ALASKA LEGISLATURE COMMITTEE BILL FILES - 1987 - 1988 8879
HB 231-S cont., HB 237 Leg. Finance 307 307

R/W #39&40

9. EIN 61 (BLM File #AA25016). This is a 100-foot wide electric transmission easement extending easterly from Section 19, T14N,R1W,S.M. to Section 16, T14N,R1W,S.M. This powerline is often referred to as the Briggs Transmission Line.

R/W #13

10. A 30-foot wide (15 feet each side of centerline) electric distribution line for Matanuska Electric Assn., Inc. within the S2NW4 of Section 21, T14N,R1W,S.M. The east-west leg of this line lies within the 100-foot wide easement identified as EIN 61.

11. EIN 1. A 60-foot wide easement for the Lower Eagle River Trail shown on the U.S.G.S. Quandrangle Map. This road extends from Section 24. T14N,R2W,S.M. easterly and southeasterly through Section 31, T14N,R1E,S.M.

12. EIN 59. A 60-foot wide easement for old Eagle River Road on the north side of the river. This old road is separate from the existing Eagle River Road that is upgraded and maintained by DOT&PF.

13. A right-of-way A-046425, twenty-five (25) feet each side of the centerline located in Sections 23,24,25, T14N,R1W,S.M. and Sections 30,31,32, T14N,R1E,S.M. for an electric distribution line for the Matanuska Electric Association, Inc. This powerline parallels the Eagle River Road and in many instances lies within the road right-of-way.

14. An electric powerline easement 30 feet wide identified by BLM casefile number A015987 traversing Tract B, Block 3, Thunderbird Heights Subdivision, Plat # 77-226 filed in Anchorage Recording District.

15. A 50 foot right-of-way for an existing trail from the Old Glenn Highway to lands patented to the State of Alaska to provide access to Thunderbird Falls. The right-of-way traverses Tract B, Block 3, Thunderbird Heights Subdivision, Plat # 77-226 filed in Anchorage Recording District.

UNDOCUMENTED OR UNAUTHORIZED ENCUMBRANCES

1. The Eklund homestead litigation (A79-336 Civil) and Carr homestead litigation (A79-336 Civil) are within Section 32, T14N,R1E,S.M. These are homestead claims that were denied to the applicants by the Bureau of Land Management. The plaintiffs have lost in the District Court. The 9th Circuit Court affirmed the District Court, but a petition for rehearing is pending.

2. The Donnelly homestead dispute is within the E2 of Section 25, T14N,R1W,S.M. Donnelly also claims to have a right to land under §14(c)(1) of the Alaska Native Claims Settlement Act.

The Federal District Court has ruled against Donnelly on his claims, but has not yet entered an appealable judgement. However, Donnelly has already filed a Notice of Appeal to the 9th Circuit Court of Appeals.

3. The Lee homestead litigation is within the NW4 of Section 25, T14N,R1W,S.M. and has been joined with the Eklund and Carr cases referred to in (1) above. The Lee 14(c)(1) claim has been joined with the Donnelly case referred to in (2) above.

4. The McIntyre homestead litigation is within Section 23, T1N,R1W,S.M. McIntyre lost his claim for a homestead in the 9th Circuit Court. The District Court still has before it his claim under §14(c)(1) of The Alaska Native Claims Settlement Act. McIntyre has expanded his 14(c)(1) claim beyond the boundaries of his homestead claim.

5. There may be claims for right-of-access to homestead lands to the south of the ANCSA 17(b) easement EIN 1-D9. The homesteaders built their roads long before ANCSA but the BLM did not reserve these lesser easements in the patent. Eklutna, Inc. does not have a list of who those users might be.

6. There appears to be a telephone line buried along the section line common to Section 13, T14N,R2W,S.M. and Section 18, T14N,R1W,S.M., also Section 24, T14N,R2W,S.M. and Section 19, T14N,R1W,S.M. Eklutna, Inc. has contacted the Matanuska Telephone Association on many occasions to determine if they had an easement of record. None has been provided, however, they did apparently apply for an easement at one time.

State of Alaska Department of Natural Resources has Eagle River Campground improvements located within Tract A-1 of Somerset Terrace Estates (Preliminary). The area is in the former W2NW2 Section 13, T14N,R2W,S.M.

Eklutna, Inc. is not aware of any other known underground entries on the proposed greenbelt lands.

EASEMENTS BEING RESERVED BY EKLUTNA, INC

Excepting and reserving to Eklutna, Inc. and its assigns:

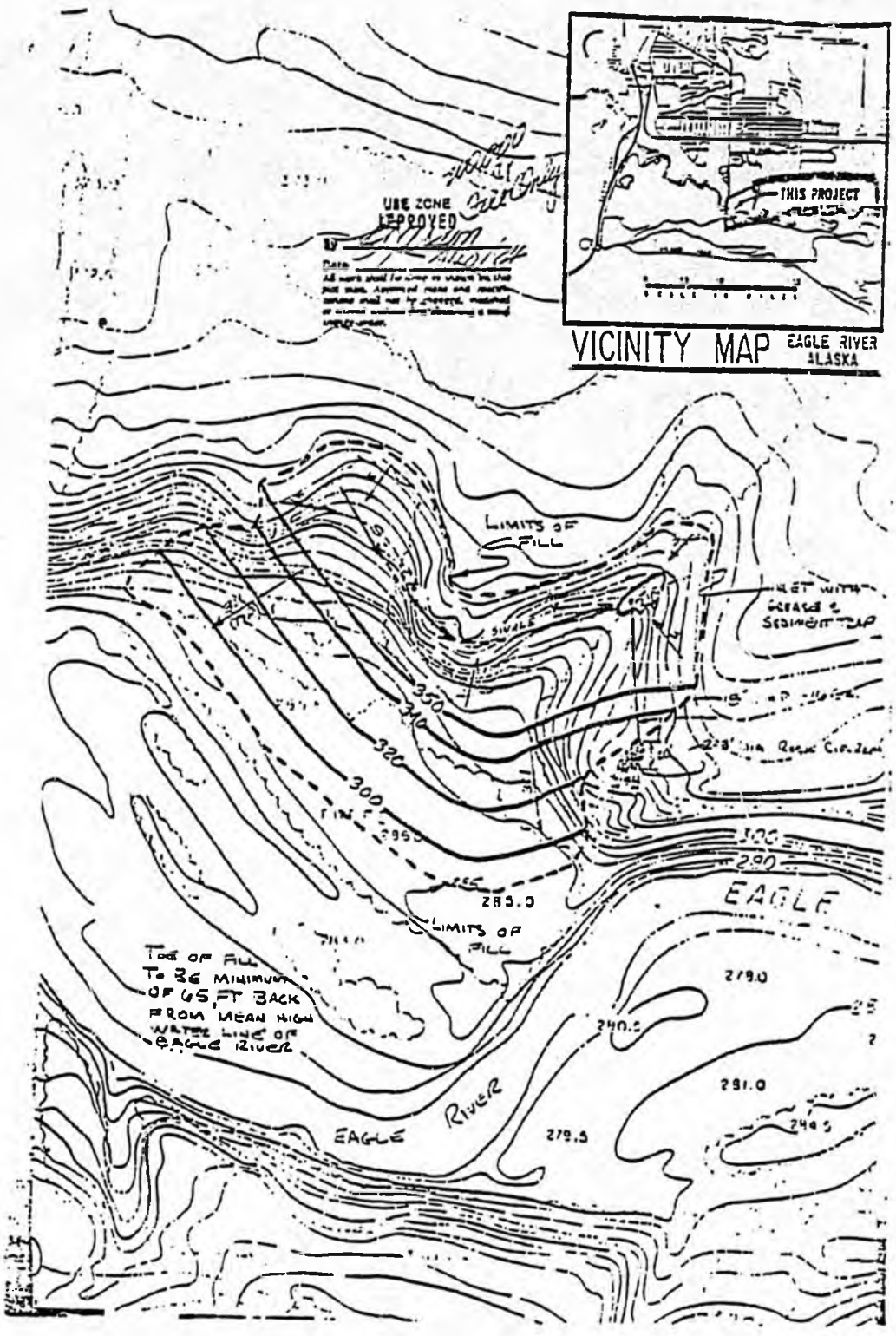
1. The 17(b)(3) easement for EIN 1 D9 reserved in Patent No. 50-79-0094 will be expanded from the current 60-foot width to 100 feet where it passes through lands acquired by the state pursuant to this agreement to accommodate a future public road and public utilities. This easement can be adjusted to provide for a more desirable alignment.

2. Lands identified by Municipality of Anchorage permit 84-6003 in the SW4, Sec 18, T14N,R1W,S.M. as shown in Exhibit A shall remain available for use as a fill site for ten (10) years from the date of execution of this agreement. Use and restoration of this site shall conform to the conditions specified on the Municipality of Anchorage permit 84-6003.

3. A 200-foot wide floating easement across lands acquired by the state in accordance with this agreement in the SE4NE4 of Sec 20 and SW4NW4 of Sec 21, T14N,R1W,S.M. to accommodate a public road with bridge, and public utilities. If this easement is used, an as-built alignment will be provided and reduced down to a 100-foot wide easement.

4. Eklutna, Inc. reserves an access easement as follows:

North 100 feet of the NE4SE4 and the north 100 feet of the east 100 feet NW4SE4, Sec 22, T14N,R1W,S.M.


