

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

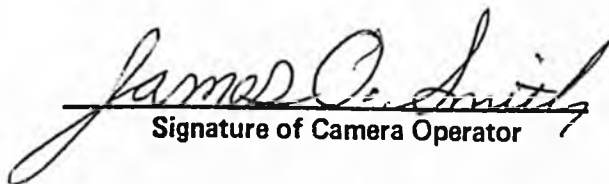
3902 SHES SB 3 778

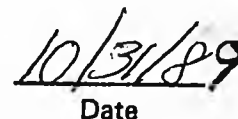


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Senate Health, Education and Social Services Committee

Legislation Checklist

Bill number: SB 3

Sponsor: Kerttula

Date referred to committee:

Synopsis completed: 1/10/85

Fiscal note:

Further referrals:

CONTACTS:

COMMITTEE REPORT
SENATE

FURTHER: JUDICIARY
FINANCE

1/14/85

Date 4-4-85

Mr. President

The Committee on HESS considered SB 3

admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure

and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for SB 3
- new title
- same title and recommends Do Pass
- and attached a "LETTER OF INTENT" NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Edwin Brown

William Stenback

Paul Frank

Butterfly Librentang
Chairman

Do Pass
Chairman recommendation

Introduced: 2/8/85
Referred: Health, Education &
Social Services, Judiciary
and Finance

*Eddie FYI
put in our bill file*

BY HANLEY, RIEGER, PETTYJOHN,
MARTIN, JENKINS, PEARCE,
FURNACE, COLLINS AND RINGSTAD

1 IN THE HOUSE

2 HOUSE BILL NO. 179

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the admissibility of hearsay
7 evidence in grand jury proceedings and amending Rule
8 6(r), Alaska Rules of Criminal Procedure."

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

10 * Section 1. 12.40 is amended by adding a new section to read:

11 Sec. 12.40. HEARSAY EVIDENCE. In a grand jury proceeding,
12 hearsay evidence establishing the offense is admissible whether or not
13 the hearsay evidence would be admissible at trial.

14 * Sec. 2. Section 1 of this Act has the effect of amending Rule 6(r),
15 Alaska Rules of Criminal Procedure, by making hearsay evidence admissible
16 in grand jury proceedings without requiring compelling justification.

TO: Bettye
FM: Edie
RE: SB 3

SB 3 was introduced with the intention of enhancing prosecution of cases involving sexual assault of young children. Because of inherent problems of communication in the very young; and because of the trauma caused by a sexual assault, the ability of the child to "testify"- communicate clearly details of an assault, is very limited.

The proponents of SB 3 believe that by liberalizing the admissibility of hearsay evidence in Grand Jury proceedings, the young victim will be treated more fairly and information required for prosecution will be more available.

The effect of what is required to accomplish these objectives is an amendment to a section of the Alaska Rules of Court, 6(r) of the Criminal Rules. 6(r) deals strictly with the admissibility of evidence. It says "...Hearsay evidence shall not be presented to the grand jury absent compelling justification."

Q1) HEARSAY EVIDENCE IS GENERALLY NOT ACCEPTABLE BECAUSE OF THE QUESTION OF RELIABILITY, TRUTH QUESTIONING, AND CROSS-EXAMINATION. IS THERE A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION?

A1) Circumstances for cross-examination and witness confrontation are not present during Grand Jury proceedings.

Q2) WHAT IS THE DEFINITION OF HEARSAY?

A2) Hearsay evidence is not defined by statute. It is understood by the court to be either a statement from the adult to whom the child recounted the incident, and/or a videotape of the child interviewed either immediately after the alleged incident or interviewed by an individual professionally trained to encourage children to describe such incidents.

Q3) WHAT ARE THE CURRENT LAWS ON VIDEOTAPING?

AS 12.45.047 allows the videotaping of testimony of a child who has been sexually abused. The testimony is presented by the prosecutor and victim before the trial judge. The defendant has a right to be present and have an attorney present and the right to cross examine the victim. The testimony can then be used at the actual trial.

