HB
326

HFIN

FILE

IOUSE COMMITTEE REPO

(11)
Date Referred to Committee: January 30, 2006 — FURTHER REFERRALS:

Date of Committee Action: 1/31/06

The FINANCE Committee considered: HB 326

HOUSE BILL NO. 326 — POSTING LEWD MATERIAL AS HARASSMENT

"An Act relating to harassment."

Recommends it be replaced with [ ] HCS or [✓] CS for HB 326 (Jud)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR______ [ ] Same Title [✓] 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

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

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
B Weyhrauch	Weyhrauch			X	
[signature]	FOSTER	X			
Carl E. Moses	MOSES	X			
Bertolini	Kerttula	X			
Bill Stoltze	STOLTZE			X	
Mike Hawker	Hawker			X	
Chair: K. Meyer	Meyer	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Title: Posting Lewd Material as Harassment
Sponsor: Representative Meyer
Requester:

Dept. Affected:
RDU: Alaska Court System
Component: Trial Courts
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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)

FUND SOURCE	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

POSITIONS	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Full-time						
Part-time						
Temporary						

ANALYSIS. (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 326.

Prepared by: Doug Wooliver, Administrative Attorney — Phone 463-4750
Division: Alaska Court System — Date/Time 1/13/06 at 11:00 AM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director — Date 1/13/2006
Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Title: "An Act relating to harassment."
Sponsor: Representatives Meyer and Lynn
Requester: House Judciary

Dept. Affected: LAW
RDU: CRIMINAL
Component: Criminal Justice Litigation
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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 (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill amends AS 11.61.120 (Criminal Law - Offenses Against Public Order) by adding a new way to commit the crime of harassment - by, with intent to harass or annoy another person, publishing or distributing a photo of another person's genitals, etc. or the person engaged in a sex act. Harassment is a class B misdemeanor. Passage of this legislation will not have a fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director — Phone: 465-3673
Division: Administrative Services Division — Date/Time: 1/26/06 12:31 PM
Approved by: Kathryn Daughhetee for David Marquez, Attorney General — Date: 1/26/2006
Agency: Department of Law

(Revised [illegible])

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Title: An Act relating to harassment.
Sponsor: Representative Meyer
Requester: House Judiciary Committee

Dept. Affected: Public Safety
RDU: Alaska State Troopers
Component: AST Detachments
Component No. 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
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TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

Passage of this legislation will have no fiscal impact on the Department of Public Safety. Even though there is a potential increase in the number of arrests for violations, the increase can be absorbed by the current assets of the department.

Prepared by: Lieutenant James Helgoe
Phone: 907-269-4532
Division: Alaska State Troopers
Date/Time: 1/17/06 10:19 AM
Approved by: Commissioner William Tandeske
Date: 1/17/2006
Agency: Department of Public Safety

Representative Kevin Meyer

HOUSE DISTRICT 30

SPONSOR STATEMENT

HB 326

"An Act relating to harassment."

The rapid evolution of technology often outpaces a statute's ability to protect Alaskans from offensive and criminal behavior. The invention and widespread adoption of digital cameras in all sorts of products ranging from pens to cellular phones has opened new avenues for those bent on harassing others to cause anguish, hurt and humiliation.

House Bill 326 An Act relating to harassment builds on my previous effort in the 23rd Legislature to cover harassment through e-mail and other electronic means. With camera phones and hidden digital cameras, individuals can take lewd and obscene pictures of others and post them electronically.

When this is done as part of a pattern of threats and intimidation it should be considered harassment. HB 326 changes the current statute to include the publishing or posting of lewd or obscene pictures in the definition of harassment.

January 9, 2006

Email: Representative_Kevin_Meyer@legis.state.ak.us • **Toll Free:** (866) 465-4945
Session: State Capitol, Juneau, Alaska [illegible] • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

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Sponsor: Representative Meyer
Requester:

Dept. Affected:
RDU: Alaska Court System
Component: Trial Courts
Component No.

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Temporary						

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Prepared by: Doug Wooliver, Administrative Attorney
Phone: 463-4750
Division: Alaska Court System
Date/Time: 1/13/06 @ 11:00 AM

Approved by: Doug Wooliver for Stephanie Cole, Administrative Director
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Agency: Alaska Court System

(Revised 9/7/2005 OMB)

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2006 LEGISLATIVE SESSION

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Title "An Act relating to harassment."
Sponsor Representatives Meyer and Lynn
Requester House Judciary

Dept. Affected: LAW
RDU CRIMINAL
Component Criminal Justice Litigation
Component No.

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Prepared by Kathryn Daughhetee, Director
Division Administrative Services Division
Phone 465-3673
Date/Time 1/26/06 12:31 PM

Approved by Kathryn Daughhetee for David Marquez, Attorney General
Agency Department of Law
Date 1/26/2006

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):

Title	An Act relating to harassment.	Dept. Affected:	Public Safety
		RDU	Alaska State Troopers
		Component	AST Detachments
Sponsor	Representative Meyer		
Requester	House Judiciary Committee	Component No.	2325

Expenditures/Revenues (Thousands of Dollars)

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

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Prepared by: Lieutenant James Helgoe — Phone 907-269-4532
Division: Alaska State Troopers — Date/Time 1/17/06 10:19 AM
Approved by: Commissioner William Tandeske — Date 1/17/2006
Agency: Department of Public Safety

Durango Herald

Local man guilty of 26 felonies

Former Fort Lewis College student cited for criminal libel

Read related article

January 27, 2006

By Shane Benjamin / *Herald Staff Writer*

After seven days of trial and seven hours of jury deliberations, jurors found Davis Temple Stephenson guilty Thursday of 26 felonies, including criminal libel.

