HB 244

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 15, 2003 **FURTHER REFERRALS:**

Date of Committee Action: April 7, 2004

The JUDICIARY Committee considered: **HB 244**

HOUSE BILL NO. 244 **CRIMINAL LAW/SENTENCING/PROBATION/PAROLE**

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 244 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
COR		✓		
ADM		✓		

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Cave		✓		
	Holm			✓	
	SAMUELS	X			
	Gruenberg		–		
Chair:	McGuire	X			
Chair:					

b

HOUSE COMMITTEE REPORT

(11)

5-15-03

Date Referred to Committee: May 12, 2003

FURTHER REFERRALS:

5-15-03 rtn to Jud today's calendar

Date of Committee Action: 5/15/03

The FINANCE Committee considered: **HB 244**

HOUSE BILL NO. 244 **CRIMINAL LAW/SENTENCING/PROBATION/PAROLE**

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB 244 (Jud)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent_____Committee

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***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓
COR	2	✓		
ADM	3	✓		

Signing with recommendations	Printed Last Name	DP	DNP (2)	NR (4)	AM (4)
	Hawker				✓
	STOLTZE				✓
	Bunkoutz				✓
	Kerttula		✓		
	MOSES			✓	
	Chenault			✓	
	Whitaker				✓
	FOSTER		X		
Chair:	Harris			✓	
Chair:	Williams			✓	

HOUSE COMMITTEE REPORT

5.12.03

(7)

Date Referred to Committee: April 4, 2003 **FURTHER REFERRALS:** Finance

Date of Committee Action: May 9, 2003

The JUDICIARY Committee considered: **HB 244**

HOUSE BILL NO. 244 **CRIMINAL LAW/SENTENCING/PROBATION/PAROLE**

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 244 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
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***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM	3	✓		

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓
COR	2	✓		

Signing with recommendations	Printed Last Name	DP (1)	DNP (1)	NR (4)	AM
	Holm			✓	
	Gara		✓		
	Ogg			✓	
	Grussendorf			–	
	Samuels	✓			
Chair:	McGuire			✓	
Chair:					

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB244-LAW-CDCO-3-17
Bill Version: CSHB 244 (2d JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to murder in the second degree, the defense of acting in the heat of passion..."
BRU Criminal
Component All
Sponsor House Rules Committee
Requester House Judiciary Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The bill proposes a number of changes in the law regarding criminal defenses and procedures.

1. Makes the death of any person in the course of the enumerated crimes such as robbery murder in the second degree.
2. It makes self-defense unavailable to violence resulting from gang activity or illegal drug transaction and it reverses certain self-defense decisions.
3. It adopt a procedure for the courts to determine whether a valid privilege against self-incrimination exists, and if found makes requirements of the court to inform prosecution of the seriousness of the crime to which privilege applies.
4. The bill adopts guidelines and direction to courts in imposing concurrent and consecutive terms of imprisonment when a defendant is convicted of more than one crime.

Prepared by: Kathryn Daughhetee, Director
Phone
Division Administrative Services
Date/Time 3/16/04 4:31 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/16/2004
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA **BILL NO.** _____
2004 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

5. It also makes failure to report a violation of a condition of release by a third party custodian a misdemeanor.
6. it expands the crime of sexual abuse of a minor in the third degree to include offenders under 16 years of age engaging in sexual penetration with a person under 13 years of age and at least three years younger than the offender and makes it a class C felony. It also authroizes the realse to the public, upon request, of agency records concerning adjudication of a sexual offense to protect the safety of a child or vulnerable adult.
7. Finally, this bill also relates to local options regarding alcoholic beverages; the boundaries of local option areas; furnishing alcoholic beverages to a person under 21 years old; and forfeiture of money and other valuable items derived from violation of laws relating to alcoholic beverages.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB244-DOC-IDO-03-16-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title: Criminal Procedures, Sentencing & Related Issues.
RDU: Administration & Operations
Component: Institution Director's Office
Sponsor
Requester
Component No.: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.4	54.6	98.9	174.2	195.0	225.7
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**3.4**	**54.6**	**98.9**	**174.2**	**195.0**	**225.7**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	3.4	54.6	98.9	174.2	195.0	225.7
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**3.4**	**54.6**	**98.9**	**174.2**	**195.0**	**225.7**

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Time served is estimated based on the time that would have been served under this bill for defendants sentenced during the time period 1/1/2001 through 12/31/2001. Time served under current law is not included on Fiscal Note estimates. Months are based on an average of 30 days per month and the FY04 cost of care of $113.69. Sentences timeframe is estimated as beginning 7/1/2004.

See attached:

Prepared by: Jerry D. Burnett, Director — Phone (907) 465-3339
Division: Administrative Services — Date/Time 3/16/04 8:05 AM
Approved by: Portia C.K. Parker, Deputy Commissioner — Date 3/16/2004
Agency: Department of Corrections

(Revised 9/2003 OMB)

ANALYSIS CONTINUATION

For years past FY 2010, there could be a cumulative effect of long-term and short-term sentence increases that would result in higher costs on an annual basis. We have not attempted to estimate these future year costs past FY 2010. Given the recidivism rates for many offenders, it is not clear that these longer sentences will actually have the effect of increasing costs to the Department of Corrections. Our costs are the same on a daily basis whether offenders are serving an extra period of incarceration or are reincarcerated for a new offense. To the extent that increased sentences reduce recidivism for this group of offenders, the legislation may result in lower costs in future years.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 244(2d JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to murder in the second degree,...
BRU: Legal and Advocacy Service
Component: Public Defender Agency
Sponsor: Rules Committee
Requester: House Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	74.5	74.5	74.5	74.5	74.5	74.5
Travel	2.1	2.1	2.1	2.1	2.1	2.1
Contractual	6.5	6.5	6.5	6.5	6.5	6.5
Supplies	1.0	1.0	1.0	1.0	1.0	1.0
Equipment	6.7	0.7	0.7	0.7	0.7	0.7
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**90.8**	**84.8**	**84.8**	**84.8**	**84.8**	**84.8**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	90.8	84.8	84.8	84.8	84.8	84.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**90.8**	**84.8**	**84.8**	**84.8**	**84.8**	**84.8**

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The Public Defender's operations will be fiscally affected by this proposed legislation if it becomes law. In sections 1-7, if established villages and municipalities adopt lower amounts of alcohol for local option purposes than established in Title 4 that would increase the number of prosecutions per year, depending upon the number of local option areas that adopt lower amounts. The Ageny cannot predict how many local option areas will lower the amounts, so the fiscal impact cannot be quantified. Expanding the circumstances under which the offense of furnishing alcohol to a minor is a class C felony instead of a class A misdemeanor, to include violations that occur

See attached page.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 4/2/04 11:43 AM
Approved by: Mike Miller, Commissioner
Date 4/2/2004
Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. CS ~~SB 170~~ HB ~~211~~ (2d JUD)

ANALYSIS CONTINUATION

within the boundaries of a local option area will have a fiscal impact on the operation of the Agency. Increasing what was a misdemeanor to a felony increases the workload of the Agency. Felonies are more difficult cases and often require more work, investigation, and resources to defend, especially in rural areas, that would be most impacted by this change. Allowing the forfeiture of money and other items used in financial transactions derived from prohibited activity violative of local option laws, will have a fiscal impact on the operations of the Agency, because there will be more hearings on the issue of forfeiture involving potential claims by lienholders, owners, and others with an interest in the property subject to forfeiture.

Section 9 expands the crime of assault in the third degree, a class C felony, to include when a person with criminal negligence causes serious physical injury by means of a dangerous instrument. This conduct is currently an A misdemeanor. Expanding the crime of third degree assault, a C felony, to include causing serious physical injury with criminal negligence, by means of a dangerous instrument, most likely a vehicle, will certainly have a fiscal impact on Agency operations. Increasing what is now a misdemeanor to a felony level offense increases the workload of the Agency. Felonies are more difficult cases that require more resources to defend. It cannot be accurately predicted however what the increased number of cases from misdemeanor to felony will be, that are the target of this section.

Section 12 (with conforming Section 28(a)) seeks to increase the penalties for and create a new criminal offense for violations of a court-ordered third party custodian's duty. Changing what is now a contempt violation to a charge for a class A or B misdemeanor with significantly stiffer penalties will result in less clients getting out of jail on bail, which will increase the need to more quickly prepare a case for trial and then go to trial more quickly for these clients to ensure their right to a speedy trial. It will also increase the Public Defender Agency's caseloads because it may be appointed to represent many of these custodians charged with these misdemeanors for failing to immediately report a violation.

Section 13 will have a fiscal affect on the Agency operations because more cases will be prosecuted where self-defense used to be legitimately raised, but now will be disallowed, however, it is impossible to accurately predict how many of these new prosecutions will result.

Section 14 proposes changing the quantum of proof that the defendant must produce to the satisfaction of the judge, sitting without a jury, in order to raise self-defense or defense of others to the jury. Instead of "some evidence" as currently required, Section 14 proposes "some plausible evidence."

The Agency will have increased investigative costs as a result of these changes, primarily in the Anchorage office that handles the most cases.

Sections 18-19, 25-26, and 28(b) seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate or restrict the court's ability to determine the appropriate amount of consecutive time to be imposed for certain crimes. This change in the sentencing statutes will likely result in the inability to resolve cases short of trial, when the case is one in which conviction of more than one count would otherwise have been an appropriate resolution, now would be forced to go to trial because of the exposure to mandatory consecutive sentences. This fiscal impact is not easily determined, but inevitable.

Sections 21-24 concern drunk driving and refusal laws under Title 28. It broadens felony DUI and refusal to include a person driving under the influence who has any prior conviction for felony DUI or refusal. Making any subsequent DUI or refusal a felony if there is a prior conviction for felony DUI or refusal will impact the operations of the agency, probably not immediately, but in the future. It is unknown how many people convicted of felony DUI or refusal will allegedly reoffend after 10 years has elapsed. Since the enactment of felony DUI and refusal in 1996, the number of these cases handled by the Agency has increased every year, In FY 99 the Agency handled approximately 125 felony DUI and refusals, but In FY02 it handled over 300. Felony prosecutions are more difficult cases and require more work, investigation, and resources to defend, especially in rural areas.

For all of the above reasons, one full time investigator is required in the Anchorage office to meet the fiscal challenges this bill will have on the operations of the Agency.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee
Letter of Intent
CSHB 244 (JUD)

The Alaska State Legislature acknowledges the findings contained in the Alaska Judicial Council's study "Alaska Felony Process: 1999" that the use of third party custodians was initially intended to give indigent defendants an equal opportunity for predisposition release, that this bail condition was one of the most important influences on the length of time that defendants spent incarcerated before disposition of their cases, and that this bail condition has resulted in substantially longer terms of predisposition incarceration in non-violent type cases. Given the right to bail guaranteed by Article I, Section 11 of the Alaska Constitution, it is the intent of the Legislature that judicial officers appoint third party custodians in a manner that will further the intent of the statute.

Representative Lesil McGuire
Chair

ALASKA STATE LEGISLATURE

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal Attn: Jerry Luckhaupt

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 19, 2004

Re: CS Request

Please create a new final draft House Judiciary Committee Substitute for work order # 23-GH 1024\Q, HB 244, substituting the attached language regarding the "firewall" immunity provisions of Sec. 21, AS 12.50.101, Page 11, Lines 4-9. Also, regarding the language change that you suggested for Sec. 25 (replacing "the alleged offense was committed" with "the operation or driving"), please make this change if it is okay with Dean Gueneli at the DOL.

If you have any questions, please call me at 4990. Thank you very much!

HB 244 (Farnell)

"If the court finds that the witness has a valid claim of privilege, it shall advise an attorney designated by the attorney general of that finding and inform the attorney of the category or categories of offenses to which the privilege applies: higher-level felony, lower-level felony, or misdemeanor. If the designate attorney decides that granting immunity to the witness is appropriate, the designated attorney shall deliver or cause to be delivered a letter to that effect to the witness or an attorney for the witness. The designated attorney may not disclose the category of offense to anyone."

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 13, 2004

SUBJECT: CSHB 244(2d JUD) (Work Order No. 23-GH1024\Q)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Gerald P. Luckhaupt
Legislative Counsel

Enclosed is the CS(2d JUD) you requested, I have a couple of comments. First, look closely at the "firewall" immunity provisions of sec. 21 to see if I correctly discerned the intent of the amendment. Second, regarding sec. 25, there is at least some concern in this office that lines 13 - 17 are no longer as clear as they should be and accordingly I recommend that the phrase "the alleged offense was committed" on line 14 be replaced with "the operation or driving." This change will remove any possible ambiguity in the statute.

GPL:mdr
04-153.mdr

Enclosure

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 7, 2004

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-GH 1024\I, HB 244, incorporating the attached eight amendments (Rescind Previous Amendment #3, Conceptual Amendment #17, Amendment #2, Amendment #19, Amendment #20A, Technical Amendment #20B, Amendment #21, and Amendment #23 (which is #22 amended)). All amendments are conceptual for the purpose of proper placement and renumbering within the bill. The bill was finally passed out of committee today!

If you have any questions, please call me at 4990. I will actually be out of town until Tuesday evening, 4/13, so if you do have questions regarding the amendments we can talk Wed. morning, and until then just use your best judgment. I don't think we're in a big rush to hand the bill in, as the committee members will want to review all the changes. Thank you so very much and have a Happy Easter!

4/9 - motion by Rep. Samuels - motion to Rescind Action on Passing this A. (A#3) - PASSED/RESCINDED

AMENDMENT NO. 3 - PASSED 4/2
by Rep. [redacted] GRUENBERG
OFFERED TO CSHB 244 (JUD)

Page 9, lines 2 and 3: Delete all material.

Page 9, line 4: Delete "(4)" and replace it with "(2)"

Page 9, line 30 to Page 10, line 1: Delete "and inform the prosecution of the category of offense to which the privilege applies: a higher level felony, a lower level felony, or a misdemeanor"

CSHB 244 (JUD) VERSION "I"

* Conceptual Amendment #17 - PASSED
by Rep. Samuels

Sect. 18

Create a "Chinese Firewall"

... Designate one person from Dept. of Law to be in receipt of the information, who is to be bound by rules of confidentiality.

(If you have questions regarding this Amendment, please speak with Rep. Samuels)

AMENDMENT #2 -set aside 4/2
by Rep. Samuels PASSED 4/7

OFFERED IN THE HOUSE

TO: CSHB 244(2nd JUD)
Version "I"

Page 8, after line ~~18~~ 22:

Insert the following:

"***Sec. 15.** AS 12.25.150(b) is repealed and reenacted to read:

(b) Immediately after an arrest, a prisoner has the right to (1) telephone or otherwise communicate with the prisoner's attorney; (2) telephone or otherwise communicate with any relative or friend; (3) an immediate visit from an attorney at law entitled to practice in the courts of Alaska requested by the prisoner; and (4) a visit from a relative or friend requested by the prisoner. This subsection does not provide a prisoner with the right to initiate communication or attempt to initiate communication under circumstances prescribed under AS 11.56.755."

Renumber the following bill sections accordingly.

AMENDMENT NO. 19 - PASSED

OFFERED TO CSHB 244 (2d JUD)

BY REPRESENTATIVE GRUENBERG

Page 12, line 7: Add a new bill section and renumber bill sections and section references accordingly:

Sec. __. AS 28.35.030(a) is amended to read:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance**, singly or in combination**; **or**

(2) **if** [WHEN], as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or **if** [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath[; OR

(3) WHILE THE PERSON IS UNDER THE COMBINED INFLUENCE OF AN ALCOHOLIC BEVERAGE, AN INTOXICATING LIQUOR, AN INHALANT, AND A CONTROLLED SUBSTANCE].

Revised Amendment #20 by Rep. Gara

AMENDMENT TO CSSB 170 (JUD) Work Draft 3/8/2004 HB 244

Delete Page ~~15, line 31 to page 16, lines 1-3~~ 13 Lines 14-17

Insert in its place:

A #20A PASSED

(s) In a prosecution under (a) of this section, a person may introduce evidence on the amount of alcohol consumed before or after operating or driving the motor vehicle, aircraft or watercraft, to rebut or explain the results of a chemical test, but the consumption of alcohol before operating or driving cannot be used as a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving. Consumption of alcohol after operating or driving the motor vehicle, aircraft or watercraft may be used to raise such a defense.

Add a new section and renumber other sections accordingly:

A #20B by Rep McGuire just make technical AS is this section:

*Sec. ___. AS 28.35.030(a) is amended to read:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance ;

Insert: and (2) **if** [WHEN], as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or **if** [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

Delete "if"

(3) while the person is under the combined influence of an alcoholic beverage, an intoxicating liquor, an inhalant, **or** [AND] a controlled substance.

CSHB 244 (JUD) version "I"

Amendment #21 - PASSED
by Rep. Gara

P. 8, Line 24
After "written"
Insert "or oral"

AMENDMENT NO. 22 - FAILED

OFFERED TO CSHB 244 (2d JUD), Version I

BY REPRESENTATIVE GRUENBERG

Page 5, line 9: Insert new bill section and renumber bill sections and section references accordingly:

Sec. ___. AS 09.50.020(a) is amended to read:

(a) A person who is guilty of contempt is punishable by **a** fine of not more than $300 or by imprisonment for not more than six months. However, when the contempt is one mentioned in AS 09.50.010(3) - (12), or in an action before a magistrate, the person is punishable by a fine of not more than $100 unless it appears that a right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt, in which case the penalty shall be as prescribed for contempts described in AS 09.50.010(1) **and** [,] (2) [, AND (13)].

YES A#23

Page 7, lines 23-31: Amend existing language as follows

Sec. 11.56.758. Violation of custodian's duty. (a) A person commits the crime of violation of a custodian's duty if the person **knowingly** fails, when acting as a custodian appointed by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of the release.

(b) Violation of custodian's duty is

[(1) A CLASS A MISDEMEANOR IF THE RELEASED PERSON IS CHARGED WITH A FELONY;

(2)] a class B misdemeanor [IF THE RELEASED PERSON IS CHARGED WITH A MISDEMEANOR].

NO

* PASSED A#23 by Rep. McGuire Everything on this page except (b) →

** conceptual A. to the A.: Also, amend AS 12.30.020(b)(1) to conform to repeal of AS 09.50.010(13).

YES A#23

AMENDMENT NO. 18 – FAILED

OFFERED IN THE HOUSE
To: CSHB 244(JUD) ~~Work Draft 1/16/2004~~ version I

Page 8, Sec 14 lines ~~14~~ 18-22, omit all of proposed section 14.

[Sec. 11.81.345. DEFENSE OF SELF AND OTHERS. A COURT MAY INSTRUCT THE JURY ABOUT THE JUSTIFICATION DESCRIBED IN AS 11.81.330 –11.81.340 IF THE COURT, SITTING WITHOUT A JURY, FINDS THAT THERE IS SOME PLAUSIBLE EVIDENCE TO WARRANT A REASONABLE JURY TO FIND THE ELEMENTS OF THE JUSTIFICATION.]

M

AMENDMENT NO. 24 - FAILED

OFFERED TO CSHB 244 (2d JUD), Version I

BY REPRESENTATIVE GRUENBERG

Page 8, lines 1-17: Delete bill section 13.

AMENDMENT TO AMENDMENT NO. 2 – not offered

OFFERED TO CSHB 244 (JUD)

BY REPRESENTATIVE GRUENBERG

Following the word "prisoner" on line 5 of the text of subsection (b), insert the words "or any relative or friend of the prisoner.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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Juneau, Alaska 99801-1182
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MEMORANDUM April 6, 2004

SUBJECT: Omnibus Criminal Law Bill - CSHB 244(2d JUD)
(Work Order No. 23-GH1024\I)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Gerald P. Luckhaupt
Legislative Counsel

Enclosed is my first attempt at the CS(2d JUD) you requested. I have several comments.

Because the working draft was not a document produced by this office we have not been able to review it as well as we normally might. There is at least one problem with the document in that bill sec. 29(a) repeals AS 09.50.010(13). AS 09.50.010(13) is referenced in AS 09.50.020(a) and that reference will need to be corrected by the addition of a bill section accomplishing that. AS 12.30.020(b)(1) may also need to be amended because of the repeal of AS 09.50.010(13). I also removed "criminal" from p.1, line 3 of the title as bill section 21 is potentially not limited to criminal proceedings.

We have rewritten amendment 6, but are still not sure we have reflected the committee's intent. See p. 5, lines 23 - 25 and 28 - 30. If this is not what the committee intended let me know and I will try again.

Amendment 15 originally was not included in this draft as I was unsure what the committee intended. After talking to Representative Gruenberg at Vanessa's suggestion I discovered an explanation and intention that was not readily apparent and I have included what I think was intended.

GPL:med
04-374.med

Enclosure

23-GH1024\I
Luckhaupt
4/6/04

CS FOR HOUSE BILL NO. 244(2d JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to murder in the second degree, the justification of defense of self or others, release before trial, immunity from prosecution, sentencing, probation, discretionary parole, and the right to representation in certain proceedings; relating to violation of a custodian's duty; relating to sexual abuse of a minor; relating to release of certain agency records; relating to local options regarding alcoholic beverages, the offense of furnishing or delivery of alcoholic beverages to a person under 21 years of age, and forfeiture of money or other items of value used in financial transactions derived from violation of certain laws relating to alcoholic beverages; relating to assault by means of a dangerous instrument; relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, to the refusal to submit to a chemical test, and to the presumptions and chemical analysis of breath or blood; and providing for an effective date."

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

*** Section 1.** AS 04.11.010(c) is amended to read:

(c) **Unless a municipality or established village has adopted a more restrictive local option under AS 04.11.491(g), in** [IN] a criminal prosecution for possession of alcoholic beverages for sale in violation of (a) of this section, the fact that a person

(1) possessed more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person possessed the alcoholic beverages for sale**;**

(2) sends, transports, or brings more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages to an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person sent, transported, or brought the alcoholic beverages for sale in the area.

*** Sec. 2.** AS 04.11.010 is amended by adding a new subsection to read:

(d) In this section,

(1) "bring" has the meaning given in AS 04.11.499;

(2) "send" has the meaning given in AS 04.11.499;

(3) "transport" has the meaning given in AS 04.11.499.

*** Sec. 3.** AS 04.11.150(g) is amended to read:

(g) If a shipment is to an area that has restricted the sale of alcoholic beverages under AS 04.11.491(a)(1), (2), or (3) or (b)(1) or (2), a package store licensee, agent, or employee may not ship to a purchaser more than 10 and one-half liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in a calendar month**, or a lower amount of distilled spirits, wine, or malt beverages if the municipality or established village has adopted the lower amount by local option under AS 04.11.491(g)**.

*** Sec. 4.** AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or

established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010(c);

(3) opt to not apply a class C felony to violations of AS 04.16.051 that apply solely by reason of the municipality or established village adopting a local option under this section.

* **Sec. 5.** AS 04.16.051(d) is amended to read:

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900**; or**

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491 and has not opted out of applying a class C felony to violations of this section under AS 04.11.491(g).

* **Sec. 6.** AS 04.16.220(a) is amended to read:

(a) The following are subject to forfeiture:

(1) alcoholic beverages manufactured, sold, offered for sale or

possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.11.010; alcoholic beverages possessed, stocked, warehoused, or otherwise stored in violation of AS 04.21.060; alcoholic beverages sold, or offered for sale in violation of a local option adopted under AS 04.11.491; alcoholic beverages transported into the state and sold to persons not licensed under this chapter in violation of AS 04.16.170(b);

(2) materials and equipment used in the manufacture, sale, offering for sale, possession for sale, barter or exchange of alcoholic beverages for goods and services in this state in violation of AS 04.11.010; materials and equipment used in the stocking, warehousing, or storage of alcoholic beverages in violation of AS 04.21.060; materials and equipment used in the sale or offering for sale of an alcoholic beverage in an area in violation of a local option adopted under AS 04.11.491;

(3) aircraft, vehicles, or vessels used to transport, or facilitate the transportation of

(A) alcoholic beverages manufactured, sold, offered for sale or possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.11.010;

(B) property stocked, warehoused, or otherwise stored in violation of AS 04.21.060;

(C) alcoholic beverages imported into a municipality or established village in violation of AS 04.11.499;

(4) alcoholic beverages found on licensed premises that do not bear federal excise stamps if excise stamps are required under federal law;

(5) alcoholic beverages, materials or equipment used in violation of AS 04.16.175;

(6) money, securities, negotiable instruments, or other things of value used in financial transactions derived from activity prohibited under AS 04.11.010 or in violation of a local option adopted under AS 04.11.491.

* **Sec. 7.** AS 04.16.220 is amended by adding a new subsection to read:

(i) When forfeiting property under (a) or (d) of this section, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of

the defendant, the seizure of property, or the identification of property for seizure,

(1) the property if the property is worth $5,000 or less and is not money or some other thing that is divisible; or

(2) up to 75 percent of the property or the value of the property if the property is worth more than $5,000 or is money or some other thing that is divisible; in determining the percentage a municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency's total involvement in the case relative to the involvement of the state.

*** Sec. 8.** AS 11.41.110(a) is amended to read:

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

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

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life;

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.020(a), 11.71.030(a)(1) or (2), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person **except when the killing is of a participant and is the direct result of felony criminal conduct by a nonparticipant** [OTHER THAN ONE OF THE PARTICIPANTS];

(4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person **except when the killing is of a participant and is the direct result of felony criminal**

conduct by a nonparticipant [OTHER THAN ONE OF THE PARTICIPANTS]; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was

(A) a felony violation of AS 11.41;

(B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or

(C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

* **Sec. 9.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person; [OR]

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment**; or**

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(55)(B) to another person by means of a dangerous instrument.

* **Sec. 10.** AS 11.41.438(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the third

degree if

(1) **being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender;**

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(3) [(2)] being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

* **Sec. 11.** AS 11.41.440(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in [SEXUAL PENETRATION OR] sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

* **Sec. 12.** AS 11.56 is amended by adding a new section to read:

Sec. 11.56.758. Violation of custodian's duty. (a) A person commits the crime of violation of custodian's duty if the person fails, when acting as a custodian appointed by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.

(b) Violation of custodian's duty is a

(1) class A misdemeanor if the released person is charged with a felony;

(2) class B misdemeanor if the released person is charged with a misdemeanor.

* **Sec. 13.** AS 11.81.330(a) is amended to read:

(a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other, unless

(1) the force involved was the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other's conduct with intent to cause physical injury to the other; [OR]

(3) the person claiming the defense of justification was the initial aggressor**; or**

(4) the force applied was the result of using a deadly weapon that the person claiming the defense of justification possessed while

(A) acting alone or with others to further a felony criminal objective of the person or one or more other persons; or

(B) participating in a felony transaction or purported transaction, or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71.

* **Sec. 14.** AS 11.81 is amended by adding a new section to read:

Sec. 11.81.345. Defense of self and others. A court may instruct a jury about the justification described in AS 11.81.330 - 11.81.340 if the court, sitting without a jury, finds that there is some plausible evidence to warrant a reasonable jury to find the elements of the justification.

* **Sec. 15.** AS 12.30.020 is amended by adding a new subsection to read:

(i) The court shall issue written findings to demonstrate why conditions provided under (b)(1) of this section needed to be imposed.

* **Sec. 16.** AS 12.50.101(a) is amended to read:

(a) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, **the witness**

may not be prosecuted for an offense about which the witness is compelled to testify [NO TESTIMONY OR OTHER INFORMATION COMPELLED UNDER THE ORDER, OR INFORMATION DIRECTLY OR INDIRECTLY DERIVED FROM THAT TESTIMONY OR OTHER INFORMATION, MAY BE USED AGAINST THE WITNESS IN A CRIMINAL CASE,] except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

*** Sec. 17.** AS 12.50.101(e) is amended to read:

(e) As used in this section,

(1) "other information" means books, papers, documents, records, recordings, or other similar material**;**

(2) "proffer" means a written or oral statement by the attorney for the witness, stating the attorney's good faith belief of the substance of the witness's testimony or other information.

*** Sec. 18.** AS 12.50.101 is amended by adding new subsections to read:

(f) If a witness refuses, or there is reason to believe the witness will refuse, to testify or provide other information based on the privilege against self-incrimination, and if the attorney general or the attorney general's designee has not applied for an order under (b) of this section, the court shall inform the witness of the right to be represented by an attorney, and that an attorney will be appointed for the witness if the witness qualifies for counsel under AS 18.85. The court shall recess the proceeding to allow the witness to consult with the attorney for the witness.

(g) If the attorney general or the attorney general's designee declines to seek an order under (b) of this section after the witness has had an opportunity to consult with an attorney, and the witness continues to refuse to testify or provide other information, the court shall hold a hearing to determine the validity of the claim of privilege by the witness. The hearing shall be in camera.

(h) At the hearing under (g) of this section, the attorney for the witness, in the form of a proffer, shall describe the testimony or other information that the witness claims is privileged. The proffer must include a description of how the testimony or other information could connect the witness with a crime. The proffer is privileged

and inadmissible for any other purpose. If the proffer establishes a factual basis that there is a real or substantial danger that the testimony or other information to be compelled would support a conviction or would furnish a link in the chain of evidence leading to conviction for a crime, the court may find that the witness has a valid claim of privilege.

(i) If the court finds that the witness has a valid claim of privilege, it shall advise the prosecution of that finding.

* **Sec. 19.** AS 12.55.025(c) is amended to read:

(c) Except as provided in (d) [AND (e)] of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence unless the court specifically provides that the defendant must report to serve the sentence on another date. If the court provides another date to begin the term of confinement, the court shall provide the defendant with written notice of the date, time, and location of the correctional facility to which the defendant must report. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

* **Sec. 20.** AS 12.55 is amended by adding a new section to read:

Sec. 12.55.127. Consecutive terms of imprisonment. (a) If a defendant is required to serve a term of imprisonment under a separate judgment, a term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive.

(b) Except as provided in (c) of this section, if a defendant is being sentenced for two or more crimes in a single judgment, terms of imprisonment may be concurrent or partially concurrent.

(c) If the defendant is being sentenced for

(1) escape, the term of imprisonment shall be consecutive to the term for the underlying crime;

(2) two or more crimes under AS 11.41, a consecutive term of imprisonment shall be imposed for at least

(A) the mandatory minimum term under AS 12.55.125(a) for each additional crime that is murder in the first degree;

(B) the mandatory minimum term for each additional crime that is an unclassified felony governed by AS 12.55.125(b);

(C) the presumptive term specified in AS 12.55.125(c) or the active term of imprisonment, whichever is less, for each additional crime that is

(i) manslaughter; or

(ii) kidnapping that is a class A felony;

(D) two years or the active term of imprisonment, whichever is less, for each additional crime that is criminally negligent homicide;

(E) one-fourth of the presumptive term under AS 12.55.125(c) or (i) for each additional crime that is sexual assault in the first degree under AS 11.41.410, or sexual abuse of a minor in the first degree under AS 11.41.434, or an attempt, solicitation, or conspiracy to commit those offenses; and

(F) some additional term of imprisonment for each additional crime, or each additional attempt or solicitation to commit the offense, under AS 11.41.200 - 11.41.250, 11.41.420 - 11.41.432, 11.41.436 - 11.41.458, or 11.41.500 - 11.41.520.

(d) In this section,

(1) "active term of imprisonment" means the total term of imprisonment imposed for a crime minus suspended imprisonment;

(2) "additional crime" means a crime that is not the primary crime;

(3) "primary crime" means the crime

(A) for which the sentencing court imposes the longest active term of imprisonment; or

(B) that is designated by the sentencing court as the primary crime when no single crime has the longest active term of imprisonment.

* **Sec. 21.** AS 18.85.100 is amended by adding a new subsection to read:

(f) Notwithstanding (a) of this section, an indigent person is entitled to the representation and necessary services and facilities of representation as provided in (a) of this section when the person is a witness who refuses, or there is reason to believe will refuse, to testify or provide other information based on the privilege against self-incrimination.

* **Sec. 22.** AS 28.35.030(n) is amended to read:

(n) A person is guilty of a class C felony if the person is convicted under (a) of this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.032(p) was previously imposed within the last 20 years**. For purposes of determining minimum sentences based on previous convictions, the provisions of (r)(4) of this section apply. Upon conviction, the court

(1) shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration of the license under (o) of this section;

(4) may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs, intended to prevent the

consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft, or aircraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(6) shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle or is registered as a co-owner under a business name, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

* **Sec. 23.** AS 28.35.030 is amended by adding a new subsection to read:

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol to rebut or explain the results of a chemical test, but only if the consumption of alcohol occurred after the driving of a motor vehicle or operating of an aircraft or watercraft that is the subject of the prosecution.

* **Sec. 24.** AS 28.35.032(p) is amended to read:

(p) A person is guilty of a class C felony if the person is convicted under this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.030(n) was previously imposed within the last 20 years**. For purposes of determining minimum sentences based on previous convictions, the provisions of AS 28.35.030(r)(4) apply. Upon conviction,

(1) the court shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four

or more times;

(2) the court may not

(A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) the court shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration under (q) of this section;

(4) the court may order that the person, while incarcerated or as a condition of probation or parole, take a drug, or combination of drugs, intended to prevent consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person;

(6) the court shall order forfeiture under AS 28.35.036, of the motor vehicle, aircraft, or watercraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(7) the court shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

* **Sec. 25.** AS 28.35.033(c) is amended to read:

(c) **Except as provided in AS 28.35.030(s), the** [THE] provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

* **Sec. 26.** AS 33.16.090(b) is amended to read:

(b) Except as provided in (e) of this section, a prisoner is not eligible for

discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under **AS 12.55.127** [AS 12.55.025(e) OR (g)]. A prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) or a definite term under AS 12.55.125(*l*) is not eligible for discretionary parole during the entire term.

*** Sec. 27.** AS 33.16.090(c) is amended to read:

(c) Except as provided in (e) of this section, a prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence imposed under **AS 12.55.127** [AS 12.55.025(e) OR (g)] shall serve the unenhanced portion of the sentence or the initial presumptive sentence before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the sentence for the most serious offense in the case of consecutive or partially consecutive presumptive sentences shall be considered the initial presumptive sentence. The unenhanced sentence or the initial presumptive sentence is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire less good time earned under AS 33.20.010.

*** Sec. 28.** AS 47.12.310 is amended by adding a new subsection to read:

(k) A state or municipal agency or authorized employee, other than a state or municipal law enforcement agency under (c) of this section, may disclose to the public information regarding a case as may be necessary to protect the safety of the public, provided the disclosure is authorized by regulations adopted by the department.

*** Sec. 29.** (a) AS 09.50.010(13) is repealed.

(b) AS 12.55.025(e), 12.55.025(g), and 12.55.025(h) are repealed.

*** Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) The changes made in secs. 5, 6, 8 - 11, 13, 14, 19, 20, 26, 27, and 29(b) of this Act apply to offenses committed on or after the respective effective date of those sections.

(b) Sections 22 and 24 of this Act apply to offenses occurring on or after the effective date of those sections, except that previous punishment, referred to in AS 28.35.030(n), as amended by sec. 22 of this Act, and in AS 28.35.032(p), as amended by sec. 24 of this Act, includes punishment imposed before, on, or after the effective date of secs. 22 and 24 of this Act.

(c) Section 12 of this Act applies to custodians who fail to report on or after the effective date of sec. 12 of this Act, for persons released for offenses committed before, on, or after the effective date of sec. 12 of this Act.

(d) The changes made in secs. 7, 16 - 18, 22, 23, and 26 of this Act apply to criminal proceedings for offenses committed before, on, or after the effective date of those sections.

(e) Section 28 of this Act applies to an offense occurring before, on, or after the effective date of this Act.

*** Sec. 31.** This Act takes effect July 1, 2004.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
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House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 2, 2004

Re: CS Request

Please create a work draft House Judiciary Committee Substitute based on the attached version of CSHB 244 (2d JUD), work order # 04-0033, 1/16/2004. I'm not sure if DOL or Leg. Legal drafted this version, so if it helps, last year the work order # assigned to HB 244 was 23-GH1024. In the work draft JUD CS, please also incorporate the attached eight amendments (A's # 1, 3, 4 as amended, 6 as amended, 10, 11 as amended, 15 as amended, and 16). Please call Rep. Gruenberg if you have any questions about Amendment 15 as amended. All amendments are conceptual for the purposes of proper placement within the bill.

The bill will be reheard on Mondav, April 5th at 1:00 p.m. If you have any questions, please call me at 4990. Thank you!

04-0033

1/16/2004

CS FOR HOUSE BILL NO. 244(2d JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:
Referred:
Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to murder in the second degree, the justification of defense of self or others, immunity from prosecution, sentencing, probation, discretionary parole, and the right to representation in certain criminal proceedings; relating to violation of a custodian's duty; relating to sexual abuse of a minor; relating to release of agency records, upon request, concerning an adjudication of a sexual offense; relating to local options regarding alcoholic beverages, the offense of furnishing or delivery of alcoholic beverages to a person under 21 years old, and forfeiture of money or other items of value used in financial transactions derived from violation of certain laws relating to alcoholic beverages; relating to assault by means of a dangerous instrument; relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, to the refusal to submit to a chemical test, and to the presumptions and chemical analysis of breath or blood; and

providing for an effective date."

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

*** Section 1.** AS 04.11.010(c) is amended to read:

(c) **Unless a municipality or established village has adopted a more restrictive local option under AS 04.11.491(g), in** [IN] a criminal prosecution for possession of alcoholic beverages for sale in violation of (a) of this section, the fact that a person

(1) possessed more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person possessed the alcoholic beverages for sale;

(2) sends, transports, or brings more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages to an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person sent, transported, or brought the alcoholic beverages for sale in the area.

*** Sec. 2.** AS 04.11.010 is amended by adding a new subsection to read:

(d) In this section,

(1) "bring" has the meaning given in AS 04.11.499;

(2) "send" has the meaning given in AS 04.11.499;

(3) "transport" has the meaning given in AS 04.11.499.

*** Sec. 3.** AS 04.11.150(g) is amended to read:

(g) If a shipment is to an area that has restricted the sale of alcoholic beverages under AS 04.11.491(a)(1), (2), or (3) or (b)(1) or (2), a package store licensee, agent, or employee may not ship to a purchaser more than 10 and one-half liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in a calendar month**, or a lower amount of distilled spirits, wine, or malt beverages if the municipality or established village has adopted the lower amount by local option under AS 04.11.491(g).**

*** Sec. 4.** AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010(c).

* **Sec. 5.** AS 04.16.051(d) is amended to read:

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury" has the meaning given in AS 11.81.900**; or**

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491.