Q4) THE GOVERNOR HAS SUBMITTED LEGISLATION, HOUSE BILL 88, WHICH ALSO PROPOSES TO ALLOW HEARSAY TO BE SUBMITTED AS EVIDENCE IN GRAND JURY DELIBERATIONS FOR CERTAIN SEXUAL OFFENSES AND BY DOING SO, CAUSE A CHANGE IN RULE 6(r). WHAT IS THE DIFFERENCE BETWEEN THE GOVERNOR'S BILL AND THIS BILL?

A4) In SB 3, hearsay evidence would be admissable in Grand Jury, whether or not it is admissable at trial. In the Governor's bill, hearsay evidence is admissable only if the circumstances of the assertion indicate it's reliability and only if the child also testifies at the grand jury proceeding or, if unavailable, has additional evidence to corroborate the assertion.

Q5) IT IS MY UNDERSTANDING THE USE OF VIDEOTAPE FOR SUBMITTING TESTIMONY IS MINIMAL AT BEST. IS THIS TRUE, AND IF SO, WHY?

Q6) HOW WAS THE AGE 16 FACTOR DETERMINED? IS IT APPROPRIATE?

Q7) WHAT ARE THE SEXUAL OFFENSES IN WHICH HEARSAY EVIDENCE WOULD BE ADMISSABLE?

- A3) a. Sexual Assault in the first degree AS 11.41.410
- sexual penetration without consent
- attempt at sexual penetration causing serious physical damage
- b. Sexual Assault in the second degree AS 11.41.420
- sexual contact without consent
-sexual penetration with a person the offender knows that is suffering from a mental disorder or defect
- c. Sexual Abuse of a minor in the first degree AS 11.41.434
-being 16 years of age or older, engaging sexual penetration with someone 13 years or younger
-being 18 years or older and engaging in sexual penetration with someone younger than 18 who is a relation
- d. Sexual Abuse of a minor in the second degree AS 11.41.436
- e. Sexual Abuse of a minor in the third degree AS 11.41.438
-being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, 15 years of age and at least three years younger than the offender.
- f. Sexual Abuse of a minor in the fourth degree AS 11.41.440
being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.
- g. Unlawful exploitation of a minor AS 11.41.455
knowingly inuces or employs a child under 18 years of age to engage in or photographs films or televises a child under 18 years of age engaged in sexual penetration; lewd touching of another person's genitals, anus, or breast; masturbation; bestiality, etc.

Introduced: 1/16/85
Referred: Health, Education & Social
Services, Judiciary and Finance

1 IN THE HOUSE

BY PHILLIPS

2

HOUSE BILL NO. 67

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to hearsay evidence in prosecutions
7 for certain sexual offenses; and amending Rules 803
8 and 804, Alaska Rules of Evidence, and Rule 6(r),
9 Alaska Rules of Criminal Procedure."

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

11 * Section 1. AS 12.40 is amended by adding a new section to read:

12 Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
13 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -
14 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise
15 admissible, made by a child under the age of 10 who is the victim of
16 the offense describing the conduct establishing the offense may be
17 admitted into evidence before the grand jury if

18 (1) the circumstances of the statement indicate its relia-
19 bility; and

20 (2) the child

21 (A) testifies at the grand jury proceeding; or

22 (B) is unavailable as a witness and there is addi-
23 tional evidence introduced to corroborate the statement.

24 (b) In this section,

25 (1) "statement" means an oral or written assertion or
26 nonverbal conduct if the nonverbal conduct is intended as an asser-
27 tion;

28 (2) "unavailable" means the child

29 (A) has a lack of memory of the subject matter of the

1 statement being offered;

2 (B) is unable to attend or testify at the hearing
3 because of death or then existing physical or mental illness or
4 infirmity;

5 (C) is declared incompetent to testify by the judge;
6 or

7 (D) is absent from the hearing and the proponent of
8 the statement has been unable to procure the child's attendance
9 by reasonable means.