Stephenson

Stephenson, clean-cut in a conservative sports coat and tie, remained stone-faced as the jury foreman announced "guilty" 26 times. He remained silent throughout.

A deputy handcuffed him and escorted him to the La Plata County Jail.

Stephenson's defense attorney, Rae Dreves of Durango, said her client plans to appeal.

Meanwhile, Stephenson, 38, faces up to 1½ years for some felonies and up to three years for others. If added together, he faces up to 52½ years, but some penalties will be served concurrently, reducing the sentence. He also faces up to 10½ years for violating bail.

Sentencing for both cases is set for 1:30 p.m. March 2 in District Court.

Over the course of three years, while a student at Fort Lewis College, Stephenson brought fear to seven victims, jurors learned through prosecution witnesses.

Prosecutors identified his targets as jail guards, a police officer, a landlord, a college newspaper editor and several FLC professors, saying he chipped away at their reputations and sense of safety by spreading lies about their character.

Evidence outlined how Stephenson created Web sites identifying his victims as sexual deviants, guided victims' family and bosses to the sites, created posters identifying victims as sex offenders and even sending a fake obituary to a newspaper falsely stating that a jail guard died of AIDS.

After the verdict, Deputy District Attorney Todd Norvell thanked the jury and Rita Warfield, the Durango Police Department's lead investigator on the case.

Then he declined to comment before Stephenson's sentencing.

During trial, prosecutors portrayed Stephenson as an intellectual who hated feminists and challenged those in power

"The defendant goes after the reputations of his victims," Assistant District Dondi Osborne told jurors during closing statements.

But Stephenson's lawyer offered a different viewpoint, saying his actions really amounted to only bad manners and opposing political opinion.

Jurors did a good job of paying attention, Dreves said, but some of the guilty verdicts were unfounded.

Stephenson's prosecution involved a Colorado criminal libel statute now under fire in a federal appeals court. A former student at the University of Northern Colorado was charged with criminal libel for posting articles on a satiric online publication that poked fun at a finance professor.

During Stephenson's trial, some 40 witnesses testified and more than 100 pieces of evidence went to the jury.

One FLC professor told jurors of letters sent to her home and on campus. They included compliments from unfamiliar men about a rape-me fantasy Web site started by Stephenson and disclosing her real address.

"I didn't want anybody coming into my house raping me,' the professor testified.

Scared, she removed her phone number from the public directory. And, she noted, "I began to take a lot more precautions. It has certainly affected my sense of safety."

Each day in court, Stephenson took extensive notes and whispered frequently to his lawyer.

Security was extraordinary during the trial supervised by District Judge David Dickinson.

Stephenson has "somewhat of a volatile personality," said sheriff's Capt. Doug Hanna, and he has a large build. So, La Plata County Sheriff Duke Schirard asked that Stephenson be shackled at the feet during trial - a security precaution not normally taken.

A black cloth covered the prosecution and defense tables so jurors would not see the ankle restraints.

Other security measures included:

• Only a 3-inch pencil for Stephenson to write with.

• Up to three deputies behind him at all times.

• A belt capable of delivering 50,000 volts of electricity, much like a Taser gun, and triggered by a remote control held by a courtroom deputy.

The jury included eight men and four women for deliberations.

After the verdict, Marilyn Wood, Stephenson's former landlord whom he depicted as a sex offender, reflected on a wasted life. As an American Indian, she said, Stephenson received free tuition at FLC. Instead of taking advantage of that, she noted, he became consumed by his anger.

"I look at this man as a person who had the opportunity of a lifetime," Wood said. "He squandered the whole thing."

shane@durangoherald.com

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Camera Phones In The Workplace: To Ban Or Not To Ban

By Andrea G. Chatfield

It is no secret that workers in the high tech industry love their electronic gadgets. The more advanced and powerful, the better. However, there is one personal technology gadget that can cause tremendous harm to high tech companies if abused. The use of camera phones, and other portable devices with embedded cameras or video capability, in the workplace is spreading like wildfire. The number of people with camera phones was estimated at 8 million last year but a report issued this summer by IT analyst firm iSupply estimated that number would jump to 488 million by 2008.

While incredibly useful (and cool!), camera phones also increase the risk of corporate espionage, employee harassment, invasion of privacy, and a litany of other offenses that can create liability for employers. The litigation over these types of problems is costly and time consuming, but can be minimized with proactive workplace policies.

The best way to address the issue of camera phones in the workplace is proactively rather than reactively. Currently, there are no laws that specifically address the use of camera phones. Employers generally have a wide latitude on regulating behavior in their own workplaces. Given the prevalence of these devices, employers must start to impose workplace policies that address the presence and/or the use of camera phones in the workplace. Such policies should also address personal cell phones. There are a number of ways a company can handle these issues, but basically it comes down to whether or not the use and/or presence of the phones should be banned in all or parts of an employer's place of work. This is becoming an ongoing debate.

Reasons for wanting a ban of some sort are based on the fact that high tech companies, which are embracing camera phones and other types of advanced electronic devices, are ironically, among the most vulnerable to their abuse. Camera phones can be misused to disclose and even broadcast, in an instant, images of trade secrets, research and development processes, proprietary materials, and confidential information about employees, clients, or customers. Ironically, a leading maker of camera phones has banned workers and visitors from bringing camera phones into certain of its factories. Other high tech companies have also banned the presence of camera phones in certain areas of its facilities.

Camera phones can easily become instruments of harassment in the wrong hands. Images of coworkers in private areas such as dressing areas, bathrooms, and locker rooms can be embarrassing and quickly transmitted to countless other people. Taking a picture everyday of a female coworker to show other male workers what she is wearing may seem like a harmless joke to some, but highly offensive and harassing to others.

