
HB

298

<target><bill>HB 298</bill><subject>HB
298</subject><comm>HFIN26</comm></target>

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSHB298(JUD)
() Publish Date: _____

Identifier (file name): CSHB298(JUD)-DPS-R&I-04-08-10 Dept. Affected: Public Safety
Title "An Act relating to the crimes of harrassment, distribution and RDU Statewide Support
possession of child pornography, and distribution of indecent materials..." Component Records & Identification
Sponsor Rules Committee
Requester House Finance Committee Component Number 1190

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
Personal Services	99.2		99.2	99.2	99.2	99.2	99.2	99.2
Travel	5.0		5.0	5.0	5.0	5.0	5.0	5.0
Contractual	5.8		5.8	5.8	5.8	5.8	5.8	5.8
Supplies	1.0		1.0	1.0	1.0	1.0	1.0	1.0
Equipment	2.9							
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING	113.9	0.0	111.0	111.0	111.0	111.0	111.0	111.0
CAPITAL EXPENDITURES								
CHANGE IN REVENUES ()								

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF	113.9		111.0	111.0	111.0	111.0	111.0	111.0
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL	113.9	0.0	111.0	111.0	111.0	111.0	111.0	111.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

Full-time	1.0		1.0	1.0	1.0	1.0	1.0
Part-time							
Temporary							

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

This legislation would require a person to register in Alaska as a sex offender or child kidnapper if required to do so in another jurisdiction for crimes similar in nature to those in Alaska law.

For sex offender registration purposes, "jurisdiction" is defined at 13 AAC 09.900(a)(5) and includes the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the U.S. Virgin Islands, and federally-recognized Indian tribes that have elected to function as a registration jurisdiction. Each jurisdiction has its own distinct laws pertaining to the registration of sex offenders, including which offenses require registration and the length of time an offender is required to register. (cont.)

Prepared by: David Schade
Division: Statewide Services
Approved by: Joe Masters
Commissioner

Phone (907) 269-0202
Date/Time 4/8/10 5:00 PM
Date 4/8/2010

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. CSHB298(JUD)

ANALYSIS CONTINUATION

For the department's Records & Identification unit to continue to accomplish a core service of providing public access to current information regarding sex offenders in Alaska, the determination that a person must register as a sex offender or child kidnapper in Alaska because of their requirement to register in another jurisdiction must be made timely and must be based on information that has been validated.

Considerable research and analysis of the criminal history background of persons with sex offense convictions outside of Alaska would be required to determine whether the offense of conviction is a registerable offense under the current laws of that jurisdiction and whether or not the person is subject to that jurisdiction's registration requirements.

Coordination with the jurisdiction's sex offender central registry would need to occur to obtain source documents and other relevant information on the person.

Additionally, the department would need to continually monitor the status of registration laws and legal cases affecting sex offender registration in all jurisdictions to ensure a person required to register in Alaska under proposed AS 12.63.100(6)(D) continued to be subject to the registration requirements of the jurisdiction that their offense was committed in.

The department anticipates that these additional efforts will require one new full-time Criminal Justice Planner position. This position would be responsible to review and evaluate offender records with out-of-state sex offense convictions to determine the requirement to register under proposed AS 12.63.100(6)(D), to coordinate with other jurisdictions' sex offender central registry offices, and to monitor sex offender registration laws in other jurisdictions and any changes for possible impact to currently registered offenders.

FISCAL NOTE

**STATE OF ALASKA
2010 LEGISLATIVE SESSION**

Fiscal Note Number: 5
 Bill Version: CSHB 298(JUD)
 (H) Publish Date: 2/12/10

Identifer (file name): _____ Dept. Affected: _____
 Title Sex Offenses; Offender Registration; Sentencing RDU Alaska Court System
 Component Trial Courts
 Sponsor House Rules
 Requester Governor Component Number _____

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
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	0.0

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES ()								
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

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 298.

Prepared by: Doug Wooliver, Administrative Attorney
 Division Alaska Court System
 Approved by: Doug Wooliver for Christine Johnson, Administrative Director
Alaska Court System

Phone 907-463-4750
 Date/Time 01-22-10 @ 8:30 am
 Date 1/22/2010

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 4
 Bill Version: HB 298
 (H) Publish Date: 1/19/10

Identifier (file name): "Act relating to crimes of sexual assault, possession of child pornography, and distribution of indecent material to a minor...."
 Title: _____
 Dept. Affected: DOC
 RDU: Administration & Support
 Component: Office of the Commissioner
 Sponsor: Rules Committee
 Requester: Governor
 Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required		Information				
	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES							
Personal Services	0.0	0.0	77.1	103.0	128.9	154.8	180.7
Travel	0.0	0.0	1.5	2.0	2.5	3.0	3.5
Contractual	0.0	0.0	50.4	67.3	84.2	101.2	118.1
Supplies	0.0	0.0	7.9	10.6	13.3	15.9	18.6
Equipment	0.0	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	0.0
Grants & Claims	0.0	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	0.0
TOTAL OPERATING	0.0	0.0	136.9	182.9	228.9	274.9	320.9
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ()	0.0	0.0	136.9	182.9	228.9	274.9	320.9

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	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	0.0
1004 GF	0.0	0.0	136.9	182.9	228.9	274.9	320.9
1005 GF/Program Receipts	0.0	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	0.0
Other Interagency Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	136.9	182.9	228.9	274.9	320.9

Estimate of any current year (FY2010) cost: 0.0

POSITIONS

Full-time	0.0	0.00	0	0	0	0	0
Part-time	0.0	0	0	0	0	0	0
Temporary	0.0	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill will have the effect of increasing the number of prisoners the Department of Corrections (DOC) will have to house beginning in Fiscal Year 2012. These approximate costs are based on the average number of new convictions or remands per year and the average estimated sentences associated with each change in the draft legislation. DOC will track the impact and could potentially request additional funding based on actual impacts.