* **Sec. 6.** AS 04.16.220(a) is amended to read:

(a) The following are subject to forfeiture:

(1) alcoholic beverages manufactured, sold, offered for sale or possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.21.010; alcoholic beverages possessed, stocked, warehoused, or

otherwise stored in violation of AS 04.11.060; alcoholic beverages sold, or offered for sale in violation of a local option adopted under AS 04.11.491; alcoholic beverages transported into the state and sold to persons not licensed under this chapter in violation of AS 04.16.170(b);

(2) materials and equipment used in the manufacture, sale, offering for sale, possession for sale, barter or exchange of alcoholic beverages for goods and services in this state in violation of AS 04.11.010; materials and equipment used in the stocking, warehousing, or storage of alcoholic beverages in violation of AS 04.21.060; materials and equipment used in the sale or offering for sale of an alcoholic beverage in an area in violation of a local option adopted under AS 04.11.491;

(3) aircraft, vehicles, or vessels used to transport, or facilitate the transportation of

(A) alcoholic beverages manufactured, sold, offered for sale or possessed for sale, bartered or exchanged for goods and services in this state in violation of AS 04.11.010;

(B) property stocked, warehoused, or otherwise stored in violation of AS 04.21.060;

(C) alcoholic beverages imported into a municipality or established village in violation of AS 04.11.499;

(4) alcoholic beverages found on licensed premises that do not bear federal excise stamps if excise stamps are required under federal law;

(5) alcoholic beverages, materials or equipment used in violation of AS 04.16.175;

(6) money, securities, negotiable instruments, or other things of value used in financial transactions derived from activity prohibited under AS 04.11.010 or in violation of a local option adopted under AS 04.11.491.

* Sec. 7. AS 04.16.220 is amended by adding a new subsection to read:

(i) When forfeiting property under (a) or (d) of this section, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of the defendant, the seizure of property, or the identification of property for seizure, (1) the property if the property is worth $5,000 or less and is not money or some other

thing that is divisible, or (2) up to 75 percent of the property or the value of the property if the property is worth more than $5,000 or is money or some other thing that is divisible. In determining the percentage a municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency's total involvement in the case relative to the involvement of the state.

* **Sec. 8.** AS 11.41.110(a) is amended to read:

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

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

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life;

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.020(a), 11.71.030(a)(1) or (2), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person [OTHER THAN ONE OF THE PARTICIPANTS];

(4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person [OTHER THAN ONE OF THE PARTICIPANTS]; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was

(A) a felony violation of AS 11.41;

(B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or

(C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

* **Sec. 9.** AS 11.41.220(a) is amended to read:

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person; [OR]

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment**; or**

(4) with criminal negligence causes serious physical injury to another person by means of a dangerous instrument.

* **Sec. 10.** AS 11.41.438(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) **being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender;**

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(3) [(2)] being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

* **Sec. 11.** AS 11.41.440(a) is amended to read:

(a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in [SEXUAL PENETRATION OR] sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

* **Sec. 12.** AS 11.56 is amended by adding a new section to read:

Sec. 11.56.758. Violation of custodian's duty. (a) A person commits the crime of violation of custodian's duty if the person fails, when acting as a custodian appointed by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.

(b) Violation of custodian's duty is

(1) a class A misdemeanor if the released person is charged with a felony;

(2) a class B misdemeanor if the released person is charged with a misdemeanor.

* **Sec. 13.** AS 11.81.330(a) is amended to read:

(a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other, unless

(1) the force involved was the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other's conduct with intent to cause physical injury to the other; [OR]

(3) the person claiming the defense of justification was the initial aggressor**; or**

(4) the person claiming the defense of justification was, at the time the force was used,

(A) acting alone or with others to further the criminal objectives of one or more other persons; or

(B) a participant in a transaction or purported transaction or in immediate flight from a transaction or purported transaction in violation of AS 11.71.

* **Sec. 14.** AS 11.81 is amended by adding a new section to read:

Sec. 11.81.345. Defense of self and others. A court may instruct the jury about the justification described in AS 11.81.330 - 11.81.340 if the court, sitting without a jury, finds that there is some plausible evidence to warrant a reasonable jury to find the elements of the justification.

* **Sec. 15.** AS 12.50.101(a) is amended to read:

(a) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, **the witness may not be prosecuted for an offense about which the witness is compelled to testify** [NO TESTIMONY OR OTHER INFORMATION COMPELLED UNDER THE ORDER, OR INFORMATION DIRECTLY OR INDIRECTLY DERIVED FROM THAT TESTIMONY OR OTHER INFORMATION, MAY BE USED AGAINST THE WITNESS IN A CRIMINAL CASE], except in a prosecution based on perjury, giving a false statement[,] or otherwise knowingly providing false information, or hindering prosecution.

* **Sec. 16.** AS 12.50.101(e) is amended by adding new paragraphs to read:

(2) "higher-level felony" means an unclassified or a class A felony;

(3) "lower-level felony" means a class B or a class C felony;

(4) "proffer" means a written or oral statement by the attorney for the witness, stating the attorney's good faith belief of the substance of the witness's testimony or other information.

* **Sec. 17.** AS 12.50.101 is amended by adding new subsections to read:

(f) If a witness refuses, or there is reason to believe the witness will refuse, to testify or provide other information based on the privilege against self-incrimination, and if the attorney general or the attorney general's designee has not applied for an order under (b) of this section, the court shall inform the witness of the right to be represented by an attorney, and that an attorney will be appointed for the witness if the witness qualifies for counsel under AS 18.85. The court shall recess the proceeding to allow the witness to consult with the attorney for the witness.

(g) If the attorney general or the attorney general's designee declines to seek an order under (b) of this section after the witness has had an opportunity to consult with an attorney, and the witness continues to refuse to testify or provide other information, the court shall hold a hearing to determine the validity of the claim of privilege by the witness. The hearing shall be in camera.

(h) At the hearing under (g) of this section, the attorney for the witness, in the form of a proffer, shall describe the testimony or other information that the witness claims is privileged. The proffer must include a description of how the testimony or other information could connect the witness with a crime. The proffer is privileged and inadmissible for any other purpose. If the proffer establishes a factual basis that there is a real or substantial danger that the testimony or other information to be compelled would support a conviction or would furnish a link in the chain of evidence leading to conviction for a crime, the court may find that the witness has a valid claim of privilege.

(i) If the court finds that the witness has a valid claim of privilege, it shall advise the prosecution of that finding and inform the prosecution of the category of offense to which the privilege applies: a higher-level felony, a lower-level felony, or a

misdemeanor.

* **Sec. 18.** AS 12.55.025(c) is amended to read:

(c) Except as provided in (d) [AND (e)] of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence unless the court specifically provides that the defendant must report to serve the sentence on another date. If the court provides another date to begin the term of confinement, the court shall provide the defendant with written notice of the date, time, and location of the correctional facility to which the defendant must report. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

* **Sec. 19.** AS 12.55 is amended by adding a new section to read:

Sec. 12.55.127. Consecutive terms of imprisonment. (a) If a defendant is required to serve a term of imprisonment under a separate judgment, any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive.

(b) Except as provided in (c) of this section, if a defendant is being sentenced for two or more crimes in a single judgment, terms of imprisonment may be concurrent or partially concurrent.

(c) If the defendant is being sentenced for

(1) escape, the term of imprisonment shall be consecutive to the term for the underlying crime;

(2) two or more crimes under AS 11.41, a consecutive term of imprisonment shall be imposed for at least

(A) the mandatory minimum term under AS 12.55.125(a) for each additional crime that is murder in the first degree;

(B) the mandatory minimum term for each additional crime that is an unclassified felony governed by AS 12.55.125(b);

(C) the presumptive term specified in AS 12.55.125(c) or the active term of imprisonment, whichever is less, for each additional crime that is

(i) manslaughter; or

(ii) kidnapping that is a class A felony;

(D) two years or the active term of imprisonment, whichever is less, for each additional crime that is criminally negligent homicide;

(E) one-fourth of the presumptive term under AS 12.55.125(c) or (i) for each additional crime that is sexual assault in the first degree under AS 11.41.410 or sexual abuse of a minor in the first degree under AS 11.41.434, or an attempt, solicitation or conspiracy to commit those offenses; and

(F) some additional term of imprisonment for each additional crime, or each additional attempt or solicitation to commit the offense, under AS 11.41.200 - 11.41.250, 11.41.420 - 11.41.432, 11.41.436 - 11.41.458, or 11.41.500 - 11.41.520.

(d) In this section,

(1) "active term of imprisonment" means the total term of imprisonment imposed for a crime, minus suspended imprisonment;

(2) "additional crime" means a crime that is not the primary crime;

(3) "primary crime" means the crime

(A) for which the sentencing court imposes the longest active term of imprisonment; or

(B) that is designated by the sentencing court as the primary crime when no single crime has the longest active term of imprisonment.

* **Sec. 20.** AS 18.85.100 is amended by adding a new subsection to read:

(f) Notwithstanding (a) of this section, an indigent person is entitled to the representation and necessary services and facilities of representation as provided in (a) of this section when the person is a witness who refuses or there is reason to believe will refuse to testify or provide other information based on the privilege against self-incrimination.

* **Sec. 21.** AS 28.35.030(n) is amended to read:

(n) A person is guilty of a class C felony if the person is convicted under (a) of this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.032(p) was previously imposed**. For purposes of determining minimum sentences based on previous convictions, the provisions of (r)(4) of this section apply. Upon conviction, the court

(1) shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration of the license under (o) of this section;

(4) may order that the person, while incarcerated or as a condition of probation or parole, take a drug or combination of drugs, intended to prevent the consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft, or aircraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(6) shall order the department to revoke the registration for any vehicle

registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle or is registered as a co-owner under a business name, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

*** Sec. 22.** AS 28.35.030 is amended by adding a new subsection to read:

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol to rebut or explain the results of a chemical test, but only if the consumption of alcohol occurred after the driving or operating that is the subject of the prosecution.

*** Sec. 23.** AS 28.35.032(p) is amended to read:

(p) A person is guilty of a class C felony if the person is convicted under this section and **either** has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense**, or punishment under this subsection or under AS 28.35.030(n) was previously imposed**. For purposes of determining minimum sentences based on previous convictions, the provisions of AS 28.35.030(r)(4) apply. Upon conviction,

(1) the court shall impose a fine of not less than $10,000 and a minimum sentence of imprisonment of not less than

(A) 120 days if the person has been previously convicted twice;

(B) 240 days if the person has been previously convicted three times;

(C) 360 days if the person has been previously convicted four or more times;

(2) the court may not

(A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) the court shall permanently revoke the person's driver's license, privilege to drive, or privilege to obtain a license subject to restoration under (q) of

this section;

(4) the court may order that the person, while incarcerated or as a condition of probation or parole, take a drug, or combination of drugs, intended to prevent consumption of an alcoholic beverage; a condition of probation or parole imposed under this paragraph is in addition to any other condition authorized under another provision of law;

(5) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person;

(6) the court shall order forfeiture under AS 28.35.036, of the motor vehicle, aircraft, or watercraft used in the commission of the offense, subject to remission under AS 28.35.037; and

(7) the court shall order the department to revoke the registration for any vehicle registered by the department in the name of the person convicted under this subsection; if a person convicted under this subsection is a registered co-owner of a vehicle, the department shall reissue the vehicle registration and omit the name of the person convicted under this subsection.

* **Sec. 24.** AS 28.35.033(c) is amended to read:

(c) **Except as provided in AS 28.35.030(s), the** [THE] provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

* **Sec. 25.** AS 33.16.090(b) is amended to read:

(b) Except as provided in (e) of this section, a prisoner is not eligible for discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under **AS 12.55.127** [AS 12.55.025(e) OR (g)]. A prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) or a definite term under AS 12.55.125(*l*) is not eligible for discretionary parole during the entire term.

* **Sec. 26.** AS 33.16.090(c) is amended to read:

(c) Except as provided in (e) of this section, a prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.127 [AS 12.55.025(e) OR (g)] shall serve the unenhanced portion of the sentence or the initial presumptive sentence before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the sentence for the most serious offense in the case of consecutive or partially consecutive presumptive sentences shall be considered the initial presumptive sentence. The unenhanced sentence or the initial presumptive sentence is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire less good time earned under AS 33.20.010.

* **Sec. 27.** AS 47.12.310(b) is amended to read:

(b) A state or municipal agency or employee shall disclose

(1) information regarding a case to a federal, state, or municipal law enforcement agency for a specific investigation being conducted by that agency; and

(2) appropriate information regarding a case to

(A) a guardian ad litem appointed by the court;

(B) a person or an agency requested by the department or the minor's legal custodian to provide consultation or services for a minor who is subject to the jurisdiction of the court under this chapter as necessary to enable the provision of the consultation or services;

(C) school officials as may be necessary to protect the safety of the minor who is the subject of the case and the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed;

(D) a governmental agency as may be necessary to obtain that agency's assistance for the department in its investigation or to obtain physical custody of a minor;

(E) a law enforcement agency of this state or another jurisdiction as may be necessary for the protection, rehabilitation, or supervision of any minor or for actions by that agency to protect the public

safety;

(F) a victim or to the victim's insurance company as may be necessary to inform the victim or the insurance company about the arrest of the minor, including the minor's name and the names of the minor's parents, copies of reports, or the disposition or resolution of a case involving a minor;

(G) the state medical examiner under AS 12.65 as may be necessary to perform the duties of the state medical examiner;

(H) foster parents or relatives with whom the child is placed by the department as may be necessary to enable the foster parents or relatives to provide appropriate care for the child who is the subject of the case, to protect the safety of the child who is the subject of the case, and to protect the safety and property of family members and visitors of the foster parents or relatives;

(I) the Department of Law or its agent for use and subsequent release if necessary for collection of an order of restitution on behalf of the recipient;

(J) the Violent Crimes Compensation Board established in AS 18.67.020 for use in awarding compensation under AS 18.67.080; [AND]

(K) a state, municipal, or federal agency of this state or another jurisdiction that has the authority to license adult or children's facilities and services**: and**

(L) upon request, a member of the public regarding an adjudication of a sexual offense under AS 11.41.410 - 11.41.460 as may be necessary to protect the safety of a child or vulnerable adult; in this subparagraph, "vulnerable adult" has the meaning given in AS 47.24.900.

* **Sec. 28.** (a) AS 09.50.010(13) is repealed.

(b) AS 12.55.025(e), 12.55.025(g), and 12.55.025(h) are repealed.

* **Sec. 29.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) The changes made in secs. 5, 6, 8 - 11, 13, 14, 18, 19, 25, 26, and 28(b) of this Act apply to offenses committed on or after the respective effective date of those sections.

CS HB 244 (2d JUD)

AMENDMENT 1 - PASSED
by REP. MCGUIRE

Pages 15-16, Section 27.
Delete the entire contents of the section and insert instead:

AS 47.12.310 is amended by adding a new subsection to read:

(k) A state or municipal agency or authorized employee, other than a state or municipal law enforcement agency under (c) of this section, may disclose to the public information regarding a case as may be necessary to protect the safety of the public, provided the disclosure is authorized by regulations adopted by the department.

AMENDMENT #4 - PASSED
by REP. MCGUIRE

OFFERED IN THE HOUSE

TO: CSHB 244(JUD)

Page 8, lines ~~9~~ 7 - 13:

Delete all material and insert the following: A#1 to the A.

"**(4) the force applied was the result of using a ~~dangerous~~ deadly weapon ~~instrument~~ that the person claiming the defense of justification possessed while**

(A) acting alone or with others to further a felonycriminal objective of the person or one or more other persons; or

(B) participating in a felony transaction or purported transaction, or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71.

HB 244

Amendment 4 - PASSED Gara

Insert at p 2/5

At line 24 after "participants" and at line 28 after "participants" the following language:

"except that when the killing of the participant is the direct result of felony criminal conduct by a non-participant."

A#10 (Same A.) - PASSED
by Rep. McGuire

AMENDMENT NO. 9 - WITHDRAWN
by Rep. Gruenberg

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence causes serious physical injury under AS 11.81.900(55)(B) to another person by means of a dangerous instrument.

HB 244 → conceptual for placement purposes

Amendment 11 - PASSED Gara

Insert at p 7 line 28, and renumber remaining sections accordingly:

Amend AS 12.30.020 by adding a subsection (i) that reads:

~~"In the case of a misdemeanor,~~ the court shall issue written findings to demonstrate why conditions provided under subsection (b)(1) needed to be imposed."

conceptual

AMENDMENT NO. 15 - PASSED AS AMENDED

by Rep. Gruenberg

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 2, line 30 – p. 3 line 26

Sec. 4 AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010©;

(3) adopt an increased penalty of a class C felony for furnishing or delivery of alcoholic beverages to persons under 21 pursuant to AS 04.16.051(d)(3).

A. to A.: will aut be increase penalty unless muni/village opts out (reverse) it

Sec. 5 AS 04.16.051(d) is amended to read

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury has the meaning given in AS 11.81.900; or

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option and the increased penalty of a class C felony under AS 04.11.491.

A

AMENDMENT NO. 16 - PASSED

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 12 line 6 and page 13 line 16.
Add the words, "**within the last twenty years**."

P

(b) Sections 21 and 23 of this Act apply to offenses occurring on or after the effective date of those sections, except that previous punishment, referred to in AS 28.35.030(n), as amended by sec. 21 of this Act, and in AS 28.35.032(p), as amended by sec. 23 of this Act, includes punishment imposed before, on, or after the effective date of secs. 21 and 23 of this Act.

(c) Section 12 of this Act applies to custodians who fail to report on or after the effective date of sec. 12 of this Act, for persons released for offenses committed before, on, or after the effective date of sec. 12 of this Act.

(d) The changes made in secs. 7, 15 - 17, 20, 22, and 25 of this Act apply to criminal proceedings for offenses committed before, on, or after the effective date of those sections.

(e) Section 27 of this Act applies to an offense occurring before, on, or after the effective date of this Act.

*** Sec. 30.** This Act takes effect July 1, 2004.

AMENDMENT TO CSHB 244 (2D JUD) Work Draft 1/16/2004 #5 - set aside
by REP. MCGUIRE

Delete Page 13, lines 7-10

Insert in its place:

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol before operating or driving the motor vehicle, aircraft or watercraft, to rebut or explain the results of a chemical test, but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

Add a new section and renumber other sections accordingly:

***Sec. ___.** AS 28.35.030(a) is amended to read:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance ;

TECH A. #1 to the A.

and (2) **if** [WHEN], as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or ~~if~~ [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of an alcoholic beverage, an intoxicating liquor, an inhalant, **or** [AND] a controlled substance.

HB 244

Amendment 7 - FAILED Gara

Delete page 6, lines 24 and 25.

HB 244

Amendment 8 - WITHDRAWN Gara

Insert at p 6 line 24 after "negligence" the following language:

"in violation of AS 28.35.030"

HB 244 Gara

Amendment

Delete page 12 lines 19 – 27, and renumber sections accordingly.

HB 244

Amendment 12 - FAILED

Gara

Delete page 8 lines 7 – 13 all language after "aggressor".

(Delete sect. 13 of the bill)

HB 244

Amendment 13 - WITHDRAWN

Gara

See A #3

At page 9 line 30, delete remainder of sentence after "finding".

HB 244

Amendment 14 - FAILED Gara

At pages 10 – 11, delete Section 19.

& conforming sections

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 3, Sec 5, line lines 10-26 omit proposed new section (3) (highlighted) thereby omitting amendment.

Sec. 5 AS 04.16.051(d) is amended to read

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

(B) "serious physical injury has the meaning given in AS 11.81.900; or

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491.

B

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence **has consumed alcohol** and causes serious physical injury to another person by means of a dangerous instrument.

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence **and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath,** causes serious physical injury **under AS 11.81.900(55)(B)** to another person by means of a dangerous instrument.

E

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence **and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath.** causes **permanent** serious physical injury **under AS 11.81.900(55)(B)** to another person by means of a dangerous instrument.

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence **and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath,** causes **permanent** serious physical injury to another person by means of a dangerous instrument.

G

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence causes **permanent** serious physical injury to another person by means of a dangerous instrument.

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence **and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath,** causes serious physical injury to another person by means of a dangerous instrument.

AMENDMENT _____

OFFERED IN THE HOUSE

TO: CSHB 244 (JUD) WORK DRAFT 04-0033

Page 7, after line 17 :

Insert the following new Sections 12 - 29:

"*Sec. 12. AS 11.46.120(a) is amended to read:

(a) A person commits the crime of theft in the first degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is **$50,000** [$25,000] or more.

Sec 13. AS 11.46.130(a) is amended to read:

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$1,000** [$500] or more but less than **$50,000** [$25,000];

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment; or

(6) the value of the property is **$100** [$50] or more but less than **$1,000** [$500] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) AS 11.46.140(a)(1) or (2), or an offense under another law or ordinance with similar elements; or

(D) AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements.

Sec. 14. AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is **$100** [$50] or more but less than **$1,000** [$500];

(2) the property is an access device; or

(3) the value of the property is less than **$100** [$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

Sec. 15. AS11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than **$100** [$50].

Sec. 16. AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is **$1,000** [$500] or more; or

(C) the value of the merchandise is **$100** [$50] or more but less than **$1,000** [$500] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of the offense of

(i) concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) AS 11.46.120, 11.46.130, or 11.46.140(a)(1) or (a)(2), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is **$100** [$50] or more but less than **$1,000** [$500]; or

(B) the value of the merchandise is less than **$100** [$50] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

(3) a class B misdemeanor if the value of the merchandise is less than **$100** [$50].

Sec. 17. AS 11.46.260 (b) is amended to read:

(b) Removal of identification marks is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,000** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is **$100** [$50] or more but less than **$1,000** [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than **$100** [$50].

Sec. 18. AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

(1) a class C felony if the value of the property on which the serial number or identification mark appeared is **$1,000** [$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is $100 [$50] or more but less than $1,000 [$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than $100 [$50].

Sec. 19. AS 11.46.280(d) is amended to read:

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is $50,000 [$25,000] or more;

(2) a class C felony if the face amount of the check is $1,000 [$500] or more but less than $50,000 [$25,000];

(3) a class A misdemeanor if the face amount of the check is $100 [$50] or more but less than $1,000 [$500];

(4) a class B misdemeanor if the face amount of the check is less than $100 [$50].

Sec. 20. AS 11.46.285(b) is amended to read:

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is $50,000 [$25,000] or more;

(2) a class C felony if the value of the property or services obtained is $1,000 [$500] or more but less than $50,000 [$25,000];

(3) a class A misdemeanor if the value of the property or services obtained is **$100** [$50] or more but less than **$1,000** [$500];

(4) a class B misdemeanor if the value of the property or services obtained is less than **$100** [$50].

Sec. 21. AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of **$1,000** [$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of **$1,000** [$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under (A) this section or AS

11.46.365;

Sec. 22. AS 11.46.482(a)(1) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of **$1,000** [$500] or more;

Sec. 23. AS 11.46.484(a)(1) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of **$100** [$50] or more but less than **$1,000** [$500];

Sec. 24. AS 11.46.486(a)(2) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than **$100** [$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or AS 11.46.365(a)(1).

Sec. 25. AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is **$1,000** [$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is **$100** [$50] or more but less than **$1,000** [$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than **$100** [$50].

Sec. 25. AS 11.46.600(a) is amended to read:

(a) A person commits the crime of scheme to defraud if the person engages in conduct constituting a scheme

(1) to defraud five or more persons or to obtain property or services from five or more persons by false or fraudulent pretense,

representation, or promise and obtains property or services in accordance with the scheme; or

(2) to defraud one or more persons of **$20,000** [$10,000] or to obtain **$20,000** [$10,000] or more from one or more persons by false or fraudulent pretense, representation, or promise and obtains property or services in accordance with the scheme.

Sec. 27. AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is **$1,000** [$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than **$1,000** [$500].

Sec. 28. AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of **$1,000** [$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is **$50,000** [$25,000] or more;

(2) a class C felony if the loss is **$1,000** [$500] or more but less than **$50,000** [$25,000].

Sec. 29. AS 11.56.120(a) is amended to read:

(a) A public servant commits the crime of receiving unlawful gratuities if, for having engaged in an official act which was required or authorized and for which the public servant was not entitled to any special or additional compensation, the public servant

(1) solicits a benefit, regardless of value; or

(2) accepts or agrees to accept a benefit having a value of **$100** [$50] or more."

Renumber the subsequent bill sections accordingly.

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 7, line 18-27
Sec.12

Sec 12. AS 11.56.758 is amended by adding a new section to read:

SEC. AS 11.56.758 Violation of custodian's duty.

(a) A person commits the crime of violation of custodian's duty if the person intentionally fails, when acting as a custodian by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.

(b) Violation if a custodian's duty is

[(1)] a class [A] B misdemeanor [IF THE RELEASED PERSON IS CHARGED WITH A FELONY]

[(2) A CLASS B MISDEMEANOR IF THE RELEASED PERSON IS CHARGED WITH A MISDEMEANOR.]

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 7, line 18-27
Sec.12

OMIT Sec 12. AS 11.56.758 in its entirety; renumber remaining sections

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 8, line 19
Proposed Sec. 16 (renumber the following bill sections accordingly)

Legislative Intent: The Alaska Legislature acknowledges the findings contained in the Alaska Judicial Council's study "Alaska Felony Process: 1999" that the use of third party custodians was initially intended to give indigent defendants an equal opportunity for predisposition release; that said bail condition was one of the most important influences on the length of time that defendants spent incarcerated before disposition of their cases; and that said bail condition has resulted in substantially longer terms of predisposition incarceration in non-violent type cases. Given the right to bail guaranteed by art. I, sec. 11 of the Alaska Constitution, it is the intent of the Legislature that judicial officers more rigorously apply the statutory framework set out AS 12.30.010-029 for pretrial release. Specifically, it is the intent of the Legislature that defendants should be released on their own recognizance or upon execution of an unsecured appearance bond unless the offense is an unclassified or class A felony, or unless the court finds that the release of the person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, or community. It is the Legislature's further intent that where the court finds additional release assurances are required to assure court appearances and public safety, it should impose, in descending order, execution of a secured bond, cash bail, and, finally, release to a third-party custodian. Release to a third party custodian should only be in lieu of a bond or cash at a defendant's request; or, in combination thereof, if the court finds by clear and convincing evidence that release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, and if the offense alleged is a violation of AS 11.41.100 – 530, or AS 28.35.030(n) or AS 28.35.032(p).

Legislative Intent to "N"

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 8, line 19
Proposed Sec.15 (renumber the following bill sections accordingly)

AS 12.30.020 is amended to read as follows:

AS 12.30.020 Release before trial
(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the offense is an unclassified felony or class A felony or unless the officer [DETERMINES} **finds by clear and convincing evidence** that the release of the person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, or the community. **If requested, such findings of fact and conclusions of law shall be put on the record.** If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow the prosecuting attorney up to 48 hours to demonstrate that release of the person on the person's personal recognizance or upon the execution of an unsecured appearance bond will not reasonably assure the appearance of the person or will pose a danger to the alleged victim, other persons, or the community.

(b) If a judicial officer [DETERMINES] **finds by clear and convincing evidence** under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, the judicial officer may
(1) **if the offense alleged is a violation of AS 11.41.100 – 530. or AS 28.35.030(n) or AS 28.35.032(p), or at the request of the defendant,** place the person in the custody of a designated person or organization agreeing as a custodian to supervise the person; the court shall, personally and in writing, inform the custodian about the duties required of a custodian, and that failure to report immediately in accordance with the terms of the order that the person released has violated a condition of release may result in the custodian's being held in contempt under AS 09.50.010;
(2) place restrictions on the travel, association, or place of abode of the person during the period of release;
(3) require the person to return to custody after daylight hours on designated conditions;
(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 percent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;
(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash;
(6) require the execution of a performance bond in a specified amount and the deposit in the registry of the court, in cash or other security; the performance bond must be imposed and

N

enforced separately from any appearance bond, and the deposit to be returned upon the performance of the condition of release; or
(7) impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of the alleged victim, other persons, or the community.
(c) In determining the conditions of release under (b) of this section, the judicial officer shall take into account
(1) the nature and circumstances of the offense charged, including the effect of the offense upon the alleged victim;
(2) the weight of the evidence against the person;
(3) the person's family ties;
(4) the person's employment;
(5) the person's financial resources;
(6) the person's character and mental condition;
(7) the length of the person's residence in the community;
(8) the person's record of convictions;
(9) the person's record of appearance at court proceedings;
(10) the flight of the accused to avoid prosecution or the person's failure to appear at court proceedings; and
(11) threats the person has made, and the danger the person poses, to the alleged victim.
(d) A judicial officer authorizing the release of a person under this section shall issue an order containing a statement of the conditions imposed.
(e) The judicial officer shall inform the person of the penalties that may be imposed for a violation of the conditions of release and advise the person that a warrant for the person's arrest will be issued immediately upon a violation or that the person may be arrested without a warrant for a violation of conditions of release as set out in AS 12.25.030(b).
(f) A person who remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. If the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review the conditions. If the conditions are not amended and the person remains in custody, the judicial officer shall set out in writing the reasons for requiring the conditions imposed.
(g) A judicial officer who orders the release of a person on a condition specified in (b) of this section may at any time amend the order to impose additional or different conditions of release, or to release the person under (a) of this section.
(h) Information offered or introduced at a hearing before a judicial officer to determine the conditions of release need not conform to the rules governing the admissibility of evidence in a court of law.

AMENDMENT NO. _____

OFFERED IN THE HOUSE
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 10 line 15 through page 11 line 25: omit proposed new section 19 in its entirety; renumber sections.

Page 14, line 22-30, omit Sec. 25 amendment [AS 12.55.127], renumber sections.

Page 14 line 31 – page 15 line 11, omit sec. 26 amendment [AS 12.55.127], renumber sections.

Page 16, line 26, omit Sec. 28(b).

CS for HOUSE BILL 244 (2nd JUD)

Sectional Summary

Sections 1 - 4 allow communities to adopt, as part of a local option, lower amounts of alcohol that may be possessed or imported into the community than may currently be possessed or imported, and still presumed to be for personal use rather than for sale. Certain communities have already adopted lower limits by ordinance. If it is part of a local option, however, state law enforcement authorities can help communities enforce these limits.

Section 5 raises the penalty for furnishing alcohol to a person under 21 years of age from a class A misdemeanor to a class C felony, if the offense occurs in a village or municipality that has adopted a local option.

Sections 6 - 7 allow for the forfeiture of money used in bootlegging offenses, and provides for sharing of the proceeds of forfeitures from bootlegging offenses with local law enforcement.

Section 8 expands the felony-murder rule so that an offender who commits a dangerous crime can be charged with second-degree murder if an accomplice is killed. The current felony-murder rule allows an offender to be charged with second-degree murder if a person, such as a bystander, is killed during the commission of the crime, even if the offender did not directly cause the death. The purpose of the felony-murder rule is to discourage serious crimes. It will be more effective if it also applies to the death of a participant in the crime.

Section 9 increases the penalty from a class A misdemeanor to a class C felony for certain vehicular offenses that cause serious physical injury. This will apply to persons who drive partly impaired (but not enough to be DUI) and cause serious injuries to another person.

Sections 10 - 11 increase the penalty for sexual abuse of very young children by teenagers from a class A misdemeanor to a class C felony.

Section 12 adopts a new crime - that of violating a person's duty as a third party custodian. It applies to a person who agrees to be a third party custodian, but does not report to authorities if the person in custody violates release conditions. It is either a class A or class B misdemeanor, depending on the crime with which the person released is charged.

Section 13 disallows self-defense if the state proves that the defendant was furthering his own criminal objectives or those of a gang, or was buying or selling illegal drugs.

Section 14 would require the court to give an instruction to the jury on self-defense only if there is plausible evidence to support self-defense. Current law requires the court to instruct the jury on self-defense even if the evidence supporting it is "weak or implausible". This

transactional immunity in AK Gonzales

12.55.025 (e) Presumption of Consecutive Sentences

change adopts the federal approach, which requires evidence on which a rational jury could find self-defense before the instruction is given.

Sections 15 - 17 and 20 adopt a fair and uniform procedure to determine if a witness has a valid Fifth Amendment privilege against self-incrimination. An attorney is appointed for the witness, and the court makes the determination in a closed proceeding outside the presence of the prosecution. If the court determines that the witness has a valid privilege, the court will inform the prosecution of the level of seriousness of the crime.

Sections 18 - 19 and 25 - 26 give direction to courts in sentencing a defendant for more than one crime. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping, and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first-degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter and kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Sections 21 and 23 provide that once a person has been convicted of felony drunk driving or felony refusal to submit to a chemical test, any subsequent drunk driving or refusal offense will also be a felony.

Sections 22 and 24 disallow the "big gulp" defense in drunk driving cases. It reverses a recent court decision, *Conrad v. State,* 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

Section 27 allows for greater disclosure to the public of information about juvenile sex offenders, if necessary to protect children or vulnerable adults.

Section 28 provides conforming repealers.

Sections 29 and 30 include applicability and effective date provisions.

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Heat of Passion	Makes Heat-of-passion (essentially a form of temporary insanity), an affirmative defense that the defendant must prove by a preponderance of evidence, just like insanity.	No similar provision	No similar provision
Self-defense; Defense of others	Makes self-defense an affirmative defense, that the defendant must prove by a preponderance of evidence, with certain exception, such as a person on their own property.	No similar provision	No similar provision. **DOES NOT CHANGE THE BURDEN OF PROOF.**
	Prohibits use of deadly force if a person brings a deadly weapon to an encounter with reckless disregard that the encounter would result in combat.	No similar provision	Prohibits self-defense if the force was used to further the criminal objectives of other persons (i.e., gang activity), or in an illegal drug transaction. Court may instruct a jury on self-defense if the court finds there is **plausible** evidence to warrant a reasonable jury to find self-defense.
Felony-Murder	No similar provision	No similar provision	Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed.
Rights of arrested person	Clarified that a person may not interrupt an interview with the police if the arrested person has consented to the interview after being advised of his rights.	Same	No similar provision
Prior convictions admissible when elements of crime	The bill allows evidence of prior convictions to be admitted during the state's case-in-chielf, if the state is required to prove the prior convictions (e.g. felony drunk driving) as an element of the offense. Allows the defendant to challenge the validity of these prior convictions only by proving to the court, sitting without the jury, that the defendant was denied the right to counsel or to a jury trial in the prior prosecutions.	No similar provision	No similar provision
Immunity for witnesses	Conforms statutory law to *State v. Gonzales*, 853 P.2d 526 (Alaska 1993), that requires complete immunity if a person is compelled to testify after claiming a valid privilege against self-incrimination.	Same	Same
	Establishes orderly procedure for the court to consider if the witness has a valid claim of the privilege against self-incrimination. An attorney would be appointed to represent the witness, and the prosecutor would be present. The court would specify the crime to which the privilege applies.	No similar provision	Establishes a procedure similar to HB 244 for the court to consider if the witness has a valid privilege. **However, the prosecutor would not be present in the hearing.** The court may inform the prosecution only about the seriousness of the crime, but not the specific crime the witness may have committed.

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Consecutive sentences	Adopts guidelines for sentencing defendants for more than one crime. In 1982, the legislature enacted AS 12.55.025 (e) and (g), which requires consecutive sentences for each count of homicide, assault, and sexual assault. Because of imprecise drafting, the courts have interpreted these statutes as a legislative preference for consecutive sentences, which is frequently ignored.	Same	Same
	For homicide, kidnapping, first-degree sexual assault, and first-degree sexual abuse (penetration), the bill adopts minimum requirements for consecutive sentences in cases with multiple convictions.	Same	Same
	For less serious crimes against a person, such as a misdemeanor assaults, the court must impose some period of consecutive time for each crime.	Same	Same
	For other less serious crimes, the bill allows the complete judicial discretion to impose sentences that are concurrent or partially concurrent.	Same	Same
Sexual abuse and Sexual assault sentence mitigator	Added a statutory mitigating factor for sentencing in sexual assault and sexual abuse cases - that the defendant mitigated the effect of the crime on the victim by entering a plea of guilty or no contest within 30 days of arraignment in superior court.	No similar provision	No similar provision
Discovery in criminal cases: Notice of Defenses	Requires the defense to give notice of certain defenses (e.g. alibi, entrapment) 30 days before trial (current rules require 10 days notice). It also requires the defense to give notice of these defenses if they are likely to raise them, and requires the court to disallow the defense if notice is not given within 7 days of trial.	Same	No similar provision
Discovery in criminal cases: Sanctions	Clarifies that sanctions for discovery violations, such as failure to give notice of defenses discussed above, are in addition to other sanctions provided in the Criminal Rules.	Same	No similar provision

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Discovery in criminal cases: Expert witnesses	Requires the disclosure of expert witnesses at least 45 days before trial. Adopts an orderly procedure for disclosure of written reports of experts. The bill also provides sanctions for failure to comply with the rule. The court must exclude the testimony if disclosure is not made within 7 days of trial.	Same	No similar provision
Impeachment evidence	Admits evidence of a statement to be used as impeachment, if the statement was voluntary and not coerced, but suppressed because *Miranda v. Arizona* was violated. This would prevent a person from testifying falsely with impunity after a statement is suppressed.	Same	No similar provision
Impeachment evidence	Allows evidence illegally obtained (for example, taken as a result of a search that was later found to be flawed), to be used to impeach testimony, if the court finds that the evidence was not obtained in substantial violation of rights.	Same	No similar provision
Impeachment with prior conviction	Increases the time after a conviction that the conviction can be used for impeachment.	Same	No similar provision
Domestic violence reports	Allows a statement made within 24 hours of an alleged domestic violence offense to be admitted, as an exception to the hearsay rule.	Same	No similar provision
Bootlegging	No similar provision	No similar provision	Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system. Increases the penalty for bootleggers in urban areas who send alcohol to local option areas. Increases penalty to a class C felony for furnishing alcohol to minors in local options areas, and for sending large amounts of alcohol to local option areas. Strengthens the forfeiture law for bootlegging.
Drunk Driving	No similar provision	No similar provision	If a person has committed felony drunk driving, all later drunk driving offenses would be treated as felonies. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury. Prohibits the "big gulp" defense in drunk driving cases.
Protects Children from Juvenile Sex Offenders	No similar provision	No similar provision	Increases penalty for sexual abuse of young children by teenagers. Allows greater disclosure of information about juvenile sex offenders.

107 S.Ct. 1098
94 L.Ed.2d 267, 55 USLW 4232
(Cite as: 480 U.S. 228, 107 S.Ct. 1098)

Supreme Court of the United States

Earline MARTIN, Petitioner,
v.
OHIO.

No. 85-6461.

Argued Dec. 2, 1986.
Decided Feb. 25, 1987.
Rehearing Denied April 20, 1987.
See 481 U.S. 1024, 107 S.Ct. 1913.

Defendant was convicted in the Court of Common Pleas, Cuyahoga County, of aggravated murder, and she appealed. The Court of Appeals affirmed, and defendant moved for leave to appeal. The Ohio Supreme Court, Celebrezze, C.J., 21 Ohio St.3d 91, 488 N.E.2d 166, affirmed, and defendant petitioned for writ of certiorari. The Supreme Court, Justice White, held that: (1) trial court's instruction, that jurors could acquit defendant of aggravated murder if she proved by preponderance of evidence that she was acting in self- defense, did not violate due process by shifting burden of proof, and (2) Ohio practice, placing on defendant the burden of proving that she was acting in self-defense when she committed alleged murder, did not violate due process.

Affirmed.

Justice Powell dissented and filed opinion, in which Justice Brennan and Justice Marshall joined, and in which Justice Blackmun joined in part.