By tolerating the misuse of camera phones in the workplace, employers put themselves at risk for lawsuits under the Massachusetts privacy statute (M.G.L. ch. 214, §1B) which provides all persons, including employees in the workplace, with a right against unreasonable or serious interference with their privacy. Moreover, if the employee has a video cell phone, which also records sound, they risk being in breach of federal and state wiretap laws if they record others in the workplace without their knowledge or consent.

On the other hand, there are a number of experts who think a ban is too harsh. They cite the difficulty of enforcing a ban given how easy it is to conceal a camera phone on one's person. Many employees rely heavily on the use of such devices to stay in touch with the office and customers, and for some jobs, camera phones may be very effective and useful. A service technician may be able to identify a problem more quickly by sending an image of a customer's piece of equipment to the home office for assessment. A ban on personal property devices may also be considered detrimental to the firm's workplace culture and morale. Further, employers may not like the options for enforcing a ban, such as confiscating a camera phone that is an employee's or visitor's personal property, or terminating an employee for bringing one to work.

The issue, however, need not be an all or nothing proposition. Certain employers are deciding that the presence or use of camera phones, and other personal cell phones, may be acceptable in some areas, but not in others, such as laboratories, prototype testing areas, R&D facilities, human resources offices, as well as dressing rooms or bathrooms. If this is the approach an employer decides to take, it should also consider posting the policy or signs in the restricted areas and determine if it needs to provide a method for employees to secure their phones prior to entering restricted areas.

Employers can also decide to restrict the use, but not the presence, of camera and other personal cell phones during work time. These types of policies generally state that employees should not use their phones and should shut them off while working, and allow them to check their phones during authorized breaks. In any event, when companies provide employees with cell phones for use within their jobs, unless there is a business necessity to have visual capabilities, they should choose phones that do not have camera or video functions, or determine if such functions can be disabled.

Finally, technology itself may provide the ultimate solution. While not widely used or available yet, there are several new technologies that are designed to either jam a camera phone signal or sound an alarm when it detects a signal in use. The jamming devices can be installed in certain areas of the workplace called wireless privacy zones. Camera phones that are in the privacy zones are disabled from sending images. Once they are taken out of the zone, they are activated again. Whether such technologies can be used legally in private workplaces remains to be seen.

Employers do have much discretion on what kind of policy they want to establish, as long as they do so consistently and communicate the policy clearly. A policy alone cannot physically prevent someone who wants to steal confidential information from doing so, but it can decrease the risk by discouraging employees from bringing such devices to work. Further, by sending a message to all employees of the problems such devices can pose if misused, employees themselves may also be more vigilant in ensuring that no one, including themselves, is misusing a camera phone in the workplace.

Andrea G. Chatfield is a member of the Employment Law Practice Group and the Corporate Department at the law firm of McLane, Graf, Raulerson & Middleton, P.A. Andrea can be reached

at 603-628-1341 or andrea.chatfield@mclane.com. The McLane Law Firm is the largest full-service law firm in the state of New Hampshire, with offices in Concord, Manchester and Portsmouth.

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Representative Kevin Meyer

House District 30

MEMORANDUM

DATE: January 9, 2006

TO: Representative Kevin Meyer

FROM: Mike Pawlowski

RE: Sectional Analysis for HB 326
(Version No. 24 – LS1223\F)

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Adds the publishing, posting or distribution of lewd pictures of another person to the definition of harassment.

Email: Representative_Kevin_Meyer@legis.state.ak.us • **Toll Free:** (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

ALASKA STATE LEGISLATURE
House Finance Committee

Sponsor: Representative Meyer
Current Version: CS HB 326 (JUD) 24-LS1223\F
Contact: Mike Pawlowski 465-2812
Date: January 30, 2006

Committee Substitute Comparison Sheet for House Bill 326

Short Title:

"Posting lewd material as harassment."

Summary:

- CSHB 326 includes the posting, publishing or distribution of lewd and obscene pictures in the definition of harassment.

House Judiciary Committee Activity:

House Judiciary originally adopted three amendments to HB 326. After input from Legislative Legal and the Department of Law, the committee rescinded their action and moved a new CS from committee with the following changes.

Changes:

1.) Inserted "the definition of the crime of" following "relating to" on page 1 line 1 to tighten the title.

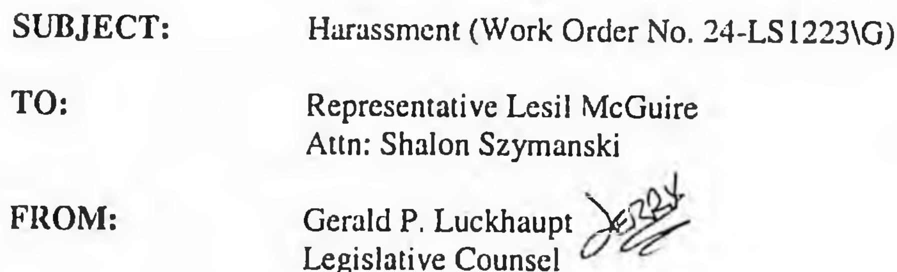
LEGAL SERVICES

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 — January 19, 2006



SUBJECT: Harassment (Work Order No. 24-LS1223\G)

TO: Representative Lesil McGuire
Attn: Shalon Szymanski

FROM: Gerald P. Luckhaupt
Legislative Counsel

Enclosed is the final CS(JUD) you requested.

1. I am unsure of both the meaning and effect of Amendments 1 and 2 (reflected in changes to AS 11.61.120(a)(4) and (6). The effect of the amendments when combined with the specific intent seems to be that the state is required to prove that the defendant's sole and only reason for performing these acts was to harass or annoy another. If the defendant had any other motivation for the act, including perhaps sexual gratification, monetary profit, etc., then it would not meet the statutory requirement and the defendant could not be convicted.

