishment because of the extent to which the offense harmed the victim, there is the potential for finding that a criminal prosecution would violate the offender's constitutional rights and that, instead, the proper forum is through a civil action initiated by the victim. Likewise, if the primary benefit would be that the criminal process is therapeutic for the victim and there is little or no benefit to society which can be identified, the legislature will have little justification for providing that victim with a criminal forum under an enlarged statute of limitation.

C. *Ex Post Facto* Laws versus Retroactive Laws

Article I, Section 10 of the *U.S. Constitution* and Article I, Section 15 of the *Alaska Constitution* provide that no *ex post facto* law, i.e., one that makes a certain act a crime at a time subsequent to the act being performed, shall be passed.

If the legislature passes a statute enlarging the limitation of action for an offense and states that it takes effect with respect to crimes committed on or after the effective date of the legislation, the legislation is said to take effect prospectively. If, on the other hand, the legislature applies the statute enlarging the limitation of action to crimes committed before the effective date of such legislation, the statute is said to take effect retroactively. This was the case with AS 12.10.020(c) which, though it took effect in 1983, was specifically applied to offenses committed during the five years immediately before the effective date of this act.

The constitutionality of AS 12.10.020(c), given its retroactivity, was considered in the case of *State v. Creekpaum* [753 P.2d 1139 (Alaska 1988)]. At the time of Creekpaum's alleged offense of sexual assault involving a minor in March 1980, the applicable statute of limitations specified a five-year period in which the indictment was to be found, or the information or complaint instituted. Alaska Statute 12.10.020(c) took effect during the five-year statute of limitation on Creekpaum's offense and had the consequence of extending the limitation of actions against Creekpaum.

Noting that AS 12.10.020(c) was explicitly retroactive, the Alaska Supreme Court observed that the crime for which Creekpaum was indicted, the punishment prescribed, and the quantity or the degree of proof necessary to establish the defendant's guilt all remained unaffected by the subsequent statute. The Alaska statute would violate the *ex post facto* prohibition of the Alaska and

---

[52]It should not go without notice, however, that according to Alaska case law, tailoring the sentence to fit the crime committed in the specific case is a central tenet of the legislated sentencing provisions [*Maal v. State*, 670 P.2d 708 (Alaska Court of Appeals 1983)].

U.S. constitutions, the court said, if, and only if, it made conduct criminal which would have been innocent when undertaken, it aggravated a crime or made it greater than it was when committed, it permitted imposition of a different and more severe punishment than was permissible when the crime was committed, or it changed the legal rules of evidence to permit less or different testimony to convict the offender than was required when the crime was committed. Accordingly, the Alaska Supreme Court concluded that extension of a criminal statute of limitation before the original period of limitation has run is not an unconstitutional *ex post facto* law under the constitutions of either Alaska or the United States.

Creekpaum makes it clear that the legislature cannot extend statutes of limitation which have already run out. (Thus nothing can be done to help an Alaskan who is twenty-one years old to prosecute someone who abused her or him before the age of 16, etc.) The legislature can do anything it wants with respect to the statute of limitation for crimes committed on or after the effective date of an act, it just has to indicate what this new rule is and what those crimes are. If the legislature wants to retroactively extend any statutes of limitation that are in effect, it can do so by specifically identifying the crimes for which it is extending the limitation of action and declaring a time period during which such crimes must have been committed, so long as that time period does not reach back to encompass crimes for which the statute of limitation has already run out.

Based on a recent ruling in Pennsylvania, it appears that by the action of naming crimes which are currently in the statutes for inclusion in a new statute of limitation, any periods of limitation which have not run out on those crimes will be extended. In other words, a statute does not have to be explicitly retroactive to encompass those offenses committed prior to the legislation for which the statute of limitation has not run at the effective date of the legislation.

As noticed by Bharam, the Pennsylvania Superior Court held in *Commonwealth v. Thek* [546 A.2d 83, at 89 (Penn. 1988)], that where the legislature amends a statute of limitation to provide a longer limitation period, or enacts an amendment which tolls the running of a statute of limitation before the prior limitation's period has expired, in the absence of language in the statute to the contrary, the amendments will be construed to apply so as to extend the period within which prosecution is to be commenced. However, where the statute explicitly states that the provision of this section or act does not apply to any offense committed before the effective date of the section or act, the limitation period only operates prospectively.[53]

---

[53]With respect to shortening a period of limitation, there is no constitutional obstacle to giving retroactive effect or to denying it, according to Uelmen, p. 71.

A NOTE ABOUT DISCOVERY

Ordinarily, a statute of limitation begins to run upon the occurrence of the last fact essential to the cause of action. Some state statutes, however, rather than suspending tolling of the statute of limitation until the victim is a certain age, suspend tolling it until "discovery" of the alleged offense. Depending upon the statute, discovery may mean discovery of the alleged offense as made by the victim, it may mean discovery as made by a third party, or it may mean discovery by a law enforcement agency.

Postponement of the tolling of a statute of limitation until discovery is based upon the common law discovery-rule principle and most often has occurred in civil matters. Courts developed the discovery rule in the context of latent harm, such as in cases of certain medical malpractice injuries or damage from long-term exposure to hazardous substances, where plaintiffs could remain blamelessly ignorant of their injuries for years. In jurisdictions where the discovery rule is applicable, courts have held that the limitation period does not begin to run until the plaintiff has discovered, or in the exercise of diligence should have discovered, all of the facts essential to the cause of action. The rule, consequently, addresses the inequity in foreclosing a cause of action where the victim may not know of the injury or harm.

According to Bharam, where a state has a discovery rule that applies to general criminal offenses and the rule is not specific to offenses against children, courts have denied applying the rule to child sexual abuse offenses. His case in point is Georgia which provides that the period within which a prosecution may be commenced for general offenses does not include any period in which the person committing the crime is unknown or the crime is unknown. Courts there have denied suspending tolling of the statutory period for child sexual abuse offenses.[54]

Since offenses against children generally come to the attention of law enforcement agencies through disclosure of the offense to them by an individual--either a victim or a third party--who has discovered the offense, we prefer speaking of "disclosure to a law enforcement agency" rather than "discovery by a law enforcement agency." If the statute of limitation did not run until disclosure of the crime to law enforcement authorities, the need to rewrite the general statute which establishes limitations of actions is circumvented. For example, AS 12.10.010, the general statute of limitation, would still provide that no person would be prosecuted for an offense not murder unless the indictment is found or the information or complaint is instituted within five years after such an offense has been committed. Alaska Statute 12.10.020(c), the current exception for offenses against children, would be deleted, and in its stead would be a new section which provides that if any offense of [....] committed against a person under the age of 18 was not reported to a peace officer during the period of limitation specified in AS

---

[54] See discussion by Bharam, previously cited, at pp. 851-854.

12.10.010, such period of limitation will not be considered to run until the actual reporting of the offense to a peace officer.

Maine, New Mexico, Florida, Minnesota, and Illinois are states which have included the discovery rule in criminal statutes of limitation for offenses against children. The 1991 Maine legislature replaced a statute, passed only 2 years previously, which provided that prosecution for sexual acts towards minors shall be commenced within 6 years after the cause of action, or within 3 years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later. Instead, Maine, as has been noted, now provides that actions based upon sexual intercourse and certain other sexual acts with victims under the age of majority must be commenced by the later of 12 years after the cause of action arose or within 6 years after the person discovers or reasonably should have discovered the harm. In addition, the statute of limitation was removed altogether for incest, rape, or gross sexual assault if the victim had not attained the age of 16 years at the time of the crime.

In New Mexico, the prescribed limitation for child abandonment, abuse of a child, and certain sexual offenses against children does not commence to run until the victim attains the age of 18 or the violation is reported to a law enforcement agency, whichever occurs first. In Florida, the statute of limitation for certain sexual offenses does not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency or other governmental agency, whichever comes first. In Minnesota, prosecution of criminal sexual conduct toward victims under the age of 18 must be commenced within 7 years of the offense except that, if the victim failed to report the offense within this time period, there are 2 additional years after the offense is reported in which to bring a cause of action provided that all such complaints are brought by the time the victim reaches the age of 25.

The Illinois legislature has specifically applied the discovery exception to sexual offenses committed by persons who were in positions of authority over the victim. Chapter 38, Para. 3-6(e) of the *Illinois Statutes* (Smith-Hurd 1989) provides:

> A prosecution for any offense involving sexual conduct or sexual penetration, as defined in § 12-12 of this Code, where defendant was within a professional or fiduciary relationship with the victim at the time of the commission of the offense may be commenced within one year after discovery of the offense by the victim.

As has already been noted, the Ohio Supreme Court has applied a general discovery rule to child sexual abuse and child neglect cases. In *State v. Hensley*, decided May 1, 1991, the court ruled that the statute of limitation in such cases does not begin to run until a "responsible adult," as listed in Ohio law, has knowledge of both the act and the criminal nature of the act.

APPROACHES WHICH COULD BE TAKEN TO ENLARGE THE STATUTORY TIME PERIOD IN WHICH TO PROSECUTE OFFENSES AGAINST CHILDREN IN ALASKA

The following are a range of approaches for enlarging the time period for prosecution of offenses against children in Alaska which the legislature might wish to consider. Which offenses to include in the statute would also be a matter of legislative determination and that matter is not discussed here. We have omitted suggesting any approach which places responsibility upon child victims under the age of 18 for reporting the abuse.