West Headnotes

[1] Constitutional Law ⚿268(11)
92k268(11) Most Cited Cases

[1] Criminal Law ⚿778(5)
110k778(5) Most Cited Cases

[1] Criminal Law ⚿822(11)
110k822(11) Most Cited Cases

Trial court's instruction, that jurors could acquit defendant of aggravated murder charge if defendant proved by preponderance of evidence that she was acting in self-defense, did not violate due process by shifting burden of proof, where trial court also instructed jurors that State had burden of establishing elements of aggravated murder beyond reasonable doubt; trial court's instructions, when read as whole, adequately conveyed to jury that all evidence, including evidence going to **self-defense**, had to be considered in deciding whether there was reasonable doubt about sufficiency of State's proof. U.S.C.A. Const.Amend. 14; Ohio R.C. § 2901.05(A).

[2] Constitutional Law ⚿266(7)
92k266(7) Most Cited Cases

[2] Homicide ⚿947
203k947 Most Cited Cases
(Formerly 203k151(3))

Ohio practice, placing on defendant the burden of proving that she was acting in self-defense when she committed alleged murder, did not violate due process. U.S.C.A. Const.Amend. 14; Ohio R.C. § 2901.05(A).

***1098 *228** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Under the Ohio Revised Code (Code), the burden of proving the elements of a criminal offense is upon the prosecution, but, for an **affirmative defense**, the burden of proof by a preponderance of

the evidence is placed on the accused. **Self-defense** is an **affirmative defense** under Ohio law and therefore must be proved by the defendant. Petitioner was charged by Ohio with aggravated murder, which is defined **1099 as "purposely, and with prior calculation and design, causing the death of another." She pleaded **self-defense**, and testified that she had shot and killed her husband when he came at her following an argument during which he had struck her. As to the crime itself, the jury was instructed (1) that, to convict, it must find, in light of all the evidence, that each of the elements of aggravated murder was proved by the State beyond reasonable doubt, and that the burden of proof with respect to those elements did not shift; and (2) that, to find guilt, it must be convinced that none of the evidence, whether offered by the State or by petitioner in connection with her self-defense plea, raised a reasonable doubt that she had killed her husband, that she had had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. However, as to self-defense, the jury was instructed that it could acquit if it found by a preponderance of the evidence that petitioner had proved (1) that she had not precipitated the confrontation with her husband; (2) that she honestly believed she was in imminent danger of death or great bodily harm and that her only means of escape was to use force; and (3) that she had satisfied any duty to retreat or avoid danger. The jury found her guilty, and both the Ohio Court of Appeals and Supreme Court affirmed the conviction, rejecting petitioner's Due Process Clause challenge which was based on the charge's placing on her the self-defense burden of proof. In reaching its decision, the State Supreme Court relied on *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

Held:

1. Neither Ohio law nor the above instructions violate the Due Process Clause of the Fourteenth Amendment by shifting to petitioner the State's burden of proving the elements of the crime. The instructions, when read as a whole, do not improperly suggest that self-defense evidence could not be considered in determining whether there was reasonable doubt about the sufficiency of the State's proof of the crime's elements. *229 Furthermore, simply because evidence offered to support self-defense might negate a purposeful killing by prior calculation and design does not mean that elements of the crime and self- defense impermissibly overlap, since evidence creating a reasonable doubt about any fact necessary for a finding of guilt could easily fall far short of proving self-defense by a preponderance of the evidence, but, on the other hand, a killing will be excused if self-defense is satisfactorily established even if there is no reasonable doubt in the jury's mind that the defendant is guilty. Pp. 1101-1103.

2. It is not a violation of the Due Process Clause for Ohio to place the burden of proving self-defense on a defendant charged with committing aggravated murder. There is no merit to petitioner's argument that it is necessary under Ohio law for the State to disprove self-defense since both unlawfulness and criminal intent are elements of serious offenses, while self- defense renders lawful that which would otherwise be a crime and negates a showing of criminal intent. The Court will follow Ohio courts that have rejected this argument, holding that unlawfulness in such cases is the conduct satisfying the elements of aggravated murder, and that the necessary mental state for this crime is the specific purpose to take life pursuant to prior calculation and design. Furthermore, the mere fact that all but two States have abandoned the common-law rule that affirmative defenses, including self- defense, must be proved by the defendant does not render that rule unconstitutional. The Court will follow *Patterson* and other of its decisions which allowed States to fashion their own affirmative-defense, burden-of-proof rules. Pp. 1102-1103.

21 Ohio St.3d 91, 488 N.E.2d 166 (1986), affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Parts I and III **1100 of which BLACKMUN, J., joined, *post*, p. ---.

James R. Willis argued the cause for petitioner. With him on the briefs was *Margery B. Koosed.*

George J. Sadd argued the cause for respondent. With him on the brief was *John J. Corrigan.**

* *Randall M. Dana, Gregory L. Ayers, Richard L.*

Aynes, Margery B. Koosed, and *J. Dean Carro* filed a brief for the Ohio Public Defender Commission as *amicus curiae* urging reversal.

***230** Justice WHITE delivered the opinion of the Court.

The Ohio Code provides that "[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof by a preponderance of the evidence, for an affirmative defense, is upon the accused." Ohio Rev.Code Ann. § 2901.05(A) (1982). An affirmative defense is one involving "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Ohio Rev.Code Ann. § 2901.05(C)(2) (1982). The Ohio courts have "long determined that self-defense is an affirmative defense," 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986), and that the defendant has the burden of proving it as required by § 2901.05(A) .

As defined by the trial court in its instructions in this case, the elements of self-defense that the defendant must prove are that (1) the defendant was not at fault in creating the situation giving rise to the argument; (2) the defendant had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of such force; and (3) the defendant did not violate any duty to retreat or avoid danger. App. 19. The question before us is whether the Due Process Clause of the Fourteenth Amendment forbids placing the burden of proving self-defense on the defendant when she is charged by the State of Ohio with committing the crime of aggravated murder, which, as relevant to this case, is defined by the Revised Code of Ohio as "purposely, and with prior calculation and design, caus[ing] the death of another." Ohio Rev.Code Ann. § 2903.01 (1982).

The facts of the case, taken from the opinions of the courts below, may be succinctly stated. On July 21, 1983, petitioner Earline Martin and her husband, Walter Martin, ***231** argued over grocery money. Petitioner claimed that her husband struck her in the head during the argument. Petitioner's version of what then transpired was that she went upstairs, put on a robe, and later came back down with her husband's gun which she intended to dispose of. Her husband saw something in her hand and questioned her about it. He came at her, and she lost her head and fired the gun at him. Five or six shots were fired, three of them striking and killing Mr. Martin. She was charged with and tried for aggravated murder. She pleaded self-defense and testified in her own defense. The judge charged the jury with respect to the elements of the crime and of self-defense and rejected petitioner's Due Process Clause challenge to the charge placing on her the burden of proving self-defense. The jury found her guilty.

Both the Ohio Court of Appeals and the Supreme Court of Ohio affirmed the conviction. Both rejected the constitutional challenge to the instruction requiring petitioner to prove self-defense. The latter court, relying upon our opinion in *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), concluded that the State was required to prove the three elements of aggravated murder but that *Patterson* did not require it to disprove self-defense, which is a separate issue that did not require Mrs. Martin to disprove any element of the offense with which she was charged. The court said, "the state proved beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the death of her husband. Appellant did not dispute the existence of these elements, but rather sought to justify ****1101** her actions on grounds she acted in self defense." 21 Ohio St.3d, at 94, 488 N.E.2d, at 168. There was thus no infirmity in her conviction. We granted certiorari, 475 U.S. 1119, 106 S.Ct. 1634, 90 L.Ed.2d 180 (1986), and affirm the decision of the Supreme Court of Ohio.

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), declared that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact ***232** necessary to constitute the crime with which he is charged." A few years later, we held that *Winship* 's mandate was fully satisfied where the State of New York had proved beyond reasonable doubt each of the elements of murder,

but placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance, which, if proved, would have reduced the crime from murder to manslaughter. *Patterson v. New York, supra.* We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion. 432 U.S., at 201-202, 97 S.Ct., at 2322. New York had the authority to define murder as the intentional killing of another person. It had chosen, however, to reduce the crime to manslaughter if the defendant proved by a preponderance of the evidence that he had acted under the influence of extreme emotional distress. To convict of murder, the jury was required to find beyond a reasonable doubt, based on all the evidence, including that related to the defendant's mental state at the time of the crime, each of the elements of murder and also to conclude that the defendant had not proved his affirmative defense. The jury convicted Patterson, and we held there was no violation of the Fourteenth Amendment as construed in *Winship.* Referring to *Leland v. Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), and *Rivera v. Delaware,* 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), we added that New York "did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause" and declined to reconsider those cases. 432 U.S., at 206, 207, 97 S.Ct., at 2324, 2325. It was also observed that "the fact that a majority of the States have now assumed the burden of disproving affirmative defenses--for whatever reasons--[does not] mean that those States that strike a different balance are in violation of the Constitution." *Id.,* at 211, 97 S.Ct., at 2327.

***233** [1] As in *Patterson,* the jury was here instructed that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated murder has been proved by the State beyond reasonable doubt, and that the burden of proof with respect to these elements did not shift. To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by Martin in connection with her plea of self-defense, raised a reasonable doubt that Martin had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. It was also told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger. The jury convicted Martin.

We agree with the State and its Supreme Court that this conviction did not violate the Due Process Clause. The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her **self-defense** evidence raised a reasonable ****1102** doubt about the State's proof that she purposefully killed with prior calculation and design. She nevertheless had the opportunity under state law and the instructions given to justify the killing and show herself **to be** blameless by proving that she acted in **self-defense.** The jury thought she had failed to do so, and Ohio is as entitled to punish Martin as one guilty of murder as New York was to punish Patterson.

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.,* that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance ***234** standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship* 's mandate. 397 U.S., at 364, 90 S.Ct., at 1072. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. It may be that most encounters in which self- defense is claimed arise suddenly and involve no prior plan or specific

purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established. We note here, but need not rely on, the observation of the Supreme Court of Ohio that "[a]ppellant did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense." 21 Ohio St.3d, at 94, 488 N.E.2d, at 168. [FN*]

> FN* The dissent believes that the self-defense instruction might have led the jury to believe that the defendant had the burden of proving the absence of prior calculation and design. Indeed, its position is that *no* instruction could be clear enough not to mislead the jury. As is evident from the text, we disagree. We do not harbor the dissent's mistrust of the jury; and the instructions were sufficiently clear to convey to the jury that the State's burden of proving prior calculation did not shift and that self-defense evidence had to be considered in determining whether the State's burden had been discharged. We do not depart from *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), in this respect, or in any other.

***235** Petitioner submits that there can be no conviction under Ohio law unless the defendant's conduct is unlawful, and that because self-defense renders lawful what would otherwise be a crime, unlawfulness is an element of the offense that the state must prove by disproving self-defense. This argument founders on state law, for it has been rejected by the Ohio Supreme Court and by the Court of Appeals for the Sixth Circuit. *White v. Arn,* 788 F.2d 338, 346-347 (1986); *State v. Morris,* 8 Ohio App.3d 12, 18-19, 455 N.E.2d 1352, 1359-1360 (1982). It is true that unlawfulness is essential for conviction, but the Ohio courts hold that the unlawfulness in cases like this is the conduct satisfying the elements of aggravated murder--an interpretation of state law that we are not in a position to dispute. The same is true of the claim that it is necessary to prove a "criminal" intent to convict for serious crimes, which cannot ****1103** occur if self-defense is shown: the necessary mental state for aggravated murder under Ohio law is the specific purpose to take life pursuant to prior calculation and design. See *White v. Arn, supra,* at 346.

[2] As we noted in *Patterson,* the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. "This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." 432 U.S., at 202, 97 S.Ct., at 2322. Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale ***236** L.J. 880, 882, and n. 10 (1968). We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of **self-defense** when it is properly raised by the defendant. But the question remains whether those States are in violation of the **Constitution**; and, as we observed in *Patterson,* that question is not answered by cataloging the practices of other States. We are no more convinced that the Ohio practice of requiring **self-defense to be** proved by the defendant is unconstitutional than we are that the **Constitution** requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity. We have had the opportunity to depart from *Leland v. Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), but have refused to do so. *Rivera v. Delaware,* 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976). These cases were important to the *Patterson* decision and they, along

with *Patterson*, are authority for our decision today.

The judgment of the Ohio Supreme Court is accordingly

Affirmed.

Justice POWELL, with whom Justice BRENNAN and Justice MARSHALL join, and with whom Justice BLACKMUN joins with respect to Parts I and III, dissenting.

Today the Court holds that a defendant can be convicted of aggravated murder even though the jury may have a reasonable doubt whether the accused acted in self-defense, and thus whether he is guilty of a crime. Because I think this decision is inconsistent with both precedent and fundamental fairness, I dissent.

I

Petitioner Earline Martin was tried in state court for the aggravated murder of her husband. Under Ohio law, the elements of the crime are that the defendant has purposely killed another with "prior calculation and design." Ohio Rev.Code Ann. § 2903.01 (1982). Martin admitted that she *237 shot her husband, but claimed that she acted in **self-defense**. Because **self-defense** is classified as an "**affirmative" defense** in Ohio, the jury was instructed that Martin had the burden of proving her claim by a preponderance of the evidence. Martin apparently failed to carry this burden, and the jury found her guilty.

The Ohio Supreme Court upheld the conviction, relying in part on this Court's opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The Court today also relies on the *Patterson* reasoning in affirming the Ohio decision. If one accepts *Patterson* as the proper method of analysis for this case, I believe that the Court's opinion ignores its central meaning.

In *Patterson*, the Court upheld a state statute that shifted the burden of proof for an affirmative defense to the accused. New York law required the prosecutor to prove all of the statutorily defined elements of murder beyond a reasonable doubt, but permitted a defendant to reduce **1104 the charge to manslaughter by showing that he acted while suffering an "extreme emotional disturbance." See N.Y.Penal Law §§ 125.25, 125.20 (McKinney 1975 and Supp.1987). The Court found that this burdenshifting did not violate due process, largely because the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder." 432 U.S., at 207, 97 S.Ct., at 2325. The clear implication of this ruling is that when an affirmative defense *does* negate an element of the crime, the state may not shift the burden. See *White v. Arn*, 788 F.2d 338, 344-345 (CA6 1986). In such a case, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), requires the state to prove the nonexistence of the defense beyond a reasonable doubt.

The reason for treating a defense that negates an element of the crime differently from other affirmative defenses is plain. If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is instructed *238 that the defendant has the burden of *dis* proving one of those same elements, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction. [FN1]

FN1. Indeed, this type of instruction has an inherently illogical aspect. It makes no sense to say that the prosecution has the burden of proving an element beyond a reasonable doubt, *and* that the defense has the burden of proving the contrary by a preponderance of the evidence. If the jury finds that the prosecutor has *not* met his burden, it of course will have no occasion to consider the affirmative defense. And

> if the jury finds that each element of the crime *has* been proved beyond a reasonable doubt, it necessarily has decided that the defendant has not disproved an element of the crime. In either situation the instructions on the affirmative defense are surplusage.
> Because a reasonable jury will attempt to ascribe some significance to the court's instructions, the likelihood that it will impermissibly shift the burden is increased.
> Of course, whether the jury will in fact improperly shift the burden away from the state is uncertain. But it is "settled law ... that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Francis v. Franklin,* 471 U.S. 307, 323, n. 8, 105 S.Ct. 1965, 1976, n. 8, 85 L.Ed.2d 344 (1985).

Given these principles, the Court's reliance on *Patterson* is puzzling. Under Ohio law, the element of "prior calculation and design" is satisfied only when the accused has engaged in a "definite process of reasoning *in advance* of the killing," *i.e.,* when he has given the plan at least some "studied consideration." App. 14 (jury instructions) (emphasis added). In contrast, when a defendant such as Martin raises a claim of ***239** self-defense, the jury also is instructed that the accused must prove that she "had an honest belief that she was in *imminent* danger of death or great bodily harm." [FN2] *Id.,* at 19 (emphasis added). In many cases, a defendant who finds himself in immediate danger and reacts with deadly force will not have formed a prior intent to kill. The Court recognizes this when it states:

> FN2. The accused also must have avoided the danger if possible, and must not have been at fault in creating the threatening situation. See *State v. Robbins,* 58 Ohio St.2d 74, 79-80, 388 N.E.2d 755, 758 (1979).

"It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior ****1105** calculation and design...." *Ante,* at 1102.

Under *Patterson,* this conclusion should suggest that Ohio is precluded from shifting the burden as to self-defense. The Court nevertheless concludes that Martin was properly required to prove self-defense, simply because "Ohio does not shift to the defendant the burden of disproving any element of the State's case." *Ibid.*

The Court gives no explanation for this apparent rejection of *Patterson.* The only justification advanced for the Court's decision is that the jury could have used the evidence of self-defense to find that the State failed to carry its burden of proof. Because the jurors were free to consider both Martin's and the State's evidence, the argument goes, the verdict of guilt necessarily means that they were convinced that the defendant acted with prior calculation and design, and were unpersuaded that she acted in self-defense. *Ante,* at 1101. The Court thus seems to conclude that as long as the jury is told that the state has the burden of proving all elements of the crime, the overlap between the offense and defense is immaterial.

***240** This reasoning is flawed in two respects. First, it simply ignores the problem that arises from inconsistent jury instructions in a criminal case. The Court's holding implicitly assumes that the jury in fact understands that the ultimate burden remains with the prosecutor at all times, despite a conflicting instruction that places the burden on the accused to disprove the same element. But as pointed out above, the *Patterson* distinction between defenses that negate an element of the crime and those that do not is based on the legitimate concern that the jury *will* mistakenly lower the state's burden. In short, the Court's rationale fails to explain why the overlap in this case does not create the risk that *Patterson* suggested was unacceptable. [FN3]

> FN3. This risk could have been reduced--although in my view, not eliminated--if the instructions had made it clear that evidence of self- defense can create a reasonable doubt as to guilt, *even if* that same evidence did not rise to the level necessary to prove an affirmative defense.

> But the instructions gave little guidance in this respect. The trial court simply told the jury that the prosecution must prove the elements of the crime, and the defendant must prove the existence of the defense. The instructions gave no indication how the jury should evaluate evidence that affected an element of *both* the crime and the defense. Cf. *Francis v. Franklin, supra,* 471 U.S., at 322, 105 S.Ct., at 1975 ("Nothing in these specific sentences or in the [jury] charge as a whole makes clear ... that one of these contradictory instructions carries more weight than the other").

Second, the Court significantly, and without explanation, extends the deference granted to state legislatures in this area. Today's decision could be read to say that virtually all state attempts to shift the burden of proof for affirmative defenses will be upheld, regardless of the relationship between the elements of the defense and the elements of the crime. As I understand it, *Patterson* allowed burdenshifting because evidence of an extreme emotional disturbance did not negate the *mens rea* of the underlying offense. After today's decision, however, even if proof of the defense *does* negate an element of the offense, burdenshifting still may be ***241** permitted because the jury can consider the defendant's evidence when reaching its verdict.

I agree, of course, that States must have substantial leeway in defining their criminal laws and administering their criminal justice systems. But none of our precedents suggests that courts must give complete deference to a State's judgment about whether a shift in the burden of proof is consistent with the presumption of innocence. In the past we have emphasized that in some circumstances it may be necessary to look beyond the text of the State's burden-shifting laws to satisfy ourselves that the requirements of *Winship* have been satisfied. In *Mullaney v. Wilbur,* 421 U.S. 684, 698-699, 95 S.Ct. 1881, 1889, 44 L.Ed.2d 508 (1975) we explicitly noted the danger of granting the State ****1106** unchecked discretion to shift the burden as to any element of proof in a criminal case. [FN4] The Court today fails to discuss or even cite *Mullaney,* despite our unanimous agreement in that case that this danger would justify judicial intervention in some cases. Even *Patterson,* from which I dissented, recognized that "there are obviously constitutional limits beyond which the States may not go [in labeling elements of a crime as an affirmative defense]." [FN5] 432 U.S., at 210, 97 S.Ct., at 2327. Today, however, the Court simply asserts that Ohio law properly allocates the burdens, without giving any indication of where those limits lie.

> FN4. We noted, for example:
> "[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S., at 698, 95 S.Ct., at 1889.

> FN5. See also *McMillan v. Pennsylvania,* 477 U.S. 79, 86, 106 S.Ct. 2411, 2416, 91 L.Ed.2d 67 (1986) ("[I]n certain limited circumstances *Winship* 's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged").

Because our precedent establishes that the burden of proof may not be shifted when the elements of the defense and the elements of the offense conflict, and because it seems clear ***242** that they do so in this case, I would reverse the decision of the Ohio Supreme Court.

II

Although I believe that this case is wrongly decided even under the principles set forth in *Patterson,* my differences with the Court's approach are more fundamental. I continue to believe that the better method for deciding when a State may shift the burden of proof is outlined in the Court's opinion in *Mullaney* and in my dissenting opinion in *Patterson.* In *Mullaney,* we emphasized that the state's obligation to prove certain facts beyond a

reasonable doubt was not necessarily restricted to legislative distinctions between offenses and affirmative defenses. The boundaries of the state's authority in this respect were elaborated in the *Patterson* dissent, where I proposed a two-part inquiry:

> "The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence.... It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof." 432 U.S., at 226-227, 97 S.Ct., at 2335 (footnotes omitted).

Cf. *McMillan v. Pennsylvania,* 477 U.S. 79, 103, 106 S.Ct. 2411, 2425, 91 L.Ed.2d 67 (1986) (STEVENS, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*").

There are at least two benefits to this approach. First, it ensures that the critical facts necessary to sustain a conviction will be proved by the state. Because the Court would ***243** be willing to look beyond the text of a state statute, legislatures would have no incentive to redefine essential elements of an offense to make them part of an affirmative defense, thereby shifting the burden of proof in a manner inconsistent with *Winship* and *Mullaney.* Second, it would leave the states free in all other respects to recognize new factors that may mitigate the degree of criminality or punishment, without requiring that they also bear the burden of disproving these defenses. ****1107** See *Patterson v. New York,* 432 U.S., at 229-230, 97 S.Ct., at 2336-2337 (POWELL, J., dissenting) ("New ameliorative affirmative defenses ... generally remain undisturbed by the holdings in *Winship* and *Mullaney* " (footnote omitted)).

Under this analysis, it plainly is impermissible to require the accused to prove self-defense. If petitioner could have carried her burden, the result would have been decisively different as to both guilt and punishment. There also is no dispute that self-defense historically is one of the primary justifications for otherwise unlawful conduct. See, *e.g., Beard v. United States,* 158 U.S. 550, 562, 15 S.Ct. 962, 966, 39 L.Ed. 1086 (1895). Thus, while I acknowledge that the two-part test may be difficult to apply at times, it is hard to imagine a more clear-cut application than the one presented here.

III

In its willingness to defer to the State's legislative definitions of crimes and defenses, the Court apparently has failed to recognize the practical effect of its decision. Martin alleged that she was innocent because she acted in self-defense, a complete justification under Ohio law. See *State v. Nolton,* 19 Ohio St.2d 133, 249 N.E.2d 797 (1969). Because she had the burden of proof on this issue, the jury could have believed that it was just as likely as not that Martin's conduct was justified, and yet still have voted to convict. In other words, even though the jury may have had a substantial doubt whether Martin committed a crime, she was found guilty under Ohio law. I do not agree that the Court's authority ***244** to review state legislative choices is so limited that it justifies increasing the risk of convicting a person who may not be blameworthy. See *Patterson v. New York, supra,* 432 U.S., at 201-202, 97 S.Ct., at 2322 (state definition of criminal law must yield when it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (quoting *Speiser v. Randall,* 357 U.S. 513, 523, 78 S.Ct. 1332, 1340, 2 L.Ed.2d 1460 (1958))). The complexity of the inquiry as to when a State may shift the burden of proof should not lead the Court to fashion simple rules of deference that could lead to such unjust results.

107 S.Ct. 1098, 480 U.S. 228, 94 L.Ed.2d 267, 55 USLW 4232

Briefs and Other Related Documents (Back to top)

- 1986 WL 728123 (Appellate Brief) Reply Brief of Petitioner (Nov. 17, 1986)

• 1986 WL 728122 (Appellate Brief) Respondent's Brief on the Merits (Sep. 12, 1986)

• 1986 WL 728121 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for Ohio Public Defender Commission as Amicus Curiae in Support of Petitioner (Jul. 11, 1986)

• 1986 WL 728120 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for Ohio Public Defender Commission as Amicus Curiae in Support of Petitioner (Mar. 31, 1986)

• 1985 WL 669489 (Appellate Brief) Petitioner's Brief on the Merits (Oct. Term 1985)

END OF DOCUMENT

STATE of Alaska, Petitioner,

v.

Peter ANDREWS, Sr., Respondent.

Peter ANDREWS, Sr., Appellant,

v.

STATE of Alaska, Appellee.

George R. KOENIG, Appellant,

v.

STATE of Alaska, Appellee.

Nos. A-468, A-492 and A-552.

Court of Appeals of Alaska.

Sept. 6, 1985.

Teacher's aide was convicted in the Superior Court, Dillingham County, Eben H. Lewis, J., of four counts of sexual abuse of minor and seven counts of sexual assault in first degree. The State petitioned for review and appeal and aide cross-appealed. In a separate prosecution, teacher was convicted in the Superior Court, Palmer County, James A. Hanson, J., of one count of sexual abuse of minor in first degree and two counts in second degree, and he appealed. Appeals were consolidated. The Court of Appeals, Singleton, J., held that statutory provisions governing consecutive and concurrent sentencing of defendant who has been convicted of two or more crimes express preference for consecutive sentences which trial court has discretion to reject.

Case A-468 affirmed; A-492 dismissed; A-552 vacated and remanded.

1. Criminal Law ⇐1210(3)

AS 12.55.025(e, g), governing consecutive and concurrent sentencing where defendant has been convicted of two or more crimes, expresses preference for consecutive sentences for crimes of sexual assault, which trial court has discretion to reject in appropriate circumstances. Const. Art. 1, § 12; AS 11.41.434(a)(1), 11.41.436(a)(2), 11.41.440(a)(2), 12.55.005; AS 11.41.410(a)(3) (Repealed).

2. Criminal Law ⇐1206

Purported repeal of AS 12.55.025(e), governing consecutive sentencing for defendant who has been convicted of two or more crimes, was obvious result of drafting error, as recognized in commentary, and should be disregarded by Court of Appeals.

3. Statutes ⇐154

Designation of act to be repealed will not effect repeal of that act where, due to clerical mistake, wrong act was named.

4. Statutes ⇐241(1)

Ambiguities in criminal statutes must be narrowly read and construed strictly against government, whether provisions govern sentencing or define crimes.

5. Statutes ⇐241(1)

Under "rule of lenity," statute establishing penalty which is susceptible of more than one meaning should be construed so as to provide most lenient penalty.

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

6. Statutes ⇐190

Statute which is susceptible of two or more conflicting but reasonable meanings is "ambiguous."

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

7. Criminal Law ⇐1210(2)

Trial judge had limited discretion to give defendant concurrent rather than consecutive sentences, despite conviction of multiple sexual assaults. AS 11.41.440 (a)(2); AS 11.41.410(a)(3)(Repealed).

8. Criminal Law ⇐1206.3(1)

Legislature intended that revised code create reasonable uniformity and eliminate unjustified disparity in sentences and, thus, established somewhat rigid sentencing framework. AS 12.55.005.

9. Criminal Law ⇐1208.1(1)

Statutory goal found in AS 12.55.005, which enumerates considerations in imposing sentence, is that those whose criminal conduct is roughly identical should receive essentially similar sentences.

10. Criminal Law ⇐1208.1(2)

Person who commits ten sexual assaults should receive more severe sentence than person convicted of single incident, but he should not be punished ten times as severely. Const. Art. 1, § 12; AS 11.41.434 (a)(1), 11.41.436(a)(2), 11.41.440(a)(2), 12.55.-005; AS 11.41.410(a)(3) (Repealed).

11. Criminal Law ⇐1208.1(3)

AS 12.55.125(f, g), governing suspension of sentences and reduction of term of imprisonment for felonies, requires only that person sentenced at time for two or more crimes each of which is subject to presumptive sentence must receive sentence at least equal to most severe presumptive sentence when adjusted to reflect aggravating or mitigating factors.

12. Infants ⇐20

Defendant, convicted of sexual abuse of minors in first and second degrees, was properly given aggravated sentence, although case was not sufficiently aggravated to warrant maximum sentence or sentences, where victims were eight and nine years of age, defendant was public school teacher with position of authority over victims, he was convicted of offenses involving multiple victims, and trial court properly considered uncharged offenses verified in record. AS 11.41.434(a)(1), 11.41.-436(a)(2), 12.55.155(c)(5); AS 11.41.-410(a)(4)(A) (Repealed).

13. Criminal Law ⇐986.2(1)

Proof of aggravating factors by clear and convincing evidence, while necessary condition for aggravated sentence, is not sufficient for that purpose but, rather, trial court must consider totality of defendant's conduct in light of his past record and future prospects. AS 12.55.005.

14. Criminal Law ⇐986.2(4)

In imposing sentence for sexual abuse, court should consider defendant's history of violent or sexually-abusive behavior with victim named in indictment, as well as similar conduct directed at other victims that has been verified in record. AS 11.41.-434(a)(1), 11.41.436(a)(2); AS 11.41.410(a)(3) (Repealed).

15. Criminal Law ⇐986.2(1)

In determining appropriate incremental increase in sentencing defendant for identical but separate criminal episodes, trial court should consider totality of defendant's conduct in comparison with totality of conduct of other sentenced offenders discussed in reported case.

16. Assault and Battery ⇐100

Sentencing range of ten to 15 years for aggravated sexual assaults involving both adult and child victims is warranted, whether aggravation is found because of multiple victims, multiple assaults on single victim, or serious injuries to one or more victims.

17. Assault and Battery ⇐100
Infants ⇐20

In aggravated cases of sexual assault in first degree, or sexual abuse of minor in first degree, by second and third felony offenders, sentences slightly higher than presumptive sentences of 15 and 25 years would be appropriate. AS 12.55.125(i), 12.-55.155.

18. Infants ⇐20

On remand, defendant's sentence for one count of sexual abuse of minor in first degree and two counts of sexual abuse of minor in second degree, whether involving concurrent or consecutive increments, should not exceed 20 years with five years suspended. AS 11.41.434(a)(1), 11.41.-436(a)(2), 12.55.025(e, g).

Cynthia M. Hora, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for petitioner in No. A-468, and appellee in No. A-492.

John M. Murtaugh, Anchorage, for respondent in No. A–468, and appellant in No. A–492.

Laurel J. Peterson, Anchorage, for appellant in No. A–552.

Michael N. White, Dist. Atty., Palmer, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee in No. A–552.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Peter Andrews, Sr., and George R. Koenig are school teachers. In unrelated prosecutions, each was convicted of multiple counts of sexual abuse and sexual assault on their elementary school female pupils. Andrews and Koenig are first offenders. Neither has a juvenile or adult criminal record. Andrews received concurrent sentences totaling eight years' imprisonment, and Koenig received consecutive sentences totaling forty years with twenty years suspended. Koenig's sentences were based in part on the trial court's conclusion that consecutive sentences were mandatory when a defendant is convicted of multiple counts of sexual assault involving different victims. AS 12.55.025(e). Andrews' sentences were based in part on an opposite conclusion by the trial court in his case.

[1] The primary issue in each appeal is the proper interpretation of AS 12.55.025(e) and (g). On our own motion, we have therefore consolidated them for decision. In Andrews' case, the state contends that where an individual is convicted of multiple counts of sexual assault, he must receive consecutive sentences, at least where his sexual abuse involves separate victims. In contrast, Andrews argues that the legislature has expressed a preference for consecutive sentences but that the trial court has discretion to reject that preference in an appropriate case. Judge Lewis accepted Andrews' argument below and sentenced Andrews to concurrent terms. The state has petitioned for review and we consider the issue of sufficient importance to warrant our granting review.[1] In Koenig's case, Judge Hanson was of the view that consecutive sentences were mandatory. He therefore gave Koenig consecutive sentences. Koenig appeals, contending that those sentences were excessive. We have carefully reviewed the record and conclude that AS 12.55.025(e) and (g) express a preference for consecutive sentences which a trial court has discretion to reject in appropriate circumstances. We therefore affirm Andrews' sentences and vacate Koenig's sentences, remanding his case for resentencing. We also set out some guidelines to be applied to Koenig in resentencing. We set out the relevant facts regarding each of these two defendants and then proceed to a discussion of the issues.

ANDREWS

Peter Andrews, Sr., was convicted of four counts of sexual abuse of a minor, a class C felony, former AS 11.41.440(a)(2),[2] and seven counts of sexual assault in the first degree, an unclassified felony, former

1. In addition, Andrews has cross-appealed, arguing that one of the five-year maximum sentences he received for sexual abuse of a minor was excessive. He asks that we reach this issue only in the event we rule against him on the issue of consecutive sentences. Our disposition makes it unnecessary to address this issue further.

2. Former AS 11.41.440(a)(2) provided, in relevant part:

> A person commits the crime of sexual abuse of a minor if, being 16 years of age or older, he engages in ... sexual contact with a person who is under 13 years of age....

Former AS 11.81.900(b)(51) defined "sexual contact" as:

> (A) the intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus, or female breast; or
>
> (B) the defendant's intentionally causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast.

Alaska Statute 12.55.125(e) provides: "A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years...."

AS 11.41.410(a)(3).[3] Andrews was sentenced to five years for each count of sexual abuse and eight years (the presumptive term) for each count of first-degree sexual assault; all terms were imposed concurrently.

The charges against Andrews involved three victims: K.E. (age nine), L.K. (age ten) and D.M. (age ten). All the offenses took place between November 1, 1982, and June 21, 1983, mainly at the village school in Aleknagik, where Andrews worked as a teacher's aide. The only incident involving K.E. was one in which Andrews touched her breasts and vaginal area. L.K. was subjected to digital penetration on at least two occasions as well as less serious sexual contact similar to that suffered by K.E. In addition to less serious contact, D.M., the third victim, was subjected to digital and penile penetration of her anus, and digital, penile and oral penetration of her vagina. L.K. told police that the penile penetration hurt her and on at least one occasion made her bleed. Andrews' contact with D.M. was the most extensive. Andrews would take D.M. into the language lab, both during school and when school was not in session. Sometimes he would cover her mouth to keep her from yelling. On at least one occasion, Andrews enticed D.M. to his home and abused her. He also arranged for D.M. to work for him, so he could engage in sexual conduct more freely. Andrews apparently gave money or candy to his victims, but at no time threatened them with physical harm.

Andrews is a well-respected member of the Aleknagik community. He has served as mayor and, at the time of his arrest, was a member of the city council. In addition to his work as a teacher's aide at the school, Andrews has also served as a lay minister for the Moravian Church and has been employed as a fisherman. Andrews is in poor health. He has had multiple tumors removed from his bladder and will probably need ongoing medical treatment. Andrews was fifty-nine years of age at the time of sentencing. His formal education ended with the eighth grade. He is married and has thirteen children, six of whom continue to live with him. Andrews was honorably discharged from the United States Army.

Judge Lewis carefully considered the *Chaney* criteria. *State v. Chaney*, 477 P.2d 441 (Alaska 1970). He recognized the state's argument that consecutive sentences were mandatory under AS 12.55.025(e) and (g), but concluded that when read together with article I, section 12 of the Alaska Constitution,[4] and AS 12.55.005,[5] the statute permits imposition of con-

3. Former AS 11.41.410 provided, in relevant part:

> A person commits the crime of sexual assault in the first degree if, ... being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age....

Former AS 11.81.900(b)(52) defined sexual penetration as:

> genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body; each party to any of the acts defined as "sexual penetration" is considered to be engaged in sexual penetration.

At the time of Andrews' offenses, AS 12.55.125(i) provided:

> A defendant convicted of sexual assault in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155–12.55.175:
>
> (1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;
>
> (2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;
>
> (3) if the offense is a second felony conviction, 15 years;
>
> (4) if the offense is a third felony conviction, 25 years.

4. Alaska Constitution, article I, section 12 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.

5. Alaska Statute 12.55.005 provides:

> The purpose of this chapter is to provide the means for determining the appropriate sen-

current sentences under some circumstances. He concluded that while there was a statutory preference for consecutive sentences, the legislature has given trial courts discretion to reject that preference where necessary to serve the defendant's rehabilitation and the protection of the community. The court noted that in light of Andrews' age and poor health, a sentence in excess of eight years would be a virtual life sentence. The court therefore concluded that on the peculiar facts of this case, concurrent sentences requiring that Andrews serve no more than eight years' incarceration would fully satisfy all of the statutory requirements.

In reaching this conclusion, Judge Lewis did not minimize the significance of Andrews' offenses. He noted that Andrews, as a teacher and community leader, had the respect and confidence of his victims and, in effect, abused a trust in subjecting them to sexual abuse. He further noted that Andrews exhibited no remorse and that, despite the jury verdicts, Andrews refused to acknowledge any guilt or responsibility, characterizing his touching of the victims as normal activity between teacher and student. Finally, Judge Lewis recognized, in part based upon his observation of the demeanor of the victims as they testified, that they had all suffered substantial psychological injury and would probably require extensive counseling in the future in order to have any hope of a psychologically healthy adult life.

KOENIG

George R. Koenig was thirty-three years of age at the time of his offenses. He has a master's degree in philosophy and was the music and language teacher at a Wasilla grammar school. Koenig was initially charged with sixteen counts of sexual abuse and sexual assault involving eight victims: S.L.F. (age nine); K.L.M. (age nine); M.A.S. (age twelve); D.M.I. (age eight); J.L.S. (age nine); G.L.H. (age eleven); E.E. (age eight); and H.D.K. (age eight). As part of a plea agreement, Koenig entered a plea of *nolo contendere* to three charges, and the state dismissed the other thirteen with the understanding that it could bring out evidence regarding all sixteen offenses at sentencing. Koenig was therefore convicted of one count of sexual abuse of a minor in the first degree, an unclassified felony, AS 11.41.434(a)(1), based upon digital penetration of H.D.K., and two counts of sexual abuse of a minor in the second degree, a class B felony, AS 11.41.436(a)(2), based upon, respectively, the touching of K.L.M.'s vagina and the touching of E.E.'s breasts.[6] Koenig was sentenced to twenty years with ten suspended on the first-degree sexual abuse conviction, and ten years with five suspended on each of the second-degree sexual abuse convictions. All three sentences

tence to be imposed on conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

(1) the seriousness of the defendant's present offense in relation to other offenses;

(2) the prior criminal history of the defendant and the likelihood of rehabilitation;

(3) the need to confine the defendant to prevent further harm to the public;

(4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;

(5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; and

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms.

6. Alaska Statute 11.41.434(a)(1) provides in relevant part:

> An offender commits the crime of sexual abuse of a minor in the first degree if ... being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age....