Note that we have reworded amendments 2 and 3 somewhat in incorporating them into the bill, since they were designated as conceptual. The wording of amendment 1 was also slightly awkward, but because it was not a conceptual amendment, it has been incorporated as written.

GPL:ljw
06-020.ljw

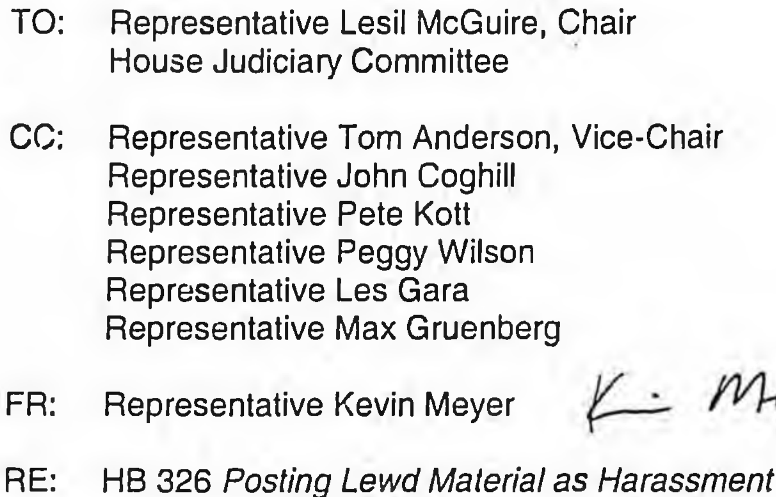
Enclosure

Representative Kevin Meyer

House District 30

MEMORANDUM

January 26, 2006



TO: Representative Lesil McGuire, Chair
House Judiciary Committee

CC: Representative Tom Anderson, Vice-Chair
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

FR: Representative Kevin Meyer

RE: HB 326 *Posting Lewd Material as Harassment*

Madam Chair,

Thank you for your consideration of HB 326 *Posting Lewd Material as Harassment* on January 18th in the House Judiciary Committee. During debate, the committee adopted two conceptual amendments that both Legislative Legal services and the Department of Law have described as problematic. The amendments attempted to limit existing statute AS 11.61.120(a)(4) and the bill's proposed addition AS 11.61.120(a)(6) by including the phrase "sole purpose" as a clarification of the intent required in AS 11.61.120(a). The language was proposed conceptually based upon the decision notes for AS 11.61.120 that referenced *Mckillop v. State*. I have attached both the memo from Legislative Legal services and a copy of the Appellate Court opinion in *Mckillop v. State* to this memo.

The opinion of Legislative Legal and the Department of Law is that the effect of the amendments would make prosecuting a person under AS 11.61.120(a) (4) or the proposed (6) next to impossible. Requiring that the State prove the "sole purpose" of a person is to harass or annoy ignores the other potential purposes a person might perform conduct targeted by the current and amended statute. As legislative legal stated: "*If the defendant had any other motivation for the act, including perhaps sexual gratification, monetary requirement, etc., then it would not meet the statutory requirement and the defendant could not be convicted.*"

In light of this the amendment to AS 11.61.120 (a)(4) [current statute] would make it next to impossible to prosecute what the Department of Law asserts is the greater potential problem: i.e. the anonymous or obscene phone calls. Further, a thorough reading of the Appellate Court's opinion in *Mckillop v State* undermines the justification for the amendments.

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The Appellate Court found that AS 11.61.120 (a)(4) was "*neither vague nor overbroad*" and that "*so limited, the statute is a constitutional exercise of legislative authority to regulate conduct involving speech.*" The limitation cited by the Appellate Court was based on a combination of previous opinions and the logic of the statute. In *Jones v. Anchorage*, 754 P.2d 275 (Alaska App. 1988) the court upheld a similar municipal ordinance:

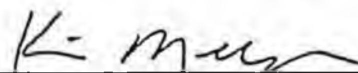
> "The ordinance challenged in this case...is readily distinguishable from provisions found to be invalid on grounds of vagueness. Cases have condemned statutes as unduly vague when those statutes prohibited conduct or speech resulting in annoyance to others, without ... specifying "upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable [person]."
>
> "In contrast, the ordinance challenged here does not purport to hinge the unlawfulness of speech or conduct on the standardless, subjective reactions of unspecified third persons. To the contrary... [and] significantly, ... the lawfulness or unlawfulness of the act turns ... on the specific intent of the accused."

The Court did, however; further limit the interpretation of AS 11.61.120(a)(4) in a similar manner to the Court's interpretation of the municipal ordinance cited in *Jones v. Anchorage*:

> "We conclude that AS 11.61.120 (a)(4) must be interpreted to prohibit telephone calls only when the call has no legitimate communicative purpose – when the caller's speech is devoid of any substantial information and the caller's sole intention is to annoy or harass the recipient."

Since the change proposed by HB 326 is limited to pictures that "*show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act,*" HB 326 prohibits conduct rather than speech; that is, it prohibits the publication or distribution of photographs rather than conduct involving some speech such as that in AS 11.61.120(a)(4), which involves mixed speech and conduct. The conduct prohibited is narrow enough to pass constitutional muster under the standards discussed in McKillop. Additionally, since the Court found 11.61.120 (a) "neither vague nor overbroad" I assert that the clarifying language offered in the conceptual amendments is unnecessary; particularly if it impedes the prosecution of the offenses I am attempting to address.

I ask the committee to reconsider their action on conceptual amendments 2 and 3 and withdraw the amendments to HB 326. Thank you for considering this matter.



Representative Kevin Meyer

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Mckillop v. State (8/6/93) ap-1307

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JON B. MCKILLOP, Appellant,	Court of Appeals No. A-4072 Trial Court No. 3AN-91-197 Cr
v.	O P I N I O N
STATE OF ALASKA, Appellee.	[No. 1307 - August 6, 1993]

Appeal from the District Court, Third Judicial District, Anchorage, Martha Beckwith and William H. Fuld, Judges.