For the eleven approaches we describe, we offer some arguments, pro and con, to help narrow the choices but do not make a choice ourselves. In making a choice, the legislature may also wish to consider Jessica Mindlin's advice that the ideal is a statute which not only recognizes that children under a certain age need additional time to disclose the abuse but also recognizes that adults, too, need additional time to report the abuse they suffered as minors. Mindlin's rationale is that child victims may become adults long before they have recovered from the abuse sufficiently to report their abuser.[55]

A. Have no statute of limitation for the included offenses against children

Pro: A statute of limitation is a legislative grace. This alternative recognizes that the included offenses against children are so serious that no legislative grace should be extended.

Con: This approach would require a legislative determination of which offenses are serious enough to include. For those offenses, the defendant would be stripped of the procedural protection that a limitation period affords. Consequently, this approach may result in constitutional challenges from the defense which would need litigation (and would, therefore, cost the state money).

B. Keep the statute of limitation at what it is--five years--but do not begin running the period of limitation for such offenses until the victim turns age 18, which approximates the legal age of majority in Alaska

Pro: Keeping the statute of limitation at what it is requires no legislative consideration of the proper period of limitation; therefore this is an expedient and cost efficient way to change the law. The only consideration is whether the legislature wishes to place responsibility for notifying law enforcement authorities in the hands of an adult survivor of child abuse or child sexual abuse versus the current system which places such responsibility on victims who are still children. It also motivates the action of law

---

[55] Mindlin, pp 197-98.

enforcement authorities and provides awareness of the constitutional rights of the accused. Additionally, it prejudices the accused no more than the victim in gathering evidence when the limitation period starts to run.

Con: For the victim, the approach is inflexible. It disrupts the lives of young people at a time when other events such as higher education, career training, or entering the job market should be paramount. Also, for the victim who has repressed memories, it may not be enough time for the victim to discover the offense. It also provides an advantage to the defendant for the statute of limitation is shorter than the maximum punishment for some crimes. Without an exception that causes the limitation of actions to run upon disclosure of the crime to a law enforcement agency, there is a possibility that a prosecutor might obtain sufficient evidence against the accused soon after the crime is committed but wait until a time just before the victim attains majority to commence prosecution. Such strategy, Bharam theorizes, may prevent a defendant from effectively and equitably establishing a defense, and will undermine many of the purposes of the statute of limitation.[56]

C. Enlarge the statute of limitation to a period beyond five years and also do not begin running the period of limitation for such offenses until the victim turns age 18, which approximates the legal age of majority in Alaska

Pro: This approach has the same pros as B. In addition, enlarging the statute of limitation to a period beyond five years for certain offenses would mean that such period more closely approximates the maximum punishment for such crimes. Experiential data and a rationale should be available from New Hampshire which provides that actions pertaining to sexual offenses when the victim was under the age of 18 must be brought within 22 years after the victim's 18th birthday.

Con: This approach requires that the legislature take time to consider what is an appropriate period or periods for limiting such actions. Depending on the amount of the enlargement, it may include the same cons as B.

---

[56]Bharam, p. 863.

D. Continue to run the statute of limitation for the included offenses against children under the age of 18 from the date of the commission of the offense but extend the running of the statute by a time period which is sufficient to allow a victim to report the offense to a law enforcement agency after attaining the age of 18[57]

Pro: This approach has the same pros as C.

Con: This approach has the same cons as C. Additionally, it will require a consideration of how far back in time an adult survivor of a certain age should be able to reach. For example, if the legislature wanted to allow a 30-year-old victim the opportunity to report an abuse that happened at age 6, and assuming AS 12.10.020(c) were repealed, the 5-year statute of limitation on the offense would have to be extended by at least 19 years.

E. Have no defined statute of limitation on any included offense against children but let prosecution for an offense which occurred when the victim was below the age of 18 take place at any time until the victim reaches a ceiling age of 25, 30, 35, 40, 45, or even 50 years

Pro: Although the effect is no different from that of approaches C and D, it requires no legislative consideration of what is an appropriate period of limitation for a particular offense. Instead, it shifts all consideration to what is an appropriate age by which the victim should have discovered the offense and also be able confront her or his alleged perpetrator. Although New Hampshire runs its statutory time limit from the victim's 18th birthday, the effect of the statute is to establish a ceiling at age 40. Minnesota just went from a cap of age 25 to no cap. Other states have different age limits. Thus there should be a good deal of experiential information and rational to draw upon.

Con: This approach requires research and legislative action to determine the most appropriate age. Even so, the cut-off is arbitrary and may result in some victims for whom the legislature has not allowed enough time. It also may encourage delay in reporting cases which could have been reported more proximate to the offense. When delay is lengthy, there may be an impingement on the constitutional rights of the accused.

---

[57]One proposal heard about for Alaska is that the statute of limitation run for 20 years (i.e., it is extended for 15 years) after commission of the offense when the offense was committed against a child under the age of 18.

F. Allow criminal action to be commenced at any time after the offense and up to a specified number of years after a victim who has attained the age of 18 discovers or should have discovered the harm[58]

Pro: This approach provides an alternative to a prescribed lengthy period of limitation to accommodate crimes. It also motivates law enforcement agencies to act within the normal statute of limitation for an offense disclosed to them before the victim has reached the age of 18. It prejudices the accused no more than the victim in gathering evidence when the limitation period starts to run. As this approach is essentially the approach adopted by Maine, there will be experiential data to aid in its evaluation.

Con: This approach requires value judgments not easily made by law enforcement agencies and prosecutors as to when running the period of limitation commenced. Consequently it could result in extensive litigation of the factual issues involved in tolling the statute and therefore could be costly and inefficient.

G. Keep the statute of limitation at five years but do not begin running it until such time as the victim has disclosed the offense to a law enforcement agency

Pro: Except for no statute of limitation, this approach provides the most flexibility to the victim. It allows victims to be far enough along in their recovery process to be responsible for their actions and to be good witnesses. It is an alternative to a longer period of limitation for concealed crimes.

---

[58]Bharam proposes a variation on this which is to let the statute run upon commission of the offense and to allow the court in its discretion to toll the limitation for one additional year upon discovery of the offense by a law enforcement agency or any person who is not a party to the offense. In implementation, Bharam proposes a number of factors for the court to consider in determining whether to apply the discovery rule exception. However, Bharam failed to reveal precisely when it is that the court gets involved. For example, upon receiving a report of the offense, would the law enforcement agency petition the court for the additional year, delaying any action until a ruling from the court. Or would the law enforcement agency conduct its investigation and, based upon its analysis of the matter, request, prior to the end of a year from knowing of the crime, permission to pursue an indictment (See Bharam, p. 864).

This is the approach favored by the Attorney General's Task Force on Family Violence[59] and prosecutors who were surveyed by Uelmen.[60]

Con: The approach fails to deal with the possibility of disclosure from someone other than the victim. This could result in a law enforcement agency postponing an investigation indefinitely until such time as the victim comes forward. If a law enforcement agency does not respond to disclosure from a third party, the accused's due process rights could be violated. The approach may also encourage the victim to delay in reporting. With delay, expediency and cost efficiency are compromised. Additionally, the longer the period between the commission of the offense and the commencement of criminal action, the fewer procedural safeguards there are for the accused; thus, there is possible impingement on the accused's constitutional rights. The approach also introduces the possibility of blackmail based upon a threat to prosecute or to disclose evidence to law enforcement officials.

H. Keep the statute of limitation at five years but do not begin running it until such time as the victim ***or another individual*** has disclosed the offense to a law enforcement agency

Pro: This approach has generally the same pros as F, though it may provide less flexibility for the victim. When compared to F, however, this approach offers greater protection to the rights of the accused by ensuring that reports to law enforcement agencies by third parties will not be ignored.

Con: This approach has the same cons as F except that it does resolve the matter of possible disclosure by someone other than the victim. If the offense

---

[59]The U.S. Attorney General's Task Force On Family Violence recommended that the statute of limitation in criminal cases of child sexual assault should run from the date of the victim's disclosure of the crime rather than from the date of victimization (*Final Report*, p. 103).

[60]Uelmen's survey questionnaire noted that suspension of the limitations period until discovery of the crime, or "tolling" the limitation during a demonstrated period of concealment, are alternatives to a longer period of limitations for concealed crimes. Respondents were asked to comment on the perceived advantages or disadvantages of these three alternatives. Most prosecutors indicated a preference for suspending the statute until discovery of the crime, suggesting that the burden of affirmatively proving concealment is difficult to meet. Several prosecutors suggested that the statute of limitation should not begin to run for any crime until it has been discovered. A minority opted for a longer statute of limitation for normally concealed crimes, objecting to having to show "diligence" in discovering the crime. Less agreement was found among defense lawyers and judges, who were evenly divided among a longer limitation period, commencement of the statute of limitation at discovery, and tolling of the statute (Uelmen, pp. 54-55).

is first disclosed by someone other than the victim, the victim may not be ready yet to confront the events of his or her past.

