

**SB**

**218**

<TARGET><BILL>SB 218</BILL><SUBJECT>SB  
218</SUBJECT><COMM>SJUD27</COMM></TARGET>

# Alaska State Legislature

**Senator Hollis French, Chair**  
State Capitol, Room 417  
Juneau, Alaska 99801  
Phone: (907) 465-3892  
Fax: (907) 465-6595



**Committee Members:**  
Senator Bill Wielechowski  
Senator Lesil McGuire  
Senator Joe Paskvan  
Senator John Coghill

## Senate Judiciary Committee

### Sectional Analysis: CSSB 218 Version B

**Sections 1 through 16** amend the theft provisions in statute to increase the financial trigger amounts for 2<sup>nd</sup> degree theft, 3<sup>rd</sup> degree theft, 4<sup>th</sup> degree theft, concealment of merchandise, removal of identification marks, issuance of bad checks, fraudulent use of an access device, vehicle theft, property damage (criminal mischief), criminal simulation, misapplication of property, and defrauding creditors.

**Section 17** amends the crime of distribution of indecent materials to minors, in response to a recent decision by a federal district court judge. In response to the decision that the law is overbroad, the bill will require that the state prove the defendant intentionally distributed or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

**Section 18** clarifies in statute that in order for a person to be found guilty but mentally ill (GBMI), the fact finder must determine by proof beyond a reasonable doubt that when the defendant committed the crime he or she was guilty but mentally ill. This change is required by the decisions of the United States Supreme Court in *Apprendi v. New Jersey* and *Blakely v. Washington*, holding that the Sixth Amendment right to a jury trial requires that a factual finding that would increase the statutory maximum penalty for an offense must be submitted to a jury and proven beyond a reasonable doubt.

The court of appeals has said that a person who is found guilty but mentally ill does not qualify for parole release, including mandatory parole, until the person no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public. Because a person who is found GBMI may not qualify for mandatory parole, the factual decisions addressing whether the defendant is GBMI must be submitted to a jury (unless the defendant waives this requirement) and proven beyond a reasonable doubt.

**Section 19:** Under current law the defense, the prosecution, or the court may raise the question after a guilty verdict, of whether the defendant is guilty but mentally ill. This is possible if the issue has not been raised in the trial. The procedure for addressing this issue needs to be changed to reflect the constitutional requirements articulated in *Apprendi* and *Blakely*. **Section 19** makes these changes. It also adopts a procedure for giving notice 10 days before trial if the party intends to raise the issue after trial.

**Section 20** clarifies that the jury must determine whether the defendant is guilty but mentally ill, unless the right is waived by the defendant. The court then determines the sentence.

**Section 21** allows the testimony of a witness in a hearing addressing the competency of a defendant charged with a crime to be given by way of contemporaneous two-way video conference.

**Section 22** is amended to recognize that current law has other provisions that require a different standard of proof in addition to those specified in the current statute.

**Sections 23 and 24** add provisions to ensure that neither the prosecuting authority nor the defendant can, without mutual agreement, change the terms of a Rule 11, Alaska Rules of Criminal Procedure, agreement after it has been imposed. If a defendant, as part of a plea agreement under Rule 11, agrees to a particular period of probation the court may not, without the consent of the prosecution, reduce the period of probation. This has the effect of overruling the decision in *State v. Henry*, 240 P. 3d 846 (Alaska App. 2010). Judges, in sentencing a person who has violated a condition of probation, must still apply the *Chaney* criteria in deciding how much, if any, of the suspended period of incarceration should be imposed. However, the court may not reduce the period of probation or the period of suspended time (less the time imposed for the probation violation) without the agreement of the prosecuting authority.

**Section 25** amends the sentencing law for murder in the first degree to change the burden of proof that the defendant subjected the victim to substantial physical torture or that the defendant was a peace officer who used the officer's authority to facilitate the murder. The current statute provides for a clear and convincing burden on the prosecution. Under the *Apprendi* and *Blakely* decisions, the state must prove these factors beyond a reasonable doubt to the jury.

**Section 26** clarifies in statute that if a sentence is imposed on a defendant that would preclude the person from receiving good time, for example a person who has been convicted of the first degree murder of a peace officer, the jury (unless waived by the defendant) must determine the factual issue, in this example, that the victim was a peace officer, beyond a reasonable doubt. Additionally, if a court is sentencing a person who is subject to a presumptive range and the prosecution seeks to increase the range by proof of certain aggravating factors, the jury (unless waived) must determine the factual issue by proof beyond a reasonable doubt.

**Section 27** includes guidance to the court in finding the aggravating factor that the defendant's conduct was the most serious in the definition of the offense. AS 12.55.155(c)(10). First, it provides that the jury must determine the facts supporting an allegation that the defendant's conduct was the most serious in the definition of the offense. Because finding a factor in aggravation allows the court to impose a higher term of imprisonment than the presumptive range, the finding by the jury (unless waived) is required by the *Apprendi/Blakely* decisions. After the jury makes this factual determination, the court then makes the legal decision that the factual decision justifies an increase in sentence because the conduct is the most serious in the definition of the offense. The crime of theft provides a good illustration of this. Theft in the second degree, a class C felony, prohibits a person from committing theft of property valued between \$500 and \$25,000. The maximum term for a class C felony is five years incarceration; the presumptive range is zero to two years for a first felony offense. If the jury finds that the defendant stole an amount close to \$25,000, the court may then consider this conduct as the most serious in the definition of second degree theft.

**Section 27** also codifies court decisions that clarify that once a factor in aggravation has been decided as required in *Apprendi/Blakely*, other factors in aggravation may be considered without a factual

determination beyond a reasonable doubt by the jury. Once one factor in aggravation is decided, the judge may sentence a person up to the maximum term; thus additional factors do not raise the maximum term. *Reandea v. State*, 265 P.3d 1045 (Alaska App. 2011).

**Sections 28 and 29** are conforming amendments to Sections 23 and 24.

**Section 30** adds to Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow testimony if the parties agree to its use or if the court finds it necessary under specific circumstances.

**Section 31** provides additional indirect Court Rule amendments on the same topic.

**Sections 32 – 34** include applicability provisions, conditional effect of the court rule change, and the effective date, July 1, 2012.

**CS FOR SENATE BILL NO. 218(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:  
Referred:

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

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to property crimes; relating to the crime of distribution of indecent  
2 material to minors; relating to testimony by video conference; relating to persons found  
3 guilty but mentally ill; relating to sentencing procedures; relating to probation; relating  
4 to procedures for finding aggravating factors at sentencing; amending Rules 32.1 and  
5 38.2, Alaska Rules of Criminal Procedure; adding Rule 38.3, Alaska Rules of Criminal  
6 Procedure; and providing for an effective date."

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

8 \* **Section 1.** AS 11.46.130(a) is amended to read:

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

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

13 (2) the property is a firearm or explosive;

- 1 (3) the property is taken from the person of another;
- 2 (4) the property is taken from a vessel and is vessel safety or survival  
3 equipment;
- 4 (5) the property is taken from an aircraft and the property is aircraft  
5 safety or survival equipment;
- 6 (6) the value of the property is \$250 [\$50] or more but less than \$1,500  
7 [\$500] and, within the preceding five years, the person has been convicted and  
8 sentenced on two or more separate occasions in this or another jurisdiction of
- 9 (A) an offense under AS 11.46.120, or an offense under  
10 another law or ordinance with similar elements;
- 11 (B) a crime set out in this subsection or an offense under  
12 another law or ordinance with similar elements;
- 13 (C) an offense under AS 11.46.140(a)(1), or an offense under  
14 another law or ordinance with similar elements; or
- 15 (D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an  
16 offense under another law or ordinance with similar elements; or
- 17 (7) the property is an access device.

18 \* **Sec. 2.** AS 11.46.140(a) is amended to read:

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

21 (1) the value of the property or services is \$250 [\$50] or more but less  
22 than \$1,500 [\$500]; or

23 (2) [REPEALED

24 (3)] the value of the property is less than \$250 [\$50] and, within the  
25 past five years, the person has been convicted and sentenced on two or more separate  
26 occasions in this or another jurisdiction of theft or concealment of merchandise, or an  
27 offense under another law or ordinance with similar elements.

28 \* **Sec. 3.** AS 11.46.150(a) is amended to read:

29 (a) A person commits the crime of theft in the fourth degree if the person  
30 commits theft as defined in AS 11.46.100 and the value of the property or services is  
31 less than \$250 [\$50].

1 \* **Sec. 4.** AS 11.46.220(c) is amended to read:

2 (c) Concealment of merchandise is

3 (1) a class C felony if

4 (A) the merchandise is a firearm;

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

6 (C) the value of the merchandise is \$250 [\$50] or more but less  
7 than \$1,500 [\$500] and, within the preceding five years, the person has been  
8 convicted and sentenced on two or more separate occasions in this or another  
9 jurisdiction of

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

13 (ii) an offense under AS 11.46.120, 11.46.130, or  
14 11.46.140(a)(1), or an offense under another law or ordinance with  
15 similar elements;

16 (2) a class A misdemeanor if

17 (A) the value of the merchandise is \$250 [\$50] or more but less  
18 than \$1,500 [\$500]; or

19 (B) the value of the merchandise is less than \$250 [\$50] and,  
20 within the preceding five years, the person has been convicted and sentenced  
21 on two or more separate occasions of the offense of concealment of  
22 merchandise or theft in any degree, or an offense under another law or  
23 ordinance with similar elements;

24 (3) a class B misdemeanor if the value of the merchandise is less than  
25 \$250 [\$50].

26 \* **Sec. 5.** AS 11.46.260(b) is amended to read:

27 (b) Removal of identification marks is

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

30 (2) a class A misdemeanor if the value of the property on which the  
31 serial number or identification mark appeared is \$250 [\$50] or more but less than

1           \$1,500 [\$500];

2                           (3) a class B misdemeanor if the value of the property on which the  
3           serial number or identification mark appeared is less than \$250 [\$50].

4   \* **Sec. 6.** AS 11.46.270(b) is amended to read:

5           (b) Unlawful possession is

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

8                           (2) a class A misdemeanor if the value of the property on which the  
9           serial number or identification mark appeared is \$250 [\$50] or more but less than  
10          \$1,500 [\$500];

11                          (3) a class B misdemeanor if the value of the property on which the  
12          serial number or identification mark appeared is less than \$250 [\$50].

13   \* **Sec. 7.** AS 11.46.280(d) is amended to read:

14           (d) Issuing a bad check is

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

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

18                          (3) a class A misdemeanor if the face amount of the check is \$250  
19          [\$50] or more but less than \$1,500 [\$500];

20                          (4) a class B misdemeanor if the face amount of the check is less than  
21          \$250 [\$50].

22   \* **Sec. 8.** AS 11.46.285(b) is amended to read:

23           (b) Fraudulent use of an access device is

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

26                          (2) a class C felony if the value of the property or services obtained is  
27          \$1,500 [\$50] or more but less than \$25,000;

28                          (3) a class A misdemeanor if the value of the property or services  
29          obtained is less than \$1,500 [\$50].

30   \* **Sec. 9.** AS 11.46.295 is amended to read:

31           **Sec. 11.46.295. Prior convictions.** For purposes of considering prior

1 convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or  
2 11.46.140(a)(2) [11.46.140(a)(3)], or in prosecuting the crime of concealment of  
3 merchandise under AS 11.46.220(c), a conviction for an offense under another law or  
4 ordinance with similar elements is a conviction of an offense having elements similar  
5 to those of an offense defined as such under Alaska law at the time the offense was  
6 committed. The court shall consider the date of a prior conviction as occurring on the  
7 date that sentence is imposed for the prior offense.

8 \* **Sec. 10.** AS 11.46.360(a) is amended to read:

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

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

14 (2) the propelled vehicle of another and

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

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

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

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

23 (4) the propelled vehicle of another and, within the preceding seven  
24 years, the person was convicted under

25 (A) this section or AS 11.46.365;

26 (B) former AS 11.46.482(a)(4) or (5);

27 (C) former AS 11.46.484(a)(2);

28 (D) AS 11.46.120 - 11.46.140 of an offense involving the theft  
29 of a propelled vehicle; or

30 (E) a law or ordinance of this or another jurisdiction with  
31 elements substantially similar to those of an offense described in (A) - (D) of

1 this paragraph.

2 \* **Sec. 11.** AS 11.46.482(a) is amended to read:

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

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

8 (2) the person recklessly creates a risk of damage in an amount  
9 exceeding \$100,000 to property of another by the use of widely dangerous means; or

10 (3) the person knowingly

11 (A) defaces, damages, or desecrates a cemetery or the contents  
12 of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,  
13 grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or  
14 memorial appears to be abandoned, lost, or neglected;

15 (B) removes human remains or associated burial artifacts from  
16 a cemetery, tomb, grave, or memorial regardless of whether the cemetery,  
17 tomb, grave, or memorial appears to be abandoned, lost, or neglected.

18 \* **Sec. 12.** AS 11.46.484(a) is amended to read:

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

22 (1) with intent to damage property of another, the person damages  
23 property of another in an amount of \$250 [\$50] or more but less than \$1,500 [\$500];

24 (2) the person tampers with a fire protection device in a building that is  
25 a public place;

26 (3) the person knowingly accesses a computer, computer system,  
27 computer program, computer network, or part of a computer system or network;

28 (4) the person uses a device to descramble an electronic signal that has  
29 been scrambled to prevent unauthorized receipt or viewing of the signal unless the  
30 device is used only to descramble signals received directly from a satellite or unless  
31 the person owned the device before September 18, 1984; or

1 (5) the person knowingly removes, relocates, defaces, alters, obscures,  
2 shoots at, destroys, or otherwise tampers with an official traffic control device or  
3 damages the work upon a highway under construction.

4 \* **Sec. 13.** AS 11.46.486(a) is amended to read:

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

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

11 (2) with intent to damage property of another, the person damages  
12 property of another in an amount less than \$250 [\$50]; or

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

15 \* **Sec. 14.** AS 11.46.530(b) is amended to read:

16 (b) Criminal simulation is

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

19 (2) a class A misdemeanor if the value of what the object purports to  
20 represent is \$250 [\$50] or more but less than \$1,500 [\$500];

21 (3) a class B misdemeanor if the value of what the object purports to  
22 represent is less than \$250 [\$50].

23 \* **Sec. 15.** AS 11.46.620(d) is amended to read:

24 (d) Misapplication of property is

25 (1) a class C felony if the value of the property misapplied is \$1,500  
26 [\$500] or more;

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

29 \* **Sec. 16.** AS 11.46.730(c) is amended to read:

30 (c) Defrauding creditors is a class A misdemeanor unless that secured party,  
31 judgment creditor, or creditor incurs a pecuniary loss of \$1,500 [\$500] or more as a

1 result to the defendant's conduct, in which case defrauding secured creditors is

2 (1) a class B felony if the loss is \$25,000 or more;

3 (2) a class C felony if the loss is \$1,500 [\$500] or more but less than  
4 \$25,000.

5 \* Sec. 17. AS 11.61.128(a) is amended to read:

6 (a) A person commits the crime of distribution of indecent material to minors  
7 if

8 (1) the person, being 18 years of age or older, intentionally  
9 [KNOWINGLY] distributes or possesses with intent to distribute any material  
10 described in (2) and (3) of this subsection to either

11 (A) a child that the person knows is under 16 years of age;

12 or

13 (B) another person that the person believes is a child under  
14 16 years of age;

15 (2) the person knows that the material [TO ANOTHER PERSON  
16 ANY MATERIAL THAT] depicts the following actual or simulated conduct:

17 (A) sexual penetration;

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

20 (C) masturbation;

21 (D) bestiality;

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

24 (F) sexual masochism or sadism; and

25 (3) [(2)] the material is harmful to minors [; AND

26 (3) EITHER

27 (A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS  
28 OF AGE; OR

29 (B) THE PERSON BELIEVES THAT THE OTHER PERSON  
30 IS A CHILD UNDER 16 YEARS OF AGE].

31 \* Sec. 18. AS 12.47.040(b) is amended to read:

1 (b) To return a verdict under (a)(4) of this section, the **fact finder** [JURY]  
2 must find beyond a reasonable doubt that the defendant committed the crime and  
3 [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant  
4 committed the crime, the defendant was guilty but mentally ill as defined in  
5 AS 12.47.030.

6 \* **Sec. 19.** AS 12.47.060(a) is amended to read:

7 (a) In a prosecution for a crime when the affirmative defense of insanity is not  
8 raised and when evidence of mental disease or defect of the defendant is not admitted  
9 at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A  
10 CRIME,] the defendant **or** [,] the prosecuting attorney [, OR THE COURT ON ITS  
11 OWN MOTION] may raise the issue of whether the defendant is guilty but mentally  
12 ill. **A party that seeks a post-conviction determination of guilty but mentally ill**  
13 **must give notice 10 days before trial of intent to do so; however, this deadline is**  
14 **waived if the opposing party presents evidence or argument at trial tending to**  
15 **show that the defendant may be guilty but mentally ill.** A hearing must be held on  
16 this issue [AT OR] before the **same fact finder that returned the verdict of guilty**  
17 **under procedures set by the court. In cases decided by a jury, at the request of**  
18 **the defendant and with the concurrence of the prosecuting attorney, the court**  
19 **may decide the issue. A waiver of consideration by a jury must be in writing and**  
20 **in person before the court** [SENTENCING HEARING]. At the hearing, the **fact**  
21 **finder** [COURT] shall determine whether the defendant has been shown to be guilty  
22 but mentally ill **beyond a reasonable doubt, considering** [BY A  
23 PREPONDERANCE OF THE] evidence presented at the hearing and any evidence  
24 relevant to the issue that was presented at trial.

25 \* **Sec. 20.** AS 12.47.060(b) is amended to read:

26 (b) If the **fact finder** [COURT] finds that a defendant is guilty but mentally  
27 ill, **the court** [IT] shall sentence the defendant as provided by law and shall enter the  
28 finding of guilty but mentally ill as part of the judgment.

29 \* **Sec. 21.** AS 12.47.100 is amended by adding a new subsection to read:

30 (h) In a hearing to determine competency under this section, the court may  
31 allow a witness, including the psychiatrist or psychologist who examined the

1 defendant, to testify concerning the competency of the defendant by contemporaneous  
2 two-way video conference if the witness lives in a place from which people  
3 customarily travel by air to the court and the procedure allows the parties a fair  
4 opportunity to examine the witness. The video conference technician shall be the only  
5 person in the presence of the witness unless the court, in its discretion, determines that  
6 another person may be present. Any person present with the witness must be identified  
7 on the record. In this subsection, "contemporaneous two-way video conference"

8 (1) means a conference among people at different places by means of  
9 transmitted audio and video signals;

10 (2) includes all communication technologies that allow people at two  
11 or more places to interact by two-way video and audio transmissions simultaneously.

12 \* **Sec. 22.** AS 12.55.025(i) is amended to read:

13 (i) Except as otherwise provided in this chapter [BY AS 12.55.125(a)(3),  
14 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence  
15 standard of proof applies to sentencing proceedings.

16 \* **Sec. 23.** AS 12.55.090(b) is amended to read:

17 (b) Except as otherwise provided in (f) of this section, the [THE] court may  
18 revoke or modify any condition of probation [,] or may change the period of  
19 probation.

20 \* **Sec. 24.** AS 12.55.090 is amended by adding a new subsection to read:

21 (f) Unless the defendant and the prosecuting authority agree at the probation  
22 revocation proceeding or other proceeding, the court may not reduce the specific  
23 period of probation, or the specific term of suspended incarceration except by the  
24 amount of incarceration imposed for a probation violation, if

25 (1) the sentence was imposed in accordance with a plea agreement  
26 under Rule 11, Alaska Rules of Criminal Procedure; and

27 (2) the agreement required a specific period of probation or a specific  
28 term of suspended incarceration.