USE ZONE APPROVED
Date
THIS PROJECT
VICINITY MAP
EAGLE RIVER ALASKA
LIMITS OF FILL
SWALE
INLET WITH GRAVEL & SEDIMENT TRAP
350
340
320
300
290
285.0
EAGLE
LIMITS OF FILL
TOE OF FILL TO BE MINIMUM OF 65 FT BACK FROM MEAN HIGH WATER LINE OF EAGLE RIVER
279.0
240.0
291.0
EAGLE RIVER
279.5

1. Zoning
Comments:
Submitted letter of determination regarding Developable Wetlands. Army Corps letter of non-involvement. Not in Habitation Wetland per telephone conversation Priscilla Wohl 7/10/84; Fish & Game

Need P.W.E.

2. Public Works/Engineering
Comments:
Conditions of Approval

1. Incremental portions of the work should be reseeded at the end of each season to provide dust control and to ensure adequate sediment & erosion control. Compaction (as required to stabilize the slopes) must be provided.
2. Percentage of woody debris must not exceed 10%. No junk or garbage allowed.
3. 3:1 slopes (as shown) should be provided thru-out, with a 10' wide drainage terrace at 30' vertical intervals.
4. Trees & shrubs must be included in proposed restoration plans. Specifics must be reviewed with PWE.

3. Traffic Engineering
Comments:

4. Building Safety
Comments:

COMPATIBILITY DETERMINATION:

This use: ______________________

Predominant Surrounding uses: ______________________

☐ Compatible ☐ Incompatible

☐ Approved ☐ Disapproved

____
BUILDING OFFICIAL

____
DATE

B-10 Exhibit A

Introduced: 3/30/87
Referred: Community & Regional Affairs & Resources

wo1477s

CARA & Res in Res

HB 231

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

IN THE SENATE

SENATE BILL NO. 221

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the Eagle River Greenbelt land exchange; and providing for an eff. :tive date."

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

* Section 1. PURPOSE AND LEGISLATIVE FINDINGS. (a) The purposes of this Act are to acquire a greenbelt along Eagle River in the Municipality of Anchorage to be managed as part of Chugach State Park, to resolve the issue of the state's use of Eklutna, Inc., land at Eagle River Campground and the Thunderbird Falls parking lot, and to transfer state land in downtown Anchorage to private ownership.

(b) The legislature finds that there are important recreational, scenic, and environmental values along Eagle River. The legislature also finds that the Eagle River Greenbelt land exchange described in sec. 2 of this Act will promote economic vitality through private development in downtown Anchorage. The legislature further finds, based on extensive public review, that the Eagle River Greenbelt land exchange is a matter of statewide significance and is in the general public interest.

* Sec. 2. APPROVAL OF LAND EXCHANGE. The legislature approves the land exchange contract entered into by the State of Alaska, Department of Natural Resources, and Eklutna, Inc. on March, 6, 1987, ADL 223175.

* Sec. 3. AS 41.21.121(12) is amended to read:

(12) Township 16 North, Range 1 West, Seward Meridian Section 25: NE1/4SE1/4SE1/4 and N1/2SE1/4SE1/4; and Tract B, Thunderbird Heights Subdivision, as shown on Plat 77-226, Anchorage Recording District, October 10, 1977

SENATE COMMITTEE REPORT

FURTHER: FINANCE

5/1/87

DATE TURNED INTO OFFICE_____

Mr. President:

RESOURCES Committee considered HB 231

Eagle River Greenbelt land exchange; efd.

and recommended:

[ ] replace with CS FOR _____) [] same title
[ ] or adopt _____ CS FOR _____) [] new title

[ ] attached amendment(s) and

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to_____

[ ] letter of intent adopted_____

Committee [ ] attached or [✓] adopted fiscal note(s)
[ ] new [ ] updated or [ ] previous
[X] zero [ ] fiscal impact

MEMBERS SIGNING DO PASS

Alan Adams
Arliss Sturgulewski
Fred L. Zharoff
John Lincoln
Dave Donley

OTHER RECOMMENDATIONS

DO PASS

Chairman signature and recommendation

[ ] Committee Backup Attached

SENATE COMMITTEE REPORT

FURTHER: RESOURCES
FINANCE

4/30/87 DATE TURNED INTO OFFICE _____

Mr. President:

C&RA Committee considered SB 231

Eagle River Greenbelt land exchange; efd.

and recommended:

[ ] replace with CS FOR _____) [] same title
[ ] or adopt _____ CS FOR _____) [] new title

[ ] attached amendment(s) and

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

[ ] letter of intent adopted _____

Committee [ ] attached or [ ] adopted fiscal note(s)
[ ] new [ ] updated or [ ] previous
[ ] zero [ ] fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____
Chairman signature and recommendation

[ ] Committee Backup Attached

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 27, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, and AS 38.50.140, I am transmitting a bill approving and ratifying the Eagle River Greenbelt land exchange, and adding 1.09 acres to Chugach State Park. The land exchange acquires from Eklutna, Inc., for the public, a greenbelt consisting of 3,558 acres along Eagle River in the Municipality of Anchorage, and an option to purchase two additional parcels. In return, Eklutna will receive Block 112A, Anchorage Original Townsite, located on the east end of downtown Anchorage, plus $173,300.

The state began land exchange negotiations with Eklutna, Inc. in June, 1986. The greenbelt is based on a plan adopted by the Anchorage Assembly on May 7, 1985 (Assembly Resolution 85-88). The original boundary of the planned greenbelt was adjusted to reduce the amount of developable land included, thereby reducing the overall cost to the state. Only surface interests are being exchanged. Cook Inlet Region, Inc. (CIRI), owns the subsurface of the Eklutna, Inc., land. In an agreement with the Municipality of Anchorage on November 25, 1986, CIRI agreed to execute to the state, without compensation, a nor-development covenant for the subsurface estate to a vertical depth of 250 feet as long as the area is used for passive public park purposes. The covenant will also allow the annual use of up to 500 cubic yards of sand and gravel on site for trails and public access.

The land that the state is offering in exchange was acquired by the state for a state office complex. It is located between "A" and Cordova Streets and between Fifth and Sixth Avenues. Changing economic conditions have made plans for constructing a state office building on this site obsolete, leaving the land available for exchange. Under the terms of a settlement dated November 25, 1986

between the state and the Municipality of Anchorage, under the municipal entitlements statutes (AS 29.65), the Municipality of Anchorage will acquire the state's interests in Block 112A if this proposed land exchange is not completed.

The appraisals for this exchange were prepared by the firm of Black-Smith and Richards, Inc. The appraised value of the Eagle River Greenbelt being acquired by the state, including the Thunderbird Falls parking lot, is $8,773,300. This total does not reflect the value of two parcels that were appraised separately. Parcels 3 and 4, appraised at $220,000 and $110,000 respectively, have been excluded from the exchange, with the state receiving an option until May 1, 1988 to purchase these parcels at that appraised value.

The appraised value of Block 112A is $8,600,000. The difference of $173,300 will be paid by the state to Eklutna, Inc. to make this an equal-value exchange. The legislature appropriated $1,000,000 for acquisition of the Eagle River Greenbelt in 1986. Two-thirds of this was frozen by Governor Sheffield because of the revenue shortfall. There is, however, sufficient money left to cover the expenses for completing this exchange and to pay Eklutna, Inc. $173,300 to equalize values in the exchange. If the money restricted by Governor Sheffield in capital improvement projects appropriation number 39454 is made available before July 1, 1987, the state will exercise its option to purchase parcels 3 and 4 before August 1, 1987.

This exchange has many benefits. Under the exchange, the state will acquire an important recreational resource in close proximity to a major urban area. The exchange will guarantee continued access by tourists and local residents to sport-fishing, wildlife viewing, berrypicking and other recreational activities. It will protect fish and wildlife habitat, and wetlands. It will also resolve two instances of state use of Eklutna, Inc. land: both the Eagle River Campground and the Thunderbird Falls parking lot are located partially on land owned by Eklutna, Inc.

This exchange also makes Block 112A available for private development. This block is located diagonally across from the Anchorage Historical and Fine Arts Museum, near the Sheraton Hotel and other tourist attractions. The state's development of this block no longer seems feasible. Allowing it to remain as a vacant parking lot on the main

thoroughfare into Anchorage is considered by many to amount to urban blight. Eklutna, Inc. will be in a better position to develop this parcel, and the land will return to the tax rolls.

Section 1 of the bill sets out the purpose of the legislation. Section 2 of the bill approves the exchange. Section 3 adds the Thunderbird Falls parking lot, described as section 25, tract B, Thunderbird Heights Subdivision, to Chugach State Park. This is necessary because this parcel is outside of the boundaries of the park. Under AS 41.21.122, the commissioner is authorized to modify the park boundaries, subject to legislative approval.

All of the requirements for a land exchange, except legislative review, have been satisfied. The state gave public notice of the exchange in January and February 1987, and held public hearings in three locations on February 18, 1987. The hearing record remained open for two weeks after that to receive written comments. The finding, under AS 38.05.035(e), that this exchange best serves the interests of the state was made on March 6, 1987. On that same date the final exchange agreement was signed.

AS 38.50.140 says that the governor is required to transmit proposals for land exchanges to the president of the senate and the speaker of the house of representatives within 10 days after the convening of a regular legislative session unless exigent circumstances require transmittal at another time. Under the schedule agreed to by the parties on August 13, 1986, this bill would have been brought before you on January 20, 1987.