Continued on page 2

Prepared by: Leslie Houston, Director Phone (907) 465-3339
 Division: Administration and Support Date/Time 1/7/10 8:30 AM
 Approved by: Dwayne Peeples, Deputy Commissioner Date 1/7/2010
Department of Corrections

FISCAL NOTE #4

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. HB 298

ANALYSIS CONTINUATION

This bill specifically adds a number of new crimes, expands existing crimes, and enhances sentences for existing crimes:

- Sections 1 and 2 remove parolees from the statute. This change should have little to no fiscal impact.
- Section 3 changes the elements for failure to register as a Sex Offender or child kidnapper in the second degree. It is estimated this will generate 3 new convictions per year carrying an average 2 month sentence.
- Section 4 raises a form of harassment in the second degree to harassment in the first degree if the offensive physical contact is by the offender touching the other person's genitals, anus, or female breast. The change from a Class B misdemeanor to a Class A misdemeanor is estimated to generate 18 convictions per year that carry an average 30 day sentence.
- Sections 5, 6, and 7 address a problem with current Alaska law prohibiting possession of child pornography. This amendment prohibits possession of child pornography, and also prohibits a person from knowingly accessing child pornography on a computer with the intent to view. We anticipate a relatively low number of new convictions and a possible increase in remands. Convictions would generate an estimated average 4 year sentence. The actual impact will be closely tracked by DOC.
- Section 8, 9, and 10 changes the elements of distribution of indecent material to minors to include any distribution in addition to electronic distribution. Because most of these cases are by computer, the impact on DOC is small and is included in Sections 5-6-7.
- Section 11 prohibits the suspension of sentences for human trafficking and possession of child pornography. DOC will track the actual impact.
- Section 12 adds discretionary probation conditions for Sex Offenders providing available electronic mail addresses and prohibiting internet use, communication with children, and possession or use of a computer. DOC believes this will have minimal impact above the number of remands that occur each year for such violations, however, we will track any impact this change to the bill may have.
- Section 13 adds as a sentencing aggravator adding the incapacity of a victim by alcohol or drugs. Due to a lack of data, the DOC is unable to assess an impact. The impact will be closely tracked.
- Section 14 adds two sentencing aggravators in a sex offense: first, to increase a sentence for a crime against a person committed against a person that the defendant was dating or with whom the defendant has engaged a sexual relationship; second, the sentence is increased if the defendant is 18 or over and is convicted of sexual abuse of a minor in the second degree under AS 11.41.436(a). Due to a lack of data, the DOC is unable to assess an impact. The impact will be closely tracked.
- Section 15 expands the definition of sex offense for sex offender registration to include sex offenses committed in other states where a person must register as a Sex Offender or child kidnapper. There are too many factors involved to determine a fiscal impact. DOC will track the actual impact.
- Section 16 amends criminal discovery restriction regarding child pornography. This represents no fiscal impact for DOC.

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: HB 298
 (H) Publish Date: 1/19/10

Identifier (file name): 0859 -Law-Crim-12-30-09 Dept. Affected: Law
 Title An Act relating to the crimes of sexual assault, possession RDU Criminal
of child pornography and distribution of indecent material to a minor. Component Criminal Justice Litigation
 Sponsor Rules
 Requester Governor Component Number 2202

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
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	0.0

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES ()								
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FUND SOURCE (Thousands of Dollars)

	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Full-time							
Part-time							
Temporary							

ANALYSIS: (Attach a separate page if necessary)

This bill adopts a class A misdemeanor for offensive touching that does not arise to sexual assault in the first, second or third degree. The bill adopts a class C felony for a person who knowingly accesses child pornography on a computer. The bill extends the prohibition of distributing indecent material to a minor to all forms of distribution. The bill provides that a person convicted of human trafficking or possession or distribution of child pornography may not be given a suspended imposition of sentence, and imposes certain restrictions on defendants.

Prepared by: Eileen Donahue, Division Operations Manager
 Division Administrative Services
 Approved by: Daniel S. Sullivan, Attorney General
Department of Law

Phone (907)465-5427
 Date/Time 12/30/09 12:00 AM
 Date 12/30/2009

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 298
 (H) Publish Date: 1/19/10

Identifier (file name): 0859-DOA-PDA-12-31-09 Dept. Affected: Administration
 Title: An Act relating to the crimes of sexual assault, RDU: Legal and Advocacy Services
 Component: Public Defender Agency
 Sponsor: Rules Committee
 Requester: Governor Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
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	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 Interagency Receipts								
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

Full-time								
Part-time								
Temporary								

ANALYSIS: (Attach a separate page if necessary)

See attached page

Prepared by: Quinlan Steiner, Director
 Division: Public Defender Agency
 Approved by: Rachael Petro, Deputy Commissioner
Department of Administration

Phone 907 334-4414
 Date/Time 12/31/2009, 4:00PM
 Date 12/31/2009

FISCAL NOTE #2

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. HB 298

ANALYSIS CONTINUATION

The bill will create a new misdemeanor crime of harassment for touching another person without consent. Additionally, the bill will eliminate the mens rea element associated with circumstances under which someone fails to register as a sex offender.

This bill will also change the procedures for defense access to evidence in child pornography cases. Under the proposed change to Criminal Rule 16, the evidence that forms the basis of such charges must remain in the custody and control of a law enforcement agency and the prosecuting attorney, and no copies can be made. This could result in additional costs associated with the logistics of reviewing and evaluating evidence.

The agency does not predict a significant fiscal impact as a result of the proposed statute. Accordingly, the agency submits a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 298
(H) Publish Date: 1/19/10

Identifier (file name): 0859-DOA-OPA-12-31-09

Dept. Affected: DOA

Title An Act relating to the crimes of sexual assault, possession of child pornography and . . .

RDU Legal and Advocacy Services

Component Office of Public Advocacy

Sponsor _____

Requester Governor

Component Number 43

Expenditures/Revenues

(Thousands of Dollars)

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

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
OPERATING EXPENDITURES								
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	0.0

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES ()								
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

Full-time								
Part-time								
Temporary								

ANALYSIS: (Attach a separate page if necessary)

This bill makes additions and changes to a number of criminal statutes and discovery procedures associated with sex offenses and child pornography prosecutions. Some of these changes could have a fiscal impact on the agency although it is not anticipated to be significant. Therefore, the agency has submitted a zero fiscal note.

Analysis continued on the second page.