Alaska Statute 11.41.436(a)(2) provides in relevant part:

> An offender commits the crime of sexual abuse of a minor in the second degree if ... being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age....

were made consecutive, so that Koenig received a total sentence of forty years with twenty years suspended.

Judge Hanson considered a number of factors in framing the sentence as he did. First, he concluded the consecutive sentences were mandatory for sexual assaults involving separate victims under AS 12.55.025(e) and (g). Second, he noted that Koenig had abused a position of trust since he was a school teacher and since all of the acts of sexual abuse occurred during school hours. Third, he recognized that Koenig's victims in the offenses to which he pled were particularly young, eight and nine years of age, and therefore vulnerable. *See* AS 12.55.155(c)(5). Finally, he noted a report by Dr. Rothrock, a psychiatrist, that Koenig was a pedophile and that his prognosis for rehabilitation was guarded. These factors led Judge Hanson to conclude that Koenig's conduct was the worst contemplated within the definitions of the offenses charged. AS 12.55.155(c)(10). Because two aggravating factors were found, Judge Hanson was not limited by the eight-year presumptive term prescribed for the single count of first-degree sexual abuse.

In Koenig's favor, Judge Hanson noted that Koenig's offenses involved sexual touching including digital penetration but no genital intercourse, that Koenig was a hard worker, that he was a well-educated, intelligent man, and that he had expressed a substantial amount of remorse and actively sought treatment in the hope it would cure his sexual predilection for small children.

DISCUSSION

I.

The primary question presented by this appeal is the proper interpretation of AS 12.55.025(e) and (g). The statute provides:

> (e) Except as provided in (g) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment shall provide that the imprisonment commences at the expiration of the term imposed by the previous judgment.
>
> . . . . . .
>
> (g) If the defendant has been convicted of two or more crimes before the judgment on either has been entered, any sentences of imprisonment may run concurrently if
>
> (1) the crimes violate similar societal interests;
>
> (2) the crimes are part of a single, continuous criminal episode;
>
> (3) there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property right offended, or the persons offended;
>
> (4) the crimes were not committed while the defendant attempted to escape or avoid detection or apprehension after the commission of another crime;
>
> (5) the sentence is not for a violation of AS 11.41.100–11.41.470; or
>
> (6) the sentence is not for a violation of AS 11.41.500–11.41.530 that results in physical injury or serious physical injury as those terms are defined in AS 11.81.900.

Alaska Statute 12.55.025(e) requires consecutive sentences in all cases subject to exceptions defined in (g), which contains six subparagraphs. The first three subparagraphs, (1)–(3), identify three situations in which concurrent sentences have been traditionally imposed. *Cf.* former AS 12.55.145(a)(3) (considering prior offenses committed under similar circumstances a single prior offense for purposes of presumptive sentencing). The problem arises because the last three subparagraphs, (4)–(6), are phrased in the negative and appear to describe situations in which the legislature may not have wished concurrent sentences, yet the drafter placed all six subparagraphs in the disjunctive. This grammatical structure suggests that each subparagraph should be considered an independent basis for permitting concurrent sentences. Read in this literal fashion, however, the

statute would permit imposition of concurrent sentences in almost every case, since the conduct need only satisfy one of the six subparagraphs, and three of them are in the negative. In *Griffith v. State*, 675 P.2d 662 (Alaska App.1984), we accepted a stipulation of the parties, ignored the disjunctive "or", and construed the three final subparagraphs as exceptions to the exceptions, *i.e.*, as situations in which the general rule precluding concurrent sentences would apply. We noted, however, the ambiguity inherent in this awkward grammatical structure, thereby indicating that interpretational problems would have existed in the absence of the parties' stipulation.

A.

Before construing AS 12.55.025(g) and considering the parties' arguments, it is necessary to reach a preliminary point. In the revisor's notes to AS 12.55.025, it is stated:

> Alaska Statute 12.55.025(e) was amended by § 24, Ch. 143, SLA 1982 and purportedly repealed by § 42, Ch. 143, SLA 1982. The repeal in § 42 was apparently a drafting error. *See* House Journal Supplement No. 63, (dated June 1, 1982), page 18.

Andrews argues that the repeal, though perhaps an oversight, must be given full force and effect. He further argues that paragraph (e) governs paragraph (g), and that if (e) was repealed, (g) cannot have any force or effect.[7] The state concedes that § 42 of Chapter 143, SLA 1982 states that AS 12.55.025(e) is repealed, and that section 24 of the same chapter repealed former AS 12.55.025(e), which had previously governed imposition of concurrent or consecutive sentences, and enacted the present provisions in its place.

[2, 3] The state reasons, however, that the commentary to the bill which became Chapter 143 recognized that the purported repeal of AS 12.55.025(e) contained in § 42 was an error, since the commentary discusses only § 24 of the bill. Supp. No. 63 at 12 in 3 House Journal (1982), following p. 2356. The revisor picked up the error as we have seen. Consequently, the state concludes, since the alleged repeal was obviously an error, we should disregard it. We agree. As Sutherland points out, "designation of an act to be repealed will not effect a repeal of that act where, due to clerical mistake, the wrong act was named." 1A C. Sands, *Sutherland Statutory Construction* § 23.07, at 219-20 n. 5 (4th ed. 1972). We are satisfied that the legislature intended to repeal the existing AS 12.55.025(e) and re-enact a new 12.55.025(e), and that the language used accomplished that purpose, though somewhat inartfully. We therefore reject Andrews' argument.

B.

In *Lacquement v. State*, 644 P.2d 856 (Alaska App.1982), we charted the history of consecutive sentencing under former law. We noted that where a defendant was convicted of two or more crimes before the judgment on either had been entered, prior legislation as well as the law in effect at the time of Lacquement's sentencing permitted a trial court to impose sentences either concurrently or consecutively.[8] We

7. The state disputes Andrews' claim that paragraph (g) depends upon paragraph (e). It points out that (g) makes no reference to (e) and that (e) sheds no light on the proper interpretation of (g). Further, the state contends that even if (e) were deemed repealed, (g) would still require consecutive sentences for sexual assaults. In light of our decision that (e) was not repealed, it is unnecessary for us to reach these arguments.

8. Former AS 12.55.025(e) provided:

> If the defendant is convicted of two or more crimes before judgment on either has been entered, any sentences of imprisonment may run concurrently or consecutively, as the court provides. If the court does not specify, the sentences of imprisonment shall run concurrently. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment may provide that the imprisonment commences at the expiration of the term limited by the previous judgment or on the date of imposition of sentence.

Prior to enactment of the revised criminal code, the applicable provision was former AS 11.05.050, which provided:

also noted, however, that neither the legislature nor the Alaska Supreme Court had ever established guidelines to assist trial judges in determining under what circumstances consecutive rather than concurrent sentences should be imposed. 644 P.2d at 861. In this case, the parties are in agreement that Chapter 143, SLA 1982 was intended in part to respond to this statutory void. The parties are also in agreement that the legislature clearly articulated a preference for consecutive sentences, subject to certain exceptions. They disagree, however, over the proper interpretation of those exceptions.

[4, 5] Ambiguities in criminal statutes must be narrowly read and construed strictly against the government. *State v. Rice*, 626 P.2d 104 (Alaska 1981); *Kuvaas v. State*, 696 P.2d 684 (Alaska App.1985); *Conner v. State*, 696 P.2d 680, 682 (Alaska App.1985); *State v. Rastopsoff*, 659 P.2d 630, 640 (Alaska App.1983); *Hugo v. City of Fairbanks*, 658 P.2d 155, 161 (Alaska App.1983); *Siggelkow v. State*, 648 P.2d 611, 614–15 (Alaska App.1982); *Cassell v. State*, 645 P.2d 219, 222 (Alaska App.1982); *Belarde v. Anchorage*, 634 P.2d 567, 568 (Alaska App.1981); *Pierce v. State*, 627 P.2d 211, 219 (Alaska App.1981); 3 C. Sands, *Sutherland Statutory Construction*, §§ 59.03, 59.04, 59.06 (4th ed. 1974). The foregoing rule applies equally to provisions governing sentencing and provisions defining crimes. *See Kuvaas*, 696 P.2d at 685; *Rastopsoff*, 659 P.2d at 640; *see also Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Closely allied to the doctrine that criminal statutes must be strictly construed is the so-called rule of lenity. If a statute establishing a penalty is susceptible of more than one meaning, it should be construed so as to provide the most lenient penalty. *See, e.g., Brookins v. State*, 600 P.2d 12, 17 (Alaska 1979).

As stated above, in *Griffith v. State*, 675 P.2d 662 (Alaska App.1984), it was unnecessary for us to finally interpret AS 12.55.025(g) because the parties reached an agreement as to its meaning which was fully dispositive of Griffith's case. We set out the statute and then concluded as follows:

> The statute is not well drafted and there are a number of possible interpretations of the statutory language. Fortunately, the state and Griffith agree on an interpretation of the statute. They agree that if a defendant's conduct falls within subparagraphs (4) [the crimes were not committed while the defendant attempted to escape or avoid detection or apprehension after the commission of another crime], (5) [the sentence is not for a violation of AS 11.41.100–11.41.470] or (6) [the sentence is not for a violation of AS 11.41.500–11.41.530 that results in physical injury or serious physical injury as those terms are defined in AS 11.81.900], the court may not impose a concurrent sentence. However, if the defendant's conduct falls within subparagraphs (1), (2) or (3), the court is authorized to impose concurrent sentences.

675 P.2d at 664. The parties' agreement was dispositive of Griffith's case. They agreed that the trial court had not correctly interpreted the statute and did not understand that it could have given Griffith a concurrent sentence, because Griffith's conduct did not fall within subparagraphs (4), (5), or (6), but it did fall within subparagraph (1). We accepted the agreement of the parties and remanded Griffith's case for resentencing.

The *Griffith* interpretation does not help Andrews and Koenig, however, because they were convicted of sexual offenses governed by subparagraph (g)(5). Consequently, it is necessary for us to consider in this case whether the legislature has absolutely

> If the defendant is convicted of two or more crimes, before judgment on either, the judgment may be that the imprisonment upon one conviction begins at the expiration of the imprisonment for any other of the crimes. If the defendant is imprisoned upon a previous judgment on a conviction for a crime, the judgment may be that the imprisonment commences at the expiration of the term limited by the previous judgment.

ruled out concurrent sentences for those convicted of such offenses.

Andrews argues that the various subparagraphs of (g) are tied together by semicolons except that the word "or" separates (5) from (6). He reasons that where words are placed in a series and the final two words in the series are separated by an "or," all of the paragraphs are disjunctive unless legislative intent is clearly contrary or such a construction is repugnant to the act in question. *United States v. Garcia*, 718 F.2d 1528 (11th Cir.1983), *aff'd*, —— U.S. ——, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984); *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*, 582 F.2d 834, 839–40 (4th Cir.1978); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir.1975); 1A C. Sands, *Sutherland Statutory Construction* § 21.14 (4th ed. 1972). Under this interpretation, Andrews argues, if a case arguably falls within any of the subparagraphs, concurrent sentences are presumptively appropriate, though not mandatory. While Andrews and Koenig were convicted of sexual assaults and therefore cannot benefit from the paragraph that makes concurrent sentences available to those who are not convicted of such offenses, their crimes involved similar societal interests, subparagraph (g)(1), were not committed while escaping, subparagraph (g)(4), and did not involve the circumstances set forth in subparagraph (g)(6). Consequently, according to Andrews' view, the trial courts were authorized to consider concurrent sentences in determining appropriate sentences for Andrews and, by extension, Koenig.

[6, 7] We agree that this is one possible reading of the statute. The interpretation discussed in *Griffith* is also a reasonable interpretation of the statute. Where a statute is susceptible of two or more conflicting but reasonable meanings it is ambiguous. We resolve the ambiguity by adopting the meaning most favorable to the defendant, and accept Andrews' interpretation of the statute. Treating the various sub-categories under paragraph (g) as disjunctive does not obviously violate legislative intent and is not repugnant to the statute. We therefore affirm Judge Lewis' conclusion that he had limited discretion to give Andrews concurrent sentences despite Andrews' conviction of multiple sexual assaults.[9] For the same reason, we reverse Judge Hanson's conclusion that he was obligated to give consecutive sentences to Koenig. We realize that Judge Hanson recognized that Koenig's sexual contact convictions were not presumptive and thus could have resulted in suspended sentences, even though he believed those sentences would have had to have been consecutive. Judge Hanson nevertheless declined to suspend additional time. We do not view Judge Hanson's consideration of this issue as establishing that any error he made in concluding that consecutive sentences were mandatory was harmless. We believe that Koenig should have an opportunity on remand to argue for concurrent sentences. We therefore vacate his sentences and remand for resentencing.

[8, 9] Our decision to accept Andrews' interpretation of AS 12.55.025(g) is reinforced by three considerations. First, the legislature intended that the revised code create reasonable uniformity and eliminate unjustified disparity in sentences; it therefore established a somewhat rigid sentencing framework. AS 12.55.005. If consecutive sentences were automatic in cases involving sexual assaults on minors, it would appear that the legislative goal of uniformity would be achieved. However, this uniformity would be illusory. Most incest cases involve a protracted sexual relationship between abuser and victim; typically, the victim testifies to many incidents, but has great difficulty differentiating between incidents. *See Covington v. State*, 703 P.2d 436 (Alaska App.1985). Generally, if

9. The state does not argue that, even if Judge Lewis had authority to impose concurrent sentences, it was inappropriate to do so in Andrews' case. Our review of the sentencing record discloses, however, that Judge Lewis did not abuse his discretion in imposing concurrent sentences in Andrews' case, so we would affirm the sentence even had this argument been made.

the state can prove one incident it can prove them all, since the same evidence will be before the jury and the result will turn on whether the jury believes the victim or not. The state is therefore able in almost all these cases to arbitrarily decide between charging multiple incidents or a single incident. Consider the cases of two identically situated individuals, the evidence against each of whom would support a finding of ten separate incidents of first-degree sexual assault. If the state's interpretation of the statute were correct, one person might be charged with and convicted of one offense and automatically receive an eight-year presumptive term, while the other was charged with and convicted of ten incidents, and therefore automatically sentenced to ten consecutive eight-year presumptive terms. Again, this would be true even though the evidence in both cases was identical. It is only if the statute permits concurrent sentences and is interpreted to impose reasonable restrictions on consecutive sentences that the statutory goal found in AS 12.55.005—that those whose criminal conduct is roughly identical should receive substantially similar sentences—can be attained.

Closely related is a second concern. Under the state's interpretation of the statute, where the evidence will permit single or multiple charges at the prosecutor's absolute discretion, a defendant is under substantial pressure to accept an offer to plead to a single count regardless of guilt. We recognize that this pressure will exist to a degree in any case in which the state may elect to charge fewer offenses, or a lesser-included offense in preference to a greater offense. Where consecutive sentences are mandatory, however, this pressure could become virtually insurmountable. Clearly the legislature did not wish to encourage the conviction of the innocent.

Finally, our conclusion that the statute establishes a preference for consecutive sentences in the case of crimes of sexual assault but does not make such sentences mandatory is consistent with the treatment given consecutive sentences in *Fair and Certain Punishment, Report of The Twentieth Century Fund Task Force on Criminal Sentencing* (1976), which was the source from which the Alaska Criminal Law Revision Subcommission derived presumptive sentencing. *See* Alaska Revised Criminal Code, Part VI, at 9 (Tentative Draft 1978) (hereafter T.D.). The authors of *Fair and Certain Punishment* concluded:

> *Concurrent Versus Consecutive Sentences*
>
> As observed in the text of the Task Force report, difficulties arise under presumptive sentencing in dealing with several offenses that grow out of the same or a connected transaction or that are closely related in time. Our proposal by no means creates this issue, but rather forces it to the surface because it is no longer hidden by the discretionary employment of concurrent sentences. We believe that several different approaches or principles are required in coping with this very difficult problem.
>
> The first principle is that a single criminal transaction cannot be broken down into separate crimes for purposes of imposing consecutive sentences, nor can the sentence for such a transaction exceed the sentence for the single most serious crime. Thus, a defendant convicted for a single armed robbery cannot receive consecutive sentences for such component crimes as possession of a weapon, assault with a deadly weapon, burglary, larceny, and trespassing; his maximum exposure would be for the sentence (presumptive plus the increment, except in extraordinary cases) prescribed for armed robbery (or whatever the single most serious crime was).
>
> The second principle is that a series of unrelated criminal acts or transactions can be punished by consecutive sentences, as in the example of four armed robberies carried out over the period of one week. We are aware that, although this is permitted under current law, it is not generally done today and could result in unrealistically long sentences. But we see no reasonable alternative other than

to devise a sophisticated system in which every additional crime in a series carries an increment of punishment, but not the full increment of a consecutive sentence. And perhaps this may prove to be the best solution.

The third principle is that a continuing crime or a series of closely run crimes should also be punished by an incremental sentencing. The example used is that of a government official who submits a single fraudulent bill versus an official who has submitted a hundred fraudulent bills over a two-year period. It would be unconscionable to punish the latter a hundred times more harshly than the former. Some legislative formula making the latter practice a *different* and more serious crime with gradually increasing penalties for each new violation makes more sense than adding an entire consecutive sentence for every fraudulent bill.

A top limit could be imposed, of course, on consecutive offenses for a particular type of crime. For example, no one convicted of larceny, regardless of how many transactions were involved, could receive a sentence in excess of ten years. Or no sentence in excess of a given maximum (say, 25 years) could be imposed regardless of the type or number of crimes charged. However, this raises the related problem of whether the government must try a defendant at the same time for *all* crimes it intends to charge him with. The Task Force takes no position on this, except as it relates to sentencing.

Fair and Certain Punishment, supra at 49–50 (appendix A).

[10, 11] As originally enacted, AS 12.55.025(e) established a preference for concurrent sentences, in reliance on ABA *Standards on Sentencing Alternatives and Procedures* § 3.4(b)(10) (Approved Draft 1971). T.D. Part VI, at 25–26. We recognize that the legislature reversed this preference when it amended subparagraph (e) and added .025(g). We do not believe, however, that the legislature intended thereby to mandate the "unconscionable" result mentioned by the authors of *Fair and Certain Punishment.* A person who commits ten sexual assaults should, consistent with the guidelines established in AS 12.55.005, receive a more severe sentence than a person convicted of a single incident, but he should not be punished ten times as severely. *See Sherman v. Holiday Construction Company,* 435 P.2d 16, 19 (Alaska 1967) (statutes should be construed to avoid glaringly absurd results seemingly compelled by their literal terms).[10]

10. The state makes a related argument. It reasons that where someone is convicted of two or more offenses each of which is subject to a presumptive term and the court determines that consecutive sentencing is appropriate, the court must impose consecutive presumptive terms. The state argues that AS 12.55.125(f) and (g) (prohibiting suspension or reduction of a presumptive term) must be read in connection with AS 12.55.025(e) and (g). Thus, if a first offender is convicted of two counts of first-degree sexual assault and no aggravating or mitigating factors were found, the state reasons that the defendants must receive two eight-year terms. AS 12.55.125(i). If the terms are imposed consecutively, a composite sixteen-year sentence is mandatory.

We reject this argument. At the very least AS 12.55.125(f) and (g) are ambiguous when read together with AS 12.55.025(e) and (g). We are thus obligated to construe their relationship strictly in favor of criminal defendants. While *in pari materia,* AS 12.55.125(f) and (g) and AS 12.55.025(e) and (g) address different concerns. We read AS 12.55.125(f) and (g) to require only that a person sentenced at the same time for two or more crimes each of which is subject to a presumptive sentence must receive a sentence at least equal to the most severe presumptive sentence when adjusted to reflect aggravating or mitigating factors. In determining whether these provisions have been satisfied, we must look to the total sentence imposed, not the individual sentence imposed on separate counts. Thus, if the trial court decided to impose consecutive sentences in the hypothetical suggested by the state, AS 12.55.125(g) would require a minimum eight-year composite sentence, but not a sixteen-year sentence. *Cf. Waters v. State,* 483 P.2d 199, 201–02 (Alaska 1971) (when two or more sentences are imposed together, a sentence which if viewed in isolation might be excessive—or, by extension, too lenient—may be appropriate in light of the total sentences imposed). An eight-year sentence would ensure that the person convicted of multiple offenses serves at least as much time as provided by the presumptive term for his most serious offense.

II.

[12] Koenig's appellate briefing was directed at establishing that his individual sentences were excessive. Since this issue will arise on remand and would be particularly significant if Judge Hanson should again determine that consecutive sentences were appropriate, we address a few remarks to his case. First of all, we agree with Judge Hanson that Koenig's case was, to a certain extent, aggravated. As Judge Hanson pointed out, the victims in this case were eight and nine years of age. *See* AS 12.55.155(c)(5) (the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth). While the elements of AS 11.41.434(a)(1) and AS 11.41.436(a)(2) require age disparity between victim and assailant, we agree with Judge Hanson that the extreme youth of these children meets the test for the aggravating factor. By the same token, Koenig's status as a public school teacher, and the position of authority it gave him over his victims, serves to aggravate this case. *See Goulden v. State*, 656 P.2d 1218, 1222 (Alaska App.1983); *see also* former AS 11.41.410(a)(4)(A). Finally, Koenig was convicted of offenses involving multiple victims, and the trial court also properly considered, pursuant to the plea agreement reached between the parties, uncharged offenses verified in the record. Taking all of these factors together, we conclude that Koenig was properly given an aggravated sentence.

[13] In reaching this conclusion, we stress, however, that proof of aggravating factors by clear and convincing evidence, while a necessary condition for an aggravated sentence, is not sufficient for that purpose. Ultimately the trial court must consider the totality of the defendant's conduct in the light of his past record and future prospects in determining an appropriate sentence. In this regard, the overwhelming majority of cases involving sexual abuse of minors that we have reviewed, regardless of whether that abuse takes the form of sexual contact or sexual penetration, have involved people in positions of authority over the minor, *e.g.*, teachers, parents, babysitters, *et cetera*, and children of extreme youth. While this case is aggravated, it is not sufficiently aggravated to warrant a maximum sentence or sentences.

In order to resolve Koenig's claim that his sentence is excessive we must compare it with sentences imposed in cases involving similar offenses. *Pears v. State*, 698 P.2d 1198, 1202 (Alaska, 1985); *Page v. State*, 657 P.2d 850, 854–55 (Alaska App. 1983).

We will therefore consider other cases discussing appropriate sentences for sexual assault in order to determine an appropriate range of sentences for someone like Koenig. We have considered sentences for sexual assault in connection with a number of recent cases. *See, e.g., State v. Brinkley*, 681 P.2d 351 (Alaska App.1984); *State v. Woods*, 680 P.2d 1195 (Alaska App.1984); *State v. Morris*, 680 P.2d 1190 (Alaska App.1984); *State v. Couey*, 680 P.2d 513 (Alaska App.1984); *State v. Rushing*, 680 P.2d 500 (Alaska App.1984); and *Langton v. State*, 662 P.2d 954 (Alaska App.1983). These cases arose prior to the effective date of legislation establishing presumptive sentences for first offenders convicted of sexual offenses against children. Nevertheless, we consider them of some value in establishing a context for a discussion of sexual-offender sentencing under existing law. In those cases we were asked to decide in part whether certain sentences imposed upon those convicted of sexual assaults on children were too lenient. We canvassed sentences previously imposed and concluded that sentences for rape including what would be sexual assaults on children under current law were "roughly divided" into three categories:

(1) The most mitigated cases usually justifying a sentence from ninety days to three years;

(2) typical conduct which should ordinarily result in a sentence of from three years to six years;

(3) aggravated conduct which may justify a sentence of from six years to the prior maximum of twenty years.

State v. Brinkley, 681 P.2d at 356. In a footnote we stated:

> A first offender who receives a sentence of six years or greater under former law should have engaged in conduct which approaches use of a dangerous weapon or causes serious physical injury to the victim. Where the sentence exceeds ten years, a substantially more aggravated case is required. [Citations omitted.]

681 P.2d at 356 n. 3. Since most of the cases we were discussing involved a state claim that the sentence imposed was too lenient rather than a claim by the defendant that the sentence was excessive, it was not necessary for us to discuss those cases in which a sentence in excess of ten years was appropriate.

In *Atkinson v. State*, 699 P.2d 881 (Alaska App.1985), we considered a sentence of ten years with four years suspended. Atkinson was sentenced on a single count of sexual assault in the first degree. The victim was Atkinson's daughter. The parties agreed that the court could consider the total sexual relationship between Atkinson and the victim. The trial court found that Atkinson began abusing the victim when she was seven years old and continued for two years until she was nine, at which time the abuse was discovered. The victim vigorously resisted the assaults and was beaten and tied up to facilitate the sexual abuse. The abuse consisted of multiple incidents of both sexual contact and sexual penetration. Atkinson appealed his sentence contending it was excessive. We affirmed.

In *Depp v. State*, 686 P.2d 712, 720–21 (Alaska App.1984), we dealt with a case having facts even more similar to those presented by the cases of Andrews and Koenig. There the fifty-one-year-old principal of a school was convicted of three counts of first-degree sexual assault and three counts of sexual abuse, all involving the eleven-year-old son of a friend. The record established a continuous course of sexual abuse of children other than the victim charged in the indictment. 686 P.2d at 721. We approved three concurrent sentences of fifteen years with seven years suspended.

In neither case did the state cross-appeal, arguing that the sentence was too lenient; our affirmances do not, therefore, indicate whether more severe sentences for Atkinson or Depp would have been excessive. Nevertheless, given the sentencing courts' careful consideration of the respective backgrounds of Atkinson and Depp, the conduct constituting their offenses and the aggravating and mitigating factors which are typically found in cases of sexual assaults on small children, *Atkinson* and *Depp* may properly serve as benchmarks against which other sentences for sexual assault on children should be measured. Unless a defendant's conduct was substantially more serious than Atkinson's and Depp's, a sentence in excess of fifteen years would appear, on its face at least, clearly mistaken. Obviously, a benchmark sentence can only be a guide, not a rule. *Page v. State*, 657 P.2d 850, 855 (Alaska App.1983).

[14, 15] In this regard we recognize that Atkinson pled to a single count of first-degree sexual assault, while others (such as Depp) who have also engaged in a continuous course of sexual abuse of a minor may be convicted of multiple counts, theoretically permitting consecutive sentences. While these distinctions may be significant, we do not believe the number of counts standing alone should be given overriding weight. Certainly the existence of multiple victims or multiple assaults on a single victim occurring during a protracted period is significant to the extent that it reflects a given defendant's potential future danger to society. Nevertheless, even in imposing a single sentence, the trial court should consider the totality of the defendant's conduct to the extent that it is verified in the record. *Nukapigak v. State*, 562 P.2d 697 (Alaska 1977), *modified on rehearing*, 576 P.2d 982 (Alaska 1978).

In imposing such a sentence the court should consider the defendant's history of violent or sexually-abusive behavior with the victim named in the indictment, as well as similar conduct directed at other victims that has been verified in the record. By the same token a trial judge simultaneously sentencing a defendant for multiple crimes should impose a composite sentence similarly reflecting the totality of the defendant's conduct. A sentence for one count which might, viewed in isolation, appear excessive (or, by extension, too lenient) may not be clearly mistaken when viewed as a component in a composite sentence. *Waters v. State*, 483 P.2d 199, 201–02 (Alaska 1971). As we noted earlier, a person who is simultaneously sentenced for ten identical but separate criminal episodes should receive an incrementally greater sentence than one convicted of a single incident, but not ten times as great a sentence. *Fair and Certain Punishment*, *supra*, at 49–50. In determining an appropriate incremental increase the trial court should consider the totality of the defendant's conduct in comparison with the totality of the conduct of other sentenced offenders discussed in the reported cases. We believe this approach particularly appropriate in sentencing sexual offenders whose victims are children. Aggravated cases warranting sentences beyond the three- to six-year mid-category established in *Brinkley* and the four to eight years established under presumptive sentencing,[11] will almost invariably involve multiple incidents and frequently multiple victims, whether or not there is actually a plea to multiple counts. *See State v. Brinkley*, 681 P.2d 351, 356 (Alaska App.1984). In our view, any approach to the problem other than that discussed above would subordinate judicial sentencing discretion to prosecutorial charging discretion. While the revised code clearly sought to limit discretion by establishing presumptive sentencing, there is no indication that the legislature preferred one form of discretion to the other.

[16] The Alaska Supreme Court and this court have considered a number of sexual assault sentences. We believe a review of those cases which address sexual assaults involving both adult and child victims supports a sentencing range for aggravated offenses of ten to fifteen years, and use of *Atkinson* and *Depp* as benchmarks for determining the kind of conduct warranting a sentence within that range. We believe these benchmarks are applicable to all aggravated cases, whether aggravation is found, because of: (1) multiple victims; (2) multiple assaults on a single victim; or (3) serious injuries to one or more victims. Of course, a trial court is not bound to sentence in accordance with a benchmark and should not do so in a truly extraordinary case. In almost every case, the sentence approved by the reviewing court was in the range of six to fifteen years.[12] These cases exhibit a variety of

11. Current law establishes an eight-year presumptive term for first offenders convicted of first-degree sexual assault. AS 12.55.125(i)(1). Mitigating factors may reduce this sentence to four years. AS 12.55.155(a)(2). Thus the legislature has slightly increased typical terms over those recognized in *Brinkley*.

12. *See Alexander v. State*, 611 P.2d 469 (Alaska 1980) (sentence of seven and one-half years for statutory rape under former law affirmed; crime was perpetrated in violent fashion, defendant had two prior robbery convictions, a forgery conviction and a heroin-possession conviction and rape occurred while defendant was on parole); *Cochrane v. State*, 611 P.2d 61 (Alaska 1980) (concurrent sentences of twelve years' imprisonment for each of two counts of rape and five years' imprisonment for each of two counts of assault with a dangerous weapon approved, where two young women were raped at gunpoint, threatened and subjected to humiliating treatment, and trial court considered all relevant material); *Shelton v. State*, 611 P.2d 24 (Alaska 1980) (defendant committed offense of rape one week after being released on bail pending trial on attempted rape charge; sentence of fifteen years approved); *Mallott v. State*, 608 P.2d 737, 752 (Alaska 1980) (defendant, while intoxicated, raped a three-year-old girl; sentence of thirty years with fifteen years suspended approved); *Lacy v. State*, 608 P.2d 19 (Alaska 1980) (defendant convicted of rape, assault with dangerous weapon, kidnapping, and petty larceny; concurrent sentences of fifteen years for rape and two counts of kidnapping approved); *Tate v. State*, 606 P.2d 1 (Alaska 1980) (defendant engaged in constant course of antisocial

circumstances which justify characterizing them as aggravated offenses. In many cases the victims suffered serious physical injury, in others there were multiple victims, or multiple attacks on a single victim. In some cases, the defendant had a substantial record of prior convictions for crimes of violence including, in many cases, prior convictions for sexual assault. Nevertheless, as the supreme court pointed out in *Tuckfield v. State*, 621 P.2d 1350, 1353 (Alaska 1981), the court had never, prior to *Tuckfield*, approved a maximum sentence for a person convicted of rape. At the time *Tuckfield* was decided, twenty years was the maximum sentence.[13] The

conduct in the past and committed cruel and calculated rape; sentence of fifteen years affirmed); *Wikstrom v. State*, 603 P.2d 908 (Alaska 1979) (court approved three concurrent fifteen-year sentences for rape, where the victim was forced to submit to vaginal and anal intercourse, to perform act of fellatio, was choked and had metal device inserted into her vagina, causing internal damage); *Holden v. State*, 602 P.2d 452 (Alaska 1979) (fifteen-year sentence, for assault with intent to commit rape approved, based upon prior criminal history and verified report of another rape); *Wagner v. State*, 598 P.2d 936 (Alaska 1979) (sentence of ten years affirmed where eleven-year-old female victim's two brothers were suborned to participate in the sexual activity, defendant's record included two prior felonies, and defendant had been diagnosed as moderately antisocial and not apt to conform his conduct to the law); *Moore v. State*, 597 P.2d 975 (Alaska 1979) (concurrent ten- and fifteen-year sentences not excessive for rape and armed robbery where defendant had extensive juvenile record and prior adult felony); *Bordewick v. State*, 569 P.2d 184 (Alaska 1977) (sentence of twelve years' imprisonment affirmed where defendant convicted of rape, sodomy, and grand larceny after violent and brutal attack on sixty-nine-year-old woman); *McCarlo v. State*, 677 P.2d 1268 (Alaska App. 1984) (composite sentence of twenty years with ten years suspended for defendant convicted of rape and attempted sexual assault in the first degree; affirmed, in light of history of aggressive behavior and seriousness of present offenses); *Cordes v. State*, 676 P.2d 611 (Alaska App.1984) (sentence of ten years with two years suspended affirmed where defendant was convicted of one count of sexual assault in the first degree and conceded four separate incidents involving his six-year-old stepdaughter, including incidents of anal intercourse and fellatio); *Barry v. State*, 675 P.2d 1292 (Alaska App.1984) (concurrent sentences of twenty years with five years suspended for first-degree sexual assault and twenty years for kidnapping approved); *Pickens v. State*, 675 P.2d 665 (Alaska App.1984) (thirteen years with five years suspended for first-degree sexual assault affirmed); *Wilson v. State*, 670 P.2d 1149 (Alaska App.1983) (consecutive terms of twenty years for kidnapping and ten years for first-degree sexual assault affirmed, where defendant and confederate beat the victim and left her to die); *Nashoalook v. State*, 663 P.2d 975 (Alaska App.1983) (ten years with five years suspended for first-degree sexual assault affirmed); *Johnson v. State*, 662 P.2d 981 (Alaska App.1983) (concurrent terms of fifteen years with five years suspended for rape and kidnapping affirmed; defendant had prior felony conviction and misdemeanor conviction for crime of violence); *Willard v. State*, 662 P.2d 971 (Alaska App.1983) (eight-year nonpresumptive sentence for first-degree sexual assault affirmed, based upon extraordinary circumstances, including verified reports of other sexual misconduct); *Hodges v. State*, 660 P.2d 1203 (Alaska App.1983) (court affirmed two concurrent eight-year terms with five years suspended for first-degree sexual assault based on several instances of sexual intercourse with defendant's twelve-year-old daughter over a four- to six-week period); *Erhart v. State*, 656 P.2d 1199 (Alaska App.1982) (ten-year sentence for first felony offender approved, based on aggravating factors); *Ecker v. State*, 656 P.2d 577 (Alaska App.1982) (six-year sentence for worst offender convicted of first-degree sexual assault affirmed); *Peetook v. State*, 655 P.2d 1308 (Alaska App.1982) (twenty years with five years suspended for first-degree sexual assault affirmed where defendant invaded victim's home in the nighttime, inflicted serious injuries and tortured victim); *Koganaluk v. State*, 655 P.2d 339 (Alaska App.1982) (court approved sentence of ten years for first-degree sexual assault, where defendant had previously been convicted of similar offense); *Williams v. State*, 652 P.2d 478 (Alaska App.1982) (twenty years with five years suspended for kidnapping and ten-year concurrent sentence for first-degree sexual assault not clearly mistaken, given substantial violence involved).

13. The supreme court and this court have approved total sentences in excess of twenty years where the defendant was guilty of sexual assault and, in addition, other more serious crimes, such as kidnapping or attempted murder, crimes which permit substantially greater maximum sentences. *See Hintz v. State*, 627 P.2d 207, 210–11 (Alaska 1981) (twenty-one-year-old defendant who had prior felony conviction kidnapped victim, threatened her with a firearm, and raped her; court reduced consecutive sentences of life plus twenty years to a total of thirty years' incarceration); *Morrell v. State*, 575 P.2d 1200, 1212–13 (Alaska 1978) (first offender

court approved such a sentence for Tuckfield based primarily on his extensive criminal record, which included two prior nonviolent felonies, and the serious injury to his victim. Further, the court stressed Tuckfield's refusal to admit guilt and the poor prognosis for his rehabilitation. 621 P.2d at 1353–54.

In two cases we have approved sentences in the twenty-year range for sexual abuse of children. *Seymore v. State*, 655 P.2d 786 (Alaska App.1982); and *Qualle v. State*, 652 P.2d 481 (Alaska App.1982). In *Seymore*, we approved a twenty-year sentence with restricted parole for one count of first-degree sexual assault on the defendant's stepdaughter. At that time the crime was a class A felony. Seymore was thirty-nine years old. The record reflected a continuous course of sexual abuse, including a prior conviction for sexual abuse of the same stepdaughter, for which Seymore had received a suspended imposition of sentence. His victim suffered substantial psychological damage. 655 P.2d at 786. In *Qualle*, we considered a forty-year composite of consecutive sentences for one count of statutory rape and one count of lewd and lascivious acts with a child involving, respectively, a seven-year-old girl and a six-year-old boy; we held the sentence excessive and directed that it be reduced on remand to no more than twenty-one years. 652 P.2d at 488. Qualle, a mature man fifty-one years old, had a long history of child sexual abuse with commercial overtones, and there was evidence that Qualle had previously engaged in sexual relations with his daughters. *Id.* at 484, 487.

The supreme court's treatment of *Tuckfield* and our treatment of *Seymore* and *Qualle* was consistent with the general rule that maximum sentences should only be imposed upon worst offenders. *See State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975). The "worst offender" designation may be based on the particular manner of committing the offense, the background of the offender or both. *Saganna v. State*, 594 P.2d 69 (Alaska 1979).

Generally, the supreme court has based a worst offender characterization on an extensive criminal record. *See, e.g., Tuckfield v. State*, 621 P.2d at 1353; *Saganna v. State*, 594 P.2d 69, 70 (Alaska 1979); *State v. Wortham*, 537 P.2d at 1119–20. In *Seymore*, the defendant had previously been convicted of sexual assault but his record was cleared. 655 P.2d at 787. In *Qualle*, charges were brought, but dismissed because of the victim's unavailability. 652 P.2d at 484. The supreme court

kidnapped eighteen-year-old hitchhiker and kept her prisoner for eight days during which she was repeatedly sexually assaulted; court affirmed a life sentence for the kidnapping and eight concurrent ten-year sentences for the rapes, to run consecutively to the kidnapping sentence); *Patterson v. State*, 689 P.2d 146, 150–52 (Alaska App.1984) (forty-one-year composite sentence for kidnapping, sexual assault, and violent assault on two separate victims reduced to thirty years; defendant had prior felony record and there was little likelihood of rehabilitation). We have also approved such sentences for those convicted of multiple violent assaults where, in addition, the defendant had a substantial felony record. *Nix v. State*, 653 P.2d 1093, 1100–02 (Alaska App.1982) (composite sentence of approximately fifty years reduced to forty years; defendant, who had an extensive criminal record, was convicted of several separate assaults, sexual assaults, and burglary charges involving different victims); *Tookak v. State*, 648 P.2d 1018, 1023–24 (Alaska App.1982) (forty-one-year total of consecutive sentences for sexual assault, kidnapping and joyriding reduced to thirty years; defendant, who had a prior felony record, took victim to remote area where he sexually assaulted and abandoned her).

