

SB

222

<target><bill>SB 222</bill><subject>SB
222</subject><comm>HFIN26</comm></target>

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: April 11, 2010

FURTHER REFERRALS:

Date of Committee Action: 4/13/2010

The FINANCE Committee considered:

CS FOR SENATE BILL NO. 222(JUD)

"An Act relating to the crimes of harassment, distribution and possession of child pornography, failure to register as a sex offender or child kidnapper, and distribution of indecent material to a minor; relating to suspending imposition of sentence and conditions of probation or parole for human trafficking or for certain sex offenses; relating to aggravating factors in sentencing; relating to reporting of crimes; relating to administrative subpoenas for certain records involving exploitation of children; amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an effective date."

SB 222-SEX OFFENSES; OFFENDER REGIS.; SENTENCING

Recommends it be replaced with HCS or CS for _____ ()

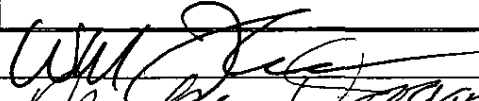
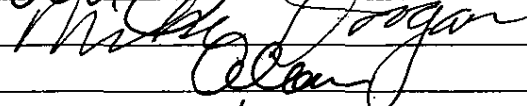
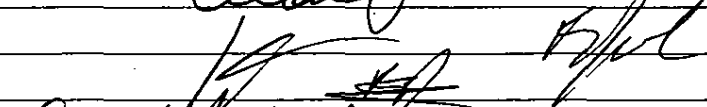
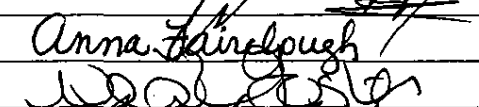
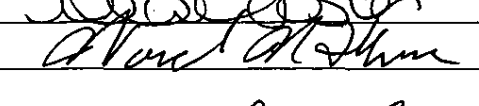
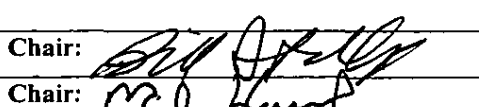
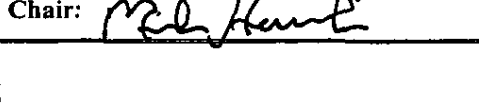

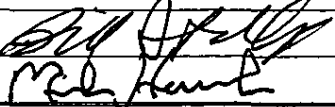
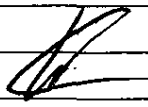
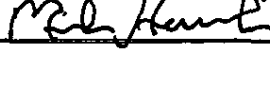
For Senate Bills with new title: Technical Title New Title: HCR _____ Same Title New Title

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

- List of Abbrev for Depts:
- ADM
 - CEC
 - COR
 - CRT
 - EED
 - DEC
 - DFG
 - GOV
 - DHS
 - LWF
 - LAW
 - LEG
 - MVA
 - DNR
 - DPS
 - REV
 - DOT
 - UA

NEW FISCAL NOTES				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM			✓	
ADM			✓	

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
COR	2	✓		
LAW	4			✓
CRT	5			✓
DPS	7	✓		

Signing with recommendations		Printed Last Name	DP	DNP	NR	AM
		Thomas	✓			
		Doogan	✓			
		Husterman	X			
		Soule	✓			
		KELLY	✓			
		FAIRCLOUGH	✓			
		FOSTER	✓			
		Salmon	X			
Chair: 		Salmon	✓			
Chair: 		Harbor	*			

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB 222
() Publish Date: _____

Identifier (file name): CSSB22(JUD)-DOA-PDA-04-12-10 Dept. Affected: Administration
Title: An Act relating to the crimes of harassment, RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: SRLS
Requester: HFIN 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	***	***	***	***	***	***	***	***
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 04/12/2010, 12:30PM
Date 4/12/2010

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. CSSB 222

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 will result in additional costs associated with the logistics of reviewing and evaluating evidence.

The agency currently does not have a reliable estimate of the number of cases that will be impacted by the discovery rule change. It is anticipated that the agency will bear an additional \$20.0-\$30.0 for each case impacted by the rule change. Accordingly, the agency submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB 222
() Publish Date: _____

Identifier (file name): CSSB222(JUD)-DOA-OPA-04-12-10 Dept. Affected: DOA
Title: An Act relating to the crimes of harassment, possession RDU: Legal and Advocacy Services
of child pornography and . . . Component: Office of Public Advocacy
Sponsor: SRLS by Request
Requester: HFIN 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	***	***	***	***	***	***	***	***
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

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 will have a fiscal impact on the agency although it is not possible to determine the precise amount at this time. Therefore, the agency has submitted an indeterminate 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 04/12/10, 9:30 AM
Date 4/12/2010

FISCAL NOTE

**STATE OF ALASKA
2010 LEGISLATIVE SESSION**

BILL NO. CSSB 222

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 will result in additional costs associated with the logistics of the defense reviewing and evaluating evidence.