10 (c) A child is not unavailable under this section if the un-
11 availability is due to the procurement or wrongdoing of the proponent
12 of the statement to prevent the child from attending or testifying.

13 * Sec. 2. AS 12.45 is amended by adding a new section to read:

14 Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
15 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 -
16 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise
17 admissible, made by a child under the age of 10 who is the victim of
18 the offense describing the conduct establishing the offense may be
19 admitted into evidence at trial if

20 (1) the court determines in a hearing outside the presence
21 of the jury that the circumstances of the statement indicate its
22 reliability;

23 (2) the child

24 (A) testifies at the trial; or

25 (B) is unavailable as a witness and there is addi-
26 tional evidence introduced to corroborate the statement; and

27 (3) the proponent of the statement informs the adverse
28 party of the intention to offer the statement and the contents of the
29 statement sufficiently before the proceedings to give the adverse

1 party a fair opportunity to respond to the statement.

2 (b) In this section,

3 (1) "statement" means an oral or written assertion or
4 nonverbal conduct if the nonverbal conduct is intended as an asser-
5 tion;

6 (2) "unavailable" means the child

7 (A) has a lack of memory of the subject matter of the
8 statement being offered;

9 (B) is unable to attend or testify at the hearing
10 because of death or then existing physical or mental illness or
11 infirmity;

12 (C) is declared incompetent to testify by the judge;
13 or

14 (D) is absent from the hearing and the proponent of
15 the statement has been unable to procure the child's attendance
16 by reasonable means.

17 (c) A child is not unavailable under this section if the un-
18 availability is due to the procurement or wrongdoing of the proponent
19 of the statement to prevent the child from attending or testifying.

20 * Sec. 3. AS 12.40.110, added by sec. 1 of this Act, has the effect of
21 amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain
22 hearsay evidence admissible in grand jury proceedings for certain sexual
23 offenses without requiring compelling justification.

24 * Sec. 4. AS 12.45.049, added by sec. 2 of this Act, has the effect of
25 amending Rules 803 and 804, Alaska Rules of Evidence, by allowing admission
26 at trial of hearsay evidence of certain statements made by certain victims
27 of certain sexual offenses.

1 medical attention.

2 (b) Endangering the welfare of a minor in the second degree is a
3 class A misdemeanor.

4 * Sec. 3. AS 11.61.125(a) is amended to read:

5 (a) A person commits the crime of distribution of child pornog-
6 raphy if the person brings or causes to be brought into the state for
7 sale or distribution, or in the state distributes, sells, or exhibits
8 to others for commercial consideration, or possesses, prepares, pub-
9 lishes, or prints with intent to distribute, sell, or exhibit to
10 others for commercial consideration, any material that visually de-
11 picts conduct described under AS 11.41.455(a), knowing that the pro-
12 duction of the material involved the use of a child under 18 years of
13 age who engaged in the conduct.

14 * Sec. 4. AS 12.10.020(c) is amended to read:

15 (c) Even if the general time limitation has expired, a prose-
16 cution under AS 11.41.410 -- 11.41.460, AS 11.66.110 -- 11.66.130,
17 former AS 11.41.430, or former AS 11.51.130(a)(4), for an offense
18 committed against a person under the age of 16 may be commenced within
19 one year after the crime is reported to a peace officer or the person
20 reaches the age of 16, whichever occurs first. This subsection does
21 not extend the period of limitation by more than five years.

22 * Sec. 5. AS 12.40 is amended by adding a new section to read:

23 Sec. 12.40.055. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL
24 OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 --
25 11.41.460, AS 11.66.110 -- 11.66.130, former AS 11.41.430, or former
26 AS 11.51.130(a)(4), hearsay evidence of a statement relating to the
27 offense, not otherwise admissible, made by a child under the age of 16
28 may be admitted into evidence before the grand jury if

29 (1) the circumstances of the statement indicate its

Introduced: 1/18/85
Referred: Health, Education & Social
Services, Judiciary and Finance

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

2 HOUSE BILL NO. 88

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the protection of children; and
7 amending Rules 504, 505, and 506, Alaska Rules of
8 Evidence, and Rule 6(r), Alaska Rules of Criminal
9 Procedure."