Appearances: David R. Weber, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellant. Ethan A. Berkowitz, Assistant District Attorney,

Edward E. McNally, District Attorney, Anchorage, and Charles E. Cole, Attorney General, Juneau, for Appellee.

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

MANNHEIMER, Judge.

A jury found Jon B. McKillop guilty of harassment, AS 11.61.120(a)(4), for making anonymous telephone calls to the Anchorage Abused Women's Aid in Crisis (AWAIC) shelter. McKillop appeals his conviction, asserting that his conviction rests on illegally seized evidence, that the trial judge misinstructed the jury on the meaning of "anonymous", and that the harassment statute is unconstitutional. We hold that the statute is constitutional if construed to require proof that the defendant's sole intent was to annoy or harass the recipient of the telephone call, but we reverse McKillop's conviction because the instructions his trial jury received did not convey the limiting construction we adopt today.

Between 10:00 and 10:30 p.m. on January 8, 1991, the counselors working the AWAIC shelter crisis hotline received approximately six telephone calls from the same male caller. The caller told the female counselors that "there's no such thing as so-called abused women", that "I've been abused by a cunt all my life", that he'd lived with a "cunt" for four years, and that women "ought to go to Baghdad and kill some niggers".

The caller did not give his name. However, at one point he stated, "I'm Elvis Presley", and at another point he told a counselor, "By the way, I'm at 277-0088, Room 225 if you want free coke." The caller also told a counselor that "Elvis was king", not Martin Luther King, Jr., who was dead.

The counselors told the male caller to stop calling the

shelter, and they hung up on him, but he kept calling. The counselors became concerned that the caller might be preventing others from using the crisis hotline; they also heard what sounded like slapping noises in the background, causing them to fear that someone was being abused. For these reasons, the counselors called the police.

Anchorage Police Officer Dan Seely and another officer went to the Budget Motel in Anchorage, after learning from police dispatch that this address corresponded to the telephone number recited by the caller. The two officers arrived at the motel at 11:12 p.m. and proceeded to Room 225. In response to the officers' knock, McKillop opened the door to the room. He was naked and apparently intoxicated.

Seely asked McKillop why he had been calling the AWAIC shelter. McKillop at first denied that he had made the calls, until Seely explained that the caller had disclosed his telephone number and room number. McKillop then admitted that he had made the calls. When Seely again asked why McKillop had made the calls, McKillop answered, "Because Elvis Presley is king, and Martin Luther King is dead." Seely recognized this statement as the same one the anonymous caller had made to the AWAIC shelter counselor. At this point, Seely left to obtain a warrant for McKillop's arrest on a charge of harassment; the other officer stayed until the warrant could be obtained and served.

McKillop asked the district court to suppress his "Elvis is king" statement to Officer Seely. McKillop argued that this statement had been obtained as a result of a warrantless seizure, and he also argued that Seely had been obliged to provide McKillop with Miranda warnings before he questioned him. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

(1966).

At the evidentiary hearing on this issue, Seely testified that, when he and his fellow officer went to McKillop's hotel room, McKillop had stepped out into the hallway wearing no clothing. Other people in the motel hallway appeared to be offended by McKillop's nakedness, so Seely suggested that McKillop step back into his room. McKillop went along with this suggestion. Seely followed McKillop over the threshold, stepping into the doorway and thus partially into the room, to continue their conversation. Seely testified that McKillop did not specifically ask Seely to leave, but he did ask whether Seely had a search warrant or arrest warrant or any other authority to be there.

District Court Judge William H. Fuld declined to suppress the "Elvis" statement. Judge Fuld concluded that Seely and the officer had been merely investigating a crime and had not placed McKillop in custody during the "fairly brief contact" that began when Seely asked the naked McKillop to go back inside the room and continued while Seely was standing in the threshold of McKillop's room.

The test for whether a person is in "custody" for Miranda purposes is generally framed as whether a reasonable person would have felt free to break off questioning and ask the police to leave. Hunter v. State, 590 P.2d 888, 895 (Alaska 1979); Edwards v. State, 842 P.2d 1281, 1284 (Alaska App. 1992). However, the fact that a defendant lacks immediate freedom to leave is not, by itself, determinative. A police-citizen encounter can constitute a "seizure" for Fourth Amendment purposes and yet not be "custody" for Miranda purposes. For example, the police are not required to give Miranda warnings

during an investigative stop or detention of limited duration even when "considerable force" was used in making the stop. Tagala v. State, 812 P.2d 604, 608 (Alaska App. 1991).1

Here, the police knocked on McKillop's door and asked if he had been making calls to the women's shelter. They made no show of weapons, they did not engage in any search, and their questioning of McKillop was not extensive. Because McKillop was both drunk and naked, it was reasonable for the police to suggest that their conversation be held in some place other than a public hallway.

We recognize that McKillop repeatedly questioned the officers' authority to be there. However, Seely testified that McKillop never actually asked the police to leave, and no one testified that McKillop made a move to close the door or otherwise demonstrated that he wished an immediate end to the conversation. Under these facts, Judge Fuld was not clearly erroneous in finding that McKillop was not in Miranda custody when he made his "Elvis" statement to the officers.

McKillop's next argument concerns the jury instructions at his trial. McKillop was tried for harassment under AS 11.61. 120(a)(4), which reads:

> A person commits the crime of harassment if, with intent to harass or annoy another person, that person
>
> . . .
>
> (4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury[.]

The State alleged that McKillop had violated this statute because his telephone calls to the AWAIC shelter had been "anonymous".