29 \* **Sec. 25.** AS 12.55.125(a) is amended to read:

30 (a) A defendant convicted of murder in the first degree or murder of an unborn  
31 child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment

1 of at least 20 years but not more than 99 years. A defendant convicted of murder in the  
2 first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

3 (1) the defendant is convicted of the murder of a uniformed or  
4 otherwise clearly identified peace officer, firefighter, or correctional employee who  
5 was engaged in the performance of official duties at the time of the murder;

6 (2) the defendant has been previously convicted of

7 (A) murder in the first degree under AS 11.41.100 or former  
8 AS 11.15.010 or 11.15.020;

9 (B) murder in the second degree under AS 11.41.110 or former  
10 AS 11.15.030; or

11 (C) homicide under the laws of another jurisdiction when the  
12 offense of which the defendant was convicted contains elements similar to first  
13 degree murder under AS 11.41.100 or second degree murder under  
14 AS 11.41.110;

15 (3) [THE COURT FINDS BY CLEAR AND CONVINCING  
16 EVIDENCE THAT] the defendant subjected the murder victim to substantial physical  
17 torture;

18 (4) the defendant is convicted of the murder of and personally caused  
19 the death of a person, other than a participant, during a robbery; or

20 (5) [THE COURT FINDS BY CLEAR AND CONVINCING  
21 EVIDENCE THAT] the defendant is a peace officer who used the officer's authority  
22 as a peace officer to facilitate the murder.

23 \* **Sec. 26.** AS 12.55.125 is amended by adding a new subsection to read:

24 (p) If the state seeks either (1) the imposition of a sentence under (a) of this  
25 section that would preclude the defendant from being awarded a good time deduction  
26 under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish  
27 a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4),  
28 (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be  
29 decided shall be presented to a trial jury and proven beyond a reasonable doubt under  
30 procedures set by the court, unless the defendant waives trial by jury and either  
31 stipulates to the existence of the fact or consents to have the fact proven to the court

1 sitting without a jury. Written notice of the intent to establish a fact under this  
2 subsection must be served on the defendant and filed with the court as provided for  
3 notice under AS 12.55.155(f)(2).

4 \* **Sec. 27.** AS 12.55.155 is amended by adding new subsections to read:

5 (i) If the state seeks to establish a factor in aggravation at sentencing under  
6 (c)(10) of this section,

7 (1) the assessment of the facts underlying the state's allegation that the  
8 defendant's conduct was among the most serious included in the definition of the  
9 offense shall be made by the trial jury under procedures set by the court and as  
10 provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates  
11 to the existence of the aggravating factor or to the facts alleged by the state, or  
12 consents to have the assessment proved under procedures set out in (f)(1) of this  
13 section; factual assertions underlying the state's allegation that the defendant's conduct  
14 was among the most serious included in the definition of the offense must be proved  
15 beyond a reasonable doubt;

16 (2) the legal decision concerning whether the defendant's conduct  
17 determined under (1) of this subsection was among the most serious included in the  
18 definition of the offense shall be made by the court under procedures set out in (f)(1)  
19 of this section.

20 (j) If one of the aggravating factors in (c) of this section is established as  
21 provided in (f)(1) and (2) of this section, the court may increase the term of  
22 imprisonment up to the maximum term of imprisonment. Any additional aggravating  
23 factor may then be established by clear and convincing evidence by the court sitting  
24 without a jury, including an aggravating factor that the jury has found not to have been  
25 established beyond a reasonable doubt.

26 \* **Sec. 28.** AS 33.05.050 is amended to read:

27 **Sec. 33.05.050. Report of probation officer.** When directed by the court, the  
28 probation officer shall report to the court [,] with a statement of the conduct of the  
29 probationer while on probation. Except as otherwise provided by law, the [THE]  
30 court may then discharge the probationer from further supervision and may terminate  
31 the proceedings against the probationer, or may extend the probation, as shall seem

1       advisable.

2       \* **Sec. 29.** AS 33.05.070(b) is amended to read:

3               (b) As speedily as possible after arrest, the probationer shall be taken before  
4       the court for the district having jurisdiction over the probationer. **Except as provided**  
5       **in AS 12.55.090(f)**, [THEREUPON] the court may revoke the probation and require  
6       the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if  
7       imposition of sentence was suspended, may impose any sentence **that** [WHICH]  
8       might originally have been imposed, subject to the limitation specified in  
9       AS 12.55.086(c).

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

12               DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal  
13       Procedure are amended by adding a new section to read:

14               **Rule 38.3. Video Conference Testimony.** (a) **In General.** In every trial, the  
15       testimony of witnesses shall be taken in open court, unless otherwise provided by  
16       statute or rule.

17               (b) **Testimony by Video Conference.** The parties may agree to take  
18       testimony from a witness at trial by contemporaneous two-way video conference  
19       presented in open court. Absent the parties' agreement, the court may authorize the  
20       contemporaneous two-way video conference testimony of a witness if

21                       (1) the requesting party establishes that testimony by two-way video  
22       conference is necessary to further an important public policy;

23                       (2) the requesting party establishes that the witness is unavailable; and

24                       (3) the testimony is given under oath and subject to cross-examination.

25               (c) **Procedures for Taking Video Conference Testimony.** If the trial court  
26       authorizes video conference testimony under (b) of this rule, it shall determine the  
27       procedures for taking the contemporaneous two-way video conference testimony. The  
28       parties, the court, the trier of fact, and the public must be able to see and hear the  
29       witness; and the witness must see and hear the courtroom proceedings, including the  
30       defendant, as if the witness were sitting in the courtroom's witness stand. The persons  
31       who are present with the witness must be identified. The parties may move to exclude

1 any person other than the video conference technician from the witness's presence; the  
2 court, in its discretion, may exclude a person other than the video conference  
3 technician from the presence of the witness.

4 (d) **Definitions.**

5 (1) **Contemporaneous Two-Way Video Conference.** Contemporaneous  
6 two-way video conference means a conference among people at different places by  
7 means of transmitted audio and video signals. It includes all communication  
8 technologies that allow two or more places to interact by two-way video and audio  
9 transmissions simultaneously.

10 (2) **Unavailable.** In this rule, a witness is unavailable if

11 (A) by clear and convincing evidence the court finds under  
12 Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska  
13 Rules of Criminal Procedure, that the witness is unavailable; or

14 (B) the parties agree that the witness is unavailable.

15 \* **Sec. 31.** The uncoded law of the State of Alaska is amended by adding a new section to  
16 read:

17 **INDIRECT COURT RULE AMENDMENT.** (a) AS 12.55.125(p), enacted by sec. 26  
18 of this Act, and AS 12.55.155(i) and (j), enacted by sec. 27 of this Act, have the effect of  
19 changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for  
20 sentencing persons convicted of certain crimes.

21 (b) AS 12.47.100, as amended by sec. 21 of this Act, has the effect of changing Rule  
22 38.2, Alaska Rules of Criminal Procedure, by providing procedures for televised appearance  
23 by witnesses in certain proceedings.

24 \* **Sec. 32.** The uncoded law of the State of Alaska is amended by adding a new section to  
25 read:

26 **APPLICABILITY.** (a) Sections 1 - 17, 23, and 24 of this Act apply to offenses  
27 committed on or after the effective date of this Act.

28 (b) Sections 18 - 22 and 25 - 31 of this Act apply to proceedings occurring on or after  
29 the effective date of this Act for offenses occurring before, on, or after the effective date of  
30 this Act.

31 \* **Sec. 33.** The uncoded law of the State of Alaska is amended by adding a new section to

1 read:

2           CONDITIONAL EFFECT. (a) Sections 26 and 27 of this Act take effect only if sec.  
3 31(a) of this Act receives the two-thirds majority vote of each house required by art. IV, sec.  
4 15, Constitution of the State of Alaska.

5           (b) Section 21 of this Act takes effect only if sec. 31(b) of this Act receives the two-  
6 thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of  
7 Alaska.

8       \* **Sec. 34.** This Act takes effect July 1, 2012.

# Alaska State Legislature

**Senator Hollis French, Chair**  
State Capitol, Room 417  
Juneau, Alaska 99801  
Phone: (907) 465-3892  
Fax: (907) 465-6595



**Committee Members:**  
Senator Bill Wielechowski  
Senator Lesil McGuire  
Senator Joe Paskvan  
Senator John Coghill

## Senate Judiciary Committee

### MEMORANDUM

March 21, 2012

TO: Leg Legal

FROM: Cindy Smith 465-6641

RE: CSSB 218 (GS2627\M)

Please make the following amendments to CSSB 218 version M.

1. Delete sections 18 and 19.
2. Amend Section 17 with attached language (27.M.2)
3. Amend Section 23 with attached language (27.G.2.A)
4. In section 32, at line 25, insert the words "at trial" after the word "witness"
5. On Page 14, under (d) (2) , delete (B).

**AMENDMENT**

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

1 Page 4, lines 9 - 10:

2 Delete "material is [TO ANOTHER PERSON ANY] material that the person  
3 knows"

4 Insert "person knows that the material [TO ANOTHER PERSON ANY  
5 MATERIAL THAT]"

AMENDMENT

OFFERED IN THE HOUSE JUDICIARY  
COMMITTEE  
TO: HB 359

BY \_\_\_\_\_

1 Page 8, lines 21 - 22, following "witness":

2 Delete "would be required to travel more than 50 miles to the court or"

3

4 Page 8, line 23, following "court":

5 Insert "; and the procedure allows the parties a fair opportunity to examine the witness.

6 The video conference technician shall be the only person in the presence of the witness unless  
7 the court, in its discretion, determines that another person may be present. Any person present  
8 with the witness must be identified on the record"

Court Appeals. allowed  
resumed textit.

(1) delete sections

18, 19

(2) + amend CH 2627/m. 2  
to sec. 17.

(3) amend section 23  
w/ 27 G. 2. A

(4) ~~sect 32~~ line 25  
two lines -  
"at that" after witness  
D. 27 G. 2. A

(5) new definition

21  
Biggs v. State

(1)

trial judge - order  
to compel  
~~to~~

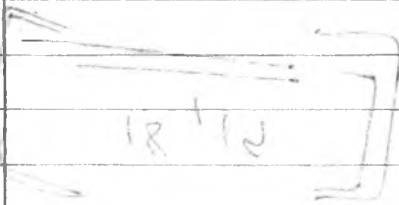
(2)

U.S. v. ...

(3)

to ...

(4)



200000 ...

to ...

SR 219

(B) by clear and convincing evidence the court finds that under the particular circumstances of the case, the witness is unable to testify in the court room.

27-GS2627M  
Gardner  
3/17/12

**CS FOR SENATE BILL NO. 218(JUD)**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Offered:**  
**Referred:**

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

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to property crimes; relating to the crime of distribution of indecent**  
2 **material to minors; relating to testimony by video conference; relating to persons found**  
3 **guilty but mentally ill; relating to sentencing procedures; relating to probation; relating**  
4 **to procedures for finding aggravating factors at sentencing; amending Rule 32.1, Alaska**  
5 **Rules of Criminal Procedure; adding Rule 38.3, Alaska Rules of Criminal Procedure;**  
6 **and providing for an effective date."**

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

8 **\* Section 1. AS 11.46.130(a) is amended to read:**

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

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

13 (2) the property is a firearm or explosive;

- 1 (3) the property is taken from the person of another;
- 2 (4) the property is taken from a vessel and is vessel safety or survival  
3 equipment;
- 4 (5) the property is taken from an aircraft and the property is aircraft  
5 safety or survival equipment;
- 6 (6) the value of the property is \$250 [\$50] or more but less than \$1,500  
7 [\$500] and, within the preceding five years, the person has been convicted and  
8 sentenced on two or more separate occasions in this or another jurisdiction of
- 9 (A) an offense under AS 11.46.120, or an offense under  
10 another law or ordinance with similar elements;
- 11 (B) a crime set out in this subsection or an offense under  
12 another law or ordinance with similar elements;
- 13 (C) an offense under AS 11.46.140(a)(1), or an offense under  
14 another law or ordinance with similar elements; or
- 15 (D) an offense under AS 11.46.220(c)(1) or (c)(2)(A), or an  
16 offense under another law or ordinance with similar elements; or
- 17 (7) the property is an access device.

18 \* Sec. 2. AS 11.46.140(a) is amended to read:

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

21 (1) the value of the property or services is \$250 [\$50] or more but less  
22 than \$1,500 [\$500]; or

23 (2) [REPEALED

24 (3)] the value of the property is less than \$250 [\$50] and, within the  
25 past five years, the person has been convicted and sentenced on two or more separate  
26 occasions in this or another jurisdiction of theft or concealment of merchandise, or an  
27 offense under another law or ordinance with similar elements.

28 \* Sec. 3. AS 11.46.150(a) is amended to read:

29 (a) A person commits the crime of theft in the fourth degree if the person  
30 commits theft as defined in AS 11.46.100 and the value of the property or services is  
31 less than \$250 [\$50].

1 \* **Sec. 4.** AS 11.46.220(c) is amended to read:

2 (c) Concealment of merchandise is

3 (1) a class C felony if

4 (A) the merchandise is a firearm;

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

6 (C) the value of the merchandise is \$250 [\$50] or more but less  
7 than \$1,500 [\$500] and, within the preceding five years, the person has been  
8 convicted and sentenced on two or more separate occasions in this or another  
9 jurisdiction of

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

13 (ii) an offense under AS 11.46.120, 11.46.130, or  
14 11.46.140(a)(1), or an offense under another law or ordinance with  
15 similar elements;

16 (2) a class A misdemeanor if

17 (A) the value of the merchandise is \$250 [\$50] or more but less  
18 than \$1,500 [\$500]; or

19 (B) the value of the merchandise is less than \$250 [\$50] and,  
20 within the preceding five years, the person has been convicted and sentenced  
21 on two or more separate occasions of the offense of concealment of  
22 merchandise or theft in any degree, or an offense under another law or  
23 ordinance with similar elements;

24 (3) a class B misdemeanor if the value of the merchandise is less than  
25 \$250 [\$50].

26 \* **Sec. 5.** AS 11.46.260(b) is amended to read:

27 (b) Removal of identification marks is

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

30 (2) a class A misdemeanor if the value of the property on which the  
31 serial number or identification mark appeared is \$250 [\$50] or more but less than

1           \$1,500 [\$500];

2                   (3) a class B misdemeanor if the value of the property on which the  
3           serial number or identification mark appeared is less than \$250 [\$50].

4   \* **Sec. 6.** AS 11.46.270(b) is amended to read:

5           (b) Unlawful possession is

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

8                   (2) a class A misdemeanor if the value of the property on which the  
9           serial number or identification mark appeared is \$250 [\$50] or more but less than  
10          \$1,500 [\$500];

11                   (3) a class B misdemeanor if the value of the property on which the  
12          serial number or identification mark appeared is less than \$250 [\$50].

13   \* **Sec. 7.** AS 11.46.280(d) is amended to read:

14           (d) Issuing a bad check is

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

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

18                   (3) a class A misdemeanor if the face amount of the check is \$250  
19          [\$50] or more but less than \$1,500 [\$500];

20                   (4) a class B misdemeanor if the face amount of the check is less than  
21          \$250 [\$50].

22   \* **Sec. 8.** AS 11.46.285(b) is amended to read:

23           (b) Fraudulent use of an access device is

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

26                   (2) a class C felony if the value of the property or services obtained is  
27          \$1,500 [\$50] or more but less than \$25,000;

28                   (3) a class A misdemeanor if the value of the property or services  
29          obtained is less than \$1,500 [\$50].

30   \* **Sec. 9.** AS 11.46.295 is amended to read:

31           **Sec. 11.46.295. Prior convictions.** For purposes of considering prior

1 convictions in prosecuting a crime of theft under AS 11.46.130(a)(6) or  
2 11.46.140(a)(2) [11.46.140(a)(3)], or in prosecuting the crime of concealment of  
3 merchandise under AS 11.46.220(c), a conviction for an offense under another law or  
4 ordinance with similar elements is a conviction of an offense having elements similar  
5 to those of an offense defined as such under Alaska law at the time the offense was  
6 committed. The court shall consider the date of a prior conviction as occurring on the  
7 date that sentence is imposed for the prior offense.

8 \* Sec. 10. AS 11.46.360(a) is amended to read:

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

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

14 (2) the propelled vehicle of another and

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

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

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

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

23 (4) the propelled vehicle of another and, within the preceding seven  
24 years, the person was convicted under

25 (A) this section or AS 11.46.365;

26 (B) former AS 11.46.482(a)(4) or (5);

27 (C) former AS 11.46.484(a)(2);

28 (D) AS 11.46.120 - 11.46.140 of an offense involving the theft  
29 of a propelled vehicle; or

30 (E) a law or ordinance of this or another jurisdiction with  
31 elements substantially similar to those of an offense described in (A) - (D) of

1 this paragraph.

2 \* Sec. 11. AS 11.46.482(a) is amended to read:

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

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

8 (2) the person recklessly creates a risk of damage in an amount  
9 exceeding \$100,000 to property of another by the use of widely dangerous means; or

10 (3) the person knowingly

11 (A) defaces, damages, or desecrates a cemetery or the contents  
12 of a cemetery or a tomb, grave, or memorial regardless of whether the tomb,  
13 grave, or memorial is in a cemetery or whether the cemetery, tomb, grave, or  
14 memorial appears to be abandoned, lost, or neglected;

15 (B) removes human remains or associated burial artifacts from  
16 a cemetery, tomb, grave, or memorial regardless of whether the cemetery,  
17 tomb, grave, or memorial appears to be abandoned, lost, or neglected.

18 \* Sec. 12. AS 11.46.484(a) is amended to read:

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

22 (1) with intent to damage property of another, the person damages  
23 property of another in an amount of \$250 [\$50] or more but less than \$1,500 [\$500];

24 (2) the person tampers with a fire protection device in a building that is  
25 a public place;

26 (3) the person knowingly accesses a computer, computer system,  
27 computer program, computer network, or part of a computer system or network;

28 (4) the person uses a device to descramble an electronic signal that has  
29 been scrambled to prevent unauthorized receipt or viewing of the signal unless the  
30 device is used only to descramble signals received directly from a satellite or unless  
31 the person owned the device before September 18, 1984; or

1 (5) the person knowingly removes, relocates, defaces, alters, obscures,  
2 shoots at, destroys, or otherwise tampers with an official traffic control device or  
3 damages the work upon a highway under construction.

4 \* Sec. 13. AS 11.46.486(a) is amended to read:

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

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

11 (2) with intent to damage property of another, the person damages  
12 property of another in an amount less than \$250 [\$50]; or

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

15 \* Sec. 14. AS 11.46.530(b) is amended to read:

16 (b) Criminal simulation is

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

19 (2) a class A misdemeanor if the value of what the object purports to  
20 represent is \$250 [\$50] or more but less than \$1,500 [\$500];

21 (3) a class B misdemeanor if the value of what the object purports to  
22 represent is less than \$250 [\$50].