While not involving sexual assault, consideration should also be given to *Wortham v. State*, 689 P.2d 1133, 1144–45 (Alaska App.1984) (composite fifty-three-year sentence affirmed where defendant, who had five prior felony convictions and had served substantial prison sentences, kidnapped, shot, and robbed his victim), and *Larson v. State*, 688 P.2d 592 (Alaska App. 1984) (defendant had two prior felony convictions for violent crimes, broke into an occupied dwelling at night and terrorized the two occupants; forty-eight-year composite sentence reduced to forty years).

Finally, consideration should be given to *Pears v. State*, 698 P.2d 1198 (Alaska 1985) (disapproving as excessive two concurrent twenty-year sentences for second-degree murder of two victims); and *Page v. State*, 657 P.2d 850, 855 (Alaska App.1983) (recognizing as a benchmark for sentences of second-degree murder based on intent to kill a sentence of twenty to thirty years).

has recognized, however, that in an unusual case a worst offender designation could be based on a single event or series of events without a prior record of convictions. *See Wilson v. State*, 582 P.2d 154, 156 (Alaska 1978); *Burleson v. State*, 543 P.2d 1195, 1201 (Alaska 1975); *Winslow v. State*, 685 P.2d 1273, 1275 (Alaska App. 1984); *Kimbrell v. State*, 647 P.2d 618, 620 n. 5 (Alaska App.1982); *Huckaby v. State*, 632 P.2d 975, 976 (Alaska App.1981). Such a designation usually involves a finding that the defendant's conduct actually constituted either (1) a higher degree of offense, *see Notaro v. State*, 608 P.2d 769, 770 (Alaska 1980) (fifteen-year sentence for manslaughter upheld where facts made the crime "an extreme one" within this class, closely equivalent to second-degree murder), *cf.* AS 12.55.155(c)(10) (discussed in *Braaten v. State*, 705 P.2d 1311 (Alaska App.1985) (Singleton, concurring)); or (2) a premeditated offense involving substantial injury to the victim or victims, where the defendant had a bad psychological prognosis and showed no remorse, *see Wilson v. State*, 582 P.2d at 156.

We recognize that many of the cases we have reviewed were decided under former law. Up until the new code became effective in 1980, a person nineteen years of age or over who engaged in consensual sexual penetration with a person under the age of sixteen was punishable by imprisonment for any term of years. Former AS 11.15.-130(a). A person who had sexual contact with a child for purposes of sexual gratification was punishable by imprisonment for one to ten years. Former AS 11.15.134. As originally enacted, the Revised Code reduced these penalties substantially. It punished sexual assault on a child under the age of thirteen as a class A felony punishable by up to twenty years' imprisonment. Former AS 11.41.410(a)(3); AS 12.55.125(c). Where sexual penetration occurred and the victim was between thirteen and sixteen years of age or sexual contact occurred with someone under thirteen the offense was a class C felony punishable by up to five years' imprisonment. Former AS 11.41.440; AS 12.55.125(e). Sexual contact with someone between the ages of thirteen and sixteen was a class A misdemeanor. Former AS 11.51.130(a)(4). The statutes were amended in 1980, 1982, and again in 1983. Under current law a person who engages in sexual penetration with a child under the age of thirteen is guilty of an unclassified felony punishable by up to thirty years' imprisonment. AS 11.41.-434(a)(1); AS 12.55.125(i). If someone sixteen or older engages in sexual penetration with someone between thirteen and sixteen, he or she is guilty of a class B felony punishable by up to ten years' imprisonment, unless he or she is less than three years older than the victim. AS 11.41.-436(a)(1); AS 12.55.125(d). The same penalty is reserved for someone sixteen or over who engages in sexual contact with someone under thirteen. AS 11.41.-436(a)(2). Where sexual contact occurs and the victim is between thirteen and sixteen years of age, and at least three years younger than the abuser, the offense is a class C felony with a five-year maximum penalty. AS 11.41.438; AS 12.55.125(e).

In summary, the drafters of the Revised Code substantially reduced the penalties for sexual abuse of minors. Since 1980, the legislature has increased the penalties, but has not restored them to former levels. Consequently, we do not find that legislative revision of the penalties establishes legislative dissatisfaction with the ranges of sentence we have been discussing.

[17] We are also satisfied that those ranges of sentence are consistent with the current presumptive sentencing provisions of the code. Adoption of presumptive sentencing was aimed at ensuring greater uniformity in sentencing, not at increasing the magnitude of sentences. *See* AS 12.55.005. Finally, while the eight-year presumptive term presently imposed on first offenders committing unmitigated sexual assaults on children slightly increases the minimum terms recognized in *State v. Brinkley*, 681 P.2d 351, we do not view this change in the statute as indicating dissatisfaction with the fifteen-year benchmark sentence for

aggravated offenses derived from cases decided under former law, at least first felony offenders. In the case of second and third felony offenders, the code does stipulate presumptive sentences of fifteen and twenty-five years, respectively, for those convicted of sexual assault in the first degree, or sexual abuse of a minor in the first degree. AS 12.55.125(i). In aggravated cases, slightly higher sentences would be appropriate. AS 12.55.155.

Koenig does not have a criminal record. Judge Hanson found that his conduct was among the most serious within the definition of the offense, AS 12.55.155(c)(10), but he did not find that Koenig committed a higher degree of offense. Koenig's offense involved multiple victims, and Judge Hanson may have concluded that Koenig's crimes were premeditated. There is nothing in the record, however, that would justify a finding that Koenig is a dangerous offender in the sense that we have used that term in the past. *See Viveros v. State*, 633 P.2d 289, 291 (Alaska App.1981) (using term "dangerous offender" as term of art in accordance with 1980 ABA *Standards For Criminal Justice*, which require conviction of two or more felonies within the past five years plus service of a year or more incarceration). It is not clear that Judge Hanson viewed diagnosis as a pedophile sufficient to support a finding that Koenig would continue to be a danger after serving eight years of continuous incarceration. *See Mutschler v. State*, 560 P.2d 377, 381 (Alaska 1977); *Brown v. State*, 693 P.2d 324, 330–31 (Alaska App.1984); *Lacquement v. State*, 644 P.2d 856, 862 (Alaska App.1982). *Cf. Maal v. State*, 670 P.2d 708, 711–12 (Alaska App.1983) (sentencing court should not give undue emphasis to predictions of future misconduct, which would violate just deserts sentencing model embodied in AS 12.55.005(1)).[14]

[18] On remand, Koenig's sentence, whether involving concurrent or consecutive increments, should not exceed twenty years with five years suspended.[15]

The sentence of the superior court in A–468 is AFFIRMED. The appeal in A–492 is DISMISSED.

The sentence in A–552 is VACATED, and that case REMANDED for resentencing.

14. The Alaska Criminal Code Revision Subcommission explained the "just deserts" theory as follows:

> In determining the appropriate sentence to be imposed, two basic principles guide the court: (1) the least severe measure should always be used which accomplishes the purposes of sentencing; and
> (2) primary consideration in imposing sentence should always be given to the seriousness of the offense and the prior criminal history of the convicted person.
>
> Under the "just deserts" theory of punishment, as a matter of justice or fairness, decisions with respect to a particular defendant ought to be made on the *basis of what the person has done, not on some speculative expectation of what he might do in the future.* Neither rehabilitation nor deterrence, as such, are primary considerations in determining the appropriate sentence, although both remain objectives of a "deserved" sentence. If a person's crime is serious, his punishment should be severe. If the offense is minor, the sanction should be mild.

T.D. at 19–20 (emphasis supplied). Where a person has been prosecuted as a child molester and nevertheless continues to abuse children, a diagnosis of pedophilia takes on added significance and may justify an extended term. *See, e.g., Seymore v. State*, 655 P.2d 786 (Alaska App.1982); *Qualle v. State*, 652 P.2d 481 (Alaska App.1982). Our concern is that first offenders, who have never been prosecuted or treated, should not be given this label and then, solely on the basis of the label, treated as, worst offenders and given maximum sentences. *See State v. Rastopsoff*, 659 P.2d 630, 640 (Alaska App.1983) (drafters of Revised Code clearly intended to punish more harshly those offenders who had been "alerted" by prior conviction, but who had failed to respond by conforming their conduct to the law).

15. Twenty years with five years suspended results in a fifteen-year period of incarceration equal to the presumptive term for a second unclassified felony offender, AS 12.55.125(i)(3), and the fifteen-year typical sentence for aggravated rape established under former law. It also allows five years of suspended time as a deterrent to Koenig, in order to protect the public as he makes the adjustment to normal life after his release from prison.

Third, the trial judge took steps to alleviate the possible prejudicial effect of the impeachment by not allowing the jury to hear that the prior offense was for the same crime currently charged against Johnson and by giving cautionary instructions on the limited use of the impeachment evidence. This was in accord with Evidence Rule 105, the commentary to Evidence Rule 403, this court's suggestion in *Alexander*, and the court of appeals' holding in *Frankson*.

Fourth, "[i]f judicial self restraint is ever desirable, it is when a probative versus prejudice analysis of a trial court is reviewed by an appellate tribunal." *U.S. v. Long*, 574 F.2d 761, 767 (3d Cir.1978), *cert. denied* 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978). As the *Long* court stated:

> [I]t is manifest that the draftsmen intended that the trial judge be given a very substantial discretion in "balancing" probative value on the one hand and "unfair prejudice" on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative value, or (b) the prejudice presented by the evidence.... The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom.

Id.

The trial judge in this case was in the court room and could directly observe the witnesses and closely assess the possible prejudicial effect the evidence would have on the jury. Accordingly, a great deal of discretion should be allowed the trial court in the probative versus prejudicial balancing analysis.

Given the evidence in the record and previous case law on the issue we cannot say the trial court's reasons for admitting the evidence were clearly untenable or unreasonable or that it abused its discretion in allowing Johnson to be impeached by reference to a prior conviction for a crime involving dishonesty.

[8] As noted, the rationale used by the court of appeals was that telling the jury that Johnson has a prior conviction for a crime involving dishonesty had the potential to create in the jurors' minds an incorrect belief that the prior crime was of a much more serious nature than that presently involved. No objection raising this point was made at the trial level. If such an objection had been made, the trial court could well have agreed and modified the instruction so that the jurors were told that the prior crime was not more serious. However, in the absence of an objection, the instruction as given is reviewable only under the plain error standard. The requirements of that standard, that the mistake be obvious and that it create a high likelihood of injustice, *Miller v. Sears*, 636 P.2d 1183 (Alaska 1981), have not, for the reasons previously stated, been met.

The judgment of the court of appeals is REVERSED and the trial court's ruling is AFFIRMED.

STATE of Alaska, Petitioner,

v.

Peter ANDREWS, Sr., and George R. Koenig, Respondents.

STATE of Alaska, Petitioner,

v.

Harry N. COFFEY, Respondent.

Nos. S–1172, S–1192.

Supreme Court of Alaska.

Aug. 8, 1986.

Petitions for Hearing from the Court of Appeals of the State of Alaska, on Appeal

from the Superior Court, Third Judicial District, Dillingham, Eben H. Lewis, Judge, *State v. Andrews;* on Appeal from the Superior Court, Third Judicial District, Palmer, James A. Hanson, Judge, *Koenig v. State,* and on Appeal from the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, *State v. Coffey.*

Cynthia M. Hora, Asst. Atty. Gen., Anchorage and Harold M. Brown, Atty. Gen., Juneau, for petitioner.

John M. Murtagh, Anchorage, for respondent Andrews.

Laurel J. Peterson, Laurel J. Peterson, P.C., Anchorage, for respondent Koenig.

A. Michael Zahare, Bradbury, Bliss, & Riordan, Inc., Anchorage, for respondent Coffey.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The issue in these consolidated cases is the proper interpretation of AS 12.55.025(e) and (g). The State contends that an offender convicted of separate counts of sexual assault must be sentenced to consecutive, rather than concurrent, terms. Having made a thorough examination of the matter, we have concluded that the opinion of the court of appeals in *State v. Andrews,* 707 P.2d 900 (Alaska App.1985), correctly treats and disposes of the issues involved, and we adopt such opinion as the opinion of this court.

RABINOWITZ, Chief Justice, with whom COMPTON, Justice, joins, concurring.

The majority adopts the court of appeals' decision in *State v. Andrews,* 707 P.2d 900 (Alaska App.1985) which holds that concurrent sentences may be given if any of the six subparagraphs of AS 12.55.025(g) are met. While the statute is drafted ambiguously, the interpretation the majority adopts is contrary to the legislative intent.

AS 12.55.025(e) provides in part:

> Except as provided in (g) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively.

AS 12.55.025(g) provides:

> If the defendant has been convicted of two or more crimes before the judgment on either has been entered, any sentences of imprisonment may run concurrently if
>
> (1) the crimes violate similar societal interests;
>
> (2) the crimes are part of a single, continuous criminal episode;
>
> (3) there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property rights offended, or the persons offended;
>
> (4) the crimes were not committed while the defendant attempted to escape or avoid detection or apprehension after the commission of another crime;
>
> (5) the sentence is not for a violation of AS 11.41.100–11.41.470; or
>
> (6) the sentence is not for a violation of AS 11.41.500–11.41.530 that results in physical injury or serious physical injury as those terms are defined in AS 11.81.-900.

The court of appeals summarized the difficulties in interpreting AS 12.55.025(g):

> The first three subparagraphs, (1)–(3), identify three situations in which concurrent sentences have been traditionally imposed. The problem arises because the last three subparagraphs, (4)–(6), are phrased in the negative and appear to describe situations in which the legislature may not have wished concurrent sentences, yet the drafter placed all six subparagraphs in the disjunctive. This grammatical structure suggests that each subparagraph should be considered an independent basis for permitting concurrent sentences. Read in this literal fashion, however, the statute would per-

> mit imposition of concurrent sentences in almost every case, since the conduct need only satisfy one of the six subparagraphs, and three of them are in the negative.

Andrews, 707 P.2d at 905–906 (citations omitted).

The court of appeals concluded that reading all six paragraphs disjunctively did not obviously violate legislative intent and was one of several "reasonable interpretations" of the statute. *Id.* at 908. The court of appeals therefore resolved the statute's ambiguity by adopting this interpretation as the one most favorable to the defendant. *Id.*

I agree that the statute is subject to several reasonable interpretations and that the rule of lenity should be applied by construing the statute strictly against the state. However, the construction adopted by the court of appeals and the majority is not a reasonable interpretation of the statute since it cannot be squared with legislative intent.

The one aspect of the legislative intent that can be confidently ascertained is that the statute was designed to require trial courts to give consecutive sentences as a general rule, subject to certain exceptions. AS 12.55.025(e) states that sentences "*shall* run consecutively," except as provided in paragraph (g) (emphasis added). AS 12.55.025(e) and (g) replaced legislation which had given trial courts discretion to impose concurrent sentences in all cases.[1] The legislative commentary to the new sections indicates that they are designed to limit the trial court's discretion to impose concurrent sentences:

> The intent of these sections are [sic] to specify circumstances when consecutive sentences are required by law and to specify the general rule that consecutive sentences are required unless the court has the discretion to impose concurrent sentences under subsection (g).

3 House Journal Supp. No. 64, at 19 (1982).

Paragraph (g) is drafted in a way such that it is difficult to determine exactly how the legislature wished the six subparagraphs to interact and to be applied. It is clear, however, that the legislature intended the subparagraphs to function as exceptions to a general rule. The majority's interpretation cannot be what the legislature intended, because to read the six subparagraphs entirely in the disjunctive causes the exceptions to completely eliminate the general rule.

Under the majority's interpretation the exception applies and concurrent sentences may be given so long as defendant's crimes were not committed while he was attempting to escape. AS 12.55.025(g)(4). Even more significant is that under the majority's interpretation subparagraphs (g)(5) and (g)(6) function to eliminate the possibility that consecutive sentences are ever required. Subparagraph (g)(5) provides that concurrent sentences may be given if the sentence is not for a violation of AS 11.41.-100–11.41.470, which encompass homicide, assault and reckless endangerment, kidnapping, and sexual offenses. Subparagraph (g)(6) provides that concurrent sentences may be given if the sentence is not for a violation of AS 11.41.500–11.41.530, which encompass robbery, coercion, or extortion, that results in physical injury or serious physical injury. The result of the majority's approach will be that concurrent sentences are always available, since homicide, assault and sexual offenses necessarily are not robbery, coercion, or extortion and thereby fall under (g)(6), and robbery, coercion, and extortion necessarily are not homicide, assault or sexual offenses and thereby fall under (g)(5).

While normally phrases separated by "or" should be read disjunctively, courts will not give a statute that interpretation if

1. Former AS 12.55.025(e) provided in part:
> If the defendant is convicted of two or more crimes before judgment on either has been entered, any sentences of imprisonment may run concurrently or consecutively, as the court provides. If the court does not specify, the sentences of imprisonment shall run concurrently.

this will frustrate the legislative intent. *De Sylva v. Ballentine*, 351 U.S. 570, 573–580, 76 S.Ct. 974, 976–79, 100 L.Ed. 1415, 1423–1427 (1956); *United States v. Moore*, 613 F.2d 1029, 1038–1045 (D.C.Cir.1979), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2922, 64 L.Ed.2d 811 (1980); 1A C. Sands, *Sutherland Statutory Construction* § 21.14 (4th ed. 1985). Although the rule of lenity provides that criminal statutes should be strictly construed against the state, "the statute is not to be construed so strictly as to defeat the intention of the legislature." *Moore*, 613 F.2d at 1044. To read the six subparagraphs entirely in the disjunctive clearly would frustrate the legislative intent to require consecutive sentences in some instances.[2] Therefore such a reading should not be accepted.

The question remains how paragraph (g) should be construed. The state argues that concurrent sentences may be given if defendant's crimes fall within subparagraph (1)–(3) *unless* they fall within the situations described in subparagraphs (4)–(6). In other words the state maintains that subparagraphs (4)–(6) act as a limitation on and override subparagraphs (1)–(3), such that a defendant who commits crimes such as sexual offenses, assault, or homicide, or who commits crimes while escaping, must always receive consecutive sentences.[3]

The above interpretation is consistent with the general legislative intent that consecutive sentences be required subject to certain exceptions. I would not, however, adopt this interpretation. The statute can be interpreted in more than one way that is consistent with the general legislative intent. At the same time the wording of the statute does not make clear the specific legislative intent as to the interaction of the exceptions. In such a situation the rule of lenity should apply and the statute should be construed strictly against the state. *Dunn v. United States*, 442 U.S. 100, 112–113, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979); *Moore*, 613 F.2d at 1043.[4]

Therefore, I would construe the statute to mean that concurrent sentences may not be given if the crimes fall within subparagraphs (4)–(6), *unless* one of the criteria set out in subparagraphs (1)–(3) are met.[5] In other words subparagraphs (1)–(3) override subparagraphs (4)–(6). Such an interpretation satisfies the rule of lenity, while at the same time it is consistent with the general legislative intent. Under this interpretation there will be instances when consecutive sentences will be required—i.e. when defendant's conduct does not fall within subparagraphs (1)–(3).[6]

2. Additionally, a statute should be construed to give effect to all of its provisions, such that no part should be read as inoperative, superfluous, void or insignificant. *State v. Frazier*, 719 P.2d 261 (Alaska 1986); 2A C. Sands, *supra*, § 46.06, at 104. The majority's interpretation renders AS 12.55.025(e) superfluous.

3. This interpretation was applied pursuant to agreement of the parties by the court of appeals in *Griffith v. State*, 675 P.2d 662, 664 (Alaska App.1984).

4. It should also be noted that to construe the statute in the manner the state urges would result in mandatory consecutive sentences for such crimes as reckless endangerment (AS 11.41.250), indecent exposure (AS 11.41.460), and coercion (AS 11.41.530).

5. This interpretation was urged by the defendant in *State v. Moody*, (Lekanof), 726 P.2d 194, (Alaska 1986).

6. If this interpretation is not in fact what the legislature intended, the legislature should redraft the statute to clarify its intent.

I concur in the result the majority reaches because the defendants' crimes involved similar societal interests. Subparagraph (g)(1) therefore is satisfied and concurrent sentences may be given.

CSHB 244(2nd JUD)

MAKES CRIMINALS THINK TWICE
BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed (sec. 8)

   - The "felony-murder rule" says that if a person dies during commission of a serious felony, the offender is guilty of second-degree murder, even if he did not cause the death. However, there is an exception in Alaska law: if the person killed is one of the perpetrators, the other perpetrators cannot be charged with his death. The felony-murder rule is designed to discourage serious crimes, and it can be made more effective if it applies equally to the death of a participant in the crime as to the death of a bystander.

   - Example: A small gang commits an armed robbery. The robbery victim (for example, a homeowner or a security guard) shoots and kills one of the robbers. Under current law, if a bystander had been killed, the robbers would be guilty of second-degree murder, but because one of the gang members dies, his accomplices cannot be charged with murder.

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime (secs. 18, 19, 25, 26 and 28)

   - Gives direction to courts when sentencing for more than one offense. Current statutes were intended to require consecutive sentences, but were not interpreted that way because of bad drafting.

   - Under this bill, courts still retain significant sentencing discretion, and for most crimes may impose sentences that are concurrent. However, for homicide, kidnapping, and serious sex offenses, the bill specifies the minimum amount of consecutive time that must be imposed.

   - Example from *State v. Glaser*: Two counts of second degree murder and one count of first degree assault (three separate victims). Under the bill, after the court determines an appropriate sentence for the first count of murder, the court must impose at least the 10-year mandatory minimum term for the second count of murder, and the sentence is consecutive. For the count of assault, the court must impose some period of consecutive time, but the amount is left to the judge's discretion. Actual sentence imposed in *Glaser*: 13 years. Under this bill, the sentence would be a minimum of 20 years.

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs (sec. 13)

   - DOES NOT CHANGE THE BURDEN OF PROOF. THE STATE MUST STILL DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.

   - This bill merely identifies additional circumstances when self-defense is not justified, similar to the current law that says self-defense is not justified if you started the fight or provoked the other person.

   - One of the reasons there is so much serious street violence, especially in Anchorage, is that individuals or groups of criminals fight over territory or over drug deals gone bad or over any number of disputes. These groups are sometimes organized gangs, but often they are loosely-associated or simply "wannabes" who try to curry favor with an organized gang or gang leader because they "want to be" part of the group. These people often roam the city, looking for an opportunity to shoot a rival or perceived rival. It is common that gang members or innocent bystanders are shot or killed, and everyone involved claims they acted in self-defense. Because the prosecution often can't prove who started shooting, the state usually can't prosecute the person who did the killing. **This bill says that if you are trying to further your own criminal objectives or those of someone else, you can't use force and claim self-defense.**

   - In illegal drug deals, it's common for all parties to be armed, and for violence to break out. Everyone claims self-defense, and the prosecution often can't prove who started shooting. **This bill says that anyone engaged in an illegal drug transaction cannot claim self-defense. This is not only a deterrent to violence, but also a deterrent to drug dealing.**

4. Disallows self-defense if the only evidence of it is implausible (sec. 14)

   - Alaska law requires the trial judge to give an instruction that allows the jury to find self-defense, even if the evidence supporting it is "weak or implausible." *Folger v. State*, 648 P.2d 111 (Alaska App. 1982).

   - Federal law, by contrast, requires the defendant to produce enough evidence in support of self-defense that a rational jury could find that the defendant acted in self-defense. *United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984).

   - The bill will help avoid verdicts not supported by evidence, by changing the law to allow the judge to instruct the jury only if there is plausible evidence of self-defense.

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices, and friends of the defendants to refuse to testify by hiding behind state immunity laws (secs. 15-17 and 20)

   - If it is possible that a person would incriminate himself by giving testimony, Alaska law requires complete immunity from prosecution (called transactional immunity) before that witness can be compelled to testify. The witness must be given immunity for any crimes that he may be required to testify about.

   - Witnesses who are willing to testify will usually consult with the prosecutor to disclose their concerns and work out an immunity agreement, if necessary. However, fellow gang members, friends and relatives of defendants usually do not want to testify and often claim self-incrimination, but then refuse to disclose their concerns. Because the prosecutors have no information about what crimes they would be immunizing, they cannot responsibly grant immunity, and therefore critical testimony is not available.

   - This provision sets up a fair and uniform procedure for determining whether a person has a valid self-incrimination claim. For example, it gives the witness a public defender to represent them. It also gives prosecutors minimal information upon which to base a rational decision, i.e., whether the possible offense committed by the witness is a serious offense.

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions (sec. 12)

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system (secs. 3 and 4)

8. Increases penalty to a class C felony for furnishing alcohol to minors in local option areas (sec. 5), and for sending large amounts of alcohol to local option areas (secs. 1 and 2)

9. Strengthens the forfeiture law for bootlegging offenses (secs. 6 and 7)

   - Allows for forfeiture of money used in bootlegging offenses and provides for sharing of proceeds of forfeitures with local law enforcement

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers (secs. 10 and 11)

- Increases the protection for children from sexual abuse of older teenagers. Adjudication for an offense that would be a felony may be used as an aggravating factor if the offender commits another offense as an adult.

11. Allows greater disclosure of information about juvenile sex offenders (sec. 27)

- Help parents and other adults protect children by making information available to them about juvenile sex offenders. This information is not currently available to the public.

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies (secs. 21 and 23)

- Because prior drunk driving offenses must be within a ten-year period to subject the driver to felony penalties, sometimes, later drunk driving offenses are treated as misdemeanors even if the person was already convicted of felony drunk driving. These drivers present a big risk to the public; by making every subsequent drunk driving a felony, we can encourage repeat drunk drivers to stay off the road if they have been drinking.

13. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury (sec. 9)

- Persons who drive partly impaired (but not enough to be DUI), and cause serious physical injury, are only guilty of misdemeanor assault. Causing long-term and debilitating injuries by driving while impaired justifies felony penalties.

14. Prohibits the "big gulp" defense in drunk driving cases (secs. 22 and 24)

- Reverses a recent court decision, *Conrad v. State,* 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

FRANK H. MURKOWSKI, GOVERNOR

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Juneau, AK 99811-0300
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February 10, 2004

Rep. Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Re: Proposal for CSHB 244 (2nd JUD)

Dear Representative McGuire:

The following describes the highlights of the proposed House Judiciary Committee Substitute for HB 244. I am also enclosing a chart comparing the original bill with CSHB 244 (JUD) and the proposed committee substitute. Also attached are a two-page sectional summary and a four-page description of the bill with examples showing how the proposed changes would improve criminal law in the state.

Highlights of Governor's 2004 Crime Bill (CSHB 244(2nd JUD))

MAKES CRIMINALS THINK TWICE
BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder law so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs

4. Disallows self-defense if the only evidence of it is implausible

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices and friends of defendants to refuse to testify by hiding behind state immunity laws

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system; increases the penalty for bootleggers in urban areas who send booze to local option areas

8. Increase penalty to a class C felony for furnishing alcohol to minors in local option areas, and for sending large amounts of alcohol to local option areas

9. Strengthens the forfeiture law for bootlegging offenses

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers

11. Allows greater disclosure of information about juvenile sex offenders

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies

13. Increase penalty to a class C felony for certain vehicular offenses that cause serious physical injury

14. Prohibits the "big gulp" defense in drunk driving cases

I hope this information is helpful to you.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: David Marquez
Assistant Attorney General

DWM:hb

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

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March 9, 2004

The Honorable Lesil McGuire, Representative
State Capitol
Juneau, Ak 99801-1182

Re: HB 244, Governor's 2004 Crime Bill

Dear Representative McGuire:

I am writing to voice my support of the Governor's 2004 Crime Bill, which I understand, will be considered as a committee substitute for HB 244. Although I support all the provisions in the Governor's new bill, there are some that are of particular interest to me because they are important in protecting children from abuse.

For over 20 years I have been working in Alaska as a prosecutor of adult sex offenders, as a prosecutor of juvenile offenders, and as a line attorney and supervisor of prosecutors of child protection (CINA) cases, many of which involve sexual abuse of children, as well as other types of abuse and neglect. I have also served on two Governor's Child Protection Task Forces and the Balloon Project Steering Committee. I continue to serve on the Juvenile Justice Working Group, the CINA and Juvenile Delinquency Court Rules Committee, the CINA Court Improvement Project and the Management Team of Alaska CARES (Anchorage's Child Advocacy Center). And I currently serve as chair of the Federal Children's Justice Act Task Force. Finally, I received the 2003 Commissioner's Award from the U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, for my "outstanding leadership and service in the prevention of child abuse and neglect." This was followed by a citation in my honor issued by the Alaska Legislature and sponsored by the Honorable Fred Dyson.

Because of my lengthy and broad experience in several aspects of the fight against child abuse and neglect articulated above, I would like to add my support and comments to four particular provisions of the Governor's crime bill that deal directly with this effort.

First, the provisions giving direction to courts in imposing sentences for defendants convicted of more than one crime will help protect children from abusers. Current laws for sentencing offenders convicted of multiple offenses are confusing and unevenly applied. As I know you are aware, child abusers often victimize more than one child, and more than one time, and therefore these new sentencing provisions are of great interest to me.

Next, because I am well aware that sexual offenders are not always adults, I support the provisions that would increase the seriousness of abuse of young children by teenagers. A 14-year-old that sexually abuses a five- year- old by penetration should be adjudicated of a felony, not a misdemeanor. Even though the incarceration/treatment of these young offenders would not drastically change, increasing the class of the offense would send the correct message to these offenders about the seriousness of the offense. Currently, to a juvenile, it appears more serious to steal someone's laptop (a felony) than to engage in full sexual penetration with a kindergartner (a misdemeanor).

Thirdly, I support the provision that would allow greater information to be released about juvenile sex offenders. A parent should be able to find out if a potential babysitter for their children has been adjudicated in the juvenile justice system for a sex offense. As a mother of two young children, I know I would be horrified if I unwittingly hired a babysitter that perpetrated on one or both of my children. My children could be scarred for life.

Finally, the provisions giving local communities authority to adopt stronger controls over alcohol in local option areas, and related provisions to curb bootlegging, will contribute to a better environment for children in rural areas. Alcohol is almost always involved in incidents of child sexual abuse, physical abuse and neglect. If perpetrators who are prone to abusing children when they have consumed too much alcohol were not allowed access to it, I guarantee the rate of child abuse and neglect would plummet.

Thank you for hearing this legislation. I believe it will greatly assist our efforts to make Alaska a safer place to be a child.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Lisa B. Nelson
Assistant Attorney General

LBN:dal

Alaska Association of Chiefs of Police

Via: US Mail

February 24, 2004

Mr. Dean Guaneli
Chief Assistant Attorney General
PO Box 110300
Juneau, Alaska 99801

RE: Governor's 2004 Crime Bill

Dear Dean,

The Alaska Association of Chiefs of Police would like to offer our support for the Governors 2004 Crime Bill. I believe this bill offers many potential solutions to problems we as Law Enforcement Officers and you as Prosecutors face day on a daily basis.

As an Alaskan Law Enforcement Officer for over 30 years I have watch our criminal justice system come from areas that were weak to a much stronger practice today. However there is still much to do to assure the safety of the people we serve as well as reducing the occurrence of serious and dangerous offenses. This bill assist's those communities that choose to reduce the use of alcohol; it improves our drunken driving laws and helps in the protection of children from juvenile offenders. These are important areas that need to be address and I believe the Governor has made a major step in the right direction.

We support this bill and offer any assistance we can provide. Please contact me if you have any questions or concerns.

Sincerely,

Thomas Lee Clemons
Chief of Police

(907) 224-3338 P.O. Box 167 Seward, AK 99664

MADD
Activism | Victim Services | Education

Mothers Against Drunk Driving
JUNEAU CHAPTER
211 4th St., Suite 314
Juneau, AK 99801
Phone (907)463-2562
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madd@alaska.net
www.madd.org/ak/juneau

Mothers Against Drunk Driving (MADD) supports CSSB 170 for House Bill 244.

MADD supports consecutive jail time for each death in a drunk driving crash in order for restorative justice to take place within our communities.

As a victim in the State v. Glaser case, I cannot begin to explain the unnecessary bitterness and frustration our families struggle with because of the court decision which refused to consider the multiple deaths in the drunk driving tragedy. Currently in Alaska, a loved one's life is less valuable than a stolen automobile in a felony case; this sends a dangerous message out to all Alaskans. Each life torn from us by drunk driving is certainly worth taking into individual consideration; to do otherwise would create additional heartache and trauma for victims of this violent crime.

MADD also supports the right for communities to adopt lower limits of alcohol possession and importation in order to increase the health and safety of their people.

MADD supports stricter drunk driving sanctions for high risk drivers. Habitual drunk drivers who have repeatedly chosen to endanger themselves and everyone else who shares their road system must be held accountable for their crimes.

About one-third of all drivers arrested or convicted of driving under the influence are repeat offenders. These drivers are 40% more likely to be involved in a fatal crash than those without prior DUIs.

MADD supports increased penalties for those whose choice to drink and drive results in the serious injury of an innocent victim or victims.

People who drink and drive are unable to determine if they are sober before arriving at their destination. If a person chooses to drink and drive then that person has committed a crime and should be held accountable for his/her actions.

MADD supports the recommended changes in CSSB 170 for House Bill224 as a way of deterring further drunk driving tragedies and improving Alaska's restorative justice system.

Sincerely,

Cindy Cashen

Cindy Cashen
Executive Director

ALASKA NETWORK ON
DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, Rm 209
Juneau, Alaska 99801

(907) 586-3650 ph
(907) 463-4493 fx

SB170/HB244
March 2004

Please accept this memo as a letter of support for the Governor's crime bill.

The Network particularly appreciates the administration's stance on holding perpetrators accountable for each crime they've committed by requiring consecutive sentencing for multiple counts of particularly heinous crimes, including sexual assault. The longer sex offenders can be removed from the community the safer we all are. Consecutive sentences also provide some sense of approximate justice to each victim involved, that at least the perpetrator is being required to pay something, for the crime committed against her/him.

The Network supports increasing the penalty from a class A misdemeanor to a class C felony for the crime of sexual abuse when an older minor penetrates a very young minor. Recognizing that minors who commit sexual abuse crimes are sometimes victims themselves, it is still important that the crime carry a penalty severe enough that if the minor chooses to perpetrate a sexual assault as an adult, the previous conduct can be examined.

The Network also supports releasing documents concerning adjudication of a sexual offense to protect the safety of a child or vulnerable adult. Balancing the needs of families to protect children and vulnerable adults and the juvenile offender's right to confidentiality is something we believe can be achieved through the regulation process when the department begins to implement procedures to allow for the release of information.

8.3[illegible].140 Abuse of third party appointment.

A. It is unlawful for any person to:

1. Intentionally, knowingly, or recklessly make a false statement to the court while being examined regarding the duties of a third-party custodian;

2. Intentionally, knowingly, or recklessly fail to comply with the conditions set by the court on the third-party appointment; or

3. Intentionally, knowingly, or recklessly fail to immediately report that the defendant has violated any condition of the defendant's release.

B. Violation of this section shall, upon conviction, be punishable by a fine of not more than $2,000.00 or imprisonment of not more than six months, or both such fine and imprisonment.

(AO No. 2000-95, § 10, 10-16-00; AO No. 2003-73, § 3, 4-22-03)

LEXSEE 853 P.2D 526

STATE OF ALASKA, Petitioner, v. THE HONORABLE RENE J. GONZALEZ, JUDGE OF THE SUPERIOR COURT, JILL JAHNKE-LELAND, PETER H. LELAND, and JEFFREY S. DEGRASSE, Respondents.

No. 3962, Supreme Court No. S-5003

SUPREME COURT OF ALASKA

853 P.2d 526; 1993 Alas. LEXIS 53; 5 A.L.R. 2204; 29 A.L.R.5th 747

June 4, 1993, Decided

PRIOR HISTORY: [**1]

Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Court of Appeals No. A-4063. Superior Court Nos. 3AN-S91-693 Cr., 3AN-S91-694 Cr. Rene Gonzalez, Judge.

DISPOSITION:

AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: The State appealed the ruling of the Court of Appeals of the State of Alaska, which affirmed the trial court's judgment holding that *Alaska Stat. § 12.50.101* was unconstitutional under Alaska Const. art. I, § 9. The statute authorized an order compelling testimony based on a grant of use and derivative use immunity.

OVERVIEW: In a murder trial, the State attempted to compel the testimony of a co-defendant under § 12.50.101, which allowed the State to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony. The trial court held that the statute was unconstitutional as it violated the self-incrimination right of the co-defendant. Finding no error in the lower courts' judgments, the court affirmed. The scope of the protection against self-incrimination under Alaska Const. art I, § 9 was that: (1) an individual could not be compelled to give testimony unless the State had taken measures to remove the hazard of incrimination; and (2) an individual faced a hazard of incrimination whenever the answers elicited could supported a conviction or could furnish a link in the chain of evidence leading to a conviction. Where the hazard of incrimination had been removed, the privilege against self-incrimination was no longer required. The court held that a grant of use and derivative use immunity did not remove the hazard of incrimination. The State could not meaningfully safeguard against nonevidentiary use of the compelled testimony.

OUTCOME: The court affirmed the judgment.

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege

[HN1] Alaska Const. art. I, § 9 states that no person shall be compelled in any criminal proceeding to be a witness against himself. This section does not prohibit compelling a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

Criminal Law & Procedure > Grand Juries > Self-Incrimination Privilege > ImmunityCriminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege

[HN2] Transactional immunity prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. Use and derivative use

immunity allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions.

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege
[HN3] *Alaska Stat. § 12.50.101* authorizes an order compelling testimony based on a grant of use and derivative use immunity.

Criminal Law & Procedure > Grand Juries > Self-Incrimination Privilege > Immunity
[HN4] Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. Additionally, if defendant is compelled to testify while her appeal is pending, transactional immunity will not invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction is reversed on appeal.

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege
[HN5] *Alaska Stat. § 12.50.101* states that: the State may compel testimony upon the condition that: no testimony or other information compelled, or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution. *Alaska Stat. § 12.50.101(a).*

Governments > Legislation > Interpretation
[HN6] Constitutional interpretation follows the rule that the intent underlying constitutional language should first be gathered from the plain meaning of the language itself. This inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the intention and spirit of our local constitutional language and whether the right invoked is necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Criminal Law & Procedure > Grand Juries > Investigatory Powers
[HN7] Nonevidentiary use of compelled testimony includes assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

COUNSEL:

Eric A. Johnson, Assistant Attorney General, Anchorage; Charles E. Cole, Attorney General, Juneau, for petitioner.

Margi Mock, Assistant Public Defender; Ray Brown, Assistant Public Defender; John B. Salemi, Public Defender, Anchorage, for respondent Jeffrey S. DeGrasse. Jeffrey S. Sauer, Juneau, for respondent Jill Jahnke-Leland.

JUDGES: Before: Moore, Chief Justice, Rabinowitz, Burke, Matthews, and Compton, Justices.

OPINIONBY: MATTHEWS

OPINION:

[*528] OPINION

MATTHEWS, Justice.