McKillop asked District Court Judge Martha Beckwith to instruct the jury that a telephone call was "anonymous" only if the caller failed to provide information from which his identity

could reasonably be ascertained. McKillop pointed out that he had given the telephone number of his motel and his motel room number to the AWAIC counselors; he argued that his disclosure of this information meant that his calls had not been anonymous.

Judge Beckwith decided, after referring to a dictionary, that "anonymous" meant "nameless" or "lack[ing identification"; she told the parties that she intended to instruct the jury accordingly. At this point, McKillop's attorney asked the judge to refrain from giving the jury any definition of "anonymous" and let the parties argue their own views of how that term should be defined for purposes of the harassment statute. Judge Beckwith acceded to this request.2 On appeal, however, McKillop renews his primary argument: that his telephone calls to the AWAIC shelter were not anonymous because he disclosed the motel's telephone number and his room number.

The criminal code does not explicitly define the term "anonymous", nor does the commentary to AS 11.61.120 address the meaning of this term. We therefore use the word's common meaning, as disclosed in the dictionary, as our primary aid in determining the legislature's intent. Michael v. State, 767 P.2d 193, 197 (Alaska App. 1988), rev'd on other grounds, 805 P.2d 371 (Alaska 1991).

Webster's New World Dictionary of American English (3rd College Ed. 1988), p. 56, gives two pertinent definitions of "anonymous": (1) "with no name known or acknowledged" an (2) "given, written, etc. by a person whose name is withheld or unknown". Under these definitions, McKillop's telephone calls to the women's shelter were anonymous. Courts in other states have applied these or similar dictionary definitions of "anonymous" when construing similar statutes prohibiting anonymous telephone

calls. See State v. Diede, 319 N.W.2d 818, 821-22 (S.D. 1982) (holding that a defendant who failed to identify himself was guilty of making "anonymous" telephone calls even though the recipients of the calls had had sufficient experience with the defendant to identify his voice); see also Caldwell v. State, 337 A.2d 476, 486 (Md. App. 1975).[3]

McKillop's proposed definition of "anonymous" would have required the jury to determine, not only that McKillop had failed to disclose his identity, but also that his identity could not have been discovered through inquiry or investigation. McKillop's proposal thus varied significantly from the commonly understood definition of the word. McKillop's brief does not explain or provide authority for his claim that the Alaska legislature intended the word "anonymous" to be construed in the non-standard way he suggests. We conclude that Judge Beckwith did not abuse her discretion when she refused to give McKillop's proposed definitions to the jury.

McKillop's final argument on appeal is that AS 11.61. 120(a)(4) is unconstitutionally broad - that it attaches criminal penalties to protected speech.

McKillop argues that a person's wish to remain anonymous cannot, of itself, be punished. He points out that anonymous political speech (advocacy of social causes and attacks on government figures and policies) holds an honored place in our political tradition. See Talley v. California, 362 U.S. 60, 64-65; 80 S.Ct. 536, 538-39; 4 L.Ed.2d 559 (1960). For example, the Federalist Papers authored by Madison, Hamilton, and Jay were published under pseudonyms. Talley, 362 U.S. at 65; 80 S.Ct. at 539. McKillop also argues that a person cannot be punished for engaging in speech that annoys others. He notes that effective

political speech will often cause annoyance, anger, or alarm in unsympathetic listeners. McKillop also points out that a speaker will often not know whether his or her listeners will find the speech annoying.

Here, however, the statute is not aimed at "pure speech" or the content of speech _ the communication of ideas or opinions. Rather, the statute is directed at conduct: the caller's act of intruding upon someone else's privacy. AS 11.61.120(a)(4) prohibits a person from making anonymous telephone calls for the purpose of annoying or harassing another. The court in People v. Smith, 392 N.Y.S.2d 968, 970 (N.Y. App. 1977), cert. denied, 434 U.S. 920, characterized the issue well when it declared that such a statute prohibits "a form of trespass". Accord, State v. Gattis, 730 P.2d 497, 502 (N.M. App. 1986); State v. Elder, 382 So.2d 687, 690-691 (Fla. 1980).[4]

The conduct prohibited by AS 11.61.120(a)(4) may often involve speech, but it need not. A person could violate the statute by calling another person, listening in silence when that person answered the phone, and then hanging up. Compare Gormley v. Director, Connecticut Dept. of Probation, 632 F.2d 938, 942 (2nd Cir. 1980), cert. denied, 449 U.S. 1023; State v. Gattis, 730 P.2d at 502.

The fact that AS 11.61.120(a)(4) prohibits conduct that may involve speech does not invalidate the statute on freedom of speech grounds. A caller may use words as the method of harassing the recipient of the call; this means only that AS 11.61.120(a)(4) deals with an aspect of conduct mixed with speech.

> [Making a course of conduct illegal] has never been deemed an abridgement of freedom of speech or press ... merely because the

> conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Cox v. Louisiana, 379 U.S. 559, 563; 85 S.Ct. 476, 480; 13 L.Ed.2d 487 (1965). See State v. Elder, 362 So.2d at 690-691. When a statute is aimed at conduct that involves speech, the governing First Amendment test is stated in Broadrick v. Oklahoma, 413 U.S. 601, 615; 93 S.Ct. 2908, 2918; 37 L.Ed.2d 830 (1973):

> [When] conduct and not merely speech is in volved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Thus, we must decide whether McKillop has shown that any possible infringement of the right of free speech wrought by AS 11.61. 120(a)(4) is "real" and "substantial" when compared to the scop of the statute's legitimate regulation of conduct.