Due primarily to problems with the appraisal process, it was impossible to meet that deadline. A protest of the award of the appraisal contract was received from an unsuccessful bidder. The hearing and resolution of that protest delayed the award of the contract. In addition, several questions were raised by Eklutna, Inc. and by state review appraisers after the draft appraisals were received. Resolution of these questions and the delay in awarding the contract delayed approval of the appraisals by 75 days. For these reasons, I find that exigent circumstances prevented submittal of this legislation earlier this year.

Two relevant statutes are inconsistent with each other. AS 38.50.140, mentioned above, refers to land exchanges "submitted to the legislature for approval under AS 38.-

50.020(a)." However, AS 38.50.020(a) says nothing about legislative approval, merely stating that certain exchanges or final agreements to exchange are "subject to legislative review under AS 38.50.140." As you know, any statute purporting to subject an executive-branch act to a legislative veto raises significant constitutional issues under the law-making-procedures provisions and the separation-of-powers doctrine. See State v. [illegible] I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); and Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983). Nevertheless, I am submitting this Eklutna land exchange to the legislature for approval because I know of and wish to accommodate the legislature's strong interest in it and because I wish to avoid any possible challenge to the exchange on the grounds that the statutes were not fully satisfied.

It is imperative that you approve this legislation this session if the exchange is to proceed. Failure to do so will lose this opportunity to acquire the Eagle River Greenbelt from Eklutna, Inc. If the exchange fails, the Municipality of Anchorage will receive the state's interest in Block 112A in partial satisfaction of Anchorage's entitlement under AS 29.65. I urge your prompt and favorable action on this measure.

Sincerely,

Steve Cowper
Governor

HB
237

(11)

COMMITTEE REPORT

Date referred: 2/19/88 FURTHER REFERRALS:

DATE: 2/29/88

The Finance Committee has considered HB 237

"An Act relating to murder, assault, and the physical and sexual abuse of children; the admissibility of certain evidence in criminal prosecutions; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

RECOMMENDS:

[X] replace with CS HB 237 (Judiciary) [ ] the same title
[ ] attached amendment(s) [ ] a new title

- [X] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [X] same as previous zero fiscal note published 2/19/88

SIGNING DO PASS:

SWACK-HAMMER
POYER
FRANK
BROWN
LARSON

SIGNING OTHER RECOMMENDATIONS:

BOURCHOT
RIEGER No Recommendation

Vice-Chair
Chairman's signature

No. 6

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 237(JUD)
PUBLISH DATE: HOUSE 2/19/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to murder, assault and physical abuse of children."
Sponsor: Rep. Ulmer, Hudson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This legislation, as revised, will have minimal impact on the Department if current sentencing practices continue. If sentencing practices change and large amounts of consecutive time are imposed, there would be a substantial impact on the Department.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director of Admin. Svs. Phone: 465-3376
Division: Administrative Services Date: 2/18/88

Susan Humphrey-Barnett

Approved by Commissioner: Susan Humphrey-Barnett Date: 2/18/88
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Offered: 2/19/88
Referred: Finance

5-0809X

Original sponsors: Ulmer, Hudson,
Grussendorf, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 237 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to physical and sexual offenses against children; amending the definitions of the crimes of murder in the second degree and assault in the first degree; relating to the joinder of offenses of the same or similar character and the admissibility in a criminal proceeding of evidence of prior acts; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) of the Alaska Rules of Evidence; and providing for an effective date."

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

* Section 1. AS 11.41.110(a) is amended to read:

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

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

(2) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1)

or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants.

* Sec. 2. AS 11.41.200(a) is amended to read:

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

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; or

(3) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life.

* Sec. 3. AS 11.41.434(a) is amended to read:

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

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; [OR]

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(3) being 18 years of age or older, the offender engages in

sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

* Sec. 4. AS 11.41.436(a) is amended to read:

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

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; [OR]

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) - (6); or

(5) being 18 years of age or older, the offender engages in

sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

* Sec. 5. AS 12.55.025(e) is amended to read:

(e) Except as provided in (g) and (h) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment shall provide that the imprisonment commences at the expiration of the term imposed by the previous judgment.

* Sec. 6. AS 12.55.025 is amended by adding a new subsection to read:

(h) If the defendant has been convicted of two or more crimes under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.455 in which the victim or victims of the crimes were minors and the judgment on any of the convictions has not been entered, the court shall impose some consecutive period of imprisonment for each conviction.

* Sec. 7. AS 12.55.155(c) is amended to read:

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in

furtherance of the offense;

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

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder

during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime

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

(B) specified in AS 11.41.410 - 11.41.460 and was committed against a minor, and the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction;

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which

the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance.

* Sec. 8. Rule 8(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies, misdemeanors or both,

(1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense,

(2) [OR] are based on the same act or transaction, or

(3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* Sec. 9. Rule 404(b), Alaska Rules of Evidence, is amended to read:

(b) Other Crimes, Wrongs, or Acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

(i) are not too remote in time;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

* Sec. 10. Section 9 of this Act is retroactive and applies

(1) to evidence of acts committed before the effective date of this Act; and

(2) in trials involving offenses committed before the effective date of this Act.

* Sec. 11. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 237(JUD)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An act relating to the physical & sexual assault & abuse of children
Sponsor: Ulmer, Hudson, Grussendorf
Requestor: _____

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Executive Director
Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault
Date: 2/26/88

Approved by Commissioner: H. Nettekoven, Dep. Comm.
Date: 2-29-88
Agency: Dept. of Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CS HB 237
PUBLISH DATE: 5/4/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to murder, assault and sexual abuse of children"
Sponsor: Representative Ulmer
Requestor: Judiciary and Finance

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: January 19, 1988

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 1/21/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

RECEIVED
JAN 21 1988
LEGISLATIVE FINANCE

HB 237

Revised 1/19/88

POSITION PAPER

CS HB 237 (HESS)

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency inmpact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: X None See attached fiscal note ____

Program impact: ____ None See analysis attached X

Constitutional impact: ____ None See analysis attached X

Based on the attached information, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill.

Dana Fabe, Public Defender
Public Defender Agency

1/20/88
Date

Brant McGee, Director
Office of Public Advocacy

1/20/88
Date

Commissioner John Andrews
Department of Administration

1/21/88
Date

This bill is a wide-ranging collection of amendments to the criminal laws and rules of evidence. It appears to be designed to overrule a number of appellate decisions unfavorable to the Department of Law in cases involving child victims. Since some of the decisions are constitutionally based, the corresponding attempted changes appear unconstitutional. The changes do not appear to be necessary to vigorous prosecution and effective enforcement of laws preventing assaults on children. Their primary consequence will be increased costs in processing the cases through the court system and increased populations in the already overcrowded prison system.

A. SECOND DEGREE MURDER AND ASSAULT

This bill proposes two changes to the second degree murder and assault statutes:

1. Neitzel change. The bill would change AS 11.41.110(a)(2) to define second degree murder as "knowingly engag[ing] in conduct [instead of: intentionally performing an act] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." We support this change, since it comports with appellate case law. See Neitzel v. State. The parallel change in the first degree assault statute is also unobjectionable.

2. Extreme indifference to the welfare of a child under 16. Under this section, it would be second degree murder if a child died as a result of a "pattern and practice of abuse." We have no problem with this concept, but suggest some tightening of the drafting.

Abuse is defined in section 2 to include bodily impact, restraint, and confinement. This is too broad, since it could encompass many normal disciplinary measures including spanking or placing a child in "time out" in his bedroom. Similar problems exist in the parallel assault provision. We suggest the following definition for abuse:

> (c) In this section, "Abuse is defined as:
>
> (1) striking a child with a body part or instrument in a manner likely to cause serious physical injury to the child; or
>
> (2) confining a child in a small enclosed area or container for a prolonged period of time without food or water in a manner likely to cause serious physical injury to the child; or
>
> (3) restraining a child by use of physical restraints in a manner which significantly limits the child's freedom of movement in a manner likely to cause serious physical injury to the child.

These changes to Sections 1 and 2 should eliminate the overbroad application of a second degree murder statute to those persons using reasonable disciplinary techniques which result in the accidental death of a child.

B. REPEATED SEXUAL ABUSE OF A MINOR

The bill creates a new set of offenses entitled Repeated Sexual Abuse of a Minor in the First, Second and Third Degrees (RSAM). These offenses, which require a "pattern and practice" of sexual abuse involving three or more incidents, will apply primarily to incest and family sexual abuse cases. As the Court of Appeals has noted in State v. Andrews, virtually all family sexual abuse cases involve repeated abuse.

1. Enhanced presumptive term (deleted by HESS). In the original draft of the bill, a person who is convicted on the first offense of Repeated Sexual Abuse of a Minor in the First Degree, would have been subject to a 13-year presumptive jail term. HESS removed this presumptive term. In the absence of the presumptive term we have no objection to the concept of the bill, although it is not necessary to get a pattern of acts against a victim into evidence.

It should be noted that the current offense of Sexual Abuse of a Minor in the First Degree carries an 8-year presumptive term for a first offender, as does Sexual Assault in the First Degree. Thus, the typical family incest offender will be punished much more harshly than a person charged with a violent rape of an adult due to the repetitive nature of incest behavior. On a second felony offense a defendant would receive a 25-year presumptive term, even if the prior felony were a theft conviction when the defendant was a young adult.

Although there may be some offenders who deserve lengthy periods of incarceration, others who willingly admit their conduct, seek treatment and exhibit remorse may not require such a lengthy presumptive term, particularly on a first offense. The prosecutor would also have unbridled discretion to charge one offender with three separate counts of Sexual Abuse in the First Degree and another offender with RSAM. Thus, two similarly situated offenders could receive vastly disparate sentences. This would certainly raise equal protection problems which would be litigated in virtually every RSAM case.