The agency does not have a reliable way of estimating the number of cases that will be impacted by the discovery rule change. It is anticipated that the agency may bear an additional \$20.0 - \$30.0 for each case affected. Accordingly, the agency submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2010 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 222
(S) 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: _____
Sponsor: Rules Committee
Requester: Governor
Dept. Affected: DOC
RDU: Administration & Support
Component: Office of the Commissioner
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)					
	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
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

	FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
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
Division: Administration and Support
Approved by: Dwayne Peeples, Deputy Commissioner
Department of Corrections

Phone: (907) 465-3339
Date/Time: 1/7/10 8:30 AM
Date: 1/7/2010

FISCAL NOTE # 2

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. SB 222

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: 4
Bill Version: SB 222
(S) 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	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	0.0

Estimate of any current year (FY2010) cost: _____

POSITIONS

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: 5
 Bill Version: CSSB 222(JUD)
 (S) Publish Date: 4/7/10

Identifier (file name): _____ Dept. Affected: _____
 Title Sex Offenses; Offender Registration; Sentencing RDU Alaska Court System
 Component Trial Courts
 Sponsor Senate 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	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	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 SB 222.

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: 7
 Bill Version: CSSB 222(JUD)
 (S) Publish Date: 4/10/10

Identifier (file name): CSSB222(JUD)-DPS-R&I-04-07-10 Dept. Affected: Public Safety
 Title: "An Act relating to the crimes of harassment, distribution, and possession of child pornography, and distribution of indecent materials..." RDU: Statewide Support
 Component: Records & Identification
 Sponsor: Rules Committee
 Requester: Senate 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	83.8		83.8	83.8	83.8	83.8	83.8	83.8
Travel	10.0		10.0	10.0	10.0	10.0	10.0	10.0
Contractual	25.8		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	123.5	0.0	100.6	100.6	100.6	100.6	100.6	100.6

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	123.5		100.6	100.6	100.6	100.6	100.6	100.6
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL	123.5	0.0	100.6	100.6	100.6	100.6	100.6	100.6

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 proposed legislation amends AS 12.62.130 to require law enforcement agencies to report to the department data regarding each type of felony sex offense committed within that agency's jurisdiction.

Enactment of this legislation would necessitate the development of an enhanced reporting mechanism and data system to collect and track felony sex offenses so that the department can provide timely, accurate and meaningful statistics specific to those felony sex offenses defined under AS 12.63.100(6).

Because the mechanism currently being used to report uniform crime report information to the department does not include the data this legislation requires, an enhanced reporting mechanism that captures the data elements (cont.)

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

Phone (907) 269-0202
 Date/Time 4/7/10 3:28 PM
 Date 4/7/2010

FISCAL NOTE # 7

STATE OF ALASKA
2010 LEGISLATIVE SESSION

BILL NO. CSSB 222(JUD)

ANALYSIS CONTINUATION

(cont.) specific to felony sex offenses will be needed. To meet this requirement, the department proposes to create a secure electronic form for reporting felony sex offense data as well as a separate database to collect, store and report the information. Law enforcement agencies would complete the form online and submit it electronically to DPS through a secure Internet connection. Reports would be assigned and identified by a unique identifier which would be used to track felony sex offenses. It is envisioned that the electronic form would interface with the database and auto-populate the data. As an alternative, hardcopy forms would be completed by law enforcement and manually entered into the database by DPS personnel.

The one-time costs associated with development of the form, electronic interface and database are estimated to be \$20,000.

The department anticipates these additional data collection and analysis efforts will require one new full-time Criminal Justice Specialist position. This position would be responsible to:

- * Train, functionally test, and affirm the proficiency of state and local law enforcement agency personnel responsible for reporting data regarding each type of felony sex offense reported within that agency's jurisdiction;
- * Provide continuing training and technical assistance to law enforcement agencies across the state as needed;
- * Review, audit and validate the data reported for agency adherence to prescribed reporting standards including completeness, timeliness and accuracy;
- * Enter hardcopy reports into the database;
- * Track, or assist in tracking, each type of felony sex offense reported;
- * Identify data reporting and collection issues and determine appropriate action;
- * Ensure law enforcement agency compliance with reporting requirements;
- * Compile and distribute statistical information and reports to authorized/interested parties;
- * Assist in the compilation of an annual report concerning the number, nature and outcomes of felony sex offenses reported in the state.

CS FOR SENATE BILL NO. 222(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 4/7/10
Referred: Finance

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

A BILL
FOR AN ACT ENTITLED

1 "An Act relating to the crimes of harassment, distribution and possession of child
2 pornography, failure to register as a sex offender or child kidnapper, and distribution of
3 indecent material to a minor; relating to suspending imposition of sentence and
4 conditions of probation or parole for human trafficking or for certain sex offenses;
5 relating to aggravating factors in sentencing; relating to reporting of crimes; relating to
6 administrative subpoenas for certain records involving exploitation of children;
7 amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an effective
8 date."

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

10 * Section 1. AS 11.56.759(a) is amended to read:

11 (a) A person commits the crime of violation by sex offender of condition of
12 probation [OR PAROLE] if the person

1 (1) is on probation [OR PAROLE] for conviction of a sex offense;
 2 (2) has served the entire term of incarceration imposed for conviction
 3 of the sex offense; and

4 (3) [EITHER

5 (A)] violates a condition of probation imposed under
 6 AS 12.55.100(a)(5), (a)(6), or (e), 12.55.101(a)(1), or any other condition
 7 imposed by the court that the court finds to be specifically related to the
 8 defendant's offense [; OR

9 (B) VIOLATES A CONDITION OF PAROLE IMPOSED
 10 UNDER AS 33.16.150(a)(3), (a)(4), (a)(6), (a)(13), (b)(4), (b)(11), OR (f)].

11 * **Sec. 2.** AS 11.56.759(c) is amended to read:

12 (c) Violation by sex offender of condition of probation [OR PAROLE] is a
 13 class A misdemeanor.