Prepared by: Rachel Levitt, Director
Division: Office of Public Advocacy
Approved by: Rachael Petro, Deputy Commissioner
Department of Administration

Phone 907 269-3504
Date/Time 12/31/09, 4:30 p.m.
Date 12/31/2009

FISCAL NOTE #1

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. HB 298

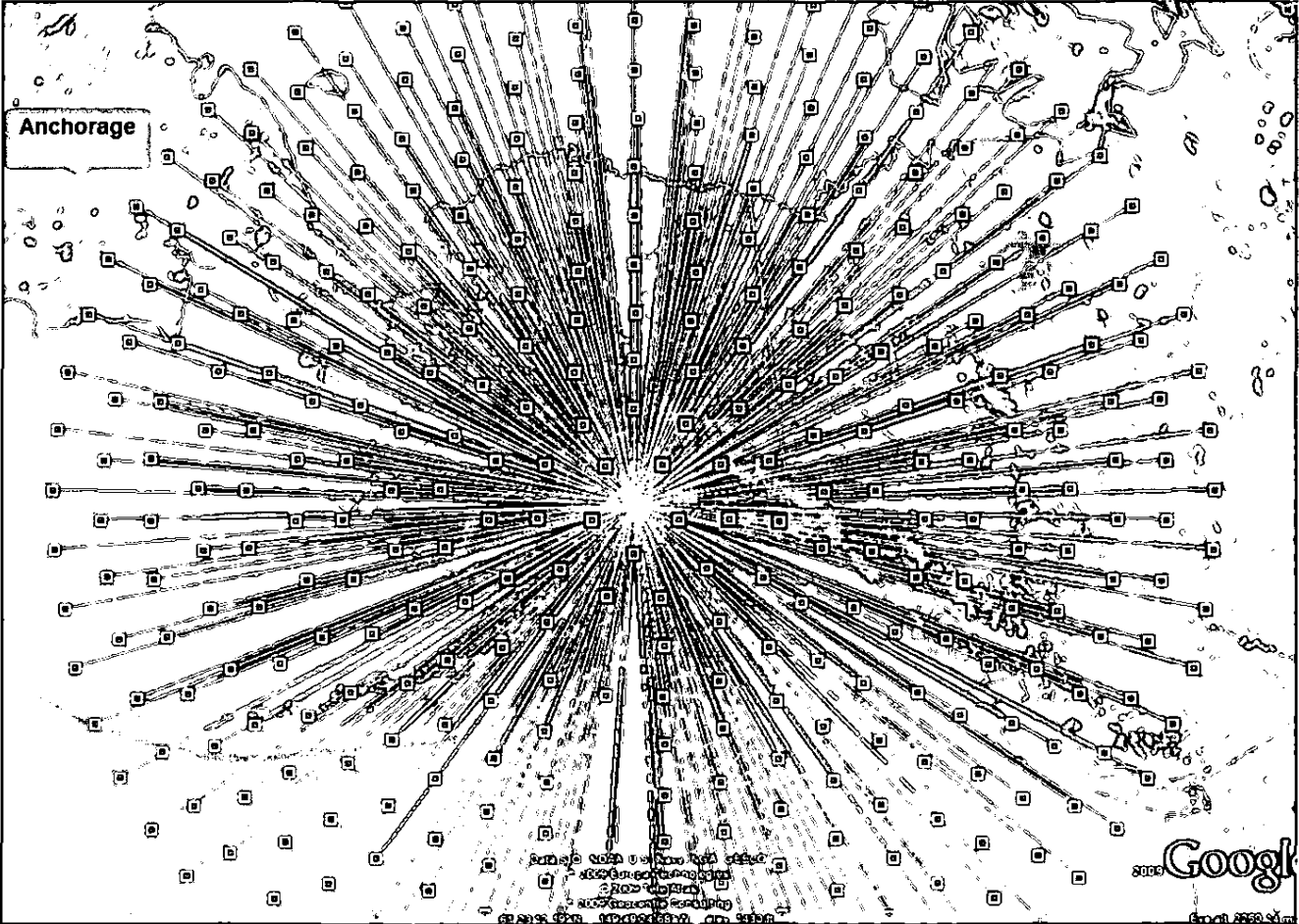
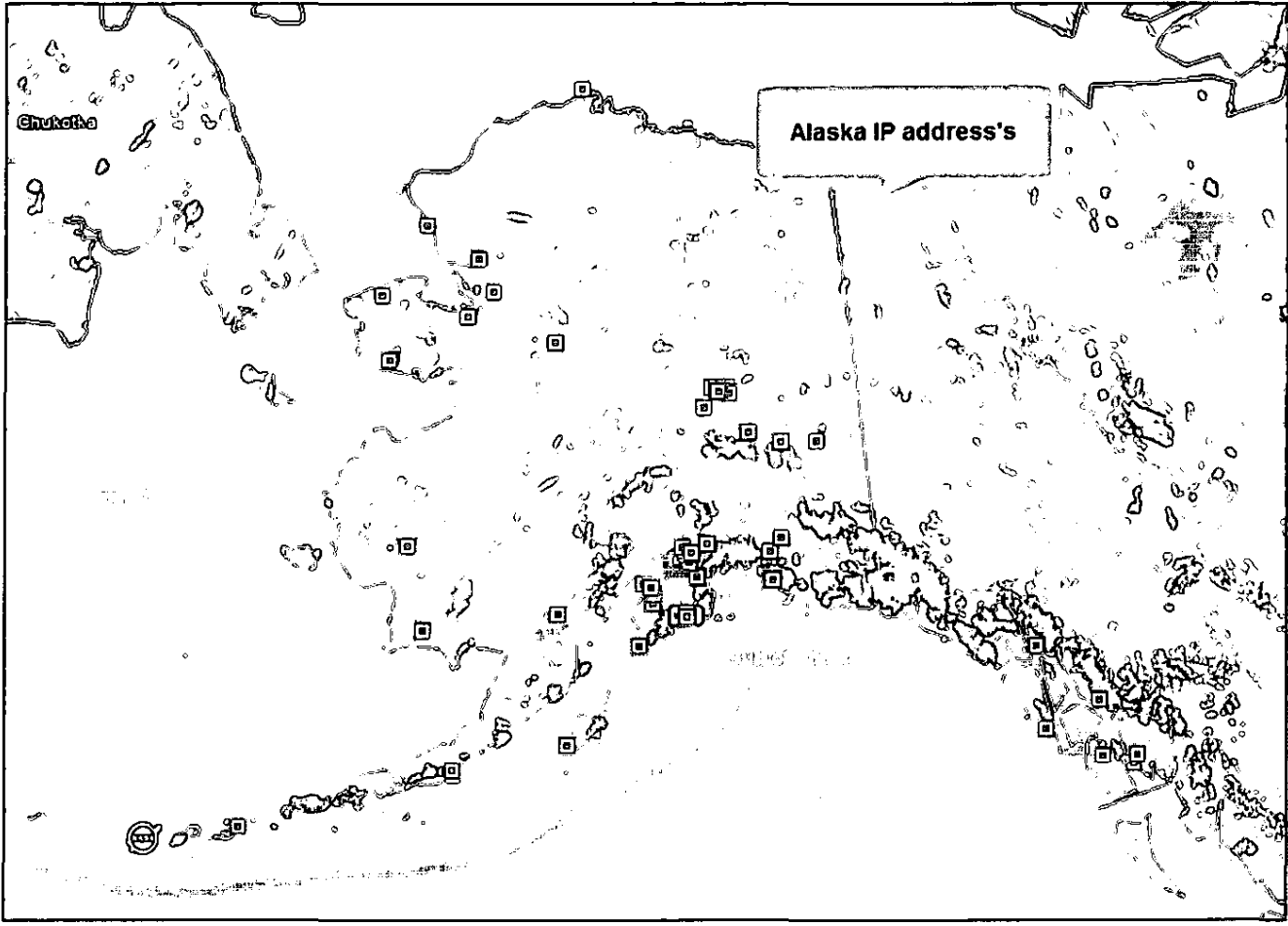
ANALYSIS CONTINUATION