The statute does not punish speech simply because it is anonymous. While "the anonymity of the caller is ... itself a circumstance raising discomfort and fear in the receiver of the call", State v. Elder, 382 So.2d at 691, quoting United States v. Darsey, 342 F.Supp. 311, 313 (E.D. Pa. 1972), nevertheless the statute requires proof of an additional element: that the caller's purpose was to annoy or harass the other person. Nor does AS 11.61.120(a)(4) suffer from the defect of punishing speech simply because it may have the effect of annoying the listener. As the court noted in Constantino v. State, 255 S.E.2d 710, 713 (Ga. 1979), cert. denied, 444 U.S. 940,

> [T]he victim's subjective ideas on what is or is not harassing are not in issue. The point is that the defendant telephones intending to harass, and he certainly knows if he is doing that.

This court used the same reasoning in Jones v.

Anchorage, 754 P.2d 275 (Alaska App. 1988), to uphold a municipal ordinance making it illegal "for any person to anonymously or repeatedly telephone another person for the purpose of annoying, molesting, ... abusing ..., or harassing that person or his family." 754 P.2d at 278.5 This court declared:

> The ordinance challenged in this case ... is readily distinguishable from provisions found to be invalid on grounds of vagueness. Cases have condemned statutes as unduly vague when those statutes prohibited conduct or speech resulting in annoyance to others, without ... specifying "upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable [person]."
>
> In contrast, the ordinance challenged here does not purport to hinge the unlawful ness of speech or conduct on the standardless, subjective reactions of unspecified third persons. To the contrary ... [and] significantly, ... the lawfulness or unlawfulness of the act turns ... on the specific intent of the accused.

Jones, 754 P.2d at 278, quoting Coates v. City of Cincinnati, 402 U.S. 611, 613; 91 S.Ct. 1686, 1688; 29 L.Ed.2d 214 (1971).6

McKillop nevertheless argues that political speakers often intend to "annoy" their listeners; political speech is frequently intended to make people uncomfortable and force them to re-examine their actions or convictions. McKillop therefore concludes that the specific intent element does not save AS 11. 61.120(a)(4) from overbreadth.

We agree that a person engaging in advocacy or criticism may legitimately intend to annoy or disturb his or her listeners. Nevertheless, "the right of every person to be le[f]t alone must be [weighed] in the scales [against] the right of others to communicate." Rowan v. United States Post Office Dept., 397 U.S. 728, 736; 90 S.Ct. 1484, 1490; 25 L.Ed.2d 736

(1970) (upholding a federal statute that requires the Post Office, upon request of an addressee, to order businesses to remove the addressee's name from their mailing lists for "pandering advertisements").7

Under the general definition of "intentionally" contained in AS 11.81.900(a)(1), a defendant's intent to cause a prohibited result (here, annoyance or harassment) "need not be the person's only objective". Thus, when AS 11.61.120(a)(4) is read in conjunction with AS 11.81.900(a)(1), the statute is theoretically broad enough to punish political speech or other legitimate communication upon proof that one of the speaker's subsidiary motives was to annoy the listener. Because the scope of the statute is potentially so broad, we conclude that AS 11.61.120(a)(4) must be interpreted to prohibit telephone calls only when the call has no legitimate communicative purpose - when the caller's speech is devoid of any substantive information and the caller's sole intention is to annoy or harass the recipient.

This court gave a similar limiting construction to the municipal ordinance in Jones v. Anchorage, 754 P.2d at 279. This limiting construction is consistent with AS 11.81.900(a)(1), because the legislature has declared that the general definition of "intentionally" is to be applied "unless the context requires otherwise". Here, the First Amendment requires a different, narrower definition.8

Applying this limiting construction to AS 11.61.120 (a)(4), we hold that the statute is neither vague nor overbroad. So limited, the statute is a constitutional exercise of legislative authority to regulate conduct involving speech. Having reached this legal conclusion (that is, having given a new, limiting construction to the harassment statute), we must

now examine the record of McKillop's trial to see if he might have been convicted of harassment for engaging in protected speech.

McKillop's main defense at trial was that his telephone calls to the AWAIC shelter had not truly been anonymous. However, McKillop's attorney also asked the jury to consider whether McKillop's real intention had been to harass or annoy, or whether, instead, McKillop had been drunkenly attempting to communicate personal grievances, albeit through intemperate, reprehensible language:

> DEFENSE ATTORNEY: [E]vidence that the defendant was intoxicated may be ... relevant to negate an element of the offense that requires that [he] intentionally caused a result. In this case, the State has to show that he intentionally called to harass or annoy another person. And, for that, you can take into consideration whether or not he was intoxicated. ... You should take that into consideration in deciding whether or not the State's proved beyond a reasonable doubt that, at the time he made these calls, [he] intended really to harass or annoy, or if he was just calling these people, venting ... the feelings that he had, apparently, at that moment, in his [state] of intoxication, that he so heartfelt [sic] wanted to share. Even though they were obnoxious, clearly.

Thus, McKillop asked the jury to consider whether the State had proved the intent element of the crime.

As we have discussed above, this element of the statute must be construed to require proof that McKillop's sole intent was to harass or annoy. If McKillop truly intended to engage in communicative speech when he made the calls to the AWAIC shelter, then even if he also intended to harass or annoy, he should not have been convicted. However, the district court's jury instruc tion on this point tracked the language of AS 11.81.900(a)(1): "A person may act intentionally with respect to causing a particular result even though causing that result was not the person's only

objective." This instruction was erroneous; it told the jury to convict McKillop even if they believed that, in addition to trying to annoy or harass the women at the AWAIC shelter, McKillop had also tried to engage in legitimate communication with them.

From our description of the evidence at McKillop's trial, it might well seem that his telephone calls to the AWAIC shelter lie at the core of the statutory prohibition - anonymous telephone calls intended only to abridge the privacy interests the statute was designed to uphold, without any claim to legitimate communication of ideas or information. However, this was an issue of fact for the jury to decide. The court's instructions on the elements of the offense in effect told the jurors to ignore this crucial issue.