[HN1] Article I, section 9 of the Alaska Constitution states that "no person shall be compelled in any criminal proceeding to be a witness against himself." This section does not prohibit compelling a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. *Surina v. Buckalew, 629 P.2d 969 (Alaska 1981); State v. Serdahely, 635 P.2d 1182 (Alaska 1981)* [**2] (per curiam). However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

There are two types of immunity from prosecution in current usage. [HN2] Transactional immunity, the more protective type, prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. The narrower form, use and derivative use immunity, allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions. *Surina, 629 P.2d at 971, n.2.* In Surina and Serdahely, pursuant to our supervisory powers, we approved of transactional immunity as a matter of practice but expressed no view as to whether use and derivative use immunity might also be constitutionally permissible.

Alaska Statute 12.50.101, enacted after Surina and Serdahely were decided, [HN3] authorizes an order compelling testimony based on a grant of use and derivative use immunity. In the present case this statute has been challenged as unconstitutional under article I, section 9 of the Alaska Constitution. The superior court [**3] and the court of appeals have concluded that the

statute is unconstitutional. We granted the state's petition and now affirm the decision of the court of appeals.

FACTS AND PROCEEDINGS

On the evening of May 8, 1990, Jill Jahnke-Leland, Carl Jahnke-Leland, Peter Leland, and Jeffrey DeGrasse were arrested for the murder of Rick Zaug and the attempted murder of Tom Moore. Earlier that day Zaug and Moore had sailed from Ketchikan to Thorne Arm to go fishing. That evening the two men tied their boat to a public mooring buoy to which another boat was already tied. Soon thereafter a tragic dispute arose over use of the buoy. After angry words were exchanged, Moore and Zaug were fired upon from the shore; Zaug was killed and Moore was seriously injured.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland all gave taped statements to the police. Leland and DeGrasse admitted that each had shot at Zaug and Moore from the shore. Jill Jahnke-Leland stated that after she had words with Zaug and Moore, she headed toward shore and fired a gun shot in the air to scare Zaug and Moore. Jill Jahnke-Leland also stated that soon after she fired that shot into the air, DeGrasse and Leland began firing. **[**4]**

Leland, DeGrasse, and Carl and Jill Jahnke-Leland were each indicted for first-degree murder, attempted first-degree murder, and first-degree assault. Jill Jahnke-Leland was convicted of manslaughter and assault. She appealed to the court of appeals. Her appeal was pending during the proceedings hereinafter described **[*529]** and during the presentation and consideration of this case by this court. n1

n1 Shortly before the publication of this opinion the court of appeals affirmed her conviction and remanded her sentence. Jahnke-Leland v. State, Mem. Op. & J. No. 2675 (Alaska App., April 21, 1993). The progress of Jill Jahnke-Leland's appeal is relevant if her conviction becomes final before the state compels her to testify. In that event, Jill Jahnke-Leland would no longer be subject to conviction or punishment on account of her compelled testimony. [HN4] Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. *E.L.L. v. State, 572 P.2d 786, 788 (Alaska 1977)* ("a witness may not refuse to testify where there is no real or substantial hazard of incrimination."). Additionally, if Jill Jahnke-Leland was compelled to testify while her appeal was pending, transactional immunity would not invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction was reversed on appeal. See *State v. Runions, 100 Wash. 2d 52, 665 P.2d 1358, 1360 (Wash. 1983)* (citing *Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)*).

[5]**

In the subsequent trial against Leland and DeGrasse, the state moved to compel Jill Jahnke-Leland to testify under *AS 12.50.101*. n2 *Alaska Statute 12.50.101* allows the state to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony in a criminal prosecution. The trial court denied the state's motion, ruling that *AS 12.50.101* violates article I, section 9 of the Alaska Constitution, which protects individuals against compelled self-incrimination. n3 Leland and DeGrasse were then tried without Jill Jahnke-Leland's testimony. The trial ended with a hung jury. On retrial, the state renewed its motion to compel Jill Jahnke-Leland to testify. The trial court again denied the motion on constitutional grounds. The state sought review and the court of appeals affirmed the trial court's decision. *State v. Gonzalez, 825 P.2d 920 (Alaska App. 1992)*. We granted the state's petition for hearing from this decision.

n2 *AS 12.50.101* [HN5] states, in relevant part, that the state may compel testimony upon the condition that:

> no testimony or other information compelled . . ., or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

AS 12.50.101(a). **[**6]**

n3 Article I, section 9 of the Alaska Constitution reads as follows:

> **Section 9. Jeopardy and Self-Incrimination.** No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

IMMUNITY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

This case presents two issues: (1) What is the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination? and (2) Does *AS 12.50.101* provide immunity which adequately matches the protection of the constitutional privilege? We address each issue in turn.

Scope of the Privilege

The issue of the scope of article I, section 9 is a question of constitutional law which we decide de novo. [HN6] Constitutional interpretation follows the "rule that the intent underlying . . . constitutional language should first be gathered from the plain meaning of the language itself." *Baker v. City of Fairbanks, 471 P.2d 386, 397 (Alaska 1970).* As the court of appeals recognized, this inquiry is not controlled by any one source **[**7]** of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our local constitutional language and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Id. at 402* (emphasis added).

In the present case, our inquiry is controlled by Alaska precedent. The state and DeGrasse acknowledge that the scope of article I, section 9 is set forth in *E.L.L. v. State, 572 P.2d 786 (Alaska 1977):*

> The privilege against self-incrimination applies where the answers elicited could **[*530]** support a conviction or might furnish a link in the chain of evidence leading to a conviction. But, a witness may not refuse to testify where there is no real or substantial hazard of incrimination . . . .

Id. at 788 (citations omitted). Thus, in *Surina v. Buckalew, 629 P.2d 969, 977 (Alaska 1981),* we stated: **[**8]** "where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required." Surina, however, left open the question of what type of immunity would "remove" "the hazard of incrimination." From these authorities we can piece together the scope of the article I, section 9 protection against self-incrimination: (1) an individual may not be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination; and (2) an individual faces a hazard of incrimination whenever "the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction." n4

> n4 This scope largely parallels the scope the Supreme court has set for the Fifth Amendment. *Kastigar v. United States, 406 U.S. 441, 453, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).* None of the parties have suggested, nor do we consider, Justice William O. Douglas' position that the privilege "put[s] it beyond the power of [government] to compel anyone to confess his crimes." *Id. at 467* (emphasis added) (Douglas, J., dissenting); see *Ullmann v. United States, 350 U.S. 422, 446, 100 L. Ed. 511, 76 S. Ct. 497 (1956)* (Douglas, J., dissenting).
>
> At times, DeGrasse claims to broaden the scope of article I, section 9 by stating that a grant of immunity must "place[] [the witness] in the same position as if he remained silent." The Supreme Court has rejected this formulation of the self-incrimination guarantee, instead favoring an interpretation similar to the one stated above. See *United States v. Apfelbaum, 445 U.S. 115, 63 L. Ed. 2d 250, 100 S. Ct. 948 (1980).* This formulation also begs a very important question: put in the same position with respect to what interest? Clearly certain interests, such as keeping the compelled testimony from coming to public light, could not be achieved without implementing extraordinary means. The standard "the same position as if he remained silent" must have a specific reference point. In the present case, that reference point is incrimination. Thus, a meaningful reading of the "same position" argument is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination from his own words. Thus, DeGrasse's seemingly restrictive standard really reduces to this court's prior standard: remove the hazard of incrimination due to the compelled person's own words.

[9]**

AS 12.50.101 and the Scope of the Privilege

We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination. See

Kastigar v. United States, 406 U.S. 441, 468, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) (Marshall, J., dissenting). In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy article I, section 9. Because we doubt that workaday measures can, in practice, protect adequately against use and derivative use, we ultimately hold that *AS 12.50.101* impermissibly dilutes the protection of article I, section 9. Our conclusion rests on two bases.

First, we are persuaded that problems of proof and ordinary human frailties combine to pose a potent threat to **[**10]** an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used. Justice William Brennan expressed these twin concerns in his dissent in *Piccirillo v. New York, 400 U.S. 548, 552, 27 L. Ed. 2d 596, 91 S. Ct. 520 (1971)* (Brennan, J., dissenting). According to Justice Brennan:

> **[*531]** all the relevant evidence will obviously be in the hands of the government -- the government whose investigation included compelling the individual involved to incriminate himself. . . . This argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is **[**11]** often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568; see also *Kastigar, 406 U.S. at 469* (Marshall, J., dissenting).

For this important reason, we also reject the state's proffered analogy between compelled testimony and coerced confessions. In a case involving a coerced confession, the facts relevant to the "voluntariness" of the confession will be known and available to both the state and the accused. In the case of compelled testimony, however, the accused can only speculate as to how widely her compelled statement has been disseminated. Procedures and safeguards can be implemented, such as isolating the prosecution team or certifying the state's evidence before trial, but the accused often will not adequately be able to probe and test the state's adherence to such safeguards. This danger does not subside in the face of even the strictest burden of proof, for, as Justice Thurgood Marshall aptly noted, although the government may have the burden of proof, "the government will have no difficulty in **[**12]** meeting its burden by mere assertion if the witness produces no contrary evidence." *Kastigar, 406 U.S. at 469* (Marshall, J., dissenting).

One of the more notorious recent immunity cases, *United States v. North, 285 U.S. App. D.C. 343, 910 F.2d 843* (D.C. Cir.), modified, *287 U.S. App. D.C. 146, 920 F.2d 940 (D.C. Cir. 1990)* (en banc), cert. denied, *111 S. Ct. 2235 (1991)*, illustrates another proof problem posed by use and derivative use immunity. North involved the criminal conviction of Oliver North for his alleged participation in the Iran/Contra Affair. Prior to his criminal trial, North had been compelled to testify before congressional committees investigating the Iran/Contra Affair. This testimony received extensive coverage in the national media. As required by federal law, North received immunity from use or derivative use of any testimony given before the committees.

On appeal, the District of Columbia Circuit identified two witness-related problems with regard to North's compelled testimony. **[**13]** First, the prosecution could use the compelled testimony to refresh the recollection of a witness testifying at North's criminal trial. Id. at 860-61. This use could be policed by relying on the good faith assurances of the prosecution and its witnesses that no such use was made of the compelled testimony. The second problem, however, is more troublesome. In a case such as North, where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. Id. at 863. In such cases, a court would face the insurmountable task of determining the extent and degree to which "the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." Id. We have not been persuaded that procedures exist to probe the mind of a witness in order to discover such use of compelled testimony.

The second basis for our decision is that the state cannot meaningfully safeguard against nonevidentiary use of compelled testimony. n5 [HN7] Nonevidentiary use "include[s] **[*532]** assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting **[**14]** evidence, planning

cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).* Innumerable people could come into contact with the compelled testimony, either through official duties or, in a particularly notorious case, through the media. n6 Once persons come into contact with the compelled testimony they are incurably tainted for nonevidentiary purposes. See id. Safeguarding against such dangers will prove well nigh impossible,

> for the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469 (Marshall, J., dissenting).

n5 Although both courts and commentators divide on whether a constitutional protection against self-incrimination should prohibit nonevidentiary use of compelled testimony, see, e.g., *United States v. Byrd, 765 F.2d 1524, 1530-31 (11th Cir. 1985)* (allowing nonevidentiary use); *United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)* (prohibiting nonevidentiary use); Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, *66 Tex. L. Rev. 351, 371-83 (1987)* (urging that nonevidentiary use be allowed); Kristine Strachan, Self-Incrimination, Immunity, and Watergate, *56 Tex. L. Rev. 791, 806-10 (1978)* (urging that nonevidentiary use be prohibited), the state concedes that the Alaska constitution prohibits such use. Additionally, we believe that nonevidentiary use could "furnish a link in the chain of evidence leading to a conviction," *E.L.L., 572 P.2d at 788,* or at least forge and shape that chain, sufficiently to fall within the conduct prohibited by article I, section 9. **[**15]**

n6 This situation is further complicated if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.

Nonevidentiary use of compelled testimony can adversely affect an accused in many ways. When compelled testimony is incriminating, the prosecution can "focus its investigation on the witness to the exclusion of other suspects, thereby working an advantageous reallocation of the government's financial resources and personnel." Strachan, supra, at 807. The compelled testimony "may help explain information otherwise known," which could aid the prosecution in the presentation of its case. Id. With knowledge of how the crime occurred, the prosecution may refine its trial strategy to "probe certain topics more extensively and fruitfully than otherwise." Id. Indeed, a defendant may choose to relinquish her right to testify out of fear that the prosecution has honed its cross-examination with its knowledge of the compelled testimony. Id. Regardless of whether Jill Jahnke-Leland testified at her first trial, the prosecution's mere knowledge **[**16]** of her compelled testimony might significantly alter her decision whether to do so in a possible retrial. These are only some of the possible nonevidentiary advantages the prosecution could reap by virtue of its knowledge of compelled testimony.

Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be "nonevidentiary uses of which even the prosecutor might not be consciously aware." *State v. Soriano, 68 Ore. App. 642, 684 P.2d 1220, 1234 (Or. App. 1984)* (only transactional immunity can protect state constitutional guarantee against nonevidentiary use of compelled testimony). We sympathize with the Eighth Circuit's lament in McDaniel that "we cannot escape the conclusion that the [compelled] testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel, 482 F.2d at 312.* This incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.

We are not alone in construing a state constitutional guarantee **[**17]** to require transactional immunity in exchange for compelled incriminating testimony. Courts in Hawaii, Massachusetts, and Oregon have reached the same result. See *State v. Miyasaki, 62 Haw. 269, 614 P.2d 915, 922-23 (Hawaii 1980); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915, 921 (Mass. 1982); Soriano, 684 P.2d at 1232.* n7 In each case, the court relied, in part or in whole, on dangers presented by the inability to adequately enforce a ban on derivative use. See *Miyasaki,* **[*533]** *614 P.2d at 923-24; Colleton, 444 N.E.2d at 920-21; Soriano, 684 P.2d at 1233-34.*

n7 But see, e.g., *State v. Strong, 110 N.J. 583, 542 A.2d 866, 871-72 (N.J. 1988); People v. Johnson, 133 Misc. 2d 721, 507 N.Y.S.2d 791, 793 (Sup. 1986); Welsh v. Commonwealth, 14 Va. App. 300, 416 S.E.2d 451, 455 (Va. App. 1992).*

[**18]

Because of the manifold practical problems in enforcing use and derivative use immunity we cannot conclude that *AS 12.50.101* is constitutional. Mindful of Edward Coke's caution that "it is the worst oppression, that is done by colour of justice," n8 we conclude that use and derivative use immunity is constitutionally infirm.

n8 1 Lord Edward Coke, The Second Part of the Institutes of the Laws of England 48 (1797).

AFFIRMED.

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 4, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: May 9, 2003

The JUDICIARY Committee considered: **HB 244**

HOUSE BILL NO. 244 **CRIMINAL LAW/SENTENCING/PROBATION/PAROLE**

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 244 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW	1			✓
COR	2	✓		
ADM		✓		

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Holm			✓	
	Coghill		✓		
	Ogg			✓	
	Gruenberg			–	
	SAMUELS	✓			
Chair:	McGuire			✓	
Chair:					

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

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House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: May 10, 2003

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1024\A, HB 244, incorporating the attached eight amendments (Amendments # 1, 2, 3, 4, 5, 6, 10 &14 passed while the other amendments failed). The bill was passed out of committee yesterday.

If you have any questions, please call me at 4990. Thank you and good luck with this one!

sects. 3-5

AMENDMENT #1 - Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page ~~1~~ 2, line ~~9~~ 10 - Page 3, line 6:
Delete all material.

Renumber the following bill sections accordingly.

Conceptual Amendment #2 - PASSED. BY REP. GARA

Removing §'s (sections) 1 & 2 of the Bill & renumber accordingly.

HB 244
(Sect. 6)

Anderson - 1

Amendment # 3 - Adopted

delete "a"
P. 3, L. 10 after (3) insert "an immediate"

Page 3, line 11, after "prisoner" insert "or any relative or friend of the prisoner"

This amendment deals with Section 6 of the bill, which seeks to restrict a prisoner's access to an attorney. Although an arrestee has been Mirandized and advised of their right to seek counsel, a prisoner's relative or friend should be able to retain counsel on their behalf. If the prisoner does not wish to meet with the attorney provided by their relative or friend, they retain the right to refuse counsel. I support this amendment because it has not been demonstrated that limiting a prisoner's right to counsel is in any way good public policy.

HB 244 Anderson .2

conceptual

Amendment #4 – Adopted

(sect. 7)

Page 3, line 15 – Page 4 line 1:
Delete all material. delete And all sections conforming to this deletion

Renumber sections accordingly.

This amendment removes Section 7 from the bill. Prior convictions should not be introduced in a criminal trial. It is highly prejudicial and has the potential of biasing a jury.

AMENDMENT #~~*~~5 - Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page 4, line 15 - Page 6, line 1: (sects. 9-12 & 17)
Delete all material.

Page 8, lines 11-16:
Delete all material.

Renumber the following bill sections accordingly.

conceptual **AMENDMENT #~~1~~ 6** -Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page 8, lines 7-10: (section 16)
Delete all material.

Renumber the following bill sections accordingly.

Amendment #9 - FAILS HB 244

P. 10 L. 5

Delete ~~p. 9 line 8~~ - p. 11 line 28

(section ~~2~~ 23)

sect. 23 stays in

Amend. #10 - conceptual - PASSES

p. 11, L. 11 after ";" delete "and"

p. 11, L. 12 before . insert "; and (D) the prosecution has not designated the officer or investigator as an expert witness."

AMENDMENT 13 - FAILS
to HB 244

By Rep. Gruenberg

1 Delete page 12, lines 24-30
(section 26)

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by Rep. McGuire

Concept. Amend. #14 → PASSED. (Clean up Amendment)
Renumber entire bill accordingly.
make any necess. conforming A's
Re-title accordingly.

HOUSE BILL 244
Sectional Analysis

Section 1. "Heat of passion" applies only to First Degree Murder and Second Degree Murder. If a person kills while in a passion that was the result of serious provocation by the intended victim, that reduces the killing from murder to manslaughter. In one case, a man broke into the home of a drug dealer to recover money, and shot the drug dealer. He claimed that the shooting was done in a "heat of passion" and the Alaska Supreme Court reversed his murder conviction because the trial judge did not believe he was entitled to raise this defense. "Heat of passion" is often a fall-back position for defendants who do not think they will completely escape responsibility under self-defense. In cases where the state is able to disprove self-defense, it may also be required to disprove "heat of passion." This section would change "heat of passion" from a defense, that the state must *disprove* beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence. The defendant is the person who knows the motivation for the killing, and should bear the burden of establishing this justification.

Sections 2 - 4. These change self-defense from a defense, that the state must disprove beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence, with two exceptions. First, self-defense would remain a defense for the state to disprove if the person was on his or her property and did not use force against a household member; Second, it would remain a defense as under current law for force used by a peace officer acting within the scope of his or her duties. In most homicides, the defendant is only person still alive who was present at the killing. As with the defense of duress, the defendant is the person who knows the motivation for the use of force, and should bear the burden of establishing this justification. Section 2 deals with use of non-deadly force in self-defense. Sections 3 and 4 deal with deadly force. Section 4 also provides that a defendant may not claim self-defense for a killing if he brought a deadly weapon to the encounter, and was aware of and disregarded the risk that the encounter would result in combat.

Section 5 makes use of force in defense of a third person an affirmative defense. As with self-defense, the state would still be required to disprove the defense if the incident occurred on the person's property or the force was used by a peace officer.

Section 6 provides that an adult who has volunteered to talk to the police must request to be visited by an attorney, relative or friend. Occasionally attorneys people will demand to visit a person under arrest, even if the person has not made a request for the visit. This interrupts the police investigation, but it is allowed under current law. All other provisions in section 6, regarding the right to immediately make phone calls, are unchanged from current law.

Section 7. When the law provides that an element of a crime depends on a prior conviction or convictions, such as felony drunk driving, the state must prove beyond a reasonable doubt that the past convictions occurred. But the Alaska courts have said that this must occur in two trials, and that the jury must not be told of the past convictions in the first trial. This section reverses that court decision. Section 7 also provides that the defendant may not again litigate the validity of the prior conviction, unless the defendant was not provided counsel or a jury trial. Prior convictions should not again be subject to attack where the defendant has had the opportunity to appeal, and to exercise post-conviction remedies.

Sections 8 -12 and 17. These sections adopt a procedure for making decisions about Fifth Amendment claims and the granting of immunity by the state. Alaska law requires complete, transactional immunity from prosecution for a person who has claimed a privilege; thus, the decision to grant immunity must be made carefully. Currently, the courts hold secret hearings with witnesses who refuse to testify, and then give the state no information that the state needs to decide whether to grant immunity to the witness. Under this bill, the state is allowed the information it needs to make a rational decision about granting immunity from prosecution. Section 8 merely conforms statutory law to a constitutional decision by the Alaska Supreme Cournt. Sections 9 and 10 are minor clarifying amendments. Section 11 defines a term that explains that the witness can communicate to the court through his or her attorney, rather than speaking directly. Section 12 adopts a procedure where the decision about the privilege is made after an attorney is appointed for the witness, and after input by both the witness and the state. Section 17 clarifies that a witness who claims a Fifth Amendment privilege not to testify is entitled to a public defender if the cannot afford one. This codifies current court practice.

Sections 13 and 14, 18 - 20. Sections 13, 18 - 20 are conforming amendments regarding consecutive sentencing. Section 14 gives direction to courts in sentencing for more than one offense. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter or kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Section 15 is similar to section 7, and provides that in imposing a presumptive sentence (which depends on prior convictions), the defendant may only challenge the validity of a prior conviction if he was denied the right to counsel or the right to a jury trial.

Section 16 would adopt a new mitigating factor for sentencing in a sexual felonies. Because these trials are so difficult for the victim, it would allow the court to consider whether to impose a lesser sentence if the defendant reduced the impact on the victim by entering a plea of guilty or no contest within 30 days of arraignment.

Section 21 changes Rule 16 (c)(5), Alaska Rules of Criminal Procedure, to require a defendant to give notice of certain defenses 30 days in advance of trial. Current law requires a shorter notice, and is routinely ignored by defense attorneys and courts.

Section 22 makes a conforming amendment to Rule 16(e)(1), Alaska Rules of Criminal Procedure, by cross-referencing consequences provided in other law for violation of the discovery rules or an order issued by a court under the discovery rules.

Section 23 addresses pretrial discovery of expert witnesses by both the prosecution and the defense. It requires that no later than 45 days before trial, both parties provide opposing counsel with the name and curriculum vitae of expert witnesses. The defense must disclose only those experts that it may call at trial. The prosecution must disclose experts that it may call at trial or that have worked on the case. Defense attorneys frequently instruct their experts not to write reports, because the report would have to be turned over to the prosecution. The prosecution has no such luxury, and is required to provide an expert's report. This section provides that if the defense expert has not written a report, the prosecution is entitled to depose the expert at the expense of the defense. It requires the court to disallow expert testimony if disclosure isn't complete seven days before trial or another time ordered by the court.

Section 24 amends the Alaska Rules of Evidence to provide that a voluntary statement obtained in violation of the technical *Miranda* requirements, may be used to impeach the person who made the statement, if that person testifies differently. Further, evidence that has been suppressed may also be used to impeach a witness. Current law only allows these statements and evidence to be used at a later perjury trial. This makes them available to impeach a witness at the first trial.

Section 25 extends the time for use of prior convictions for impeachment at trial from five years from conviction, to five years from the date of unconditional discharge.

Section 26 adopts a new exception to the rule against use of hearsay evidence, by allowing the use at trial of statements made within 24 hours of a crime involving domestic violence, if the statement reports or describes the crime.

Sections 27 - 31 include conforming repealers, a notice of a court rule change described above, procedural directions, and an effective date, July 1, 2003.

HB 244 Anderson, 3

Amendment # 7 - FAILS

Page 9, line 20, after "defense" delete the remainder of line 20 through "defense" on line 22.

This amendment addresses Section 21. Although I have no problem to require more advance notice of certain defenses, I do object to mandating the courts deny the defendant from asserting the designated defenses if notice is not provided at least seven days before trial.

Amendment 8 - FAILS HB 244

Delete p. 7 line 26 - p. 8 line 6.
(Section 15)

Amendment 11 - FAILS HB 244

~~Delete~~ Delete
P. 11 Line 29 - p. 12 line 13.
(section 24)

Amendment 12 - FAILS HB 244

Delete

p. 6 line 14 - p. 7 line 25
(Sect. 14)

p. 8 line 17 - p. 9 line 6.
(Sect. 18 & 19)

TO Vanessa FROM Jenn Rep McGuire

SENATE BILL 170 / HOUSE BILL 244

Questions

1) Generally, should a person be innocent until proven guilty or guilty until proven innocent?

2) Does changing the use of nondeadly force in defense of self (AS 11.81.330), the use of deadly force in defense of self (AS 11.81.335) and the use of force in defense of a third person (AS 11.81.340) from "defenses" to "affirmative defenses" now place the burden on the individual to prove his or her innocence?

3) Under existing law, aren't individuals already required to retreat if they can rather than use deadly force? Answer: Yes! (AS 11.81.335(b))

4) Won't SB 170/HB 244 chill the right to bear arms for self defense by placing on potential crime victims who would act in self defense, the burden of proving their innocence in addition to the existing burden of having to decide if retreat is reasonable?

5) Under proposed subsection (c) of AS 11.81.335 (page 2, line 18 of the bill), isn't a woman with a protective order who is carrying a firearm for self-defense because she anticipates an "encounter" with an abusive, estranged "household member" and further anticipates that the encounter could result in "combat," stripped of her right to use deadly force in self-defense?

6) What is the definition of "household member" (page 2, lines 6 and 25)? Answer: It is broad!

7) Is it possible that proposed subsection (c) of AS 11.81.335 will allow juries to engage in second guessing a defendant's legitimate use of force in defense of self, potentially chilling the right to bear arms for self-defense?

Comments

1) The apparent purpose of SB 170/HB 244 is to allow the state to convict people more easily.

2) Victims of violent crime are further restricted in their right to self-defense.

3) Another purpose of SB 170/HB 244 appears to be to make it more difficult for a defendant to successfully plead defense of self or others. -This is accomplished by saddling the defendant with the heavier burden of an "affirmative defense" rather than the present burden of a "defense."

4) Being armed for self-defense can be construed as reckless under SB 170/HB 244.

Suggestion

Delete sections 2,3,4 and 5 of the bill.

Subject: NRA Contact
Date: Mon, 14 Apr 2003 13:06:01 -0800
From: Jennifer Yuhas <Jennifer_Yuhas@Legis.state.ak.us>
Organization: Alaska State Legislature
To: vanessa_tondini@legis.state.ak.us

Brian Judy is the Regional Rep for the NRA for the 6 NW States.

His desk is 916.446.2455
His cell is 916.806.3854

He is operating out of the office on his cell phone today - but wil be back in the office tomorrow - his office is in Sacremento.

He says that Wayne Anthony Ross has several concerns with this legislation as well - and was supposed to call the chair today - but apparently hasn't done that....

I'm available too later - thanks - Brian says he "feels much better than he did 15 minutes ago" now that he also found out that Anderson and Holm have concerns and Gruenberg is "going ballistic" about this.

Lesil, Im assuming we don't plan to pass this out today... many concerns.

V- can you contact him on my behalf plz to assess his concerns.

Subject: SB-170/HB-244
Date: Tue, 29 Apr 2003 23:01:01 -0800
From: "Grant Hunter" <hunterpp@corecom.net>
To: <vanessa_tondini@legis.state.ak.us>

4-29-2003

Madame:

I live at 2700 Forest Park Drive in Anchorage.

I respectfully request that the Judiciary Chair oppose House Bill 170 and Senate Bill 244 because they will impede the right of self-defense in those most in need of the same. I incorporate by reference the article by Brant McGee and Barbara Brink at page B5 of the Anchorage Daily News on 4-26-2003. As you may know, I am from the opposite side of the political spectrum. I firmly believe that Yates vs. United States was incorrectly decided and that the United States would be a better place if Barry Goldwater had been elected in 1964. Despite my differences on economic and national security policy with Mr. McGee and Ms. Brink, I stand shoulder-to-shoulder with them on the need to protect the natural law right to protect one's life and the Second Amendment right to keep and bear arms.

Grant W. Hunter
645 G. Street Ste. 100 PMB 653
Anchorage, AK 99501

907-258-6735

hunterpp@corecom.net

Subject: SB 170
Date: Fri, 2 May 2003 20:32:09 EDT
From: Craylaw@aol.com
To: rep.lesil.mcguire@legis.state.ak.us
CC: rep.tom.mcguire@legis.state.ak.us, rep.jim.holm@legis.state.ak.us, rep.dan.ogg.@legis.state.ak.us, rep.ralph.samuels@legis.state.ak.us, rep.les.gara@legis.state.ak.us, rep.max.gruenberg@legis.state.ak.us

Reprsentative McGuire, and members of the House Judiciary Committee --

It has come to my attention that the legislature is considering amendment of statutes governing the standard of proof applicable to a criminal defendant's assertion of self-defense as a justification for use of a weapon. I understand that John Novak testified before the Senate Judiciary Committee in support of suggested amendments. Apparently Mr. Novak suggested that certain recent verdicts rendered after murder trials support his view that the present law is in need of amendment. Mr. Novak is reported to have testified that in particular, the jury verdict in *State v. Vasco Vea* indicates that the present law is insufficient to protect the community. Following Mr. Novak's testimony, Senator Ogan is reported to have observed that it was obvious to him that in *Vea*, there was a "flawed jury." Assuming the accuracy of what has been reported to me, I must respectfully disagree with Mr. Novak's testimony, and the remark by Senator Ogan. I do not fault Senator Ogan, for if the facts presented to the jury in *Vea* had been as reported to the committee, Senator Ogan's remark would probably have merit.

I sat on the *Vea* jury, and was its foreperson. There was not a single suggestion during the course of either the State's case, presented by Assistant District Attorney David Wallace, or Mr. Vea's case, presented by Carmen Gutierrez, that Mr. Vea or anyone else involved in the actual shooting at issue, or the events described as leading up to the shooting, was a gang member or that the shooting or preceding events were gang related. This includes the fellow who died in the incident, the fellow who was seriously wounded in the incident, Mr. Vea, and the people with whom he was spending his afternoon on the day of the shooting. Simply put, the jury had *no* evidence of gang activity as a component of the incident or any of the events leading up to it. Hence, any suggestion by Mr. Novak that Mr. Vea was carrying a gun because his gang and another were at odds over some issue related to gangs is either false, or for reasons known to Judge Souter was not presented to the jury.

There *was* violence before the shooting for which Mr. Vea was on trial. His best friend had been shot several times by the the people who later were shot by Mr. Vea. Another of Mr. Vea's friends was chased through a neighborhood by the same people who were thought to be carrying baseball bats and guns. Mr. Vea's home was the subject of a drive-by shooting, during which drywall dust settled on his and his wife's baby as bullets pierced the wall not far above the baby's crib. The shooters were not identified, but the inference was the fellows later shot by Mr. Vea were involved. I could go on, since there was a wealth of evidence that the people shot by Mr. Vea were a far cry from model citizens. I dare say that if Senator Ogan -- if he does not already -- would arm himself if he thought the likes of the people Mr. Vea shot were out to get him.

As to the shooting itself, Mr. Vea was not in a car when it occurred. Rather, the evidence at trial was that Mr. Vea was playing with some dogs in a yard adjacent to where several friends of his were having a enighborhood barbecue, at which barbecue Mr. Vea himself was an invited guest, when the two fellows he shot "rolled up" on Mr. Vea and his friends. The evidence of events as the car rolled up supported the jury's conclusion that Mr. Vea had every reason to be in fear of his life. He was backed up against a fence, the car turned directly toward him, and he could clearly see who was in the car. Bullet wounds in the fellow that died further supported that he was reaching for a semi-automatic pistol found in that vehicle when he was shot by Mr. Vea.

I would add some of the jurors' thoughts during the course of deliberations. First, there were at least 2 jurors who thought, based on the evidence at trial, that Mr. Vea deserved a medal, not prosecution, for shooting the two men. Second, there was no doubt in any of the jurors' minds that Mr. Vea feared for his life when the car with the two guys drove up to Mr. Vea and his friends and turned directly toward Mr. Vea. There was no doubt in any of the jurors' minds that such fear was reasonable. There was no doubt that Mr. Vea was justified in defending himself by shooting those men.

The *Vea* jurors very carefully considered all of the evidence presented during the course of a nearly 3 week trial. Only after very studied deliberation was Mr. Vea acquitted. That this was the correct result was essentially corroborated by Mr. Wallace after the trial. When I told Mr. Wallace that he had put on a good case, given what he had to work with, I clearly remember his response, "If I'm going to lose one, this is the one to lose." This was not a "flawed jury," but a panel of responsible, thoughtful individuals with whom I was proud to serve as a juror.

Mr. Novak does a terrible disservice to the public, jurors, Mr. Vea's jury, and your committee, by painting an erroneous picture of the evidence at Mr. Vea's trial. Please do not compound Mr. Novak's error by tinkering with statutes that do not warrant tinkering. In the experience of this juror, the system, under the law as written, worked precisely as it should -- a defendant who was in fear of his life took the life of another under circumstances which fully justified the killing.

Thank you for considering my input into your deliberations on SB 170.

Respectfully,

Charles W. Ray, Jr.
711 H Street, Suite 310
Anchorage, AK 99501
phone (907) 274-4839
crraylaw@aol.com

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 244
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to the Code of Criminal Procedure; . . ."
BRU Criminal Division
Component All
Sponsor Rules Committee
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The bill proposes a number of changes in the law regarding criminal defenses and criminal procedures. It addresses self-defense, and other defenses such as acting in the heat of passion and using deadly force in defense of others. It also would put some limits on collateral attacks on prior convictions. Additionally, the bill adopts a rational procedure for courts to follow in deciding claims of privilege and the granting of immunity, and it makes changes in sentencing procedures.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/20/03 8:30 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/20/2003
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 244
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Title: Criminal Procedures, Sentencing & Related Issues
Sponsor
Requester

Dept. Affected: Department of Corrections
BRU: Administration & Operations
Component: Institution Director's Office
Component No.: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.4	54.4	98.6	173.6	194.3	224.9
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	3.4	54.4	98.6	173.6	194.3	224.9
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Time served is estimated based on the time that would have been served under this bill for defendants sentenced during the time period 1/1/2001 through 12/31/2001. Time served under current law is not included on Fiscal Note estimates. Months are based on an average of 30 days per month and the FY03 cost of care of $113.31. Sentences timeframe is estimated as beginning 7/1/2003.

See attached:

Prepared by: Jerry D. Burnett, Director — Phone (907) 465-3339
Division: Administrative Services — Date/Time 3/21/03 8:31 AM
Approved by: Portia C.K. Parker, Deputy Commissioner — Date 3/21/2003
Agency: Department of Corrections

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 244

ANALYSIS CONTINUATION

For years past FY 2009, there could be a cumulative effect of long-term and short-term sentence increases that would result in higher costs on an annual basis. We have not attempted to estimate these future year costs past FY 2009. Given the recidivism rates for many offenders, it is not clear that these longer sentences will actually have the effect of increasing costs to the Department of Corrections. Our costs are the same on a daily basis whether offenders are serving an extra period of incarceration or are reincarcerated for a new offense. To the extent that increased sentences may reduce recidivism for this group of offenders, the legislation may result in lower costs in future years.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB244
(S) Publish Date: 4/4/2003

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title "An Act relating to the Code of Criminal Procedure;..."
BRU Legal and Advocacy Services
Component Public Defender Agency
Sponsor Rules Committee
Requester House Judiciary
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	106.4	106.4	106.4	106.4	106.4	106.4
Travel	4.2	4.2	4.2	4.2	4.2	4.2
Contractual	13.0	13.0	13.0	13.0	13.0	13.0
Supplies	2.0	2.0	2.0	2.0	2.0	2.0
Equipment	13.4	1.3	1.3	1.3	1.3	1.3
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**139.0**	**126.9**	**126.9**	**126.9**	**126.9**	**126.9**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	139.0	126.9	126.9	126.9	126.9	126.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**139.0**	**126.9**	**126.9**	**126.9**	**126.9**	**126.9**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill proposes numerous changes in criminal law and procedure. These changes will result in a financial impact on the Public Defender Agency. The impact will be felt in increased preparation for trials in felony and misdemeanor cases as described below. The Agency will need two additional Investigators, one in Anchorage and one in Fairbanks, the offices with the highest caseloads, to meet this need. Currently the Agency only has 13.5 investigators handling over 20,000 cases a year.

See attached page for continuing analysis.

Prepared by: Linda K. Wilson, Deputy Director + Kevin Jardell Dept of Admin. Phone (907)-334-4416
Division Public Defender Agency Date/Time 5/7/03 1:27 PM
Approved by: Mike Miller, Commissioner Date 5/7/2003
Agency Department of Administration

ANALYSIS CONTINUATION

Sections 1-5 change long-standing Alaska laws on self-defense, defense of others, and heat of passion and require the defense to carry the entire burden of proving to the jury that the defendant acted in self-defense, defense of others, or in the heat of passion. Under current law the defendant must produce some credible evidence of self-defense, defense of others or heat of passion before a judge will allow a jury to consider the defense, but once sufficiently produced, the state then has the burden of proving that the defendant's actions were not justified. The Agency will have increased investigative costs as a result of this change.

Shifting the burden to the defense to prove self-defense, defense of others, and heat of passion by a preponderance of the evidence in many instances will require more defense investigative efforts to find, arrange and then have the attorney present the relevant evidence. Relevant evidence to the defense is not always in the exclusive possession of the individual defendant.

Sections 7 and 15 of the bill propose to change the burden of proof, currently belonging to the prosecution, to make it the defense's burden of proof to challenge the validity of a prior conviction in both a prosecution where the prior conviction is an element of the crime being prosecuted and at sentencing where a prior conviction may result in a longer sentence. The defense must prove by a preponderance of the evidence that a prior conviction, sometimes from another state, that is either an element of the crime being prosecuted or is being used to seek a longer sentence, is invalid because of the denial of the right to counsel or jury trial. Shifting this burden of proof onto the defense will require more investigation efforts from the defense to find out the underlying facts in the old case, perhaps from out of state, and then retrieve evidence from that old case to be presented in the current case to meet the burden of proof. This is not an easy task to accomplish by an agency that is outside of law enforcement, and does not have the numerous resources to draw on to assist them across the country.

Sections 21 - 23 concern notice of defenses and experts and require the defense to give notice sooner than required under current law. It also adopts serious sanctions for failures to timely notify the prosecution. These changes in the rules will require the defense to put forth additional investigative efforts related to experts and defenses to meet these earlier deadlines in order to avoid the significant sanctions proposed.

Sections 13, 14, and 20 seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate the court's ability to determine the amount of consecutive time to be imposed for certain crimes. It will likely result in the inability to resolve cases short of trial because of the exposure to mandatory consecutive sentences. This fiscal impact is not easily determined, but inevitable.

Anchorage, AK 99501
(907)334-4400 FAX: (907)269-5476

ALASKA PUBLIC DEFENDER AGENCY
- Anchorage Office -

Fax

CONFIDENTIAL !!!
IF RECEIVED IN ERROR PLEASE SEND BACK IMMEDIATELY TO FAX # ABOVE.
THANK YOU!