The bill will create a new misdemeanor crime of harassment for touching another person's genitals, anus or female breast, directly or through clothing. Additionally, the bill will eliminate the mens rea element associated with circumstances under which someone fails to register as a sex offender. These changes could increase prosecutions and litigation associated with failure to register as a sex offender and child pornography cases.

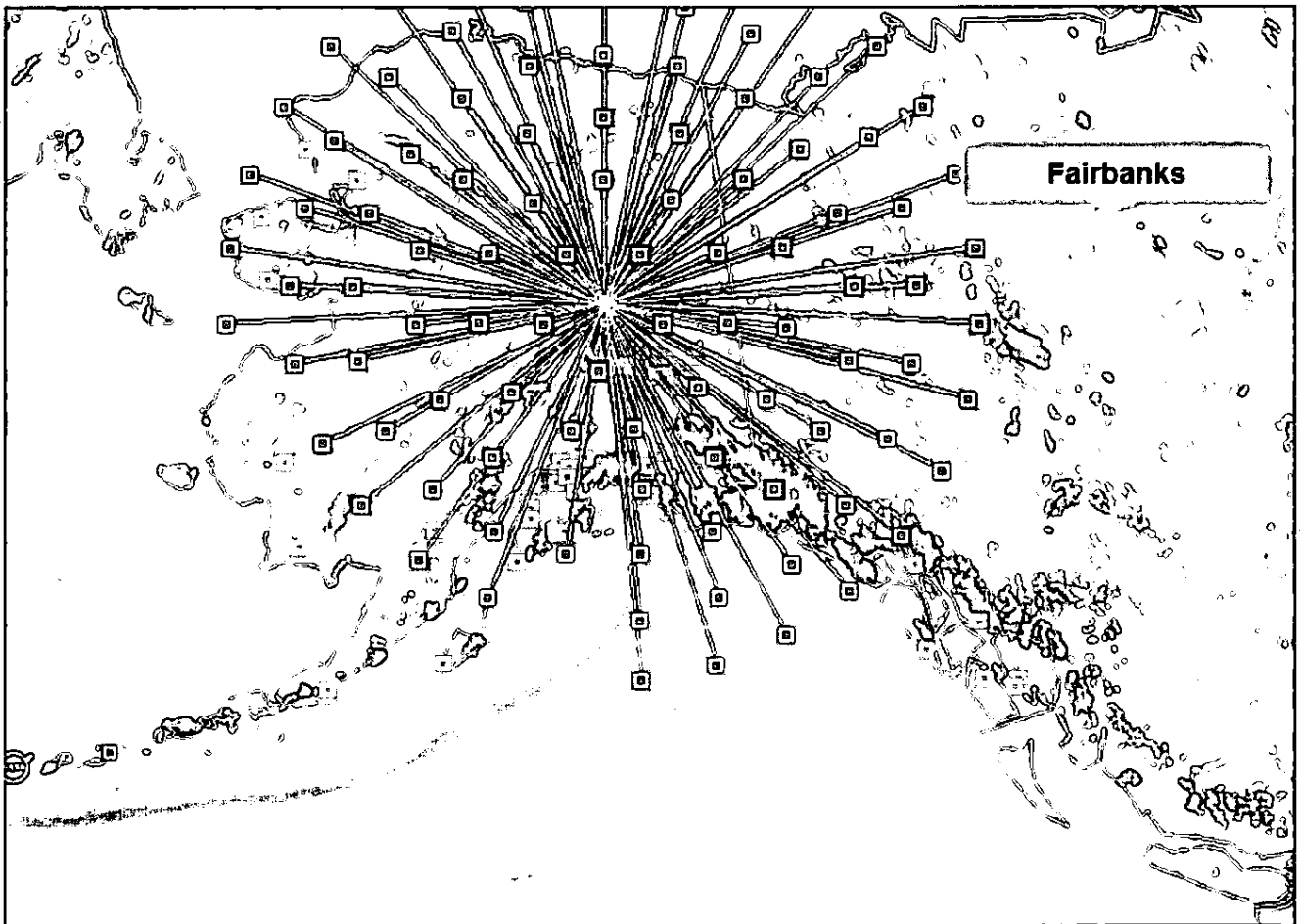
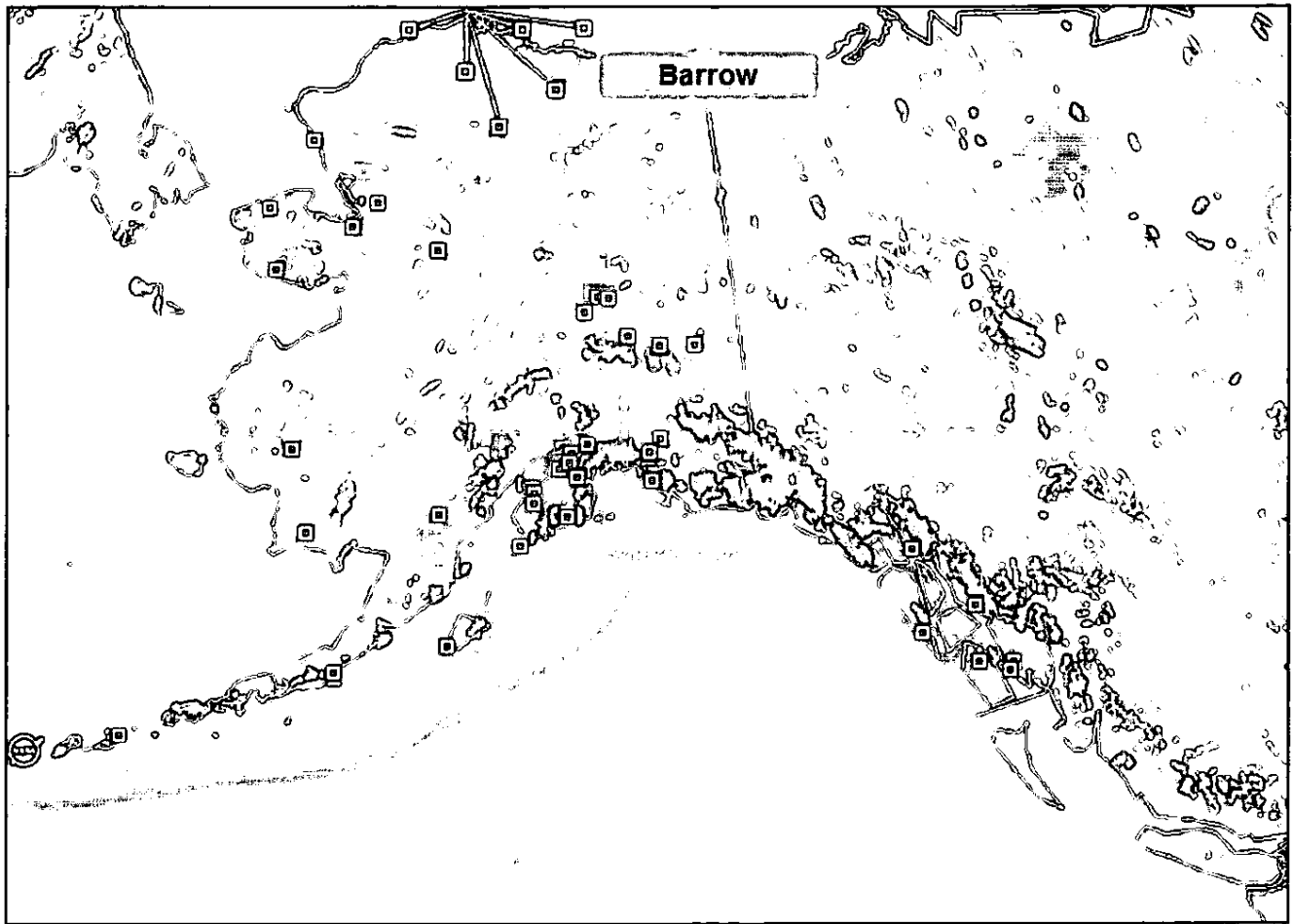
This bill will also change the procedures for defense access to evidence in child pornography cases. Under the proposed change to Criminal Rule 16, the evidence that forms the basis of such charges must remain in the custody and control of a law enforcement agency and the prosecuting attorney, and no copies can be made. This could result in additional costs associated with the logistics of the defense reviewing and testing evidence. For example, in a child pornography case any experts hired to review evidence would have to be paid for time involved with traveling and reviewing evidence where it is being held by the prosecutor or police agency, and facilities will have to be made available for evidence review and testing.

