ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1618 HJ HB 438 - HB 473

E. Estimate of Cost - If a Community Based Program oriented method of confinement is envisioned.

The additional bed requirement would be met through contracts with local agencies at approximately $50.00 per bed per day.

Cost = 26 beds X $50.00 per day X 365

FY 1983 = $474,500
FY 1984 = 517,200
FY 1985 = 563,800
FY 1986 = 614,500
FY 1987 = 669,800

9% inflation per year was used for fiscal years after 1983.

Advantages to this method of confinement are numberous. There is no Capital expenditure necessary. The contractor will provide alcohol abuse education programs. For persons with longer sentences, work release would be available, with earnings used partially to offset above identified costs, make restitution when indicated, support family, etc. The individuals would still be under supervision 24 hours per day, and in a closed setting while not on work release.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSSSHB 438
Title An act related to driving offenses & related blood tests for intoxication
Requested by Health & Social Services Date 2/19/82

II. FISCAL DETAIL
Agency Affected Health & Social Services
Program Category Affected Public Health
BRU, Program, Or Subprogram(s) Affected Laboratories
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | -0- | 77.6 | 83.4 | 89.7 | 96.4 | 103.6 |
| 200 TRAVEL | -0- | 10.0 | 12.0 | 14.4 | 17.3 | 20.7 |
| 300 CONTRACTUAL | -0- | 30.0 | 107.4 | 110.0 | 113.0 | 115.0 |
| 400 COMMODITIES | -0- | 8.0 | 8.6 | 9.3 | 10.0 | 10.9 |
| 500 EQUIPMENT | -0- | 25.0 | 5.0 | 3.0 | 3.0 | 3.0 |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS,CLAIMS,ETC. | | | | | | |
| TOTAL | -0- | 150.6 | 216.4 | 226.4 | 239.7 | 253.2 |

FUNDING (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | 150.6 | 216.4 | 226.4 | 239.7 | 253.2 |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |

POSITIONS

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| FULL TIME | 0 | 2 | 2 | 2 | 2 | 2 |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The Department of Health & Social Services believes that this bill requires the Department to certify laboratories and methods for drug and alcohol analysis, to ensure that laboratory data obtained from a person's blood is admissable as evidence in court. A program of laboratory certification, proficiency testing, and on-site inspection could be established that would ensure correct blood analysis and protect the public from those individuals that drive under the influence of drugs and/or alcohol. The small additional cost can be justified if only one death or serious injury is prevented from reoccuring by incarcerating offenders or directing them into treatment programs. The bill's language should be changed to reflect legislative intent and clearly indicate that drug and alcohol blood tests be carried out under the circumstances described in this bill.

IV. DATE February 19, 1982 PREPARED BY Harry J. Colvin, Ph.D.
AGENCY Health & Social Services
PHONE 465-3077

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 438
Title Administration of Chemical Blood Tests
Requested by House Judiciary Committee Date 2/9/82

II. FISCAL DETAIL
Agency Affected Alaska Court System
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected ______
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| TOTAL | | -0- | -0- | -0- | -0- | -0- |

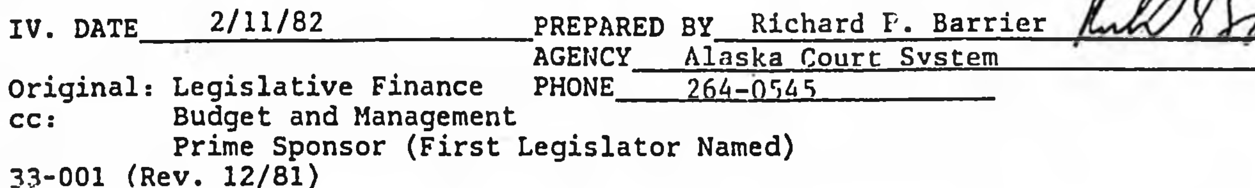
FUNDING (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)



IV. DATE 2/11/82 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

# FISCAL NOTE

I. REQUEST
Bill/Resolution No. Sponsor Substitute for House Bill No. 438
Title "An Act relating to....chemical blood tests...."
Requested by ______ Date ______

II. FISCAL DETAIL
Agency Affected Department of Public Safety
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Alaska State Troopers
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS,CLAIMS,ETC. | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |
| | -0- | -0- | -0- | -0- | -0- | -0- |

POSITIONS

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

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No Fiscal Impact.

IV. DATE February 2, 1982 PREPARED BY Francis C. Allan
AGENCY Department of Public Safety
PHONE 264-5[illegible]

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor [illegible]

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

# FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSSS HB 438 (Judiciary)
Title Driving or Operating a Motor Vehicle While Intoxicated
Requested by House Judiciary Committee Date 02-02-82

II. FISCAL DETAIL
Agency Affected Law
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS,CLAIMS,ETC. | | | | | | |
| TOTAL | 0 | 0 | 0 | 0 | 0 | 0 |

FUNDING (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 0 | 0 | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |

POSITIONS

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

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill makes several significant amendments to the state laws pertaining to driving while intoxicated, including making it a class B misdemeanor to refuse a breathalyzer and authorizing the forcible taking of blood after a person refuses a breathalyzer. It can be expected that these and other provisions in the bill will result in additional appeals testing the constitutionality of these sections. Additionally, there is the distinct possibility that the number of guilty pleas for Driving While Intoxicated will decrease in view of the generally more severe penalties specified, and that with the corresponding increase in trials a need for additional attorney positions may arise. While this possibility is speculative and consequently no additional positions have been requested at this time, any legislative action diminishing the resources available to the department in FY 83, coupled with the enactment of this and other crime bills requiring a greater prosecution effort will severely hamper the department's overall ability to prosecute criminal offenses.

IV. DATE 02-03-82 PREPARED BY Dan Hickey, Chief Prosecutor
AGENCY Department of Law
PHONE 465-3429

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

If we write a very clear letter of intent to go with the Bill, clarifying what the committee meant; wouldn't that help the court with interpretation of the language

STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE DISTRICT ATTORNEY*

*JAY S. HAMMOND, GOVERNOR*

604 Barnette St., Rm. 247
Fairbanks, Alaska 99701
(907) 452-1565

January 19, 1982

Mr. Bill Cook
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

RE: Admissibility of blood test results after refusal to take a breathalyzer test

Dear Mr. Cook:

It is my understanding that legislation is being proposed concerning the use of the breathalyzer and blood tests as investigative tools in cases concerning certain crimes committed by the use of a motor vehicle.

The breathalyzer is now used to determine if a person has too high a blood alcohol content in "drunk driving cases". However, it frequently occurs that a person will refuse to submit to a breathalyzer test in an effort to prohibit the collection of evidence in the proof of such a case. State law specifically prohibits the involuntary seizure of a blood sample from a person charged with DWI after such person has refused a breathalyzer test.

It too often occurs that a person who is DWI has also committed a greater offense during the DWI by placing a victim in fear of death due to the dangerous way in which a vehicle is driven, or by the killing of a victim by a drunk driver who is driving a vehicle in a dangerous manner. In such cases, the drunk driver may refuse a breathalyzer test and likewise refuse thereafter to submit to the giving of a sample of his blood. Frequently such person will claim that a seizure of his blood pursuant to a search warrant is in violation of his "right" not to have evidence of a blood sample seized after he has refused a breathalzyer. Whether such a "right" exists is raised by the fact that in <u>DWI cases</u> blood cannot be seized after refusal of

a breathalyzer. It is often argued that since blood cannot be seized in a DWI case, neither can it lawfully be seized in any case where a motor vehicle is used in the commission of a crime.

I understand that legislation is being proposed that would clear up any confusion by expressly providing that in instances of certain crimes other than DWI, the seizure of a blood sample pursuant to a search warrant would not make the test results inadmissible even though a breathalyzer test may have been refused. I understand that such proposal includes assault crimes committed by the use of an automobile and the crime of manslaughter that is often committed by the use of an automobile.

I urge that murder committed by the use of a motor vehicle also be included with the listing of crimes for which blood tests results are admissible, even though a breathzlyzer has been refused, if the blood sample is obtained pursuant to a search warrant. In support of this position let me cite the facts of a recent murder conviction wherein the defendant killed two women and seriously injured a third while DWI. In this case, the defendant consented both to the breathalyzer and to the taking of a blood sample, but it could have been the other way. Here are the facts:

On Monday night, October 5, 1981, the defendant went to a bar to watch Monday night football and to "have a few drinks" while he was there. While at the bar the defendant had three drinks called Margarita grande which were simply the "giant versions" of the drink otherwise known as a Margarita. While still at the same bar, the defendant thereafter had one or two beers. Next he had a drink called a "Jellybean" which is a mixture of a liqueur known as anisette and of another liqueur having a coffee flavor. These drinks were consumed by the defendant during the early evening hours in an approximate two hour period.

After the defendant left the bar, he went to another bar where, during approximately one hour, he drank two more drinks called White Russians. Having had seven or eight drinks all totaled, the defendant then left the second bar. While crossing the street with his keys visible in his hand, the defendant was seen by two police officers who saw the defendant staggering toward his pickup truck. Anticipating that the defendant intended to drive the vehicle, the officers stopped the defendant and warned him that he was in no condition to operate the vehicle. The defendant assured the police officers that he would not drive and walked off in the opposite direction of his vehicle. After the police officers drove out of sight, the defendant immediately returned to his pickup truck and drove it away. Minutes after, the crime occurred.

During the defendant's driving from the first bar, he was personally observed to have: gone through one yield sign without bothering to look or slow for any possible traffic; intentionally run one stop sign; run a red light at a major traffic intersection; and to have tailgated a vehicle within approximately one foot to show his displeasure that the motorist ahead was not going fast enough to suit the defendant.

During the defendant's driving from the second bar, he was personally observed to have: speeded down an interior city street; run over or nearly run over a curb in making a fast turn at an intersection; intentionally run another stop sign; intentionally run a second red light; and to have intentionally run a third red light at a speed of approximately 50 to 60 mph after passing stopped cars by passing on the right side of the roadway.

Finally, the defendant approached a fourth red light at a major intersection where, without bothering to slow down or apply any brakes, he ran through the red light and broadsided a car with three females in it and knocked the car 146 feet down the road at a right angle to the original direction of travel of the car.

The driver of the car, Gladys Kavorkian, died almost instantly since the force of the impact caused her heart to sever from its main artery, the aorta. The right front passenger, 15 year old Tanya Brantingham, was crushed in the wreckage when the right front portion of the car was caved in clamping her feet and also causing a crushing head injury resulting in death due to tremendous brain damage.

The rear seat passenger, 20 year old Sarah Kavorkian, daughter of Gladys Kavorkian, was seriously injured with the major injury being numerous lacerations about her head and face which required almost six hours of initial surgery but leaving several scars after well over a hundred stitches.

After the impact the defendant was observed walking around his wrecked vehicle using profanity and loudly complaining about the damage to his own vehicle. A bystander admonished the defendant that he should be more concerned with the condition of the injured people than with his truck. The defendant replied, "To hell with them, I don't have to make payments on them."

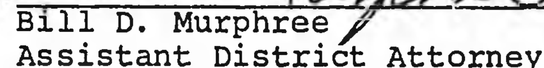
A breathalyzer test showed that the defendant's blood alcohol (as measured by his breath) was a .17%, well in excess of the .10% required to prove DWI. A corroborating blood alcohol test done by analyzing a sample of the defendant's blood (taken over an hour later) confirmed a blood alcohol of .16%.

The defendant was convicted for the murders under A.S. 11.41.110 (a) (2) for "intentionally performing an act resulting in the death of another person under circumstances manifesting an extreme indifference to the value of human life". It was argued that the intentional driving while intoxicated and the driving in the manner that the defendant drove all justified a verdict under the above murder statute where a death resulted in connection with the use of a motor vehicle.

These matters are submitted for your consideration in proposing legislation as indicated.

Sincerely,

HARRY L. DAVIS
DISTRICT ATTORNEY



By
Bill D. Murphree
Assistant District Attorney

BDM:lp

Original sponsor: Meekins

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 438 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act revising laws relating to revocation of drivers' licenses for certain offenses, including driving while intoxicated, and for refusal to take a chemical breath test for alcohol, and revising the driving while intoxicated law, and specifying procedures for chemical tests of blood for alcohol."

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

* Section 1. AS 09.65.095(a) is amended to read:

(a) No civil or criminal action arising out of battery may be brought against a health care provider for the act of taking a blood sample if the sample is taken

(1) at the request of a police officer under the circumstances specified in AS 28.35.032 or 28.35.035 when a chemical test of blood may be administered without a person's consent or when the arresting officer has a search warrant or court order authorizing the taking of the blood sample; and

(2) without the use of excessive or unreasonable force.

* Sec. 2. AS 12.30.020(b) is amended by adding a new paragraph to read:

(7) require the person to surrender his driver's license to the peace officer or to the court for a specified period of hours in order to enable the arrested person to become sufficiently sober to operate a motor vehicle, if the person is charged with an offense involving driving while intoxicated; however, if the judicial officer finds probable cause to believe that the person has been convicted of an

1 offense involving driving while intoxicated within the three years
2 before his appearance, the judicial officer shall order the license held
3 by the officer or the court until the conclusion of the case charged,
4 and shall order the person not to operate any motor vehicle.
5 * Sec. 3. AS 12.30.020 is amended by adding new subsections to read:
6 (i) A person who is required to surrender his driver's license
7 under (b)(7) of this section may move the court at his next court ap-
8 pearance to review that requirement.
9 (j) "Danger to other persons and the community", as used in this
10 section, includes danger that may result from offenses against the
11 person, offenses against property, offenses against public order, and
12 offenses relating to operation of aircraft or a motor vehicle, as de-
13 fined by AS [illegible]5.260(a)(7).
14 * Sec. 4. AS 28.15.181 is repealed and reenacted to read:
15 Sec. 28.15.181. COURT REVOCATIONS AND LIMITATIONS. (a) The
16 following are grounds for the immediate revocation of an operator's or
17 driver's license or a nonresident privilege to drive:
18 (1) conviction of a crime under AS 11.41.100 - 11.41.250 if
19 the crime was committed while operating or driving a motor vehicle;
20 (2) a felony in the commission of which the person convicted
21 was operating or driving a motor vehicle;
22 (3) failure to stop and give aid as required under the laws
23 of this state when a motor vehicle accident results in the death or
24 personal injury of another;
25 (4) perjury or committing the crime of unsworn falsification
26 under a law relating to motor vehicles;
27 (5) operating or driving a motor vehicle while intoxicated;
28 (6) reckless driving; or
29 (7) using a motor vehicle in unlawful flight to avoid arrest

by a peace officer.

(b) A court convicting a person of an offense under (a) of this section shall revoke that person's driver's license or nonresident privilege to drive or shall order the denial of issuance of a driver's license or permit for a period of not less than 30 days nor more than 10 years, except as provided in (c) and (d) of this section.

(c) If the person was convicted of an offense under (a) of this section within five years previous to the present offense, the court shall order revocation or denial of issuance of a license or permit for a period of not less than one year, except as provided in (d) of this section.

(d) If the person was convicted of an offense under (a) of this section within one year previous to the present offense or if the person was convicted of two or more of these offenses within the five years previous to the present offense, the court shall order revocation or denial of issuance of a license or a permit for not less than three years.

(e) If the person has no prior convictions under (a) of this section within five years previous to the present offense, the court may, after the license has been revoked or issuance denied, issue a certificate of limited driving privileges to him. The certificate may restrict the person to operation of a motor vehicle only at certain times, on certain days, and on certain highways and vehicular ways or areas. The court may not issue a certificate of limited driving privileges under this section unless it finds, by a preponderance of the evidence, that the person's ability to earn a livelihood would be severely impaired or that the availability of presently necessary health care to the person or a member of his immediate family would be severely impaired. If the court issues a certificate of limited driving privi-

1 leges, the revocation or denial period and the period of certification
2 shall be for not less than 60 days. Any certificate of limited driving
3 privileges may, for good cause, be cancelled by the issuing court during
4 the revocation or denial period.
5 (f) A court revoking or denying issuance of a license under (b),
6 (c), or (d) of this section shall consider a prior conviction for an
7 offense committed in another jurisdiction if that offense has elements
8 substantially identical to those of a comparable offense under (a) of
9 this section.
10 (g) A period of revocation imposed on a person by a court under
11 (a) of this section shall run consecutive to any other period of license
12 revocation or suspension imposed on that person by the court or by the
13 department.
14 * Sec. 5. AS 28.15.191(c) is amended to read:
15 (c) A court which [SUSPENDS,] revokes [,] or limits a driver's
16 license shall require the surrender of the license, and shall immediately
17 forward it to the department with the record of conviction and notifica-
18 tion of the effective date of the [SUSPENSION,] revocation or limitation
19 <u>of driving privileges</u> as determined under <u>AS 28.15.181 and 28.15.211</u>
20 [AS 28.15.211(b)].
21 * Sec. 6. AS 28.15.191(d) is repealed and reenacted to read:
22 (d) A court which issues a certificate of limited driving privi-
23 leges shall specify the period of 60 days or longer prescribed by AS 28-
24 15.181, and shall specify limitations on days, hours, routes, and pur-
25 poses of driving under the certificate. A copy of the certificate of
26 limited driving privileges shall be forwarded to the department imme-
27 diately.
28 * Sec. 7. AS 28.15.201 is amended by adding a new subsection to read:
29 (d) This section does not apply to cases in which the driver's

1 license or nonresident privilege to drive has been revoked or denial of
2 issuance of a driver's license has been ordered and a certificate of
3 limited driving privileges has been issued after revocation or denial
4 under AS 28.15.181.
5 * Sec. 8. AS 28.15.211 is repealed and reenacted to read:
6 Sec. 28.15.211. PERIODS OF SUSPENSION OR REVOCATION; OPPORTUNITY
7 FOR HEARING AND SURRENDER OF LICENSE. (a) Except for a point system
8 suspension or revocation under AS 28.15.221 - 28.15.261 and unless
9 provided otherwise by law, and unless the suspension or revocation was
10 for a cause which has been removed, a person whose driver's license or
11 privilege to drive a motor vehicle in this state has been suspended or
12 revoked may not apply for a new license nor may his driving privilege be
13 restored until the expiration of the period specified by the court or
14 the department in accordance with this title.
15 (b) A suspension or revocation of a driver's license imposed by a
16 court takes effect on the date of final judgment, except that if another
17 suspension or revocation of license is in effect on the date of final
18 judgment, the effective date of the last imposed suspension or revoca-
19 tion is at the end of the last day of the previous suspension or revoca-
20 tion.
21 (c) At the end of a period of suspension, the person whose license
22 has been suspended may apply to the department and, upon payment of the
23 proper fee, be issued a duplicate driver's license if he is otherwise
24 entitled to the license under this title.
25 (d) At the end of a period of revocation, a person whose driver's
26 license has been revoked may apply to the department for the issuance of
27 a new license, but shall submit to reexamination and pay all required
28 fees.
29 (e) At the end of a period of suspension or revocation under this

1 chapter, the department may not issue a driver's license or a duplicate
2 driver's license to the licensee until he has complied with AS 28.20
3 relating to proof of financial responsibility.
4 * Sec. 9. AS 28.35.030 is repealed and reenacted to read:
5 Sec. 28.35.030. DRIVING WHILE INTOXICATED. (a) A person commits
6 the crime of driving while intoxicated if he operates or drives a motor
7 vehicle
8 (1) while under the influence of intoxicating liquor,
9 depressant, hallucinogenic, stimulant, or narcotic drugs, as defined in
10 AS 17.10.230(13) and AS 17.12.150(3);
11 (2) when there is 0.10 percent or more by weight of alcohol
12 in his blood or 100 milligrams or more of alcohol per 100 milliliters of
13 his blood, or when there is 0.10 grams or more of alcohol per 210 liters
14 of his breath; or
15 (3) while he is under the combined influence of intoxicating
16 liquor and another substance.
17 (b) Driving while intoxicated is a class A misdemeanor, except
18 that the third or subsequent conviction under this section shall be a
19 class C felony and be punished according to (e) of this section.
20 (c) Upon the first conviction under this section, the court shall
21 impose a minimum sentence of imprisonment for not less than 120 consecu-
22 tive hours. Upon a subsequent offense within five years after a con-
23 viction under this section, except as provided in (d) and (e) of this
24 section, the court shall impose a minimum sentence of imprisonment of
25 not less than 20 consecutive days.
26 (d) Upon a subsequent offense within one year after a conviction
27 under this section, except as provided in (e) of this section, the court
28 shall impose a minimum sentence of imprisonment of not less than 60
29 consecutive days.