14 * **Sec. 3.** AS 11.56.840 is repealed and reenacted to read:

15 **Sec. 11.56.840. Failure to register as a sex offender or child kidnapper in**
 16 **the second degree.** (a) A person commits the crime of failure to register as a sex
 17 offender or child kidnapper in the second degree if the person

18 (1) is required to register under AS 12.63.010;

19 (2) knows that the person is required to register under AS 12.63.010;

20 and

21 (3) fails to

22 (A) register;

23 (B) file written notice of

24 (i) change of residence;

25 (ii) change of mailing address;

26 (iii) establishment of an electronic or messaging address

27 or any change to an electronic or messaging address; or

28 (iv) establishment of an Internet communication

29 identifier or any change to an Internet communication identifier;

30 (C) file the annual or quarterly written verification; or

31 (D) supply accurate and complete information required to be

1 submitted under this paragraph.

2 (b) In a prosecution for failure to register as a sex offender in the second
3 degree under (a) of this section, it is an affirmative defense that

4 (1) unforeseeable circumstances, outside the control of the person,
5 prevented the person from registering under (a)(3)(A) of this section or filing or
6 supplying the written notices, verification, and other information required under
7 (a)(3)(B) - (D) of this section; and

8 (2) the person contacted the Department of Public Safety orally and in
9 writing immediately upon being able to perform the requirements described in this
10 section.

11 (c) Failure to register as a sex offender or child kidnapper in the second degree
12 is a class A misdemeanor.

13 * Sec. 4. AS 11.61.118(a) is amended to read:

14 (a) A person commits the crime of harassment in the first degree if

15 (1) the person violates AS 11.61.120(a)(5) and the offensive physical
16 contact is contact with human or animal blood, mucus, saliva, semen, urine, vomitus,
17 or feces; or

18 (2) under circumstances not proscribed under AS 11.41.434 -
19 11.41.440, the person violates AS 11.61.120(a)(5) and the offensive physical
20 contact is contact by the person touching through clothing another person's
21 genitals, buttocks, or female breast.

22 * Sec. 5. AS 11.61.125(a) is amended to read:

23 (a) A person commits the crime of distribution of child pornography if the
24 person distributes in this state or advertises, promotes, solicits, or offers to
25 distribute in this state [BRINGS OR CAUSES TO BE BROUGHT INTO THE
26 STATE FOR DISTRIBUTION, OR IN THE STATE DISTRIBUTES, OR IN THE
27 STATE POSSESSES, PREPARES, PUBLISHES, OR PRINTS WITH INTENT TO
28 DISTRIBUTE,] any material that is proscribed under AS 11.61.127 [VISUALLY
29 OR AURALLY DEPICTS CONDUCT DESCRIBED IN AS 11.41.455(a),
30 KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE
31 USE OF A CHILD UNDER 18 YEARS OF AGE WHO ENGAGED IN THE

1 CONDUCT].

2 * Sec. 6. AS 11.61.127(a) is amended to read:

3 (a) A person commits the crime of possession of child pornography if the
4 person knowingly possesses or knowingly accesses on a computer with intent to
5 view any material that visually [OR AURALLY] depicts conduct described in
6 AS 11.41.455(a) knowing that the production of the material involved the use of a
7 child under 18 years of age who engaged in the conduct or a depiction of a part of an
8 actual child under 18 years of age who, by manipulation, creation, or
9 modification, appears to be engaged in the conduct.

10 * Sec. 7. AS 11.61.127(c) is amended to read:

11 (c) Each film, audio, video, electronic, or electromagnetic recording,
12 photograph, negative, slide, book, newspaper, magazine, or other material that visually
13 or aurally depicts conduct described in AS 11.41.455(a) that is possessed or accessed
14 in violation of (a) of this section [BY A PERSON KNOWING THAT THE
15 PRODUCTION OF THE MATERIAL INVOLVED THE USE OF A CHILD
16 UNDER 18 YEARS OF AGE THAT ENGAGED IN THE CONDUCT] is a separate
17 violation of this section.

18 * Sec. 8. AS 11.61.127 is amended by adding new subsections to read:

19 (e) In a prosecution under (a) of this section, it is an affirmative defense that
20 the person

21 (1) possessed or accessed fewer than three depictions described in (a)
22 of this section; and

23 (2) without allowing any person other than a law enforcement agency
24 to view the depictions, either took reasonable steps to destroy the depictions, or
25 reported the matter to a law enforcement agency and allowed the agency access to the
26 depictions.

27 (f) In this section, "computer" has the meaning given in AS 11.46.990.

28 (g) In a prosecution under (a) of this section, the prosecution is not required to
29 prove the identity of a minor depicted or that the defendant knew the identity of a
30 minor depicted.

31 * Sec. 9. AS 11.61.128(a) is amended to read:

1 (a) A person commits the crime of [ELECTRONIC] distribution of indecent
2 material to minors if

3 (1) the person, being 18 years of age or older, knowingly distributes to
4 another person [BY COMPUTER] any material that depicts the following actual or
5 simulated conduct:

6 (A) sexual penetration;

7 (B) the lewd touching of a person's genitals, anus, or female
8 breast;

9 (C) masturbation;

10 (D) bestiality;

11 (E) the lewd exhibition of a person's genitals, anus, or female
12 breast; or

13 (F) sexual masochism or sadism; [AND]

14 (2) the material is harmful to minors; and

15 (3) either

16 (A) the other person is a child under 16 years of age; or

17 (B) the person believes that the other person is a child under 16
18 years of age.