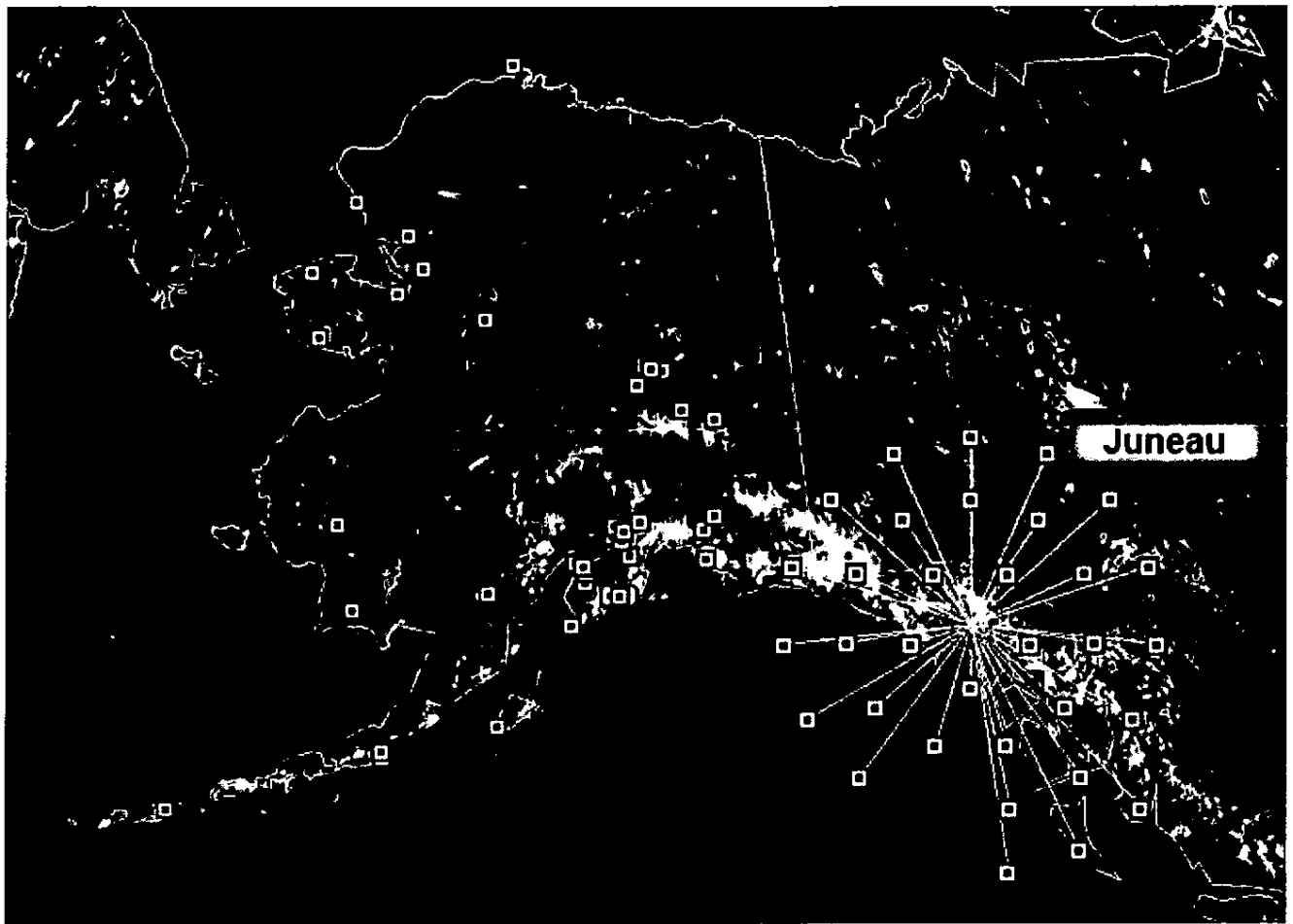
The agency does not predict a significant fiscal impact as a result of the proposed statute. Accordingly, the agency submits a zero fiscal note.