DATE: 5-6-03
TO: Vanessa - House Judiciary
AGENCY: [redacted]
TELEPHONE #: _____ **FAX #:** 465-6592

Number of Pages (including cover sheet): 10

FROM: Linda Wilson
AGENCY: Public Defenders
TELEPHONE #: 334-4416 **FAX #:** 269-5476
(CASE NAME/#: HB 244)

COMMENTS:

Vanessa, Here are some handouts that I think would be very helpful for the Judiciary committee members to have for the hearing tomorrow. Would you distribute these to them if you agree?

Thanks, Linda Wilson

ing it. A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a class A misdemeanor. (§ 10 ch 166 SLA 1978; am §§ 9, 10 ch 143 SLA 1982; am §§ 17, 18 ch 37 SLA 1986; am §§ 2, 3 ch 59 SLA 1988; am §§ 7, 8 ch 54 SLA 1999)

COMMENTARY

From Senate Journal Supp. No. 47, at 124 (June 12, 1978):

This section lists the six classes of offenses in title 11: Class A, B and C felonies, class A and B misdemeanors and violations. Only three offenses are not classified: murder in the first and second degree and kidnapping.

The terms "offense", "crime", "felony", "misdemeanor", and "violation" are defined in AS 11.81.900. All forms of prohibited conduct described in the Code are offenses. An offense is either a crime or a violation. A crime is an offense for which a sentence of imprisonment is authorized. Crimes are either felonies or misdemeanors. A felony is a crime for which a sentence of imprisonment of more than one year is authorized. A misdemeanor is a crime for which a sentence for a term of more than one year may not be imposed. A violation is a noncriminal offense punishable only by fine.

Offenses are classified based on the type of injury "characteristically caused or risked by commission of the offense and the culpability of the defendant." The injury risked or caused may be to a person, property, the family, public administration, public order, or public health and decency. The "culpability of the defendant" refers to which culpable mental state — intentionally, knowingly, recklessly, or criminal negligence — the defendant committed the acts constituting the offense.

From House Journal Supp. No. 64, at 3 (May 29, 1980):

These sections make only technical changes to reflect the fact that the classification of Sexual Assault in the First Degree has been changed from a class A to an unclassified felony.

CROSS REFERENCES

Definition of "offense," "crime," "conduct," "felony," "serious physical injury," "misdemeanor," "physical injury," "violation" — AS 11.81.900(b)

Original Code Provision — None.

Article 4.

General Principles of Justification.

Section
300. Justification: Defense
320. Justification: Necessity
330. Justification: Use of nondeadly force in defense of self
335. Justification: Use of deadly force in defense of self
340. Justification: Use of force in defense of a third person
350. Justification: Use of force in defense of property and premises
370. Justification: Use of force by a peace officer in making an arrest or terminating an escape
380. Justification: Use of force by private person assisting an arrest or terminating an escape
390. Use of force by a private person in making arrest or terminating an escape
400. Justification: Use of force in resisting or interfering with arrest
410. Justification: Use of force by guards
420. Justification: Performance of public duty
430. Justification: Use of force, special relationships
440. Duress
450. Entrapment

Sec. 11.81.300. Justification: Defense. Except as otherwise specified in this title, justification as provided in AS 11.81.320 — 11.81.430 is a defense. (§ 10 ch 166 SLA 1978; am § 25 ch 102 SLA 1980)

COMMENTARY

From Senate Journal Supp. No. 47, at 126 (June 12, 1978):

This section classifies the various forms of justification described in AS 11.81.320 — 11.81.430 as defenses. If some evidence of justification is admitted at trial the state will have the burden of disproving the defense beyond a reasonable doubt. See definition of "defense" in AS 11.81.900(b).

From Senate Journal Supp. No. 44, at 17 (May 29, 1980):

Because of the specification of AS 11.81/.400(a)(2) as an affirmative defense, this conforming amendment is required.

CROSS REFERENCES

Definition of "defense" — AS 11.81.900(b)

Original Code Provision — None.

TD: II, 68.

Sec. 11.81.320. Justification: Necessity. (a) Conduct which would otherwise be an offense is justified by reason of necessity to the extent permitted by common law when

(1) neither this title nor any other statute defining the offense provides exemptions or defenses dealing with the justification of necessity in the specific situation involved; and

(2) a legislative intent to exclude [illegible] of necessity

fax: 465-6592

Vanessa

is incorporated into the Code "to the extent permitted by common law." Under subsection (1) the defense will be inapplicable if another statute covers the defense in the particular situation involved. *See, e.g.*, AS 11.46.340. Subsection (2) provides that the defense does not apply if a legislative intent to exclude the defense plainly appears.

From House Journal Supp. No. 64, at 3 (May 29, 1980):

This amendment provides that the defense of necessity is an affirmative defense which the defendant is required to establish by a preponderance of the evidence. *See* AS 11.81.900(b)(1).

CROSS REFERENCES

Justification: defense — AS 11.81.300
Defense: emergency use of premises — AS 11.46.340
Definition of "affirmative defense" — AS 11.81.900(b)

Original Code Provision — None.

TD: II, 48-49.

Sec. 11.81.330. Justification: Use of nondeadly force in defense of self. (a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other, unless

(1) the force involved was the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other's conduct with intent to cause physical injury to the other; or

(3) the person claiming the defense of justification was the initial aggressor.

(b) In circumstances described in (a)(1) — (a)(3) of this section, the person claiming the defense of justification may use nondeadly force if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force. (§ 10 ch 166 SLA 1978)

Sec. 11.81.335. Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent

(1) the use of nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self defense against death, serious physical injury, kidnapping, sexual assault in the first degree, sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating, except there is no duty to retreat if the person is

(1) on premises which the person owns or leases and the person is not the initial aggressor; or

(2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380. (§ 10 ch 166 SLA 1978; am § 10 ch 4 SLA 1990)

COMMENTARY

From Senate Journal Supp. No. 47, at 126-28 (6/12/78):

Section 11.81.330 - NONDEADLY FORCE. Subsection (a) allows a person to use nondeadly force to defend himself from what he reasonably believes to be the use of unlawful force. Since force is defined to include the threat of imminent bodily impact, a person may defend himself from threats of imminent impact as well as actual impact.

Paragraphs (1)-(3) qualify the right of a person to use nondeadly force in self-defense. Under paragraph (1), neither party to mutual combat which is not authorized by law can claim self-defense. Paragraph (2) prohibits a person from provoking another person into using force and later claiming that his use of force in self-defense was justified. Finally, paragraph (3) prevents an initial aggressor from claiming self-defense.

Subsection (b) provides that even in the three circumstances described in paragraphs (1)-(3) a person can nevertheless use nondeadly force if he withdraws from the encounter and effectively communicates his withdrawal to the other person. If the other person continues the incident by the use of unlawful force, nondeadly force may then be used in self-defense.

Section 11.81.335 - DEADLY FORCE. As a prerequisite to the use of deadly force in self-defense, subsection (a)(1) requires that the use of nondeadly force would have been justified. If the use of nondeadly force would have been justified, subsection (a)(2) allows a person to use deadly force when and to the extent he reasonably believes it necessary to defend himself from death, serious physical injury, kidnapping, forcible sexual assault or robbery.

Subsection (b) requires a person to retreat prior to using deadly force. Retreat is not required when the defender is (1) on premises, including a dwelling, which he owns or leases and when he is not the original aggressor, (2) a peace officer acting within the scope and authority of his employment, or (3) a person assisting a peace officer in making an arrest. Note that there is no duty to retreat prior to using nondeadly force. Further, the defendant must know that he has a safe retreat; it is not enough that a reasonable person would have believed he could have retreated safely.

CROSS REFERENCES

Definition of "intentionally," "nondeadly force," "force," "physical injury," "serious physical injury," "premises," "peace officer," "leased" — AS 11.81.900
Kidnapping — AS 11.41.300
Robbery — AS 11.41.500, 11.41.510
Use of force in defense of a third person — AS 11.81.340

COMMENTARY

The commentary to this section was inadvertently omitted from the Senate Journal. This section was intended to limit the applicability of the revised criminal code's general rules on culpability to title 11.

CROSS REFERENCES

Original Code Provision — None.

Article 6.

Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "access device" means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document, to obtain property or services, or that can be used to initiate a transfer of property;

(2) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(3) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary;

(4) "building", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building;

(5) "cannabis" has the meaning ascribed to it in AS 11.71.900(10), (11), and (14);

(6) "conduct" means an act or omission and its accompanying mental state;

(7) "controlled substance" has the meaning ascribed to it in AS 11.71.900(4);

(8) "correctional facility" means premises, or a portion of premises, used for the confinement of persons under official detention;

(9) "credit card" means any instrument or device, whether known as a credit card, credit plate, courtesy card, or identification card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining property or services on credit;

(10) "crime" means an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor;

(11) "crime involving domestic violence" has the meaning given in AS 18.66.990;

(12) "criminal street gang" means a group of three or more persons

(A) who have in common a name or identifying sign, symbol, tattoo or other physical marking, style of dress, or use of hand signs; and

(B) who, individually, jointly, or in combination, have committed or attempted to commit, within the preceding three years, for the benefit of, at the direction of, or in association with the group, two or more offenses under any of, or any combination of, the following:

(i) AS 11.41;

(ii) AS 11.46; or

(iii) a felony offense.

(13) "culpable mental state" means "intentionally", "knowingly", "recklessly", or with "criminal negligence", as those terms are defined in (a) of this section:

(14) "dangerous instrument" means any deadly weapon or anything that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury;

(15) "deadly force" means force that the person uses with the intent of causing, or uses under circumstances that the person knows create a substantial risk of causing, death or serious physical injury; "deadly force" includes intentionally discharging or pointing a firearm in the direction of another person or in the direction in which another person is believed to be and intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument;

(16) "deadly weapon" means any firearm, or anything designed for and capable of causing death or serious physical injury, including a knife, an axe, a club, metal knuckles, or an explosive;

(17) "deception" means to knowingly

(A) create or confirm another's false impression that the defendant does not believe to be true, including false impressions as to law or value and false impressions as to intention or other state of mind;

(B) fail to correct another's false impression that the defendant previously has created or confirmed;

(C) prevent another from acquiring information pertinent to the disposition of the property or service involved;

(D) sell or otherwise transfer or encumber property and fail to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether or not that impediment is a matter of official record; or

(E) promise performance that the defendant does not intend to perform or knows will not be performed;

(18) "defense", other than an affirmative defense, means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt;

(19) "defensive weapon" means an electric stun gun, or a device to dispense mace or a similar chemical agent, that is not designed to cause death or serious physical injury;

(20) "drug" has the meaning ascribed to it in AS 11.71.900(9);

(21) "dwelling" means a building that is designed for use or is used as a person's permanent or temporary home or place of lodging;

(22) "explosive" means a chemical compound, mixture, or device that is commonly used or intended for the purpose of producing a chemical reaction resulting in a substantially instantaneous release of gas and heat, including dynamite, blasting powder, nitroglycerin, blasting caps, and nitrojelly, but excluding salable fireworks as defined in AS 18.72.050, black powder, smokeless powder, small arms ammunition, and small arms ammunition primers;

(23) "felony" means a crime for which a sentence of imprisonment for a term of more than one year is authorized;

(24) "fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person carrying on functions of trust on behalf of another person or organization;

(25) "firearm" means a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury;

(26) "force" means any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement, "force" includes deadly and nondeadly force;

(27) "government" means the United States, any state or any municipality or other political subdivision within the United States or its territories; any department, agency, or subdivision of any of the foregoing; an agency carrying out the functions of government; or any corporation or agency formed under interstate compact or international treaty;

(28) "highway" means a public road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path, or similar or related facility, as well as ferries and similar or related facilities;

(29) "identification document" means a paper, instrument, or other article used to establish the identity of a person; "identification document" includes a social security card, driver's license, nondriver's identification, birth certificate, passport, employee identification, or hunting or fishing license;

(30) "includes" means "includes but is not limited to";

(31) "incompetent person" means a person who is impaired by reason of mental illness or mental deficiency to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that person;

(32) "intoxicated" means intoxicated from the use of a drug or alcohol;

(33) "law" includes statutes and regulations;

(34) "leased" includes "rented";

(35) "metal knuckles" means a device that consists of finger rings or guards made of a hard substance and designed, made, or adapted for inflicting serious physical injury or death by striking a person;

(36) "misdemeanor" means a crime for which a sentence of imprisonment for a term of more than one year may not be imposed;

(37) "nondeadly force" means force other than deadly force;

(38) "offense" means conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation;

Sec. 18.66.990. Definitions. In this chapter,

(1) "council" means the Council on Domestic Violence and Sexual Assault;

(2) "crisis intervention and prevention program" means a community program that provides information, education, counseling, and referral services to individuals experiencing personal crisis related to domestic violence or sexual assault and to individuals in personal or professional transition, excluding correctional half-way houses, outpatient mental health programs, and drug or alcohol rehabilitation programs;

(3) "domestic violence" and "crime involving domestic violence" mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

(A) a crime against the person under AS 11.41;

(B) burglary under AS 11.46.300 — 11.46.310;

(C) criminal trespass under AS 11.46.320 — 11.46.330;

(D) arson or criminally negligent burning under AS 11.46.400 — 11.46.430;

(E) criminal mischief under AS 11.46.475 — 11.46.486;

(F) terrorist threatening under AS 11.56.807 or 11.56.810;

(G) violating a domestic violence order under AS 11.56.740; or

(H) harassment under AS 11.61.120(a)(2) — (4);

(4) "domestic violence program" means a program that provides services to the victims of domestic violence, their families, or perpetrators of domestic violence;

(5) "household member" includes

(A) adults or minors who are current or former spouses;

(B) adults or minors who live together or who have lived together;

(C) adults or minors who are dating or who have dated;

(D) adults or minors who are engaged in or who have engaged in a sexual relationship;

(E) adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law;

(F) adults or minors who are related or formerly related by marriage;

(G) persons who have a child of the relationship; and

(H) minor children of a person in a relationship that is described in (A) — (G) of this paragraph;

(6) "judicial day" means any Monday through Friday that is not a state holiday and on which the court clerk's offices are officially opened to receive legal documents for filing;

(7) "local community entity" means a city or borough or other political subdivision of the state, a nonprofit organization, or a combination of these;

(8) "petitioner" includes a person on whose behalf an emergency protective order has been requested under AS 18.66.110(b);

(9) "sexual assault" means a crime specified in AS 11.41.410 — 11.41.450;

(10) "sexual assault program" means a program that provides services to the victims of sexual assault, their families, or perpetrators of sexual assault. (§ 33 ch 64 SLA 1996; am § 75 ch 21 SLA 2000; am § 20 ch 92 SLA 2002)

Chapter 67.

Violent Crimes Compensation Board.

Section
10. Purpose
20. Violent Crimes Compensation Board
30. Application for compensation
40. Action on application; hearings
50. Attorney fees
60. Regulations
70. Standards for compensation
80. Awarding compensation
90. Recovery from collateral source
101. Incidents and offenses to which this chapter applies
110. Nature of the compensation
120. Emergency compensation
130. Limitations on awarding compensation
140. Recovery from offender
150. False claim
160. Survival and abatement
162. Crime victim compensation fund
170. Reports
175. Duty to display information
180. Definitions

Sec. 18.67.010. Purpose. It is the purpose of this chapter to facilitate and permit the payment of compensation to innocent persons injured, to dependents of persons killed, and to certain other persons who by virtue of their relationship to the victim of a crime incur actual and reasonable expense as a result of certain serious crimes or in attempts to prevent the commission of crime or to apprehend suspected criminals. (§ 1 ch 203 SLA 1972; am § 1 ch 132 SLA 1975)

Sec. 18.67.020. Violent Crimes Compensation Board. (a) There is the Violent Crimes Compensation Board in the Department of Public Safety composed of three members to be appointed by the governor. One of the members shall be designated as chairman by the governor. At least one member must be a medical or osteopathic physician licensed to practice in this state and one member must be an attorney licensed to practice in this state.

(b) Members of the board serve staggered terms of three years. All vacancies, except through the expiration of term, shall be filled for the unexpired term only.

(c) Each member of the board is eligible for reappointment and serves at the pleasure of the governor.

tion" and would therefore be subject to the rules and conditions he seeks to have reviewed. [At. 34-35]

[11] The problem with this argument is that Kleven was not asserting a claim for constructive discharge in his second lawsuit. The trial court noted this in making its ruling. The issue then is whether an employee who starts a grievance process and subsequently resigns has standing to force the employer to continue with the process and remedy problems presumably for the benefit of those employees who remain. Even under our liberal standing rules, we do not believe Kleven has established a sufficient personal stake in the case to gain standing under an interest-injury analysis. As the trial court noted, because Kleven is no longer employed by YKSD, he is no longer subject to the contested grievance procedures, nor is he threatened by the alleged safety violations.[14] *Compare Rutter v. State*, 668 P.2d 1343, 1345 (Alaska 1983) (holding that commercial fisherman had standing to challenge state's fishing permit policy because his ability to fish would be directly impacted by the number of permits granted); *with Bowers Office Prod. v. University of Alaska*, 755 P.2d 1095, 1098 (Alaska 1988) (holding that bidder did not have standing to challenge university bid review practices where bidder had abandoned claim for damages arising out of these practices and was currently only seeking declaratory relief).

[12, 13] Taxpayer-citizen status is a sufficient basis to challenge allegedly illegal governmental conduct when the issues raised are of significant public concern and when the taxpayer-plaintiff is a suitable advocate of the issues involved in the lawsuit. *See Trustees for Alaska*, 736 P.2d at 329; *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2949, 53 L.Ed.2d 1073 (1977). In *Trustees for Alaska*, we noted that standing may properly be denied to a taxpayer-plaintiff where "there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." *Trustees for Alaska*, 736 P.2d at 329. Because YKSD's remaining employees are certainly in better position to raise the grievances Kleven cites and because we have no reason to believe that current YKSD employees would be indisposed to press legitimate grievances, we agree with the trial court that Kleven has failed to establish citizen-taxpayer standing. Accordingly, we hold that Kleven's second lawsuit was properly dismissed for lack of standing.

[14] We also uphold the trial court's partial attorneys' fee award. *See* Alaska Civil Rule 82. The court awarded YKSD $2,700.00 in cost and fees which represented only about fifty percent of YKSD's total fees for the second lawsuit. We have previously upheld awards representing well over fifty percent of a prevailing party's actual fees and therefore find no abuse of discretion in this case. *See, e.g., Steenmeyer Corp. v. Mortenson-Neal*, 781 P.2d 1221, 1226-27 (Alaska 1987) (holding that a Civil Rule 82 award of 75 percent of actual fees was not "manifestly unreasonable").

The judgment in the first lawsuit is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. The judgment in the second lawsuit is AFFIRMED.

14. If Kleven had articulated a claim for constructive discharge in his second lawsuit he would have had a sufficient interest in these issues. *See Beard*, 796 P.2d at 1349.

STATE of Alaska, Petitioner,

v.

The Honorable Rene J. GONZALEZ, Judge of the Superior Court, Jill Jahnke-Leland, Peter H. Leland, and Jeffrey S. DeGraaf, Respondents.

No. S-5903.

Supreme Court of Alaska.

June 4, 1993.

Following retrial in criminal case, state issued subpoena for witness to appear as prosecution witness. Witness moved to quash subpoena by asserting constitutional privilege against compulsory self-incrimination. The Superior Court, Third Judicial District, Anchorage, Rene Gonzalez, J., found that Alaska's witness immunity statute violated Alaska Constitution and quashed the subpoena. State appealed. The Court of Appeals, 825 P.2d 926, affirmed. Petition for hearing was granted. The Supreme Court, Matthews, J., held that statute granting use and derivative use immunity violated the constitutional provision that no person could be compelled to give testimony against himself.

Affirmed.

1. Witnesses ⇐297(4.1)

State constitutional prohibition against compelling person to witness against himself does not prohibit forcing person to testify in criminal case against another person, even though testimony may show witness was guilty of crime. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

2. Witnesses ⇐304(4)

Witness compelled to give testimony that might show he or she was guilty of crime must be granted some type of immunity from prosecution. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

3. Criminal Law ⇐42

"Transactional immunity" from prosecution, of witnesses whose compelled testimony might show their guilt of crime, prohibits prosecution for crime concerning which witness is compelled to testify. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

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

4. Criminal Law ⇐42

"Use and derivative use immunity," in connection with compelled testimony that might show witness was guilty of crime, allows prosecution of witnesses for crimes referred to in compelled testimony, but prohibits use of compelled testimony and its fruits in such prosecutions. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

5. Criminal Law ⇐1139

Scope of state constitutional provision, that no person would be compelled to be witness against himself in criminal proceeding, is question of constitutional law to be decided by Supreme Court de novo. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

6. Constitutional Law ⇐12, 13, 16

In applying state constitutional provision barring person from being compelled to testify against himself in criminal case, Supreme Court's inquiry is not controlled by any one source of authority, such as United States Supreme Court or appeal to intent of framers of State Constitution; such authority is considered when helpful in discerning intent and spirit of local constitutional language and whether right invoked is necessary for kind of civilized life and ordered liberty which is at core of constitutional heritage. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

7. Criminal Law ⇐393(1)

Under state constitutional provision prohibiting self-incrimination individual may not be compelled to give testimony unless state has taken measures to remove hazards of incrimination, and individual faces hazard of incrimination whenever answers elicited could support conviction or might furnish link in chain of evidence leading to conviction. Const. Art. 1, § 9; AS 12.50.101.

8. Criminal Law ⇐42, 393(1)

Statute granting use and derivative use immunity to witnesses compelled to give testimony that might incriminate them violated state constitutional prohibition against forcing a person to be witness against himself in criminal proceeding; due to human frailties it could be impossible to ensure that testimony would not be used in some manner against defendant in subsequent trial and even if evidence was not used directly, nonevidentiary use could be made of testimony in terms of focusing investigation, deciding to initiate prosecution against witness, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally do-

veloping trial strategy. Const. Art. I, § 9; AS 12.50.101, 12.50.101(a).

Eric A. Johnson, Asst. Atty. Gen., Anchorage, Charles E. Cole, Atty. Gen., Juneau, for petitioner.

Margi Mock, Ray Brown, Asst. Public Defenders, John B. Salsmi, Public Defender, Anchorage, for respondent Jeffrey S. DeGrasse.

Jeffrey F. Sauer, Juneau, for respondent Jill Jahnke-Leland.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

[1, 2] Article I, section 9 of the Alaska Constitution states that "[n]o person shall be compelled in any criminal proceeding to be a witness against himself." This section does not prohibit *compelling* a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. *Surina v. Buckalew*, 629 P.2d 988 (Alaska 1981); *State v. Serdahely*, 635 P.2d 1182 (Alaska 1981) (per curiam). However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

[3, 4] There are two types of immunity from prosecution in current usage. Transactional immunity, the more protective type, prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. The narrower form, use and derivative use immunity, allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions. *Surina*, 629 P.2d at 971, n. 2. In *Surina* and *Serdahely*, pursuant to our supervisory powers, we approved of transactional immunity as a matter of practice but expressed no view as to whether use and derivative use immunity might also be constitutionally permissible.

Alaska Statute 12.50.101, enacted after *Surina* and *Serdahely* were decided, authorizes an order compelling testimony based on a grant of use and derivative use immunity. In the present case this statute has been challenged as unconstitutional under article I, section 9 of the Alaska Constitution. The superior court and the court of appeals have concluded that the statute is unconstitutional. We granted the state's petition and now affirm the decision of the court of appeals.

FACTS AND PROCEEDINGS

On the evening of May 8, 1990, Jill Jahnke-Leland, Carl Jahnke-Leland, Peter Leland, and Jeffrey DeGrasse were arrested for the murder of Rick Zaug and the attempted murder of Tom Moore. Earlier that day Zaug and Moore had sailed from Ketchikan to Therne Arm to go fishing. That evening the two men tied their boat to a public mooring buoy to which another boat was already tied. Soon thereafter a tragic dispute arose over use of the buoy. After angry words were exchanged, Moore and Zaug were fired upon from the shore; Zaug was killed and Moore was seriously injured.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland all gave taped statements to the police. Leland and DeGrasse admitted that each had shot at Zaug and Moore from the shore. Jill Jahnke-Leland stated that after she had words with Zaug and Moore, she headed toward shore and fired a gun shot in the air to scare Zaug and Moore. Jill Jahnke-Leland also stated that soon after she fired that shot into the air, DeGrasse and Leland began firing.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland were each indicted for first-degree murder, attempted first-degree murder, and first-degree assault. Jill Jahnke-Leland was convicted of manslaughter and assault. She appealed to the court of appeals. Her appeal was pending during the proceedings hereinafter described and during the presentation and consideration of this case by this court.[1]

In the subsequent trial against Leland and DeGrasse, the state moved to compel Jill Jahnke-Leland to testify under AS 12.50.101.[2] Alaska Statute 12.50.101 allows the state to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony in a criminal prosecution. The trial court denied the state's motion, ruling that AS 12.50.101 violates article I, section 9 of the Alaska Constitution, which protects individuals against compelled self-incrimination.[3] Leland and DeGrasse were then tried without Jill Jahnke-Leland's testimony. The trial ended with a hung jury. On retrial, the state renewed its motion to compel Jill Jahnke-Leland to testify. The trial court again denied the motion on constitutional grounds. The state sought review and the court of appeals affirmed the trial court's decision. *State v. Gonzalez*, 825 P.2d 929 (Alaska App.1992). We granted the state's petition for hearing from this decision.

IMMUNITY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

This case presents two issues: (1) What is the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination? and (2) Does AS 12.50.101 provide immunity which adequately matches the protection of the constitutional privilege? We address each issue in turn.

Scope of the Privilege

[5, 6] The issue of the scope of article I, section 9 is a question of constitutional law which we decide *de novo*. Constitutional interpretation follows the "rule that the intent underlying ... constitutional language should first be gathered from the plain meaning of the language itself." *Baker v. City of Fairbanks*, 471 P.2d 386, 397 (Alaska 1970). As the court of appeals recognized, this inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our *local constitutional language* and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Id.* at 402 (emphasis added).

[7] In the present case, our inquiry is controlled by Alaska precedent. The state and DeGrasse acknowledge that the scope of article I, section 9 is set forth in *E.L.L. v. State*, 572 P.2d 786 (Alaska 1977):

> The privilege against self-incrimination applies where the answers elicited could

1. Shortly before the publication of this opinion the court of appeals affirmed her conviction and remanded her sentence. *Jahnke-Leland v. State*, Mem.Op. & J. No. 2675 (Alaska App., April 21, 1993). The progress of Jill Jahnke-Leland's appeal is relevant if her conviction becomes final before the state compels her to testify. In that event, Jill Jahnke-Leland would no longer be subject to conviction or punishment on account of her compelled testimony. Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. *E.L.L. v. State*, 572 P.2d 786, 788 (Alaska 1977) ("a witness may not refuse to testify where there is no real or substantial hazard of incrimination."). Additionally, if Jill Jahnke-Leland was compelled to testify while her appeal was pending, transactional immunity would *not* invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction was reversed on appeal. *See State v. Runions*, 100 Wash.2d 52, 665 P.2d 1358, 1360 (1983) (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

2. AS 12.50.101 states, in relevant part, that the state may compel testimony upon the condition that:

> no testimony or other information compelled ..., or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

AS 12.50.101(a).

3. Article I, section 9 of the Alaska Constitution reads as follows:

> Section 9. Jeopardy and Self-Incrimination. No person shall be put to jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

support a conviction or might furnish a link in the chain of evidence leading to a conviction. But, a witness may not refuse to testify where there is no real or substantial hazard of incrimination.....

Id. at 788 (citations omitted). Thus, in *Sarina v. Buskalon*, 629 P.2d 969, 977 (Alaska 1981), we stated: "where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required." *Sarina*, however, left open the question of what type of immunity would "remove" "the hazard of incrimination." From these authorities we can piece together the scope of the article I, section 9 protection against self-incrimination: (1) an individual may not be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination; and (2) an individual faces a hazard of incrimination whenever "the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction."[4]

AS 12.50.101 and the Scope of the Privilege

[6] We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination. *See Kastigar v. United States*, 406 U.S. 441, 468, 92 S.Ct. 1653, 1668, 32 L.Ed.2d 212 (1972) (Marshall, J., dissenting). In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy article I, section 9. Because we doubt that workaday measures can, *in practice*, protect adequately against use and derivative use, we ultimately hold that AS 12.50.101 impermissibly dilutes the protection of article I, section 9. Our conclusion rests on two bases.

First, we are persuaded that problems of proof and ordinary human frailties combine to pose a potent threat to an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used. Justice William Brennan expressed these twin concerns in his dissent in *Piccirillo v. New York*, 400 U.S. 548, 562, 91 S.Ct. 520, 522, 27 L.Ed.2d 595 (1971) (Brennan, J., dissenting). According to Justice Brennan:

> all the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself.... [T]his argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568, 91 S.Ct. at 530–531; *see also Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

For this important reason, we also reject the state's proffered analogy between compelled testimony and coerced confessions. In a case involving a coerced confession, the facts relevant to the "voluntariness" of the confession will be known and available to *both* the state and the accused. In the case of compelled testimony, however, the accused can only speculate as to how widely her compelled statement has been disseminated. Procedures and safeguards can be implemented, such as isolating the prosecution team or certifying the state's evidence before trial, but the accused often will not adequately be able to probe and test the state's adherence to such safeguards. This danger does not subside in the face of even the strictest burden of proof, for, as Justice Thurgood Marshall aptly noted, although the government may have the burden of proof, "the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence." *Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

One of the more notorious recent immunity cases, *United States v. North*, 910 F.2d 843 (D.C.Cir.), *modified*, 920 F.2d 940 (D.C.Cir.1990) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991), illustrates another proof problem posed by use and derivative use immunity. *North* involved the criminal conviction of Oliver North for his alleged participation in the Iran/Contra Affair. Prior to his criminal trial, North had been compelled to testify before congressional committees investigating the Iran/Contra Affair. This testimony received extensive coverage in the national media. As required by federal law, North received immunity from use or derivative use of any testimony given before the committees.

On appeal, the District of Columbia Circuit identified two witness-related problems with regard to North's compelled testimony. First, the prosecution could use the compelled testimony to refresh the recollection of a witness testifying at North's criminal trial. *Id.* at 860–61. This use could be policed by relying on the good faith assurances of the prosecution and its witnesses that no such use was made of the compelled testimony. The second problem, however, is more troublesome. In a case such as *North*, where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. *Id.* at 863. In such cases, a court would face the insurmountable task of determining the extent and degree to which "the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." *Id.* We have not been persuaded that procedures exist to probe the mind of a witness in order to discover such use of compelled testimony.

The second basis for our decision is that the state cannot meaningfully safeguard against nonevidentiary use of compelled testimony.[5] Nonevidentiary use "in-

4. This scope largely parallels the scope the Supreme Court has set for the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). None of the parties here suggested, nor do we consider, Justice William O. Douglas' position that the privilege "put[s] it beyond the power of [government] to compel anyone to confess his crimes." *Id.* at 467, 92 S.Ct. at 1668 (emphasis added) (Douglas, J., dissenting); *see Ullmann v. United States*, 350 U.S. 422, 446, 76 S.Ct. 497, 511, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

At times, DeGraff claims to broaden the scope of article I, section 9 by stating that a grant of immunity must "place[ ] [the witness] in the same position as if he remained silent." The Supreme Court has rejected this formulation of the self-incrimination guarantee, instead favoring an interpretation similar to the one stated above. *See United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). This formulation also begs a very important question: put in the same position with respect to *what interest*? Clearly certain interests, such as keeping the compelled testimony from coming to public light, could not be achieved without implementing extraordinary means. The standard "the same position as if he remained silent" must have a specific reference point. In the present case, that reference point is incrimination. Thus, a meaningful reading of the "same position" argument is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination *from his own words*. Thus, DeGraff's seemingly restrictive standard really reduces to this court's prior standard: remove the hazard of incrimination due to the compelled person's own words.

5. Although both courts and commentators divide on whether a constitutional protection against self-incrimination should prohibit nonevidentiary use of compelled testimony, *see, e.g., United States v. Byrd*, 765 F.2d 1524, 1530–31 (11th Cir.1985) (allowing nonevidentiary use); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973) (prohibiting nonevidentiary use); Gary S. Hunble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 Tex.L.Rev. 351, 371–83 (1987) (urging that nonevidentiary use be allowed); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 Tex.L.Rev. 791, 804–10 (1978) (urging

clude[s] assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973). Innumerable people could come into contact with the compelled testimony, either through official duties or, in a particularly notorious case, through the media.[6] Once persons come into contact with the compelled testimony they are incurably tainted for nonevidentiary purposes. *See id.* Safeguarding against such dangers will prove well nigh impossible,

> [f]or the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

Nonevidentiary use of compelled testimony can adversely affect an accused in many ways. When compelled testimony is incriminating, the prosecution can "focus its investigation on the witness to the exclusion of other suspects, thereby working an advantageous reallocation of the government's financial resources and personnel." Strachan, *supra*, at 807. The compelled testimony "may help explain information otherwise known," which could aid the prosecution in the presentation of its case. *Id.* With knowledge of how the crime occurred, the prosecution may refine its trial strategy to "probe certain topics more extensively and fruitfully than otherwise." *Id.* Indeed, a defendant may choose to relinquish her right to testify out of fear that the prosecution has honed its cross-examination with its knowledge of the compelled testimony. *Id.* Regardless of whether Jill Jahnke-Leland testified at her first trial, the prosecution's mere knowledge of her compelled testimony might significantly alter her decision whether to do so in a possible retrial. These are only some of the possible nonevidentiary advantages the prosecution could reap by virtue of its knowledge of compelled testimony.

Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be "non-evidentiary uses of which even the prosecutor might not be consciously aware." *State v. Soriano*, 68 Or.App. 642, 684 P.2d 1229, 1236 (1984) (only transactional immunity can protect state constitutional guarantee against nonevidentiary use of compelled testimony). We sympathize with the Eighth Circuit's lament in *McDaniel* that "we cannot escape the conclusion that the [compelled] testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel*, 482 F.2d at 312. This incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.

We are not alone in construing a state constitutional guarantee to require transactional immunity in exchange for compelled incriminating testimony. Courts in Hawaii, Massachusetts, and Oregon have reached the same result. *See State v. Miyazaki*, 62 Haw. 269, 614 P.2d 915, 922–23 (1980); *Attorney General v. Colleton*, 387 Mass. 790, 444 N.E.2d 915, 921 (1982); *Soriano*, 684 P.2d at 1232.[7] In each case, the court relied, in part or in whole, on dangers presented by the inability to adequately enforce a ban on derivative use. *See Miya-*

(that nonevidentiary use be prohibited), the state concedes that the Alaska Constitution prohibits such use. Additionally, we believe that nonevidentiary use could 'furnish a link in the chain of evidence leading to a conviction,' *R.L.*, 572 P.2d at 786, or at least forge and shape that chain, sufficiently to fall within the conduct prohibited by article I, section 9.

6. This situation is further complicated if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.

7. *But see, e.g., State v. Strong*, 110 N.J. 513, 542 A.2d 866, 871–72 (1988); *People v. Johnson*, 133 Misc.2d 721, 507 N.Y.S.2d 791, 793 (Sup.1986); *Welsh v. Commonwealth*, 14 Va.App. 300, 416 S.E.2d 451, 453 (1992).

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saki, 614 P.2d at 922–24; *Colleton*, 444 N.E.2d at 920–21; *Soriano*, 684 P.2d at 1233–34.

Because of the manifold practical problems in enforcing use and derivative use immunity we cannot conclude that AS 12.50.101 is constitutional. Mindful of Edward Coke's caution that "it is the worst oppression, that is done by colour of justice,"[8] we conclude that use and derivative use immunity is constitutionally infirm.

AFFIRMED.

John WILLIS, Appellant,

v.

WETCO, INCORPORATED, Appellee.

No. S-4905.

Supreme Court of Alaska.

June 4, 1993.

Employer brought action against employee for violation of noncompetition and confidentiality agreements. After preliminary injunction was granted against employee, employee filed counterclaim. The Superior Court, Third Judicial District, Anchorage, Dana Fabe and Peter Michalski, JJ., dismissed case for failure to prosecute. Employee filed motion to reconsider dismissal, which was denied, and employee appealed. The Supreme Court, Rabinowitz, J., held that employee failed to demonstrate good cause for delay in prosecution.

Affirmed.

1. Appeal and Error ⇐962

Supreme Court will review lower court's dismissal of action for delay of prosecution under the abuse of discretion standard. Rules Civ.Proc., Rule 41(e).

8. 3 Lord Edward Coke, *The Second Part of the*

2. Pretrial Procedure ⇐534.1

A showing of "good cause" for delay in prosecution is the production of a reasonable excuse for lack of prosecution.

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

3. Pretrial Procedure ⇐534.1

Trial court did not abuse its discretion in finding that employee failed to demonstrate good cause for delay in prosecuting his counterclaim where employee did not explain what aspect of his damages were continuing to accumulate, or why time was any more ripe for trial now than earlier if alleged damages were still accumulating, and where a review of his counterclaim indicated that there was no support for his excuse.

4. Pretrial Procedure ⇐681

Prior to court's dismissal of case for lack of prosecution, there must be record evidence of court's consideration of lesser sanctions. Rules Civ.Proc., Rule 41(e).

5. Pretrial Procedure ⇐587

Trial court did not abuse its discretion in dismissing employee's counterclaim for failure to prosecute where employee failed to demonstrate good cause for his nearly two-year delay in prosecution. Rules Civ. Proc., Rule 41(e).

6. Pretrial Procedure ⇐681

Trial court is not under duty to explore meaningful alternatives before entering dismissal without prejudice for failure to prosecute where function of rule is to clear court's calendar and to protect parties against undue delay; however, relevant inquiry for court is to determine whether any proceedings have been taken within one-year period, and if no proceedings have been taken for more than one year, to determine whether or not good cause has been shown why action should not be dismissed. Rules Civ.Proc., Rule 41(e); AS 09.10.240.

Institutes of the Laws of England 43 (1797).

MEMORANDUM

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TO:	House Judiciary
FROM:	Linda K. Wilson, Deputy Public Defender
RE:	HB 244
DATE:	5/07/03

Introduction

Chairwoman McGuire, Vice-Chairman Anderson, and members of the Committee, Representatives Gara, Gruenberg, Holm, Ogg, and Samuels.

The Public Defender Agency has serious concerns regarding numerous portions of this bill.

This bill proposes some radical changes to the criminal laws, many of which are unwarranted, unfair, and in some instances unconstitutional. This bill covers many different areas within the topic of criminal law and procedure, including defenses, affirmative defenses, rights of prisoners after arrest, discovery, immunity, notice of defenses, admissibility of certain evidence, consecutive sentencing and mitigation in sentencing. I would like to address each area individually.