2. Non-unanimous jury verdicts. As noted above, it is an element of Repeated Sexual Abuse of a Minor that three or more incidents of the prohibited conduct have occurred. Section 8 of the bill provides that the jury need not be unanimous as to any particular incident.

This provision is in direct conflict with Covington v. State, a 1985 decision of the Alaska Court of Appeals. Covington requires that jurors must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. The Covington holding is based upon the defendant's constitutional right to a unanimous verdict. No state or federal court has reached a contrary result, even in the RICO line of cases which involve parallel "pattern and practice" provisions.

3. Definition of "Authority Over Child". The last troublesome portion of the Repeated Sexual Abuse of a Minor provision is the definition of "having authority over a child" found in Section 8. This broad language presumes that all members of a social unit have authority over a child when in fact they may not. Examples of the problematic application of this provision include a romantic relationship between a young teenager and an exchange student or step-sibling who is living in the family unit.

C. PRIOR INCONSISTENT STATEMENTS (DELETED BY HESS)

This section, which was drafted to combat perceived problems caused by Brower v. State, was deleted by the HESS committee. This portion of the bill stated that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

The question whether an uncorroborated prior inconsistent statement is sufficient to support a conviction is a uniquely judicial determination, not one susceptible to legislative fiat. The federal constitution prohibits conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358. A court's holding on a question of the sufficiency of certain evidence is an interpretation of the constitutional requirement of proof beyond a reasonable doubt. Thus, the Court of Appeals' decision in Brower took no radical or novel position; the Brower holding is consistent with all other courts which have considered this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action.

D. CHANGES TO EVIDENCE RULE 404

The bill proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

This raises serious constitutional problems. In a very long line of cases, the Alaska appellate courts have held that evidence of prior bad acts by a defendant are not admissible to prove the defendant's propensity to commit crimes. E.g., Eubanks v. State, 516 P.2d 726 (Alaska 1973); Oksoktaruk v. State, 611 P.2d 521 (Alaska 1980); Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd, 726 P.2d 546 (Alaska 1986). The rationale for these cases is rooted in the constitutional guarantee of due process and the requirement of proof beyond a reasonable doubt. U.S. Const., amend. VI; Alaska Const., art.I, subsection 7. When evidence of a defendant's character, as shown through prior bad acts, is admitted to show his propensity to commit a crime, there is a grave likelihood that the jury will convict the defendant because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

Prior bad acts, relevant to show only disposition, are also excluded because admitting such evidence prolongs trials, causing added expense to all parties and the court system. Rather than have a five-day trial focused on the criminal act alleged in the indictment, if prior bad acts were invariably admissible, trials could take two to three times as long, as witnesses are called by both sides to establish and refute incidents entirely collateral to the real issues at trial. Longer trials also mean longer transcripts; increasing the cost of appeals means more defendants would need public defenders.

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly opens the door to evidence of prior bad acts when such evidence is probative of something other than criminal disposition, such as motive, intent, opportunity and common scheme or plan. The Alaska Supreme Court and Court of Appeals have in many instances allowed evidence of a defendant's prior abusive conduct to come in at trial, including abuse of the named victim, abuse of other victims in the family and abuse of victims outside of the family who are similarly situated to the named victim. Following are brief summaries of the cases in this area of the law.

1. Evidence of Other Abuse on Named Victim is Ordinarily Admissible.

In Burke v. State, 624 P.2d 1240 (Alaska 1980), the Alaska Supreme Court established the rule that evidence of earlier assaults on the same victim is admissible. The Supreme Court held that it was proper for a victim to testify to the whole history of assault by her step-father, the defendant.

A recent Court of Appeals decision, Patterson v. State, 732 P.2d 1102, 1103 (Alaska App. 1987), explained the justifiction for the well-established Burke rule: "First, to establish an ongoing relationship between the victim and the accused; and, second, to place an offense in context and to show the background of the offense." In Patterson, the court approved admitting evidence of a prior sexual assault on the named victim even though that assault occurred nearly two years earlier.

The "same victim" rule is also followed in cases charging physical assaults on children. The Court of Appeals in Garner v. State, 711 P.2d 1191, 1193 (Alaska App. 1986), held that it was proper to admit evidence indicating prior physical abuse by the defendant during the four-month period before the child's death.

2. Evidence of Abuse of Other Victims in the Same Family is Ordinarily Admissible.

In Soper v. State, 731 P.2d 587 (Alaska App. 1987), the Court of Appeals expanded Burke to cover testimony of abuse on other family members. The court in Soper said:

> The limited exception for lewd disposition recognized in Burke should be extended to cover the testimony of

the complaining witnesses' sisters who were allegedly seduced under similar circumstances at roughly the same age as the complaining witness.

3. Evidence of Abuse Outside the Family Can Be Admissible.

Evidence of abuse of other victims not in the same family but in the same class is admissible if the defendant's plan or pattern of sexual misconduct is relevant. Soper appears to authorize admission of evidence concerning sexual assaults of non-family victims so long as the victims are members of a "limited class [having] highly relevant common characteristics." 731 P.2d at 590. For example, in recent trials where the defendant was charged with sexual abuse of a child in a daycare situation, the state successfully argued that Soper authorized admission of evidence concerning sexual abuse on other children in the daycare.

Other cases upholding admission of evidence concerning abuse on non-family victims include Oswald v. State, 715 P.2d 276 (Alaska App. 1986); Moor v. State, 709 P.2d 498 (Alaska App. 1985).

4. Bolden v. State -- Similar in concept to the Rape Shield Law.

The only time a prior bad act is not admissible in this context is when there is no nexus or connection between the prior act and the charged conduct.

Bolden v. State, 720 P.2d 957 (Alaska App. 1986), illustrates the rule that evidence of sexual abuse of uncharged victims not part of the same class as the victim is ordinarily inadmissible. Bolden was charged with sexually abusing two of his daughters. At trial the state presented testimony by other girls that they had been sexually molested by the defendant. The Court of Appeals found that the evidence was inadmissible because neither identity nor intent was an issue at the trial and the acts did not establish a common scheme or plan.

The Bolden rule, which disallows evidence of other sexual assaults where the only purpose for such testimony is to show the defendant's propensity to commit such acts, is comparable to the rape shild law protection for victims. That is, the fact that a victim may have engaged in a certain type of sexual practice on one occasion with one partner is not admissible to prove the victim consented to such practice on another occasion with the defendant.

In summary, in all situations in which prior bad acts by the defendant are relevant and probative of the issues at hand, the Court of Appeals and Supreme Court have upheld their admissibility. If it is not relevant and is admitted only to show that the defendant has done this in the past, there is a great danger that the defendant will be convicted because he is a "bad person" regardless of whether there is sufficient evidence to support the charges at hand.

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: CS HB 237
Publish Date: 2-88

Revision Date: 2-16-88
Title: An act relating to sexual abuse of children
Agency Affected: Alaska Court System
BRU: Trial Courts
Sponsor:
Components:
Requestor: Ulmer, Hudson, Grussendorf, et al.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 2-16-88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 2-16-88
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

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STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 237 (HESS)
PUBLISH DATE: 5/4/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to crimes against children..."
Sponsor: Ulmer, Hudson, et. al.
Requestor: Judiciary, Finance

Agency Affected: Administration
BRU: Office of Public Advocacy
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Phone: 274-1684
Date: 1/20/88

Approved by Commissioner: John Andrews
Agency: Department of Administration
Date: 1/27/88

Distribution (by preparer):
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page ___ of ___

56 237

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 237 (Jud.)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: February 26, 1988
Title: "An Act relating to physical and sexual abuse against children..."
Sponsor: House Judiciary
Requestor: House Finance

Agency Affected: Department of Law
BRU: Prosecution
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 26, 1988

(Richard L. Pegues /FOR/)
Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: February 26, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 237 (Jud.)

This bill amends the state's laws relating to murder, assault, and the physical and sexual abuse of minors. Additionally, the bill also changes rules regarding the joinder of offenses, and the admissibility of certain evidence, in criminal child abuse prosecutions.

Section 1 changes the mental state requirement for defendants charged with second-degree murder from "intentionally performs an act" to "knowingly engages in conduct" that results in the death of another person under circumstances manifesting an extreme indifference for the value of human life. Many of the cases which would result in second- degree murder prosecutions under the new law are now being prosecuted as manslaughter or as criminally negligent homicide. Because the majority of these cases are already being prosecuted (although at a lower level), this section will not have a significant fiscal impact on the department.

Section 2 changes the mental state requirement for defendant's charged with assault in the first degree from "intentionally performs an act" to "knowingly engages in conduct" that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life. The department currently prosecutes most of the cases that would fall within this section under lower level assault statutes. Because these are cases which, by and large, are already being handled by the department, this section will not have a significant fiscal impact.

Sections 3 and 4 broaden the conduct of offenders committing the crimes of sexual abuse of a minor in the first degree and sexual abuse of a minor in the second degree, to include prosecution of offenders residing in the same household with the victims if such offenders are in a position of authority over the victims. This conduct would also include offenders temporarily entrusted with the care of the victim.

Sections 5 and 6 clarify whether a court should give consecutive or concurrent sentences to a convicted offender at the time of sentencing. This is a sentencing provision that, although having no impact on the Department of Law, may have an impact on the Department of Corrections.

Section 7 adds an aggravating factor that increases the presumptive penalty in abuse of minor prosecutions where the defendant has engaged in similar conduct with another victim who is a minor.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 237 (Jud.)