19 * Sec. 10. AS 11.61.128(c) is amended to read:

20 (c) Except as provided in (d) of this section, [ELECTRONIC] distribution of
21 indecent material to minors is a class C felony.

22 * Sec. 11. AS 11.61.128(d) is amended to read:

23 (d) Distribution [ELECTRONIC DISTRIBUTION] of indecent material to
24 minors is a class B felony if the defendant was, at the time of the offense, required to
25 register as a sex offender or child kidnapper under AS 12.63 or a similar law of
26 another jurisdiction.

27 * Sec. 12. AS 11.61.128 is amended by adding a new subsection to read:

28 (e) In this section, "harmful to minors" means

29 (1) the average individual, applying contemporary community
30 standards, would find that the material, taken as a whole, appeals to the prurient
31 interest in sex for persons under 16 years of age;

1 (2) a reasonable person would find that the material, taken as a whole,
 2 lacks serious literary, artistic, educational, political, or scientific value for persons
 3 under 16 years of age; and

4 (3) the material depicts actual or simulated conduct in a way that is
 5 patently offensive to the prevailing standards in the adult community as a whole with
 6 respect to what is suitable for persons under 16 years of age.

7 * Sec. 13. AS 12.55.085(f) is amended to read:

8 (f) The court may not suspend the imposition of sentence of a person who

9 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260
 10 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, [OR] AS 11.46.400, or
 11 AS 11.61.125 - 11.61.128;

12 (2) uses a firearm in the commission of the offense for which the
 13 person is convicted; or

14 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony
 15 and the person has one or more prior convictions for a misdemeanor violation of
 16 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction
 17 having [SUBSTANTIALLY] similar elements to an offense defined as a misdemeanor
 18 in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person
 19 shall be considered to have a prior conviction even if that conviction has been set aside
 20 under (e) of this section or under the equivalent provision of the laws of another
 21 jurisdiction.

22 * Sec. 14. AS 12.55.100(e) is repealed and reenacted to read:

23 (e) In addition to other conditions imposed on the defendant, while on
 24 probation and as a condition of probation

25 (1) for a sex offense, as described in AS 12.63.100, the defendant

26 (A) shall be required to submit to regular periodic polygraph
 27 examinations;

28 (B) may be required to provide each electronic mail address,
 29 instant messaging address, and other Internet communication identifier that the
 30 defendant uses to the defendant's probation officer; the probation officer shall
 31 forward those addresses and identifiers to the Alaska state troopers and to the

1 local law enforcement agency;

2 (2) if the defendant was convicted of a violation of AS 11.41.434 -
3 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the
4 defendant may be required to refrain from

5 (A) using or creating an Internet site;

6 (B) communicating with children under 16 years of age; or

7 (C) possessing or using a computer.

8 * Sec. 15. AS 12.55.155(c)(5) is amended to read:

9 (5) the defendant knew or reasonably should have known that the
10 victim of the offense was particularly vulnerable or incapable of resistance due to
11 advanced age, disability, ill health, homelessness, consumption of alcohol or drugs,
12 or extreme youth or was for any other reason substantially incapable of exercising
13 normal physical or mental powers of resistance;

14 * Sec. 16. AS 12.55.155(c)(18) is amended to read:

15 (18) the offense was a felony

16 (A) specified in AS 11.41 and was committed against a spouse,
17 a former spouse, or a member of the social unit made up of those living
18 together in the same dwelling as the defendant;

19 (B) specified in AS 11.41.410 - 11.41.458 and the defendant
20 has engaged in the same or other conduct prohibited by a provision of
21 AS 11.41.410 - 11.41.460 involving the same or another victim; [OR]

22 (C) specified in AS 11.41 that is a crime involving domestic
23 violence and was committed in the physical presence or hearing of a child
24 under 16 years of age who was, at the time of the offense, living within the
25 residence of the victim, the residence of the perpetrator, or the residence where
26 the crime involving domestic violence occurred;

27 (D) specified in AS 11.41 and was committed against a
28 person with whom the defendant has a dating relationship or with whom
29 the defendant has engaged in a sexual relationship; or

30 (E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128
31 and the defendant was 10 or more years older than the victim;

1 * Sec. 17. AS 12.63.100(6) is amended to read:

2 (6) "sex offense" means

3 (A) a crime under AS 11.41.100(a)(3), or a similar law of
4 another jurisdiction, in which the person committed or attempted to commit a
5 sexual offense, or a similar offense under the laws of the other jurisdiction; in
6 this subparagraph, "sexual offense" has the meaning given in
7 AS 11.41.100(a)(3);

8 (B) a crime under AS 11.41.110(a)(3), or a similar law of
9 another jurisdiction, in which the person committed or attempted to commit
10 one of the following crimes, or a similar law of another jurisdiction:

11 (i) sexual assault in the first degree;

12 (ii) sexual assault in the second degree;

13 (iii) sexual abuse of a minor in the first degree; or

14 (iv) sexual abuse of a minor in the second degree; or

15 (C) a crime, or an attempt, solicitation, or conspiracy to commit
16 a crime, under the following statutes or a similar law of another jurisdiction:

17 (i) AS 11.41.410 - 11.41.438;

18 (ii) AS 11.41.440(a)(2);