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453
 Submitted by Dept of Public Safety





STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL,
GOVERNOR

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CSHB 298(JUD) SEXUAL ASSAULT AND DOMESTIC VIOLENCE Sectional Analysis

Sections 1 and 2 correct an error made in 2007 when the legislature enacted AS 11.56.759, that adopted a class A misdemeanor if a sex offender violates specific conditions of probation or parole. One of the requirements of the crime is that the person have served the entire period of incarceration imposed for the crime. This is effective for probationers, but not for parolees, because a person is never on parole if he or she has served the entire period of incarceration. A member of the Parole Board brought this issue to our attention, because the statute has caused problems for the board in dealing with parolees. These sections remove parolees from the statute.

Section 3 rewrites AS 11.56.840, failure to register as a sex offender in the second degree. The proposal is similar to current law, but it sets out the elements more clearly. The section also adopts an affirmative defense that unforeseeable circumstances outside the control of the person prevented him or her from registering, and that the person contacted the Department of Public Safety immediately upon being able to do so.

Section 21 on page 11 of the bill adopts in uncodified law the legislative statement that the culpable mental state of knowing only applies to the sex offender or child kidnapper know that he or she is required to register. In the original version of the bill this provision was in the substantive part of the statute.

Section 4 would raise a form of harassment in the second degree (that is, with intent to harass or annoy another person, the person subjects the other person to offensive physical contact) to harassment in first degree if the offensive physical contact is by the offender touching the other person's genitals, anus, or female breast. Harassment in the first degree is a class A misdemeanor; the second degree offense is a class B misdemeanor. There have been prosecutions recently involving offensive touching that occurred so quickly that the court concluded that the victim did not have time to convey lack of consent to the offender. The court reduced these charges from sexual assault to harassment in the second degree. This conduct is more serious than a class B misdemeanor; the bill would raise it to a class A misdemeanor.

Sections 5, 6, and 7 address a problem with Alaska law prohibiting possession of child pornography that was raised by a recent decision of the Alaska Court of Appeals, *Worden v. State*, 213 P.3d 144 (Alaska App. 2009). *Worden* held that our current statute does not prohibit a

person from viewing child pornography on a computer; rather, the statute requires that the person must also save it on the computer to be considered to possess it. In response to this decision, the bill adopts the federal approach. It prohibits possession of child pornography, and it also prohibits a person from knowingly accessing child pornography on a computer with the intent to view it.

The bill adds to the child pornography law the prohibition of the depiction of a part of a child under 18 years of age that by manipulation appears to be engaged in conduct prohibited by AS 11.41.455(a). It also would prohibit material that appears to include a child under 18 years of age (often referred to as anime pornography) if the material is obscene.

Section 8 proposes an affirmative defense to possession of child pornography that is similar to federal law. The affirmative defense would address a situation where a person finds child pornography on their computer, and did not obtain it themselves. The defense requires that there are three or less depictions, and the person, without showing the material to another person except law enforcement, destroys the depictions or contacts law enforcement and turns it over to them.

Section 8 also adopts a definition of the “appears to include a child” for purposes of the prohibition of anime child pornography that references a definition of obscene.

Sections 9, 10, 11, and 12 amend the crime that prohibits the electronic distribution of indecent material to minors by expanding the offense to prohibit any form of distribution of indecent material to minors, in addition to electronic distribution. It also adds a new element of the offense that the state must prove that requires the material to be harmful to a child. Whether the material is harmful to a child is defined in **Section 12**, that defines that term.

Section 13 adds the crimes of human trafficking in the first and second degrees, distribution of child pornography, possession of child pornography, and distribution of indecent materials to minors to the crimes that are not eligible for a suspended imposition of sentence.

Section 13 also includes an amendment that removes “substantially” when describing a crime in another jurisdiction that may be a predicate conviction that would disallow the use of a suspended imposition of sentence for other offenses. This conforms with other statutes that require that a predicate offense in another jurisdiction be only similar to an offense in Alaska. Examples include AS 12.55.145(a) (presumptive sentencing), AS 11.41.320(a)(5) (third degree assault), and AS 11.41.110(a)(5) (murder in the second degree).

Section 14 adds to the conditions of probation that may be imposed on a person convicted of a sex offense. It gives the court discretion to order the person to submit e-mail addresses and other networking addresses to his or her probation officer, who would be required to give this information to the Troopers and to the local law enforcement agency. If the person was convicted of sexual abuse of a minor or an offense related to child pornography, it gives the court discretion

to prohibit the person from using an Internet site, communicating with children under 16 years of age, or possessing or using a computer.

Section 15 amends the aggravating factor at sentencing that allows the court to increase a sentence above the sentencing range if the defendant knew that the victim was particularly vulnerable. It does this by adding the consumption of alcohol or drugs as factors that might make a victim particularly vulnerable.

Section 16 adds two new aggravating factors to the sentencing law. First, it allows the court to increase a sentence above the sentencing range for a crime against a person (AS 11.41) committed against a person that the defendant was dating or with whom the defendant has engaged in a sexual relationship. Second, it allows the court to increase the sentence if the defendant is convicted of sexual abuse of a minor or distribution of indecent material to minors if the defendant is 10 years or more older than the victim.