I. **Keep the statute of limitation at five years but do not begin running it until the victim has turned 18 or until such time as the victim or another individual has disclosed the offense to a law enforcement agency, whichever is earliest**

Pro: This approach provides a definite end to the statutory period of limitation, which is when the victim turns 23, as well as motivating law enforcement agencies to act within the normal statute of limitation for an offense disclosed to them before the victim has reached the age of 18. Thus it maintains a degree of flexibility while being generally expedient and cost efficient. It also prejudices the accused no more than the victim in gathering evidence.

Con: The approach fails to accommodate a victim who discovers a cause of action after the age of 23 and there has been no one-else who has disclosed the offense to authorities.

J. **Keep the statute of limitation at five years but do not commence tolling the statutory time limit for offenses against children under the age of 18 until the victim reaches the age of 18 or until the relationship or status involved has ceased to exist, whichever comes latest**

Pro: This approach is expedient and cost efficient while maintaining some flexibility for the victim. It protects the individual who stays under the authority of the perpetrator past the age of 18. In the case of intrafamilial abuse, it appears to protect the victim over the age of 18 who may be living away from home but still receiving financial support from the family. For those abused outside the family at a young age (as for example, a school teacher or program leader), it allows them to take action after the age of 18. The approach is based on the Louisiana statute so there would be some experiential information.

Con: The approach provides inequity for the victim emancipated at age 18 in contrast to the victim still supported by her or his family after the age of 18. In addition, the time limit may run out before the victim has discovered a cause of action.

K. **Enact a general concealment statute that tolls the statute of limitation for crimes committed in a secret manner until such time as the offense is disclosed to a law enforcement agency**[61]

Pro: The approach addresses those cases in which the abuser used coercion to prevent disclosure of the crime by the victim. Judicial flexibility is preserved by permitting courts to decide case by case when the facts warrant tolling the statute of limitation.

Con: This approach may not address victims who were not actively coerced by the perpetrator. Without legislative application of the statute specifically to offenses against children, the approach relies on court discretion for its application thereby creating the risk that the courts will not apply the statute at all to offenses against children or will severely restrict its application. Thus the approach is potentially inefficient and expensive as it could result in extensive factual litigation outside of the criminal prosecutions.

A SIDE ISSUE: ADMISSION OF HEARSAY EVIDENCE

In concert with considering measures to enlarge the period of time in which to prosecute offenses against children, the legislature might also consider allowing victims of child abuse and child sexual abuse the corroboration of witnesses with whom they may have shared information pertaining to the abuse but who did not witness the abuse. In other words, the consideration of an enlarged statute of limitation for offenses against children provides a timely opportunity for the legislature to ease the introduction of hearsay evidence by these victims.

Under the *Alaska Rules of Court* pertaining to indictment and information before the grand jury (Criminal Rule 6(r)), hearsay evidence of a statement related to sexual assault in the first, second, or third degree; sexual abuse of a minor in the first, second, third, or fourth degree; and unlawful exploitation of a minor, when it pertains to accusations by children under the age of 10, may be admitted into evidence before the grand jury when certain circumstances warrant it. No provision is made for hearsay evidence before the grand jury for accusations by any one over the age of 10, yet such evidence arguably has a role in substantiating the allegations of a victim of child abuse, regardless of the present age of the victim.

In addition, at a trial involving accusations of child abuse, no special provisions exist for witnesses providing hearsay evidence, although such witnesses might be admitted under exceptions to the hearsay rule in Evidence Rule 303, of the *Alaska Rules of Court*. For example, Evidence Rule 803(23) provides that a statement having circumstantial guarantees of trustworthiness

---

[61]Derived from Mindlin, pp. 204-205.

equivalent to that of any other hearsay exception may be admitted if the statement offers evidence of a material fact, is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and the interest of justice will best be served by admission of the statement into evidence.

According to Josephine Bulkley, statements of child sex offense victims constituting hearsay are frequently admitted under the excited utterance exception, the exception for statements made for purposes of medical diagnosis or treatment, the residual exception, and special exceptions for child abuse victims.[62] Although we have no information on how **Evidence Rule 803** has been applied with respect to witnesses in trials pertaining to felony offenses against children, please note that most of 39 professionals working with incest victims and offenders who were interviewed for *An Incidence Study Of Incest In Juneau* favored legislation allowing the use of hearsay evidence in adjudication proceedings as well as in grand jury proceedings.[63]

ADVANTAGES OF CIVIL LITIGATION VERSUS DELAYED CRIMINAL PROCEEDINGS AGAINST ABUSERS OF CHILDREN

Several features of our criminal justice system make it necessary to question whether there exists any justification to prosecute cases that would be stale under the current Alaska statute of limitation for offenses against children. These include the principles of penal administration established in **Article I, Section 12** of the *Alaska Constitution*, namely reformation and the need for protecting the public; reminders to this effect by the *Chaney* court; **AS 12.55.005** which incorporates the *Chaney* criteria into the means for determining the appropriate sentence to be imposed upon conviction of an offense; the absence of the goals of retribution or punishment in any of these; and the observation of the Advisory Committee on the *Model Penal Code* that "If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed....If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitation."

Even if Uelmen's and Bharam's factors of concealment, investigation, and the seriousness of the offense are found to justify enlarging the time period in which to prosecute certain offenses against children, a civil forum may be preferable to a criminal forum. Not the least of these advantages would be the savings to the state if it did not have to spend the time or the money on the criminal investigation and prosecution of these older claims.

---

[62]Bulkley, previously cited, pp. 170-172.

[63]Wallace, previously cited, p. 86.

With no change in Alaska law, an adult survivor of child abuse who is so moved already has the ability to maintain a civil cause of action. Through AS 09.55.650, the Alaska legislature has provided that as of February 2, 1990, a person who, as a minor under 16 years of age, was a victim of [any of the offenses of sexual assault in the first, second, or third degree; sexual abuse of a minor in the first, second, third, or fourth degree; incest; or unlawful exploitation of a minor], may maintain a civil action against the perpetrator for recovery of damages suffered as the result of the sexual abuse.

In a separate statute, the legislature applied the discovery rule to the period in which the plaintiff may bring suit. According to AS 09.10.140, an action based on a claim of sexual abuse may be brought more than three years after the plaintiff reaches the age of majority (which, incidentally, is not defined in a context that applies to this statute) under the following circumstances:

- if the claim asserts that the defendant committed one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered that the act caused the injury or condition.

- if the claim asserts that the defendant committed more than one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered the effect of the injury or condition attributable to the series of acts.[64]

A civil arena provides the opportunity for the victim to disclose her or his true motives which are likely to be retribution and punishment, motives which are not part of the Alaska criminal justice system. Another reason for the victim to participate in a civil rather than a criminal action is that the opportunity for the victim to prevail is greater in civil court than in criminal court. Civil and criminal suits when predicated on similar facts still have major differences. Chief among these is the burden of proof. In a criminal suit, the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. In a civil suit, the plaintiff only need prove the claim by a preponderance of the evidence. Criminal defendants also have additional constitutional protections. Thus it may be easier for a plaintiff to prevail in a civil suit than for the prosecutor to obtain a conviction in a criminal suit based on the same fact situation.

---

[64]You may be interested in knowing that suggested legislation concerning civil actions by adult survivors of childhood sexual abuse presented in *Suggested State Legislation 1991, Volume 50*, by the Council of State Governments, is based on AS 09.10.140. We have attached their draft as Attachment I to this memorandum for your comparison.

Even if criminal proceedings are successful, they may not adequately compensate victims for the psychological or physiological injuries that they suffered. A successful civil litigant, on the other hand, receives direct compensation for the harm suffered. The effect of monetary awards, particularly if they include punitive damages, can be to punish the perpetrator. The psychological impact for the victim is also different. In a criminal proceeding, the victim confronts the perpetrator only as a witness. In a civil proceeding the victim is an adversary. Only in civil litigation does the victim have authority equal to if not greater than the perpetrator's. This dramatic shift in power can affect the victim's psychological recovery process. The victim also has the satisfaction of watching the court place the blame on the abuser. For the incest survivor in particular, access to civil proceedings enables the victim to place publicly the blame for the incest on the abuser, thereby exonerating the victim in her or his own view. Society as a whole is also served when civil incest suits are brought because they increase public awareness of the problem and break down the secrecy surrounding incest that exacerbates the problem.[65]

Also, according to James William Harshaw III, staleness of evidence should not be a major concern for the courts in civil child sexual abuse claims. In that forum, he contends, courts should allow decisions to be made on the credibility of the parties. The civil court is better able to analyze a claim in the context of the reasons for delay, he explains. Harshaw also claims that the passage of time actually works to the defendant's advantage, since juries will be suspicious of a plaintiff who brings an action long after the alleged acts occurred.[66]

We hope this information is helpful to you. If you have any questions or need for more information after reading this, please call our office.

Attachments

---

[65]Lamm, previously cited, at pp. 2189-2208. Also, Kelli L. Nabors, "The Statute Of Limitations: A Procedural Stumbling Block In Civil Incestuous Abuse Suits," *Law And Psychology Review*, Vol. 14, 1990, pp. 153-166, at pp. 160-161.