19 (iii) AS 11.41.450 - 11.41.458;

20 (iv) AS 11.41.460 if the indecent exposure is before a
21 person under 16 years of age and the offender has a previous conviction
22 for that offense;

23 (v) AS 11.61.125 - 11.61.128;

24 (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who
25 was induced or caused to engage in prostitution was 16 or 17 years of
26 age at the time of the offense; [OR]

27 (vii) former AS 11.15.120, former 11.15.134, or assault
28 with the intent to commit rape under former AS 11.15.160, former
29 AS 11.40.110, or former 11.40.200; or

30 (viii) AS 11.61.118(a)(2) if the offender has a
31 previous conviction for that offense;

1 * **Sec. 18.** AS 12.62.130 is amended to read:

2 **Sec. 12.62.130. Reporting of uniform crime information.** A criminal justice
3 agency shall submit to the department, at the time, in the manner, and in the form
4 specified by the department, data regarding crimes committed within that agency's
5 jurisdiction. At a minimum, the department shall require a criminal justice
6 agency to report each felony sex offense committed in the agency's jurisdiction.
7 The department may withhold grant funding to a criminal justice agency that
8 fails to report data as required by this section. The department shall compile, and
9 provide to the governor and the attorney general, an annual report concerning the
10 number and nature of criminal offenses committed, the disposition of the offenses, and
11 any other data the commissioner finds appropriate relating to the method, frequency,
12 cause, and prevention of crime. In this section, "sex offense" has the meaning given
13 in AS 12.63.100.

14 * **Sec. 19.** AS 44.23 is amended by adding a new section to read:

15 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
16 **of an Internet service account in the exploitation of children.** (a) In an
17 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
18 11.61.128 and on reasonable cause to believe that an Internet service account has been
19 used in the exploitation or attempted exploitation of children, the attorney general may
20 issue in writing and cause to be served a subpoena requiring the production and
21 testimony described in (b) of this section.

22 (b) A person receiving a subpoena under (a) of this section shall disclose, for
23 the account that is the subject of the subpoena,

24 (1) the name of the person holding the account;

25 (2) the address and physical location associated with the account; and

26 (3) length of service, including service start date, and types of service
27 used by the account.

28 (c) At any time before the return date specified on the subpoena, the subpoenaed
29 person may petition a court of competent jurisdiction for the judicial district in which the
30 person resides or does business for an order modifying or setting aside the subpoena or for
31 an order sealing the court record.

32 (d) A subpoena under this section must describe the objects required to be

1 produced and must prescribe a return date with a reasonable period of time within which
2 the objects must be assembled and produced.

3 (e) If no case or proceeding arises from the production of records or other
4 documents under this section within a reasonable time after those records or documents
5 are produced, the attorney general shall either destroy the records and documents or return
6 them to the person who produced them.

7 (f) A subpoena issued under this section may be served as provided for service of
8 subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under
9 Rule 4, Alaska Rules of Civil Procedure.

10 (g) Except as provided in this section, any information, records, or data reported
11 or obtained under a subpoena under this section shall remain confidential and may not be
12 disclosed unless the disclosure occurs in connection with a criminal case related to the
13 subpoenaed materials.

14 * **Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 DIRECT COURT RULE AMENDMENT. Rule 16(b), Alaska Rules of
17 Criminal Procedure, is amended by adding a new paragraph to read:

18 (9) Restriction on Availability of Certain Material or Property.
19 Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the
20 defendant to copy, photograph, duplicate, or otherwise reproduce any property or
21 material that may be illegal or prohibited under AS 11.41.455(a) or defined as "child
22 pornography" under 18 U.S.C. 2256, provided the prosecution makes the property or
23 material reasonably available to the defendant. Property or material shall be deemed to
24 be made reasonably available to the defendant if the prosecution provides, at a
25 prosecution or law enforcement facility, ample opportunity for inspection, viewing,
26 and examination of the property or material by the defendant, the defendant's attorney,
27 and any individual the defendant may seek to qualify to furnish expert testimony at
28 trial.

29 * **Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to
30 read:

31 LEGISLATIVE STATEMENT CONCERNING CULPABLE MENTAL STATE. In
32 AS 11.56.840(a), as repealed and reenacted by sec. 3 of this Act, the only culpable mental

1 state required to be proven by the prosecution is the "knowing" requirement in paragraph (2)
2 of that subsection. No other culpable mental state needs to be proven for the other elements of
3 that offense.

4 * **Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 **APPLICABILITY.** (a) Sections 1 - 17 of this Act apply to offenses committed on or
7 after the effective date of this Act.

8 (b) Sections 19 and 20 of this Act apply to offenses committed before, on, or after the
9 effective date of this Act.

10 * **Sec. 23.** This Act takes effect July 1, 2010.

House Finance Committee
Monday, April 12, 2010
1:30PM

SB 222 – SEX OFFENSES; OFFENDER REGIS.; SENTENCING

New Fiscal Notes

ADM 0 (replaces published #1)

ADM * (replaces published #3)



April 12, 2010

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

AMERICAN CIVIL
LIBERTIES UNION OF
ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

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NOELANI KAMAHELE, Anchorage
STUDENT ADVISORS

Re: **Senate Bill 222**
Constitutional Issues

Chairs Hawker & Stolze:

Thank you for the opportunity to submit written testimony regarding Senate Bill 222 (CS 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 significant concerns with the proposed legislation.