Section 8 amends Rule 8(a), Alaska Rules of Criminal Procedure, relating to joint trials of individuals charged with multiple crimes. In 1986, the Alaska Court of Appeals in Johnson v. State interpreted Criminal Rule 8(a) so that a defendant is granted an automatic severance of charges even if a defendant can show no prejudice arising from the joinder of those charges for purposes of trial. Under this new interpretation of the rule it is now quite common for defendants to be granted three, four, and sometimes five separate trials, where a single trial would have been required under the previous interpretation. Often the prosecution is forced to compromise the case simply to avoid forcing victims to testify over and over again, particularly in sexual assault and abuse cases. Likewise, the prosecution is often forced to compromise the case as a simple matter of economics as prosecutors balance charging decisions with limited resources and backlogged caseloads. Consequently, this bill will not have a fiscal impact on the Department of Law's operations.

Section 9 amends Rule 404(b), Alaska Rules of evidence, to broaden the kinds of evidence that may be admitted in the prosecution of crimes involving physical or sexual assault or abuse of a minor. This section will not have a fiscal impact on the department, although it will obviously assist the state's prosecution in certain child abuse cases.

House Judiciary Committee

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

The changes to AS 11.41.110(a)(2) and 11.41.200(a)(3) are solely intended as technical amendments to make it clear that the language "intentionally performs an act" means "knowingly engages in conduct". This amendment thus conforms the statutes to the interpretation provided in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982).

Sections 3 and 4

The addition of AS 11.41.434(a)(30 and 11.41.436(a)(5) recognizes that the most serious forms of child sexual abuse are often committed by those who live in the same household as the victim or who are temporarily entrusted with the victim's care. Despite having no legal authority over the victim, such persons are nonetheless in a position of power such that even older children often find it impossible to thwart their advances. Because other subsections of these statutes already cover sexual misconduct with persons under the age of 13, the new changes apply only to victims from 13 to 15 years old. The cutoff at 16 years of age was specifically chosen instead of the 18-year-old cutoff in other subsections dealing with persons with legal or biological ties to the victim.

Sections 5 and 6

In enacting these sections, which require judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose whatever consecutive time as it decides is appropriate pursuant to the sentencing considerations in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children is to express the Legislature's preference for judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense. In some cases, the court may find that only a minimal period of consecutive time to serve may be necessary while in other cases the court may find that a lengthy consecutive term is required. Another purpose of this amendment is to allow judges to fashion some consecutive period of suspended time, with conditions of probation, to assure that offenders being released from prison have an adequate period of supervision by the

court or the Department of Corrections.

Section 7

AS 12.55.155(c)(18)(B) has been amended to create a new aggravating factor for repeated sexual misconduct toward minors. This change reflects the Legislature's intent that, although most judges already take into account prior misconduct in sentencing, is should be specifically recognized as a statutory aggravating factor. It is not necessary that a conviction have been entered to constitute this aggravating factor. This factor is also intended to apply to incidents not resulting in convictions. Prior convictions already trigger imposition of presumptive sentencing, or can constitute a separate aggravating factor if there are three or more felonies (AS 12.55.155(c)(15)) or if there are repeated instances of similar conduct (AS 12.55.155(c)(21)). Convictions used for those purposes are not intended to trigger this aggravating factor. As used in this aggravating factor, the phrase "same or similar conduct" is not intended to require a strict analysis of statutory elements of offenses.

Section 8

The amendment to Rule 8 of the Alaska Rules of Criminal Procedure is specifically intended to reverse the decision in Johnson v. State, 730 P.2d 175 (Alaska App. 1986) to permit multiple offenses to be joined for trial when evidence of one offense is admissible to prove another. It is intended that the determination that evidence will likely be cross-admissible be made before trial. This determination depends to a large extent on the state of the prosecution's evidence. The courts should be given great latitude to structure these pretrial proceedings to rely as much as possible on offers of proof and other non-testimonial showings, so as to avoid conducting a mini-trial, and to avoid situations where defendants use this procedure to obtain pretrial depositions to which they are not otherwise entitled. The determination on cross-admissibility may also turn on the precise parameters of a person's defense. A defendant who declines, in an *ex parte in camera* hearing, to disclose a defense, which could have been anticipated at this point in the proceedings and which would render evidence of other offenses inadmissible, should be deemed to have waived any objection to joinder.

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery."
Soper v. State 731 P.2d 537 (Alaska App. 1987) at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and

the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct, particularly as to non-family members. The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. It is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

Rep. John Sund, Chair,
House Judiciary Committee

Alaska Court System
State of Alaska
303 "K" STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-8611

February 9, 1988

Representative Sund
Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

I am writing to express some of my concerns about the procedures used to amend court rules. As you know, court rules can be amended both through the legislative process and through action by the supreme court. For the reasons I have outlined below, I suggest that the legislature consider sending a request for a rule change to the supreme court, prior to any direct action by the legislature to change a rule.

The procedure that the court has now adopted to change court rules is designed to provide a careful, structured review of any proposed rule change. The procedure allows those persons who would be affected by a proposed change to express their opinions to the supreme court. The procedure also insures that any change will be consistent with other court rules.

Let me outline the procedure the court follows when a proposed rule amendment is received. First, the court rules attorney researches the legal and practical consequences of the proposed amendment. The attorney reviews the court's historical file on the rule in question, to determine if the problem which generated the proposal has been previously addressed. The attorney also compares the proposal to the corresponding federal court rule, and in some cases, researches comparable rules from other states.

After this research is completed, the proposal is referred to a rules committee for a recommendation. There are presently five rules committees, which review civil, criminal, appellate, childrens' (delinquency, CINA, adoptions), and probate rules proposals. The committees hold telephonic meetings to allow for

state-wide participation. These committees are composed of attorneys and judges appointed by the chief justice. The appropriate committee evaluates the merits of the proposal and also attempts to anticipate any unintentional consequences of the proposal, whether legal or practical. The committees and the court rules attorney strive to determine the effects of proposed amendments on other court rules. For example, the argument in favor of changing a particular civil rule may also apply to a criminal rule. Often one rule change may require that several other rules also be amended.

After the appropriate rules committee makes a recommendation about the proposed change, the court solicits comments by sending notices of proposals (in legislative form and usually including a commentary) to all attorneys and court clerks. Depending on the proposal, the court may also request comments from other persons who may be affected. The court rules attorney analyzes and consolidates all recommendations and comments in a memorandum which is forwarded to the supreme court. The supreme court then decides whether to adopt the proposal, based on the background research, the rules committee recommendation and other comments as well as the court's own experience and research.

There may be circumstances in which the supreme court declines to amend a rule, and yet the legislature may feel that the proposed change is desirable. In such a circumstance, if the supreme court's rulemaking procedure has been completed prior to legislative action, the legislature will be able to obtain the results of the court's research and review of the proposed change.

I appreciate your consideration of the court's concerns in this matter.

Very truly yours,

Arthur H. Snowden, II
Administrative Director

BILL NO: CS HB 237 (Judiciary) DATE: February 26, 1988

TITLE: An act relating to the physical and sexual assault and sexual abuse of children; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) of the Alaska Rules of Evidence; and providing for an effective date.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault
Dept. of Public Safety

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports CSHB 237(Judiciary).

Sections 1 and 2 changes the language of the present 2nd Degree murder and 1st Degree assault statutes, by substituting the phrase "knowingly engages in conduct" for "intentionally performs an act". This change simply brings the language of the statutes into accordance with the way it has been interpreted by the Alaska Court of Appeals.

Section 3 allows a charge of 1st Degree Sexual Abuse of a Minor (SAM I) to be brought against a person over 18 who engages in sexual penetration with someone under 16 who is living in the same household and is under the offender's authority, or who has been temporarily entrusted to the offender's care. Under current statute, this offense would be classified as SAM I only if the victim were under 13 years of age. Section 4 similarly amends the 2nd Degree Sexual Abuse of a Minor (SAM II) statute to include situations in which a person over 18 engages in sexual contact with someone under 16 who is living in the same household and under the offender's authority, or who has been temporarily entrusted to the offender's care. Currently, this offense is classified as 3rd Degree Sexual Abuse of a Minor (SAM III) if the victim is 13, 14 or 15 years of age. The kind of offense addressed by these amendments is more likely to be repeated or continuous in nature than a similar assault by someone who does not hold a position of trust and authority over the child. Children who have been abused by an authority figure often have long-term emotional and psychological problems which stem from the abuse of power and betrayal of trust in assaults of that nature. The same protection afforded to children who are abused by a parent should be extended to children who are abused by other authority figures.

Sections 5 and 6 amend AS 12.55.025 to require that a person convicted of two or more physical or sexual assaults committed against a minor will be sentenced to some consecutive period of imprisonment for each conviction. The length of the consecutive period is to be determined by the judge in each case.

Section 7 permits consideration of a defendant's previous sexual offenses against a minor as an aggravating factor in determining the presumptive sentence for a crime under AS 11.41.410 - 11.41.460. This enables the court to increase the sentences of those offenders who have repeatedly victimized children. The aggravating factor applies to conduct "similar" to the present offense; the defendant need not have been tried or convicted for the previous offense. This further protects child victims, since many sexual assaults against children do not result in criminal convictions.