Specifics

1. Self Defense and Heat of Passion

Sections 1-5 change long-standing Alaska laws on self-defense, defense of others, and heat of passion and require the defense to carry the entire burden of proving to the jury that the defendant acted in self-defense, defense of others, or in the heat of passion. Under current law, if you defend yourself and are later prosecuted, you must produce some evidence of self-defense before a judge will allow a jury to consider the defense, but once produced, the state must prove beyond a reasonable doubt that your use of force was unjustified to gain a conviction. The same holds true for those acting in defense of others, or in the heat of passion.

Defenses can be divided into two basic categories: Justification and Excuse. Although there is some overlap between the categories, looking at defenses in this way helps

explain differences between true "affirmative defenses" which the defense must prove, and other defenses, like self-defense, on which the prosecution has the burden.

An example of an Excuse in the affirmative defense is the defense of necessity. If a person is in danger of freezing to death and breaks into a cabin, he has committed the crime of burglary. But the criminal conduct is excused by necessity. Under current law, the defense has the burden of convincing the judge or jury of the "affirmative defense." This is the way it should be. If a defendant essentially admits to criminal conduct but asks the judge or jury to excuse the transgression, he or she should bear the burden of proving the excuse.

Justifications are given a higher status in criminal law, and the prosecution has traditionally had the burden of proving that a crime took place despite a justification. (Although the prosecution has the ultimate burden, the judge will not allow the jury to consider the justification unless the defense has come forward with some credible evidence to support it.) An example of justification is a police officer using force to arrest someone for a crime. Technically, the police officer's actions are a criminal assault. However, under AS 11.81.370, the police officer is justified in using force to make an arrest or terminate an escape.

Therefore, with justifications, criminal conduct is not merely excused. When a defendant's actions are **justified**, society has made the judgement that conduct that would otherwise be criminal is not a crime. The law placing the ultimate burden of proof on the prosecution when justifications are legitimately raised is longstanding in Alaska (see Toomey v. State, 581 P.2d 1124 (Alaska Supreme Court 1978) and elsewhere (see Paul H. Robinson, Criminal Law Defenses, Sec. 132 at pg. 99-100 (West Publishing Co. 1984)). This law should not be changed.

Many states, and the federal government require that the prosecution has the burden of proving beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. From a 2002 pocket supplement to an American Law Reports article on the subject entitled *Homicide: Modern Status of Rules As to Burden and Quantum of Proof to Show Self-Defense*, 43 ALR 3d 221, June 2002 Supp. at pp. 13-24, more than 30 states require the government to prove beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. Those states include Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Washington, and West Virginia. Some state may label the defense of self-defense an "affirmative defense," but that can mean, like in Alaska now, that the defendant has the affirmative duty to produce some evidence of self-defense to raise the issue, and then the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you look at AS 11.81.900(b)(2) and (18) it explains how the two work in Alaska. "Affirmative defense" is an ambiguous phrase and means different things in different states.

One part of this bill seeks to deny to a victim of domestic violence a right to armed self-defense against the very perpetrator of prior violence. That proposed change in section 4 states that "A person may not use deadly force... if the person brought a deadly weapon to an encounter with reckless disregard that the encounter would result in combat." In other words, the proposed law denies the right of self–defense to the very people who are most likely to have to exercise it. It may be proposed with gangs in mind, but its reach is far more expansive. For example, a woman who carries concealed because she is afraid her abusive ex-boyfriend might seriously hurt or kill her, now would have absolutely no right to self-defense if she regularly carries a weapon and encounters him picking up her child at day care and he lunges at her and she shoots him. She is completely denied her right to self defense under this new provision, because she brought a gun to an encounter with reckless disregard that the encounter with him would result in combat. This is so even if she was not the initial aggressor or did not provoke the incident.

Sections 2 and 4 of the proposed legislation provide exceptions to the burden shifting to the defense for citizens that defend themselves in their own home, but the exeption is meaningless. The transmittal letter states that citizens who defends themselves in their own homes and must use force to protect their families would not be affected by this change, as long as they are in their own home, are not the initial aggressor, and not assaulting a "household member." This exception is meaningless for most people defending themselves in their own home, because the definition of "household member" in AS 18.66.990(5) is so broad, it includes a multitude of people that one can't defend against, even in one's own home. For instance, if a woman is in her home with her children, and a person she dated twice many years before comes to her home and while there physically threatens her, and she grabs a handgun and forcefully defends herself, if she is prosecuted for killing or assaulting him, she has the full burden (preponderance of the evidence) to prove her innocence, because this person is considered a "household member" under the definition. This should not be the case.

Changes in the law on self defense, defense of others and heat of passions are not warranted. In the Governor's transmittal letter it describes how difficult it is for prosecutors to obtain convictions while self defense and 'heat of passion' remain elements that the State of Alaska must disprove. This claim is hard to support. Distress over the results in 16 cases over the last twenty years, as mentioned by prosecutor Novak is not such a compelling figure that it warrants the radical changes proposed. The expressed distress over these sixteen cases out of hundreds does not warrant the drastic erosion of the right to protect oneself.

Further, the argument that this change is needed to combat a rise in drug violence is also misstated. An examination of Alaska's current criminal law shows that possessing a firearm while violating Alaska's controlled substances act is in and of itself a crime. AS 11.61.195 defines this as Misconduct Involving Weapons in the Second Degree, a class B felony. If a person actually uses or attempts to use a firearm while conducting a controlled substances transaction or other violation of the law, AS 11.61.190 defines that conduct as Misconduct Involving Weapons in the First Degree, a class A felony.

That crime is punishable by up to twenty (20) years in prison. As such, when the argument is made that too many drug dealers are carrying weapons and innocent people are dying, the proper response should not be to pass more legislation. The proper response should be to wonder why current laws are not being enforced. It is not that charges can't be prosecuted, but that they are choosing not to charge.

All of this analysis, however, begs the question of how many people are in fact being shot in drive-by shootings or other drug-related violence. The answer, at least according to news reports, is very few. The vast majority of homicides that occur within this state arise over relationships. As such, changing this law will not help put drug dealers who shoot innocent people in jail. Rather, it erodes basic, constitutional and common-law rights of individuals.

This is the second reason why this law should be rejected. From its roots in the Anglo jurisprudence system, individuals have been held to hold basic, inalienable rights. As recognized by the drafters of the United States Constitution, these rights included the right to life, liberty, and the pursuit of happiness. Because the loss of liberty involves such a significant right, courts have held that the Government, in seeking to imprison a defendant, must bear a great burden of proof. As such, for the past several centuries, the government has had to prove that a case did not involve self-defense or heat of passion. Yes, this did make it more difficult for the government to prove, but this was accepted because the rights involved were so great.

The policies behind self-defense and heat of passion are a little different. For heat of passion, a defense only to murder, that if successful, reduces the conduct to manslaughter, the common law recognized that sometimes people were so provoked that they in fact killed the person who did the provoking. The law school textbook example is of the man who comes home to catch his wife in the act of adultery. If the homicide occurred very soon after such a discovery, the law recognizes that the intent of the individual who committed the crime was less than the intent of the individual who deliberately planned a murder, stalked his victim, and then, when an opportunity arose, killed the victim. Thus, the *mens rea* of someone who commits first degree murder is more culpable than one who commits manslaughter, the appropriate crime when someone kills in the heat of passion.

The reasons against making heat of passion an affirmative defense are then two-fold. First, the common law sought to discourage behavior that would provoke ordinary persons into homicidal rage. Adultery and fighting were discouraged in an effort to promote a just and orderly society. Second, because the *mens rea* of murder is more culpable than manslaughter, it is appropriate that the State should have to prove the more culpable *mens rea* in order to gain the greater punishment. By making the defendant prove that this was heat of passion, this bill would erode the protections envisioned by the common law of England and the United States, and the current law in Alaska. It would ignore the wisdom behind that policy, and while it increases the power of the State it does so at the expense of the rights of an individual.

The policy behind the law of self-defense was a little bit different than that of heat of passion. Under common law, individuals were understood to own their own body. Thus, they had the right to do whatever they wished to do as long as they did not unreasonably interfere with the rights of others. This meant, though, that they had the capacity to protect what was theirs, namely, their own persons. Common law recognized this right as being embodied in every major legal system since Old Testament times. Based upon the desire to promote a stable and just society, the right of self defense was extended to encompass third persons, if the third persons would be unable to defend themselves. The common law courts recognized, as courts recognize today, that the sovereign owed no duty to individuals for police protection. Even today, if a person calls 9-1-1 to report a burglar, there is no guarantee that police will respond. By granting individuals the right to self-defense, the common law provided an efficient means of promoting social order. This policy certainly holds true in Alaska where bush communities are the norm, and police protection is not always available. Individuals would be less likely to use violence against others if that violence would be returned upon them.

The policy behind the law then favors individuals having the right to defend themselves. By making individuals prove that any homicide or assault was in fact self defense, this bill would erode that public policy and support a less orderly and just society. It is true, however, that defendants do have to affirmatively raise some evidence of self defense before the jury will be instructed on the matter. Under *Toomey v. State*, 581 p.2d 1124 (Alaska 1978), the Court recognized that the defendant will have to demonstrate some evidence before being entitled to an instruction on self-defense. So not every homicide or assault will be granted jury instructions on self-defense. There does have to be some evidence to support the jury instructions.

The trial courts, then, have not been "too loose in enforcing the Alaska Supreme Court's admonition". Rather, they have been following the instructions of *Toomey*, *supra*, *Folger v. State*, 648 P.2d 111 (Alaska App. 1982), and other decisions holding that once the defendant puts forward some evidence to support the defense of self defense, the trial court is duty bound to give the instruction. This, however, has not resulted in a flood of vicious murderers being acquitted. Rather, it has apparently resulted in some acquittals in cases in which the State of Alaska believes there should have been convictions. This is not a reason to vitiate the sound public policy of the common law in an effort to encourage reasonable people to act reasonably and thus promote a just and orderly society.

This policy, however, went farther and did allow individuals, in certain circumstances, to arm themselves in anticipation of a potential conflict. This right, however, was limited to certain instances. As described in *Brown v. State*, 698 P.2d 671 (Alaska App. 1985), individuals could seek out an adversary in an effort to peacefully settle their differences. A person doing such could, under common law, arm himself in an effort to prevent future attacks. The court in *Brown* noted that neither the defendant's arming himself nor the return to confront his adversary deprived him of the right to self-defense per se. Rather, the test was what did the evidence show the defendant and the adversary did.

This is exactly the purpose of our jury system. As discussed below, these factual nuances are for juries to decide.

Juries decide these questions, though, within well-specified boundaries. It is well-settled law that an aggressor forfeits his right to self-defense. This concept has long roots in common law, and it makes sense when considering the policy previously described. If the law is to promote a just and orderly society, a person who violates the rights of others should not be allowed to avail himself of rights and defenses seeking to promote those rights. There certainly are numerous cases in Alaska where it was decided that a self-defense instruction was not warranted. *See Bangs*, 608 P.2d 1 (1980); *McMahon v. State*, 617 P.2d 909 (Alaska 1980), *cert. de*nied, 454 U.S. 839 (1981); *Stapleton v. State*, 696 P.2d 180 (Alaska App. 1985), *Hilbish v. State*, 891 P.2d 841 (Alaska App. 1995), and *Ha v. State*, 892 P.2d 184 (Alaska App. 1995). There are probably many more unreported or unpublished decisions. The system as it is, then, does work. Making a blanket rule that anyone who arms himself forfeits the right of self-defense destroys common law rights and takes away the decision-making power of the jury. It is an attempt to impose a one-size-fits-all solution to a problem that really is not a problem.

The proponents of this bill argue that these laws are becoming too lax and need to be fixed because too many people are being acquitted on self-defense grounds. The above analysis shows that the law is quite clear regarding self defense and that once a defendant shows some evidence supporting his claim of self defense, the trial court must instruct the jury and let the jury decide. The arguments, then, are not so much against the laws because they even acknowledge the *Bangs* decision. Rather, the difficulty appears to be with jury decisions.

This attitude is extremely problematic. Our system is one in which the power of the sovereign is ostensibly derived from the consent of the governed. This is one of the primary reasons for the right to a jury trial. From *Blackstone's Commentaries on the Law* to present day, opinion is unanimous that juries serve as a vital part of the justice system. Juries serve as a voice of the community. The people give the government its power, and through their representatives they describe the society in which they wish to live. The legislatures seek to create this society through general laws. The community, though, is asked to judge on particular instances when they serve on juries. Thus, the community wants murder against the law, and so the law is passed generally prohibiting murder. But the community, when representatives are seated as a jury, is asked specifically whether under these facts they believe that a murder has been committed. The State of Alaska is arguing that the juries really do not know what they are doing because they are finding too many people not guilty.

Reduced to its simplest terms, the proponents of this bill are saying that the source of its authority, the people, is wrong and that the prosecutors need more power because the people are not smart enough to get it right for themselves. This argument goes against the foundations of our representational legal system and against our commitment to juries as determiners of the facts. While no system is perfect, Alaska juries by and large

understand what happens and they reach correct results. Putting twelve citizens in a box and having them listen to testimony, filtering it through their common sense and experience, and judging it by the law has proven to be remarkably effective at determining what actually happened in a case. Further, it is an important way for communities to voice their approval or disapproval upon certain behavior. Granted, no system is perfect. But we should not be rejecting hundreds of years of experience simply because there are a couple of cases where juries reach decisions that the prosecutors do not like.

The last reason that the legislature should reject these amendments is because they are inefficient. As noted above, part of the public policy supporting the right to self-defense is the idea that the police cannot be everywhere. Further, allowing individuals to defend themselves will have the effect of reducing crime and creating a more just and orderly society without the need for the money or person power a police force needs. These policy arguments have been verified in the work of criminologists John Lott and Gary Kleck, both of whom have found that individuals possessing firearms and exercising their right to self-defense have prevented literally millions of crimes per year. All of this was done at literally no cost to the respective states.

In a time when Alaska is facing huge budget deficits, it makes little sense to diminish the rights of individuals to use self-defense. Already in rural Alaska, it can take literally days and sometimes weeks for appropriate law enforcement to arrive on a scene to determine what happened. Many rural villages are without any law enforcement whatsoever. Even on the road system, there are numerous communities long distances from police protection. By making these defenses affirmative defenses and thus making people prove their innocence, this bill will chill the exercise of self-defense by citizens. This will diminish the just and orderly society we all wish to promote.

I would urge the legislature to trust the juries and the people of this State. By and large, they get it right and there really is no need to enact the changes urged in this section of the bill. The changes are not necessary, they reduce individual liberties and increase the power of the government, and they are an assault on the integrity and intelligence of our juries. For all of the stated reasons, I urge you to reject these proposed changes and leave the law of self-defense, heat of passion, and armed individuals as it is. These laws have worked well for several centuries. They will work well for a few more.

2. Prisoner Rights after Arrest

Section 6 of the bill seeks to amend AS 12.25.150(b). This amendment will limit the right of an accused to consult with an attorney. There is no explanation for why this amendment is being offered. Yet the proponents seek to keep the prisoner without counsel as long as possible, and by this legislation make it harder for the prisoner to obtain the benefit of counsel, when one is ready and willing, and already retained to represent the prisoner. The amendment will allow the police or department of corrections to prohibit an attorney who was retained by the friends and family of an accused to speak to that person, unless the accused specifically asks to see that

attorney. The practical effect is that when someone is arrested they are allowed to call an attorney or friends and family, but only if they think to ask to call. It is much easier for a family member or friend to arrange an attorney and get them to the jail than it is for a prisoner. If an accused calls friends or family, they in turn, hire an attorney who tries to see the accused. That attorney will be turned away under this legislation, unless the accused specifically asks to see that attorney.

There is no problem to fix by this legislation. Attorneys are not hanging out at jails seeking to counsel prisoners with no prior arrangement to represent them. Many accused people have mental disabilities or are young, and not very smart. The police can lie to them while they are being questioned. Don't forget that suspects do make false confessions. There has been mention of these recently in the press, like in NYC with the Central Park jogger case. An arrested person should get the benefit of a lawyer that his or her loved ones have secured.

The problem is that the accused is detained and restricted from communicating with the family or friends. It is impossible for that person to know whether his or her friends and family have contacted and retained an attorney, or whether that attorney has arrived, therefore it is impossible to expect the accused to specifically ask to see that attorney. The right to counsel is constitutionally protected by the 5th Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution. We should not make it more difficult for a person incarcerated to get the benefit of a lawyer arranged for him or her by family or close friends.

3. The Use and Admissibility of Prior Convictions

Section 7 of the bill seeks to make evidence of a prior conviction admissible in a case where it is an element of the offense, but not contested. Currently in Alaska under *Ostlund v. State*, 51 P3d 938 (Alaska App. 2002) a defendant is entitled to a bifurcated trial so that the jury is not prejudiced by the prior conviction (ie: a prior DUI in a felony DUI case, or a prior shoplifting in a felony shoplifting case) by being informed about it before they deliberate on the current allegation (ie: the current DUI or shoplifting allegation). A bifurcated trial is not two separate trials, but two parts of a single trial done with one jury. This is not necessarily a long or time cunsuming process, and can take less than an hour. This procedure is important though because it preserves both parties' right to a determination of all of the issues, but avoids the potential for unfair prejudice. A majority of other states follow a similar procedure. They have also found that this procedure is the proper way to try these types of cases to protect the defendant from being unfairly prejudiced by evidence of a prior conviction of a similar offense that destroys the presumption of innocence. As Judge Mannheimer stated in *Ostlund*: "When a defendant is tried for felony DWI, and when the defendant's previous offenses have no relevance other than to prove the "prior convictions" element of the offense, a trial judge should bifurcate the trial so that the jury's deliberations on the current DWI are not unfairly prejudiced by evidence of the defendant's prior similar crimes –

evidence that, in other circumstances, would be barred by Evidence Rule 404(b)(1)", the rule against unfair propensity evidence.

This well reasoned, fair procedure that is followed in a majority of states should not be changed. The claimed reason of wanting to explain to a jury why there are 12 of them instead of 6, is not persuasive. It is doubtful whether jurors even notice this distinction and it certainly does not outweigh an accused's right to a fair trial.

Sections 7 and 15 of the bill also propose to change the burden of proof making it the defense's burden of proof to challenge the validity of a prior conviction both in a prosecution where the prior conviction is an element of the crime being prosecuted and also at sentencing where a prior conviction may result in a longer sentence. This change is also not warranted. Currently the state must prove the validity of a prior conviction before it can be considered. The bill proposes that the defense must prove by a preponderance of the evidence that a prior conviction is invalid. Sometimes the prior conviction is from another state. The defendant can only claim that the prior conviction is invalid because of the denial of the right to counsel or jury trial. Not only is this unfair and a violation of due process, the shifting of this burden of proof onto the defense will require more investigation efforts from the defense to find out the underlying facts in the prior case, perhaps from out of state, and then retrieve evidence from that old case to be presented in the current case to meet the burden of proof. This is not an easy task to accomplish by an agency that is outside of law enforcement, and does not have the numerous resources to draw on to assist them across the country.

4. Witness Immunity

Alaska is a state that requires the government to grant transactional immunity, meaning complete immunity from prosecution, to force a witness with a legitimate claim of privilege against self-incrimination to testify. We do so because our state constitution protecting the right against self-incrimination requires it.

Sections 8 - 12 of this bill claim to seek to conform Alaska's immunity statute to the Alaska Constitution for witnesses who testify in a criminal proceeding after establishing a valid claim of privilege against self-incrimination. Amending AS 12.50.101 to enact transactional immunity as required by article I, section 9 of the Alaska Constitution and the Alaska Supreme Court holding in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) is commendable. Unfortunately, this intent is not carried out in the proposed legislation because of the additional provisions included in Sections 11 and 12 that allow the prosecutor to participate in the proceeding where the court determines whether the witness has a valid claim of privilege against self-incrimination. Allowing the prosecutor to hear the proffered testimony with only a requirement that it is inadmissible for any other purpose, only provides use and derivative use immunity, not transactional immunity. Use and derivative use immunity is not adequate under the Alaska Constitution and therefore this section of the proposed legislation is unconstitutional.

While the Public Defender Agency supports proposed legislation to conform Alaska's

immunity statute to the requirements of the Alaska Constitution, this proposed legislation fails to do so, and therefore the Agency cannot recommend this portion of the legislation in its entirety. AS 12.50.101 is unconstitutional as currently written because it does not adequately protect the privilege against self-incrimination afforded by article I, section 9 of the Alaska Constitution. The Alaska Supreme Court in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) unanimously found the statute unconstitutional and required the state to confer "transactional immunity," not just "use and derivative use immunity" in order for the statute to comply with Alaska's constitution. Simply amending the language in AS 12.50.101(a) as proposed in Section 8 of the new legislation, with a small but important change of the word "an" on line 8, page 4 with the word "any", would bring the statute into compliance. The Public Defender Agency has no objection to making the statute constitutional. The Agency takes no position on Sections 9 and 10 of the proposed legislation changing all references to "attorney general or attorney general designee" with "prosecutor."

The Public Defender Agency, however, strongly opposes the language provided in Section 12. Article I, section 9 of the Alaska Constitution provides that "no person shall be compelled in any criminal proceeding to be a witness against himself." The original drafters of Article I, section 9 intended to confer transactional immunity, which is complete immunity from prosecution for **any** crime about which the witness testifies. The Alaska constitutional right against self-incrimination is closely guarded and construed stringently against the abuse of governmental power. The incurable inability to prevent or even detect the non-evidentiary use of compelled testimony is a fatal constitutional flaw of use and derivative use immunity that would result from enactment of Section 12 of this bill.

The judge alone has to hear the proffer to decide if the privilege exists. If the prosecutor hears it, the privilege is vitiated. If the state is concerned about the judge making a fair ruling on whether or not the witness has a valid claim of privilege, the state always has the ability to petition the court of appeals to review the decision made by the trial court under seal, and the appellate court would review the same information under seal, without the state looking at it. To open the *in camera* proceeding to the prosecutor violates the witness' privilege against self-incrimination, the right not to be compelled to be a witness against oneself.

Allowing the prosecutors to be present during the *in camera* hearing on whether the witness has a valid claim of privilege against self-incrimination, and only providing that any testimonial proffer made under this section is "privileged and inadmissible for any other purpose" only confers use and derivative use immunity to the potential witness. Only providing use and derivative use immunity to the witness after he is compelled to proffer testimony against himself in front of the prosecutor at the *in camera* hearing is inadequate to protect against the privilege against self-incrimination. The inability to adequately enforce a ban on use and derivative use immunity makes this section unconstitutional. The only way this legislation would not violate Article I, section 9 of the Alaska Constitution and the holding in *Gonzalez* would be if the state could not prosecute the witness for anything arising out of his or her proffered testimony, that is

transactional immunity.

5. Consecutive Sentences

Sections 13, 14, and 18 - 20 seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate the court's ability to determine the appropriate amount of consecutive time to be imposed for certain crimes. This change in the sentencing statutes will have a fiscal impact on the criminal justice system, including an increase in prison populations. It will likely result in the inability to resolve cases short of trial, when the case is one in which conviction of more than one count would otherwise have been an appropriate resolution, now would be forced to go to trial because of the exposure to mandatory consecutive sentences.

The proposed legislation is, in the first place, not needed. The concerns that purport to be addressed in the proposed legislation are already being addressed by the current sentencing scheme. Trial courts are aware of the legislative preference for consecutive sentences and give that preference great weight when they impose sentences. For example, in the case of *Jones v. State*, 744 P.2d 410, 411 (Alaska App. 1987) the sentencing judge concluded that consecutive sentences were necessary to reflect the seriousness of the crime. Specifically, the judge emphasized that two people had died and that a third person had been seriously injured. The Court of Appeals agreed with this reasoning. In *State v. Dunlop*, 721 P.2d 604 (Alaska 1986), the Supreme Court specifically held that where an act of violence injures multiple victims, there are as many punishable offenses as there are victims.

In addition to being unnecessary, the proposed legislation would have serious fiscal impacts. The prison population would increase significantly. In addition to the fiscal impact on the Department of Corrections, other parts of the criminal justice system would see increased costs. For example, because the proposed legislation would discourage settlement in cases in which conviction of more than one count would otherwise be an appropriate resolution, many more cases would go to trial. As a result, the resources of the court system, the Department of Law, and the Public Defender Agency would be fiscally impacted beyond what they are under the current sentencing scheme.

Finally, this section of the proposed legislation is not in conformity with the legislature's stated declaration regarding the purpose of existing sentencing laws, which is codified in AS 12.55.005. Requiring a sentencing judge to impose large amounts of consecutive jail time when imposing sentences for certain crimes would eliminate the judge's ability to take into account the seriousness of the defendant's present offense in relation to other offenses, the prior criminal history of the defendant and the likelihood of rehabilitation, the need to confine the defendant to prevent further harm to the public, the circumstances of the offense, and the effect of the sentence on deterring the defendant and others. Currently, in situations in which a defendant has established that he cannot be deterred or rehabilitated within the confines of a given sentence, longer

sentences are justified. However, in situations in which additional jail time would not provide additional deterrence or rehabilitative effect, less consecutive time may be imposed. When sentencing a defendant for a number of individual crimes at the same time, the judge is permitted to determine the appropriate overall sentence taking into account each crime, the surrounding circumstances, the defendant's age and background, and any aggravating or mitigating factors. The proposed legislation would force judges into a sentencing scheme that overcrowds the prison system and overburdens the courts, prosecutors, and public defenders, while simultaneously eliminating the trial court's ability to consider a variety of sentencing factors that the legislature has expressly recognized in AS 12.55.005 as fundamental. The effect of previously legislated mandatory sentencing laws can be seen across the country as Los Angeles County, the state of Texas, and New York have been forced into wholesale releases of prisoners without much thought as to appropriateness due to budget constraints. Surely, Alaska should promote reasoned and considered sentences on an individual basis.

Section 14 creates AS 12.55.127(a) effectively replacing AS 12.55.025(e),(g),and (h), which are repealed by Section 20. Proposed AS 12.55.127(a) provides that "If a defendant is required to serve a term of imprisonment under a separate judgment, any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive." This proposed provision is consistent with existing law insofar as it relates to sentences/dispositions imposed for criminal conduct **committed** after a person "is imprisoned upon a previous judgment..." AS 12.55.025(e); *Jennings v. State*, 713 P.2d 1222 (Alaska App. 1986). Subsection (a)'s language may, however, have an impact upon persons who committed separate criminal acts, charged in separate criminal cases, but **prior** to the imposition of any judgments in the resulting cases. Existing law permits courts to impose concurrent or partially concurrent sentences under those circumstances. *See Wells v. State,* 706 P.2d 711 (Alaska App. 1985)(construing AS 12.55.125(e) to permit concurrent sentencing where judgments are entered in separate cases after the conduct underlying each has ocurred).

Under proposed subsection (a), the mere existence of a "separate judgment" would eliminate this prospect for concurrent sentencing. This would lead to irrational results where clearly similarly situated offenders would not be treated similarly, which defies the stated desire for uniformity and the elimination of unjustified disparity in sentences. For example, a defendant charged with two or more crimes in a single indictment could receive concurrent sentences, while a defendant charged with several related or similar crimes, but in separate indictments or cases could not, unless the defendant made arrangements for sentencing proceedings in the two cases to be consolidated. Yet, for the defendant who did not know or have the foresight to arrange consolidated sentencing proceedings or for whom consolidated proceedings were not possible due to scheduling problems or other procedural difficulties, imposition of consecutive sentences would be mandatory. Mandatory application of consecutive sentences should not turn on such fortuitous or haphazard considerations.

6. Mitigator for Pleading Quickly to Sex Offense

This section of the bill, section 16, adds a mitigator for consideration at sentencing. Normally the Agency would support the addition of a mitigator, but this one is unworkable. It states that the mitigator applies when a defendant is sentenced for a sexual offense and he or she has pled out to the offense within 30 days of being arraigned on the charge. This makes the availability of the mitigator dependant on the prosecution to get full discovery to the defense in a timely manner to enable the defendant to adequately assess the charge and options on how to plead. Therefore it puts the defendant in the difficult and unacceptable position of pleading to a crime without the necessary information to do so, in order to get the benefit of the mitigator.

Perhaps an amendment making the mitigator available based upon an event, or a later time frame, but certainly before trial would be more workable.

7. Notice of Defenses and Experts

Sections 21 - 23 concern notice of defenses and experts and require the defense to give notice sooner than required under current law. It also adopts serious sanctions for failures to timely notify the prosecution. These changes in the rules will require the defense to put forth additional investigative efforts related to experts and defenses to meet these earlier deadlines in order to avoid the significant sanctions proposed.

The proposed amendment to Criminal Rule 16(c)(5) should be amended to allow for a continuance if the prosecutor claims it is prejudiced by the late notice, instead of simply entitling the prosecutor to one with no showing of prejudice required. . Precluding a defendant from raising a defense because his/her attorney failed to file a timely notice has broad reaching repercussions. First, such a ruling most certainly opens the case up for an ineffective assistance of counsel claim that will be filed after any trial where a defendant has been precluded from running an appropriate defense because his/her attorney dropped the ball.

The troubling part of the bill is the language that **requires** the judge to preclude an affirmative defense for lack of notice. No other provision in Criminal Rule 16 **requires** the court to exclude evidence for a violation of the rule. Exclusion is an option in the case of late notice of an expert witness, and one option the court can exercise under Rule 16(b)(1)(B). The Governor's amendments to expert disclosure, under this same rule, include specific language that a continuance is a remedy to late notice. See Section 23, page 11, line 20, but it also requires preclusion of the expert witness in the proposed Rule 16(g)(5)(C) if disclosure is not complete within 7 days of trial or at a time ordered by the court.

8. Expanding Impeachment Testimony

This portion of the bill, found in Sections 24 and 25 amend several of Alaska's Rules of

Evidence.

The first concerns Evidence Rule 412 related to the admissibility of evidence illegally obtained by the state. It seeks to make admissible illegally obtained statements and evidence when used to impeach a witness, not just in a perjury prosecution.

This proposed change is not warranted. Evidence Rule 412 as currently written protects constitutional guarantees and removes incentives for governmental intrusion into those protected areas, by precluding use of evidence obtained **illegally**. It does not create a great incentive for the defendant to commit perjury, because the state can still cross-examine the defendant on his claims and the defendant can be prosecuted for perjury with use of the statements in that prosecution. The current rule is a good deterrent and there has been no demonstrated history of misuse.

The second section, section 25, seeks to amend Evidence Rule 609(b) to increase the opportunity to use prior convictions of dishonesty from five years fro the date of conviction to within 5 years from unconditional discharge from the conviction when the prosecutor wants to use evidence of the prior conviction to impeach the accused defendant. This will certainly expand the use of prior convictions in cases. If a young adult is convicted of a misdemeanor or low level felony and receives a sentence short of a year, but is put on probation for a significant period of time, he would not be unconditionally discharged from that conviction until he was off probation completely, which could be more than ten years later. Young people may commit crimes of dishonesty and then become upstanding citizens. Using that stale conviction of dishonesty to impeach him when he is much older seems more prejudicial and probative.

9. Unreliable Hearsay Evidence Made Admissible in Domestic Violence Cases

While we recognize that domestic violence cases are tought cases, this section of the bill is unconstitutional and against longstanding rules of evidence. Section 26 of the proposed legislation found on pages 12-13 of the bill seeks to amend Alaska's Rules of Evidence to provide an exception to the hearsay rule, to make statements about an alleged crime of domestic violence made **within 24 hours** of the alleged offense, either by the alleged victim or by another person who allegedly saw or heard the alleged offense, admissible even though the declarant is available as a witness. The underlying state and federal constitutional rights of a defendant to confront witnesses is enforced by the exclusion of hearsay evidence. The constitutional right to confrontation, which entails the right of cross-examination, is a fundamental right essential to a fair trial in a criminal prosecution. Hearsay evidence is second hand evidence that is not capable of cross-examination. Unless the evidence fits one of the constitutionally acceptable exceptions to the hearsay rule, the admissibility and use of out-of-court statements violates the constitutional right to confrontation. Hearsay evidence is generally unreliable second-hand evidence unless it fits one of the closely guarded exceptions. It would be a mistake to broaden the hearsay exceptions to include these out of court statements. Statements made within 24 hours of an alleged crime of domestic violence

are not any more reliable simply because it is an alleged crime of domestic violence. Many domestic violation cases are frought with passion, emotion, and bias, where it is even more essential to provide the accused with the right to test the declarant of the statement's sincerity, memory, ability to perceive and relate, and the factual basis of their statement. It is aiso essential to a reliable verdict that the jury have the ability to assess the witness' demeanor on the stand so that the witness' veracity is displayed for the jury to judge. Section 26 of this bill should be deleted

Closing

Numerous portions of this bill are problematic. It proposes radical changes in the criminal laws and in particular attempts to make it far easier to convict a person exercising their right to self-defense. It treats the victim of an unlawful assault like a criminal and makes them prove their innocence. The proposed legislation is poorly conceived and runs counter to nearly everyone's conception of the right to self-defense. With the exception of a few sections, most of the sections of this bill are unwarranted, unfair, and in some instances unconstitutional.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

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April 3, 2003

Representative Lesil McGuire
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: "An act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date"

Dear Representative McGuire:

I am writing this letter to request that you schedule the above act, pending referral, for a hearing at your earliest convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
Attorney General

By: David W. Marquez
David W. Marquez
Assistant Attorney General

DWM:lb
Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

HOUSE BILL 244
Sectional Analysis

Section 1. "Heat of passion" applies only to First Degree Murder and Second Degree Murder. If a person kills while in a passion that was the result of serious provocation by the intended victim, that reduces the killing from murder to manslaughter. In one case, a man broke into the home of a drug dealer to recover money, and shot the drug dealer. He claimed that the shooting was done in a "heat of passion" and the Alaska Supreme Court reversed his murder conviction because the trial judge did not believe he was entitled to raise this defense. "Heat of passion" is often a fall-back position for defendants who do not think they will completely escape responsibility under self-defense. In cases where the state is able to disprove self-defense, it may also be required to disprove "heat of passion." This section would change "heat of passion" from a defense, that the state must *disprove* beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence. The defendant is the person who knows the motivation for the killing, and should bear the burden of establishing this justification.

Sections 2 - 4. These change self-defense from a defense, that the state must disprove beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence, with two exceptions. First, self-defense would remain a defense for the state to disprove if the person was on his or her property and did not use force against a household member; Second, it would remain a defense as under current law for force used by a peace officer acting within the scope of his or her duties. In most homicides, the defendant is only person still alive who was present at the killing. As with the defense of duress, the defendant is the person who knows the motivation for the use of force, and should bear the burden of establishing this justification. Section 2 deals with use of non-deadly force in self-defense. Sections 3 and 4 deal with deadly force. Section 4 also provides that a defendant may not claim self-defense for a killing if he brought a deadly weapon to the encounter, and was aware of and disregarded the risk that the encounter would result in combat.

Section 5 makes use of force in defense of a third person an affirmative defense. As with self-defense, the state would still be required to disprove the defense if the incident occurred on the person's property or the force was used by a peace officer.

Section 6 provides that an adult who has volunteered to talk to the police must request to be visited by an attorney, relative or friend. Occasionally attorneys people will demand to visit a person under arrest, even if the person has not made a request for the visit. This interrupts the police investigation, but it is allowed under current law. All other provisions in section 6, regarding the right to immediately make phone calls, are unchanged from current law.

Section 7. When the law provides that an element of a crime depends on a prior conviction or convictions, such as felony drunk driving, the state must prove beyond a reasonable doubt that the past convictions occurred. But the Alaska courts have said that this must occur in two trials, and that the jury must not be told of the past convictions in the first trial. This section reverses that court decision. Section 7 also provides that the defendant may not again litigate the validity of the prior conviction, unless the defendant was not provided counsel or a jury trial. Prior convictions should not again be subject to attack where the defendant has had the opportunity to appeal, and to exercise post-conviction remedies.

Sections 8 -12 and 17. These sections adopt a procedure for making decisions about Fifth Amendment claims and the granting of immunity by the state. Alaska law requires complete, transactional immunity from prosecution for a person who has claimed a privilege; thus, the decision to grant immunity must be made carefully. Currently, the courts hold secret hearings with witnesses who refuse to testify, and then give the state no information that the state needs to decide whether to grant immunity to the witness. Under this bill, the state is allowed the information it needs to make a rational decision about granting immunity from prosecution. Section 8 merely conforms statutory law to a constitutional decision by the Alaska Supreme Court. Sections 9 and 10 are minor clarifying amendments. Section 11 defines a term that explains that the witness can communicate to the court through his or her attorney, rather than speaking directly. Section 12 adopts a procedure where the decision about the privilege is made after an attorney is appointed for the witness, and after input by both the witness and the state. Section 17 clarifies that a witness who claims a Fifth Amendment privilege not to testify is entitled to a public defender if the cannot afford one. This codifies current court practice.

Sections 13 and 14, 18 - 20. Sections 13, 18 - 20 are conforming amendments regarding consecutive sentencing. Section 14 gives direction to courts in sentencing for more than one offense. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter or kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Section 15 is similar to section 7, and provides that in imposing a presumptive sentence (which depends on prior convictions), the defendant may only challenge the validity of a prior conviction if he was denied the right to counsel or the right to a jury trial.

Section 16 would adopt a new mitigating factor for sentencing in a sexual felonies. Because these trials are so difficult for the victim, it would allow the court to consider whether to impose a lesser sentence if the defendant reduced the impact on the victim by entering a plea of guilty or no contest within 30 days of arraignment.

Section 21 changes Rule 16 (c)(5), Alaska Rules of Criminal Procedure, to require a defendant to give notice of certain defenses 30 days in advance of trial. Current law requires a shorter notice, and is routinely ignored by defense attorneys and courts.

Section 22 makes a conforming amendment to Rule 16(e)(1), Alaska Rules of Criminal Procedure, by cross-referencing consequences provided in other law for violation of the discovery rules or an order issued by a court under the discovery rules.

Section 23 addresses pretrial discovery of expert witnesses by both the prosecution and the defense. It requires that no later than 45 days before trial, both parties provide opposing counsel with the name and curriculum vitae of expert witnesses. The defense must disclose only those experts that it may call at trial. The prosecution must disclose experts that it may call at trial or that have worked on the case. Defense attorneys frequently instruct their experts not to write reports, because the report would have to be turned over to the prosecution. The prosecution has no such luxury, and is required to provide an expert's report. This section provides that if the defense expert has not written a report, the prosecution is entitled to depose the expert at the expense of the defense. It requires the court to disallow expert testimony if disclosure isn't complete seven days before trial or another time ordered by the court.

Section 24 amends the Alaska Rules of Evidence to provide that a voluntary statement obtained in violation of the technical *Miranda* requirements, may be used to impeach the person who made the statement, if that person testifies differently. Further, evidence that has been suppressed may also be used to impeach a witness. Current law only allows these statements and evidence to be used at a later perjury trial. This makes them available to impeach a witness at the first trial.

Section 25 extends the time for use of prior convictions for impeachment at trial from five years from conviction, to five years from the date of unconditional discharge.

Section 26 adopts a new exception to the rule against use of hearsay evidence, by allowing the use at trial of statements made within 24 hours of a crime involving domestic violence, if the statement reports or describes the crime.

Sections 27 - 31 include conforming repealers, a notice of a court rule change described above, procedural directions, and an effective date, July 1, 2003.