[66]James Wilson Harshaw III, "Not Enough Time?: The Constitutionality Of Short Statutes Of Limitations For Civil Child Sexual Abuse Litigation," *Ohio State Law Journal*, Vol. 50, 1989, pp. 754-766, at p. 764.

LIST OF ATTACHMENTS

A. Articles from the *Anchorage Daily News* of July 27 and November 3, 1991, concerning adult survivors of child sexual abuse in western Alaska who realized the offenses subsequent to the expiration of the criminal statute of limitation as well as a related resolution from the Alaska Network on Domestic Violence and Sexual Assault of October 6, 1991, which supports changing the statute in child sexual assault cases.

B: National Center for Prosecution of Child Abuse, American Prosecutors Research Institute; Beth Payne, project supervisor; *State Legislation Extending or Removing the Statutes of Limitation for Offenses Against Children*; Alexandria, Virginia: American Prosecutors Research Institute; 1991.

C. Durga M. Bharam, "Statute of Limitations For Child Sexual Abuse Offenses: A Time For Reform Utilizing The Discovery Rule," *The Journal of Criminal Law and Criminology*, Northwestern University School of Law, Vol. 80, 1989, pp. 842-865.

D. Jessica E, Mindlin, "Child Sexual Abuse And Criminal Statutes Of Limitation: A Model For Reform," *Washington Law Review*, Vol. 69, 1990, pp. 189-207.

E. Andrea J. Sediak, Ph.D., "Technical Amendment to the Study Findings--National Incidence and Prevalence of Child Abuse and Neglect: 1988," Rockville, Maryland: Westat, Inc., May 23, 1990, for the National Center On Child Abuse And Neglect, U.S. Department of Health and Human Services.

F. Josephine Bulkley, J.D., "Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse Cases," *Behavioral Sciences And The Law*, Vol. 6, No. 2, 1988, pp. 153-180.

G. Diana E.H. Russell, Ph.D., "The Incidence And Prevalence Of Intrafamilial And Extrafamilial Sexual Abuse Of Female Children," *Child Abuse And Neglect*, Vol. 7, 1983, pp. 133-146.

H. Gerald F. Uelmen, "Making Sense Out Of The California Criminal Statute Of Limitations," *Pacific Law Journal*, Vol. 15, 1983, pp. 35-82

I. Committee on Suggested State Legislation, "[Civil] Actions by Adult Survivors of Childhood Sexual Abuse," *Suggested State Legislation 1991, Volume 50*, Lexington: The Council of State Governments, 1990, pp. 121-122.

THE COURT OF APPEALS OF THE STATE OF ALASKA

S.R.D., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-2853/62 Trial Court Nos. 3AN-S87-8197/98CR
M.K.D., Appellant, v. STATE OF ALASKA, Appellee.	

Before: Bryner, Chief Judge, Coats, Judge, and Andrews, Superior Court Judge.*

ORDER ON REHEARING

The petition for rehearing filed by S.D. is GRANTED. In response to the concerns raised in the petition, an amended opinion (a copy of which is attached) will issue in this case, replacing the opinion originally entered by this court.

Entered at Anchorage, Alaska, this 15th day of November, 1991, by the direction of the Court of Appeals.

JAN HANSEN
Clerk of the Appellate Courts

*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

S.R.D., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-2853/62 Trial Court Nos. 3AN-S87-8197/98CR
	O P I N I O N
	C O R R E C T E D
M.K.D., Appellant, v. STATE OF ALASKA, Appellee.	[No. 1161 - November 15, 1991]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Appearances: David E. George, Anchorage, for Appellant S.R.D. R. Scott Taylor, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellant M.K.D. Cynthia M. Hora, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Andrews, Superior Court Judge. [Mannheimer, Judge, not participating.]

BRYNER, Chief Judge.

her children to a physician after S. had beaten and injured the child. One occasion involved A.D.; the other, S.E.D. In each case, a third person eventually intervened, and the child was examined by a physician. The examinations revealed injuries resulting from abuse, but the injuries did not require actual treatment.

On appeal, M. claims that the evidence was insufficient to establish criminal nonsupport, because neither child was found to require any medical treatment. The criminal nonsupport statute, however, requires parents to provide their children with necessary "medical attention." AS 11.51.120(b). We agree with the state that "attention" must be construed more broadly than "treatment." It is conceivable that children may suffer injuries sufficiently threatening to require a medical examination, even if that examination ultimately discloses no need for treatment.

In the present case, evidence concerning A.D.'s and S.E.D.'s injuries and the manner in which those injuries were inflicted was sufficient, when viewed in the light most favorable to the state, to permit a reasonable juror to infer that, even though no treatment was required, medical attention was actually necessary to rule out the possibility of life-threatening or potentially disabling conditions. The trial court did not err in declining to enter a judgment of acquittal as to these two counts.

As to the remaining count of criminal nonsupport, the evidence indicated that S.D. was found to be suffering from a severe case of impetigo upon placement in a foster home. The condition had apparently existed for several months and responded

rapidly to medical treatment when the foster parents took S.D. to a physician. M. presented evidence indicating that, before S.D. was placed in foster care, she had attempted to treat the impetigo herself, without medical assistance. Based on this evidence, M. contends that she could not have been convicted of failing to provide treatment.

Viewing the evidence in the light most favorable to the state, however, a reasonable juror could have rejected the defense evidence or found that, despite M.'s efforts to provide home treatment, professional medical attention was actually necessary. The state thus presented sufficient evidence to support the charge, and the trial court did not err in denying M.'s motion for a judgment of acquittal.

2. Fourth-Degree Assault

In Counts VII and VIII, M. was charged with assault in the fourth degree for banging A.D.'s and S.D.'s heads together.[2] At trial, the state neglected to present testimony concerning these charges before resting its case-in-chief. M. immediately moved for a judgment of acquittal. The state realized its oversight and asked to reopen its case. The trial court granted the state's request.

On appeal, M. does not dispute the sufficiency of the evidence presented after the state reopened its case-in-chief. She nonetheless argues that the trial court was bound to rule on her

---

[2]. M. does not challenge the sufficiency of the evidence with respect to her fourth-degree assault conviction on Count XII.

motion for a judgment of acquittal as soon as it was made. According to M., the trial court had no discretion to allow the state to reopen its case before addressing the motion. M. asks this court to assess the sufficiency of the evidence based on the record as it existed when she first made her motion. In support of her argument, M. relies on a number of federal cases generally holding that motions for judgments of acquittal must be ruled on at the close of the prosecution's case-in-chief and may not be deferred to the end of trial. See, e.g., United States v. Reifstek, 841 F.2d 701, 703 (6th Cir. 1988).

Alaska, however, has rejected the approach taken in the federal cases. This court and the supreme court have consistently taken the view that, even when motions for judgments of acquittal are made at the close of the state's case-in-chief, the sufficiency of the evidence at trial may be based on the totality of the evidence, including evidence presented by the defense after the state has rested its case. See Martin v. Fairbanks, 456 P.2d 462 (Alaska 1969), overruled on other grounds, Whitton v. State, 479 P.2d 312 (Alaska 1970); Deal v. State, 657 P.2d 404 (Alaska App. 1983).

Even if Alaska's approach did not differ from the federal approach, the federal cases relied on by M. merely preclude the trial court from waiting until the defense presents its case before ruling on a motion for a judgment of acquittal. Those cases do not purport to restrict the trial court's authority to allow the prosecution to reopen its case-in-chief before the defense presents its case. The trial court has broad discretion to allow the

prosecution to reopen. See, e.g., Miller v. State, 462 P.2d 421, 428 (Alaska 1969). M. has shown no abuse of that discretion here.

B. S.'s Convictions

1. First-Degree Assault

Count II charged S. with assault in the first degree for recklessly causing serious physical injury to S.E.D. by means of a dangerous instrument. AS 11.41.200(a)(1). Prosecution on this count was based on the theory that S. had struck S.E.D. on the mouth with a book or with his hand on repeated occasions over a span of approximately two years. Individual blows resulted in cuts to the underside of the child's lip; eventually, scar tissue accumulated, causing S.E.D.'s lip to be permanently disfigured. The state's theory was that the disfigurement amounted to a serious physical injury. The state reasoned that, because S. had actually inflicted serious physical injury on S.E.D., whatever he had used to inflict the injury (whether a book or his hand) qualified as a dangerous instrument. See AS 11.81.900(b)(11) (defining dangerous instrument to include "anything which, under the circumstances in which it is used . . . is capable of causing death or serious physical injury[.]").

The state's evidence established that the disfigurement to S.E.D.'s lip could not have resulted from a single incident of assault. The state presented testimony indicating that the deformation to S.E.D.'s lip resulted from multiple discrete incidents (a minimum of twenty to thirty), each separated by enough time to allow at least partial healing to occur.

The state's evidence, however, specifically established only one incident involving a blow by S. to S.E.D.'s mouth. Even the evidence relating to this incident was presented only in the form of a prior inconsistent statement. At trial, S.E.D. could not recall any occasion when S. struck her in the mouth. To impeach S.E.D.'s testimony, the state called the assistant district attorney who had handled S.'s case before the grand jury. He testified that S.E.D. had told the grand jury that S. once struck her in the mouth with a book, chipping or breaking one of her front teeth. No details of the incident were related.