Section 8 modifies Rule 8 of the Alaska Rules of Criminal Procedure to allow two or more offenses to be charged in the same indictment or information if the offenses are of the same or similar character and it can be determined before trial that evidence of one charged offense would likely be admissible to prove another charged offense, or the offenses are based on the same act, or two or more acts are connected together or constitute parts of a common scheme or plan. Currently, a child may be required to testify at numerous trials under certain circumstances, (e.g.: if there are multiple victims). Even under the best circumstances, testifying in court can be extremely difficult for a child, as s/he may be required to confront the defendant and relive the abuse again and again. This amendment will lessen the trauma of the court process for these victims.

Section 9 amends Rule 404(b) of the Alaska Rules of Evidence to allow the introduction of evidence, in a trial for physical or sexual assault or abuse of a minor, of other similar acts by the defendant towards children in order to show a common scheme or plan. This evidence is allowable only if the prior offenses are reasonably recent, similar to the offense charged, and committed against persons similar to the prosecuting witness. Many sex offenders follow a pattern in their offenses. Evidence of previous similar acts is important to establish a framework in which the jury may fairly evaluate the victim's testimony regarding the charged acts.

Section 10 provides that the changes to the evidence rules made in section 9 applies to acts and offenses committed before the effective date of the bill. Section 11 establishes an immediate effective date.

Arthur English
Commissioner

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM May 5, 1987

SUBJECT: Constitutionality of CSHB 237(HESS)
(Jury unanimity/ex post facto laws)

TO: Representative John Sund
Chair, House Judiciary Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have asked for an analysis of the constitutional issues raised by CSHB 237(HESS). The two issues of which you should be aware relate to the constitutional requirement of jury unanimity to sustain a guilty verdict and the proscription against ex post facto laws.

I. JURY UNANIMITY.

CSHB 237(HESS) defines several new offenses to make illegal a "pattern or practice" of conduct. That term is defined to mean three or more incidents of the prohibited conduct. Section 8 of the bill adds a new provision of law which states, in part, that in a prosecution for an offense requiring a "pattern or practice" of prohibited conduct, "each juror in a jury trial must be convinced beyond a reasonable doubt that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to the particular incidents." The issue of jury unanimity was discussed in Covington v. State, 703 P.2d 436 (Alaska App. 1985). Overturning a conviction for sexual abuse of a minor, the court said:

> . . . a conviction may properly be entered only if the jury unanimously finds that all essential elements of the offense charged were proved beyond a reasonable doubt. Thus all jurors must agree that the defendant committed a single offense. State v. James, 698 P.2d 1161 (Alaska 1985). Where one jury instruction may encompass two separate incidents, the trial judge must instruct the jury that if a guilty verdict is returned,

> the jurors must be unanimous as to the incident or incidents of which they find the defendant guilty. Covington, at 440.

The provision in CSHB 237(HESS) permitting the jury to reach a verdict even though the individual jurors do not agree on the specific incidents necessary for the conviction appears to be in direct conflict with the court's holding in Covington.

It is my understanding that this provision was included in the draft by the Department of Law in the hopes of circumventing or overturning the Covington decision. While it is possible that the Alaska Supreme Court could take a different view of Covington in the future, there is nothing in existing Alaska case law to support a waiver of the jury unanimity requirement.

II. USE OF ACTS COMMITTED BEFORE EFFECTIVE DATE OF THE BILL TO ESTABLISH CRIMINAL PATTERN OR PRACTICE.

As noted above, CSHB 237(HESS) creates several new offenses requiring the prosecution to establish a "pattern or practice" of criminal activity, defined to mean at least three incidents. AS 11.41.600(4), added by sec. 8 of the bill, provides that as many as two of the three required incidents may have occurred before the effective date of the bill. As a general rule, making criminal an act which was not criminal when done, or increasing the penalty for the act, violates the constitutional proscription against ex post facto laws.

There is some precedent in the federal racketeering law (R.I.C.O.) for making criminal a pattern or practice of activity when some of the activity occurred before the law was enacted. The cases under the R.I.C.O. statutes do provide some support for using past activity to establish a crime. One commentator has found other support for this position citing a number of federal cases:

> Although an act not unlawful when committed may not be made the basis of criminal liability, a statute prescribing punishment for continuing the action is not invalid as ex post facto. Sutherland, Statutory Construction, sec. 42.10 (4th ed. 1986).

However, there is an exception to this rule worth noting. Application of a perjury statute based on inconsistent statements, one of which occurred before enactment of the perjury statute, was held to be an impermissible ex post facto application. U.S. v. Bell, 371 F. Supp. 220 (E.D. Texas 1973).

In any case, the federal cases are not binding on the Alaska Supreme Court, and moreover, the R.I.C.O. statutes are distinguishable from the provisions of CSHB 237(HESS). Therefore, despite the possibility that the provision could be upheld, AS 11.41.600(4) still presents some constitutional problems.

Under 18 U.S.C. 1962, it is a crime to receive income from a "pattern of racketeering activity." The term "pattern of racketeering activity" is defined in 18 U.S.C. 1961(5) to require at least two acts of racketeering activity, one of which occurred after the effective date of the racketeering law. This law has been upheld against challenges based on the ex post facto clause of the federal constitution. In U.S. v. Campanale, 518 F.2d 352 (9th Cir. 1975), the court said:

> The speculation that by relying to any extent on acts prior to its effective date the statute risks contravening the prohibitions of U.S. Const. art. I, sec. 9, cl. 3, against the passage of bills of attainder or ex post facto laws is not unreasonable. The same thought occurred to Congress, and the statute was drafted so as to avoid this possible unconstitutionality. This was done by defining "pattern of racketeering activity" to require one act of racketeering activity after the effective date of the chapter. Campanale, at 364.

However, the court did note that each incident of racketeering activity "must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute." Campanale, n. 34, at 364. The court also observed that the penalties imposed under R.I.C.O. are "no greater than the penalties imposed for many of the substantive offenses constituting racketeering activity." Campanale, n. 36, at 365.

The R.I.C.O. provisions that were upheld are very different from the provisions of CSHB 237(HESS). For example, sec. 1 of the bill amends AS 11.41.110(a) to add a new circumstance

under which a person may be guilty of murder in the second degree. The offense is committed if, "under circumstances manifesting an extreme indifference to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse or gross neglect of the child that results in the death of the child." Under AS 11.41.600(4), as many as two of the three incidents of abuse or neglect required for conviction may have occurred before the effective date of the bill. Accordingly, a person may be convicted of murder in the second degree for acts which, when committed, were at most assault and possibly not criminal at all.

The argument in support of the validity of this result under the R.I.C.O. statute is that a person who has abused a child before the effective date of the bill is on notice that further abuse resulting in death will amount to murder in the second degree. The difficulty is that the final act after the effective date of the bill in and of itself is not murder in the second degree. The prior acts are an element of the offense even though they may not be independent offenses. If the court finds this to be a requirement for making the prior acts an element of the offense, it will have to find AS 11.41.600(4) unconstitutional.

The cases noted above are supportive of the questioned provisions of CSHB 237(HESS) but they are by no means conclusive. In my opinion, the validity of AS 11.41.600(4) remains an open question.

III. EX POST FACTO APPLICATION OF CHANGE IN RULES OF EVIDENCE.

Section 14 of CSHB 237(HESS) makes an amendment to Alaska Rule of Evidence 404 apply retroactively to acts and offenses committed before the effective date of the bill. That amendment, contained in sec. 13 of the bill, makes evidence of prior acts of the defendant involving the same or another victim admissible to prove the defendant's disposition to commit certain offenses. In Moor v. State, 709 P.2d 498 (Alaska App. 1985), the Alaska Court of Appeals specifically rejected the Department of Law's argument that incidents of sexual abuse with a different victim are admissible in sexual abuse cases to show "lewd disposition." Thus, the retroactive application of sec. 13 allows the state to introduce evidence in a criminal prosecution even

though the evidence would not have been admissible at the time the offense was committed.

The constitutional proscription against ex post facto laws includes laws which alter the legal rules of evidence and receive less or different testimony than was required when the offense was committed. As one commentator noted:

> Changes in the law of evidence making it easier to prove guilt than was the case when an offense was committed is obviously prejudicial to the interests of the accused. Repeal of a law making certain evidence inadmissible is ex post facto to offenses committed prior to the repealing act. Sutherland, Statutory Construction, sec. 42.07 (4th ed. 1986).

Of course not all changes in the rules of evidence amount to illegal ex post facto laws. The United States Supreme Court summed up the issue this way:

> . . . no ex post facto violation occurs if the change effected is merely procedural, and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 23, n. 12 (1981).

Thus, if sec. 13 of CSHB 237(HESS) alters or deprives a defendant of a substantial right, it may not constitutionally be applied retroactively. As noted below, there is substantial case law supporting the argument that a seemingly procedural amendment does in fact alter a substantial right, and therefore retroactive application of such a change is unconstitutional.

In a very recent case before the Alaska Court of Appeals, an attempt by the Department of Law to limit the application of the ex post facto clauses was firmly rejected. State v. Creekpaum, File No. A-1228, __ P.2d __ (Alaska App. 1987). The court held that an extension of the statute of limitations under which the defendant could have been prosecuted amounted to an unconstitutional ex post facto law.

The Creekpaum case dealt with the issue of whether the statute of limitations is merely a procedural issue or a

substantive right which may not be applied retroactively. The court concluded:

> . . . although we find the issue to be a close one, we are persuaded that a criminal statute of limitations is not merely procedural, but operates as a substantive right for ex post facto purposes. While such a statute does not directly establish the elements of an offense, it is closely related thereto, since it limits the circumstances under which guilt may be found and is aimed at preserving the accuracy and basic integrity of the adjudicative process in which the guilt or innocence of the accused is ultimately decided. We hold, therefore, that the ex post facto clauses of the Alaska and United States Constitutions prohibit a retrospective change in the statute of limitations in a criminal case when the change operates to the detriment of the accused. Creekpaum, at 22.