Sections 17 and 18 add a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would have to register for 15 years if convicted of only one offense, and for life if convicted for two or more offenses.

Section 19 authorizes the attorney general, in the investigation of online enticement of a minor, unlawful exploitation of a minor, and child pornography crimes, to issue a subpoena to an Internet service provider if there is reasonable cause to believe that the Internet service account has been used in the exploitation or attempted exploitation of children. The subpoena may require the provider to disclose the name, address, telephone connection records, and other information about the account. Other than use in the criminal case related to the subpoenaed materials, the information obtained must remain confidential.

Section 20 amends Rule 16(b), Alaska Rules of Criminal Procedure, by adding a prohibition of copying or otherwise reproducing child pornography as part of the discovery process in a criminal prosecution. The material must still be available for inspection for the defendant, defense counsel, and any person the defense may seek to qualify as an expert witness at trial. Federal law has a similar provision. 18 U.S.C.A. § 3509(m).

Section 21 provides a legislative statement that in a prosecution for failure to register as a sex offender, the state is not required to prove a culpable mental state for the conduct of not registering. The state would be required to prove that the defendant knew he or she was required to register as a sex offender.

Sections 22 and 23 include applicability and effective date provisions.

3/19/10



March 19, 2010

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The Honorable Mike Hawker
The Honorable Bill Stoltze
Co-Chairs, House Finance Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801

Re: **House Bill 298**
Constitutional Issues

Chairs Hawker & Stolze:

Thank you for the opportunity to submit written testimony regarding House Bill 298, [CS FOR HOUSE BILL NO. 298(JUD)]. The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation, outlined in greater detail below.

With respect to the best use of resources of the State of Alaska, the Finance Committee should note that – if passed as currently worded – HB 298 would result in lengthy and costly litigation with the predictable result of the Alaska Supreme Court overturning the problematic provisions detailed. Appropriate revision of the bill would result in more timely and cost-effective protections for the safety of Alaskans.

Section 20 Proposed Amendments to
Rule 16 of the Rules of Criminal Procedure

Section Twenty of the Bill proposes changes to the rules of criminal procedure that violate the state and federal constitutional rights to a fair trial and to effective representation, and would involve the state in lengthy and costly litigation defending an unconstitutional provision.

(Copy on file)

The Section proposes that relevant evidence should be revealed to defendants, defense attorneys, and defense experts only at a state facility, under the control of a law enforcement agency. While protecting the privacy of the victims of certain crimes is an important interest, the proposed changes to the Rules of Criminal Procedure unnecessarily restrict the rights of the accused.

In some cases, the use of a technological expert is necessary. Defendants are entitled to establish, for example, that images at issue in a trial are not illegal material, were placed on the drive by another party, or were altered in some way. The computer source files would require review at length by an expert witness. Being forced to conduct the review at a local police department or District Attorney's office would make the work of these experts essentially impossible. Moreover, the analysis of hard drives and other media would likely require unique analysis programs which would necessitate examining the images on the expert's own computers. The proposed Rule Amendment would deprive defendants of the effective use of expert testimony, which would be a key defense resource in these cases.

Even where the use of an expert is unnecessary, the defense attorney may need to review the files at length to establish the exact nature of images or files. Requiring defense attorneys to do their work at times and places convenient to the state is unnecessarily and unconstitutionally restrictive.

A case from Washington State perfectly illustrates why the proposed rule would result in lengthy and expensive litigation which would ultimately result in the overturning of the statute. In *State v. Boyd*, the prosecution in a child pornography case sought and obtained a protective order from the court which only permitted the defense to view the evidence at a state facility. 158 P.3d 54 (Wash. 2007). ***The Supreme Court of Washington ruled that the Rules of Evidence, the Fifth Amendment right to a fair trial, and the Sixth Amendment right to effective representation by counsel all required that the protective order be struck down and the defendant be granted a new trial, because the defendant could not be adequately represented nor fairly tried under the order.***

The important privacy needs of victims can be protected without the measures laid out in Section 20. For example, the *Boyd* court upheld an order requiring the defense to keep "mirror image" hard drives of evidence under lock and key, to use firewall software on any computer viewing images that was connected to the internet, making the attorney personally and professionally responsible for any unauthorized release of the images, and allowing state experts to verify the complete eradication of the images after the conclusion of the case.

The power of a court to issue a protective order in a particular case already exists and needs no augmentation by the Legislature. An order issued after consideration of the unique facts of an individual case is far more likely to survive appellate review than a blanket rule set down by the Legislature.

Section 20 of H.B. 298 violates the state and federal constitutional rights to a fair trial and to effective representation. We recommend the Bill be revised so that the courts would be permitted

to manage the disclosure of evidence on a case-by-case basis, rather than by instituting a blanket rule that would guarantee entanglement of the State in litigation.

Section 17 Requirement for Registration of Sex Offenders from Other Jurisdictions

Section 17 proposes to expand the list of those required to register as sex offenders to include anyone required to register in another jurisdiction. This section would also entangle the state in lengthy and costly litigation defending a provision which has essentially already been ruled unconstitutional by the Alaska Supreme Court.

In *Doe v. State*, 189 P.3d 999 (Alaska 2008), the Supreme Court found that those convicted of sex offenses in Alaska before the enactment of the sex offender registry statutes in 1994 could not be required to register, as the statute would violate the *ex post facto* provision of the State Constitution. In many other jurisdictions, the state courts have not declared their state sex offender statutes to offend their own *ex post facto* rules. Thus, the Alaska *ex post facto* provision would likely prohibit mandatory registration for those convicted of offenses in another state prior to 1994. A final determination would need to be made by the Alaska Supreme Court, after lengthy litigation.

Additionally, the proposed amendment in Section 17 usurps the State's own policy making decisions, and adds needless expense that our lawmakers have previously determined are not appropriate or cost-effective. For instance, in Alaska, the Legislature has set the age of consent at sixteen. This amendment would nullify the legislature's judgment and require someone convicted of having sex with a 17-year-old in another state to report to the Department of Public Safety and face incarceration should he fail to report on time. Should he end up incarcerated, the people of the state of Alaska will be paying \$44,000 a year to incarcerate someone as a consequence for committing an underlying act which would not even be a crime in Alaska.