(e) Upon the third conviction under this section, regardless of the period between convictions, the person shall be guilty of a class C felony and the court shall impose a definite term of imprisonment of not less than 120 consecutive days.

(f) The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for not less than the minimum period provided in this section.

(g) A person convicted under this section shall have his operator's license or nonresident privilege to drive revoked or shall be denied issuance of a license, in accordance with AS 28.15.181. In addition, a person convicted under this section shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation which the court, after consideration of any information compiled under (j) of this section, finds appropriate.

(h) A court imposing a sentence of imprisonment under (c), (d), or (e) of this section shall consider a prior out-of-state conviction for operating or driving a motor vehicle while intoxicated if the prior offense upon which the conviction is based would have been a violation of this section if committed in this state.

(i) A person who is imprisoned for 120 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment within 120 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from an additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

1 (2) the additional period of confinement did not exceed 12
2 hours.
3 (j) Except as prohibited by federal law or regulation, every
4 provider of treatment programs to which persons are ordered under (g) of
5 this section shall supply the Alaska court system with the information
6 regarding the condition and treatment of those persons as the supreme
7 court may require by rule. Information compiled under this subsection
8 is confidential and may only be used by a court in sentencing a person
9 convicted under (g) of this section, or by an officer of the court in
10 preparing a presentence report for the use of the court in sentencing
11 a person convicted under (g) of this section.
12 * Sec. 10. AS 28.35.032(a) is amended to read:
13 (a) If a person under arrest refuses the request of a law enforce-
14 ment officer to submit to a chemical test of his breath as provided in
15 AS 28.35.031, after being advised by the officer that his refusal will
16 result in the [SUSPENSION,] denial or revocation of his license or his
17 nonresident privilege to drive, [AND] that the refusal may be used
18 against him in a civil or criminal action or proceeding arising out of
19 an act alleged to have been committed by him while operating or driving
20 a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING
21 LIQUOR], and that the refusal is a misdemeanor, a chemical test may
22 [SHALL NOT] be given in accordance with (i) of this section.
23 * Sec. 11. AS 28.35.032(b) is amended to read:
24 (b) Upon receipt of a sworn report of a law enforcement officer
25 that a person has refused to submit to a chemical breath test authorized
26 under AS 28.35.031, containing a statement of the circumstances sur-
27 rounding the arrest and the grounds upon which his belief was based that
28 the person was operating or driving a motor vehicle in violation of
29 AS 28.35.030, the Department of Public Safety, regardless of whether

a chemical test of blood has been subsequently administered to the person, shall notify the person that his license or nonresident privilege to drive or operate a motor vehicle in the state is revoked [OR SUSPENDED], or that no original license or permit will be issued for one year, except as provided in (d) of this section [THREE MONTHS]. In the same notice the department shall inform the person that he may initiate a proceeding in the district court to rescind the department's action. The court proceeding shall be without jury and shall be limited to the issues of whether

(1) the arresting officer had reasonable grounds to believe the arrested person had been operating or driving a motor vehicle in the state while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR];

(2) the arrested person refused to submit to the breath test upon request of the officer after being advised that his refusal would result in the [SUSPENSION,] revocation [,] or denial of his license or nonresident privilege to drive and that the refusal is a misdemeanor; and

(3) the accused defendant was informed fairly of the nature of the tests, the accuracy of the methods, machines, equipment involved, the expertise of the person administering the tests, or operator of the machines, and the accused given such other reasonable information as may be requested by him.

* Sec. 12. AS 28.35.032(d) is amended to read:

(d) If the person who refuses to submit to the chemical test of his breath authorized by AS 28.35.031, within two years previous to his arrest, has been convicted in this or any other state of operating or driving a motor vehicle while intoxicated, the period of revocation [SUSPENSION] for his license, nonresident privilege to drive, or denial of original license shall be two years [ONE YEAR].

* Sec. 13. AS 28.3[illegible](e) is amended to read:

(e) The refusal of a person to submit to a chemical test of his breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR].

* Sec. 14. AS 28.35.032 is amended by adding new subsections to read:

(f) Refusal to submit to a chemical test of breath under (a) of this section is a class B misdemeanor but it shall be a bar to prosecution for this offense if the person agrees and submits to a chemical test of blood.

(g) Upon conviction of a person under (f) of this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours. The sentence imposed by the court under this subsection shall run consecutive to any other sentence of imprisonment imposed on that person. The execution of sentence may not be suspended nor may probation be granted until the minimum imprisonment provided in this section has been served. Imposition of sentence may not be suspended, except upon the condition that the defendant be imprisoned for not less than the minimum period provided in this section.

(h) A person who is sentenced to imprisonment for 72 consecutive hours under (g) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12

hours.

(i) If a person is arrested for a crime alleged to have been committed by him while operating or driving a motor vehicle while intoxicated, a chemical test of his blood may be administered without his consent.

* Sec. 15. AS 28.35.033(a) is amended to read:

(a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle while intoxicated [UNDER THE INFLUENCE OF INTOXICATING LIQUOR], the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of his blood, or 0.05 grams or less of alcohol per 210 liters of his breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of his blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of his breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) (repealed)

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 mil-

1 liliters of his blood, or 0.10 grams or more of alcohol per 210 liters
2 of his breath it shall be presumed that the person was under the influ-
3 ence of intoxicating liquor.
4 * Sec. 16. AS 28.35.033(b) is amended to read:
5 (b) For purposes of this chapter [SECTION], percent by weight of
6 alcohol in the blood shall be based upon milligrams of alcohol per 100
7 cubic centimeters of blood.
8 * Sec. 17. AS 28.35.033 is amended by adding a new subsection to read:
9 (g) To be considered valid under the provisions of this section
10 the chemical analysis of the person's blood shall be performed according
11 to recognized medical practices, and if it is established at trial that
12 a chemical analysis of blood was performed according to such methods
13 there is a presumption that the test results are valid and further
14 foundation for introduction of the evidence is unnecessary.
15 * Sec. 18. AS 28.35.034 is amended to read:
16 Sec. 28.35.034. PERIOD OF REVOCATION. A person whose license or
17 permit to operate or drive a motor vehicle has been [SUSPENDED OR]
18 revoked under the provisions of AS 28.35.032 shall surrender his license
19 or permit to the department on receipt of notice of the revocation.
20 Such a person is ineligible for an operator's license or permit for
21 one year [THREE MONTHS] following the date on which the license or
22 permit was received by the department, except that if AS 28.35.032(d)
23 applies, the period of ineligibility is two years [, UNLESS THE DISTRICT
24 COURT FINDS THAT EXTENUATING CIRCUMSTANCES EXIST WHICH WOULD CAUSE
25 EXTREME HARDSHIP, IN WHICH CASE THE SUSPENSION OR REVOCATION MAY BE
26 MODIFIED OR NULLIFIED]. After the [THREE MONTHS'] period of ineligi-
27 bility has expired the person may make application for a new license as
28 provided by law. During the period of ineligibility no certificate of
29 limited driving privileges may be issued and no court may order a modi-

fication or nullification of the revocation.

* Sec. 19. AS 28.35 is amended by adding a new section to read:

Sec. 28.35.035. PERSONS INCAPABLE OF REFUSING OR TAKING TESTS. A person who is unconscious or otherwise in a condition rendering him incapable of refusing a chemical test of breath if arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while intoxicated, is nonetheless subject to a chemical test of his blood.

* Sec. 20. AS 28.35.260(a) is amended by adding a new paragraph to read:

(19) "chemical test" means a test administered to determine the amount of alcohol in a person's breath or blood.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

I. REQUEST
Bill/Resolution No. CSSSHB 438
Title
Requested by Health & Social Services Date: 3/4/82

II. FISCAL DETAIL
Agency Affected Health & Social Services
Program Category Affected Public Health
BRU, Program, Or Subprogram(s) Affected Laboratories
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | -0- | -0- | -0- | -0- | -0- | -0- |
| 200 TRAVEL | -0- | -0- | -0- | -0- | -0- | -0- |
| 300 CONTRACTUAL | -0- | -0- | -0- | -0- | -0- | -0- |
| 400 COMMODITIES | -0- | -0- | -0- | -0- | -0- | -0- |
| 500 EQUIPMENT | -0- | -0- | -0- | -0- | -0- | -0- |
| 600 LAND & STRUCTURES | -0- | -0- | -0- | -0- | -0- | -0- |
| 700 GRANTS, CLAIMS, ETC. | -0- | -0- | -0- | -0- | -0- | -0- |
| | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | -0- | -0- | -0- | -0- | -0- | -0- |
| OTHER (Specify Source) | -0- | -0- | -0- | -0- | -0- | -0- |
| | -0- | -0- | -0- | -0- | -0- | -0- |
| | -0- | [illegible] | -0- | -0- | -0- | -0- |

POSITIONS

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| FULL TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| TEMPORARY | -0- | -0- | -0- | -0- | -0- | -0- |
| | -0- | -0- | -0- | -0- | -0- | -0- |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

CSSSHB 438 implies no involvement by the Department of Health and Social Services in determining the methods of analysis for alcohol content in blood or the accuracy of the test results. Blood alcohol tests unless performed according to approved methods may not provide sufficient evidence for conviction.

Harry Colvin

IV. DATE March 4, 1982 PREPARED BY Harry J. Colvin, Ph.D
AGENCY Health & Social Services
Original: Legislative Finance PHONE 465-3077
cc: Budget and Management

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CSSSHB 438
Title An act related to driving offenses & related blood tests for intoxication
Requested by Health & Social Services Date 2/19/82

II. FISCAL DETAIL
Agency Affected Health & Social Services
Program Category Affected Public Health
BRU, Program, Or Subprogram(s) Affected Laboratories
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | -0- | 77.6 | 83.4 | 89.7 | 96.4 | 103.6 |
| 200 TRAVEL | -0- | 10.0 | 12.0 | 14.4 | 17.3 | 20.7 |
| 300 CONTRACTUAL | -0- | 30.0 | 107.4 | 110.0 | 113.0 | 115.0 |
| 400 COMMODITIES | -0- | 8.0 | 8.6 | 9.3 | 10.0 | 10.9 |
| 500 EQUIPMENT | -0- | 25.0 | 5.0 | 3.0 | 3.0 | 3.0 |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| TOTAL | -0- | 150.6 | 216.4 | 226.4 | 239.7 | 253.2 |

FUNDING (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | 150.6 | 216.4 | 226.4 | 239.7 | 253.2 |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |

POSITIONS

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| FULL TIME | 0 | 2 | 2 | 2 | 2 | 2 |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The Department of Health & Social Services believes that this bill requires the Department to certify laboratories and methods for drug and alcohol analysis, to ensure that laboratory data obtained from a person's blood is admissable as evidence in court. A program of laboratory certification, proficiency testing, and on-site inspection could be established that would ensure correct blood analysis and protect the public from those individuals that drive under the influence of drugs and/or alcohol. The small additional cost can be justified if only one death or serious injury is prevented from reoccuring by incarcerating offenders or directing them into treatment programs. The bill's language should be changed to reflect legislative intent and clearly indicate that drug and alcohol blood tests be carried out under the circumstances described in this bill.

Harry Colvin

IV. DATE February 19, 1982 PREPARED BY Harry J. Colvin, Ph.D.
AGENCY Health & Social Services
Original: Legislative Finance PHONE 465-3077
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

HB
445

(From NCSL Renewable Energy Development Report - 11/80)

With regard to agency cooperation, it was argued that the Cooperative Agreement between the Departments of Fish and Game, Environmental Conservation and Natural Resources was a better approach than the EPCA procedures.[14] Finally, while it was suggested that the designation of a lead agency could foster interagency cooperation,[15] there was agreement that a general master permit was not required. The current delays appear to be caused by review procedures within specific agencies rather than by the number of different permits required.

(B) Review Procedures.

1. Options:

- Amend the state Administrative Procedures Act to establish uniform and consistent notice and comment requirements.[16]

- Amend the state Administrative Procedures Act to require comments early enough in the comment period to allow a developer to amend a permit application prior to the time it has been considered by other state agencies.

- Establish classes of permits and mandatory review periods for each class.

- Establish a training program for technical staff charged with the responsibility for permit applications review.

• Authorize and appropriate funds for a study of the regulatory path which a SSH developer would be required to follow.

2. Discussion:

A number of people interviewed were of the opinion that redundant or inconsistent notice and comment requirements resulted in substantial delays in the permitting process.[17] Under existing procedures, a SSH developer is required to obtain a number of different permits. Each of these permits requires a notice and comment period. At present, these notice and comment periods are inconsistent or redundant. It was argued that the state should "conform the hoops to be jumped through."[18]

As was discussed in the previous section, the EPCA is not being utilized. One reason for this is the EPCA notice and comment procedures which appear to be overly burdensome on small projects,[19] including SSH development.

Legislation was introduced in 1979 which would have established classes of permits.[20] Mandatory review periods would have been established for agency consideration of permit applications falling within each class. This legislation was not passed.

The establishment of classes of permits and mandatory review periods might also be done administratively. Regulatory changes which would

achieve these results are currently being prepared and should be ready for public comment by late 1980.[21] These administrative revisions cannot, of course, be in conflict with statutory requirements.

With the exception of water use permit applications, there was general agreement that the number of permits required of a developer was not a factor delaying development. Mandatory review periods for different classes of permits would assist in eliminating agency delays. Any such revisions should include a detailed time frame which would accurately delineate when an agency action would be required. It was suggested that notices of agency actions be sent by registered mail so that the timing of the action could be established.[22]

Finally, with regard to mandatory review periods, there was disagreement as to whether an agency's failure to act within the prescribed period should constitute automatic approval. While such a result was generally favored, it was not necessarily seen as necessary to force agencies to respond to designated time limits.[23]

A requirement that comments and proposed stipulations be submitted early in the notice and comment period would reduce delays by allowing an application to be amended prior to final consideration by other state agencies. Allowing one agency to respond to the changes suggested or stipulations required by another agency could eliminate the need for a developer to make repeated appearances before the same agency.[24] At present, the Department of Fish and Game is hindering

the permitting process by making adverse comments so late in the comment period that the developer does not have time to properly respond.[25] As a result, the process may require reiteration and, obviously, further delay.

A number of individuals, both within agencies and those affected by agency actions, commented that the lack of trained personnel substantially delayed the permitting process.[26] Furthermore, this problem appear to make permit stipulations nearly impossible to enforce.[27]

It was suggested that the state train a number of permit application reviewers. These reviewers would be trained to know what information was required by a specific application and why it was required. Such reviewers would also be trained to understand the regional differences which exist in Alaska and how these differences affect operational requirements.[28] A core group of trained personnel could speed the permit process by reducing the length and improving the quality of agency review.

It was also suggested that a study which would document the "permit path" required for SSH development would be of great assistance both to the developer and to agency personnel.[29] It was suggested that, in many cases, neither the applicant nor the reviewer "knows what he's doing."[30] A specific statement of the permit path could be of great assistance in removing this uncertainty. (See Appendix 1.)

HB
468

1/28/81

PAPRY,

ENCLOSED IS THE LATEST LETTER FROM DEPT. OF REV. STATING REASON'S FOR DENIAL. I'VE OUTLINED PARAGRAPH THAT'S NEED'S CHANGING.

WE ARE IN DIRE NEED OF THIS PERMIT TO CONTINUE EXISTENCE OF THE CLUB. THANK YOU SO MUCH FOR HELPING.

COMMODORE

[illegible]

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF REVENUE

11th FLOOR
STATE OFFICE BUILDING
POUCH SA
JUNEAU, ALASKA 99811

December 31, 1980

A. J. Movius
Fairbanks Outboard Association
P.O. Box 685
Fairbanks, AK. 99701

TAX TYPE AND PERIOD: Games of Chance and Skill Permit - 1980

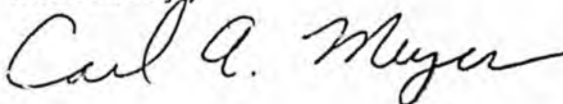
Gentlemen:

An Informal Conference decision had been reached with regard to the above referenced appeal. Your application for a permit has been denied. This decision is fully explained in the enclosed report.

If you are in disagreement with this action and wish to appeal our findings, please complete the enclosed Request for Appeal and return it with a copy of this letter within 30 days from the above date to:

Office of the Commissioner
Department of Revenue/Pouch SE
Juneau, AK 99811

Cordially,



Carl A. Meyer
Conference Officer
Audit Division
(907) 465-2344

Enclosure

04-04LH

DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
|---|---|
| Fairbanks Outboard Association | 1980 |

FACTS:

On August 22, 1979, following a review by the Department of Revenue of permittees authorized to conduct games of chance and skill, the Fairbanks Outboard Association (hereinafter Permittee) was notified by letter that it did not qualify for renewal of its permit. A second notification of the denial by the Department to renew the permit for 1980 was issued to Permittee on October 30, 1979. The permit renewal for 1980 was denied based on the Permittee not constituting a qualified organization under ALASKA STAT. § 05.15.100.

The Permittee, following a telephone inquiry with the Department in late August of 1979, formally protested on November 27, 1979 the action of the Department in the denial of the permit.

After numerous contacts with the Permittee, and conferences held in Juneau and Fairbanks, the following informal conference decision is rendered.

The Permittee was organized in 1957 for the purpose of promoting racing and use of power boats and the improvement of their design and construction, to formulate rules to govern trials of speed, endurance

FORM 04-768 (11/78)

DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
| --- | --- | --- |
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
| --- | --- |
| Fairbanks Outboard Association | 1980 |

and competition between boats, and, among other things to further interest in boating generally. Membership in the Permittee is open to those individuals with an interest in its boating activities.

Over the years since its inception, the Permittee has conducted raffles and lotteries to raise money for prizes and trophies awarded to winners in boat races sponsored by the Permittee. In addition, occasionally a small amount of money has been dispersed to other organizations.

Boat races, such as the Yukon 800 Marathon race, are the major activities of the Permittee and the vast majority of all funds raised are expended in connection with these races. Only the members of the Permittee's Associaton are eligible to participate in these boat races. However, the Permittee on occasion has also presented boating safety programs to civic groups conducted a boat building class at a local community college and provided instruction on basics of safe boat handling to beginning level boaters.

ISSUE:

Is the Permittee a qualified organization under ALASKA STAT. § 05.15.210?