The Department of Law argued that substantive criminal law refers only to statutes which define what acts are criminal or which prescribe the penalties for criminal acts: all other aspects of the law affecting criminal proceedings are procedural. Creekpaum, at 5. If this were true, then retroactive application of sec. 13 of CSHB 237(HESS) would probably not present a constitutional problem. However, the court rejected this argument and found that it is not supported by the holdings of the United States Supreme Court. Creekpaum, at 6. Instead, the court ruled:

> In our view, a substantive change in the law is one that works a disadvantage to the accused either directly, by altering the requisite elements of the offense, or indirectly, by impairing important rights that are related to the substance of the offense -- those rights meant to assure fairness in the ultimate adjudication of guilt or innocence. As the Supreme Court has held: "It is sufficient now to say that a statute belongs to the protected class which by its necessary operation and in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage." Creekpaum, at 12 - 13. (Citations omitted.)

Other jurisdictions have also found that seemingly procedural changes were in fact substantive for ex post facto purposes. State v. Schreuder, 726 P.2d 1215 (Utah 1986)

involved a statute that prohibited a conviction based solely on uncorroborated accomplice testimony. The statute was in effect at the time the defendant committed the offense, but was subsequently repealed. The court ruled that retroactive application of the statute:

> . . . would lessen the amount of proof necessary to convict defendant and thereby deprive defendant of a substantial right that the law gave her at the time of the murder. Therefore, application of section 77-17-7 would fall within the classes of changes prohibited by the ex post facto clause. Schreuder, at 1218.

In State v. Edwards, 701 P.2d 508 (Wash. 1985), the Washington Supreme Court ruled unconstitutional the retroactive application of an amendment to the murder statute defining the offense to require that the victim die within three years rather than the common law requirement of one year that was in effect when the offense was committed. The court found the retroactive application of the amendment offensive in several ways and specifically stated:

> . . . the amendment alters the rules of evidence by receiving different testimony than required or permitted at the time of the crime since the State may prove different facts than it had to prove when the crime was committed. * * * Such an enactment violates state and federal constitutional prohibitions against ex post facto legislation. Edwards, at 512 - 513.

All of these cases clearly indicate that there is at least a significant possibility that the Alaska Supreme Court, if faced with the question, would find the retroactive application of the amendment to the Rules of Evidence contained in secs. 13 and 14 of CSHB 237(HESS) an unconstitutional ex post facto law. Substantive evidence that was not admissible at the time a defendant committed an offense would become admissible at that defendant's trial. The case law clearly indicates that the retroactive application of such a provision raises substantial constitutional questions.

If I may be of further assistance, please advise.

KBL:mkr
m11/117

Alaska State Legislature
House

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

January 21, 1988

TO: House Judiciary Committee

FROM: Representative Fran Ulmer

SUBJECT: House Bill 237

The proposed CS which you have in front of you today, differs from original House Bill 237 in several significant ways.

The original bill proposed combining several instances of abuse into a new offense a pattern or practice of abuse. This approach was designed to permit the court to try several instances of abuse under one charge in one trial so that in cases like Covington where the child victim could not identify with precision the time, date and place of each act of abuse, it would be possible to convict the offender of abuse.

During the interim, I have had many discussions with individuals regarding this approach. We have researched other states to see whether similar legislation has been adopted. Only the State of Washington has approached child abuse in this manner, with the passage of a new statute last spring. As of this date, there have been no prosecutions under that section or any appellate efforts to shed light on its constitutionality. As you may remember from earlier testimony, the concern which the public defender has regarding the "pattern or practice" charge is the constitutional requirement for a unanimous jury. Her argument is that if you have several instances of abuse combined in a "pattern or practice" charge that the jury may not be unanimous as to which incidents occurred and which were committed by the defendant.

Although there is considerable debate about how the court might interpret the unanimous jury requirement in any challenge to this new "pattern or practice" charge, I have avoided this debate in this proposed CS by attempting to solve the problem in a different way. The CS no longer has a pattern or practice charge for either physical or sexual abuse or assault. Instead, the CS changes court rules which permit related cases to be tried together.

The question as to whether a court should sever or join a case rests on a variety of factors, including the economy of justice, the similarity and related nature of the charged offenses, potential prejudice to the accused, convenience to the parties, and other factors.

CS HB 237 clarifies that cases should be joined if the evidence of one charged offense would be admissible to prove another charged offense. It is preferable to do so for many of the parties involved; certainly for the court system and for the efficiency of the administration of justice. It will save money and time. It accomplishes part of what I had hoped to accomplish with a pattern or practice, but avoids the constitutional issue altogether.

Another major change in the proposed CS is new language amending Rule 404. This new language is a recommendation from the legislative committee of S.T.A.R. (Standing Together Against Rape) and, I believe, is more narrowly focused in a way which directly accomplishes the objective.

The third major change in the CS is the addition of an aggravating factor to be considered at sentencing so that the judge considers additional time for those offenders who abuse or assault minor victims more than once.

The next major difference in the proposed CS is a definition of the phrase "over whom the offender had authority". This proposed new language will clarify that it is intended to cover not only those individuals who reside within the household of the victim, (e.g., a live-in boyfriend), but also cover someone who is caring for the child, like a babysitter.

The final major difference between this CS and the original bill is the addition of a section which clarifies sentencing for concurrent and consecutive terms. Representative Ramona Barnes introduced a bill which was passed by the Legislature and has been interpreted by the courts to mean something quite different than what was originally intended. Sections 4 and 5 are an effort to restore some balance: if the offender is convicted of multiple charges, his sentences should not all run concurrently.

In summary, this proposed CS deals with the issues of joinder of cases, admissibility of evidence, sentencing for multiple offenders. I sincerely hope that after the testimony from individuals who have experience with prosecuting these cases, we'll have a clearer understanding of how these changes will have a positive effect on the administration of criminal justice in Alaska.

Offered: 5/4/87
Referred: Judiciary and Finance

5-0809L

Original sponsors: Ulmer, Hudson, Grussendorf, et al.

IN THE HOUSE

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 237 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to murder, assault, and the physical and sexual abuse of children; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

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

* Section 1. AS 11.41.110(a) is amended to read:

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

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

(2) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; [OR]

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants; or

(4) under circumstances manifesting an extreme indifference

to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse or gross neglect of the child that results in the death of the child.

* Sec. 2. AS 11.41.110 is amended by adding a new subsection to read:

(c) In this section, "abuse or gross neglect" includes intentional bodily impact, restraint, confinement, administration of lethal chemicals or drugs that create a substantial and unjustifiable risk that the child will suffer serious physical injury, or knowingly exposing the child to conditions which create a substantial risk that the child will suffer serious physical injury due to burns, hypothermia, or suffocation.

* Sec. 3. AS 11.41.200(a) is amended to read:

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

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; [OR]

(3) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) the person engages in a pattern or practice of abuse or gross neglect of a child under the age of 16 that results in serious physical injury to the child.

* Sec. 4. AS 11.41.200 is amended by adding a new subsection to read:

(c) In this section, "abuse or gross neglect" includes intentional bodily impact, restraint, confinement, administration of lethal chemicals or drugs that create a substantial and unjustifiable risk that the child will suffer se ious physical injury, or knowingly

exposing the child to conditions which create a substantial risk that the child will suffer serious physical injury due to burns, hypothermia, or suffocation.

* Sec. 5. AS 11.41 is amended by adding new sections to read:

Sec. 11.41.441. REPEATED SEXUAL ABUSE OF A MINOR IN THE FIRST DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the first degree if, being 16 years of age or older and having authority over a child under the age of 13, the person engages in a pattern or practice of sexual penetration with a child who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in a pattern or practice of sexual penetration with another person.

(b) Repeated sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 11.41.442. REPEATED SEXUAL ABUSE OF A MINOR IN THE SECOND DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the second degree if, being 16 years of age or older and having authority over a child under the age of 16, the offender

(1) engages in a pattern or practice of sexual penetration with a child who is 13, 14, or 15 years of age and at least three years younger than the person, or aids, induces, causes, or encourages a child who is 13, 14, or 15 years of age and at least three years younger than the person to engage in a pattern or practice of sexual penetration with another person; or

(2) engages in a pattern or practice of sexual contact with a child who is under 13 years of age or aids, induces, causes, or encourages a child under 13 years of age to engage in a pattern or practice of sexual contact with another person.

(b) Repeated sexual abuse of a minor in the second degree is a

class A felony.

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

Sec. 11.41.444. REPEATED SEXUAL ABUSE OF A MINOR IN THE THIRD DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the third degree if

(1) being 16 years of age or older and having authority over a child under the age of 16, the person engages in a pattern or practice of sexual contact with a child who is 13, 14, or 15 years of age and at least three years younger than the person, or aids, induces, causes, or encourages a child who is 13, 14, or 15 years of age and at least three years younger than the person to engage in a pattern or practice of sexual contact with another person; or

(2) being under 16 years of age and having authority over a child under the age of 13, the person engages in a pattern or practice of sexual penetration or sexual contact with a child who is under 13 years of age and at least three years younger than the person.

(b) Repeated sexual abuse of a minor in the third degree is a class B felony.