**Section Nineteen – Unnecessary Invitation to
Governmental Abuse of Alaskan’s Internet Records**

Section 19 proposes that the Attorney General may issue administrative subpoenas to obtain an internet user’s name, address, and service history.

The general rule in criminal investigations has been that a warrant issues from a judge or other judicial authority. In some contexts, administrative warrants have been issued by various administrative agencies – to assist the IRS, for instance, in recovering owed taxes, or the SEC in identifying violations of securities regulations. Permitting a criminal enforcement agency to issue its own subpoenas for the purpose of prosecution inevitably leads to abuse.

***a. U.S. Department of Justice Reports on Abuse of Federal
Administrative Subpoenas***

In January of this year, the U.S. Department of Justice, Office of the Inspector General issued a report on the FBI’s use of non-judicially approved

requests for telephone records. See, <http://www.justice.gov/oig/special/s1001r.pdf>.

As the OIG noted: "Our investigation also uncovered abuses in the FBI's use of administrative subpoenas." (pg.129) There, as proposed in this bill, the authorization was intended "in connection with the investigation of . . . offenses involving the sexual abuse or exploitation of children . . ." (pg 130)

The New York Times summarized the report as follows:

The Federal Bureau of Investigation improperly obtained calling records for more than 3,500 telephone accounts from 2003 to 2006 without following any legal procedures, according to a newly disclosed report by the Justice Department's inspector general.

Instead, according to the 289-page report, F.B.I. agents informally requested the records from employees of three unidentified telephone companies who were stationed inside a bureau communications office.

Based on nothing more than e-mail messages or scribbled requests on Post-it notes, the phone employees turned over customer calling records, the report said.

On some occasions, the phone employees allowed the F.B.I. to upload call records to government databases. On others, they allowed agents to view records on their computer screens, a practice that became known as "sneak peeks."

Moreover, the report found that the F.B.I. improperly uploaded into its databases large numbers of calling records without determining whether they were relevant to an investigation.

On four occasions, the bureau made inaccurate statements to a court that authorizes national security wiretaps about how it had obtained calling records, the report said.

And agents twice improperly gained access to reporters' calling records as part of leak investigations.

<http://www.nytimes.com/2010/01/21/us/21fbi.html>

The OIG's March, 2008 Report on abuse of NSL's documents similar abuses. See, <http://www.justice.gov/oig/special/s0803b/final.pdf>. And the Washington Post, in a lengthy report, analyzed the issue. That report quotes former Republican Congressman Bob Barr:

Barr, the former congressman, said that "the abuse is in the power itself."

“As a conservative,” he said, “I really resent an administration that calls itself conservative taking the position that the burden is on the citizen to show the government has abused power, and otherwise shut up and comply.”

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html>.

b. Administrative Subpoena Powers are Unnecessary

Recent testimony to the Alaska Legislature to the effect that such sweeping authority should be removed from the hands of a judge – who traditionally affords constitutional protections as a neutral party – has indicated that the judicial process is too cumbersome or takes too much time. However, the submission of a warrant to a judge is the same procedure by which the phones of those accused of drug dealing are tapped, by which the homes of those accused of murder are searched, and by which those accused of rape are arrested. While the “affidavit” portion of a warrant request can be lengthy, much of it is boilerplate. The ACLU can provide the Committee with an exemplar affidavit showing that the original language necessary to complete the affidavit is rather minimal.

Testimony that it would be easier for the head of the state’s law enforcement and litigation agency to read an application for an administrative subpoena than for any of the many state court judges to do so is similarly unpersuasive. Regardless of who will finally sign a warrant or subpoena, the same steps must be completed. The statement of probable cause must be drafted, the statement of what materials are to be seized must be prepared, and the application must be submitted for signature. Whether the application is faxed to a judge’s chambers or carried upstairs does not add significantly to the time needed to complete the application.

One could imagine that the Attorney General would have less time to fully review the application than judges around the state. If the intention of the bill is that the Attorney General will designate representatives to sign these warrants in his name, such a practice invites different concerns. Devolving subpoena power to numerous subordinates whose actions would be difficult to track even within the Department of Law, opens even more avenues for abuse.

The context of the subpoena – internet usage – should prompt more scrutiny from the courts, since access to the internet is part of the freedom of speech. Allowing the government to discover who makes negative comments about political figures on websites, to find out whether a state employee is visiting a website about whistleblower law, and who is supporting rival political campaigns threatens the privacy and the free speech rights of citizens. *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986) (privacy clause protects “sensitive personal information”). It is no answer to say that the statute is supposedly about child exploitation when the subpoenas are not subject to independent scrutiny. The only entity able to challenge the subpoena would be the internet service provider, which has no particular interest in the freedom of speech or privacy of citizens.

Allowing a law enforcement agency to issue its own subpoenas without review by a neutral party has led in the past and will lead again to serious abuse by government officials.

c. Recommendation for Annual Review of Administrative Subpoena Use

While it would be preferable for the Finance Committee to delete this provision from the Bill, should it pass, it is strongly recommended that the Bill be amended to include a requirement for an annual report to the Legislature on the use of Administrative Subpoenas. In that way, as at the federal level, abuses could be uncovered and determination made if the problem is with the existence of non-judicially reviewed warrants or internal Alaska Department of Law processes.

Absent such a review process, the risk is too great that Alaskans who have no connection to internet pornography of any kind could have their names, accounts, and service histories captured.