FORM 04-768 (11/78)

DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
|---|---|
| Fairbanks Outboard Association | 1980 |

PERMITTEE'S POSITION:

The activities engaged in fall within the scope of an educational organization.

LAW & CONFEREE'S DECISION

ALASKA STAT. § 05.15.100 provides in part that the Commissioner of Revenue may issue a permit to a qualified organization conferring the privilege of conducting raffles and contests of skill.

ALASKA STAT. § 05.15.210(15) provides that a qualified organization means "a bona fide civic or service organization or a bona fide religious, charitable, fraternal, labor, political or educational organization, police or fire department company, dog mushers association, or fishing derby association in the state, which operates without profits to its members and which has been in existence continually for a period of five years immediately before applying for a license, and the organization may be a firm, corporation, company, association or partnership".

Alaska Reg. § 15 AAC 05.300 provides that operating without profit to its members means that no part of the net earnings of the organization shall inure to the benefit of any private shareholder or individual.

FORM 04-768 (11/78)

STATE OF ALASKA
DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
|---|---|
| Fairbanks Outboard Association | 1980 |

ALASKA STAT. § 05.15.210(4) provides that a contest of skill means a contest or game in which prizes are awarded for the demonstration of human skills in races and ALASKA STAT. § 05.15.210(16) provides that a raffle means the selling of rights to participate, and the awarding of prizes, in the specified kind of game of chance conducted by the drawing for prizes by chance.

ALASKA STAT. § 05.15.020 provides that no raffle or contest of skill may be conducted without a permit.

ALASKA STAT. § 05.15.210(7) provides that an educational organization means a:

> "civic, service or charitable organization in the state, not for pecuniary profit, whose primary purpose is educational in nature and designed to develop the capabilities of individuals by instruction and which has been in existence for five years before applying for a license" (emphasis added).

ALASKA STAT. § 05.15.210(3) provides that a civic or service organization means any branch or lodge or chapter of a national or state organization which is a

FORM 04-768 (11/78)

STATE OF ALASKA
DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
|---|---|
| Fairbanks Outboard Association | 1980 |

civic or service organization, not for pecuniary profit, and authorized by its written constitution, charter or articles of incorporation or bylaws to engage in a fraternal, civic or service purpose in the state.

ALASKA STAT. § 05.15.210(2) defines a charitable organization as an organization which is operated for the relief of poverty, distress, or other condition of public concern in the state.

ALASKA STAT. § 05.15.150(a) provides that the authority to conduct the activity authorized by this chapter is contingent upon the dedication of the net proceeds of the raffles or contests to the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses in the state.

ALASKA STAT. § 05.15.210(13) defines net proceeds as gross receipts less expenses, prizes, duties, or charges, fees, and deductions which are specifically authorized under this chapter.

A reading of the above statutes reflects the fact that permits may only be issued to organizations falling

FORM 04-768 (11/78)

DEPARTMENT OF REVENUE

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
| --- | --- | --- |
| CH & SK Permit | | |
| NAME OF TAXPAYER | | YEAR/PERIOD ENDED |
| Fairbanks Outboard Association | | 1980 |

within certain classifications. One of the permitted classifications is an educational organization. For the Permittee here to fall within the terms of the statute, he must fit within the educational organization classification.

For an organization to fall within the educational organization classification, such organization must have as its primary purpose the development, through education, of the capabilities through instruction of individuals. This contemplates an ongoing teaching process through which individuals gain knowledge in the area of instruction. In the instant case, the primary purpose of the Permittee is to promote boat racing, as evidenced by its activities. Thus, the Permittee is unable to satisfy the primary purpose test. Permittee thus cannot constitute a qualified organization.

However, apart from the primary purpose test, before an organization can qualify as an educational organization it must first be either a civic, service or charitable organizaiton. The Permittee here cannot qualify as a civic or service organization as it is not a branch or lodge or chapter of a national or state civic or service organization. It also cannot

FORM 04-768 (11/78)

STATE OF ALASKA
DEPARTMENT OF REVENUE

SCHEDULE ______

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |

| NAME OF TAXPAYER | YEAR/PERIOD ENDED |
|---|---|
| Fairbanks Outboard Association | 1980 |

qualify as a charitable organization as it is not operated for the relief of poverty, distress, or any other area of public concern. Thus, as the Permittee is not a civic, service or charitable organization, it does not come within the scope of the educational organization criteria.

In addition to Permittee's failure to qualify as a qualified organization, it also is not eligible for a permit due to the manner in which the net proceeds from its raffles are utilized. ALASKA STAT. § 05.15.150 expressly conditions the granting of a permit to those situations where the net proceeds of the raffles or contests are dedicated to the awarding of prizes to contestants or participants and to political, educational, civic, public, charitable, patriotic, or religious uses in the state. It is the utilization of the net proceeds from each separate activity that must be examined. In other words, where both a raffle and a contest of skill are conducted, the net proceeds from the raffle must be determined independently from the net proceeds from the contest of skill. The net proceeds from each of these activities must then be dedicated to a proper purpose.

In the instant case, the Permittee has consistently

FORM 04-768 (11/78)

STATE OF ALASKA
DEPARTMENT OF REVENUE

SCHEDULE ______

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
|---|---|---|
| CH & SK Permit | | |
| NAME OF TAXPAYER | | YEAR/PERIOD ENDED |
| Fairbanks Outboard Association | | 1980 |

used the net proceeds from the raffles to fund cash prizes in its contests of skill. For instance, in 1979 the Permittee had gross receipts of $16,304.50 from raffles and lotteries and $770 from contests of skill. The net proceeds of the raffles were then utilized to pay cash prizes to contestants in the contests of skill. As the proceeds from the raffles may only be used to provide raffle-related prizes or for contributions to political, educational, civic, public, charitable, patriotic or religious uses, the utilization of such proceeds to provide prizes in the contests of skill is not authorized by the statute and thus operates to revoke the privilege of conducting these types of activities.

The operational result of the Permittee's activities serves to illustrate the reason why the net proceeds from each activity must be separately utilized in the appropriate manner. The Permittee conducts raffles to raise money. This money is then awarded as prizes in its contests of skill. Only members of the Permittee can participate in the contests of skill. Thus, for all practical purposes the money raised in the raffles is expended to members of the Permittee. Essentially, the profits of the organization are being applied to the "profit of the members" in an indirect manner.

FORM 04-768 (11/78)

SCHEDULE

| TAX TYPE | EXPLANATION OF ITEMS | S.S.N./EIN |
| --- | --- | --- |
| CH & SK Permit | | |
| NAME OF TAXPAYER | | YEAR/PERIOD ENDED |
| Fairbanks Outboard Association | | 1980 |

This result has never been condoned by the statute; indeed, it has specifically been prohibited.

Accordingly, it is the decision of the Conferee that the Permittee is not a qualified organization. It is further the decision of the Conferee that the net proceeds from the Permittee's activities have been utilized in past years in a prohibited manner. Accordingly, Permittee is not entitled to a permit in 1980 and the protest is therefore denied.

pay the additional tax within 20 days after service of the notice he forfeits his license and is permanently disqualified from receiving a new license. In addition the licensee and the members thereof are jointly and severally liable to the state in the penal sum of $1,000. (§ 11 ch 157 SLA 1960)

**Sec. 05.10.160. Penalty for conducting contests without license.** A person, club, corporation, organization, association or fraternal society conducting boxing, sparring or wrestling contests or exhibitions without a license is guilty of a misdemeanor. (§ 12 ch 157 SLA 1960)

**Sec. 05.10.170. General penalty.** A person violating a provision of this chapter for which no penalty is provided in this chapter is guilty of a misdemeanor. (§ 13 ch 157 SLA 1960)

## Chapter 15. Bingo, Raffles and Ice Pools.

Article
1. Administration (§§ 05.15.010—05.15.090)
2. Licenses and Permits (§§ 05.15.100—05.15.180)
3. General Provisions (§§ 05.15.190—05.15.210)

### Article 1. Administration.

Section
10. Department of Revenue to administer chapter
20. Annual permit and fee
30. Notification of local governments and protests
40. Issuance and effect and term of permit
50. Surrender of permit upon suspension or revocation
60. Rules and regulations
70. Commissioner of revenue may examine permittees
80. Reports by permittees
90. Reports to the legislature by commissioner of revenue, attorney general and commissioner of public safety

**Sec. 05.15.010. Department of Revenue to administer chapter.** The Department of Revenue shall administer this chapter. (§ 3 ch 27 SLA 1960)

Legislative committee reports.—For legislative committee reports on original bill, see House Journal (1960), pages 276, 412; House Journal (1961), pages 57, 58, 65, 325, 326.

Am. Jur., ALR and C.J.S. references.—24 Am. Jur., Gaming and Prize Contests, §§ 12 to 30; 34 Am. Jur., Lotteries, §§ 22 to 32.

What transactions are within the purview of statutes or ordinances in relation to gifts or prizes or gift enterprises, 30 ALR 1036.

Statute exempting schemes for benefit of public, religious or charitable purposes, from statute against lotteries, 103 ALR 875.

Lottery as game of chance, 135 ALR 168.

What are games of chance, games of skill, and mixed games of chance or skill, 135 ALR 104.

38 C.J.S. Gaming §§ 80 to 132; 54 C.J.S. Lotteries § 1 et seq.



to the department. No activity is permitted for a period of 15 days after application. (§ 3 ch 27 SLA 1960)

**Sec. 05.15.030. Notification of local governments and protests.** (a) At the time of filing application the applicant shall notify the city or borough nearest to the location of the proposed activity of the application. During the 15-day period a local government unit may protest the conduct of the activity in its jurisdiction by resolution stating the reasons for the protest filed with the department. Protests are limited to the lack of qualifications prescribed by this chapter.

(b) This resolution is only a recommendation by the city which may be considered by the commissioner in his determination to issue or refuse to issue a permit. (§ 3 ch 27 SLA 1960)

**Sec. 05.15.040. Issuance and effect and term of permit.** After the fee is paid, a permit issued, and during the effective period of the permit, the organization may conduct the activity specified in the permit. If a permit is revoked, the permittee is not eligible for another permit until the expiration of one year from the date of revocation. A permit expires at the end of the period for which it is issued. A permit is not transferable. (§ 3 ch 27 SLA 1960)

Permit for more than one activity.—Under AS 05.15.210 a permit may be issued which gives a qualified organization the privilege of conducting any of the designated activities. AS 05.15.040 limits the activities that may be conducted to those activities specified in the permit. Under AS 05.15.060 the commissioner has authority to further limit the number of activities which may be conducted pursuant to any permit. Therefore, absent any regulation to the contrary, a permit could be issued for more than one activity to a qualified organization. 1960 Op. Atty. Gen., No. 8.

**Sec. 05.15.050. Surrender of permit upon suspension or revocation.** When a permit is suspended or revoked, the permittee shall surrender the permit to the department on or before the effective date of the suspension or revocation. A permit is not valid beyond the effective date of the suspension or revocation, whether surrendered or not. (§ 3 ch 27 SLA 1960)

**Sec. 05.15.060. Rules and regulations.** In accordance with the Administrative Procedure Act (AS 44.62), the commissioner of revenue shall adopt, no later than September 7, 1960, rules and regulations necessary to carry out this chapter covering, but not limited to

(1) the issuance, renewal, and revocation of permits;

(2) a method of ascertaining net proceeds, the determination of items of expense which may be incurred or paid and the limitation of the amount of the items of expense to prevent the proceeds from the activity permitted from being diverted to noncharitable non-

(3) the immediate revocation of permits if this chapter or regulations issued under it are violated;

(4) the requiring of detailed, sworn, financial reports of operations from permittees including detailed statements of receipts and payments;

(5) the investigation of permittees and their employees, including the fingerprinting of those permittees and employees whom he considers it advisable to fingerprint;

(6) exclusion from participation as a permittee or employee of a permittee of any person convicted of a felony, a crime involving moral turpitude, or violation of a municipal, state, or federal gambling law;

(7) the method and manner of conducting activity and awarding of prizes or awards, and the equipment which may be used;

(8) the number of activities which may be held, operated, or conducted under a permit during a specified period;

(9) a method of accounting for receipts and disbursements including the keeping of records and requirements for the separate banking of all receipts, and payments by check only;

(10) the disposition of funds in possession of a permittee at the time a permit is surrendered, revoked or invalidated;

(11) other matters which the commissioner considers necessary to carry out this chapter or protect the best interest of the public. (§ 4 ch 27 SLA 1960)

**Permit for more than one activity.** —See same catchline in note to AS 05.15.040.

**Sec. 05.15.070. Commissioner of revenue may examine permittees.** The commissioner may examine or have examined the books and records of a permittee. The commissioner may require the permittee to pay the reasonable cost of the examination. The commissioner may issue subpoenas for the attendance of witnesses and the production of books, records, and other documents. (§ 6 ch 27 SLA 1960)

**Sec. 05.15.080. Reports by permittees.** If the licensed activity grosses over $500, the permittee shall, within 15 days after the holding of the specific activity, file for public inspection with the city or borough clerk nearest to the location of the activity licensed and with the commissioner of revenue, an itemized statement showing all income and expense in connection with the activity. If the activity grosses over $20,000, the commissioner may extend the time for filing the report for a period not exceeding 60 days. (§ 6 ch 27 SLA 1960)

**Sec. 05.15.090. Reports to the legislature by commissioner of**



commissioner of revenue shall submit a detailed report containing a summary of all reports required of permittees and recommending a permit fee scale that will cover costs of administration and enforcement. The attorney general and the commissioner of public safety shall, within 10 days after the convening of the legislature each year, submit a jointly prepared, detailed report outlining the effect, if any, of the operation of this chapter on the legal and law enforcement activities of the state. (§ 9 ch 27 SLA 1960)

### Article 2. Licenses and Permits.

Section
100. Commissioner of revenue may issue permits
110. Authorized activities a privilege
120. Eligibility for permit
130. Commissioner may impose additional requirements for eligibility
140. Proof necessary to qualify for permit
150. Limitation on use of proceeds
160. Authorized expenses
170. Suspension of permit
180. Limitations on authorized activity

**Sec. 05.15.100. Commissioner of revenue may issue permits.** The commissioner of revenue may issue a permit to a qualified organization. The permit gives the organization the privilege of conducting bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill. (§ 1 a ch 27 SLA 1960)

**Sec. 05.15.110. Authorized activities a privilege.** The activities specified in § 100 of this chapter may be permitted as a privilege and do not confer a right upon any person to conduct the activities. (§ 1 b ch 27 SLA 1960)

**Sec. 05.15.120. Eligibility for permit.** An applicant shall be a qualified organization to be eligible for a permit. (§ 1 c ch 27 SLA 1960)

**Sec. 05.15.130. Commissioner may impose additional requirements for eligibility.** The commissioner of revenue may supplement the definitions of qualified organizations and activities by rules and regulations adopted under this chapter adding to the definitions additional requirements which the commissioner considers necessary for the best interests of the public or for the proper administration of this chapter. (§ 1 d ch 27 SLA 1960)

**Sec. 05.15.140. Proof necessary to qualify for permit.** The commissioner of revenue may not issue or renew a permit except upon proof, satisfactory to him, that the applicant is a qualified organization, the activity may be permitted under this chapter, and the issuance of a permit is not detrimental to the best interests of the public. Upon request of the commissioner of revenue, the applicant

**Sec. 05.15.150. Limitation on use of proceeds.** (a) The authority to conduct the activity authorized by this chapter is contingent upon the dedication of the net proceeds of the raffles or contests to the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses in the state. "Educational, civic, public, charitable, patriotic, or religious uses" mean uses benefiting an indefinite number of persons either by bringing them under the influence of education or religion or relieving them from disease, suffering, or constraint, or by assisting them in establishing themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government but do not include the erection, acquisition, improvement, maintenance, or repair of real, personal or mixed property unless it is used exclusively for one or more of the uses stated.

(b) The net proceeds derived from the activity must be devoted within one year to one or more of the uses stated. An organization desiring to hold the net proceeds for a period longer than one year must apply to the commissioner of revenue for special permission and upon good cause shown the commissioner may grant the request. (§ 1 c ch 27 SLA 1960)

**Sec. 05.15.160. Authorized expenses.** No item of expense may be incurred or paid in connection with the holding, operating or conducting of an activity, held, operated or conducted under a license issued under this chapter, except bona fide expenses in reasonable amount for goods, wares, and merchandise furnished or services rendered, reasonably necessary for the holding, operating or conducting of the activity. (§ 1 c ch 27 SLA 1960)

**Sec. 05.15.170. Suspension of permit.** The commissioner of revenue may suspend a permit pending investigation or hearing. The suspension is effective upon the giving of notice to the permittee. The notice may be given by the delivery or handling of written notice to the permittee or a person conducting an activity under the permittee's permit or the mailing of notice to the permittee at the address shown on the permit. A permit may be suspended under this section for a period of 90 days or until the end of a hearing or other proceeding begun during suspension. The authority of the commissioner to suspend a permit is not subject to the Administrative Procedure Act (AS 44.62). (§ 5 ch 27 SLA 1960)

**Sec. 05.15.180. Limitations on authorized activity.** (a) This chapter does not authorize the use of playing cards, dice, roulette wheels, coin-operated instruments or machines, or other objects or instruments used, designed, or intended primarily for gaming or gambling or any other method or implement not expressly au-



existed in the state in substantially the same form and was conducted in substantially the same manner before January 1, 1959. (§ 2 ch 27 SLA 1960)

Quoted in Pin-Ball Machine, Serial No. 2334 v. State, Sup. Ct. Op. No. 86 (File No. 162), 371 P. (2d) 305.

### Article 3. General Provisions.

Section
190. Interpretation and construction
200. Penalty

Section
210. Definitions

**Sec. 05.15.190. Interpretation and construction.** If any provision of this chapter, or regulation made under this chapter, is determined to be unlawful, then all permits issued in connection with the licensed activity to which the unlawful provision or regulation related shall be cancelled. (§ 8 ch 27 SLA 1960)

**Sec. 05.15.200. Penalty.** Every permittee and every officer, agent, or employee of the permittee and every other person or corporation who wilfully violates or who procures, aids, or abets in the wilful violation of this chapter is guilty of a misdemeanor. (§ 7 ch 27 SLA 1960)

**Sec. 05.15.210. Definitions.** In this chapter

(1) "bingo" means a game of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers when objects similarly numbered are drawn from a receptacle, and the game being won by the person who first covers a previously designated arrangement of numbers on the card;

(2) "charitable organization" means an organization, not for pecuniary profit, which is operated for the relief of poverty, distress, or other condition of public concern in the state, and which has been so engaged for five years before applying for a permit under this chapter;

(3) "civic or service organization" means any branch or lodge or chapter of a national or state organization which is a civic or service organization, not for pecuniary profit, and authorized by its written constitution, charter, or articles of incorporation, or bylaws to engage in a fraternal, civic or service purpose in the state and which has been so engaged for five years before applying for a license under this chapter;

(4) "contest of skill" means a contest or game in which prizes are awarded for the demonstration of human skills in marksman-

# MEMORANDUM State of Alaska

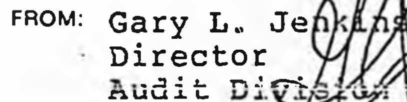
TO: R. D. Stevenson
Legislative Assistant

DATE: April 14, 1981

FILE NO:

TELEPHONE NO:

FROM: Gary L. Jenkins
Director
Audit Division



SUBJECT: HB 468

This bill would make an amendment to the Games of Chance and Skill law by providing for a boating association to become a qualified organization for purposes of obtaining a permit. However, there is a serious question whether the organization for which this amendment is proposed will qualify even if this change is made in the law. The proposed definition of a boating organization requires that the organization be a civic, service, or charitable organization in the state. The organization in question is organized to conduct a boat race on the Chena River. They want a Games of Chance and Skill permit to raise money to give away as prizes in their race. If the organization could have met the requirement of being a civic, service or charitable organization, they would be eligible to obtain a permit under the current law. It does not appear possible to change the law to enable the organization in question to obtain a permit without completely departing from the original intent of the law of limiting permits to civic, service and charitable organizations.