The current state of the law in Alaska is that anyone convicted under appropriate Alaska statutes or similar statutes in another state, such as rape, sexual assault, etc., must register in Alaska. Section 17 would therefore expand the registry – not to the most culpable and the most dangerous – but to those who have committed acts such as having sex with a 17 year old; prostitution; and other minor offenses, like indecent exposure. These offenders are not likely to commit the rapes and molestations that the registry is designed to protect Alaskans from.

Of note, as well, registries have been ineffective in preventing crime. A Rutgers University study showed that the New Jersey sex offender registry had “no demonstrable effect in reducing sexual re-offenses.” The study also showed the enactment of the law had no effect on the number of victims of sex offenses, no effect on how long those convicted of sex offenses remained arrest-free, and no effect on the type of sex offenses committed. The Legislature and the Finance Committee should look for proven, effective methods of preventing sex offenses. The proposed expansion of the sex offender registry in HB 298 is not a means to do this.

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**Sections Three and Twenty-One – Eliminating the
Mental State Requirement of the Failure to Register Statute**

Section Three of the Bill, along with Section Twenty-one, eliminates a criminal culpability mental state requirement, or *mens rea*, for the offense of failure to register, which means that a person who “knowingly” but accidentally or in good faith neglects to complete the registration requirement every three months could still be found guilty of the offense. Section 3, subsection (b) creates an affirmative defense that registration became impossible because of an unforeseen circumstance and that the individual orally and in writing contacted the Department of Public Safety as soon as possible.

Generally, the criminal law requires “not only the doing of some act by the person to be held liable, but also *the existence of a guilty mind* during the commission of the act.” *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969). The Alaska courts have held that, for major felonies, a mental state requirement is **mandatory**, while some minor offenses, such as hunting or public health related offenses, may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see also* *State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996).

In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has neither a provision for mental state nor language stating that no mental state requirement exists. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484 P.2d 677 (Alaska 1971). With an explicit statement only a “knowing” mental state is required in Section Three, the courts would not be able to avoid the constitutional conflict and would likely rule the statute unconstitutional.

Of note, as well, are the unique conditions here in Alaska. Many registered sex offenders live off the road system and in remote villages in which mail service gets interrupted, travel and telecommunications are irregular, and weather could keep an offender from being able to comply. Placing the burden on the defendant to prove his innocence reverses our legal tradition and the traditional balance of powers between the defense and the prosecution. The elimination of a criminally culpable mental state requirement and the substitution of a restrictive affirmative defense make Sections Three and Twenty-one subject to lengthy and costly litigation, with a likely eventual finding of unconstitutionality.

Conclusion

We hope that the Finance Committee will note the multiple constitutional infirmities in Sections Three, Seventeen, Twenty, and Twenty-one of House Bill 298, and consider amending them or eliminating them from the Bill to avoid these concerns.

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While the ACLU of Alaska takes very seriously the need to address the incidence of sexual assault in Alaska, the sections detailed are not well-crafted to vindicate the state's purposes. The sections we have identified present substantial Constitutional problems and would entangle the state in lengthy, costly, and needless litigation, should HB 298 pass as currently written.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Bill Thomas, Vice-Chair
Representative Alan Austerman
Representative Anna Fairclough
Representative Reggie Joule
Representative Mike Kelly
Representative Mike Doogan
Representative Neal Foster
Representative Les Gara
Representative Woodie Salmon
Representative Mike Chenault

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

Distributed by Chair

Rep STOETZ

Expected witnesses for CSHB 298(JUD)
House Finance Committee

Joseph A. Masters, Commissioner
Department of Public Safety

Derek DeGraaf, Sergeant, Supervisor
Technical Crimes Unit
Alaska Bureau of Investigation
Division of Alaska State Troopers

Dwayne Peoples, Deputy Commissioner
Office of the Commissioner, Juneau
Department of Corrections

Daniel S. Sullivan, Attorney General
Department of Law

Anne Carpeneti
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Governor Sean Parnell
STATE OF ALASKA

January 15, 2010

The Honorable Mike Chenault
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Chenault,

Under the authority of Art. III, Sec. 18, of the Alaska Constitution, I am transmitting a bill that provides Alaska law enforcement and other agencies the resources needed to prevent sexual assault and domestic violence crimes in Alaska. Sexual assault and domestic violence crimes destroy individuals and families, eroding the foundation of a just society. Alaska's challenge is to stop child pornography, sexual assault, and sexual abuse of minors in addition to ending the cycle of domestic violence.

Alaska's criminal laws concerning domestic violence, sexual assault, sexual abuse of a minor, and child pornography are strong. However, a few changes would improve prosecution of these offenses. The bill will adopt a class A misdemeanor for offensive touching that does not arise to sexual assault in the first, second, or third degree. It will also adopt a class C felony, the offense of knowingly accessing child pornography on a computer, and extend the prohibition of distributing indecent material to a minor to all forms of distribution.

The bill provides that a person convicted of human trafficking, possession, or distribution of child pornography may not be given a suspended imposition of sentence. It will specify conditions of probation for child predators that allow a court to forbid the defendant from using a computer or internet site, and prohibit contact with children.

The bill will give the courts more discretion in sentencing defendants. Specifically, it will allow a court to increase a person's sentence above the usual sentencing range if the defendant knew that the victim was particularly vulnerable as a result of having consumed alcohol or drugs. It will also allow an increased sentence if the crime is a felony and is committed against a person whom the offender is in a relationship of trust, such as dating or sexual relationship, or the offense involves a defendant who is 18 years of age or older and has sexual contact with a minor under 13 years of age.

Sex offenders and child kidnappers required to register elsewhere should not be able to move to Alaska and avoid registration. The bill will make it mandatory for a registered sex offender or child kidnapper from another state to register in Alaska when the intention is to live in Alaska. This would apply even when Alaska does not have a substantive law that is similar to the crime the person committed.

The Honorable Mike Chenault
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Finally, the bill protects victims of child pornography from being victimized or traumatized by the pre-trial discovery process in a criminal prosecution. While it allows the pornographic material to be inspected by the defendant, defense counsel, and experts the defense may use, copying the material would be prohibited and required to remain in the possession of law enforcement.

I urge your prompt and favorable consideration of this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sean Parnell".

Sean Parnell
Governor

Enclosure