* Sec. 7. AS 11.41.445 is amended to read:

Sec. 11.41.445. AFFIRMATIVE DEFENSES [GENERAL PROVISIONS]. (a) In a prosecution under AS 11.41.434 - 11.41.444 [AS 11.41.434 - 11.41.440] it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 - 11.41.444 [AS 11.41.410 - 11.41.440], whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the

victim was under 13 years of age at the time of the alleged offense.

* Sec. 8. AS 11.41 is amended by adding new sections to read:

ARTICLE 6. GENERAL PROVISIONS.

Sec. 11.41.600. PATTERN OR PRACTICE. In a prosecution under this chapter for an offense that includes as one of its elements that a person engaged in a "pattern or practice" of conduct toward a child

(1) it is not necessary that the person be separately charged with specific incidents of prohibited conduct; however, prosecution for separate incidents is not precluded;

(2) to support a conviction, each juror in a jury trial must be convinced beyond a reasonable doubt that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to particular incidents;

(3) if a person who is separately charged with a specific incident of prohibited conduct is found not guilty of an incident, that incident may not be relied upon to establish the pattern or practice; and

(4) incidents occurring before the effective date of the law establishing the offense may be used to establish the pattern or practice as long as there was at least one incident that occurred after the effective date of the law.

Sec. 11.41.610. DEFINITIONS. In this chapter

(1) "having authority over a child" means

(A) the child is entrusted to the person's care by authority of law;

(B) the child is the person's son or daughter, including an illegitimate or adopted child, or a stepchild;

(C) the person resides as a member of a social unit in the same household as the child; or

(D) the child has been temporarily entrusted to the person's care;

(2) "pattern or practice" means three or more incidents of the prohibited conduct.

* Sec. 9. AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified into the following categories:

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

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

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

(4) class A misdemeanors, which characteristically involve

less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk or physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

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

* Sec. 10. AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, is designated in the section defining it. A felony under Alaska law defined outside this title for which no penalty is specifically provided is a class C felony.

* Sec. 11. AS 12.55.035(b) is amended to read:

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

(1) $75,000 for murder in the first or second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

* Sec. 12. AS 12.55.125(i) is amended to read:

(i) A defendant convicted of sexual assault in the first degree, repeated sexual abuse of a minor in the first degree, or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years.

* Sec. 13. Rule 404, Alaska Rules of Evidence, is amended by adding a new subsection to read:

(c) Notwithstanding (b) of this rule, in a prosecution for physical assault upon or sexual misconduct with a child under the age of 16, evidence of prior acts of the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

* Sec. 14. Section 13 of this Act is retroactive and applies

(1) to evidence of acts committed before the effective date of

this Act; and

(2) in trials involving offenses committed before the effective date of this Act.

* Sec. 15. This Act takes effect immediately under AS 01.10.070(c).

Introduced: 4/1/87
Referred: Health, Education & Social Services, Judiciary and Finance

5-0809B

BY ULMER, HUDSON, GRUSSENDORF, BOYER, DAVIDSON, ELLIS, FRANK, GOLL, GRUENBERG, HOFFMAN, KOPONEN, LARSON, MENARD, NAVARRE, PEARCE, PETTYJOHN, PHILLIPS, SUND, SWACKHAMMER, TAYLOR AND WALLIS

IN THE HOUSE

HOUSE BILL NO. 237

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to murder, assault, and the physical and sexual abuse of children; the admissibility of certain evidence in criminal prosecutions; amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

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

* Section 1. AS 11.41.110(a) is amended to read:

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

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

(2) the person <u>knowingly engages in conduct</u> [INTENTIONALLY PERFORMS AN ACT] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; [OR]

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants<u>; or</u>

(4) under circumstances manifesting an extreme indifference to the welfare of a child under the age of 16, the person engages in a pattern or practice of abuse of the child that results in the death of the child.

* Sec. 2. AS 11.41.110 is amended by adding a new subsection to read:

(c) In this section, "abuse" includes bodily impact, restraint, or confinement.

* Sec. 3. AS 11.41.200(a) is amended to read:

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

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person; [OR]

(3) the person knowingly engages in conduct [INTENTIONALLY PERFORMS AN ACT] that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) the person engages in a pattern or practice of abuse of a child under the age of 16 that results in serious physical injury to the child.

* Sec. 4. AS 11.41.200 is amended by adding a new subsection to read:

(c) In this section, "abuse" includes bodily impact, restraint, or confinement.

* Sec. 5. AS 11.41 is amended by adding new sections to read:

Sec. 11.41.441. REPEATED SEXUAL ABUSE OF A MINOR IN THE FIRST DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the first degree if, being 16 years of age or older and having authority over a child under the age of 16, the person engages in a pattern or practice of sexual penetration with a child who is

under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in a pattern or practice of sexual penetration with another person.

(b) Repeated sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 11.41.442. REPEATED SEXUAL ABUSE OF A MINOR IN THE SECOND DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the second degree if, being 16 years of age or older and having authority over a child under the age of 16, the offender

(1) engages in a pattern or practice of sexual penetration with a child who is 13, 14, or 15 years of age and at least three years younger than the person, or aids, induces, causes, or encourages a child who is 13, 14, or 15 years of age and at least three years younger than the person to engage in a pattern or practice of sexual penetration with another person; or

(2) engages in a pattern or practice of sexual contact with a child who is under 13 years of age or aids, induces, causes, or encourages a child under 13 years of age to engage in a pattern or practice of sexual contact with another person.

(b) Repeated sexual abuse of a minor in the second degree is a class A felony.

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

Sec. 11.41.444. REPEATED SEXUAL ABUSE OF A MINOR IN THE THIRD DEGREE. (a) A person commits the crime of repeated sexual abuse of a minor in the third degree if

(1) being 16 years of age or older and having authority over a child under the age of 16, the person engages in a pattern or practice of sexual contact with a child who is 13, 14, or 15 years of age and at least three years younger than the person, or aids,

induces, causes, or encourages a child who is 13, 14, or 15 years of age and at least three years younger than the person to engage in a pattern or practice of sexual contact with another person; or

(2) being under 16 years of age and having authority over a child under the age of 16, the person engages in a pattern or practice of sexual penetration or sexual contact with a child who is under 13 years of age and at least three years younger than the person.

(b) Repeated sexual abuse of a minor in the third degree is a class B felony.

* Sec. 7. AS 11.41.445 is amended to read:

Sec. 11.41.445. AFFIRMATIVE DEFENSES [GENERAL PROVISIONS]. (a) In a prosecution under AS 11.41.434 - 11.41.444 [AS 11.41.434 - 11.41.440] it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 - 11.41.444 [AS 11.41.410 - 11.41.440], whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense.

* Sec. 8. AS 11.41 is amended by adding new sections to read:

ARTICLE 6. GENERAL PROVISIONS.

Sec. 11.41.600. PATTERN OR PRACTICE. In a prosecution under this chapter for an offense that includes as one of its elements that a person engaged in a "pattern or practice" of conduct toward a child

(1) it is not necessary that the person be separately charged with specific incidents of prohibited conduct; however, prosecution for separate incidents is not precluded;

(2) to support a conviction, each juror in a jury trial must be convinced beyond a reasonable doubt that at least three incidents of prohibited conduct occurred, but the jury need not be unanimous as to particular incidents;

(3) if a person who is separately charged with a specific incident of prohibited conduct is found not guilty of an incident, that incident may not be relied upon to establish the pattern or practice; and

(4) incidents occurring before the effective date of the law establishing the offense may be used to establish the pattern or practice as long as there was at least one incident that occurred after the effective date of the law.

Sec. 11.41.610. DEFINITIONS. In this chapter

(1) "having authority over a child" means

(A) the child is entrusted to the person's care by authority of law;

(B) the child is the person's son or daughter, including an illegitimate or adopted child, or a stepchild;

(C) the person resides as a member of a social unit in the same household as the child; or

(D) the child has been temporarily entrusted to the person's care;

(2) "pattern or practice" means three or more incidents of the prohibited conduct.

* Sec. 9. AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, <u>repeated sexual abuse of a minor in the first degree,</u>

misconduct involving a controlled substance in the first degree, and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified into the following categories:

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

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

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

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

(5) class B misdemeanors, which characteristically involve a minor risk or physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct

inappropriate to an orderly society but which do not denote criminality in their commission.

* Sec. 10. AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, is designated in the section defining it. A felony under Alaska law defined outside this title for which no penalty is specifically provided is a class C felony.

* Sec. 11. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.025. PRIOR INCONSISTENT STATEMENTS. In a prosecution for an offense, evidence of a prior inconsistent statement of a witness, if believed by the trier of fact, is sufficient to support a conviction.

* Sec. 12. AS 12.55.035(b) is amended to read:

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

(1) $75,000 for murder in the first or second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, repeated sexual abuse of a minor in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

* Sec. 13. AS 12.55.125 is amended by adding a new subsection to read:

(j) A defendant convicted of repeated sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 50 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, 13 years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 15 years;

(3) if the offense is a second felony conviction, 25 years;

(4) if the offense is a third felony conviction, 35 years.

* Sec. 14. Rule 404, Alaska Rules of Evidence, is amended by adding a new subsection to read:

(c) Notwithstanding (b) of this rule, in a prosecution for physical assault upon or sexual misconduct with a child under the age of 16, evidence of prior acts of the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

* Sec. 15. Section 14 of this Act is retroactive and applies

(1) to evidence of acts committed before the effective date of this Act; and

(2) in trials involving offenses committed before the effective date of this Act.

* Sec. 16. This Act takes effect immediately under AS 01.10.070(c).