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

## FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 468
Title An Act relating to Games of Chance and Skill
Requested by House Judiciary Committee Date April 4, 1981

II. FISCAL DETAIL
Agency Affected Department of Revenue
Program Category Affected Revenue Collection and Management
BRU, Program, or Subprogram(s) Affected Audit Division
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars) NONE

| | FY 80 | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| | | | | | | |
| TOTAL | | | | | | |

FUNDING (Thousands of Dollars) NONE

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |
| | | | | | | |
| | | | | | | |

POSITIONS NONE

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

See the memorandum to R. D. Stevenson dated April 14, 1981 which is attached.

IV. DATE April 14, 1981 PREPARED BY Gary L. Jenkins
AGENCY Audit Division
PHONE 465-2320

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/79)

HB
473

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM March 24, 1981

SUBJECT: Section-by-section analysis of Work Order Number 12-1161

TO: Representative Ramona L. Barnes

FROM: Tamara Brandt Cook
Legislative Counsel TBC

This draft makes no changes to existing laws relating to lesser sexual offenses or lesser degrees of assault, but instead deals with the crime of sexual assault in the first degree and assault in the first degree:

"Sec. 11.41.410. SEXUAL ASSAULT IN THE FIRST DEGREE. (a) A person commits the crime of sexual assault in the first degree if,

"(1) being any age, he engages in sexual penetration with another person without consent of that person;

"(2) being any age, he attempts to engage in sexual penetration with another person without the consent of that person and causes serious physical injury to that person;

"(3) being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person; or

"(4) being 18 years of age or older, he engages in sexual penetration with another person who is under 18 years of age and who

(A) is entrusted to his care by authority of law; or

(B) is his son or daughter, whether adopted, illegitimate, or stepchild.

"(b) Sexual assault in the first degree is a class A felony.

"Sec. 11.41.200. ASSAULT IN THE FIRST DEGREE. (a) A person commits the crime of assault in the first degree if

"(1) with intent to cause serious physical injury to another person, he causes physical injury to any person by means of a dangerous instrument;

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

"(3) he intentionally performs an act that results in serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life.

"(b) Assault in the first degree is a class A felony."

Sec. 1. The classification of assault in the first degree is changed from a class A felony, with a maximum term of imprisonment of not more than 20 years, to an unclassified felony.

Sec. 2. The classification of sexual assualt in the first degree is changed from a class A felony, with a maximum term of imprisonment of not more than 20 years, to an unclassified felony.

Sec. 3. Sexual assault in the first degree and assault in the first degree are added to the list of unclassified felonies, the most serious crimes in the state.

Sec. 4. Sexual assault in the first degree and assault in the first degree are added to the list of unclassified felonies.

Sec. 5. Sexual assault in the first degree and assault in the first degree are included as an unclassified felony for

which a fine of up to $75,000 may be imposed. Under existing law, a fine of $50,000 may be imposed upon conviction of either crime.

Sec. 6. A minimum sentence of 25 years shall be imposed upon conviction of sexual assault in the first degree or murder in the first degree. Under existing law, the maximum sentence which may be imposed for sexual assault in the first degree is 20 years and the minimum sentence which may be imposed for murder in the first degree is 20 years. This section increases the sentences imposed for sexual assault in the first degree and murder in the first degree, making these crimes the most serious in the state.

Sec. 7. A minimum sentence of 5 years and not more than 99 years shall be imposed upon conviction of assualt in the first degree.

Sec. 8. A person sentenced AS 12.55.125(i), added by this draft, may not have his term suspended or otherwise reduced.

Sec. 9. New minimum sentences are imposed when a defendant is convicted of several crimes committed in the course of a single criminal incident:

(1) Murder in the first degree, kidnapping, and sexual assault in the first degree or assault in the first degree -- 99 years;

(2) Murder in the second degree, kidnapping, and sexual assault in the first degree or assault in the first degree -- 75 years;

(3) Murder in the first degree, and sexual assault in the first degree or assault in the first degree -- 60 years;

(4) Sexual assault in the first degree or assault in the first degree, and murder in the second degree -- 50 years; and

(5) Sexual assault in the first degree or assault in the first degree, and kidnapping -- 40 years.

Sec. 10. No person serving a sentence under AS 12.55.125(i), added by this bill, may be released on parole until he has served the minimum term of imprisonment.

TBC:ljb

2/23/82

# SECTIONAL ANALYSIS OF CSHB473

Sec. 1 Changes the name of Second Degree Sexual Assault to Third Degree Assault in the felony murder statute, AS 11.41.110(a)(3). The actual crime is the same and the classification is the same, B felony, but this change is needed because a part of present First Degree Sexual Assault is renamed Second Degree Sexual Assault. See Section 3.

Sec. 2 Changes Sexual Assault in the First Degree - nonconsensual penetration and attempted nonconsensual penetration with serious physical injury - from A felony, 0-20 years, to Unclassified Felony, 5-99 years.

Sec. 3 Takes two other forms of present Sexual Assault First Degree and changes to Sexual Assault Second Degree. The A felony, 0-20 years, does not change, only the name. These are basically statutory rape of a youth 12 years old or younger, and incest by parents. In 1980 Code.

Sec 4 Renames present Second Degree Sexual Assault to Third Degree Sexual Assault. Penalty of B felony, 0-10 years does not change. This crime, in 1980 code, basically covers sexual contact, not penetration, by coercion. Housekeeping change, in line with Sec. 3.

Sec. 5 Renames present Third Degree Sexual Assault to Fourth Degree Sexual Assault. Penalty of C felony, 0-5 years does not change. This crime, in 1980 Code, is basically penetration with a mentally incompetent or drunk person. Housekeeping change, in line with Sec. 4.

Sec. 6 Adds Sexual Assault First Degree (per Sec. 2 above) to list of other Unclassified Felonies in classification section. Housekeeping.

Sec. 7 Adds Sexual Assault First Degree (per Sec. 2, above) to a list of Unclassified Felonies in another classification section. Housekeeping.

Sec. 8 Changes name of Second Degree Sexual Assault to Third Degree Sexual Assault (per Sec. 4, above) in list of crimes for which a person can use deadly force to defend herself. Does same for penetration and penetration with serious injury - the only First Degree Sexual Assault crimes under this bill. Housekeeping, no substantive changes.

Sec. 9 Adds Sexual Assault First Degree to $75,000 maximum fine list of other Unclassified Felonies.

Sec. 10. Housekeeping - adds (i) as an exception for 20 year minimum or <u>First Degree Murder</u>.

Sec. 11 Housekeeping - adds (i) as an exception to 5 year minimum for <u>Second Degree Murder</u>, <u>Kidnapping</u>, and <u>First Degree Sexual Assault</u>.

Sec. 12 Housekeeping - adds (i) to prohibition of Suspended Sentence, Suspended Imposition of Sentence and other Reduction.

Sec. 13 This is (i)! Establishes these Minimum Mandatory Sentences for combinations of the most violent crimes:

(1) 99 years - <u>First Degree Murder</u> plus <u>two other</u> Unclassified crimes. This could be:

Three 1st° murders
One 1st° + two 2nd°'s
One 1st° + one 2nd° + one rape
One 1st° + two rapes
One 1st° + two kidnappings
One 1st° + one kidnap + one rape

(2) 75 years - <u>First Degree Murder</u> plus <u>one</u> other Unclassified Crime. This could be:

1st° + rape
1st° + 2nd°
1st° + kidnapping
Two 1st°'s

(3) 60 years - Three Violent Crimes, <u>not</u> including 1st°. This could be:

Three rapes
Three kidnappings
Three 2nd°'s
2nd° + kidnap + rape
Two 2nd° + one rape

(4) 50 years - Two Violent Crimes, <u>not</u> including 1st°. This could be:

Two 2nd°'s
Two rapes
Two kidnappings
One 2nd° + rape
One 2nd° + kidnap
One kidnap + one rape

All of the above <u>must have been</u> inflicted upon the victim or victims IN THE COURSE OF A SINGLE CRIMINAL INCIDENT.

(5). First Degree Sexual Assault with a prior conviction for First Degree Sexual Assault or a crime which would be a First Degree Sexual Assault in Alaska now. - results in a minimum of 20 years.

Sec. 14 Housekeeping - adds (i) above to minimum period prior to parole.

Sec. 15 Housekeeping - removes the "statutory rape" and "incest" from new First Degree Sexual Assault, as these are now called Second Degree Sexual Assault. No change in classification or penalty. See Sec. 3, supra.

HOUSE JUDICIARY COMMITTEE 3/4/82
ANALYSIS OF "POSITION PAPER: HB473"

of the

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

I.

The position paper, undated and unsigned, states in paragraph 4 that the "Network" supports Sections 1-5 of HB473. The Network agrees that (1) forcible penetration and, (2) attempted forcible penetration would result in serious physical injury should be an unclassified felony, equivalent to kidnapping and second degree murder. This results in a minimum of a five-year term.

II.

The position paper does not comment on bill sections 6-12. These are mostly housekeeping sections (see sectional analysis attached), but bill sections 10, 11, and 12 are essential to the implementation of Section 13, which is opposed by the Network in the last paragraph. As an example, Section 12 is absolutely necessary to:

negate the possibility of Suspended Sentence, Suspended Imposition of Sentence, and other reduction of the 99, 75, 60, 50 and 20 year terms set in Section 13.

III.

The last paragraph of the Position Paper deliniates the Networks opposition to the Bill. Upon careful examination of this paragraph, several questions arise as to how the Network arrived at their asessment of Section 13 - the section on minimum mandatory sentences which the Network opposes. The following are "excerpts" from the Position Paper with a brief explanation clarifying how HB473 addresses the Network's opposition to the Bill.

1. "...(Section 13) which creates mandatory sentences for the individual convicted of multiple crimes" implies that Bill Section 13 applies to all crimes, when in fact it applies only to the most serious ones recognized by our Criminal Code and probably the most universally condemned crimes in our society, (with the possible exception of treason in wartime).

- First Degree Murder
- Second Degree Murder
- Kidnapping
- Rape

An individual unacquainted with the realities of HB473 but having read this "Position Paper" would have no knowledge of which crimes were covered in Bill Section 13. Possibly the bill itself was attached to the Position Paper in each and every instance where the person received a copy. Nonetheless, the sentence itself seems to be a clear misinterpretation of Bill Section 13, regardless of the cause of the misconstruction.

2. The sentence "Simply in terms of blame worthiness, criminal cases are different from each other in ways that cannot be anticipated." [emphasis added] is equally surprising. Perhaps "blame worthiness" covers a wide spectrum of ideas, including the presence and type of *mens rea* of the crime ("intentionally, with knowledge, recklessly, with criminal negligence") and the question of whether the crime is a "strict liability" one, (D.W.I., commercial fishing, etc.) or degree of injury to a human being or property. In any event, most people would agree that crimes do differ, always have, and always will. However, the proposition that the people through its legislature cannot "anticipate" the "blame worthiness" differential between certain crimes, the specific ways that they are carried out, and their combinations with other crimes, is an unsupported, unqualified, and unjustified assumption, apparently one to be swallowed by the reader of the Position Paper along with the other assumptions therein. For example:

Could ordinary but reasonable people distinguish between and anticipate differences between "simple" kidnapping cases without injury - minimum mandatory term of five years under both present law and HB473 - and First Degree Murder after the kidnapping - minimum mandatory term of 75 years? The position paper assumes that these people could not so distinguish, and the legislature should not attempt to do so.

Could ordinary and reasonable people distinguish between a forcible rape of a 12 year old girl by a 40 year old man near a bike path (no kidnapping), and a similar instance where the rapist increased his possible minimum mandatory term from five years to 75 years by committing First Degree Murder after the rape? Could and should these people (and the Legislature which represents them) consider the differences in these crimes including all factors guiding laws of criminal punishment, not just deterrence. Should they consider the fact that the rapist coldly calculated his chances of apprehension and decided to eliminate the evidence by murdering the child. Could they consider that obviously the rapist had no remorse at all for the life that he had despoiled by the rape and already possibly pschologically destroyed, but took the ultimate step, murder of the child.

Is it really not possible to anticipate the "blame worthiness" differentials in these acts and similar ones?

Every legislature considers "blame worthiness" differentials whenever criminal statutes are enacted; else how would it be able to specify any penalty, regardless of minimum, maximum, presumptive or mandatory. To take the "no anticipation of blame worthiness" assumption to its logical extension, every crime would be of equal degree and would suffer equal punishment, all the way from littering to torture murder. Certainly there would be no need for Unclassified, A, B, C felonies, A, B, misdemeanors and violations in our Alaska Criminal Code. Penal laws, whether set by legislative bodies, monarchs, or any other form of human government, have always operated on the theory that ordinary and reasonable human beings were able to detect "blame worthiness" differentials between crimes.

Granted that there certainly are differentials in "blame worthiness", the Position Paper erroneously concludes that Bill Section 13 precludes the consideration of these differentials. Of course the people through legislative enactment of HB473 in its present form would in fact have considered these differentials. Obviously, as in any other enactments specifying terms of imprisonment, there are limitations on the discretion of prosecutors, courts, and parole boards. However, the prosecutors would continue to have discretion over which counts would be indicted and tried, (hopefully limiting that discretion to the question of the existence of sufficient evidence under the Department of Law's "no plea bargaining" rule). Likewise, the courts and parole boards would still retain discretion.

IV.

The last paragraph concludes "The Network prefers the current statutory scheme of presumptive sentencing, which specifies a "normal" sentence for each offense, but permits limited departures from the norm in atypical cases." [no emphasis added] This is a unusual statement in light of the prior support of the increase of rape to an Unclassified felony, removing it from the "presumptive sentencing" scheme. Presumptive sentences do not apply to Unclassified felonies. (AS 12.55.135) Even without the enactment of Bill Section 13, the penalty ranges for unclassified felonies are:

- First Degree Murder - 20-99
- Second Degree Murder - 5-99
- Kidnapping - 5-99
- Rape - 5-99

There are no presumptive sentences for any of these offenses, either in present law or in HB473. Presumptive

sentencing only applies to lessor crimes. Therefore, the presumptive sentence reference in the Position Paper refers to something not yet in law and not specifically suggested in the Position Paper.

Also, the Position Paper does not specify which are the "atypical" (or the "typical" for that matter) cases of multiple murder, kidnapping and rape. What could these be? Rape of a child under three with subsequent murder? Torture murder of a rape victim? Is there some distinction between the murder victims if they were in the same household, etc.? Need the murderer have previously completed a "rehabilitation course"?

The Position Paper seems to recognize the shortcoming of its own conclusions by placing quotes around the word normal. Perhaps the "normal" sentence for multiple murders, kidnappings, and rapes can and should be defined by the legislature. HB473 does exactly that. A copy of the committee sectional analysis of the bill is attached; the mandatory minimum sentences for combinations of murder and other unclassified felonies are listed under Section 13 on the second page of that analysis.

Jan 23, 1982 WG Clark

Alaska Network on Domestic Violence and Sexual Assault
P.O. Box 3356, ANCHORAGE, ALASKA 99510

POSITION PAPER: House Bill 473

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit corporation composed of seventeen domestic violence, sexual assault, and adult crisis intervention programs throughout the State. Network programs are funded in part through grants and contracts awarded by the recently established Council on Domestic Violence and Sexual Assault in the Department of Public Safety.

Network programs have extensive experience dealing with the issue of sexual assault. Often victims contact our crisis centers immediately after the assault, involving our program advocates in the entire reporting and judicial process.

Based on experience with the offense of sexual assault and with the criminal justice system, the Network offers the following remarks regarding House Bill 473.

The Network supports that portion of House Bill 473 (Sections 1 - 5) which reclassifies sexual assault in the first degree, making it an unclassified felony. The crime of sexual assault is traumatic and dehumanizing. In Coker v. Georgia, 433 U.S. 584, 612 (1977), the United States Supreme Court commented on sexual assault:

> Short of homicide, it is the "ultimate violence of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. . . . .Because it undermines the community's sense of security, there is public injury as well.

House Bill 473 by reclassifying sexual assault raises the penalty for those convicted of first degree sexual assault, thereby recognizing the gravity of the crime.

The Network is however, not in support of that section of the proposed legislation (Section 13) which creates mandatory sentences for the individual convicted of multiple crimes. Simply in terms of blame worthiness, criminal cases are different from each other in ways that cannot be anticipated. The mandatory sentencing requirements of Section 13 do not allow for these differences to be considered. The Network prefers the current statutory scheme of presumptive sentencing, which specifies a "normal" sentence for each offense, but permits limited departures from the norm in atypical cases.

Speach before AK. House of Representatives Re: HB473
From Prime Sponsor Rep. Ramona L. Barnes

MR. SPEAKER, HB473 IS INTENDED TO ADDRESS A CRIME PROBLEM IN ALASKA. I AM SURE THAT THE MEMBERS OF THIS BODY ARE FAMILIAR WITH THE SADDENING STATISTICS, ALASKA HAS ONE OF THE HIGHEST RAPE RATES OF ANY STATE IN THE NATION ON A PER CAPITA BASIS. ANCHORAGE HAS A RATE THAT IS TWO AND A HALF TIMES THE NATIONAL AVERAGE, BUT THIS EXTENDS TO RURAL ALASKA AS WELL.

IT IS EXTREMELY DISTURBING TO NOTE THAT RECENTLY THE NATIONAL AVERAGE FOR TIME SERVED IN PRISON STANDS AT 52 MONTHS FOR PEOPLE CONVICTED FOR FORCIBLE RAPE, PERSONS CONVICTED OF THE SAME CRIME IN ALASKA SERVE AN AVERAGE OF ONLY 14 MONTHS.

THE MAIL I HAVE RECEIVED SINCE HB473 WAS INTRODUCED IS INDICATIVE OF THE PUBLIC'S AWARENESS AND GREAT SENSE OF FRUSTRATION OVER THE INCREASE IN THIS TRAGIC CRIME. IN ADDITION TO THE SCORES OF LETTERS, TELEGRAMS, AND PUBLIC OPINION MESSAGES I HAVE RECEIVED, PLEADING FOR THIS LEGISLATURE TO TAKE ACTION AND PASS HB473, I HAVE RECEIVED A PETITION FROM THE PEOPLE OF BARROW, COMPLAINING OF INSENSITIVITY OF THE COURTS TO THE RAPE PROBLEMS THERE. ALSO, I HAVE FOR THE INSPECTION OF ALL MEMBERS, A PETITION SIGNED BY OVER 2000 ALASKA RESIDENTS, CALLING FOR MINIMUM MANDATORY SENTENCES FOR SEXUAL ASSAULT IN ALASKA. HB473 ESTABLISHES THIS.

FOR A FIRST TIME FORCEABLE RAPE CONVICTION, A RAPIST WILL RECEIVE A FIVE YEAR MINIMUM PRISON TERM NOT EXCEEDING 99 YEARS. THIS PARALLELS CURRENT SENTENCING FOR SECOND DEGREE MURDER AND KIDNAPPING. A SECOND OFFENSE RAPIST RECEIVES A 20 YEAR MINIMUM MANDATORY PRISON TERM.