23 \* Sec. 15. AS 11.46.620(d) is amended to read:

24 (d) Misapplication of property is

25 (1) a class C felony if the value of the property misapplied is \$1,500  
26 [\$500] or more;

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

29 \* Sec. 16. AS 11.46.730(c) is amended to read:

30 (c) Defrauding creditors is a class A misdemeanor unless that secured party,  
31 judgment creditor, or creditor incurs a pecuniary loss of \$1,500 [\$500] or more as a

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result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is \$25,000 or more;

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

\* Sec. 17. AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors if

(1) the person, being 18 years of age or older, intentionally [KNOWINGLY] distributes or possesses with intent to distribute any material described in (2) and (3) of this subsection to either

(A) a child that the person knows is under 16 years of age;

or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [TO ANOTHER PERSON ANY] material that the person knows depicts the following actual or simulated conduct:

(A) sexual penetration;

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

(C) masturbation;

(D) bestiality;

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

(F) sexual masochism or sadism; and

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

\* Sec. 18. AS 11.66.140 is amended to read:

*Alanson*

*doherty*

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Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under AS 11.66.110 - 11.66.135 [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

\* Sec. 19. AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of AS 11.66.100 - 11.66.135 [AS 11.66.110 - 11.66.135] shall be forfeited.

\* Sec. 20. AS 12.47.040(b) is amended to read:

(b) To return a verdict under (a)(4) of this section, the fact finder [JURY] must find beyond a reasonable doubt that the defendant committed the crime and [FIND BY A PREPONDERANCE OF THE EVIDENCE] that, when the defendant committed the crime, the defendant was guilty but mentally ill as defined in AS 12.47.030.

\* Sec. 21. AS 12.47.060(a) is amended to read:

(a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, [AND THE DEFENDANT IS CONVICTED OF A CRIME,] the defendant or [,] the prosecuting attorney [, OR THE COURT ON ITS OWN MOTION] may raise the issue of whether the defendant is guilty but mentally ill. A party that seeks a post-conviction determination of guilty but mentally ill must give notice 10 days before trial of intent to do so; however, this deadline is waived if the opposing party presents evidence or argument at trial tending to show that the defendant may be guilty but mentally ill. A hearing must be held on this issue [AT OR] before the same fact finder that returned the verdict of guilty under procedures set by the court. In cases decided by a jury, at the request of the defendant and with the concurrence of the prosecuting attorney, the court may decide the issue. A waiver of consideration by a jury must be in writing and in person before the court [SENTENCING HEARING]. At the hearing, the fact finder [COURT] shall determine whether the defendant has been shown to be guilty

*del x*  
*add*  
*9/29/10*

1 but mentally ill beyond a reasonable doubt, considering [BY A  
2 PREPONDERANCE OF THE] evidence presented at the hearing and any evidence  
3 relevant to the issue that was presented at trial.

4 \* Sec. 22. AS 12.47.060(b) is amended to read:

5 (b) If the fact finder [COURT] finds that a defendant is guilty but mentally  
6 ill, the court [IT] shall sentence the defendant as provided by law and shall enter the  
7 finding of guilty but mentally ill as part of the judgment.

8 \* Sec. 23. AS 12.47.100 is amended by adding a new subsection to read:

9 (h) In a hearing to determine competency under this section, the court may  
10 allow a witness, including the psychiatrist or psychologist who examined the  
11 defendant, to testify concerning the competency of the defendant by contemporaneous  
12 two-way video conference if the witness would be required to travel more than 50  
13 miles to the court or lives in a place from which people customarily travel by air to the  
14 court. In this subsection, "contemporaneous two-way video conference"

15 (1) means a conference among people at different places by means of  
16 transmitted audio and video signals;

17 (2) includes all communication technologies that allow people at two  
18 or more places to interact by two-way video and audio transmissions simultaneously.

19 \* Sec. 24. AS 12.55.025(i) is amended to read:

20 (i) Except as otherwise provided in this chapter [BY AS 12.55.125(a)(3),  
21 12.55.145(d), 12.55.155(f), AND 12.55.165], the preponderance of the evidence  
22 standard of proof applies to sentencing proceedings.

23 \* Sec. 25. AS 12.55.090(b) is amended to read:

24 (b) Except as otherwise provided in (f) of this section, the [THE] court may  
25 revoke or modify any condition of probation [,] or may change the period of  
26 probation.

27 \* Sec. 26. AS 12.55.090 is amended by adding a new subsection to read:

28 (f) Unless the defendant and the prosecuting authority agree at the probation  
29 revocation proceeding or other proceeding, the court may not reduce the specific  
30 period of probation, or the specific term of suspended incarceration except by the  
31 amount of incarceration imposed for a probation violation, if

# language  
[Redacted]  
✓

1 (1) the sentence was imposed in accordance with a plea agreement  
2 under Rule 11, Alaska Rules of Criminal Procedure; and

3 (2) the agreement required a specific period of probation or a specific  
4 term of suspended incarceration.

5 \* Sec. 27. AS 12.55.125(a) is amended to read:

6 (a) A defendant convicted of murder in the first degree or murder of an unborn  
7 child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment  
8 of at least 20 years but not more than 99 years. A defendant convicted of murder in the  
9 first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

10 (1) the defendant is convicted of the murder of a uniformed or  
11 otherwise clearly identified peace officer, firefighter, or correctional employee who  
12 was engaged in the performance of official duties at the time of the murder;

13 (2) the defendant has been previously convicted of

14 (A) murder in the first degree under AS 11.41.100 or former  
15 AS 11.15.010 or 11.15.020;

16 (B) murder in the second degree under AS 11.41.110 or former  
17 AS 11.15.030; or

18 (C) homicide under the laws of another jurisdiction when the  
19 offense of which the defendant was convicted contains elements similar to first  
20 degree murder under AS 11.41.100 or second degree murder under  
21 AS 11.41.110;

22 (3) [THE COURT FINDS BY CLEAR AND CONVINCING  
23 EVIDENCE THAT] the defendant subjected the murder victim to substantial physical  
24 torture;

25 (4) the defendant is convicted of the murder of and personally caused  
26 the death of a person, other than a participant, during a robbery; or

27 (5) [THE COURT FINDS BY CLEAR AND CONVINCING  
28 EVIDENCE THAT] the defendant is a peace officer who used the officer's authority  
29 as a peace officer to facilitate the murder.

30 \* Sec. 28. AS 12.55.125 is amended by adding a new subsection to read:

31 (p) If the state seeks either (1) the imposition of a sentence under (a) of this

1 section that would preclude the defendant from being awarded a good time deduction  
2 under AS 33.20.010(a) based on a fact other than a prior conviction; or (2) to establish  
3 a fact that would increase the presumptive sentencing range under (c)(2), (d)(2), (e)(4),  
4 (i)(1)(A) or (B), or (i)(2)(A) or (B) of this section, the factual question required to be  
5 decided shall be presented to a trial jury and proven beyond a reasonable doubt under  
6 procedures set by the court, unless the defendant waives trial by jury and either  
7 stipulates to the existence of the fact or consents to have the fact proven to the court  
8 sitting without a jury. Written notice of the intent to establish a fact under this  
9 subsection must be served on the defendant and filed with the court as provided for  
10 notice under AS 12.55.155(f)(2).

11 \* **Sec. 29.** AS 12.55.155 is amended by adding new subsections to read:

12 (i) If the state seeks to establish a factor in aggravation at sentencing under  
13 (c)(10) of this section,

14 (1) the assessment of the facts underlying the state's allegation that the  
15 defendant's conduct was among the most serious included in the definition of the  
16 offense shall be made by the trial jury under procedures set by the court and as  
17 provided in (f)(2) of this section, unless the defendant waives trial by jury, stipulates  
18 to the existence of the aggravating factor or to the facts alleged by the state, or  
19 consents to have the assessment proved under procedures set out in (f)(1) of this  
20 section; factual assertions underlying the state's allegation that the defendant's conduct  
21 was among the most serious included in the definition of the offense must be proved  
22 beyond a reasonable doubt;

23 (2) the legal decision concerning whether the defendant's conduct  
24 determined under (1) of this subsection was among the most serious included in the  
25 definition of the offense shall be made by the court under procedures set out in (f)(1)  
26 of this section.

27 (j) If one of the aggravating factors in (c) of this section is established as  
28 provided in (f)(1) and (2) of this section, the court may increase the term of  
29 imprisonment up to the maximum term of imprisonment. Any additional aggravating  
30 factor may then be established by clear and convincing evidence by the court sitting  
31 without a jury, including an aggravating factor that the jury has found not to have been

1 established beyond a reasonable doubt.

2 \* **Sec. 30.** AS 33.05.050 is amended to read:

3 **Sec. 33.05.050. Report of probation officer.** When directed by the court, the  
4 probation officer shall report to the court [,] with a statement of the conduct of the  
5 probationer while on probation. Except as otherwise provided by law, the [THE]  
6 court may then discharge the probationer from further supervision and may terminate  
7 the proceedings against the probationer, or may extend the probation, as shall seem  
8 advisable.

9 \* **Sec. 31.** AS 33.05.070(b) is amended to read:

10 (b) As speedily as possible after arrest, the probationer shall be taken before  
11 the court for the district having jurisdiction over the probationer. Except as provided  
12 in AS 12.55.090(f), [THEREUPON] the court may revoke the probation and require  
13 the probationer to serve the sentence imposed [,] or any lesser sentence [,] and, if  
14 imposition of sentence was suspended, may impose any sentence that [WHICH]  
15 might originally have been imposed, subject to the limitation specified in  
16 AS 12.55.086(c).

17 \* **Sec. 32.** The uncodified law of the State of Alaska is amended by adding a new section to  
18 read:

19 DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal  
20 Procedure are amended by adding a new section to read:

21 **Rule 38.3. Video Conference Testimony. (a) In General.** In every trial, the  
22 testimony of witnesses shall be taken in open court, unless otherwise provided by  
23 statute or rule.

24 (b) **Testimony by Video Conference.** The parties may agree to take  
25 testimony from a witness <sup>at trial</sup> by contemporaneous two-way video conference presented in  
26 open court. Absent the parties' agreement, the court may authorize the  
27 contemporaneous two-way video conference testimony of a witness if

28 (1) the requesting party establishes that testimony by two-way video  
29 conference is necessary to further an important public policy;

30 (2) the requesting party establishes that the witness is unavailable; and

31 (3) the testimony is given under oath and subject to cross-examination.

1           (c) **Procedures for Taking Video Conference Testimony.** If the trial court  
2 authorizes video conference testimony under (b) of this rule, it shall determine the  
3 procedures for taking the contemporaneous two-way video conference testimony. The  
4 parties, the court, the trier of fact, and the public must be able to see and hear the  
5 witness; and the witness must see and hear the courtroom proceedings, including the  
6 defendant, as if the witness were sitting in the courtroom's witness stand. The persons  
7 who are present with the witness must be identified. The parties may move to exclude  
8 any person other than the video conference technician from the witness's presence; the  
9 court, in its discretion, may exclude a person other than the video conference  
10 technician from the presence of the witness.

11           (d) **Definitions.**

12           (1) **Contemporaneous Two-Way Video Conference.** Contemporaneous  
13 two-way video conference means a conference among people at different places by  
14 means of transmitted audio and video signals. It includes all communication  
15 technologies that allow two or more places to interact by two-way video and audio  
16 transmissions simultaneously.

17           (2) **Unavailable.** In this rule, a witness is unavailable if

18                   (A) by clear and convincing evidence the court finds under  
19 Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska  
20 Rules of Criminal Procedure, that the witness is unavailable;

21                   (B) by clear and convincing evidence the court finds that under  
22 the circumstances the witness is unavailable; or

23                   (C) the parties agree that the witness is unavailable.

24       \* **Sec. 33.** The uncodified law of the State of Alaska is amended by adding a new section to  
25 read:

26           INDIRECT COURT RULE AMENDMENT. AS 12.55.125(p), enacted by sec. 28 of  
27 this Act, and AS 12.55.155(i) and (j), enacted by sec. 29 of this Act, have the effect of  
28 changing Rule 32.1, Alaska Rules of Criminal Procedure, by amending procedures for  
29 sentencing persons convicted of certain crimes.

30       \* **Sec. 34.** The uncodified law of the State of Alaska is amended by adding a new section to  
31 read:

1           APPLICABILITY. (a) Sections 1 - 19, 25, and 26 of this Act apply to offenses  
2 committed on or after the effective date of this Act.

3           (b) Sections 20 - 24 and 27 - 33 of this Act apply to proceedings occurring on or after  
4 the effective date of this Act for offenses occurring before, on, or after the effective date of  
5 this Act.

6       \* **Sec. 35.** The uncodified law of the State of Alaska is amended by adding a new section to  
7 read:

8           **CONDITIONAL EFFECT.** Sections 28 and 29 of this Act take effect only if sec. 33 of  
9 this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,  
10 Constitution of the State of Alaska.

11       \* **Sec. 36.** This Act takes effect July 1, 2012.

27-LS0646\E  
Gardner  
3/13/12

**CS FOR SENATE BILL NO. 110(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS WIELECHOWSKI, McGuire

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to human trafficking and sex trafficking, to punishment and fines for  
2 those offenses, and to peace officer powers to enforce human trafficking and sex  
3 trafficking laws in licensed premises; relating to conditions of probation in criminal  
4 cases involving sex offenses; including human trafficking in the first degree and sex  
5 trafficking in the first degree in the definition of 'serious felony offense' for the offense of  
6 conspiracy and including sex trafficking and online enticement of a minor in the  
7 definition of 'most serious felony' for sentencing; relating to prostitution and promoting  
8 prostitution; relating to the definition of 'sex offense'; including human trafficking and  
9 sex trafficking in the list of offenses that make hearings for certain delinquent minors  
10 public and require disclosure of the names of certain delinquent minors; and providing  
11 for an effective date."

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

1 \* **Section 1.** AS 04.06.110 is amended to read:

2           **Sec. 04.06.110. Peace officer powers.** The director and the persons employed  
3 for the administration and enforcement of this title may, with the concurrence of the  
4 commissioner of public safety, exercise the powers of peace officers when those  
5 powers are specifically granted by the board. Powers granted by the board under this  
6 section may be exercised only when necessary for the enforcement of the criminally  
7 punishable provisions of this title, regulations of the board, and other criminally  
8 punishable laws and regulations, including investigation of violations of laws against  
9 prostitution and sex trafficking [PROMOTING PROSTITUTION] described in  
10 AS 11.66.100 - 11.66.135, human trafficking described in AS 11.41.355 -  
11 11.41.365, [AS 11.66.100 - 11.66.130] and laws against gambling, promoting  
12 gambling, and related offenses described in AS 11.66.200 - 11.66.280.

13 \* **Sec. 2.** AS 04.11.370(a) is amended to read:

14           (a) A license or permit shall be suspended or revoked if the board finds

15                       (1) misrepresentation of a material fact on an application made under  
16 this title or a regulation adopted under this title;

17                       (2) continuation of the manufacture, sale, or service of alcoholic  
18 beverages by the licensee or permittee would be contrary to the best interests of the  
19 public;

20                       (3) failure on the part of the licensee to correct a defect that constitutes  
21 a violation of this title, a condition or restriction imposed by the board, a regulation  
22 adopted under this title, or other laws after receipt of notice issued by the board or its  
23 agent;

24                       (4) conviction of a licensee of a violation of this title, a regulation  
25 adopted under this title, or an ordinance adopted under AS 04.21.010;

26                       (5) conviction of an agent or employee of a licensee of a violation of  
27 this title, a regulation adopted under this title, or an ordinance adopted under  
28 AS 04.21.010, if the licensee is found by the board to have either knowingly allowed  
29 the violation or to have recklessly or with criminal negligence failed to act in  
30 accordance with the duty prescribed under AS 04.21.030 with the result that the agent  
31 or employee violates a law, regulation, or ordinance;

1 (6) failure of the licensee to comply with the public health, fire, or  
2 safety laws and regulations in the state;

3 (7) use of the licensed premises as a resort for illegal possessors or  
4 users of narcotics, prostitutes, human traffickers, or sex traffickers [PROMOTERS  
5 OF PROSTITUTION]; in addition to any other legally competent evidence, the  
6 character of the premises may be proved by the general reputation of the premises in  
7 the community as a resort for illegal possessors or users of narcotics, prostitutes,  
8 human traffickers, or sex traffickers [PROMOTERS OF PROSTITUTION];

9 (8) occurrence of illegal gambling within the limits of the licensed  
10 premises;

11 (9) the licensee permitted a public offense involving moral turpitude to  
12 occur on the licensed premises;

13 (10) violation by a licensee of this title, a condition or restriction  
14 imposed by the board, a regulation adopted under this title, or an ordinance adopted  
15 under AS 04.21.010; or

16 (11) violation by an agent or employee of a licensee of a provision of  
17 this title, a condition or restriction imposed by the board, a regulation adopted under  
18 this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the  
19 board to have either knowingly allowed the violation or to have recklessly or with  
20 criminal negligence failed to act in accordance with the duty prescribed under  
21 AS 04.21.030 with the result that the agent or employee violates the law, condition or  
22 restriction, regulation, or ordinance.

23 \* **Sec. 3.** AS 11.31.120(h)(2) is amended to read:

24 (2) "serious felony offense" means an offense

25 (A) against the person under AS 11.41, punishable as an  
26 unclassified or class A felony;

27 (B) involving controlled substances under AS 11.71,  
28 punishable as an unclassified, class A, or class B felony;

29 (C) that is criminal mischief in the first degree under  
30 AS 11.46.475; [OR]

31 (D) that is terroristic threatening in the first degree under

1 AS 11.56.807;

2 (E) that is human trafficking in the first degree under

3 AS 11.41.355; or

4 (F) that is sex trafficking in the first degree under

5 AS 11.66.110.

6 \* **Sec. 4.** AS 11.41 is amended by adding a new section to read:

7 **Sec. 11.41.355. Human trafficking in the first degree.** (a) A person commits  
8 the crime of human trafficking in the first degree if the person violates AS 11.41.360  
9 by compelling or inducing another person to engage in sexual conduct, adult  
10 entertainment, or an act described in AS 11.41.455(a)(1) - (7), and the other person  
11 compelled or induced is under 18 years of age.

12 (b) Human trafficking in the first degree is an unclassified felony.

13 \* **Sec. 5.** AS 11.41.360(a) is amended to read:

14 (a) A person commits the crime of human trafficking in the second [FIRST]  
15 degree if the person compels or induces another person to [COME TO THIS STATE  
16 TO] engage in sexual conduct, adult entertainment, or labor in the state by force or  
17 threat of force against any person, or by deception.

18 \* **Sec. 6.** AS 11.41.360(c) is amended to read:

19 (c) Human trafficking in the second [FIRST] degree is a class A felony.

20 \* **Sec. 7.** AS 11.41.365 is amended to read:

21 **Sec. 11.41.365. Human trafficking in the third [SECOND] degree.** (a) A  
22 person commits the crime of human trafficking in the third [SECOND] degree if the  
23 person obtains a benefit from the commission of human trafficking under  
24 AS 11.41.355 or 11.41.360 [AS 11.41.360,] with reckless disregard that the benefit is  
25 a result of the trafficking.

26 (b) Human trafficking in the third [SECOND] degree is a class B felony.

27 \* **Sec. 8.** AS 11.41.370 is amended by adding new paragraphs to read:

28 (4) "adult entertainment" means the conduct described in  
29 AS 23.10.350(f)(1) - (3);

30 (5) "sexual conduct" has the meaning given in AS 11.66.150.

31 \* **Sec. 9.** AS 11.66.100(b) is amended to read:

1 (b) Except as provided in (c) of this section, prostitution  
2 [PROSTITUTION] is a class B misdemeanor.

3 \* **Sec. 10.** AS 11.66.100 is amended by adding a new subsection to read:

4 (c) Prostitution is a class C felony if

5 (1) the person described in (a)(1) of this section is under 18 years of  
6 age; the age of the person is a circumstance that does not require proof of a culpable  
7 mental state; and

8 (2) the person described in (a)(2) of this section is 18 years of age or  
9 older and at least three years older than the person described in (a)(1) of this section.