On appeal, in response to S.'s claim of insufficient evidence, the state insists that the jury could reasonably have found S. guilty of repeated assaults on S.E.D. even though only one episode was specifically proven. The state submits that jurors might have rejected S.E.D.'s out-of-court statement that S. had struck her on only a single occasion. This contention, however, seems problematic, for rejection of S.E.D.'s statement that S. had struck her once would not in itself support a conclusion that he struck her repeatedly; rejection of S.E.D.'s claim would have left the trial record devoid of affirmative evidence linking S. to the repeated series of blows to S.E.D.'s mouth.

The state goes on to cite Garner v. State, 711 P.2d 1191, 1193 (Alaska App. 1986), for the proposition that the jury could properly have relied on evidence of S.'s other abusive acts toward his children in determining whether he was responsible for repeatedly striking S.E.D.'s mouth. Again, the state's contention is problematic. Garner does permit a jury in a parental child

abuse case to consider evidence of a defendant's prior abusive conduct toward the defendant's children. However, here, the state's evidence at trial strongly indicated that the children had suffered repeated physical abuse at the hands of both their parents. Under the circumstances, the evidence of prior abuse afforded little basis for jurors to make a rational decision as to whether S.E.D.'s injuries resulted from repeated blows struck by M., S., or both.

Ultimately, however, we need not decide whether these problems would in themselves require a judgment of acquittal. We find a more fundamental problem here. In charging S. with repeated assaults resulting in serious physical injury inflicted by means of a dangerous instrument, the state necessarily presupposes that numerous discrete nonaggravated assaults may properly be grouped together into a single charge of aggravated assault. The state presents no authority to support such a theory, and all authority we have found points to a contrary conclusion.

Assault is not typically regarded as a continuing offense. See, e.g., Covington v. State, 703 P.2d 436, 440-41 (Alaska App. 1983) (citing State v. Petrich, 683 P.2d 173, 176-77 (Wash. 1984)). While multiple blows struck in the course of a single, continuous criminal episode may be charged as one assault, separate assaults occur -- and must be charged separately -- when blows are struck at clearly separate times and in clearly separate incidents, that is, when one blow is separated from another by a change in purpose, a "fresh impulse," or a different provocation. See Gray v. United States, 544 A.2d 1255 (D.C. App. 1988).

Compare, e.g., Owens v. United States, 497 A.2d 1086 (D.C. App. 1985), and Johnson v. United States, 398 A.2d 354 (D.C. 1979), with Glymph v. United States, 490 A.2d 1157 (D.C. App. 1985), and Shivers v. United States, 537 A.2d 258 (D.C. 1987).

Here, the repeated assaults charged in Count II were interspersed over a period of approximately two years and clearly constitute separate criminal episodes.[3] Moreover, this is not an instance in which a single charge encompasses several discrete acts, each of which could independently support a finding of guilt.[4] Rather, Count II appears to encompass a series of fourth-degree assaults, none of which could be deemed aggravated in itself. The charge of assault in the first degree depends entirely on the cumulation of the separate, non-aggravated incidents -- both in terms of the seriousness of the injuries inflicted on S.E.D. and in terms of D.'s use of a dangerous instrument.

In the absence of an express statutory provision, we are aware of no authority allowing cumulative harm resulting from separate assaults to be aggregated for purposes of enhancing the

---

[3]. The state neither alleged nor proved a common scheme or plan uniting the repeated assaults into a single continuing criminal episode. We express no opinion as to the propriety of aggregating assaultive acts occurring over a lengthy period of time when the individual acts are alleged and shown to be part of an overall criminal scheme or plan which spans the entire duration and involves a single, discernible criminal purpose.

[4]. In such cases, the only significant concern relates to jury unanimity, a problem that can be addressed by an appropriate jury instruction, and one that becomes inconsequential when the circumstances of the case provide adequate assurances of unanimity. See Covington v. State, 747 P.2d 550 (Alaska App. 1987).

class of crime for which a defendant may be convicted.[5] Similarly, although the extent of injury inflicted by an object used in a single episode of assaultive conduct may be considered in determining whether that object amounted to a dangerous instrument under AS 11.81.900(b)(11),[6] we are aware of no authority allowing injuries inflicted over the course of several separate assaults to be cumulated for purposes of establishing that those injuries resulted from the use of a dangerous instrument.

While the evidence presented at trial in connection with Count II was certainly sufficient to support S.'s conviction for assault in the fourth degree, we conclude that it was insufficient to support his conviction for assault in the first degree. Even when viewed in the light most favorable to the state, the evidence failed to provide a basis for concluding that S. inflicted the alleged serious physical injury on S.E.D. by means of a dangerous instrument on any single occasion. S.'s conviction for first-degree assault must thus be vacated. Because the jury's verdict convicting S. of first-degree assault necessarily encompasses all the elements necessary to a finding of guilt on the lesser-

---

[5]. In contrast, for property crimes, the legislature has expressly authorized aggregation of individual pieces of property for purposes of determining the value of property involved in an offense. See AS 11.46.980. Even so, this authorization appears to extend only to individual items involved in a single criminal episode and would not appear to allow aggregation of property involved in separate property offenses.

[6]. See Konrad v. State, 763 P.2d 1369 (Alaska App. 1988) (indicating that serious physical injury resulting from an episode of assault may be considered prima facie evidence, under AS 11.81.900(b)(11), that the defendant committed the assault by means of a dangerous instrument).

included offense of assault in the fourth degree, the trial court may, on remand, enter a judgment against S. for the lesser offense.

2. Second-Degree Assault

Counts III and IV charged S. with separate incidents of assault in the second degree for intentionally causing physical injury to S.D. and A.D. by means of a dangerous instrument. AS 11.41.210(a)(1). As to each case, the evidence showed that S. beat his victim with a belt. Each child suffered extensive bruising as a result of the beating; neither suffered serious physical injury, and neither actually required medical treatment.

S. argues that, under the circumstances, the evidence was insufficient to establish the use of a dangerous instrument. As we have observed, AS 11.81.900(b)(11) defines "dangerous instrument" to include "anything which, under the circumstances in which it is used . . . is capable of causing death or serious physical injury[.]" For purposes of this definition, an instrument's capacity for causing death or serious physical injury is not measured in the abstract; rather, the evidence must establish that the instrument was used in a manner that "actually created a substantial risk of death or serious physical injury." Konrad v. State, 763 P.2d 1369, 1372 (Alaska App. 1988).

S.'s case presents a close question. S.'s use of a belt on S.D. and A.D. did not result in serious physical injury to either child, and the state presented no expert testimony to establish that his conduct actually created a substantial risk of death or serious physical injury. We nevertheless believe that the

evidence as a whole, when viewed in the light most favorable to the state, could support the conclusion by a reasonable juror that S.'s use of a belt posed a sufficient threat of serious physical injury to amount to the use of a dangerous instrument.

S. was charged with assaulting his children not with his bare hands, but with a foreign object -- a belt. The instrument is one with which jurors may reasonably be expected to be familiar. Detailed evidence was presented concerning the nature, extent, and duration of the injuries that S. inflicted on his victims with the belt. The jury was also able to observe the relative size of S. and his victims. Thus, from the evidence before it, the jury was capable of making its own determination as to the manner in which S. used the belt against his children and as to the degree of risk that the belt posed under the circumstances.

S. does not complain that the trial court failed to properly instruct the jury on the definition of a "dangerous instrument" or on the need to find an actual risk of death or serious physical injury before determining that an object qualifies as a dangerous instrument. Under the circumstances, we are satisfied that a reasonable juror, viewing the evidence at trial in the light most favorable to the state, could conclude beyond a reasonable doubt that S. assaulted S.D. and A.D. by means of a dangerous instrument.

3. Interference with Official Proceedings

Count VI charged S. with interference with official proceedings by threatening A.D. with intent to influence the

child's testimony. AS 11.56.510(a)(1). The incident occurred when the police went to the D. home to investigate a report of abuse. Upon contacting A.D., the police observed injuries that appeared recently inflicted; they decided to remove A.D. from the home.

As the police left with the child, S. pointed his finger angrily at A.D. and yelled, "Remember the rule," in a menacing tone. Testimony at trial indicated that "the rule" was a term used in the D. household to remind the children that they were not obligated to speak to authorities without one of their parents present.

On appeal, S. insists that his reference to "the rule" was in substance no more than a reminder to A.D. of A.D.'s right to remain silent. S. reasons that, accordingly, he cannot properly be deemed to have "threatened" A.D.

This argument, however, views the evidence in the light most favorable to S., not the state. In determining whether S. uttered a threat to A.D., the jury was not bound by the literal meanings of the words he spoke. Rather, it could consider the totality of the evidence, including testimony concerning the tone and manner in which S. spoke the words and S.'s own admission that he "enforced" the rule with his children.

Considering the entire record in the light most favorable to the state, a reasonable juror could readily have concluded that S.'s words were spoken as a threat intended to deter A.D. from cooperating with the authorities. The trial court did not err in denying S.'s motion for a judgment of acquittal.