HB473 ALSO CONTAINS A MULTIPLE CRIMES PROVISION, WHEREBY UNCLASSIFIED MULTIPLE FELONIES SUCH AS FIRST AND SECOND DEGREE MURDER, KIDNAPPING AND FORCEABLE RAPE OCCURRING IN A SINGLE CRIMINAL INCIDENT SHALL CARRY PERSCRIBED MINIMUM MANDATORY SENTENCING.

THE NEED FOR HB473 IS GREAT AND ITS PENALTY PROVISIONS REASONABLE IN RELATION TO OTHER SERIOUS FELONY PUNISHMENTS. CURRENTLY UNDER ALAKSA LAW, A FIRST TIME FORCEABLE RAPIST CAN RECEIVE A SUSPENDED SENTENCE, WITH NO TIME SERVED, NO PROTECTION FOR THE PUBLIC.

IT IS IMPERATIVE THAT WE RESPOND TO THE PUBLIC OUTCRY TO KEEP RAPISTS OFF THE STREETS. WE HAVE A RESPONSIBILITY TO ALL THE PEOPLE OF THIS STATE TO PROVIDE THE NECESSARY DIRECTION TO THE COURT SYSTEMS TO CARRY OUT THIS PUBLIC MANDATE FOR PROTECTION.

THE TIME TO DO IT IS NOW, NOT TOMORROW, OR NEXT MONTH. OR NEXT SESSION, BUT NOW.

THE PUBLIC HEARINGS HAVE BEEN HELD, THE TESTIMONY TAKEN, THE FACTS CLEARLY STATED-------

THE TIME IS NOW OURS, AND THE QUESTION BEFORE US WILL SOON BE----SHALL HB473 PASS THE ALASKA STATE HOUSE OF REPRESENTATIVES?

I URGE YOUR SUPPORT IN ACCOMPLISHING THAT OBJECTIVE!

THANK YOU.

1980 CASES INVOLVING SEXUAL ASSAULT FIRST DEGREE
Information provided by Alaska Judicial Council
1980 Felony Sentencing Study

| URBAN | SENTENCE LENGTH (months) | # OF PRIORS | # OF CONTEMPORANEOUS CHARGES | PRESUMPTIVE SENTENCES |
|---|---|---|---|---|
| *1 | -0- | -0- | 1 | no |
| *2 | 96 | Misdemeanor only | none | no |
| *3 | 54 | -0- | none | no |
| *4 | 36 | misd. only | none | no |
| *5 | 60 | -0- | none | no |
| 6 | 240 | 1 felony | 1 | yes |
| 7 | 240 | 1 felony | 4 | no |
| *8 | 24 | misd. only | none | no |
| *9 | 24 | misd. only | none | no |
| 10 | 180 | 1 felony | 1 | yes |
| RURAL | | | | |
| 1 | 60 | 1 felony | 1 | no |
| 1 | 60 | 1 felony | 1 | no |
| *2 | 24 | misd. only | none | no |
| *3 | 120 | -0- | 2 | no |
| *4 | 12 | -0- | none | no |
| *5 | 36 | -0- | 1 | no |
| *6 | 60 | misd. only | none | no |
| 7 | 60 | 1 felony | none | no |
| *8 | 6 | misd. only | none | no |
| *9 | 36 | -0- | 1 | no |
| 10 | 60 | 1 felony | none | no |

* 1) Average sentence for Sexual Assault First Degree -
(first time felony offender) - under current law - 3.5 years
- with "good time" provisions - 2.6 years

2) Minimum mandatory sentence Sexual Assault First Degree -
(first time felony offender) - under HB 473 - 5 years
- with "good time" provisions - 3.75 years

3) Average sentence for Sexual Assault First Degree -
(all 1980 cases) - under current law - 5.8 years
- with "good time" provisions - 4.3 years

# 1980 CASES WITH MULTIPLE CHARGES INVOLVING SEXUAL ASSAULT FIRST DEGREE

| URBAN (def. #) | PRIOR CONVICTIONS | CONTEMPORANEOUS CHARGE(s) | SENTENCE LENGTH (months) | TOTAL ACTIVE TIME TO SERVE (months) |
|---|---|---|---|---|
| 1 | -0- | sexual assault first degree | -0- | -0- |
| | | sexual abuse of a minor | -0- | -0- |
| 6 | 1 felony | sexual assault first degree | 240 | 240 -- (20 yrs.) |
| | | burglary first degree | 96 | (concurrent sent.) |
| 7 | 1 felony | sexual assault first degree | 240 | 1,188 -- (99 yrs.) |
| | | murder first degree - 3 counts | 1,188 each ct. | (all sentences |
| | | kidnapping | 360 | ran concurrent.) |
| 10 | 1 felony | sexual assault first degree | 180 | 180 -- (15 yrs.) |
| | | burglary first degree | 48 | (concurrent sent.) |
| RURAL | | | | |
| 1 | 1 felony | sexual assault first degree | 60 | 60 -- (5 yrs.) |
| | | sexual assault first degree | 60 | (concurrent sent.) |
| 3 | -0- | sexual assault first degree | 120 | 180 -- (15 yrs.) |
| | | kidnapping | 180 | (all sent. ran |
| | | assault second degree | 60 | concurrently.) |
| 5 | -0- | sexual assault first degree | 36 | 36 -- (3 yrs.) |
| | | burglary | 36 | (concurrent sent.) |
| 9 | -0- | sexual assault first degree | 36 | 36 -- (3 yrs.) |
| | | burglary | 24 | (concurrent sent.) |

# Spent in Jail U.S. Felon, NLJ Study

with state-by-state data. Average time served in the United States in the late 1960s for felonies were 79 months for homicide, 68 months for forcible rape, 29 months for negligent manslaughter, 44 months for robbery, 23 months for assault, 23 months for burglary, 17 months for larceny and 18 months for auto theft.

In 1977, certain states punished criminals far more severely in general than did other states. Although Massachusetts leads the list in time served for all felonies covered by the survey, at 53 months, the state actually is one of the more lenient states on penal matters in general. Its lengthy time-served statistic is partially a consequence of a low incarceration rate for crimes other than willful homicide, and the relatively high percentage of murderers serving extremely long sentences in its prison population. Utah, at 41 months for the average time served over all categories, was the next most punitive state, followed by Puerto Rico (40 months), South Carolina (32 months), and North Carolina and West Virginia (31 months each).

By contrast, seven states covered by the survey released prisoners who had served only an average of 18 months or less. These states were South Dakota (13 months), Delaware (15 months), North Dakota (16 months), New Jersey (17 months), and Illinois, Kansas and Missouri (18 months each).

**Disparities Seen**

Although the states show general agreement that murder and rape are the most serious offenses, several states punished less serious crimes more severely than others did rape. And the lack of overall standards in the United States actually allowed some states to require prisoners to serve more time on the average for relatively minor felonies than other states did for willful homicide.

For example, in South Carolina, prisoners convicted of robbery served an average of 46 months before parole in 1977. That's more time than the average prisoner convicted of willful homicide served in Arkansas, Illinois, Iowa, Louisiana, Pennsylvania or South Dakota. Similarly, in West Virginia, the average prisoner convicted of car theft served 41 months — nearly three times the average time served for forcible rape in the state. West Virginia's average time served for car theft was also higher than that for rape in Alaska, Arizona, Colorado, Delaware, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, North Dakota, Pennsylvania, Puerto Rico and Wisconsin.

In the category of willful homicide, Massachusetts was far and away the most punitive state, requiring the

## PRISON TIME SERVED

In Months

| | Assault | Burglary | Car Theft | Forcible Rape | Larceny Theft | Negl. Manslaughter | Robbery | Willful Homicide | ALL FELONIES |
|---|---|---|---|---|---|---|---|---|---|
| ALABAMA | 19 | 19 | 14 | 50 | 11 | — | 40 | 70 | 25 |
| ALASKA** | 28 | — | — | 14 | 26 | 11 | 23 | — | 22 |
| ARIZONA* | 21 | 18 | 15 | 36 | 18 | — | 25 | 58 | 23 |
| ARKANSAS** | 17 | 26 | — | 119 | 22 | 16 | 20 | 41 | 26 |
| CALIFORNIA*[1] | 34 | 24 | 21 | 47 | 21 | 35 | 35 | 76 | 30 |
| COLORADO* | 21 | 16 | — | 34 | 18 | 22 | 27 | 79 | 20 |
| DELAWARE | 13 | 15 | — | 35 | 11 | 23 | 18 | — | 15 |
| D.C. | 21 | 30 | 35 | 70 | 18 | 57 | 39 | 70 | 31 |
| FLORIDA | 27 | 22 | 22 | 68 | 18 | 39 | 39 | 52 | 28 |
| GEORGIA | 23 | 25 | 18 | 62 | 16 | 28 | 35 | 63 | 28 |
| IDAHO | 14 | 21 | 13 | 42 | 23 | 23 | 33 | 45 | 22 |
| ILLINOIS[7] | 20 | 15 | 13 | 46 | 13 | 21 | 21 | 40 | 18 |
| IOWA** | 34 | 20 | 22 | — | 17 | — | 30 | 38 | 21 |
| KANSAS | 19 | 16 | — | 31 | 15 | 15 | 29 | 69 | 18 |
| KENTUCKY | 18 | 13 | 16 | 35 | 11 | 17 | 28 | 39 | 18 |
| LOUISIANA* | 22 | 19 | — | 45 | 17 | — | 27 | 42 | 25 |
| MAINE | 16 | 16 | — | 28 | 16 | 31 | 28 | 74 | 20 |
| MARYLAND | 18 | 19 | 9 | 52 | 14 | 34 | 41 | 78 | 22 |
| MASSACHUSETTS*[2] | 30 | 30 | 18 | 30 | 18 | — | 18 | 180+ | 53 |
| MICHIGAN | 28 | 22 | 16 | — | 18 | 46 | 33 | 99 | 24 |
| MINNESOTA* | 32 | 23 | 15 | 34 | 19 | — | 40 | 65 | 30 |
| MISSOURI | 19 | 9 | 11 | 96 | 11 | 8 | 31 | 72 | 18 |
| NEBRASKA | 25 | 23 | 28 | 37 | 22 | 30 | 37 | 128 | 25 |
| NEVADA | 21 | 20 | 21 | 14 | 19 | 15 | 25 | 89 | 23 |
| NEW JERSEY | 19 | 10 | 16 | 42 | 12 | 27 | 20 | 62 | 17 |
| NEW YORK*[1] | 22 | 20 | 16 | 30 | 17 | 33 | 24 | 84 | 22 |
| NORTH CAROLINA | 23 | 33 | 17 | 109 | 19 | 38 | 43 | 87 | 35 |
| NORTH DAKOTA | 21 | 15 | — | 28 | 14 | — | 19 | — | 16 |
| OHIO | 27 | 22 | 29 | 47 | 16 | 32 | 39 | 86 | 26 |
| PENNSYLVANIA | 22 | 22 | 21 | 32 | 15 | 28 | 27 | 46 | 24 |
| PUERTO RICO** | 26 | 29 | 21 | 18 | 30 | 87 | 27 | 82 | 40 |
| SOUTH CAROLINA | 30 | 28 | 16 | 73 | 25 | 20 | 46 | 58 | 33 |
| SOUTH DAKOTA | 15 | 13 | — | 59 | 15 | — | 23 | 31 | 13 |
| TEXAS | 26 | 19 | 17 | 55 | 17 | 16 | 39 | 60 | 25 |
| UTAH[3] | 19 | 41 | — | 52 | 32 | 107 | 53 | 111 | 41 |
| VIRGINIA | 23 | 24 | 57 | 49 | 15 | 16 | 38 | 67 | 29 |
| WEST VIRGINIA[4] | 44 | 31 | 41 | 16 | 24 | 20 | 60 | 72 | 32 |
| WISCONSIN | 23 | 22 | 16 | 32 | 15 | 18 | 29 | 96 | 26 |
| WYOMING | 24 | 20 | 18 | 46 | 24 | 30 | 21 | 54 | 23 |
| NATIONAL AVERAGE[5] | 23 | 20 | 17 | 52 | 16 | 32 | 31 | 62 | 25 |
| FEDERAL CRIMES[6] | 34 | 35 | 21 | — | 19 | — | 48 | — | 27 |
| FEDERAL TERRITORIES | 34 | 21 | 16 | 74 | 21 | — | 35 | 55 | 33 |

(*) 1977 LEAA data.

(**) 1976 LEAA data.

(1) Median figures only. State medians on time served are generally about one-third lower than average or mean time served.

(2) Approximate average only. State supplied range figures, such as 24-36 months. Figures represent midpoint of range.

(3) State parole board supplied figures for forcible rape and willful homicide. Other state figures did not agree with Uniform Parole Reports data and show lower penalties in most categories. Utah's self-reporting for 1977 runs as follows: assault (19), burglary (23), forcible rape (52), larceny theft (22), willful homicide (111), robbery (53), negligent manslaughter (28), all felonies (31).

(4) Combines 1976 and 1977 figures for forcible rape.

(5) National averages include only those states within the Uniform Parole Reports data. States not included in figuring the national averages were Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Montana, Oklahoma, Oregon, Rhode Island, Vermont and Washington.

(6) Federal crimes refer to prisoners released from Federal Bureau of Prisons in 1977.

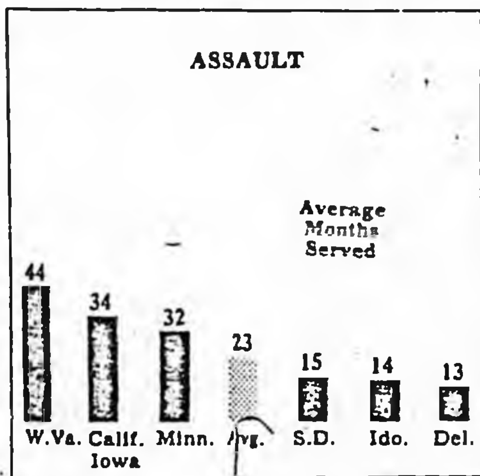
(7) Illinois parole officials dispute the Uniform Parole Reports statistics for their state for willful homicide. State Officials said that murderers in the state must serve 16 years or more for murder and that the overall average for willful homicide is far higher than reflected by the UPR data.

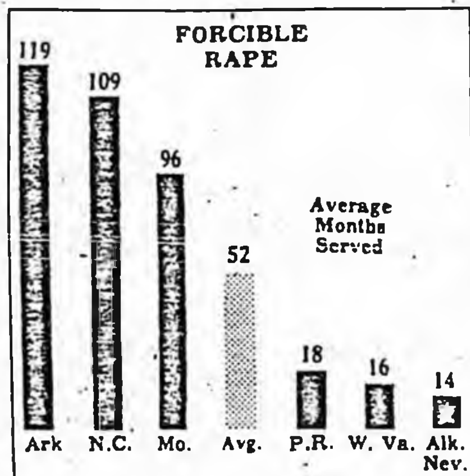
and Utah, at 111 months, were the next most punitive states in the category of willful homicide. However, since then

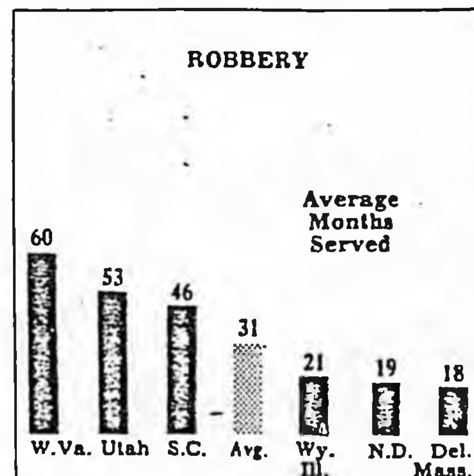
state was closer to the 1976 figure of 63 months.

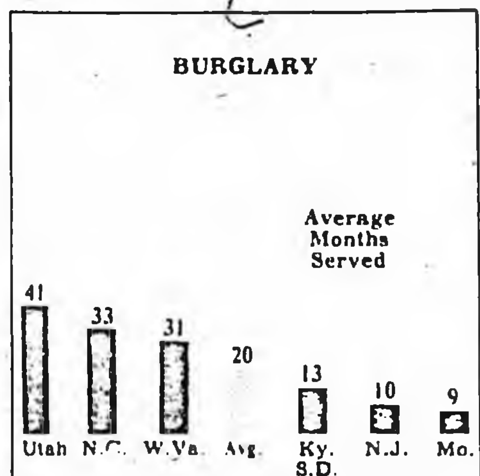
Those paroled after serving time on

## Crime-by-Crime Comparisons of Months Spent in Prison

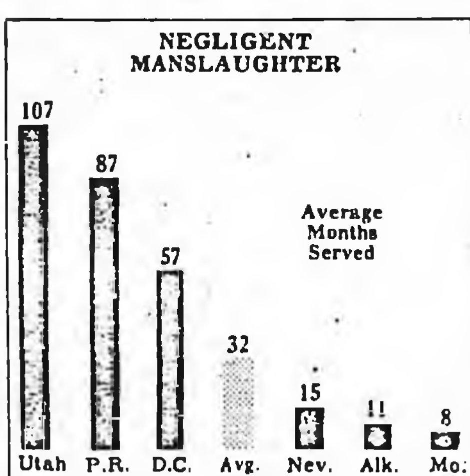


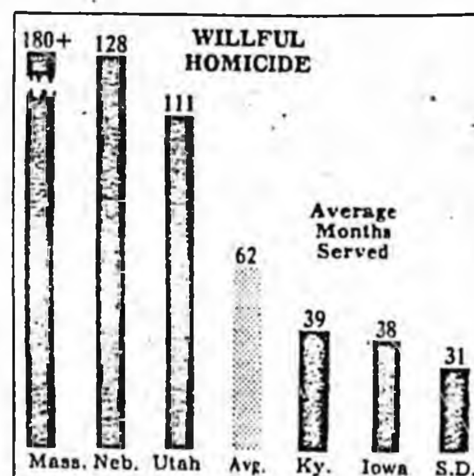




Utah figures disputed by state parole officials, who contend correct figure is 23 months for burglary.




Utah figures disputed by state parole officials, who contend correct figure is 28 months for negligent manslaughter.




Kentucky figure disputed by state parole officials, who contend correct figure is close to national average. Charts by RONNIE LEE LYONS

Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Maine, New Jersey, New Mexico, North Dakota, Rhode Island and Tennessee. In most cases, time served in those jurisdictions has increased since then, officials speculated.

But in at least one state, Maine, the increased time served has not been an unmixed success. Last month, state legislators introduced a bill that would re-establish the discretionary parole system abolished by the state's determinate sentencing law.

### Wide Deference

The lack of national standards relating to time served before parole would apparently not be enough to sustain a constitutional attack on sentencing and parole procedures following the Supreme Court's decision in *Rummel v. Estelle*, 48 USLW 4261 last March.

In the *Rummel* decision, a five-man majority of the Supreme Court ruled that a mandatory life sentence imposed on a Texas prisoner for three petty property offenses involving a total of $230 and classified as felonies by the state did not violate the Eighth Amendment's proscription against cruel and unusual punishment.

In the majority opinion, written by Justice William H. Rehnquist, the court rejected an attack on the Texas habit . offender statute based on the theory of "proportionality," granting the state legislature wide deference to determine terms of imprisonment.