10 \* **Sec. 11.** AS 11.66.110(a) is amended to read:

11 (a) A person commits the crime of sex trafficking [PROMOTING  
12 PROSTITUTION] in the first degree if the person

13 (1) induces or causes a person to engage in prostitution through the use  
14 of force;

15 (2) as other than a patron of a prostitute, induces or causes a person  
16 under 18 years of age to engage in prostitution; or

17 (3) induces or causes a person in that person's legal custody to engage  
18 in prostitution.

19 \* **Sec. 12.** AS 11.66.110(c) is amended to read:

20 (c) Except as provided in (d) of this section, sex trafficking [PROMOTING  
21 PROSTITUTION] in the first degree is a class A felony.

22 \* **Sec. 13.** AS 11.66.120 is amended to read:

23 **Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the**  
24 **second degree.** (a) A person commits the crime of sex trafficking [PROMOTING  
25 PROSTITUTION] in the second degree if the person

26 (1) manages, supervises, controls, or owns, either alone or in  
27 association with others, a prostitution enterprise other than a place of prostitution;

28 (2) procures or solicits a patron for a prostitute; or

29 (3) offers, sells, advertises, promotes, or facilitates travel that includes  
30 commercial sexual conduct as enticement for the travel; in this paragraph,  
31 "commercial sexual conduct" means sexual conduct for which anything of value is

1 given or received by any person.

2 (b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is  
3 a class B felony.

4 \* **Sec. 14.** AS 11.66.130 is amended to read:

5 **Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the**  
6 **third degree.**

7 (a) A person commits the crime of **sex trafficking** [PROMOTING  
8 PROSTITUTION] in the third degree if, with intent to promote prostitution, the  
9 person

10 (1) manages, supervises, controls, or owns, either alone or in  
11 association with others, a place of prostitution;

12 (2) as other than a patron of a prostitute, induces or causes a person 18  
13 years of age or older to engage in prostitution;

14 (3) as other than a prostitute receiving compensation for personally  
15 rendered prostitution services, receives or agrees to receive money or other property  
16 **under** [PURSUANT TO] an agreement or understanding that the money or other  
17 property is derived from prostitution; or

18 (4) engages in conduct that institutes, aids, or facilitates a prostitution  
19 enterprise.

20 (b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a  
21 class C felony.

22 \* **Sec. 15.** AS 11.66.135 is amended to read:

23 **Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the**  
24 **fourth degree.** (a) A person commits the crime of **sex trafficking** [PROMOTING  
25 PROSTITUTION] in the fourth degree if the person engages in conduct that institutes,  
26 aids, or facilitates prostitution under circumstances not proscribed under  
27 AS 11.66.130(a)(4).

28 (b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is  
29 a class A misdemeanor.

30 \* **Sec. 16.** AS 11.81.250(a) is amended to read:

31 (a) For purposes of sentencing under AS 12.55, all offenses defined in this

1 title, except murder in the first and second degree, attempted murder in the first  
2 degree, solicitation to commit murder in the first degree, conspiracy to commit murder  
3 in the first degree, murder of an unborn child, sexual assault in the first degree, sexual  
4 abuse of a minor in the first degree, misconduct involving a controlled substance in the  
5 first degree, sex trafficking [PROMOTING PROSTITUTION] in the first degree  
6 under AS 11.66.110(a)(2), human trafficking in the first degree under  
7 AS 11.41.355, and kidnapping, are classified on the basis of their seriousness,  
8 according to the type of injury characteristically caused or risked by commission of  
9 the offense and the culpability of the offender. Except for murder in the first and  
10 second degree, attempted murder in the first degree, solicitation to commit murder in  
11 the first degree, conspiracy to commit murder in the first degree, murder of an unborn  
12 child, sexual assault in the first degree, sexual abuse of a minor in the first degree,  
13 misconduct involving a controlled substance in the first degree, sex trafficking  
14 [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2),  
15 human trafficking in the first degree under AS 11.41.355, and kidnapping, the  
16 offenses in this title are classified into the following categories:

17 (1) class A felonies, which characteristically involve conduct resulting  
18 in serious physical injury or a substantial risk of serious physical injury to a person;

19 (2) class B felonies, which characteristically involve conduct resulting  
20 in less severe violence against a person than class A felonies, aggravated offenses  
21 against property interests, or aggravated offenses against public administration or  
22 order;

23 (3) class C felonies, which characteristically involve conduct serious  
24 enough to deserve felony classification but not serious enough to be classified as A or  
25 B felonies;

26 (4) class A misdemeanors, which characteristically involve less severe  
27 violence against a person, less serious offenses against property interests, less serious  
28 offenses against public administration or order, or less serious offenses against public  
29 health and decency than felonies;

30 (5) class B misdemeanors, which characteristically involve a minor  
31 risk of physical injury to a person, minor offenses against property interests, minor

1 offenses against public administration or order, or minor offenses against public health  
2 and decency;

3 (6) violations, which characteristically involve conduct inappropriate  
4 to an orderly society but which do not denote criminality in their commission.

5 \* **Sec. 17.** AS 12.55.035(b) is amended to read:

6 (b) Upon conviction of an offense, a defendant who is not an organization may  
7 be sentenced to pay, unless otherwise specified in the provision of law defining the  
8 offense, a fine of not [NO] more than

9 (1) \$500,000 for murder in the first or second degree, attempted  
10 murder in the first degree, murder of an unborn child, sexual assault in the first degree,  
11 sexual abuse of a minor in the first degree, kidnapping, sex trafficking  
12 [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2),  
13 human trafficking in the first degree under AS 11.41.355 or misconduct involving  
14 a controlled substance in the first degree;

15 (2) \$250,000 for a class A felony;

16 (3) \$100,000 for a class B felony;

17 (4) \$50,000 for a class C felony;

18 (5) \$10,000 for a class A misdemeanor;

19 (6) \$2,000 for a class B misdemeanor;

20 (7) \$500 for a violation.

21 \* **Sec. 18.** AS 12.55.085(f) is amended to read:

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

23 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260  
24 - 11.41.320, 11.41.355 - 11.41.365 [11.41.360 - 11.41.370], 11.41.410 - 11.41.530,  
25 AS 11.46.400, or AS 11.61.125 - 11.61.128;

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

28 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony  
29 and the person has one or more prior convictions for a misdemeanor violation of  
30 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction  
31 having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a

1 felony in this state; for the purposes of this paragraph, a person shall be considered to  
2 have a prior conviction even if that conviction has been set aside under (e) of this  
3 section or under the equivalent provision of the laws of another jurisdiction.

4 \* **Sec. 19.** AS 12.55.185(10) is amended to read:

5 (10) "most serious felony" means

6 (A) arson in the first degree, **sex trafficking** [PROMOTING  
7 PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online**  
8 **enticement of a minor**, or any unclassified or class A felony prescribed under  
9 AS 11.41; or

10 (B) an attempt, or conspiracy to commit, or criminal  
11 solicitation under AS 11.31.110 of, an unclassified felony prescribed under  
12 AS 11.41;

13 \* **Sec. 20.** AS 12.55.125(i) is amended to read:

14 (i) A defendant convicted of

15 (1) sexual assault in the first degree, sexual abuse of a minor in the  
16 first degree, **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree  
17 under AS 11.66.110(a)(2), **or human trafficking in the first degree under**  
18 **AS 11.41.355** may be sentenced to a definite term of imprisonment of not more than  
19 99 years and shall be sentenced to a definite term within the following presumptive  
20 ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

21 (A) if the offense is a first felony conviction, the offense does  
22 not involve circumstances described in (B) of this paragraph, and the victim  
23 was

24 (i) less than 13 years of age, 25 to 35 years;

25 (ii) 13 years of age or older, 20 to 30 years;

26 (B) if the offense is a first felony conviction and the defendant  
27 possessed a firearm, used a dangerous instrument, or caused serious physical  
28 injury during the commission of the offense, 25 to 35 years;

29 (C) if the offense is a second felony conviction and does not  
30 involve circumstances described in (D) of this paragraph, 30 to 40 years;

31 (D) if the offense is a second felony conviction and the

1 defendant has a prior conviction for a sexual felony, 35 to 45 years;

2 (E) if the offense is a third felony conviction and the defendant  
3 is not subject to sentencing under (F) of this paragraph or (I) of this section, 40  
4 to 60 years;

5 (F) if the offense is a third felony conviction, the defendant is  
6 not subject to sentencing under (I) of this section, and the defendant has two  
7 prior convictions for sexual felonies, 99 years;

8 (2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online  
9 enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to  
10 commit sexual assault in the first degree, sexual abuse of a minor in the first degree,  
11 **sex trafficking** [OR PROMOTING PROSTITUTION] in the first degree under  
12 **AS 11.66.110(a)(2), or human trafficking in the first degree under AS 11.41.355**  
13 may be sentenced to a definite term of imprisonment of not more than 99 years and  
14 shall be sentenced to a definite term within the following presumptive ranges, subject  
15 to adjustment as provided in AS 12.55.155 - 12.55.175:

16 (A) if the offense is a first felony conviction, the offense does  
17 not involve circumstances described in (B) of this paragraph, and the victim  
18 was

19 (i) under 13 years of age, 20 to 30 years;

20 (ii) 13 years of age or older, 15 to 30 years;

21 (B) if the offense is a first felony conviction and the defendant  
22 possessed a firearm, used a dangerous instrument, or caused serious physical  
23 injury during the commission of the offense, 25 to 35 years;

24 (C) if the offense is a second felony conviction and does not  
25 involve circumstances described in (D) of this paragraph, 25 to 35 years;

26 (D) if the offense is a second felony conviction and the  
27 defendant has a prior conviction for a sexual felony, 30 to 40 years;

28 (E) if the offense is a third felony conviction, the offense does  
29 not involve circumstances described in (F) of this paragraph, and the defendant  
30 is not subject to sentencing under (I) of this section, 35 to 50 years;

31 (F) if the offense is a third felony conviction, the defendant is

1 not subject to sentencing under (I) of this section, and the defendant has two  
2 prior convictions for sexual felonies, 99 years;

3 (3) sexual assault in the second degree, sexual abuse of a minor in the  
4 second degree, online enticement of a minor under AS 11.41.452(d), unlawful  
5 exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography  
6 under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not  
7 more than 99 years and shall be sentenced to a definite term within the following  
8 presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

9 (A) if the offense is a first felony conviction, five to 15 years;

10 (B) if the offense is a second felony conviction and does not  
11 involve circumstances described in (C) of this paragraph, 10 to 25 years;

12 (C) if the offense is a second felony conviction and the  
13 defendant has a prior conviction for a sexual felony, 15 to 30 years;

14 (D) if the offense is a third felony conviction and does not  
15 involve circumstances described in (E) of this paragraph, 20 to 35 years;

16 (E) if the offense is a third felony conviction and the defendant  
17 has two prior convictions for sexual felonies, 99 years;

18 (4) sexual assault in the third degree, incest, indecent exposure in the  
19 first degree, possession of child pornography, distribution of child pornography under  
20 AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in  
21 the second degree, sexual abuse of a minor in the second degree, unlawful exploitation  
22 of a minor, or distribution of child pornography, may be sentenced to a definite term  
23 of imprisonment of not more than 99 years and shall be sentenced to a definite term  
24 within the following presumptive ranges, subject to adjustment as provided in  
25 AS 12.55.155 - 12.55.175:

26 (A) if the offense is a first felony conviction, two to 12 years;

27 (B) if the offense is a second felony conviction and does not  
28 involve circumstances described in (C) of this paragraph, eight to 15 years;

29 (C) if the offense is a second felony conviction and the  
30 defendant has a prior conviction for a sexual felony, 12 to 20 years;

31 (D) if the offense is a third felony conviction and does not

1 involve circumstances described in (E) of this paragraph, 15 to 25 years;

2 (E) if the offense is a third felony conviction and the defendant  
3 has two prior convictions for sexual felonies, 99 years.

4 \* **Sec. 21.** AS 12.63.100(6) is amended to read:

5 (6) "sex offense" means

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

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

14 (i) sexual assault in the first degree;

15 (ii) sexual assault in the second degree;

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

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

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

20 (i) AS 11.41.410 - 11.41.438;

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

22 (iii) AS 11.41.450 - 11.41.458;

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

26 (v) AS 11.61.125 - 11.61.128;

27 (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who  
28 was induced or caused to engage in prostitution was 16 or 17 years of  
29 age at the time of the offense;

30 (vii) former AS 11.15.120, former 11.15.134, or assault  
31 with the intent to commit rape under former AS 11.15.160, former

1 AS 11.40.110, or former 11.40.200; [OR]

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

4 (ix) human trafficking in the first degree under  
5 AS 11.41.355;

6 \* **Sec. 22.** AS 15.80.010(9) is amended to read:

7 (9) "felony involving moral turpitude" includes those crimes that are  
8 immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault,  
9 sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion,  
10 coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a  
11 forgery device, offering a false instrument for recording, scheme to defraud, falsifying  
12 business records, commercial bribe receiving, commercial bribery, bribery, receiving a  
13 bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor,  
14 escape, promoting contraband, interference with official proceedings, receiving a bribe  
15 by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical  
16 evidence, hindering prosecution, terroristic threatening, riot, criminal possession of  
17 explosives, unlawful furnishing of explosives, sex trafficking, human trafficking  
18 [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a  
19 controlled substance or an imitation controlled substance, permitting an escape,  
20 promoting gambling, possession of gambling records, distribution of child  
21 pornography, and possession of child pornography;

22 \* **Sec. 23.** AS 28.15.046(c) is amended to read:

23 (c) The department may not issue a license under this section to an applicant  
24 who has been convicted of any of the following offenses within 20 years of the time of  
25 application:

- 26 (1) sexual abuse of a minor in any degree under AS 11.41.434 -  
27 11.41.440;
- 28 (2) sexual assault in any degree under AS 11.41.410 - 11.41.425;
- 29 (3) incest under AS 11.41.450;
- 30 (4) unlawful exploitation of a minor under AS 11.41.455;
- 31 (5) contributing to the delinquency of a minor under AS 11.51.130;

1 (6) a felony involving possession of a controlled or imitation  
2 controlled substance under AS 11.71 or AS 11.73;

3 (7) a felony or misdemeanor involving distribution of a controlled or  
4 imitation controlled substance under AS 11.71 or AS 11.73;

5 (8) sex trafficking [PROMOTING PROSTITUTION] in the first or  
6 second degree under AS 11.66.110 or 11.66.120;

7 (9) indecent exposure in the first or second degree under AS 11.41.458  
8 or 11.41.460;

9 **(10) human trafficking in the first degree under AS 11.41.355.**

10 \* **Sec. 24.** AS 47.12.110(d) is amended to read:

11 (d) Notwithstanding (a) of this section, a court hearing on a petition seeking  
12 the adjudication of a minor as a delinquent shall be open to the public, except as  
13 prohibited or limited by order of the court, if

14 (1) the department files with the court a motion asking the court to  
15 open the hearing to the public, and the petition seeking adjudication of the minor as a  
16 delinquent is based on

17 (A) the minor's alleged commission of an offense, and the  
18 minor has knowingly failed to comply with all the terms and conditions  
19 required of the minor by the department or imposed on the minor in a court  
20 order entered under AS 47.12.040(a)(2) or 47.12.120;

21 (B) the minor's alleged commission of

22 (i) a crime against a person that is punishable as a  
23 felony;

24 (ii) a crime in which the minor employed a deadly  
25 weapon, as that term is defined in AS 11.81.900(b), in committing the  
26 crime;

27 (iii) arson under AS 11.46.400 - 11.46.410;

28 (iv) burglary under AS 11.46.300;

29 (v) distribution of child pornography under  
30 AS 11.61.125;

31 (vi) sex trafficking [PROMOTING PROSTITUTION]

1 in the first degree under AS 11.66.110; [OR]

2 (vii) misconduct involving a controlled substance under  
3 AS 11.71 involving the delivery of a controlled substance or the  
4 possession of a controlled substance with intent to deliver, other than  
5 an offense under AS 11.71.040 or 11.71.050; or

6 (viii) human trafficking in the first degree under  
7 AS 11.41.355; or

8 (C) the minor's alleged commission of a felony and the minor  
9 was 16 years of age or older at the time of commission of the offense when the  
10 minor has previously been convicted or adjudicated a delinquent minor based  
11 on the minor's commission of an offense that is a felony; or

12 (2) the minor agrees to a public hearing on the petition seeking  
13 adjudication of the minor as a delinquent.

14 \* **Sec. 25.** AS 47.12.315(a) is amended to read:

15 (a) Notwithstanding AS 47.12.310, when an agency takes action under  
16 AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court  
17 directs the agency to adjust the matter, the agency

18 (1) shall, for a minor who is at least 13 years of age at the time of  
19 commission of the offense, disclose to the public the name of the minor, the name or  
20 names of the parent, parents, or guardian of the minor, the action required by the  
21 agency to be taken by the minor under AS 47.12.060 to adjust the matter, and  
22 information about the offense exclusive of information that identifies the victim of the  
23 offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent  
24 minor on the basis of the minor's commission of at least one offense and, on the basis  
25 of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a  
26 preliminary inquiry to determine if any action on that matter is appropriate, and, if the  
27 minor is alleged to be a delinquent minor on the basis of the minor's commission of  
28 another offense, exercise of agency jurisdiction is based on the minor's alleged  
29 commission of that other offense, and that other offense is one of the following:

30 (A) a crime against a person that is punishable as a felony;

31 (B) a crime in which the minor employed a deadly weapon, as

1 that term is defined in AS 11.81.900(b), in committing the crime;

2 (C) arson under AS 11.46.400 - 11.46.410;

3 (D) burglary under AS 11.46.300;

4 (E) distribution of child pornography under AS 11.61.125;

5 (F) sex trafficking [PROMOTING PROSTITUTION] in the  
6 first degree under AS 11.66.110; [OR]

7 (G) misconduct involving a controlled substance under  
8 AS 11.71 involving the delivery of a controlled substance or the possession of  
9 a controlled substance with intent to deliver, other than an offense under  
10 AS 11.71.040 or 11.71.050; or

11 (H) human trafficking in the first degree under  
12 AS 11.41.355; and

13 (2) may, for a minor who is at least 13 years of age at the time of  
14 commission of the offense, disclose to the public the name of the minor, the name or  
15 names of the parent, parents, or guardian of the minor, the action required by the  
16 agency to be taken by the minor under AS 47.12.060 to adjust the matter, and  
17 information about the offense exclusive of information that identifies the victim of the  
18 offense if the minor has knowingly failed to comply with all terms and conditions  
19 required of the minor by the agency to adjust the matter under AS 47.12.060(b).

20 \* **Sec. 26.** AS 11.41.360(b)(1) and 11.41.360(b)(3) are repealed.

21 \* **Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to  
22 read:

23 APPLICABILITY. (a) Sections 1, 2, 11 - 15, and 22 - 25 of this Act apply to offenses  
24 committed before, on, or after the effective date of the Act.

25 (b) Sections 3 - 10, 16 - 21, and 26 of this Act apply to offenses committed on or after  
26 the effective date of this Act.

27 \* **Sec. 28.** The uncodified law of the State of Alaska is amended by adding a new section to  
28 read:

29 REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the catch  
30 line of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in  
31 the first degree."

1

\* **Sec. 29.** This Act takes effect July 1, 2012.

# Alaska State Legislature

**Senator Hollis French, Chair**  
State Capitol, Room 417  
Juneau, Alaska 99801  
Phone: (907) 465-3892  
Fax: (907) 465-6595



**Committee Members:**  
Senator Bill Wielechowski  
Senator Lesil McGuire  
Senator Joe Paskvan  
Senator John Coghill

## Senate Judiciary Committee

### MEMORANDUM

Date: March 15, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS drafting request SB 218 (GS2627\A)

Please provide a Judiciary CS for SB 218 with the following changes:

1. Delete sections 1-3, Sections 5-11, Section 14, Sections 17-24, plus any appropriate applicability provisions.
2. Add all provisions of SB 186 LS0811\I.
3. Add amendment I.1 to SB 186 LS0811.I
4. Make all necessary conforming and title changes.