4. Assault in the Fourth Degree

S. was charged in Count XV with fourth-degree assault for recklessly placing A.D. in fear of imminent physical injury. AS 11.41.230(a)(3). The charge arose from an incident in which neighbors heard A.D.'s voice begging S., "Daddy, please don't hit me anymore." A.D.'s pleas were interrupted by loud thumps, which sounded like a body hitting the floor. A.D. was nine years old at the time.

S. argues that it would be speculative to conclude from this evidence that he actually struck A.D. or that his conduct was not justified as reasonable and appropriate discipline. See AS 11.81.430(a)(1) (allowing parents to use "reasonable and appropriate nondeadly force" on their children when "reasonably necessary and appropriate to promote the welfare of the child"). To convict S. of fourth-degree assault, however, the state was not required to prove that he actually struck A.D., only that he recklessly placed the child in fear of imminent physical injury. Furthermore, in considering whether S.'s conduct was justified as appropriate parental discipline, the jury was entitled to rely on the totality of the circumstances. Viewing the record in the light most favorable to the state, we conclude that a reasonable juror could find that the state met its burden of establishing S.'s guilt beyond a reasonable doubt. The trial court did not err in denying a judgment of acquittal.

S. also challenges the sufficiency of the evidence to support his conviction on Count I, which alleged a fourth-degree

assault against S.E.D. occurring on or about January 25, 1983. S. argues that the evidence did not establish that he was the one who inflicted S.E.D.'s injuries. Viewing the evidence in the light most favorable to the state, however, the jury could reasonably have inferred that S. was responsible for the injuries to S.E.D. See Garner v. State, 711 P.2d 1191, 1193 (Alaska App. 1986) (evidence of past acts of abuse by the defendant against a child could properly be considered to establish defendant's guilt as assailant in the offense charged). We find no error in the denial of a judgment of acquittal on this count.

II. ADEQUACY OF INSTRUCTIONS ON CRIMINAL NONSUPPORT

M. complains that the trial court inadequately instructed the jury on the elements of criminal nonsupport. Specifically, M. claims that the trial court failed to advise the jury of the need to find that she acted recklessly with regard to her children's need for medical attention. Because M. did not object to the instructions at trial, we must determine whether her claim involves plain error. Alaska R. Crim. P. 47(b). A plain error is an obvious one that results in substantial prejudice. See, e.g., Potts v. State, 712 P.2d 385, 390 (Alaska App. 1985); Carman v. State, 658 P.2d 131, 137 (Alaska App. 1983). Here, we find that plain error occurred.

In Taylor v. State, 710 P.2d 1019, 1022 (Alaska App. 1985), we construed Alaska's criminal nonsupport statute, AS 11.51.120, to require proof of knowing conduct -- that is, a knowing failure to provide support -- coupled with recklessness as

to the need for support. In the context of the present case, the state was thus required to prove not only that M. knowingly failed to provide medical attention for her children, but also that she recklessly disregarded the fact that such attention was actually necessary.

The jury instructions specified only that M. was required to have acted knowingly in failing to provide medical attention. The instructions did not specify the need to find recklessness with regard to the fact that the children actually required medical attention.

In previous cases, we have found plain error when instructions incorrectly informed a jury of the essential elements of an offense. See, e.g., Reischman v. State, 746 P.2d 912, 915-16 (Alaska App. 1987). On the other hand, we have declined to find reversible error when the trial record as a whole established that incomplete jury instructions had no significant influence on the jury's decision. See, e.g., Bowell v. State, 728 P.2d 1220, 1224 (Alaska App. 1986); Reynolds v. State, 664 P.2d 621, 627-28 (Alaska App. 1983). The state argues that M.'s case falls into the latter category. According to the state, in the absence of a specific instruction to the contrary, the jury in all likelihood believed that it was required to find that M. acted knowingly not only in failing to provide medical attention to her children but also in recognizing that her children actually required such attention.

The record does not bear out the state's assertion. As to each of the criminal nonsupport charges, M. effectively acknowledged that she had knowingly failed to take her child to a

physician. The principal issue was the extent to which her decision to forego medical attention was justified. The evidence on the issue was far from overwhelming.

As to two counts, it was undisputed that M.'s children did not actually require any medical treatment. The primary issue was whether, despite the lack of any need for treatment, the children required a medical examination to rule out the need for treatment. On that score, the only expert testimony presented by the state indicated, as to one of the two children, that a medical examination was "appropriate." As to the third criminal nonsupport charge, evidence was presented to establish that medical treatment for A.D.'s impetigo was actually necessary. However, M. presented evidence in response indicating that she had attempted to provide appropriate treatment on her own, without a physician. The crucial issue was thus whether and to what extent M. recognized her child's need for treatment by a physician.

During both the opening and closing portions of its final argument to the jury on the criminal nonsupport charges, the prosecution emphasized that it was undisputed that M. had failed to take her children to a physician. With regard to M.'s awareness of her children's need for treatment by a physician, the prosecution repeatedly asked the jury to consider whether a "reasonable parent" or "reasonable person" would have sought medical attention for her children under similar circumstances. Given the state's emphasis on the reasonable parent standard and the trial court's failure to instruct that M. was required to have recklessly disregarded her children's need for medical attention,

there appears to us to be a substantial likelihood that M.'s convictions for criminal nonsupport were in essence based on a finding of civil negligence -- in other words, on the jury's conclusion that M. did not adhere to the standard of a reasonable parent in failing to recognize her children's need for medical attention. Had the trial court properly instructed on recklessness, the jury could not have found M. guilty for simply failing to act as a reasonable parent would have under the same circumstances; instead, it could have found guilt only upon concluding that M. had actually been aware of and consciously disregarded a substantial and unjustifiable risk that her children required the attention of a physician.

We conclude that the failure to give an appropriate instruction on the applicable mental state amounted to plain error and requires M.'s convictions for criminal nonsupport to be vacated.

S.: was also convicted of one count of criminal nonsupport, based on the allegation that he failed to secure medical treatment for A.D.'s impetigo. On appeal, S. has joined in M.'s challenge to the adequacy of the instructions on the offense. At trial, S.'s theory of defense was that he reasonably relied on M.'s efforts to treat A.D.'s impetigo herself. Under the circumstances, we find no basis for distinguishing S.'s situation from M.'s and conclude that reversal of S.'s criminal nonsupport conviction is also required.

III. OTHER ISSUES

M. and S. raise a number of other claims that we find to be without merit. They first contend that their charges should have been dismissed for preindictment delay. M. and S. argue that, given the length of the delay in their case, they should be excused from proving prejudice. Alternatively, they contend that they suffered prejudice because their witnesses' memories and effectiveness faded. These arguments are foreclosed by our recent decision in State v. Mouser, 806 P.2d 330 (Alaska App. 1991), which is controlling here.

M. and S. next contend that their indictment should have been dismissed because inadmissible evidence was presented to the grand jury. The only conceivable prejudice stemming from any flaws in the grand jury hearing, however, relates to S.'s felony charges, since the state was entitled to proceed on all misdemeanor charges against M. and S. without any indictment at all. We have separately determined that the evidence at trial was insufficient to support S.'s conviction for assault in the first degree. We thus consider the present issue only as it relates to the remaining three felony counts against S.

As to those counts, our review of the record satisfies us that, even when all arguably improper evidence is excised, ample evidence remained to support the indictment. We further find no basis for concluding that the arguably improper evidence appreciably affected the grand jury's decision. See Panther v. State, 780 P.2d 386 (Alaska App. 1989). Accordingly, we conclude

that the superior court did not err in denying M. and S.'s motion to dismiss their indictment.

The D.'s further contend that the superior court erred in refusing to suppress as involuntary various statements they made to social workers during preindictment child-in-need-of-aid proceedings relating to their children. We assume for purposes of this decision that the purported conduct of Division of Family and Youth Services (DFYS) personnel would qualify as "coercive police activity" within the meaning of Colorado v. Connelly, 479 U.S. 157 (1986); see also Macauly v. State, 734 P.2d 1020, 1023 n.2 (Alaska App. 1987). Here, the superior court expressly found that DFYS workers made no overt threats to remove M. and S.'s children from their home or to terminate their parental rights if M. and S. did not confess to their abuse of the children. The superior court further expressly found that the D'.s were at all times cognizant of the risk associated with making any potentially incriminating statements to DFYS workers. These findings are not clearly erroneous. In fact, it appears from the record that, throughout the course of their dealings with DFYS personnel, the D.'s were quite circumspect with regard to the disclosure of any potentially incriminatory information.

Having independently considered the totality of the circumstances in light of the superior court's factual findings,

we conclude that statements made by the D.'s to DFYS workers were not involuntary.[7]

CONCLUSION

In summary, S.'s conviction for assault in the first degree must be VACATED. A judgment for the lesser-included offense of assault in the fourth degree may be substituted therefor. On remand, a hearing will be necessary for imposition of a sentence for that offense. S.'s and M.'s convictions for criminal nonsupport must be vacated. Since we have found that sufficient evidence was presented on those charges to withstand a motion for a judgment of acquittal, the state will not be precluded from seeking a retrial on remand. In all other respects, the convictions are affirmed.[8]

AFFIRMED in part and REVERSED in part.

---

[7]. This case is readily distinguishable from Webb v. State, 756 P.2d 293 (Alaska 1988), which the D.'s liken to their own situation. Here, no statement was ever demanded of the D.'s as a quid pro quo for custody of their children. Furthermore, no illegal seizures or detentions were involved.