The Supreme Court's attitude varied sharply from that expressed by the American Bar Association in a 1979 Task Force study on sentencing alternatives and procedures. In that study, the principal conclusion of the ABA was that "above all, the role of the legislature in sentencing must be recognized as a limited one." The ABA emphasized that proportionality and equality in punishing similar defendants similarly should be highly significant principles in the criminal system.

# FOIA REQUESTS

## SELECTED INFORMATION ACT REQUESTS

### ◘ FEDERAL TRADE COMMISSION

*FOI Office: (202) 523-3582*

Data re: Whiteworth Inc., a California corporation. 12-3. Req. by: George M. Turner Esq., Turner & Smart, of Pasadena, Calif. No information on file. 1-2.

Data re: Alhambra Motor Parts, others. 12-5. Req. by: David Brice Toy Esq., Toy & Rymer, of Los Angeles. Partially granted. 1-19. Exemptions: 3, 4.

Data re: General Motors Corp. automatic transmissions. 12-9. Req. by: Claude P. Rosser Jr. Esq., Alvin T. Prestwood, of Montgomery, Ala. Partially granted. 12-31. Exemptions: 3, 4.

Data re: LTV Corp. 12-9. Req. by: William E. Wallace III Esq., Howrey & Simon.

Data r[illegible]ney Wolofsky, Mel Shuster, others. [illegible]eq. by: Warren L. Miller Esq., St[illegible]lpert & Miller, of Wash., D.C. Par[illegible] granted. 1-14. Exemptions: 3, 4, 5, 7A, D.

Data re: investigation of American Express Co.'s purchase of the stock or assets of First Data Resources Inc. 12-11. Req. by: Stephen R. Bell Esq., Wilkinson, Cragun & Baker, of Wash., D.C. Denied. 12-29. Exemptions: 3, 5.

Data re: FOIA requests concerning Oldsmobile warranties. 12-11. Req. by: David A. Collins Esq., staff attorney, General Motors, of Detroit. Granted. 12-17.

Data re: Subaru of America Inc. or Fuji Heavy Industries Ltd. 12-11. Req. by: Kenneth D. Ludwig Esq., Steptoe & Johnson, of Burbott, of Palm Springs, Calif. Denied. 11-17. Exemption: 4.

Copies of correspondence re: Haudek FOIA request concerning First National Bank of Chicago. 11-7. Req. by: Ricki Rhodarmer Tigert, of Leva, Hawes, Symington, Martin & Oppenheimer, of Wash., D.C. Granted. 11-13.

Data re: acquisition of Fidelity National Bank, of Concord, Calif. 11-10. Req. by: Rachel F. Robbins, of Milbank, Tweed, Hadley & McCloy, of New York City. Partially granted. 11-25. Exemptions: 4, 5, 6, 8.

Data re: Citibank charter application for South Dakota. 11-17. Req. by: Stanley A. Carlson, of Davis, Wright and Todd, of Seattle. Granted. 11-20.

Data re: letters approving or denying applications under Change of Bank Control

YOUR SIGNATURE ON THE ATTACHED WILL ASSIST IN GETTING ALASKA STATE HOUSE BILL #473 PASSED. HOUSE BILL #473 SETS A MINIMUM MANDATORY PRISON TERM FOR FORCEABLE RAPE WHERE THE SENTENCE MAY NOT BE REDUCED OR SUSPENDED AND PAROLE NOT GRANTED UNTIL AT LEAST THE MINIMUM MANDATORY PRISON TERM IS SERVED.

FOR A FIRST TIME FORCEABLE RAPE CONVICTION, ONE WILL RECEIVE A 5 YEAR MINIMUM MANDATORY PRISON TERM NOT EXCEEDING 99 YEARS. A SECOND FORCEABLE RAPE CONVICTION CARRIES WITH IT A 20 YEAR MINIMUM MANDATORY PRISON TERM NOT EXCEEDING 99 YEARS.

YOUR ASSISTANCE IN THIS EFFORT IS GREATLY APPRECIATED.

SINCERELY,

J. B. Burt

J. B. BURT
1901 OTTER ST.
PH. 333-9862

P. S.
THIS BILL WAS INTRODUCED BY REPRESENTATIVE - RAMONA BARNES
AND CO-SPONSORED BY REPRESENTATIVES - JOE HAYES
MITCH ABOOD
CHARLES ANDERSON
MIKE BEIRNE
BERNIE BYLSMA
DAVID CUDDY
RICK HALFORD
E. J. HAUGEN
TERRY MARTIN
RAY METCALFE
JOE MONTGOMERY
PATRICK O'CONNELL
RANDY PHILLIPS

TO ALL LEGISLATORS:

WE, THE UNDERSIGNED, REQUEST THAT HOUSE BILL #473 BE PASSED PRIOR TO THE ADJOURNMENT OF THIS LEGISLATIVE SESSION. THIS IS AN EXCELLENT BILL AND SHOULD BE PASSED INTO LAW WITHOUT ANY CHANGES.

| Signature | Address |
| --- | --- |
| P.E. Whitehead | #103 Northwood - Anchorage |
| C.W. Cutte | 3623 Lynn Dr. |
| Ed Kent | PO Box 1206. Eagle River |
| [illegible] | [illegible] Anchorage |
| Ed [illegible] | SR 1 B Box 1756 Eagle River |
| John A Freeman | 1410 MEDFRA ANCHORAGE AK |
| Stanley Cavender | SRD. 9777 Palmer ak |
| [illegible] | 5766 S. Tahiti # 195 Anch. |
| [illegible] | 3500 Hagen Circle Anch |
| [illegible] | 2947 E. 80th ANCH AK. |
| [illegible] Marx | 6460 Village Parkway, Anc |
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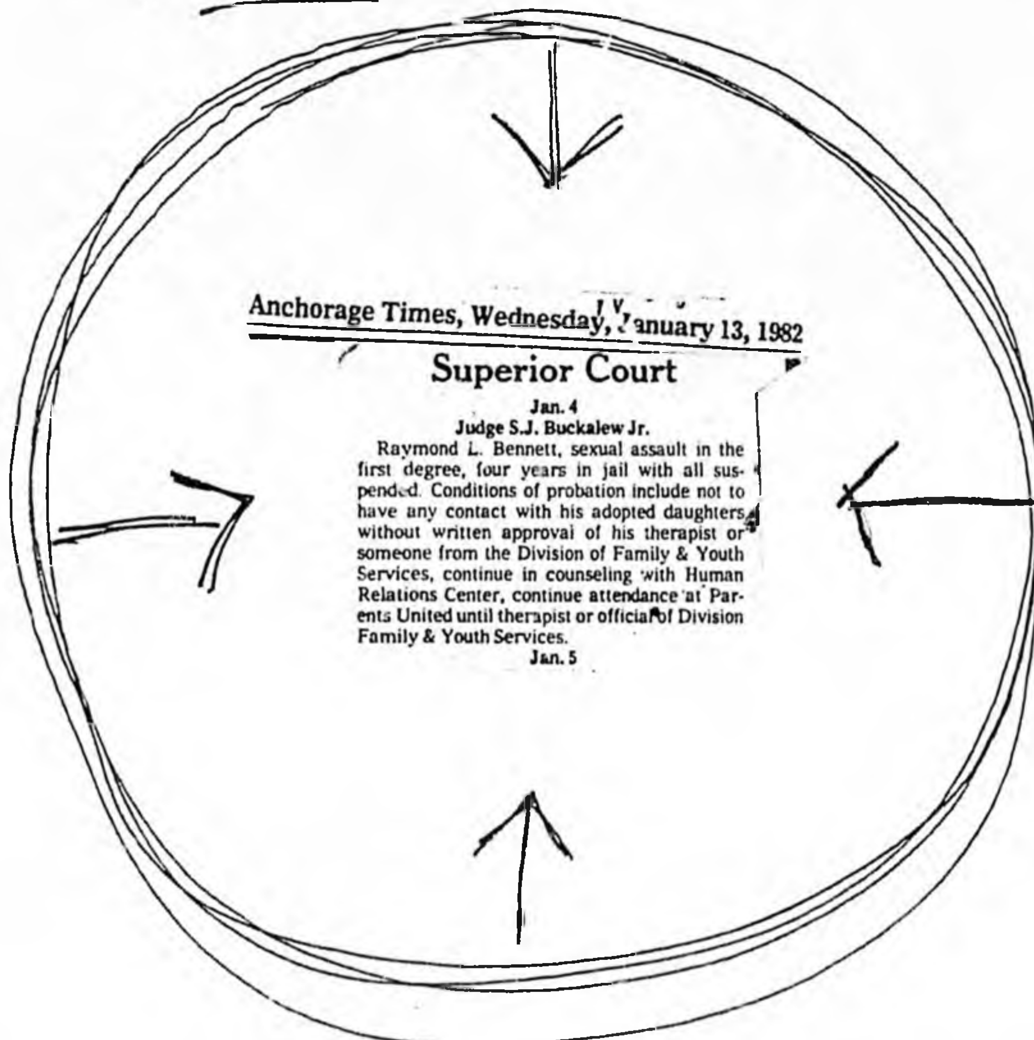
Note:


Anchorage Times, Wednesday, January 13, 1982

Superior Court

Jan. 4

Judge S.J. Buckalew Jr.

Raymond L. Bennett, sexual assault in the first degree, four years in jail with all suspended. Conditions of probation include not to have any contact with his adopted daughters without written approval of his therapist or someone from the Division of Family & Youth Services, continue in counseling with Human Relations Center, continue attendance at Parents United until therapist or official of Division Family & Youth Services.

Jan. 5

Date- January 4, 1982
Judge- S. J. Buckalew
Crime- Sexual Assault 1°
Sentance- 4 yrs. All suspended

TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. House Bill No. 473
Title "An Act changing the classification of and punishment for certain crimes against a person
Requested by Representative Barnes Date 1/8/82

II. FISCAL DETAIL
Agency Affected Department of Health & Social Services
Program Category Affected Offender Confinement, Reformation & Supervision
BRU, Program, Or Subprogram(s) Affected Adult Confinement
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS,CLAIMS,ETC. | | | | | | |
| TOTAL | -0- | -0- | -0- | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | -0- | -0- | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Source) | | | | | | |
| | | | | | | |

POSITIONS

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| FULL TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

There would be no fiscal impact resulting from enactment of this legislation in the first 5 years because of the current minimum sentence lengths for the crimes addressed in this bill. However, because of the longer sentences which would be required in Section 13, there will eventually be an impact on the number of prisoners in confinement under Alaska Statutes.

IV. DATE January 11, 1982 PREPARED BY Roger C. Lange *Roger C. Lange*
AGENCY Division of Adult Corrections
PHONE 465-3376

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

*Joanne C. Clark, Acting Director*
*Division of Management & Budget*

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 473
Title An Act Changing the Classification of and Punishment for Crimes
Requested by House Judiciary Committee Date 1-8/82

II. FISCAL DETAIL
Agency Affected Alaska Court System
Program Category Affected
BRU, Program, or Subprogram(s) Affected
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

| | FY 81 | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 |
|---|---|---|---|---|---|---|
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 COMMODITIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS, ETC. | | | | | | |
| | | | | | | |
| TOTAL | | -0- | -0- | -0- | -0- | -0- |

FUNDING (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | | | | | | |
| FEDERAL FUNDS | | | | | | |
| OTHER (Specify Fund Source) | | | | | | |
| | | | | | | |
| | | | | | | |

POSITIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL TIME | | | | | | |
| PART TIME | | | | | | |
| TEMPORARY | | | | | | |

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

HB 473 changes the classification of and punishment for certain crimes against the person. This substantive change in criminal classification should have no fiscal impact on the Alaska Court System.

IV. DATE 1/12/82 PREPARED BY Richard P. Barrier
AGENCY Alaska Court System
PHONE 264-0545

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

32-001 (Rev. 12/80)

*Digest of Opinion:* Sears, Roebuck & Co. sold Lloyd Fullman, Jr., a rifle and ammunition, but did so in violation of Del. Code Ann. tit. 24, §904 (Michie 1975). At the time of this sale, §904 required two "freeholders resident in the county wherein the sale is made" to identify any purchaser of a deadly weapon. Fullman, however, did not produce two Delaware freeholders for the purpose of positively identifying him. He merely showed a Delaware driver's license with his picture on it and completed a Federal Firearm Transaction Record, Form 4473.

Although the Delaware statute does not define "freeholder," that term is generally understood to mean an owner of real property. Gebelein v. Nashold, Del. Ch., 406 A2d 279 (1979).

During the course of a robbery, Fullman shot plaintiff Hetherton in the head, severely wounding him. Hetherton sued Sears alleging that the corporation was negligent in selling the weapons to Fullman without requiring that he be identified by two freeholders.

Sears challenges the constitutionality of §904, but Hetherton claims Sears has no standing to do so.

Quoting from Baker v. Carr, 369 U.S. 186, 204 (1962), the Supreme Court observed that the "'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" Flast v. Cohen, 392 U.S. 83, at 99-100 (1968).

[*Text*] There is little question that Sears risks suffering injury in fact to an interest arguably within the zone of interest to be regulated by §904. As the district court wrote: "The statutory requirement which Sears is challenging here created for Sears a legal duty to require anyone purchasing a firearm from Sears to produce two freeholders who would identify the purchaser. Sears' failure to perform this duty is presently exposing it to a very large potential liability and could lead to criminal prosecution. Thus, the statute is clearly causing Sears injury in fact and Sears had a weighty personal interest in demonstrating that the law was unconstitutional." District Court Opinion at A-3. The existence of potential civil and criminal liability when combined with the statute's clear intention to regulate the vendors of deadly weapons assures us that Sears had presented the "concrete adverseness" envisioned by Flast and Baker. [*End Text*]

We now pass to the constitutional question.

[*Text*] The essence of Sears' argument is that the §904 requirement of two freeholder witnesses to the sale of a deadly weapon bears no rational basis to Delaware's legitimate interest in having purchasers positively identified and in deterring ex-felons, such as Fullman, who are not permitted to purchase firearms in Delaware, from buying guns. Hetherton counters that, since Delaware can totally ban the sale of firearms, nonfreeholders are not being deprived of a right. Further, he contends the two freeholder requirement is rational in that it results in a more burdensome procedure for the purchase of weapons.

Hetherton's argument that Delaware has created no right to purchase firearms is misconceived. While it may be true that Delaware could ban the sale of all deadly weapons, it does not follow that the State, having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups. The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in the negative.

The Supreme Court has consistently looked askance at classifications based on the ownership of land. [*End Text*]

See, e.g., Turner v. Fouche, 396 U.S. 346 (1969), where the Court, using a rational relationship test, invalidated a Georgia statute limiting school board membership to freeholders. The Court found it difficult to envision legitimate reasons for distinguishing between property owners and non-property owners for purpose of school board membership.

[*Text*] It is clear to this court that Delaware's freeholder identification requirement is as anachronistic as the one in Fouche. As the lower court observed, many very responsible citizens in Delaware do not own property. Renting has become increasingly more popular and even necessary as the cost of real estate has grown prohibitive, particularly in urban areas, for the average wage earner. For Delaware to assume that only citizens with the wealth and/or interest in owning real property are capable of participating in the regulatory functions of §904 is simply not rational. A leaseholder is fully qualified to provide the needed identification and is capable of possessing the same "attachment to the community" as a freeholder. We therefore reject Hetherton's contention that the "right" of non-freeholders to serve as witnesses to the character of firearms purchasers is not unconstitutionally infringed upon by §904. We find the same irrationality present in the fact that Delaware residents who know only leaseholders would be barred by §904 from lawfully purchasing weapons.

Similarly, the argument that the freeholder requirement makes the buying of deadly weapons more burdensome does not meet the test of rationality. The state may have an interest in restricting the sale of firearms; however, it cannot do so by creating irrational and unconstitutional classifications. As noted earlier, there is no rational basis to conclude that a freeholder would take the responsibility of identifying weapons purchasers more seriously than a leaseholder. If Delaware desired to burden the sale of firearms by restricting them to persons who are non-felons or otherwise stable members of the community, it should have done so by a more narrowly tailored statute. [*End Text*]

We agree with the district judge's observation that there is no reason to believe "non-freeholders will be less willing than freeholders to attempt to protect their communities by helping to prevent those who should not possess firearms from purchasing them."

[*Text*] As a deterrent to our nation's escalating violence, certainly a legislature may prohibit the sale of handguns to individuals who have records such as Fullman and certainly they can impose substantial civil liability on gun sellers like Sears who breach the statutory obligations. * * * To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is no more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns. Thus, though Sears may have avoided legal liability here because of a technical deficiency in the statute, the human and moral issues raised by this case are deeply troubling and the issue of gun control is one certainly appropriate for further legislative inquiry and correction. [*End Text*] —Higginbotham, J.

Judge Weis dissents, arguing that Sears lacks standing to challenge §904.

(Hetherton v. Sears, Roebuck & Co.; CA3, 6/25/81)

## MASS. LAW REQUIRING PARTS OF SEX OFFENSE TRIALS TO BE CLOSED IS VALID

*Law serves valid state interests in protecting young victims, encouraging them to testify.* ►*90.70* ►*278.05*

A majority of the Massachusetts Supreme Judicial Court finds nothing in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 27 CrL 3261 (1980), to undermine a state statute that, as construed in an earlier opinion, requires the closing of certain phases of sex offense trials involving youthful victims. The law is therefore upheld as a permissible effort by the state to protect such victims and encourage them to testify.

In its previous opinion, 401 NE2d 360 (1980), the court interpreted the statute to require closure only during the testimony of minor complainants, and to grant trial courts discretion to consider requests for exclusion of the public during additional segments of the trial as well. On this remand, ordered by the Supreme Court near the beginning of the 1980-81 Term, 28 CrL 4033 (1980), the



0011-1341/81/$00.50



up in U.S. Supreme Ct 1981-82 Session

majority poses three questions, focusing on the tradition of open proceedings, the effect of closure on the flow of information, and the state interests the statute is supposed to serve.

The closure authorized by this statute does not conflict with tradition to the same extent as that authorized by the statute involved in Richmond Newspapers, the majority first concludes. The courts have long taken special steps, including closure, to compensate for the difficulty many sex offense victims, especially minors, have in testifying. Secondly, the flow of information about sex offense trials in general will not be completely cut off, the majority notes, since the statute does not apply to cases in which the complaint is an adult. Finally, the majority says the interests advanced by the state are properly adressed by the legislature through a statute of general application rather than, as the newspaper argues, by the courts on a case-by-case basis.

Justice Wilkins concurs for the most part but finds the mandatory aspect of the statute objectionable. (Globe Newspaper Co. v. Superior Court, 6/30/81)

*Digest of Opinion:* The statute, G.L.c. 278, §16A, reads in relevant part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, * * * the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." In our prior opinion, we interpreted the statute to require closure only during the testimony of complainants who are minors and to grant trial courts discretion to consider requests to exclude the public from additional segments of the trial. The Supreme Court vacated our decision and remanded the case for reconsideration in light of Richmond Newspapers.

The Globe does not deny that there are instances where a minor victim may be psychologically unable to testify if confronted with a large group of spectators, or if the minor is aware that the testimony will become a matter of wide public knowledge. But the Globe says such a determination can be constitutional only if made in a case-by-case manner after a hearing. Additionally, the paper asserts that the standards set forth in the first opinion do not give adequate weight to the interests of the press and the public.