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-3600  
FAX: (907)465-2075

February 22, 2012

The Honorable Hollis French, Chair  
Senate Judiciary Committee  
State Capitol Room 417  
Juneau, AK 99801

Re: Senate Bill 218 – relating to sex crimes and video conferencing

Dear Chair French:

Senate Bill 218 has been assigned to the Senate Judiciary Committee for your consideration. The Department of Law respectfully requests a hearing in the Judiciary Committee on the bill at your earliest convenience. SB 218 builds on and refines legislation enacted over the past several years to address serious problems of sexual exploitation of children and other victims.

A sectional analysis that describes each section of the bill is attached. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and representatives from the Department of Public Safety will testify regarding this legislation. Experienced law enforcement officers will also be available if needed.

Thank you for your consideration of this request.

Sincerely



Michael C. Geraghty  
Attorney General

Enclosure

# STATE OF ALASKA

**DEPARTMENT OF LAW**  
*CRIMINAL DIVISION CENTRAL OFFICE*

**SEAN PARNELL,  
GOVERNOR**

**Mailing:** PO Box 110300  
Juneau, AK 99811-0300  
**Delivery:** 123 4<sup>th</sup> Street, Ste 450  
Juneau, AK 99801  
**Phone:** (907) 465-3600  
**Fax:** (907) 465-4043

## SENATE BILL 218 SEX TRAFFICKING AND HUMAN TRAFFICKING SECTIONAL ANALYSIS

The increased scrutiny of crimes related to promoting prostitution of children in Alaska has prompted the proposed change in terminology from promoting prostitution to sex trafficking. There are good reasons for this change. First, a child who is put into prostitution by an adult should be considered and described as a victim, not a prostitute. The change in terminology will encourage this change. Second, a majority of law enforcement officers now refer to the crime of promoting prostitution of children as sex trafficking. Changing Alaska law will facilitate better communication and understanding.

**Sections 1, 2, 7 -- 11, 14, 17 – 19, and 21 -- 24** change the statutes prohibiting promoting prostitution to prohibiting sex trafficking. The elements of the offenses remain the same. These sections also make conforming amendments to other laws that currently refer to the crime of promoting prostitution so that they cross-reference sex trafficking.

**Section 3** adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as “serious felony offenses” in the state’s conspiracy law, AS 11.21.120. This change would enable the state to investigate and potentially prosecute offenders who work with other people to plan and engage in human trafficking or sex trafficking.

**Section 4** amends the crime of distribution of indecent materials to minors, AS 11.61.128. This proposed amendment is in response to the recent decision by a federal district court judge holding the current version of the statute to be unconstitutional in violation of the first amendment, because it applies to conduct that is constitutionally protected. In response to the decision that the current law is overbroad, the bill would require that the state prove the defendant intentionally distributed, or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

**Sections 5 and 6** raise the penalty for being a patron of a prostitute, if the prostitute is a minor under 18 years of age, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state.

**Section 12:** Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third

degrees. The bill adds the crime of promoting prostitution (sex trafficking) in the fourth degree to those crimes that do not require corroboration of the testimony of an alleged victim.

**Section 13:** Under current law property used to facilitate or derived from a crime of promoting prostitution (sex trafficking) is subject to forfeiture. The bill adds the crime of prostitution to these crimes. Under the bill property used to facilitate or derived from the crime of prostitution would be subject to forfeiture.

**Section 15** corrects an error in AS 11.81.250(b). Under current law the crime of promoting prostitution (sex trafficking) in the first degree under AS 11.66.110(a)(2) – where the person promoted is a child – is an unclassified felony. The bill adds this offense to the other offenses described as unclassified felonies in Alaska law.

**Section 16** allows the testimony of a witness in a hearing addressing the competency of a defendant for being tried for a crime by way of contemporaneous two-way video conference. It allows this testimony if the witness would be required to travel more than 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site.

**Section 19**, in addition to conforming the definition of most serious felony to the changes in the sex trafficking provisions, also corrects an omission in the definition of most serious felony by including online enticement of a minor in the definition.

**Section 20** adds 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 be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

**Section 25** adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow this testimony if the parties agree to its use. If the parties do not agree, it would allow contemporaneous two-way video conference testimony if the court finds that its use is necessary to further an important public policy, the witness is unavailable, and the testimony is given under oath and is subject to cross-examination.

**Section 26** addresses the applicability of the changes described above.

**Section 27** is an instruction to the revisor of statutes regarding the heading of AS 11.66.110.

**Section 28** provides for an effective date of July 1, 2012.

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version SB 218  
 Fiscal Note Number 1  
 (S) Publish Date 2/22/12

Identifier (file name) 0627-LAW-CRIM-02-17-12 Dept. Affected Law  
 Title An Act relating to sex trafficking and distribution of indecent materials. Appropriation Criminal  
 Allocation Criminal Justice Litigation  
 Sponsor Rules  
 Requester Request of the Governor OMB Component Number 2202

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required;  
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager  
 Division Administrative Services  
 Approved by Michael C. Geraghty, Attorney General  
Department of Law

Phone 465-5427  
 Date/Time 2/17/12 3:40PM  
 Date 2/17/2012

FISCAL NOTE #1

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

BILL NO. SB 218

**Analysis**

The bill changes the description of the crime of promoting prostitution under AS 11.66.110 – 11.66.135 from promoting prostitution in the first, second, third, and fourth degrees to sex trafficking in the first, second, third, and fourth degrees.

It adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the definition of “serious felony offense” under the conspiracy law.

The bill amends the crime of distribution of indecent materials to minors under AS 11.61.128 in response to the judicial decision that the current law is unconstitutional due to over breadth by requiring the prosecution to prove that the offender intentionally distributed, or possessed with the intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

It adopts a procedure for contemporaneous two-way videoconference in criminal trials where the court finds that it is necessary to further an important public policy, that the witness is unavailable, and the testimony is given under oath and subject to cross-examination. The bill would also allow contemporaneous two-way videoconference testimony in hearings addressing the competency of a defendant to be tried for criminal charges if the witness resides 50 or more miles away from the place of the hearing or the customary travel to the site of the hearing is by air.

The bill would require a person present in Alaska to register as a sex offender if the person is required to register as a sex offender in another jurisdiction.

# FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

Bill Version SB 218  
Fiscal Note Number 2  
(S) Publish Date 2/22/12

Identifier (file name) 0627-DPS-R&I-02-21-12 Dept. Affected Public Safety  
Title SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS Appropriation Statewide Support  
Allocation Records & Identification  
Sponsor Rules by Request of the Governor  
Requester Governor Parnell OMB Component Number 1190

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates					
			FY13	FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>								
Personal Services	109.5		109.5	109.5	109.5	109.5	109.5	109.5
Travel	5.0		5.0	5.0	5.0	5.0	5.0	5.0
Services	5.8		5.8	5.8	5.8	5.8	5.8	5.8
Commodities	1.0		1.0	1.0	1.0	1.0	1.0	1.0
Capital Outlay	2.9		2.9	2.9	2.9	2.9	2.9	2.9
Grants, Benefits								
Miscellaneous								
<b>TOTAL OPERATING</b>	<b>124.2</b>	<b>0.0</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>

**FUND SOURCE** (Thousands of Dollars)

1002	Federal Receipts							
1003	GF Match							
1004	GF	124.2	124.2	124.2	124.2	124.2	124.2	124.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
<b>TOTAL</b>		<b>124.2</b>	<b>0.0</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>	<b>124.2</b>

**POSITIONS**

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

**CHANGE IN REVENUES**

--	--	--	--	--	--	--	--

Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version.

Prepared by David Schade, Director  
Division Division of Statewide Services  
Approved by Joe Masters, Commissioner  
Department of Public Safety

Phone (907) 269-0202  
Date/Time 2/21/12 11:07 AM  
Date 2/21/2012

**Analysis**

This proposed legislation would require a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska even if there is no substantive law in Alaska that is similar to the offense the person was convicted of.

For the department's Records & Identification bureau 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 office would need to occur to obtain source documents and other relevant information on the person.

Additionally, it is anticipated that 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  
2012 LEGISLATIVE SESSION

Bill Version SB 218  
Fiscal Note Number 3  
(S) Publish Date 2/22/12

Identifier (file name) 0627-DPS-DET-02-17-12 Dept. Affected Public Safety  
Title SEX TRAFFICKING AND DISTRIBUTION OF Appropriation Alaska State Troopers  
INDECENT MATERIAL TO MINORS Allocation AST Detachments  
Sponsor Rules by Request of the Governor  
Requester Governor Parnell OMB Component Number 2325

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE** (Thousands of Dollars)

1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS**

Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

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Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version.

Prepared by Lt. Rodney Dial  
Division Alaska State Troopers  
Approved by Joseph A. Masters, Commissioner  
Department of Public Safety

Phone (907) 247-4480  
Date/Time 2/17/12 5:25 PM  
Date 2/17/2012

FISCAL NOTE #3

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

BILL NO. SB 218

**Analysis**

This bill changes the name of the crime of "promoting prostitution" to "sex trafficking" in numerous sections in Alaska Statutes; makes changes to Alaska Statute to address recent court decisions regarding the distribution of indecent material to minors; adds AS 11.61.100 (Prostitution) to AS 11.66.145 (Forfeiture) relating to the forfeiture of property used in prostitution offenses; would define human trafficking and sex trafficking in the first degrees as serious felony offenses for purposes of the state conspiracy law; and requires a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska.

This bill will have no fiscal impact on the Division of Alaska State Troopers.

# FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

Bill Version SB 218  
Fiscal Note Number 4  
(S) Publish Date 2/22/12

Identifier (file name) 0627-DOA-PDA-2-17-12 Dept. Affected Administration  
Title Sex trafficking and distribution of indecent materials Appropriation Legal and Advocacy Services  
Allocation Public Defender Agency  
Sponsor Rules by Request of the Governor  
Requester Governor OMB Component Number 1631

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							
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Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner  
Division Public Defender Agency  
Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 465-4414  
Date/Time 2/17/12 3:00 PM  
Date 2/17/2012

**Analysis**

This bill changes the language used to describe conduct "promoting prostitution" to the phrase "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Public Defender Agency does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Public Defender. The Agency, therefore, submits an indeterminate fiscal note.

# FISCAL NOTE

STATE OF ALASKA  
2012 LEGISLATIVE SESSION

Bill Version SB 218  
Fiscal Note Number 5  
(S) Publish Date 2/22/12

Identifier (file name) LL0627-DOA-OPA-2-17-12 Dept. Affected Administration  
Title Sex trafficking and distribution of indecent material Appropriation Legal & Advocay Services  
Allocation Office of Public Advocacy  
Sponsor Rules by Request of the Governor  
Requester Governor OMB Component Number 43

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates					
			FY13	FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>								
Personal Services	***	***	***	***	***	***	***	***
Travel								
Services								
Commodities								
Capital Outlay								
Grants, Benefits								
Miscellaneous								
<b>TOTAL OPERATING</b>	***	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
<b>TOTAL</b>		***	***	***	***	***	***	***

POSITIONS								
Full-time								
Part-time								
Temporary								

CHANGE IN REVENUES								
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Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version

Prepared by Richard Allen, Director  
Division Office of Public Advocacy  
Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 907-269-3504  
Date/Time 2/17/12 3:00 PM  
Date 2/17/2012

**Analysis**

This bill changes the language used to describe conduct "promoting prostitution" to the phrase, "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Office of Public Advocacy does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Office of Public Advocacy. Therefore, the Office of Public Advocacy submits an indeterminate fiscal note.

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version SB 218  
 Fiscal Note Number 6  
 (S) Publish Date 2/22/12

Identifier (file name) JU2011200627 Dept. Affected DOC  
 Title "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree" Appropriation Admin & Support  
 Allocation Commissioner's Office  
 Sponsor Rules Committee  
 Requester Governor OMB Component Number 694

**Expenditures/Revenues** (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>

<b>FUND SOURCE</b>		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>	<b>**</b>

<b>POSITIONS</b>							
Full-time							
Part-time							
Temporary							

<b>CHANGE IN REVENUES</b>							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

This is the original version of the bill.

Prepared by Leslie Houston, Director  
 Division Department of Corrections - Administrative Services  
 Approved by Joseph D. Schmidt, Commissioner  
Department of Corrections

Phone 907-465-3339  
 Date/Time 2/17/12 8:30 PM  
 Date 2/17/2012

**Analysis**

This bill adds human trafficking in the first degree and sex trafficking in the first degree to the conspiracy statutes (AS 11.31.120). A person convicted of this new crime would be subject to punishment for a Class B felony. The average sentence for a Class B felony is five years. The average daily cost of care in a DOC facility is \$134.90. Therefore, one individual convicted of conspiring to commit sex trafficking in the first degree could cost the Department of Corrections \$246,192.50 based on a five year *average* sentence.

In the past five years, DOC has seen an average of 2.4 convictions for promoting prostitution (sex trafficking). However, DOC does not have any historical data on conspiracy to commit sex or human trafficking, as this would be a new crime if this legislation were to pass. Therefore, DOC is currently unable to quantify the fiscal impacts of the passage of this legislation.

The Department will closely monitor the potential future fiscal impacts should this legislation pass.



March 15, 2012

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

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JUNE PINNELL-STEPHENS, Fairbanks  
TONY STRONG, Juneau

ZACH FICK, Anchorage  
EMMA HILL, Anchorage  
STUDENT ADVISORS

The Honorable Hollis French, Chair  
The Honorable Bill Wielechowski, Vice-Chair  
Senate Judiciary Committee  
Alaska State Senate  
State Capitol  
Juneau, AK 99801

*via email:* [Senator Hollis French@legis.state.ak.us](mailto:Senator_Hollis_French@legis.state.ak.us)  
[Senator Bill Wielechowski@legis.state.ak.us](mailto:Senator_Bill_Wielechowski@legis.state.ak.us)

**Re: SB 218: Video Testimony and Sex Offender Registration**  
**ACLU Review of Legal Issues**

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to provide written testimony with respect to Senate Bill 218, which – amongst other provisions – permits judicial testimony by video conference and modifies the registration of sex offenders.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we wish to advise you of constitutional and policy issues with sections 16, 20, and 25 of the proposed legislation.

**Section 16 Unconstitutionally Violates the Confrontation Clause**

If enacted, Section 16 of SB 218 would permit, in the context of determining if a criminal defendant were mentally competent to stand trial, a witness, “including the psychiatrist or psychologist who examined the defendant,” who would have to “travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court,” to “testify

concerning the competency of the defendant by contemporaneous two-way video conference[.]”

Based on our review of court decisions, we believe the Alaska courts would likely rule that this provision violates the Confrontation Clauses of the federal and Alaska Constitutions. U.S. Const., Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”); Alaska Const., Art. I, § 11 (“In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him”).

The U.S. Constitution’s Confrontation Clause’s “right to confront one’s accusers is a concept that dates back to Roman times.” *Crawford v. Washington*, 541 U.S. 36, 43 (2004). It is a “bedrock procedural guarantee” that “applies to both federal and state prosecutions.” *Id.* at 42; see *Lemon v. State*, 514 P.2d 1151 (Alaska 1973).

This essential right serves four purposes: first, it “insures that the witness will give his statements under oath [by] impressing him with the seriousness of the matter,” *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (internal quotation omitted); second, it “ensur[es] that evidence admitted against an accused is reliable” by “forc[ing] the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth,” *id.* (internal quotation omitted); third, it “permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility,” *id.* (internal quotation omitted); and fourth, it has a “strong symbolic purpose” of assuring everyone that the prosecution is fair, *id.* at 847. Confrontation “may confound and undo the false accuser, or reveal the child coached by a malevolent adult.” *Id.* at 846–47 (internal quotation omitted).

Face-to-face confrontation is “the core of the values furthered by the Confrontation Clause,” *id.* at 847 (internal quotation omitted) and “[t]he prosecution *must* produce . . . witnesses . . . against the defendant,” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2534 (2009) (emphasis in original). **The face-to-face confrontation may be denied only if, after a fact-based, “case-specific” inquiry, *Craig*, 497 U.S. at 855, a court determines that “denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured,” *id.* at 850 (emphasis added).**

The “necessary to further an important public policy” prong is not easily satisfied. While juvenile victims of sexual violence may be exempted from personally confronting the accused, the denial of face-to-face confrontation is only justified if “it is the presence of the defendant that causes the trauma.” *Id.* at 856. But, even the desire to have a child witness avoid “courtroom trauma generally” is insufficient to deny face-to-face confrontation “because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.” *Id.* And, the court must determine that “the emotional distress . . . is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify.” *Id.* (internal quotation omitted);

*Blume v. State*, 797 P.2d 664, 674 (Alaska Ct. App. 1990). **Simple need for a witness's testimony,<sup>1</sup> expediency,<sup>2</sup> efficiency,<sup>3</sup> security,<sup>4</sup> "convenience and cost-saving,"<sup>5</sup> and a desire not to leave a severely ill, elderly spouse's side<sup>6</sup> do not satisfy *Craig's* important public policy test nor justify avoiding face-to-face in-person confrontation.<sup>7</sup>**

While no court has squarely addressed if "the [federal] Confrontation Clause applies to pretrial competency hearings," *United States v. Hamilton*, 107 F.3d 499, 504 (7th Cir. 1997), such as those in Alaska Stat. § 12.47.100, an Alaska court might hold that the federal and state Confrontation Clauses do. West Virginia holds that a defendant is entitled to face-to-face confrontation in pretrial hearings to determine whether to transfer his case from juvenile to criminal court, *State v. Gary F.*, 432 S.E.2d 793, 800 (W. Va. 1993), and Pennsylvania applies the Confrontation Clauses to pretrial suppression hearings, *Commonwealth v. Atkinson*, 987 A.2d 743, 746 (Pa. Super. Ct. 2009).

The touchstone of a court's inquiry would be the Confrontation Clauses' purpose in a competency hearing. A competency hearing is "critically important," see *Gary F.*, 432 S.E.2d at 801, and "an adversarial proceeding and a critical stage in a criminal proceeding . . . at which substantive rights may be preserved or lost," *Atkinson*, 987 A.2d at 747 (internal quotation omitted). Indeed, the competency hearing is how the court determines if a "defendant is unable to understand the proceedings against [him] or to assist in [his] own defense," and if not, the defendant "may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists." Alaska Stat. § 12.47.100(a). The court decides this issue through an adversarial process and "[t]he party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence." *Id.* at § 12.47.100(c).

The court bases its decision on the testimony of "at least one qualified psychiatrist or psychologist," *id.* at § 12.47.100(b), but the scientific expertise of the witness does not affect the

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<sup>1</sup> *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

<sup>2</sup> *Id.*

<sup>3</sup> *Commonwealth v. Atkinson*, 987 A.2d 743, 750 (Pa. Super. Ct. 2009).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 751.

<sup>6</sup> *Bush v. State*, 193 P.3d 203, 216 (Wyo. 2008).