[8]. Our disposition makes it unnecessary to consider the parties' sentencing arguments at this time.

THE COURT OF APPEALS OF THE STATE OF ALASKA

SHANE DWAYNE BUOY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-3656 Trial Court No. 1JU-S90-407CR O P I N I O N [No. 1169 - October 25, 1991]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Rodger Pegues, Judge.

Appearances: Tricia Collins, Juneau, for Appellant. Richard Svobodny, District Attorney, and Charles E. Cole, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Andrews, Superior Court Judge.* [Mannheimer, Judge, not participating.]

BRYNER, Chief Judge.

This sentence appeal requires us to determine what standard of proof applies to the resolution of factual issues arising under the rule in Austin v. State, 627 P.2d 657, 657-58 (Alaska App. 1981).

*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

Shane Dwayne Buoy entered a plea of no contest to one count of criminally negligent homicide, a class C felony. The conviction was based on Buoy's having supplied another person with information that facilitated the commission of a burglary and robbery at the home of Buoy's grandfather, who was killed in the course of the crimes.

Criminally negligent homicide is a class C felony, punishable by a maximum term of five years. AS 11.41.130(b); AS 12.55.125(e). Presumptive terms of two and three years are specified for second and subsequent felony offenders convicted of class C felonies; no presumptive term is prescribed for first felony offenders. Id.

As a first felony offender, Buoy was not subject to presumptive sentencing. However, his case was governed by Austin v. State, in which this court held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. 627 P.2d at 657-58. We indicated in Austin that this rule should be deviated from only in exceptional cases. Id. Subsequently, in Brezenoff v. State, 658 P.2d 1359, 1362 (Alaska App. 1983), we decided that, for purposes of the Austin rule, an exceptional case is one in which there are significant aggravating factors as specified in AS 12.55.155(c), or the kind of exceptional circumstances that would warrant referral to the three-judge panel

for enhancement of the presumptive term pursuant to AS 12.55.165-.175.

In the present case, the total sentence of five years with three years suspended imposed by Judge Pegues exceeded the two-year presumptive term for a second felony offender convicted of a class C felony. Thus, under the Austin rule, the sentence could be justified only by an express finding of significant aggravating factors or extraordinary circumstances. In imposing Buoy's sentence, Judge Pegues did specifically find that the case was exceptionally aggravated. Judge Pegues indicated that, although Buoy had been convicted only of criminally negligent homicide, his conduct had actually amounted to manslaughter, a more serious class of crime. Given this finding, Buoy's case was subject to AS 12.55.155(c)(10), which provides that an aggravating factor may be found when "the conduct constituting the offense was among the most serious conduct included in the definition of the offense[.]"

In concluding that Buoy's conduct amounted to manslaughter, however, Judge Pegues relied on the preponderance of the evidence standard:

> So quite frankly I think that it is an extraordinary crime. I think that when we say its the worst of its class it's because it [was] probably manslaughter. If [I] were certain it were manslaughter and this were like the difference between first-degree and second-degree sexual assault, if . . . we knew there was sexual penetration and there had been a plea to a lesser crime, if I had that kind of evidence that there were manslaughter

> I'd give him five years. It would be the only appropriate sentence. I think the sentence that's been recommended under these circumstances is lenient. . . .
>
> . . . .
>
> . . . But we're talking about the disposition phase, we're talking about what type of crime this was and what is the character of the offender. And that's--it's enough there to be more likely than not, and I think it's more likely than not that this was manslaughter.

On appeal, Buoy argues that the sentencing court erred in relying on the preponderance of the evidence standard for purposes of finding an exception to the Austin rule. This is an issue that we expressly reserved in Brakes v. State, 796 P.2d 1368, 1372 n.5 (Alaska App. 1990). In Brakes, we noted that AS 12.55.155(f) requires proof of aggravating and mitigating factors by clear and convincing evidence. We nevertheless adopted preponderance of the evidence as the standard of proof generally applicable to factual determinations in nonpresumptive sentencing proceedings. Id. We then discussed the question of whether to apply the clear and convincing evidence standard in the context of Austin rule issues:

> We stress, however, that our holding [adopting the preponderance of the evidence standard] is limited to verified facts offered in cases of non-presumptive sentencing. In Austin v. State, 627 P.2d 657 (Alaska App. 1981), we held that a first felony offender convicted of an offense should normally receive a more favorable sentence than the presumptive sentence for a second offender. In only exceptional cases would a sentence equal to or greater than a second offender's

> presumptive term be sustained on appeal. Id. at 658. In later cases we have indicated that "exceptional cases" involve statutory aggravating factors, AS 12.55.155, or extraordinary circumstances permitting referral to the three-judge panel, AS 12.55.165-.175, which would warrant an enhanced sentence for someone presumptively sentenced. Where the state relies on factual determinations to enhance a sentence in conformity with the Austin rule, we may require clear and convincing evidence in order to insure that Austin is not undermined. Cf. III Standards for Criminal Justice § 18-6.5(b)(ii) (2d ed. 1980) (requiring findings of fact by clear and convincing evidence where used to impose an enhanced penalty). We reserve this question for decision in an appropriate case.

Id. (citations omitted).

Although we did not decide the issue in Brakes, our discussion in that case clearly foreshadows the correct resolution. As we suggested in Brakes, application of the preponderance of the evidence standard to Austin rule determinations would undermine the rule, for it would inevitably allow some first offenders to receive sentences more severe than would have been permissible had they been subject to presumptive sentencing by virtue of a prior felony conviction. It is precisely this anomaly that the Austin rule was meant to avoid.

The appropriateness of extending the clear and convincing evidence standard to the Austin rule context is also indicated in Wylie v. State, 797 P.2d 51, 662 (Alaska App. 1990), which we decided at approximately the same time as Brakes. In Wylie, we reviewed the procedural safeguards associated with the

determination of aggravating and mitigating factors in presumptive sentencing cases and concluded that similar safeguards were warranted in cases involving Austin rule determinations.

> Before a second or third felony offender can receive a sentence in excess of the appropriate presumptive term, the state must give notice of aggravating factors and present clear and convincing evidence to establish them. AS 12.55.155(f).
>
> In evaluating the Austin rule in the past, we have not been as strict in reviewing aggravating factors as in cases where presumptive sentencing applies. On reflection, we are satisfied that unless a first felony offender is given advance notice of proposed aggravating factors, there is a substantial risk that the Austin rule will be undermined. In such a case, a first felony offender may in fact receive a more serious sentence than the same person with the same background committing the same offense would receive as a second felony offender. Henceforth, we will require prior notice to the defendant before approving deviations from the Austin rule.

Id. (footnote omitted).

As with Brakes, although our holding in Wylie stopped short of explicitly extending the clear and convincing evidence standard to Austin rule determinations, it clearly foreshadowed such an extension.

In the present case, the state has advanced no reasons to favor adoption of the preponderance of the evidence standard to the determination of aggravating factors or extraordinary circumstances in cases involving the Austin rule. Given Brakes and

Wylie, we conclude that such determinations should be made by clear and convincing evidence.

Here, we cannot say whether the sentencing court would have reached the same conclusion under the clear and convincing evidence standard that it reached under the preponderance of the evidence standard. For this reason, we find it necessary to vacate Buoy's sentence and to remand this case for further consideration under the clear and convincing evidence standard.[1]

The sentence is VACATED; this case is REMANDED for further proceedings in conformity herewith.

---

[1]. Buoy has separately argued that the sentencing court erred in failing to order a suspended imposition of sentence in his case. Because the merits of this claim turn in part on the validity of the court's conclusion that Buoy's case is exceptionally aggravated, we do not resolve the issue at this time.

STATUTES OF LIMITATIONS [A-29.2]
(CRIMINAL PROSECUTIONS)

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Ala	None §15-3-5	Arson, forgery, counterfeiting, use or threat of violence to person, felony with serious physical injury or death, any sex offense involving victim under 16, drug trafficking None §15-3-5 Others-3 yrs §15-3-1	Misdemeanors-12 mos §15-3-2	Prosecution commences upon indictment, issuing warrant or binding over §15-3-7
Alk	None §12.10.010	5 yrs-12.10.010 If fraud is an element of the offense limitation is extended to 1 year after discovery of the fraud	5 yrs §12.10.010	If outside state, hiding (max extension 3 yrs) §12.10.040
Ark	None	Kidnapping, rape, aggravated robbery-6 yrs Others-3 yrs None if certain felonies against minors §5-1-109	1 yr §5-1-109	Absent from state or no ascertainable residence within state (max extension of 3 years) §5-1-109
Calif	None PC §799	Offenses punishable by death or life imprisonment, embezzlement of public money-none; Offenses punishable by 8 yrs	Offenses not punishable by death or imprisonment-1 yr PC §802	Not in state max 3 yrs PC §803