[*Text*] To test the mandatory closing requirement of G. L. c. 278, §16A, against the standard of Richmond Newspapers requires a threefold inquiry: (1) Does the closing of the testimony of the minor victom of a sexual assault violate the same tradition of open proceedings as the closing of an entire murder trial; (2) to what extent does the restriction impede the flow of information necessary to the functioning of democratic institutions; (3) are there substantial State interests underlying the statute, and if there are, can they be furthered by more tightly drawn regulations that will intrude to a lesser degree on the constitutionally protected interests of the press and public? [*End Text*]

The tradition of open trials has long been a part of the common law of this commonwealth, but there is at least one notable exception. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult. See e.g., Latimore v. Sielaff, 561 F2d 691, 21 CrL 2530 (CA7 1977). It is no longer possible to justify such closings as attempts to protect the public from offensive information. But more typically the motivation has been to overcome the difficulty the victim may have in publicly testifying about the details of such crimes. Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial. A majority of the courts have upheld decisions to close part of trials when a minor victim of a sexual assault is testifying.

Under the statute in question, courtroom testimony of minors who are the victims of sexual assaults cannot be the subject of contemporaneous reporting by members of the press. But closure is not automatic when the victim is an adult, so the public will be able generally to observe the judicial system dealing with sexual assault charges.

The question we must resolve is whether the genuine state interests furthered by the statute justify this impact on First Amendment interests. Globe I identified the state interests as: (a) to encourage minor victims to come forward to institute complaints and give testimony; (b) to protect minor victims from public degradation, humiliation, demoralization, and psychological damage; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice; and (e) to preserve evidence and obtain just convictions.

We do not agree with the newspaper that a balancing of state interests against First Amendment rights is permissible only if undertaken on a case-by-case basis, and we perceive no such holding in Richmond Newspapers.

[*Text*] We believe that the Legislature, a coordinate branch of government, has power to act. We note additionally that, by their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguished between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial. Implicit also in the Globe's argument that a State Legislature is without power to act to protect substantial State interests in the context of such trials. We do not believe Richmond Newspapers goes that far * * * and we are not disposed to reach such a conclusion. [*End Text*]

Nor do we agree that the statute is "underinclusive" because of its failure to prevent revelation of the victim's name. The statute is aimed at balancing the defendant's Sixth Amendment rights and the public's right to know against the minor victim's right to minimal harm in the process of testifying and the commonwealth's interests. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific state interest in protecting minors. This interest permits the state to protect juvenile offenders by closed hearings; it would be anomalous if the legislature were held to lack the power to protect juvenile victims of crime.

[*Text*] The statute, as it affects the testimony of minor victims, is fairly characterized as an attempt to reduce possible harm to a vulnerable group of individuals. Both precedent and empirical research support the Commonwealth's position that this concern is genuine and well-founded. * * * Logic and history indicate that the method chosen by the State will further this goal, while making increased reporting of sexual assaults more likely.

Balanced against this must be the impact that the closing of this testimony has on the public's knowledge about these trials. Although there is some temporary diminution of information, we cannot say that Richmond Newspapers requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims. [*End Text*] — Liacos, J.

*Concurrence:* I agree with most of what the court has said. But I am not certain that the mandatory closing of a trial of a case involving a minor victim of a sex crime during his or her testimony is constitutionally permissible without specific findings by the judge that the closing is justified by overriding or countervailing interests of the commonwealth. I would not


0011-1341/81/$00.50

foreclose the judge from concluding, on proper findings, that the trial should be entirely public —Wilkins, J.

(Globe Newspaper Co. v. Superior Court; Mass SupJudCt, 6/30/81)

## BOSTON'S LICENSING SCHEME FOR "ADULT THEATERS" INVALID IN PART

*One criterion for denial suffers from unconstitutional vagueness. ►254.45*

A Boston ordinance used to deny licenses to peep-show operators in the city's adult entertainment district or "Combat Zone" is unconstitutional in part, the U.S. Court of Appeals for the First Circuits says. Furthermore, the licensing denials involved in the present case are suspect despite the licensing authority's ostensible reliance on a provision that the court finds acceptable.

The ordinance provides in part that a license may be denied if its issuance would create a nuisance or "endanger the public health, safety, or order" by "unreasonably increasing" pedestrian traffic or noise, or by "increasing the incidence of disruptive conduct." While the "disruptive conduct" section skirts the edge of vagueness, these three sections are acceptable under First Amendment standards, at least on a facial analysis.

However the ordinance also provides for denial if a license would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." This standard is purely subjective and open-ended, with the result that the licensing authority has unbridled discretion. Where First Amendment interests are at stake, such an ordinance cannot be upheld.

The licenses here were denied on the basis of not only the fourth criterion but also the "disruptive conduct" section. However, the court perceives a considerable factual basis for the applicants' claim that the licensing authority did not really evaluate the potential for disruption but, instead, simply denied the licenses in order to pave the way for the applicants' eviction and the eventual redevelopment of their lessor's building. The district court must evaluate this claim on remand, with particular attention to the protection of the applicants' First Amendment rights. (Fantasy Book Shop, Inc. v. City of Boston, 6/16/81)

*Digest of Opinion:* Boston's zoning restricts so-called adult uses to a single downtown adult entertainment district, popularly known as the "Combat Zone." All "theatrical exhibitions, public shows, public amusements and exhibitions of every description" are required to obtain a license before they may operate for pay. This licensing requirement has been enacted pursuant to a 1979 Massachusetts statute. As reenacted, the statute makes it a crime to operate a public amusement for pay without a license, and delegates the power to grant or deny licenses to local governments. In material part, the statute provides that: "[T]he mayor or selectmen shall grant such license or shall deny such license upon a finding that issuance of such license would lead to the creation of a nuisance or would endanger the public health, safety or order by: (a) unreasonably increasing pedestrian traffic in the area in which the premises are located or (b) increasing the incidence of disruptive conduct in the area in which the premises are located or (c) unreasonably increasing the level of noise in the area in which the premises are located." The city ordinance quotes this statute but adds a fourth criterion, (d), allowing denial of a license that would "otherwise significantly harm [] the legitimate protectible interests of the affected citizens of the city." The ordinance also adds a general condition providing that "no application shall be denied if the anticipated harm is not significant or if the likelihood of its occurrence is remote."

This action was brought by three adult book stores that offer coin-operated motion pictures whose operation is within the scope of the ordinance. Their license applications were denied after hearings at which virtually all testimony focused on nearby residents' objections to the activities in the Combat Zone as a whole. Other testimony, offered by organizations interested in purchasing and redeveloping the building in which the stores operated, emphasized the importance of redevelopment to the community's financial well being and asserted that the continuance of the applicants' activities would be incompatible with that redevelopment. Appellee White, the city's mayor, has publicly stated his intention to eliminate the Combat Zone as a whole.

Prevost, director of the licensing office, denied the applications in letters that closely tracked the second and fourth criteria of the ordinance. She also asserted that "the anticipated harm is significant and the likelihood of its occurrence is not remote."

On this appeal from the denial of the applicants' request for injunctive or declaratory relief, we first address their claim that the ordinance is an invalid prior restraint. While there is a heavy presumption against the validity of prior restraints on First Amendment protected activities, a regulation directed primarily at conduct or noncommunicative aspects of protected expression is permissible, despite an incidental prior burden on expression, if it is justified by sufficiently strong permissible government interests. U.S. v. O'Brien, 391 U.S. 367, 377 (1968). We think this ordinance is not per se impermissible as a prior restraint under the O'Brien test.

*[Text]* First, a law requiring the licensing of routine commercial operations in an attempt to limit noise, traffic and disruption is clearly with a state's constitutional power. Second and third, those interests may well be said to be important, and are in themselves entirely unrelated to the suppression of expression. Finally, since the interests thus defined require regulation of public amusements whose content is within the First Amendment no less than they require regulation of any other public amusements, and since the market for coin-operated adult films as a whole is "essentially unrestrained", the regulation's inclusion of the latter is not broader than is essential to the furtherance of those interests. *[End Text]*

The applicants next claim that this sort of licensing scheme must provide various safeguards before any decisions denying the license may be given effect, including adequate administrative procedures, licensor-initiated judicial review, and prompt appellate review of that decision. While the cases they rely on did not involve facially content-neutral regulations, they argue that the safeguards are necessary because the ordinance has a content-specific effect. The defendants, on the other hand, argue that any positive correlation between the stated criteria of noise, traffic, and disruption, on the one hand, and a particular kind of film content, on the other, is purely accidental.

We think that where the ordinance has both facially neutral criteria and effectively non-neutral impacts, the full panoply of procedural safeguards do not apply unless a rejected applicant can demonstrate that, either in general or in a particular case, the neutral criteria asserted serve as a mere pretext for what were in fact content-directed decisions. Absent such a showing, a statute must be accepted as a valid police power/land use regulation not directly implicating First Amendment values. Therefore such a statute need not provide for prior licensor-initiated judicial review. However, the regulation must provide for adequate administrative procedures, including notice and a hearing, and expeditious decision by the administrator, along with the availability of prompt judicial review of a denial and appellate review of that decision. We see no reason to conclude that the licensing scheme here is procedurally deficient.

In addition, a party asserting that facial neutrality is a mere ruse for de facto content discrimination must be given an opportunity to prove that claim. Resolution turns on the inquiry into the substantive criteria. In this case, we find the first three criteria acceptable but the fourth impermissibly vague.



0011-1341/81/$00.50

search for controlled substances. (U.S. v. Harrington. 10/23/81)

In its original opinion, the court held that Reorganization Plan No. 2 of 1973, 87 Stat 1091, completely removed the Customs Service's authority to investigate drug law violations, placing all such authority in the hands of the Drug Enforcement Administration.

The court rejected then, as it does now, the government's attempt to rely on isolated portions of the plan and the presidential transmittal memorandum as indicating an intent to place "primary" drug enforcement authority in the DEA while leaving secondary authority in other agencies. Such an interpretation, the court says, would do violence not only to the plain language of the plan but also to the policy underlying it. "Once all intelligence, investigative, and law enforcement functions had been transferred from the Secretary of the Treasury to the Attorney General, Treasury had no such functions to perform. * * * [T]his court finds itself unable to read the [language of the plan] to mean less than it clearly says."

The court also rejects two new arguments raised by the government. First, the government claims that complete authority for the search can be found in the Currency and Foreign Transactions Reporting Act, 31 USC 1101. While it is true that the affidavit filed by the agent made a "fleeting" reference to the Act, the court is unable to conclude that the warrant was issued with any consideration of that statute. The affidavit made a bald assertion that the agent believed that the individuals under investigation were violating the Act, but pointed to no specific, articulable facts to establish such a violation. Accordingly, the authority vested in customs officers by this statute has no relevance to the search in this case.

Finally, the court rejects the argument that, the lack of authority for the search notwithstanding, application of the exclusionary rule is not appropriate. Aware of a long line of cases holding that technical violations of Fed.R.Crim.P. 41 do not warrant invocation of the exclusionary rule, the court observes that the primary question in this case is whether this was a "mere" technical violation.

For the answer, the court turns to U.S. v. Soto-Soto, 598 F2d 545 (CA9 1975), which held that one federal law enforcement officer may not use the statutory authority given by Congress to another agency and that the evidence so acquired would be inadmissible. "In reading Soto-Soto, it is apparent that the Ninth Circuit felt that a very important policy would be served by the application of the exclusionary rule to a search conducted by an officer without statutory authority to do so: it would deter individual officers from ignoring the delegations of authority painstakingly created by Congress." (Page 2119)

Prior Testimony Usable

## POTENTIAL WITNESS' PSYCHOLOGICAL PROBLEMS MADE HER "UNAVAILABLE"

Testifying in court, which can be an unpleasant or frightening ordeal for many witnesses, can present serious risk of psychological harm to some. Such witnesses can be considered "unavailable," just as if they could not be located, the D.C. Court of Appeals holds. If other conditions are met, the prior testimony of such a witness may be admitted at trial, thus sparing the witness the need to appear personally. (Warren v. U.S., 10/9/81)

The defendant in this case was convicted of rape in 1973, but the conviction was later reversed. One of the alleged victims was excused from testifying at the retrial on the basis of psychiatrists' statements that a court appearance could lead to permanent psychological injury. Instead, the transcript of her testimony from the first trial was repeated to the second jury.

Observing that the issue is one of common law in this jurisdiction, the court notes that only two cases have expressly sanctioned findings of unavailability under similar circumstances. People v. Gomez, 103 CalRptr 80 (CalApp 1972); People v. Lombardi, 332 NYS2d 749 (AppDiv 1972), aff'd 303 NE2d 705 (1973). As in the instant case, both Gomez and Lombardi involved rape victims whose precarious mental conditions might have been aggravated by the ordeal of testifying. These cases are instructive, the court notes, as are Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, both of which allow findings of unavailability on the basis of existing mental illness or infirmity.

Defining "unavailability" to include mental conditions such as this witness' is a reasonable construction of the common-law rule, the court says. "We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional and psychological effects as a result of testfying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony." The court identifies the following factors as relevant: "(1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act." (Page 2113)


0011-1341 81 $00.50

sentencing judge," limiting the sentences to a maximum of two years' imprisonment for Hamm and a maximum of six months for the others. The record indicates, however, that in the prosecutor's zeal to convict the leaders of the conspiracy, he may have misled at least one defendant into believing that the judge had already agreed to follow these sentencing recommendations.

When the first defendant was brought before the court for sentencing, the trial judge stated that he had not been informed of the modified plea agreement and would not be bound by it. The government then moved to dismiss the indictments against all the defendants under Rule 48(a). The district judge denied the motion, refused to let the defendants withdraw their pleas, and sentenced them to terms of imprisonment.

Rule 48(a) states that a federal prosecutor "may by leave of court file a dismissal of an indictment * * * and the prosecution shall thereupon terminate."

[*Text*] Our determination of the meaning of the "leave of court" requirement is essential to the proper disposition of this appeal. In deciding in what situations that leave can be denied, we must balance the constitutional duty of government prosecutors, as members of the Executive Branch, to "take care that the laws [are] faithfully executed" with the constitutional powers of the federal courts, most particularly the sentencing power of trial judges.

We hold that the "leave of court" requirement of Rule 48(a) is primarily intended to protect the defendant against prosecutorial harassment. The district court may not deny a government motion to dismiss a prosecution, consented to by the defendant, except in those extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest. [*End Text*]

See U.S. v. Cowan. In Rinaldi v. U.S., the Supreme Court held that if the prosecutor's motion to dismiss was not "tainted with impropriety," and was not "motivated by considerations * * * 'clearly contrary to manifest public interest,' " the trial court could not properly deny the prosecutor's motion.

[*Text*] We continue to hold that even when the defendant consents to the motion to dismiss, the trial court, in extremely limited circumstances in extraordinary cases, may deny the motion when the prosecutor's actions clearly indicate a "betrayal of the public interest." U.S. v. Cowan, 524 F.2d at 514. As the Supreme Court indicated in Rinaldi, the trial judge must look to the motivation of the prosecutor at the time of the decision to dismiss. * * * Unless the court finds that the prosecutor is clearly motivated by considerations other than his assessment of the public interest, it must grant the motion to dismiss.

In this case, we find no evidence that the prosecutor was motivated by any considerations other than his evaluation of the public interest. The appellants were the principal government informants and witnesses in the prosecutions of the leaders of a large drug-smuggling conspiracy. The service they provided to the Government greatly exceeded that expected, or required, by the initial plea-bargaining agreement. As a result of their cooperation, the lives of at least two of the appellants were threatened and the prosecutor expressed considerable concern for the appellants' safety in prison. The prosecutor also indicated that the continued cooperation of the appellants would be needed in the prosecution of additional leaders of the drug-smuggling conspiracy. * * * * * *

When it became clear to the United States Attorney that he could not assure the appellants that they would receive favorable sentences, he concluded, after "re-evaluat[ing] the magnitude of the information [given by the appellants] and following actions by unknown persons which created concerns for the safety of the witnesses," that the public interest would best be served by dismissing the indictments against the appellants. It must be emphasized that this is not a case in which the prosecutor entered into any agreement with the appellants to dismiss the charges if the judge did not abide by the sentencing agreement or presented the judge with the alternative of either going along with the sentencing agreement or the prosecutor would dismiss the charges. Nothing to that effect has been said or implied. Instead, this is a case in which the Government, in consideration of the appellants' extraordinary past cooperation, and in order to assure their continued cooperation, to protect their lives and to set a positive example for others who may decide to cooperate, decided that it would best serve the public interest to dismiss the indictments against the appellants. Neither this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest. As long as it is not apparent that the prosecutor was motivated by considerations clearly contrary to the public interest, his motion must be granted. * * *

The district court appears to have placed the burden on the prosecutor to show that dismissal itself would be in the public interest. The language of this court in Cowan and the Supreme Court in Rinaldi makes it clear that the motion should be granted unless the trial court has an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest. As the district judge acknowledged, the prosecutor is the first and presumptively the best judge of where the public interest lies. The trial judge cannot merely substitute his judgment for that of the prosecutor.

We also disagree with the district judge's notion that the public interest can never be served by dismissing an indictment because of the defendants' past cooperation. The decision to dismiss may be the prosecutor's way of letting future conspiracy defendants know of the possible advantages of cooperation with the Government. It may very well be crucial to the prosecutor's credibility in future cases involving informants or defendants who testify in return for lenient treatment. Moreover, as we have explained above, the prosecutor was motivated not only by a desire to reward past cooperation but also by the need to assure the appellants' future cooperation and to protect their lives. [*End Text*]

We need not reach the issue of whether the judge should have permitted the defendants to withdraw their guilty pleas. — Ainsworth, J.

*Concurrence:* It would be intolerable to grant the prosecutor practical power to bargain away the trial court's sentencing discretion in advance, and I recognize that we come perilously close to doing so in the very broad dismissal power that we recognize for the prosecutor. Any calculated or premeditated effort by the prosecutor to usurp the court's power must be brought to nothing. Since I see neither evidence nor finding of such an effort here, however, I concur. — Gee, J.

*Dissent:* The district judge expressly found that the government's motion to dismiss the indictments was "nothing more than a camouflaged attempt to limit the 'sentencing authority reserved to the judge.' " This finding is fully supported by the record. The prosecutor moved to dismiss because he disagreed with the sentences that he anticipated the judge would dispense. In federal courts, the determination of the length of a defendant's sentence is a function reserved to the district judge. Therefore, a dismissal motion inspired by the district judge's refusal to assess the sentence recommended by the prosecution is clearly contrary to manifest public interest and may be denied to protect the sentencing authority reserved to the judge.

The judge, however, should have allowed Butler, Evans, and Washington to withdraw their guilty pleas. These three relied on the prosecutor's statement that the judge had agreed to the recommended sentence. Although the record does not so clearly demonstrate that the two other defendants relied on this statement, the district court should reconsider their motions to withdraw. It is unclear whether, in denying the motions the first time, the judge considered our liberal interpretation of Fed.R.Crim.P. 32(d) in U.S. v. Presley, 478 F.2d 163 (1973). — Reavley, Garza, Politz, and Sam D. Johnson, JJ.

(U.S. v. Hamm; CA5 (former) UnitA (en banc), 10/19/81)

## MENTAL STATE MADE WITNESS UNAVAILABLE SO HER PRIOR TESTIMONY COULD BE USED

*But rape defendant's second trial was flawed by disclosure of presentence report.* ▶ *120.20* ▶ *300.120*

Prior testimony of an alleged rape victim was properly admitted at the retrial of her assailant, the District of

Columbia Court of Appeals holds, under the common-law rule pertaining to "unavailable" witnesses. The victim was rendered "unavailable" for the second trial by her precarious mental condition, which made it dangerous for her to testify.