<sup>7</sup> In *Melendez-Diaz*, the U.S. Supreme Court directly faced a request to "relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.'" *Melendez-Diaz*, 129 S. Ct. at 2540. The Court rejected this proposal because "[i]t is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience." *Id.* "It is a truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

Confrontation Clause analysis. “The prosecution *must* produce . . . witnesses . . . against the defendant,” *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original), even if the witnesses are scientists offering forensic analysis. “Confrontation is one means of assuring accurate forensic analysis. . . . Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.” *Id.* at 2536–37. “[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” *Id.* at 2534.<sup>8</sup> **The importance of a pretrial competency hearing, with an adversarial process to determine critical rights, likely requires the full protections of the Confrontation Clauses.**

In conducting its inquiry of Section 16, an Alaska court will rely on the *Craig* test. *Blume*, 797 P.2d at 674; *Reutter v. State*, 886 P.2d 1298, 1307 (Alaska Ct. App. 1994) (using *Craig* to evaluate Alaska Stat. § 12.45.046, which allows child victims to testify via closed-circuit television).<sup>9</sup> Using the *Craig* test, **the Eight and Eleventh federal circuits determined “[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. . . . the two are not constitutionally equivalent.”** *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (en banc), (emphasis added). **The Confrontation Clause “is most certainly compromised when the confrontation occurs though an electronic medium. Indeed, no court that has considered the question has found otherwise[.]”** *Id.* “The virtual ‘confrontations’ offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect.” *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Given (1) the criticism of two-way video testimony and (2) that the supposed benefits of Section 16, such as cost-savings, convenience, and efficiency, do not rise to an “important public policy,” a court would likely conclude that Section 16 violates the federal and Alaska Confrontation Clauses. This is especially true because **the Alaska Supreme Court has expressly reserved its ability to interpret the Alaska Confrontation Clause more broadly than the federal one**, *Lemon*, 514 P.2d at 1154 n.5,<sup>10</sup> and because it has “the authority and, when necessary, duty to construe the provisions of the Alaska Constitution to provide greater protections than those arising out of the identical federal clauses,” *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).

This conclusion is even more inexorable given the Alaska Supreme Court’s long-standing recognition that one of the “vital interests” of the Confrontation Clauses is to “enable[] the

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<sup>8</sup> The two categories of witnesses are “those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter.” *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original).

<sup>9</sup> The Sixth, Eighth, Ninth, Tenth, and Eleventh federal circuits apply the *Craig* test to evaluate two-way video conference testimony. *Yates*, 438 F.3d at 1313 (listing cases).

<sup>10</sup> The supreme courts of Illinois and Pennsylvania each interpreted their state Confrontation Clause more broadly than the federal one and each concluded that their state Clauses prohibit testimony by closed-circuit television. *People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994); *Commonwealth v. Ludwig*, 594 A.2d 281, 281–82 (Pa. 1991).

defendant to demonstrate to the jury the witnesses' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom," *Lemon*, 514 P.2d at 1153, and that testimony via video may alter "impressions of the witness' demeanor and credibility," *Stores v. State*, 625 P.2d 820, 828 (Alaska 1980).<sup>11</sup>

Even if a court did not completely overturn Section 16, that Section "must be construed to incorporate the requirements of *Craig*." *Reutter*, 886 P.2d at 1307. *Craig* would require that a court permit video testimony only if it "is necessary to further an important public policy," *Craig*, 497 U.S. at 850, which, as noted above, does not include efficiency, speed, convenience, or cost-savings. **At best, Section 16 would be functionally overturned because it would be the rare situation when the need for video testimony in a competency hearing satisfied *Craig*.**<sup>12</sup>

### **Section 25 Should Be Improved to Enhance Witnesses' Reliability and to Strengthen Its Constitutionality**

Section 25's proposed addition to the Alaska Rules of Criminal Procedure tracks *Craig* and so it is likely secure from federal constitutional challenge.<sup>13</sup> **It should, however, be altered to enhance witnesses' reliability and to further buttress its presumed constitutionality.**

*Craig* and other courts note that the Confrontation Clause increases witnesses' reliability by exposing witness coaching. *E.g. Craig*, 497 U.S. at 847 (face-to-face confrontation may "reveal the child coached by a malevolent adult") (internal quotations omitted). Subpart (c) of Section 25 puts the onus on the parties to "move to exclude any person other than the video conference technician from the witness's presence[.]"

Given that witnesses who testify via video are more able to be coached (because someone in the video room, rather than in the courtroom, with the witness, may more easily coach him) and any coaching is harder to detect, **the Committee should amend the Rule and establish a default of**

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<sup>11</sup> Video testimony causes the "most serious . . . [e]vidence distortion . . . because the picture conveyed may influence a juror's feelings about guilt or believability. . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question . . . Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded while the focus is on another part of the body or another witness." *Stores*, 625 P.2d at 828 n.25.

<sup>12</sup> This analysis focused on Section 16's unconstitutionality, but the Committee should also consider practical problems with video testimony, such as the difficulties of having the witness physically use and interact with exhibits, counsel, and the court.

<sup>13</sup> Alaska courts could conclude, however, that the Rule violates the Alaska Confrontation Clause. *Lemon*, 514 P.2d at 1154 n.5

**having just the video technician in the room with the witness, but permitting the parties to move to allow others to be present with him.** To further caution against coaching, the Committee should also add a provision that a second camera should transmit to the courtroom a live feed of what the witness sees.<sup>14</sup>

### **Section 20 Is Unwise; It Shackles Alaska's Policy to Outside Jurisdictions**

Section 20 adds a requirement that anyone who has been convicted of “a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction” must register with the Alaska sex offender registry. Alaska Stat. § 12.63.100(6) currently ensures that out-of-state offenders register in Alaska if they “committed or attempted to commit” one of Alaska Stat. § 12.63.100(6)'s offenses or “a similar offense [or] law of another jurisdiction.” Section 20, then, serves only to unpin the Alaska registry from Alaska crimes and Alaska public policy.

**This concern is not academic. Other states require registration for offenses that, if committed in Alaska, would not require the offender to register.** In Alaska, for example, while most forms of indecent exposure require offenders to register, not all do: streaking (perhaps done as a prank),<sup>15</sup> is a misdemeanor in Alaska<sup>16</sup> and does not require registration.<sup>17</sup> Other states are more draconian; to continue to use the indecent exposure example, some states require registration for all forms, even for those variants that Alaska has omitted from registration.<sup>18</sup> If Section 20 is enacted, it would commit these individuals to register annually for at least 15 years<sup>19</sup> and suffer the ignominy and consequences of registration.

Registration is life-changing. The Department of Public Safety publishes, on an easily accessible website, each registrant's “name, aliases, address, photograph, physical description, description

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<sup>14</sup> Not all coaching is intentional or malicious. Spectators may innocently influence testimony through their facial expressions and body language. Permitting the court, counsel, and the defendant to see what the witness sees enables them to notice and check that behavior.

<sup>15</sup> Associated Press, *Juneau High School Boys Disciplined for Streaking*, Oct. 28, 2009; Julia O'Malley, *Hey, Nude Hikers, What About the Bugs?*, Anchorage Daily News, May 19, 2010 (discussing nude hiking on Anchorage's trails).

<sup>16</sup> Alaska Stat. § 11.41.460.

<sup>17</sup> Alaska Stat. § 12.63.100(6)(C)(iv) (not requiring registration for indecent exposure so long as it was not “before a person under 16 years of age and the offender [does not have] a previous conviction for that offense”).

<sup>18</sup> Including California (Cal. Penal Code § 290(c) for violating California's indecent exposure statute, Cal. Penal Code. § 314); Colorado (Colo. Rev. Stat. § 16-22-103 for violating Colorado's indecent exposure statute, Colo. Rev. Stat. § 18-7-302); and Oklahoma (Okla. Stat. tit. 57, § 582(A) for violating Oklahoma's indecent exposure statute, Okla. Stat. tit. 21, § 1021).

<sup>19</sup> 15 years is the briefest registration period in Alaska. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.” Alaska Stat. § 18.65.087(b). This “impose[s] significant affirmative obligations and a severe stigma on every [registrant],” *Doe*, 189 P.3d at 1009 (quoting *Smith v. Doe*, 538 U.S. 84, 111 (Stevens, J., dissenting)) (first alteration in original), and “through aggressive public notification of their crimes,” *id.* (internal quotation omitted), causes registrants to risk “public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson,” *id.* at 1010 n.80.

If obligated to register, one must register each year for at least 15 years.<sup>20</sup> Once on the registry, there is “no mechanism” through which one “can petition the state or a court for relief from the obligations of continued registration and disclosure.” *Id.* at 1017.

At least 136 jurisdictions have sex offender registries.<sup>21</sup> The State, if it enacts Section 20, will bind Alaska to each of these jurisdictions in an ever-changing, complex web. The Alaska Supreme Court held that Alaska’s registry is “punitive” and, when applied “to defendants who committed their crimes before the legislature enacted [the Alaska Sex Offender Registration Act],” *Doe*, 189 P.3d at 1019, violates the Alaska *Ex Post Facto* Clause.<sup>22</sup>

The complex interaction between Alaska and each of these 135 jurisdictions may present future *ex post facto* issues, which may expose the State to expensive and lengthy litigation. Section 20 applies to offenses committed only after its enactment. But, how would it apply in the following example? (1) Another jurisdiction, like Alaska, does not require otherwise innocent college-student stalkers to register. (2) A college student in that jurisdiction stalks on July 1, 2013. (3) The individual moves to Alaska on January 1, 2014 and does not have to register here. (4) On February 1, 2014, that jurisdiction amends its laws, with a retroactive date to January 1, 2010, to require stalkers to register. Does that person now need to register in Alaska? With at least 135 other jurisdictions, this hypothetical is plausible and implicates the Alaska *Ex Post Facto* Clause. If the State incorrectly requires this individual to register, it would likely face an *ex post facto* challenge and a suit for civil damages. Section 20, rather than being clear and efficient, makes Alaska law more turbid and turbulent.

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<sup>20</sup> Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

<sup>21</sup> The Dru Sjodin National Sex Offender Public Website, administered by the U.S. Department of Justice, lists 136 jurisdictions with sex offender registries: the 50 States; the District of Columbia; the 4 territories of Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; and 81 Native Tribes. United States Department of Justice National Sex Offender Public Website, at <http://www.nsopw.gov/Core/PublicRegistrySites.aspx> (last visited Mar. 7, 2012).

<sup>22</sup> Alaska Const., Art. I, § 15 (“No . . . ex post facto law shall be passed.”).

No matter one's assessment regarding registration as a policy matter, clearly placement on the registry – because of its significant, irrevocable consequences – should never be done without intentional review and action by the Alaska Legislature. Were Section 20 to be enacted, individuals would be forced to register and bear the heavy costs associated thereto, even though they had not committed an offense that Alaska, in its sound policy judgment, had decided warrants registration.

Alaska should not abdicate its sovereignty and wisdom, it should not cede its policymaking to other jurisdictions, and it should not expose itself to needless constitutional litigation. The Legislature should continue to exercise its considered judgment in determining which offenses do justify registration. Section 20 would make Alaska's registry an appendage to all other jurisdictions.

### Conclusion

We hope to work with the Judiciary Committee to address the above-noted problems with Senate Bill 218, so that final legislation would not impermissibly deprive Alaskans of their constitutional rights nor abdicate the Legislature's policy judgments about the offender registry.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,



Jeffrey Mittman  
*Executive Director*  
ACLU of Alaska

cc: Senator Joe Paskvan, [Senator\\_Joe\\_Paskvan@legis.state.ak.us](mailto:Senator_Joe_Paskvan@legis.state.ak.us)  
Senator Lesil McGuire, [Senator\\_Lesil\\_McGuire@legis.state.ak.us](mailto:Senator_Lesil_McGuire@legis.state.ak.us)  
Senator John Coghill, [Senator\\_John\\_Coghill@legis.state.ak.us](mailto:Senator_John_Coghill@legis.state.ak.us)

1 contemporaneous two-way video conference testimony of a witness if

2 (1) the requesting party establishes that testimony by two-way video  
3 conference is necessary to further an important public policy;

4 (2) the requesting party establishes that the witness is unavailable; and

5 (3) the testimony is given under oath and subject to cross-examination.

6 (c) **Procedures for Taking Video Conference Testimony.** If the trial court  
7 authorizes video conference testimony under (b) of this rule, it shall determine the  
8 procedures for taking the contemporaneous two-way video conference testimony. The  
9 parties, the court, the trier of fact, and the public must be able to see and hear the  
10 witness; and the witness must see and hear the courtroom proceedings, including the  
11 defendant, as if the witness were sitting in the courtroom's witness stand. The persons  
12 who are present with the witness must be identified. The parties may move to exclude  
13 any person other than the video conference technician from the witness's presence; the  
14 court, in its discretion, may exclude a person other than the video conference  
15 technician from the presence of the witness.

16 (d) **Definitions.**

17 (1) **Contemporaneous Two-Way Video Conference.** Contemporaneous  
18 two-way video conference means a conference among people at different places by  
19 means of transmitted audio and video signals. It includes all communication  
20 technologies that allow two or more places to interact by two-way video and audio  
21 transmissions simultaneously.

22 (2) **Unavailable.** In this rule, a witness is unavailable if

23 (A) by clear and convincing evidence the court finds under  
24 Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska  
25 Rules of Criminal Procedure, that the witness is unavailable;

26 (B) by clear and convincing evidence the court finds that under  
27 the circumstances, <sup>the particular case</sup> the witness is unavailable; or

28 (C) the parties agree that the witness is unavailable.

29 \* **Sec 26.** The uncoded law of the State of Alaska is amended by adding a new section to  
30 read:

31 **APPLICABILITY.** (a) Sections 1, 2, 7 - 11, 14, 17 - 19, 21 - 24, and 27 of this Act

*unavailable due to death or physical injury*  
*unavailable by process*  
*unavailable to process*  
*Insert #2*

Ten years later, with the Adam Walsh Act of 2006, Congress again passed legislation increasing the categories of people that states were required to register as sex offenders and for how long they would have to do so.<sup>98</sup> The Act also authorized a national registry that would incorporate the information from every state registry.

The Adam Walsh Act significantly expands the federal requirements of who must register as a sex offender. The Act defines a sex offense as a “criminal offense that has an element involving a sexual act or sexual contact with another.”<sup>99</sup> The law exempts consensual sexual conduct when the victim was at least 13 and the offender was no more than four years older.<sup>100</sup> For the first time, federal law under the Adam Walsh Act requires some juveniles to register (see Chapter VII, “Sex Offender Laws and Child Offenders”).

The Adam Walsh Act creates three tiers or levels of registrants, determined solely by the conviction offense, with Tier I crimes the least serious and Tier III crimes the most serious. The tiers dictate the duration of the registry requirement.<sup>101</sup>

The Act also sets the frequency with which a former offender must update registry information: Tier I sex offenders must do so every year; Tier II sex offenders must do so every six months; and Tier III offenders must do so every three months. A registrant must not only register with local law enforcement in the jurisdiction where

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in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; and (2) engaging in sexual acts involving penetration with victims below the age of 12.”

<sup>97</sup> Ibid. Megan’s Law is most commonly associated, however, with its community notification provisions, discussed below.

<sup>98</sup> The act is named after a six-year-old boy who was abducted and murdered in 1981. Adam’s severed head was found in a canal about 100 miles from his family home. The rest of his remains have never been found, nor has anyone been convicted of his murder. His father, John Walsh, is a prominent national victims’ rights advocate and the host of the television show *America’s Most Wanted*. “About John Walsh,” [http://www.amw.com/about\\_amw/John\\_Walsh.cfm](http://www.amw.com/about_amw/John_Walsh.cfm) (accessed January 14, 2007).

<sup>99</sup> Adam Walsh Act, Title I, Sec. 111(5)(A)(i).

<sup>100</sup> Ibid., Sec. 111(5)(C).

<sup>101</sup> Ibid., Sec. 111. Tier III registrants are those who committed a sex crime punishable by more than one year in prison and comparable or more severe than aggravated sexual abuse, abusive sexual contact with a child under 13, kidnapping of a child by someone other than the guardian, any sex crime occurring after the offender was a Tier II offender. Ibid., Sec. 111(4). Tier II registrants are “those who are not a Tier III offender” and whose offense is against a minor, is punishable by imprisonment of more than one year, and is comparable or more severe to sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, involves the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, production or distribution of child pornography, or if the sex offense occurs after the offender becomes a Tier I sex offender. Ibid. Sec. 111(3). A Tier I sex offender is defined as “a sex offender other than a Tier II or Tier III sex offender.” Ibid. Sec. 111(2).

he or she resides, but must also register in the jurisdiction where he or she is employed or and goes to school.<sup>102</sup> The Act makes failure to register a violation of federal law, carrying with it a fine or imprisonment.<sup>103</sup> These registration requirements are applied to all registrants, for the duration of their registration. So, for example, a man convicted of soliciting an underage prostitute would have to register in the jurisdiction where he lives and also in the jurisdiction where he is employed (if different) and provide information about his employer to the police, even if his work does not involve contact with children.

One of the goals of the Act was to create more uniformity among state registration schemes, to avoid some of the confusion as to registration requirements when registrants moved to different states. However, since the Act does not limit the authority of states to go beyond federal law (see below), uniformity will still be elusive.

Moreover, the Act will preclude state officials from instituting registration laws they deem more reasonable or effective but which fall below the federal mandate.

In 1996 Congress authorized the creation of a national registry of offenders convicted of coercive, penetrative sex with anyone, sex with children under the age of 12, recidivists of any sexual offense, and sexually violent predators.<sup>104</sup> In 2005 the national registry went online with links to state online registries.<sup>105</sup> The Adam Walsh Act requires all states to upload their online sex offender database to the national database by 2009.<sup>106</sup>

## State Registration Laws

The only reason I am considered a sex offender is because I committed an offense that triggers registration. In any other context, my crime

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<sup>102</sup> Ibid. Sec. 113(a).

<sup>103</sup> Ibid. Sec. 141. Failure to register is also a deportable offense for non-citizens.

<sup>104</sup> The Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 USC. Sec. 14072. Pam Lyncher was a victim of sexual assault and the founder of Justice for All, a victims' rights group. She died with her two daughters when TWA Flight 800 crashed in New York in July 1996. Justice for All, "In Memory," <http://www.jfa.net/memory.html> (accessed September 8, 2006). The FBI maintains the registry. 42 USC. sec. 14072.

<sup>105</sup> Dru Sjodin National Sex Offender Public Website, <http://www.nspor.gov> (accessed March 16, 2007).

<sup>106</sup> Ibid.

would never be considered a sex offense, and I would not be considered a threat to society.

—Trent B., a Pennsylvania registrant convicted of streaking<sup>107</sup>

While federal law requires states to register former offenders convicted of certain offenses, it does not limit states' authority to increase the number of offenses that trigger registration or the duration of the requirement to register.

### *Expanding the Definition of Sex Offender*

Most people assume that a registered sex offender is someone who has sexually abused a child or engaged in a violent sexual assault of an adult. A review of state sex offender registration laws by Human Rights Watch reveals that states require individuals to register as sex offenders even when their conduct did not involve coercion or violence, and may have had little or no connection to sex. For example:

- At least five states require registration for adult prostitution-related offenses;<sup>108</sup>
- At least 13 states require registration for public urination; of those, two limit registration to those who committed the act in view of a minor;<sup>109</sup>
- At least 29 states require registration for consensual sex between teenagers;<sup>110</sup> and

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<sup>107</sup> Email communication from Trent B. to Human Rights Watch, January 11, 2007.

<sup>108</sup> Alabama, Ala. Code §13A-200(b); Michigan, Mich. Comp. Laws §28.722 & §750.455; Oregon, Or. Rev. Stat. §181.594, 595; Tennessee, Tenn. Code Ann §40-39-202, 203; West Virginia, W. Va. Code §15-12-2, §61-8-6, §61-8-7. These provisions are distinct from prostitution-related offenses with children. At least 39 states require persons to register as sex offenders for prostitute-related offenses against children.