**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 result in lengthy and costly litigation. 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 invaluable. 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 effectively 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, or to determine whether some of them are duplicates. 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*, for example, 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 S.B. 222 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 invite litigation.

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

Section 21 of the Bill eliminates any mental state requirement, or *mens rea*, for the offense of failure to register, set forth in Section 3. This means that a person who accidentally or in good faith neglects to complete the registration requirement could still be found guilty of the offense.

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 no provision for mental state but no 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 that no mental state is required, the courts will not be able to avoid the constitutional conflict and may 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 the mental state requirement and the substitution of a restrictive affirmative defense make Sections Three and Twenty-One subject to attack under the Alaska constitution.

Sections Six and Seven: First Amendment Issues

Sections 6 and 7 present First Amendment issues. By inclusion of non-obscene material, these proposed amendments run afoul of the U.S. Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), (child pornography cannot be banned if it is both (1) not constitutionally obscene and (2) not a depiction of real children).

As currently drafted, one could imagine a work of art, for instance, placing a photo of the head of a minor Britney Spears, on drawing intended as commentary on media depictions of youth and sexuality unconstitutionally qualifying as "criminal material." Absent, for example, language tracking the *Miller* standard (*Miller v. California*, (1973) 413 U.S. 15) these provisions are subject to facial challenge.

Conclusion

The ACLU takes seriously the need to address sexual assault in Alaska. But the sections cited invite constitutional challenge and will likely entangle the state in lengthy and costly litigation, and lead to unnecessary uncertainty in criminal verdicts

We hope that the Finance Committee will note these constitutional infirmities and consider amending them or eliminating them from the Bill to avoid these concerns.

Thank you again for the opportunity to share our concerns. Please feel free to contact the undersigned should you require any additional information.
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 Anna Fairclough
Representative Mike Kelly
Representative Neal Foster
Representative Woodie Salmon

Representative Alan Austerman
Representative Reggie Joule
Representative Mike Doogan
Representative Les Gara
Representative Mike Chenault

STATE CAPITOL
PO Box 110001
Juneau, Alaska 99811-0001
907-465-3500
fax: 907-465-3532



550 West 7th Avenue #1700
Anchorage, Alaska 99501
907-269-7450
fax 907-269-7463
www.gov.alaska.gov
Governor@alaska.gov

Governor Sean Parnell
STATE OF ALASKA

January 15, 2010

The Honorable Gary Stevens
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear President Stevens,

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.

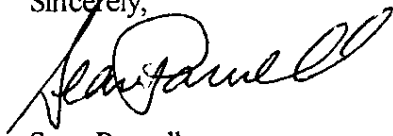
Sex offenders and child kidnappers required to register elsewhere should not be able to move to Alaska and avoid registration. The bill will make it mandatory for a registered sex offender or child kidnapper from another state to register in Alaska when the intention is to live in Alaska. This would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

The Honorable Gary Stevens
January 15, 2010
Page 2

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 black ink, appearing to read "Sean Parnell", written in a cursive style.

Sean Parnell
Governor

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL,
GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Physical: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

26-GS2859\S

SENATE BILL 222
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. Although the proposal is similar to current law, it removes the requirement that the state prove a culpable mental state for the conduct of not registering or otherwise filing the required notices and information. The state would still be required to prove that the person knew he or she was required to register and failed to do so. 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 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 touchings 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.

Section 5 amends the definition of the crime of distribution of child pornography so that the crime of distribution is more clearly linked to the definition of child pornography in AS 11.61.127.

Sections 6, 7 and 8 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 also proposes an affirmative defense 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.

Sections 9 and 10 amend the crime that prohibits the electronic distribution of indecent material to minors by expanding the offense to prohibit any distribution of indecent material to minors. The section adds an element requiring proof that the indecent material is harmful to minors.

Section 11 increases the penalty for distribution of indecent materials to minors to a class B felony if the offender was required to register as a sex offender at the time of the offense.

Section 12 defines the meaning of "harmful to minors". The definition reflects the contemporary law pertaining to the type of pornography which a state may regulate.

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 in the second degree under AS 11.41.436(a)(2) (a person 16 years of age or older having sexual contact with a child under 13 years old), if the defendant is 18 years old or older.

Section 17 amends the definition of sex offenses under AS 12.63.100 to include individuals who are convicted of harassment under AS 11.61.118(a)(2) and have previously convicted of that offense.

Section 18 amends AS 12.62.130, which requires criminal justice agencies to report crime data to the department of public safety to include the mandatory requirement that at a minimum the agencies must report data pertaining to sex offenses, or face possible loss of funding the agencies receive from the department.

Section 19 grants the Attorney General the power to issue subpoenas in connection with investigations of crimes relating to the exploitation or attempted exploitation of children. Upon a showing of reasonable cause to believe that an Internet service account was used in these crimes, the Attorney General would be authorized to issue a subpoena requiring the Internet service provider to disclose the name and address of the account holder and the length of service used by the account.

Section 20 amends Rule 16(b)(1)(A) by prohibiting the copying of child pornography as part of the discovery process in a criminal prosecution. It would allow defense counsel, the defendant, and defense experts to examine the material, but it must be kept in the custody and control of a law enforcement agency or the prosecuting authority. Federal law has a similar provision. 18 U.S.C.A. § 3509(m).

Section 21 adds a new section to the uncodified law of the State of Alaska, providing a statement of legislative intent regarding the applicable culpable mental state for the crime of failure to register as a sex offender.