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Calif (cont.)		or more of imprisonment-6 yrs; Offenses punishable by imprisonment-3 yrs PC §§799-801		
Colo	None §16-5-401	Kidnapping, treason forgery-none; Others-3 yrs §16-5-401 Additional 3 yrs for bribery and corrupt influences; Additional 7 years for sexual assault victim under 15 years of age, incest, child prostitution	Misdemeanors-18 mos; Class I and II misdemeanors and traffic offenses-1 yr; petty offenses-6 mos §16-5-401 Additional 3½ years for sexual assault 3rd degree	Absent from state (max extension 5 yrs) §16-5-401
Conn	None §54-193	Except murder or Class A felony, if imprisonment is more than 1 yr-5 yrs any other offense-1 yr §54-193(b)		Fleeing or outside state §54-193(c)
Ga	None §17-3-1(a)	Crimes punishable by death or life-7 yrs §17-3-1(b) Others-4 yrs §17-3-1(c) Crimes against victims under 14 years of age-7 yrs §17-3-1(c)	Misdemeanors-2 yrs §17-3-1(d)	Nonresident §17-3-2

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Iaw	None	Robbery, kidnapping, rape, sodomy-6 yrs §701-108(2)(a): Others-3 yrs §701-108(2)(b); If fraud or breach of fiduciary duty is an element of the offense limitation is extended to 2 years after discovery of the offense to a maximum of six years after the offense; An offense based on misconduct in public office-2 yrs after discovery of the offense not to exceed 3 yrs §701-108(3)(a)(b)	Misdemeanors, parking-2 yrs §701-108(2)(c) Petty misdemeanors-1 yr §701-108(2)(d)	Absent from state or has no reasonably ascertainable residence (max extension is 3 yrs) §701-108(6)
Ida	None §19-401	3 yrs §19-402 Felony against child 5 yrs §19-402	Misdemeanors-1 yr §19-403	Absent state §19-404
Ind	None §35-41-4-2	Kidnapping, rape, deviate sexual conduct, child molesting, robbery, arson-none; others 5 yrs §35-41-4-2(a)(1)	Misdemeanors 2 yrs §35-41-4-2(a)(2)	Absent state, conceals self or evidence of crime §35-41-4-2(d) Prosecution is considered

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Ind (cont.)				timely if defendant pleads guilty
Iowa	1st & 2nd degree None §802.1	3 yrs §802.3 4 yrs sexual abuse of child under 10 yrs old §802.2	Serious misdemeanors-3 yrs §802.3; simple misdemeanors or violations of ordinances-1 yr §802.4 Extension for fraud-§802.5	Outside state §802.6 For felony or indictable misdemeanor when identity of defendant is unknown §614.6(1)
Kan	None §21-3106	5 yrs if victim is under 16, or indecent liberties with a child, or aggravated criminal sodomy, or indecent solicitation of a child, or sexual exploitation of a child or incest. All other crimes-2 yrs §21-3106(3)		Absent state or concealed within the state §21-3106
Ky	None §500.050(1)	None §500.050(1)	1 yr §500.050(2)	
La	None if punishment is death or life imprisonment Code of Crim Pro Art 571	Punishment: hard labor 6 yrs; not hard labor 4 yrs CCP Art 572	Misdemeanors: punishment fine, forfeiture-6 mos; fine &/or prison-2 yrs CCP Art 572	Avoid detection, fleeing, outside state, absent residence in state CCP Art 575 Time limits do not begin to run for certain crimes until

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
				relationship or status ceases CCP Art. 573
La (cont.)				
Me	Including criminal homicide None §17-A §8(1)	Class A, B & C offenses—6 yrs 17-A §8(2)(A) Class D & E offenses & all nonclass—3 yrs 17-A §8(2)(B)		Absent state (maximum 5 yrs), prosecution pending in state 17-A §8(3)
Md	No statute of limitations		Misdemeanors not punishable by confinement-1 yr CJ §5-106; fine, penalty, forfeiture-1 yr CJ §5-107	
Mass	None C277§63	Assault, robbery-10 yrs; others 6 yrs C277§63 Extension of time if victim is under 16 yrs of age	Prostitution C272§11-1 yr 6 yrs C277§63	Tolled when defendant is not usually and publically resident C277§63
Mich	None §767.24	Kidnapping, extortion, assault with intent to murder, conspiracy to commit murder-10 yrs; Others-6 yrs §767.24 If indictment is found on crime against victim under age of 18-6 yrs or by		Not resident §767.24

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Mich (cont.)		victim's 21st birthday, whichever is later		
Minn	None §628.26	Bribery, medical assistance fraud, theft, 6 yrs, interfamilial sexual abuse, criminal sexual conduct, 7 yrs, all other offenses, 3 yrs Where value of property or services stolen is in excess of $35,000-5 yrs §628.26	3 yrs, §628.26	Not resident §628.26
Mo	None §556.036(1)	Class Felony-none §556-036(1) Other felonies-3 yrs §556.036(2)(1)	Misdemeanors-1 yr §556.036(2)(2); infractions-6 mos §556.036(2)(3)	Absent state, hiding (max 3 yrs) §556.036(6)
NJ	None 2C:1-6(a)	5 yrs 2C:1-6(b)(1) 7 yrs for crimes enumerated in 2C:1-6(3) When victim is under the age of 18 prosecution must begin within two years after victim attains the age of 18 or within 5 years of time crime was committed	Petty offenses-1 yr 2C:1-6(b)(2)	Fleeing justice 2C:1-6(f)

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
NM	15 yrs §30-1-8(a)	First degree-15 yrs §30-1-8(b) second degree-6 yrs §30-1-8(c) third and fourth degree-5 yrs §30-1-8(d) If offense is against children limitation does not run until victim attains age 16 or the violation is reported	Misdemeanors-2 yrs §30-1-8(e); petty misdemeanors-1 yr §30-1-8(f)	Fleeing justice §30-1-9(a); enumerated procedural defects §30-1-9(b)
NC	None §15-1	None §15-1	Malicious misdemeanors-none; others-2 yrs §15-1	
ND	None §29-04-01	Sexual abuse of children-7 yrs 3 yrs §29-04-02	2 yrs §29-04-03	Absent state §29-04-04
Okla	None 22§151	All other offenses-3 yrs 22§152 Exceptions-see Statute		Absent state 22§153
Penn	Murder, voluntary manslaughter, conspiracy to commit murder or soliciting to commit murder if murder results, or felony connected with 1st or 2nd degree murder-none T42 §5551	Major offenses-5 yrs Others-2 yrs T42 §5552	Misdemeanors-2 yrs T42 §5552; vehicular offenses-30 days T42 §5553	Absent from state, not resident T42 §5554

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
PR	Murder, stealing children, kidnapping, misappropriation of public funds, forging public documents-none Penal Code T33, §3412	5 yrs Penal Code T33, §3412(a) If victim is under age of 18-5 yrs starting from victim's 18th birthday	1 yr, except violations of T33, §§4365—4366 T33, §3412(b)	
RI	None §12-12-17	First, second and third degree arson, murder arson, burglary, counterfeiting, forgery, robbery and larceny, first and second degree child molestation, sexual assault, bigamy or conspiracy to commit any of the above-none. 4 yrs all other felonies not listed §12-12-17	3 yrs §12-12-17	Stolen, lost, destroyed information, (max 1 yr) §12-12-18
SD	None §23A-42-2	Class A, Class B, or Class 1 felony-none All other public offenses-7 yrs		Absent state §23A-42-5
Tenn	Crimes punishable by death, life imprisonment-none §40-2-101(a)	Punishable by imprisonment less than 5 yrs-2 yrs; Offenses arising under revenue laws-3 yrs (listed exceptions-6 yrs); §40-2-101(b); Certain offenses against a	Misdemeanors, except gaming,-12 mos gaming-6 mos §40-2-102	Concealing fact of crime, absent state §40-2-103

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Tenn (cont.)		child-4 yrs; §40-2-101(c); others-4 yrs; §40-2-101(d)		
Tex	None CCP §12.01	Manslaughter-None Certain thefts involving fiduciaries-10 yrs; other theft, burglary, robbery, arson, rape and certain sexual offenses-5 yrs CCP §12.01; others-3 yrs CCP §12.01	Misdemeanors-2 yrs CCP §12.02	Absent state CCP §12.05
Utah	First or second degree murder and manslaughter-none §76-1-301	4 yrs §76-1-302(a) Embezzlement of public monies or falsification of public records-none §76-1-301	Misdemeanors-2 yrs §76-1-302(b); infractions-1 yr §76-1-302(c)	Absent state §76-1-30[illegible]
Vt	Murder, arson causing death, kidnapping-none T13 §4501(a)	Larceny, aggravated sexual assault, burglary, arson, embezzlement, forger, bribery, fraud-6 yrs T13§4501(b) others-3 yrs T13§4501(c) Sex crimes involving	Misdemeanors-3 yrs T13 §4501(c); crimes w/penalty or forfeiture 2 yrs T13 §4505	* (See below)

* Prosecution commences when arrest is made, citation issued, indictment or information presented T13 §4508

Jurisdiction	Murder	Felonies	Misdemeanors & Violations	Tolling S/L
Vt (cont.)		children under 16 years-6 yrs		
Wash	Murder & arson resulting in death-none §9A.04.080	Arson-10 yrs; others-3 yrs §9A.04.080 (Code lists specific exceptions)	Gross misdemeanors-2 yrs; other offenses-1 yr §9A.04.080	Not publicly resident §9A.04.080