<sup>109</sup> Arizona, Ariz. Rev. Stat. §13-3821 (if the individual has more than one previous conviction for public urination—two if exposed to a person under 15; three if exposed to a person over 15); California, Cal. Penal Code §314(1)-(2), 290; Connecticut, Conn. Gen. Stat. §53a-186, §54-250, §54-251 (if the victim was under 18); Georgia, O.C.G.A. §42-1-12, 16-6-8 (if done in view of a minor); Idaho, Idaho Code Ann. §18-4116, 8306, 8304; Kentucky, Ky. Rev. Stat. Ann. §510.148, §17.520, 500, §510.150; Massachusetts, Mass. Gen. Laws ch. 272 §16, ALM GL ch. 6 §178G, 178C; Michigan, Mich. Comp. Laws §167(1)(f), §28.722, 723; New Hampshire, N.H. Rev. Stat. Ann. §651-B:1, RSA 651-B:2, 645:1(II), (III); Oklahoma, 57 Okl.St. §582.21, §1021; South Carolina, S.C. Code Ann. §23-3-430; Utah, Utah Code Ann. §77-27-21.5, §76-9-702.5; Vermont, Vt. Stat. Ann. Tit. 13, §2601, §5407, 5401.

<sup>110</sup> Alabama, Ala. Code §13A-6-63, §13A-11-200; Alaska, Alaska Stat. S11.41.434, §12.63.010, 100; Arizona, A.R.S. §13-1405, 3821; Arkansas, Ark. Code Ann §12-12-903, 905, §5-14-110; Colorado, Colo. Rev. Stat. §16-22-103, §18-3-402, 411; Connecticut, Conn. Gen. Stat. § 54-250, § 54-251, § 53a-70; Florida, Fla. Stat. Ann. §775.21, § 794.011; Indiana, Burns Ind. Code Ann § 11-8-8-7, § 11-8-8-5; Louisiana, La. R.S. 15:542, 15: 541, 14:92(A)(7); Maine, 34-A M.R.S. § 11222, 34-A M.R.S. § 11203, 17-

- At least 32 states require registration for exposing genitals in public;<sup>111</sup> of those, seven states require the victim to be a minor.<sup>112</sup>

### Case study: Oklahoma

Oklahoma law treats any type of public exposure as a sex offense that triggers 10 years on the sex offender registry, even if the offender had no sexual or lascivious motivation or intent at the time he or she exposed him- or herself. According to a local newspaper, nearly 600 registrants appear on Oklahoma's website for engaging in indecent exposure.<sup>113</sup>

In 1999 a high school senior in Salina, Oklahoma was arrested for what his mother described to the local media as a "high school thing."<sup>114</sup> He reportedly exposed himself to a group of female freshman gym students on his way to the restroom.

A M.R.S. § 254; Maryland, Md. Criminal Procedure Code Ann. § 11-704, 11-701, 3-308; Massachusetts, ALM GL ch. 6, § 178C, 178D, ALM GL ch. 272, § 35A; Michigan, MCLS § 28.723, 28.722, 750.520e; Minnesota, Minn. Stat. § 243.166, Subd. 1b(a)(1)(iii), 609.345 (2006); Missouri, 589.400 R.S.Mo., § 566.032 R.S.Mo.; New Hampshire, N.H. Rev. Stat. Ann. § 651-B:1, RSA 651-B:2, RSA 632-A:2; New Jersey, N.J. Stat. Ann. § 2c 14-2, § 2C:7-2, 2C:14-3b; North Carolina, N.C. Gen. Stat. § 14-208.7, 14-208.6, 14-27.7A; North Dakota, N.D. Cent. Code § 12.1-32-15, 12.1-20-07; Oklahoma, 57 Okl. St. § 582, 21 Okl. St. § 1123; Rhode Island, R.I. Gen. Laws § 11-37.1-3, 11-37.1-2; South Carolina, S.C. Code Ann. § 23-3-430, § 16-3-655; South Dakota, S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-22-7; Tennessee, Tenn. Code Ann. § 40-39-202, 40-39-203, 39-13-506; Texas, Tex. Code Crim. Proc. art. 62.002, 62.001, Tex. Penal Code § 21.11; Utah, Utah Code Ann. § 77-27-21.5, § 76-5-401, 76-5-401.2; Washington, Rev. Code Wash. (ARCW) § 9A.44.130, § 9A.44.096; West Virginia, W.Va. Code § 15-12-2, § 61-8B-9; Wisconsin, Wis. Stat. § 301.45, § 948.02 (2006).

111 Alabama: Code of Ala. § 13A-11-200, 13A-6-68; Arizona: A.R.S. § 13-3821, § 13-1402; Arkansas: A.C.A. § 12-12-905, § 12-12-903, § 5-14-112; California: Cal Pen Code § 290, § 314; Colorado: C.R.S. 16-22-103 (2006), 18-3-411 (2006), 18-7-302 (2006); Connecticut: Conn. Gen. Stat. § 54-250, 54-251, 53a-186; Idaho: Idaho Code § 18-8304, 18-4116; Illinois: 730 ILCS 150/3, 730 ILCS 150/2, 720 ILCS 5/11-9; Iowa: Iowa Code § 692A.2, 692A.1, 709.9 (2006); Kansas: K.S.A. § 22-4904, 22-4902, 21-3508 (2006); Kentucky: KRS § 17.510, 17.500, 510.148, 510.150 (2006); Louisiana: La. R.S. 15:542, 15:541, 14:81; Massachusetts: ALM GL ch. 6, § 178E, 178C, ALM GL ch. 272, § 16; Michigan: MCLS § 28.723, 28.722, 750.335a; Minnesota: Minn. Stat. § 243.166, 617.23 (2006); Montana: Mont. Code Anno. § 46-23-504, 46-23-502, 45-5-504 (2005); Nevada: Nev. Rev. Stat. Ann. § 179D.450, 179D.400, 179D.410, 201.220; New Mexico: N.M. Stat. Ann. § 29-11A-4, 29-11A-3, 30-9-14.3; North Dakota: N.D. Cent. Code § 12.1-32-15, 12.1-20-12.1; South Carolina: S.C. Code Ann. § 23-3-430, 16-15-130 (2006); South Dakota: S.D. Codified Laws § 22-24B-2, 22-24B-1, 22-24-1.2; Tennessee: Tenn. Code Ann. § 40-39-203, 40-39-202, 39-13-511; Texas: Tex. Code Crim. Proc. art. 62.051, 62.001, Tex. Penal Code § 21.08; Vermont: 13 V.S.A. § 5407, 5401, 2601; West Virginia: W.Va. Code § 15-12-2, 61-8-9.

112 Alaska: Alaska Stat. § 12.63.100, § 11.41.460 (to anyone under 16 AND the offender has a prior conviction for the offense); Delaware: 11 Del. C. § 4120, 4121(a)(4), 765 (exposed to person under 16); Florida: Fla. Stat. § 775.21, 800.04 (exposed to anyone under 16 and must be in a lewd or lascivious manner); Georgia: O.C.G.A. § 42-1-12, 16-6-8; Missouri: § 589.400 R.S.Mo., § 566.083 R.S.Mo. (exposure to a child less than 14 years old); North Carolina: N.C. Gen. Stat. § 14-208.7, 14-208.6, 14-190.9 (exposure by anyone over 18 to anyone under 16; must be for the purpose of sexual arousal/gratification); Utah: Utah Code Ann. § 77-27-21.5, 76-9-702.5 (exposure to a child under age 14).

113 Curtis Killman, "Sex Offenders Struggle to Find Jobs," *Tulsa World*, July 10, 2005.

114 *Ibid.* The paper did not report the name of the youth.

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668 P.2d 829

Alaska App., 1983.

September 09, 1983

Term 

668 P.2d 829

Court of Appeals of Alaska.

Willie B. BELL, Appellant,

v.

STATE of Alaska, Appellee.

No. 5821.

Sept. 9, 1983.

Christine Schleuss, Asst. Public Defender,  
Dana Fabe, Public Defender, Anchorage, for  
appellant.

W.H. Hawley, Jr., Asst. Atty. Gen.,  
Anchorage, Wilson L. Condon, Atty. Gen.,  
Juneau, for appellee.

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

## OPINION

BRYNER, Chief Judge.

Willie B. Bell appeals his convictions for promoting prostitution in the first degree in violation of [AS 11.66.110\(a\)\(2\)](#) and managing a prostitution enterprise in violation of [AS 11.66.120\(a\)\(1\)](#). He also appeals the sentence imposed. We affirm.

Bell was a twenty-nine-year-old army sergeant when he procured two sixteen-year-old girls, C.R. and M.J., and one fourteen-year-old girl, D.W., for prostitution. C.R. began living with Bell and engaging in prostitution after Bell promised to marry her and to buy her a new car and new clothing. At Bell's direction, D.W. and M.J. worked as prostitutes in May, 1980. On May 22, 1980, Bell assaulted M.J., claiming that she had been drinking instead of "working." Fearing that Bell would harm them, C.R. and M.J. left him and contacted police, who obtained a search warrant to record conversations between M.J., C.R. and Bell. A telephone conversation between Bell and C.R. and a conversation involving Bell, M.J. and C.R. were recorded pursuant to the warrant and used as evidence against Bell.

The indictment returned against Bell charged two counts of promoting prostitution in the first degree, alleging that he induced D.W. to engage in prostitution when she was under the age of sixteen (Count I) (AS 11.66.110(a)(2)), and that he induced C.R. to engage in prostitution by means of force (Count II) (AS 11.66.110(a)(1)). Count III of the indictment, as it went to the jury, alleged that Bell was guilty of attempted promotion of prostitution in the first degree, AS 11.66.110(a)(1) and AS 11.31.100(a), regarding M.J. The indictment also alleged that Bell managed, supervised, controlled or owned a prostitution enterprise other than a house of prostitution in violation of AS 11.66.120(a)(1) (Count IV). Bell was convicted of Counts I and IV. On Count II, Bell was acquitted of the charge but convicted of the lesser-included offense of promoting prostitution in the third degree, AS 11.66.130. On Count III, Bell was found not guilty of the charge but guilty of the lesser-included offense of attempted promotion of prostitution in the third degree, AS 11.66.130 and 11.31.100(a). Bell was not sentenced on Counts II and III. Superior Court Judge Milton M. Souter sentenced Bell

to a five-year term with two years suspended on Count I, and a four-year term with three years suspended on Count IV. The sentences for these offenses were to run concurrently. Subsequently, Judge Souter refused to reduce the sentence.

On appeal, Bell argues that: (1) he should have been allowed to present a reasonable mistake of age defense to the charge contained in Count I; (2) a partially inaudible tape recording should not have been admitted into evidence; (3) the search warrant for recording of conversations was improperly issued and executed; (4) supplemental instructions given to the jury were unduly coercive; (5) the sentences imposed by the trial court violated his double jeopardy rights; and (6) Judge Souter gave improper consideration to a letter Bell wrote, while awaiting sentencing, to the fourteen-year-old daughter of another inmate.

#### I. MISTAKE OF AGE

Bell asserts that the trial court erred in refusing to give a proposed jury instruction providing for a reasonable mistake of age defense to the charge of inducing a person under the age of sixteen to engage in prostitution in violation of AS 11.66.110(a)(2).<sup>FN1</sup> Bell argues that AS 11.66.110(b) violates his due process rights under the United States and Alaska constitutions by expressly precluding mistake of age as a defense to the charge of violating AS 11.66.110(a)(2). We find this argument unpersuasive and conclude that the legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the crime of promoting prostitution in the first degree.

FN1. AS 11.66.110 provides:  
PROMOTING PROSTITUTION IN  
THE FIRST DEGREE.

(a) A person commits the crime of promoting prostitution in the first degree if he

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or

(3) induces or causes a person in his legal custody to engage in prostitution.

(b) In a prosecution under (a) (2) of this section, it is not a defense that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

(c) Promoting prostitution in the first degree is a class B felony.

The jury was instructed on the elements of this offense. The court then instructed that:

It is not a defense to the crime charged in Count I of the Indictment that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

The instruction proposed by Bell stated:

It is a defense to Count I of the indictment, Inducing a Person Under 16 Years of Age to Engage in Prostitution, that the defendant reasonably and in good faith believed that the female person was of the age of

sixteen years or older, even though, in fact, she was under the age of sixteen years. If from all the evidence you have a reasonable doubt as to the question whether defendant reasonably and in good faith believed that she was sixteen years of age or older, you must give the defendant the benefit of that doubt and find him not guilty.

It is apparent that the legislature considered procurement of a person under sixteen to be an aggravated form of promoting prostitution. The commentary to the Revised Criminal Code, 2 Senate Journal, Supplement No. 47, at 109 (1978), states that by denying a defendant the defense of reasonable mistake as to age, creation of strict liability was intended as to the element of the offense involving age of the victim.<sup>FN2</sup> Supporting the validity of the legislature's decision in this regard is the supreme court's opinion in Hentzner v. State, 613 P.2d 821 (Alaska 1980), in which the court held:

FN2. See also Alaska Criminal Code Revision Part 4, at 103 (Tent. Draft 1977) (Commentary to AS 11.66.140).

Where a crime involved may be said to be *malum in se*, that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case the requirement of criminal intent is met on proof of conscious action, and it would be entirely acceptable to define the word "wilfully" to mean no more than a consciousness of the conduct in question.

*Id.* at 826. See also Wheeler v. State, 659

P.2d 1241, 1254 n. 18 (Alaska App.1983).

Bell correctly states the well-recognized rule in this jurisdiction that criminal intent is a necessary ingredient of criminal liability and that one charged with criminal conduct must have an awareness or consciousness of wrongdoing. Speidel v. State, 460 P.2d 77, 78 (Alaska 1969). In *Speidel*, the awareness of wrongdoing was in the context of a larceny-type crime, for which courts have historically required a specific intent to wrongfully deprive. In Alex v. State, 484 P.2d 677 (Alaska 1971), the supreme court discussed the intent required for non-larceny crimes:

However, as applied to crimes generally, what is imperative, is that an accused's act be other than simply inadvertent or neglectful. What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing." It is, however, no defense that one was not aware that his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.

*Id.* at 681-82.<sup>FN3</sup>

FN3. See also State v. Rice, 626 P.2d 104, 115 (Alaska 1981) (Matthews, J., concurring) (a statute prohibiting the transportation of illegally taken game was overbroad, because it included "within its ambit the conduct of people who have no reason to believe that what they are doing is criminal").

We believe this language is applicable to Bell's actions, since he was consciously

committing the acts proscribed by law. As an element of this offense, Bell was required to be aware that he was procuring women to engage in acts of prostitution. Indeed, the jurors in this case were instructed that they must be convinced beyond a reasonable doubt

that the defendant engaged in conduct which caused or induced [D.W.] to engage in prostitution; [and] that the defendant engaged in said conduct with the specific intent to cause or induce [D.W.] to engage in prostitution.

Thus, while Bell was not required to know the age of those whom he procured, this is not to say that the offense did not require *mens rea* or a culpable mental state.

We also note that AS 11.66.110(b) is in accord with the common law view that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be illegal or immoral. <sup>FN4</sup> As Bell recognizes on appeal, his conduct would still have been illegal even if D.W. had been sixteen or over. AS 11.66.130 (a)(2). <sup>FN5</sup> Moreover, although it might be arguable that the offense of prostitution should be considered a *malum prohibitum* crime, we think it manifest that *promoting* prostitution is an offense "which reasoning members of society regard as condemnable," and thus, is *malum in se*. Hentzner v. State, 613 P.2d at 826. Accordingly, there can be little doubt that *Hentzner*'s basic requirement of an awareness or consciousness of wrongdoing is satisfied, despite the fact that AS 11.66.110(b) precludes mistake of age as a defense to the offense of promoting prostitution in the first degree.

<sup>FN4</sup>. In the landmark case of *Regina v. Prince*, L.4., 2 Cr.Cas.Res. 154 (1875), the defendant was convicted of taking a girl under sixteen years of age from under the

care of her father, even though the defendant reasonably believed she was older. The defense of mistake of age was disallowed on the ground that removal of an unmarried girl from the lawful custody of her parents would have been a crime even had she been as old as he believed. Hence, the defendant acted at his peril.

FN5. AS 11.66.130 provides, in relevant part:

(a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, he ...

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution ....

(b) Promoting prostitution in the third degree is a class A misdemeanor.

In continuing to press his claim that AS 11.66.110(b) imposes an unconstitutional standard, Bell relies upon *State v. Guest*, 583 P.2d 836 (Alaska 1978), in which the supreme court upheld a trial court's decision to instruct the jury on a defense of reasonable mistake of age in a statutory rape case. Following the reasoning of *Speidel* and *Alex*, the court stated that an intent requirement must be read into former AS 11.15.120 to save it from unconstitutionality. To refuse a defense of mistake of age in a statutory rape case, according to the *Guest* court, would be to impose significant criminal liability without any criminal mental element. *Id.* at 839.

Bell relies most heavily upon the following language in *Guest*:

It has been urged in other jurisdictions that where an offender is aware he is

committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view. While it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken. Thus, if an accused had a reasonable belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was eighteen years of age or older, he may still be criminally liable for contribution to the delinquency of a minor.

*Id.* (citations and footnotes omitted). The court cited in support of its position section 2.04(2) of the Model Penal Code (Proposed Official Draft 1962), which provides:

Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

We believe the problem addressed in *Guest* is distinguishable from the issue at hand. As we have stated, Bell did not lack criminal intent; he intended to promote prostitution. See *Hentzner v. State*, 613 P.2d at 826; *Wheeler v. State*, 659 P.2d at 1251. The court in *Guest* was careful to point out that fornication was not itself a crime, so that it could not have been considered as a lesser-included offense of statutory rape. Also,

although the court went on to observe that Guest *might* still have been guilty of contributing to the delinquency of a minor under former AS 11.40.130 if he did not have a reasonable belief that his partner was under eighteen, it is clear that Bell was *necessarily* guilty of promoting prostitution in the third degree if the facts were as he supposed them to be.

This distinction is supported by analysis of other authorities. The revised criminal code contains no provision paralleling the second sentence of MPC § 2.04(2), quoted by the *Guest* court. Instead, AS 11.81.600(b)(2) provides:

(b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that no culpable mental state must be proved

*(2) if an intent to dispense with the culpable mental state requirement for that element clearly appears.*

(Emphasis added.) AS 11.66.110(b), by proscribing any defense to AS 11.66.110(a)(2) based upon mistake of age, clearly demonstrates a legislative intent to dispense with knowledge of age.

More importantly, despite the language of MPC § 204(2), the Model Penal Code takes essentially the same approach as the Revised Code to in its treatment of criminal intent for the offense of promoting prostitution. MPC § 251.2(2) (1980) makes the conduct proscribed by AS 11.66.130(a)(2)—promoting prostitution in the third degree—a misdemeanor, while § 251.2(3)(c) provides that the same conduct shall be a felony if “the actor promotes prostitution of a child under 16, *whether or not he is aware of the child's age.*” Similarly, New York Penal Law § 230.30 (1978), from which AS 11.66.110 appears to be derived, provides that it shall be a felony

to "knowingly" advance or profit from the prostitution of a person less than sixteen years old, while New York Penal Law § 15.20 (3) (1967) provides that

Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

We find it highly persuasive that these statutory schemes are, when applied to the precise conduct engaged in by Bell, in consonance with the approach taken in the Revised Code.

Under the Revised Alaska Criminal Code, it is Bell's intentional procurement of a person under the age of sixteen years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. The act of procuring another for purposes of prostitution is *malum in se*, without regard to the age of the person procured, and thus, as we have indicated, in a prosecution for procuring a person under the age of sixteen years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. Hentzner v. State, 613 P.2d at 826. We hold that AS 11.66.110(b), which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. We therefore conclude that the trial court did not err in rejecting Bell's challenge to the instruction on mistake of age.