Sections 22 and 23 include the applicability and effective date provisions.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL,
GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Physical: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

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THE MEDIA COALITION INC

275 SEVENTH AVENUE • 15TH FLOOR • NEW YORK, NEW YORK 10001
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
Executive Director

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Consumers
Association

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Independent Book
Publishers Association

Motion Picture Association
of America, Inc.

National Association of
Recording Merchandisers

Recording Industry
Association of America, Inc.

Chair
Chris Finan
*American Booksellers
Foundation for Free
Expression*

Immediate Past Chair
Sean Devlin Bersell
*Entertainment Merchants
Association*

Treasurer
Sally Jefferson
*Entertainment Software
Association*

General Counsel
Michael A. Bamberger
*Sonnenschein Nath &
Rosenthal LLP*

April 12, 2010

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

Delivered by email

Re: Constitutional concerns regarding Section 8 of Senate Bill 222

Dear Representatives Hawker and Stoltze,

The members of Media Coalition believe that S.B. 222 is a substantial improvement on AS 11.61.128(a), which Section 8 would amend, and goes a long way toward curing the constitutional problems in the existing law. However, we still believe that Section 8's application to the Internet must be narrowed or it will violate the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations who comprise Media Coalition have many members throughout the country, including Alaska: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Section 8 of S.B. 222 would narrow AS 11.61.128(a) to only criminalize the distribution of material "harmful to minors" by an adult to anyone under 16 years old or someone the adult believes is under 16 years old, but it broadens the existing law to apply to non-electronic distribution. Presently, 11.61.128(a) applies only to electronic distribution but to a much broader range of sexually explicit content. "Harmful to minors" is defined in Section 11 as a three-prong test that adheres to Supreme Court decisions in this area.

Limiting the material subject to prosecution in 128(a) to speech "harmful to minors" is an essential change to 11.61.128(a). In *Ginsberg v. New York*, 390 U.S. 629 (1968) (as subsequently modified by *Miller v. California*, 413 U.S. 15 (1973)), the Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. Material that does not meet that test is legal for minors and the government cannot ban it as to them.

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers and consumers in the United States.

Even if 128(a) is limited to material "harmful to minors," the application of the restriction to material generally available on the Internet and on listserves that allow open subscriptions is almost certainly unconstitutional. Imposing this restriction to speech generally available on the Internet treats this material as if there were no difference between a web site or blog and a book, video, or video game store. Cyberspace is not like a brick and mortar retailer. There is no way to know whether the person receiving the "harmful" material is a minor or an adult. As a result, the effect of banning the computer dissemination of material "harmful to minors" is to force a content provider, whether a publisher or an on-line carrier, to risk prosecution or deny or restrict access to both minors and adults, depriving adults of their First Amendment rights.

There is a substantial body of case law that establishes this principle. A very similar federal law and seven state laws have been found unconstitutional. *See Mukasey v. ACLU*, 534 F.2d 181 (3d Cir. 2008), cert. den. 129 Sup. Ct. 1032 (2009); *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2d Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D.S.C. 2003); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). At issue in *Mukasey* was a federal law that barred dissemination to minors of material harmful to minors by commercial sites on the World Wide Web. The second time the case was before the Supreme Court (then *Ashcroft v. ACLU*), Justice Kennedy, writing for the majority, sent the case back to the U.S. District Court to determine if there were less restrictive means to protect minors from such material than a broad law that restricts the rights of adults. The district court ruled that the law was overbroad and that there are less restrictive and more effective means to protect minors from sexual content without infringing on adults. The Third Circuit upheld that ruling and the Supreme Court declined to hear the case a third time. We are happy to provide the opinions in these cases if they would be helpful.

We believe that small changes to the bill would cure the constitutional problems in Section 8 while still providing law enforcement with the means to protect minors from adults looking to prey on them. The present version of Section 8 can be amended to avoid these constitutional weaknesses by limiting the law to speech by an adult communicated directly to a specific person either known or believed to be a minor.

The present version of Section 8 (1) could be amended to read (changes are in bold):

- (1) the person, being 18 years of age or older, **knowing the character and content of the material**, knowingly and intentionally distributes to a **specific other** person any material that depicts the following actual or simulated conduct:

The first change tracks settled case law that a retailer or web site owner cannot be convicted if they are not aware of the nature of the content distributed to a minor. This is a concern both for a web site owner who may not be aware of everything on a site if others can post to the site and brick and mortar bookstore owners who stock hundred or thousands of new books each week and cannot peruse each book for potentially illegal contents. The content of some books is obvious,

but for many it is not. The second change protects web sites that intend to communicate with adults but are aware that minors can access the site because there is no way to keep them out. The third change limits the law to speech sent to a specific minor rather than speech posted generally on web sites, to an open listserve or a site like Twitter that is a hybrid of the two. Again, without these changes, Section 8 likely violates the First Amendment as overbroad.

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In the successful challenges to other such state laws plaintiffs have received as much as \$450,000 in legal fees.

We appreciate the opportunity to share our concerns with the Finance Committee. If you would like to discuss further our position on this bill, please contact me at 212-587-4025 #11 or at horowitz@mediacoalition.org. We welcome the opportunity to work with the Committee to amend Section 8.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

cc: Representative Thomas, Vice-Chair
Representative Austerman
Representative Cheneault
Representative Crawford
Representative Fairclough
Representative Gara
Representative Joule
Representative Kelly
Representative Salmon