Only a few cases sanctioning this type of unavailability have been decided. However, the court considers those decisions sound and calls the trial court's action in this case "a reasonable construction of the witness unavailability rule." While not just any "adverse emotional or psychological effects" will excuse a witness from testifying, the expert testimony here showed that the risks faced by this witness were grave.

Nonetheless the defendant's trial was hampered by other errors that require reversal. In particular, the court stresses a violation of the local counterpart of Fed.R.Crim.P. 32, which forbids disclosure of the presentence report in advance of the verdict of guilt. Following the defendant's conviction at his first trial, he admitted to a probation officer that he had had sexual relations with two of the complainants; these admissions, contained in the presentence report, were read to the jury at the second trial. This amounted to a clear violation of the rule, the court says, and the error was extremely prejudicial. (Warren v. U.S., 10/9/81)

*Digest of Opinion:* Upon retrial before a jury after a prior reversal by this court, Davis v. U.S., 367 A2d 1254 (1976), defendant Warren was convicted of kidnapping while armed, rape while armed, and other offenses. Prior to the second trial, the motions judge ruled admissible the prior testimony of Marilyn Reed, one of the complainants, on the ground that she was "psychologically unavailable." Her testimony was presented by having a secretary from the U.S. Attorney's office play the complainant's role. The prosecutor read the questions asked at the first trial and the secretary responded by reading Reed's answers.

The prosecutor's principal argument at trial was the inconsistency between Warren's denial at the first trial of any knowledge of the complaining witnesses and his admission, in a presentence report, to sexual relations with two of the women, whom he alleged consented to those relations. In his defense, Warren argued only the likelihood of misidentification.

Warren argues that Reed was not "unavailable" within the meaning of the common law of his jurisdiction pertaining to admission of prior recorded testimony. See Henson v. U.S., 399 A2d 16, 19 (DC 1979). He argues first that admissibility of her testimony is governed by D.C. Code §14.303. However, that provision treats only the admissibility of former testimony of parties, not of former non-party witnesses.

He also argues that even under a common-law test, the introduction of the testimony was improper. While we are not bound by any statutory limitations, constitutional limitations have been set in Ohio v. Roberts, 448 U.S. 56, 27 CrL 3234 (1980). The constitutional question appears to be at what point, if any, it is no longer reasonable to require the government to produce witnesses at the risk of their psychological health. We need not resolve this question here, but pose it to underscore the inherent flexibility and ambiguity of the constitutional standard and to set the outer boundaries of our task of common-law interpretation.

Professor McCormick lists nine recognized categories of witness unavailability but adds that "[i]n principle probably anything which constitutes unavailabilty in fact ought to be considered adequate." Evidence, §253, at 609-12 (1972). To our knowledge, the type of witness unavailability in issue here has been expressly sanctioned in only two cases, both of which interpreted the meaning of medical unavailability under codified rules of evidence. People v. Gomez, 103 CalRptr 80 (CalApp 1972); People v. Lombardi, 332 NYS2d 749 (AppDiv 1972), aff'd 303 NE2d 705 (1973). In both cases the prior testimony of rape victims was admitted.

The trial judge's reference to these interpretations of out-of-state statutes was a proper means of obtaining guidance in formulating our common law. It is also useful to note Fed.R.Ev. 804(a)(4) and the corresponding Uniform Rule of Evidence, which provide that a declarant is unavailable if he "is unable to be present or to testify at the hearing because of death, or then existing physical or mental illness or infirmity." The mental infirmity part of this definition was applied in U.S. v. Benfield, 593 F2d 815, 25 CrL 2026 (CA8 1979). There a psychiatrist's testimony led the lower court to allow the witness to testify at a videotaped deposition at which defendant's counsel but not defendant would be present. The appellate court did not object to the finding of unavailability, but reversed on the basis of reliability.

[*Text*] In ruling as he did, Chief Judge Green cautiously extended the traditional definition of witness unavailability to include psychological unavailability of the type demonstrated in the case of Marilyn Reed, but to exclude the lesser degree of psychological infirmity demonstrated by Linda Jenkins. After evaluating the testimony of two psychiatrists, one of whom he personally appointed to obtain an independent, second opinion, he excused Reed from testifying because the experts agreed that she "would undergo far greater mental anguish than normally accompanies court appearances of the victims of rapes (and presumably other such crimes as kidnapping, terrorism, and hijacking) and that her appearance in court . . . would be likely to lead to severe psychosis, even possible suicide," [*End Text*]

The evidence supports this finding. Dr. Yochelson testified that Reed suffered from a severe mixed psychoneurosis with particular emphasis on depressive mood, phobic reaction and anxiety. He found that the depth of her depression had reached suicidal levels and that sucidal tendencies were still present. The trauma of another court appearance, he said, would most likely shatter her fragile adaptation to society, possibly leading to permanent psychological injury. The court also appointed an independent psychiatrist who substantially agreed with Dr. Yochelson's assessment of the severity of the injury that would befall Reed were she forced to relive the events of her rape through another court appearance.

[*Text*] The ruling below was not only supported by the evidence, but was also a reasonable construction of the witness unavailability rule. We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional or psychological effects as a result of testifying against their assailants. But in the extreme circumstances presented here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony. The expert testimony relating to Reed's mental health established that there was both a high likelihood of temporary psychological injury, perhaps even psychosis, and a possibility of permanent psychological injury. We also are persuaded of the correctness of the trial court's ruling because of the experts' agreement on the comparative severity of this victim's probable reaction to testifying again. * * * [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.) [*End Text*]

Warren also complains of the fact that the jury was permitted to hear statements made by him to a probation officer. The statements were contained in a presentence report prepared after the first trial and essentially read to the jury by the probation officer.

[*Text*] Superior Ct. Cr. R. 32(b)(1) states in relevant part, that a presentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty, or nolo contendere, or has been found guilty . . ." Our reversal of appellant's convictions from the first trial effectively meant that he had not yet been found guilty at the time Officer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Swepson gave his testimony before the jury at the second trial. Resort to the presentence report was therefore impermissible under Rule 32(b)(1), a restriction which evidently was not considered by the trial court. [*End Text*]

In Gregg v. U.S., 394 U.S. 489 (1969), which interpreted our rule's federal counterpart, the Court said it was clear that the presentence report "must not, under any circumstances, be 'submitted to the court's before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes an error of the clearest kind."

[*Text*] In appellant's case, "error of the clearest kind" has been committed. Statements by appellant in the presentence report were not only heard by the trial judge, but also by the jury. The fact that the report was prepared after the jury's verdict in the first trial is of no import, since that verdict was nullified as to appellant. The report contained information elicited from the appellant concerning the same case for which he was later separately retried. The very nature of a presentence report is directly in conflict with the adversary nature of a trial. Information, quite often prejudicial, is obtained and used in making discretionary decisions about sentencing. The reports are informal documents. Information in them can be based on hearsay or pertain to separate matters having no relation to the crime with which defendant has been charged. Counsel is not present during the interview upon which the report is based. It would be the essence of unfairness to use such information as evidence against the appellant.

The purpose of the sentencing report is to aid in the sentencing process. ' The primary objective of the presentence report is to focus light on the character and personality of the defendant and to discover those factors that underlie commission of the offense and defendant's conduct in general." Note, Presentence Reports, 58 GEO. LJ. 451, 455-56 (1970). This information is essential in making a discretionary decision of sentencing. Allowance of this information as evidence of defendant's guilt would have a chilling effect on the interview.

The evidentiary error committed with respect to allowance of Probation Officer Swepson's testimony must be characterized as highly prejudicial since the sole defense at trial was the unreliability of the complainant's identifications and, implicitly, the lack of connection between appellant and the crimes. The probation report testimony directly conflicted with this theory since it contained admissions by the defendant directly implicating him in two of the offenses. Swepson's testimony effectively removed the issue of identification from the case and left appellant with no credible theory of defense, unless jury could be convinced that appellant's statements to the probation officer were fabricated in hopes of a lenient sentence. This latter theory was unsuccessfully argued to the jury by defense counsel in closing. [*End Text*]

[In a section of the opinion not digested herein, the court also finds error in the admission of prior consistent hearsay statements. —ed.]

The cumulative impact of the errors noted in this case substantially influenced the jury's verdict. Accordingly, a new trial is necessary . —Kelly, J.

(Warren v. U.S.; DC CtApp, 10/9/81)

## ERRORS IN CHOOSING GEORGIA FEDERAL GRAND JURIES HELD INSUBSTANTIAL

*Statutory violations uncovered by defendants are not serious enough to require dismissal*
*►50.10*

Over a period of several years, selection of federal grand juries in the Northern District of Georgia failed to comply with the Jury Selection and Service Act, 28 USC 1861 et seq., the former U.S. Court of Appeals for the Fifth Circuit says. However, the court goes on to hold that none of the violations was "substantial" and that a district court therefore erred in dismissing a number of indictments earlier this year. See U.S. v. Northside Realty Associates, Inc., 510 FSupp 668 [reported sub nom. U.S. v. Alexander, 29 CrL 2202]. The district court's key error was to confuse the "random selection" required by the Act with "statistical randomness."

Rather than select the "starting number" from a drum filled with cards, as she was required to do by the district's Local Plan for implementing the Act, the jury clerk chose numbers from her head or by flipping pages of a book. These methods produced starting numbers that were not "random" in a statistical sense.

But the legislative history of the Act explicitly states that a jury selection system is sufficiently "random" if it prevents impermissible discrimination against individuals or groups, the court points out. No such discrimination has been shown here, and there is almost no possibility of using the clerk's system for discriminatory purposes. With similar reasoning, the court declares that the clerk's failure to post public notices concerning the selection of the starting numbers was not a substantial violation of the Act.

Because of misinterpretations of the Local Plan, the clerk and her assistants erroneously excused, exempted, or disqualified about 500 persons, out of the some 30,000 qualified jurors. This number was insignificant in a quantitative sense, the court says; moreover, the errors did not introduce forbidden subjectivity into the selection process. For the same reasons, the court finds no substantial violation of the Act in the erroneous granting of some 200 permanent excusals from jury service (U.S. v. Bearden, 10/19/81)

*Digest of Opinion:* The government appeals from the dismissal of five of the indictments: those charging antitrust violations by the "real estate" and "garbage case" defendants, and three charging individual defendants with various federal crimes.

The Act seeks to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service. It prescribes a general procedural scheme but provides that the details are to be worked out in the Local Plan adopted by each district. The Plan adopted by the Northern District of Georgia uses voter registration lists to create a master wheel computer tape. Qualified wheels are created for each of the district's four divisions, questionnaires for this purpose are mailed out and, when returned, are screened by the clerk's office.

To select a panel, an "increment" or "quotient" number is calculated by dividing the number of qualified jurors by the number needed. The clerk then selects a "starting number"; the first juror selected is the one whose place on the qualified wheel corresponds to the starting number. Thereafter the computer selects each qualified juror whose position falls one increment number farther down the list. Those selected have an opportunity to seek excusal on the basis of harship or inconvenience.

The Act's timeliness requirement, §1867(a), requires that a motion to dismiss, plus a sworn affidavit, be filed before voir dire begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds for the motion, whichever is earlier. This requirement is to be strictly construed. The real estate defendants' challenges to the selection of the starting number and the failure to post notices do not appear to have been timely filed. A timely motion they filed did assert that there were not enough cards in the drum; but this is not sufficient to cause the violations they uncovered later to relate back to the original motion. Nor does it appear that they exercised diligence in investigating and inquiring about the selection of starting numbers and the posting of notices. However, it may be that they were misled or that infor-


0011-1341/81/$00.50

Patricia E. Aune
P.O. Box 2962 • Palmer, Ak. 99645

December 1, 1981

Representative Ramona L. Barnes
Box 3382 Downtown Station
Anchorage, Alaska 99510

Dear Representative Barnes,

I was pleased to read the newspaper report concerning proposed changes in Alaska's laws on sexual abuse and family violence in the Anchorage Times, October 1981.

I am a strong supporter of court protection for victims of abuse, particularly minors. Abuse is extremely traumatic to the persons involved; the victim, family members, and the accused.

Victims of abuse are apt to suffer permanent emotional and mental damage. The open courtroom can add to the trauma. It is ironic that the juvenile offender is protected more than a juvenile victim. The victim does not need any more punishment.

As these laws are changed, please provide legal protection for the juvenile victim of abuse.

Sincerely,

Pat Aune

Patricia E. Aune

TO: The House Judiciary Committee

FROM: Suzanne Lombardi
Client Service Coordinator
Valley Womens Resource Center

RE: Testimony for House Bills on Sexual Assault and Violent Crime

The Valley Womens Resource Center has been serving victims of sexual assault and domestice violence in the Matanuska-Susitna Borough for the last year. I would like to thank the Judiciary Committee for this opportunity to express our opinions on the follwing bills:

HB 473 Regarding Sexual Assault

We are grateful to see that the Task Force has recognized the serious effects of these crimes and are pleased to see this legislation that will enforce stiffer penalties.

We would like to suggest that along with longer sentences that there be mandated treatment programs as well as funds appropriated for treatment not only within the prison system, but for ouside as well.

We have found that assailants convicted of sexual assault are usually sentenced to time without parole, and therefore, upon release there is not treatment and no hold upon them. As aresult the recidivism rate for this particular crime is extremely high.

HB 572 Domestice Violence/Emergency Injunctive Relief or TRO

We are pleased to see that the breakdown has been recognized between victims being informed of the TRO and the actual carrying through of this process.

At this time we are not sure that more legislation, or more paperwork will solve this gap. The problem in our area seems to be with the original bill. To our knowledge, some women have not been informed of either the Resource Center or the option of filing a TRO.

It is our opinion that more would be accomplished if the original HB 287 was more effectively enforced.

If the victims were made aware of the existence of the Center, and if possible, a call made at the scene of the incident to our advocates, the trained staff would be able t follow through with the action and accompany the person throughout the legal system. This would cut down on police time as well as put the victim in direct contact with the Resource Center for further support systems.

We would emphasize that our situation in the Valley may differ substantially from more inaccessable areas.

CONTINUED OVER →

376-1292

Oct. 26 /1981

My name is Celia Warrior,

And I'm addressing the The House Judiciary Committee on House Bill 473, because I believe it being passed, will go a long way towards reducing the incresing crimes of SEXUAL CRIMES that are on the constant rise in our State of Alaska. Also because of reading the police blotter as of early last spring of 81" I was becoming awaee that these Sex offenders were not being punish, because a day or two later they were right back on the street committing the same offences, usually within a week or two. Looking into this more I found out the reason for all of them being let loose again so soon after they were apprehended that is the fault came to rest on account of the sentencing of these offenders being so lenient.

Research reveals the problems are exactly these!

I. The bails were way too low! They were required to make only 10 % of the bail. I see they have toughened up on bails, because of the newly started Crime Commission back in or arround July somewhere, and thats very good!

2. The Process that the offenders go through after their arrest is such that there is not information or Lack of in--formation on the offenders past records( possibly he, is a repeater) on the Judges desk! by sentencing time! A good solution to that would be to appoint some people to the task of acting as a go between the Police and the Prosecuting Attorneys, This go--between would gather allthe facts about the case, and about the offender, his convictions past records,ect.

3. Fleabargaining" They say it doesn't go on,but it does! Thats getting lighter sentences because of lack of evidence. Get the evidence!

4. Get a jail built, and the sooner the better! they approved of getting one built in a election a couple yrs. and all that needs to be done is to get the bonds sold. A good place place would be Fire Island! Its a military installation , not doing thing! and they couldn't get offof there to easily! Not a recreation like Eagle River!

The problem is that there was 326 cases oth er types of sex crimes, reported other than actual rapes. These are the ones that I m addressing to you now . this include Child enticement, Flashers, and actual assults of the innocents, Children on the most part are not very observant of the persons that do this type of offences or the incidents that surrounded or what led up to the violation against their own , an d after that its very hard to relate what happened to them to a third person. Simply becauss it was a tramatic situtlon for them at the time. and it does stay with them throughout their lives! And a lot of the time its ended up destroying their lives if they don' t have support from their loved ones. Saddest of all is that this happens to the victims , and they are in returned to asshamed to report it to anyone , and they carry it inside where it does irreparable damage to their wellbeing!

These are some of these reported offences published in the Police Blotter! -

of the Anchorage Times , and these occurred since Jan. 1981

Read a few of them, Also read the petition and the events surrounding it. the response from people who signed , and what they felt could resolved the problem!

Also say what this bill could do to prevent these crimes against people , and the one thing that could be ammended on House bill 473.

Page 3 , section 6!

Thank You for listening to me .

Celia Warrior

PTARMIGAN SCHOOL

ANCHORAGE SCHOOL DISTRICT

September 10, 1981

Dear Parents,

The police informed me of the following at 1:55 p.m. today:

1. There was a rape and assult of an elementary age child in the Creekside area yesterday.

2. The suspect was described as follows:

   a. Male
   b. 20 - 30 years old
   c. Shoulder length dirty light brown hair
   d. Wearing jeans, T-shirt and tennis shoes

3. The vehicle was described as follows:

   a. 4 X 4 pickup
   b. Dark red to maroon (solid color)
   c. Decal painting of a sun burst on the front hood
   d. An antenae on top of the cab

Please report any sighting of this person and/or vehicle to the school and/or the police. The police have requested that the license number be recorded and reported if the vehicle is sighted.

Thank you,

Charles R. Booth

Charles R. Booth
Principal, Ptarmigan

NOTE: The teachers have read and explained this flyer to your students.

I wrote an open letter to the school board in aug this year I received one answer to my request. I phoned those running for Board positions - and 3 seemed concerned & wanted to do something about it. The rest were unaware & would check it out. I attended a board meeting early Sept 81 and presented the open letter & a flyer from Creekside Elementary showing the recent serious situation which happened to a student there. The board seemed concerned. I attended a Hazard Committee meeting neither they nor the next board meeting members gave a serious decision on the matter.
Taxes are paid for all Children to attend school. All but those living 1 1/4 miles from School are allowed the option of walking or riding to School. But those in the walking distance have no such option. This is descrimination, against the Walking minority. Where is the money that should be appropriated for buses. There is money for athletic fields swimming pools & School repairs. What price do you put on a child's life? Is our priorities on things or people? It would behoove us to re-consider our priorities and values, up to what is a hazard for children. The Winters are long & dark for our children to walk. and the cold, should also be considered. The Hazard conditions of present are intolerable, when it comes to the safety of children. Busing would provide protection from molestation & rape. Our Children have the right to arrive alive and safe unmolested during their school years. Safe Homes help but they are not the whole answer. Let's do something in addition, ahead of time. We should not have to accept these Hazard conditions as a life style. Protect the Children before crime has a chance. Get busing throughout the city, Consider, as a serious alternative to walking. Protect our school children against these violent sexual crimes consider an amendment to Alaska Statute 14.09.10 The Transportation of pupils. The price the victim has paid is already too high. Their lives are forever changed. There are cases where no matter what rehabilitation measures have been used. that are unable to pick up their life again as before. Their future lives, suffer if they are able to have families, they are often unable to be a [illegible] task. Their self image suffers & those who love them suffer. Many attempt suicide, Some succeed - but for those who live and the [illegible] - and it is never over. The future, for some, could be different [illegible] the School [illegible]

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