## II. PARTIALLY INAUDIBLE TAPE

Bell argues that error occurred when a

recording of a telephone conversation between Bell and C.R. was played for the jury. At trial, Bell's attorney objected to admission of the recorded telephone conversation, contending that parts of the tape were substantially inaudible. The tape of another conversation was played without objection. Before this tape was played, the trial judge gave a cautionary instruction admonishing the jury to consider only what it actually heard on both tapes.<sup>FN6</sup>

FN6. The jury was instructed:

[I] want to admonish the jury that there are portions of these tapes that are impossible to hear .... Consider only what you hear, only what you actually hear on the tapes, together with any other evidence .... But don't speculate what is on the tape where there isn't credible evidence .... The tapes are going to be hard to understand. Don't guess at what's on those tapes.

The trial court's decision to admit the phone tape is reversible error only if it constituted an abuse of discretion. Robinson v. State, 593 P.2d 621, 624 n. 5 (Alaska 1979). In Dana v. State, 623 P.2d 348 (Alaska App.1981), we considered the correctness of the trial court's admission of a tape which had "significant gaps" due to equipment failure. We held that there could be no abuse of discretion in admitting the flawed tape unless its prejudicial impact outweighed its probative value. Id. at 353-54.

In the present case, after weighing the possibility of prejudice against the probative value of the tape, and taking into account the other evidence at trial, the cautionary instruction, and the fact that most of the tape is audible, we conclude that Judge Souter did not abuse his discretion in admitting the tape.

### III. ISSUANCE AND EXECUTION OF THE GLASS WARRANT

Bell argues that procedures outlined in the federal electronic surveillance act should supplement the requirements, enumerated in *State v. Glass*, 583 P.2d 872 (Alaska 1978), that must be met before electronic monitoring of conversations is permitted. We considered and rejected a similar argument in *Jones v. State*, 646 P.2d 243, 248 (Alaska App.1982). See also *Gallagher v. State*, 651 P.2d 1185, 1187 (Alaska App.1982). Our holdings in *Jones* and *Gallagher* are dispositive of this issue.

Bell also contends that probable cause for the issuance of a *Glass* warrant did not exist because it was not known whether relevant conversations would occur between Bell, M.J. and C.R., and because M.J. and C.R. were neither reliable nor credible. Bell's motion to suppress on this ground was denied at the omnibus hearing.

The judge's determination that probable cause existed is entitled to great deference by this court. *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 584, 590-91, 21 L.Ed.2d 637, 645 (1969). We find ample facts to support issuance of the search warrant. C.R. and M.J. stopped working for Bell less than a week before they testified at the proceeding to issue the *Glass* warrant. Since C.R. had worked for Bell for nearly six months and given him \$5,000 of the money she made by prostitution, it was logical to assume she could contact him and that he would have some interest in talking to her. Although M.J. had worked for Bell for only a few weeks, the same reasoning applies. We believe the court correctly found that sufficient probable cause existed to issue the *Glass* warrant. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 745-46, 13 L.Ed.2d 684, 689 (1965); *Martel v. State*, 511 P.2d 1055, 1055 n. 1 (Alaska 1973); *Rosa v. State*, 633 P.2d 1027, 1029-30 (Alaska App.1981).

Bell, relying on *Spinelli v. United States*, and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), additionally contends that the search warrant should not have been issued because C.R. and M.J. were neither reliable nor credible. Bell's reliance on the rulings in *Aguilar* and *Spinelli* is misplaced, because those cases set forth criteria for ascertaining the reliability and credibility of informants who have provided hearsay information. Neither C.R. nor M.J. was a confidential informant; both testified personally and were under oath at the time. The magistrate thus had ample opportunity to assess their credibility. Accordingly, the *Aguilar-Spinelli* standards do not apply in this case, and Bell's argument is without merit.

Next, Bell argues that the recordings should have been suppressed because the police failed to comply with Alaska Rule of Criminal Procedure 37(b)(2), and because the police failed to mail a copy of the warrant and receipt to Bell in compliance with the provision of the warrant requiring that Criminal Rule 37(b)(1) and (2) be satisfied.<sup>FN7</sup>

FN7. Alaska R.Crim.P. 37 provides, in pertinent part:

(b) *Execution and Return With Inventory*. The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant

(1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or

(2) shall leave the copies and the receipt at the place from which the property was taken ....

The court ordered that a copy of the

warrant and receipt be mailed to Bell within ten days of May 27, 1980, when the warrant was executed. Officer George Novaky stated in an affidavit that, although he did not specifically advise Bell of the recording at the time of Bell's arrest and although Bell was not sent a copy of the search warrant, Novaky included information concerning the recording in police reports made available to Bell on June 16, 1980. Additionally, on June 13, 1980, Bell obtained actual notice of the recording when he appeared at a bail hearing with his attorney. At the bail hearing, Officer Michael Grimes testified that electronic surveillance was used to record Bell's conversation. Bell's attorney then declined to question Grimes, and the tape was played. It is unclear from the record whether Bell received notice of the recording in a copy of Officer Novaky's complaint at the time of his arraignment on May 28, 1980; consequently, we assume that Bell first received notice at the bail hearing on June 13, 1980—slightly more than two weeks after police recorded Bell's conversations.

Under the circumstances, Bell has shown no prejudice stemming from untimely notification of execution of the warrant authorizing his telephone conversation to be monitored and recorded. Nor does it appear that the late notification was the result of bad faith on the part of investigating officers. We hold that the untimely notice to Bell did not justify suppression of the recording made pursuant to the *Glass* warrant. See *Gallagher v. State*, 651 P.2d 1185 (Alaska App.1982).

#### IV. COERCIVE INSTRUCTION DURING DELIBERATIONS

Bell argues that a supplemental instruction issued by Judge Souter was coercive and that it was essentially an "Allen charge." <sup>FN8</sup> We disagree. During deliberations, the jury sent a note to the judge inquiring if inability to agree on one count of the indictment constituted a hung jury. The judge replied:

FN8. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

If you were to be unable to agree to a verdict on one Count of the Indictment, you would be a hung jury as to that one Count, but you would not be a hung jury as to the remaining Counts unless you were also unable to agree to your verdicts on them also. *In my opinion you have not deliberated long enough yet to be able to validly reach the conclusion that you cannot agree to a verdict on any one or more Counts of the Indictment.* [Emphasis added.]

The jury subsequently returned its verdicts on the four counts, as well as the two lesser-included offenses.

The Alaska Supreme Court proscribed *Allen* charges in *Fields v. State*, 487 P.2d 831, 836 (Alaska 1971). In *Fields*, the jury was instructed, after extensive deliberations and at least two prior communications indicating a deadlock, that it was required to continue deliberations until a unanimous verdict was reached. This instruction was found to be so coercive as to require reversal of the conviction. We find that Judge Souter's instruction lacked the coerciveness proscribed by *Fields*. We note in this regard that Standard 15-4.4(b) of the ABA Standards Relating to Trial by Jury specifically provides that a court may require continued deliberations if a jury is unable to agree.<sup>FN9</sup> In this case, the jury had not deliberated for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached. Under these circumstances the supplemental instruction did not constitute an abuse of discretion and Bell's argument must fail.

FN9. ABA Standard Relating to Trial by Jury § 15-4.4(b) (1980)

provides:

If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

The Commentary to Standard 15-4.4(b) states:

This paragraph confirms that a trial judge may send the jury back for further deliberations notwithstanding its indication that it has been unable to agree....

....

There is no coercion if a court requires jurors to deliberate a reasonable length of time.

#### V. DOUBLE JEOPARDY

Bell additionally argues that his sentences on Count I FN10 and Count IV FN11 violate double jeopardy under *Whitton v. State*, 479 P.2d 302 (Alaska 1970). The *Whitton* court adopted the following analysis to determine whether or not a double jeopardy violation had occurred:

FN10. Bell's conviction on Count I was for inducing or causing a person under 16 years of age [D.W.] to engage in prostitution, AS 11.66.110(a)(2). See *supra* n. 1.

FN11. Conviction on count IV was for violating AS 11.66.120(a)(1), a class C felony, which provides:  
(a) A person commits the crime

of promoting prostitution in the second degree if he

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution ....

AS 11.66.150(2) defines a "prostitution enterprise" as

[A]n arrangement in which two or more persons are organized to render sexual conduct in return for a fee.

The jury was instructed in the language of both these statutes.

The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments ....

If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy.

*Id.* at 312 (footnotes omitted).

We must therefore compare AS 11.66.110(a)(2) and AS 11.66.120(a)(1) as applied to the facts of Bell's case, to determine whether differences in intent or conduct were involved in this case. Then, if there are differences, we must decide whether, in light of the societal

interests to be protected, the differences were so substantial as to warrant multiple punishment.

AS 11.66.110(a)(2) proscribes the conduct of inducing or causing a person under the age of sixteen to engage in prostitution. AS 11.66.120(a)(1) prohibits managing, supervising, controlling or owning a prostitution enterprise. We believe that, under the *Whitton* analysis, the offenses proscribed by the two statutes in question involve different intents and different conducts. Bell's conviction on Count I was based squarely upon his inducement of D.W. Bell's conviction under AS 11.66.120(a)(1), on the other hand, required proof of management of a prostitution enterprise. No showing of inducement is necessary to establish the offense, since a prostitution enterprise can be comprised entirely of persons who willingly take part in the business, without inducement or promotion. Clearly Bell's conduct in arranging for two or more people to provide sexual services for a fee, a part of which would accrue to him, goes beyond the act of inducing a single person under the age of sixteen to engage in prostitution. The finding that Bell managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in the inducement charge. We thus conclude that Bell's intent and conduct clearly differed on the two charges.

We must also determine whether such differences in intent or conduct are substantial in relation to the societal interests involved. As we have stated in connection with Bell's mistake of age claim, AS 11.66.110(a)(2) imposes criminal liability for non-forcible inducement of individuals under sixteen to engage in acts of prostitution with others. This liability is imposed without regard to any pecuniary gain on the part of the offender. We believe that the primary aim of

this provision is to protect individuals, particularly those who are young and therefore more vulnerable, from being led into committing acts of prostitution by the efforts of others. By contrast, AS 11.66.120 (a)(1) seeks to prevent and punish the commercial aspects of ongoing organized prostitution by subjecting persons who manage prostitution-related activities as business enterprises to sanctions greater than those applicable to persons who commit individual acts of prostitution, without regard to age of the persons managed. We therefore conclude that multiple punishment was appropriate in this case because of the differences in intent and conduct and because of the differing societal interests furthered by the two statutes in question.

#### VI. REFUSAL TO REDUCE SENTENCE

Finally, Bell contends that denial of the motion to reduce his sentence was error. While incarcerated prior to sentencing, Bell wrote a letter to L.S., the fourteen-year-old daughter of a fellow inmate. The letter was produced at the sentencing hearing, and the father of L.S. was called to testify. He stated that Bell had threatened him with violence if he did not testify favorably to Bell. Judge Souter stated that the threats convinced him to increase Bell's sentence by one year. The judge stated that, although the letter could easily be interpreted as an attempt "to strike a sexual relationship" with L.S., he would give Bell the "benefit of the doubt" and not consider it in sentencing him. Later, Bell moved for reconsideration of the sentence, based on discovery of a letter from the father of L.S. to Bell; the letter indicated that the father had committed perjury at Bell's sentencing. FN12 A hearing was subsequently held on Bell's motion to reconsider the sentence.

FN12. The letter from L.S.'s father, written to Bell prior to his sentencing, contained a postscript

which stated, "Tell [L.S.] I love her and when I write I'll tighten it for you. I'll get you a picture 'a pose'."

Judge Souter refused to reduce Bell's sentence, reasoning that, in writing to L.S., Bell had been "attempting to arrange for [L.S.] to become a prostitute for him or to be involved with him in a sexual relationship." The original sentence was based on Judge Souter's belief that Bell had threatened L.S.'s father; at that point Judge Souter did not believe that Bell had "propositioned" L.S. On resentencing, Judge Souter changed his reasoning for Bell's sentence; he was persuaded that L.S.'s father had lied, but he was also persuaded that Bell *had* been trying to establish a sexual relationship with the fourteen-year-old L.S.<sup>FN13</sup>

FN13. Judge Souter stated:

The court was not persuaded of this fact when the presentation of evidence concluded at the sentencing hearing, but the contents of the postscript [on the letter from L.S.'s father to Bell] have caused the court to re-examine this question and to resolve it contrary to the way it was resolved at the sentencing hearing.

Bell now claims that, because the trial court did not reduce his sentence after finding that Bell had not threatened L.S.'s father, double jeopardy was violated. However, he fails to cite any authority supporting his theory that failure to reduce a sentence may violate double jeopardy. Judge Souter's reinterpretation of Bell's letter to L.S. in light of the letter from L.S.'s father to Bell was not unreasonable. Nor can we find that Judge Souter abused his discretion in refusing to reduce the original sentence, based on his reinterpretation of the letter. Since there was no increase in the original sentence, no

violation of double jeopardy is involved.

Bell also contends that the effective increase in the period of incarceration based upon the letter was not justified under the sentencing goals set forth in *State v. Chaney*, 477 P.2d 441, 442 (Alaska 1970). The fact that Bell attempted to arrange a romantic involvement with a fourteen-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of sixteen indicates a lack of remorse on Bell's part and a greater need for deterrence of Bell himself; it therefore justifies imposition of a more severe sentence. We conclude that Bell's sentence was not clearly mistaken.

The conviction and sentence are  
AFFIRMED.

Alaska App., 1983.  
Bell v. State  
668 P.2d 829

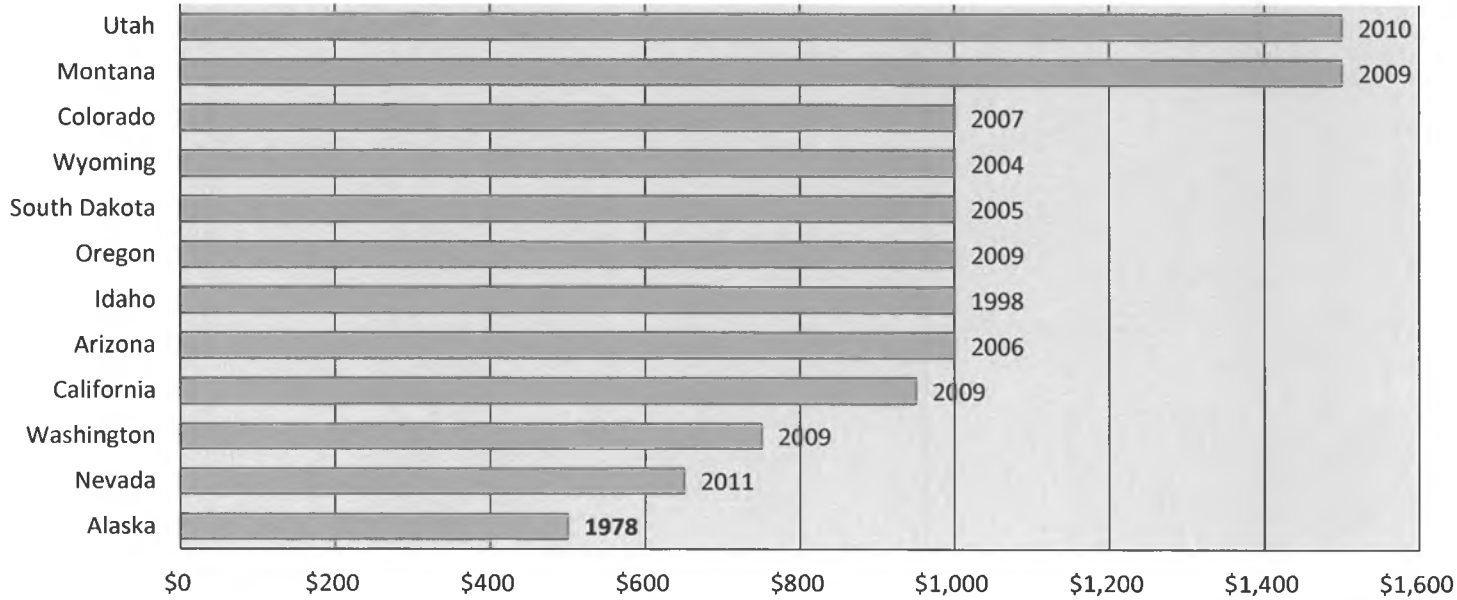
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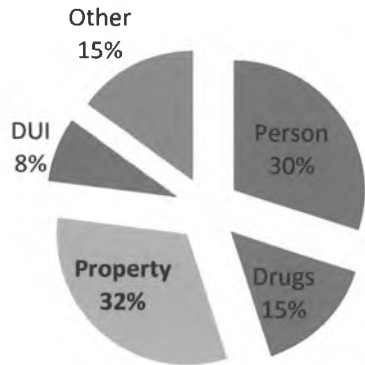


### Theft Felony Thresholds in Western U.S. and Year of Adoption



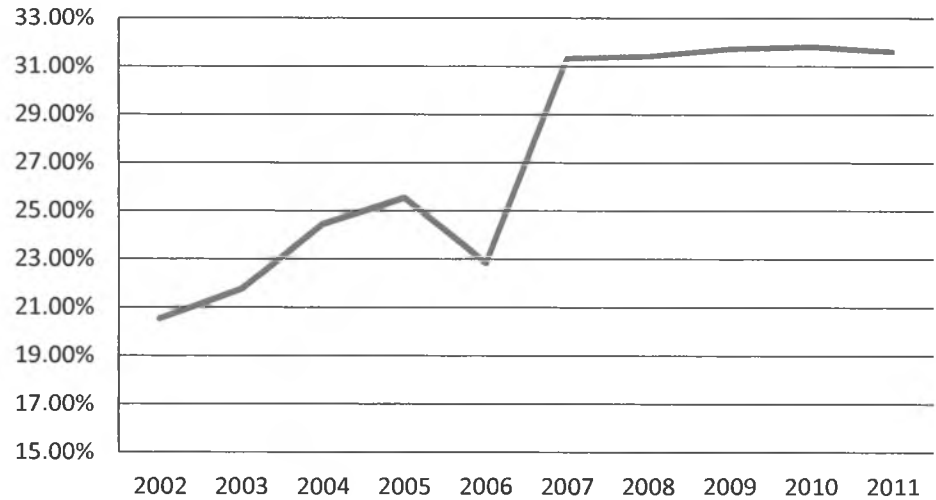
Alaska	\$500
Nevada	\$650
Washington	\$750
California	\$950
Arizona	\$1,000
Idaho	\$1,000
Oregon	\$1,000
South Dakota	\$1,000
Wyoming	\$1,000
Colorado	\$1,000
Montana	\$1,500
Utah	\$1,500

### AK Felonies by Case Type FY11



U.S. Dollar Inflation	
1978	2011
\$50	\$173.06
\$500	\$1730.61

### Property Crimes as a Percentage of All Felonies



Conviction Year	Offense Class as Determined by CSSB 218 "Theft" offenses	Count of Convictions Resulting in Sentence Time
2010	Felony C	637
2010	Misd. A	710
2010	Misd. B	142
2011	Felony C	796
2011	Misd. A	831
2011	Misd. B	170
2012 (as of 03/21/2012)	Felony C	178
2012 (as of 03/21/2012)	Misd. A	162
2012 (as of 03/21/2012)	Misd. B	34

<b>Average Number of Adjudicated Sentence Days. Does not factor in Suspended time or probation time</b>	
	664.36
	189.33
	69.8
	582.84
	175.78
	57.17
	644.34
	164.77
	34.32