Because the error in the jury instructions lies in the court's definition of the elements of the offense, we must reverse McKillop's conviction and return his case to the district court for a new trial unless we are convinced that the error was harmless beyond a reasonable doubt. St. John v. State, 715 P.2d 1205, 1209-1211 (Alaska App. 1986). Despite the strength of the State's case, we believe there is a reasonable possibility that the jury's verdict would have been different if the jurors had been correctly instructed on the elements of the offense. For this reason, we REVERSE McKillop's harassment conviction and remand his case to the district court for a new trial.

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1 Compare Moss v. State, 823 P.2d 671, 674-75 (Alaska App. 1991), where this court, although declaring that the issue was "close", concluded that a defendant had been in custody (even though the police had told him that he was not formally under arrest) when the police entered the defendant's residence at gunpoint, questioned him extensively, spent two and one-half hours searching the residence, and "deprived [the defendant] of his freedom of action in a significant way".

2 McKillop's attorney argued to the jury (unsuccessfully) that McKillop's phone calls to the shelter had not been anonymous because, by divulging his telephone number and room number (although not the name of his motel), McKillop had invited discovery of his identity.

3 We note that 47 U.S.C. 223(a)(1)(B), the federal counterpart to AS 11.61.120(a)(4), prohibits a person from "mak[ing] a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number." This federal formulation appears to embody the same concept manifested in the dictionary definition of "anonymous".

4 This aspect of the statute (that it prohibits telephone calls that are intended to be annoying or harassing to the recipient) distinguishes McKillop's case from two of the authori ties he cites, Figari v. New York Telephone Co., 303 N.Y.S.2d 245 (N.Y. App. 1969), and Huntley v. Public Utilities Comm'n, 442 P.2d 685 (Cal. 1968).

Figari and Huntley involved telephone company attempts to regulate an anti-communist group which produced pre-recorded messages that people could listen to by calling an advertised telephone number. The telephone companies tried to force the anti-communist group to identify itself on the taped messages, but the New York and California courts struck down the telephone regulations as violative of the group's freedom of speech. McKillop argues that Figari and Huntley stand for the proposition that the government can never force people to identify themselves. However, there is an obvious distinction between, on the one hand, a person or group that offers people the opportunity to call and hear a recorded message (if they wish) and, on the other hand, a person who makes unsolicited calls to other people for the purpose of annoying or harassing them.

5 The defendant in Jones made at least 38 abusive telephone calls to her ex-boyfriend and his new girlfriend; in many of these calls, she identified herself. 754 P.2d at 276-77. Thus, the anonymity provision of the ordinance was not at issue; rather, the question presented in Jones was the constitutionality of the section of the ordinance prohibiting a person from "repeatedly telephon[ing] another".

6 Courts are in virtually unanimous agreement that the requirement of specific intent (that is, requiring the government to prove that the caller's subjective purpose in making the call was to annoy or harass) saves statutes such as AS 11.61.120(a)(4) from vagueness problems. See State v. Elder, 382 So.2d at 691-92, in which the court upheld the constitutionality of a statute forbidding a person from "mak[ing] a telephone call ... without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number".

Indeed, most decisions in this area deal with statutes that simply forbid telephone calls made for the purpose of annoyance or harassment, without the additional element that the caller fail to identify himself. Such statutes are virtually always upheld against vagueness attacks because they include the element

of specific intent. Jones v. Anchorage cites several of these decisions. 754 P.2d at 278-79. Other cases reaching the same conclusion are: United States v. Lampley, 573 F.2d 783, 787 (3rd Cir. 1978); Donley v. City of Mountain Brook, 429 So.2d 603, 606-613 (Ala. Cr. App. 1982), rev'd on other grounds, 429 So.2d 618 (Ala. 1983); State v. Hagen, 558 P.2d 750, 753 (Ariz. App. 1976); People v. Weeks, 591 P.2d 91, 94 & n.1 (Colo. 1979); Kinney v. State, 404 N.E.2d 49, 50-51 (Ind. App. 1980); Caldwell v. State, 337 A.2d 476, 481-82 (Md. App 1975); State v. Gattis, 730 P.2d 497, 502-03 (N.M. App. 1986); and People v. Smith, 392 N.Y.S.2d 968, 970-71 (N.Y. App. 1977), cert. denied, 434 U.S. 920 (1977).

7 We also note that what begins as protected speech may ultimately violate the harassment statute. See, for example, People v. Smith, 392 N.Y.S 2d 968, in which a citizen repeatedly called the police department to make a complaint. The police informed him several times that the matter was civil and that he was tying up police phone lines; he nevertheless continued to call the police 27 times in the following 3« hours. The court held that "the impropriety was not in the complaint made by the defendant but in its repetition." Id. at 971. That is, the caller's actions provided a basis for a fact-finder to conclude that the caller had previously accomplished any legitimate communication and his sole intent had become to annoy or harass.

8 This same limitation is sometimes explicitly written into other states' statutes. See Donley v. City of Mountain Brook, 429 So.2d at 605 ("with intent to harass or alarm [and] with no purpose of legitimate communication"), and Kinney v. State, 404 N.E.2d 49, 50 (Ind. App. 1980) ("with intent to harass, annoy, or alarm another person, but with no intent of legitimate communi cation"). More often, a telephone harassment statute is silent on this point, and the limitation is inferred by courts. State v. Gattis, 730 P.2d at 503; State v. Elder, 382 P.2d at 691; United States v. Lampley, 573 F.2d at 787 (Congress has a "compel ling interest in the protection of innocent individuals from fear, abuse, or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives."). But compare Gormley v. Director, Connecticut Dept. of Probation, 632 F.2d at 942-43 & n.5 (suggesting that a harassment statute that requires proof of specific intent has so little potential for abridging protected speech that it requires no additional limiting gloss).