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

11 * Section 1. AS 11.51.100 is amended to read:

12 Sec. 11.51.100. ENDANGERING THE WELFARE OF A MINOR IN THE FIRST
13 DEGREE. (a) A person commits the crime of endangering the welfare of
14 a minor in the first degree if, being a parent, guardian, or other
15 person legally charged with the care of a child under 18 [10] years of
16 age, the person intentionally deserts the child in any place under
17 circumstances creating a substantial risk of physical injury to the
18 child.

19 (b) Endangering the welfare of a minor in the first degree is a
20 class C felony.

21 * Sec. 2. AS 11.51 is amended by adding a new section to read:

22 Sec. 11.51.110. ENDANGERING THE WELFARE OF A MINOR IN THE SECOND
23 DEGREE. (a) A person commits the crime of endangering the welfare of
24 a minor in the second degree if, being entrusted with the care of a
25 child under 13 years of age, the person with criminal negligence

26 (1) exposes the child to circumstances creating a substan-
27 tial risk of physical injury or sexual abuse; or

28 (2) exposes the child to physical injury by failing to
29 provide the child with necessary food, care, clothing, shelter, or

1 reliability; and

2 (2) the child

3 (A) testifies at the grand jury proceeding; or

4 (B) is unavailable as a witness and there is some
5 additional evidence to corroborate the statement.

6 (b) In this section,

7 (1) "statement" means an oral or written assertion or
8 nonverbal conduct if the nonverbal conduct is intended as an asser-
9 tion;

10 (2) "unavailable" means that the child

11 (A) has a lack of memory of the subject matter of the
12 statement being offered;

13 (B) is unable to testify at the proceeding because of
14 death or then existing physical or mental illness or infirmity;

15 (C) is likely to suffer substantial psychological,
16 emotional, or physical harm if required to testify;

17 (D) is declared incompetent to testify by the judge;
18 or

19 (E) is absent from the proceeding and the prosecution
20 has been unable, after reasonable efforts, to procure the child's
21 attendance.

22 * Sec. 6. AS 12.45.045 is amended to read:

23 Sec. 12.45.045. EVIDENCE OF PAST SEXUAL CONDUCT IN TRIALS FOR
24 SEXUAL OFFENSES [OF RAPE AND ASSAULT WITH INTENT TO COMMIT RAPE]. (a)
25 In prosecutions for the crimes [CRIME] of sexual assault in any de-
26 gree, sexual abuse of a minor in any degree, or unlawful exploitation
27 of a minor, or an attempt to commit any of these crimes [SEXUAL AS-
28 SAULT IN ANY DEGREE], evidence of the complaining witness' previous
29 sexual conduct may [SHALL] not be admitted nor reference made to it in

1 the presence of the jury except as provided in this section. When the
2 defendant seeks to admit the evidence for any purpose, the defendant
3 may apply for an order of the court at any time before or during the
4 trial or preliminary hearing. After the application is made, the
5 court shall conduct a hearing in camera to determine the admissibility
6 of the evidence. If the court finds that evidence offered by the
7 defendant regarding the sexual conduct of the complaining witness is
8 relevant, and that the probative value of the evidence offered is not
9 outweighed by the probability that its admission will create undue
10 prejudice, confusion of the issues, or unwarranted invasion of the
11 privacy of the complaining witness, the court shall make an order
12 stating what evidence may be introduced and the nature of the ques-
13 tions which may [SHALL] be permitted. The defendant may then offer
14 evidence under the order of the court.

15 * Sec. 7. AS 12.62.035(a) is amended to read:

16 (a) Notwithstanding any other provision of law, an interested
17 person as defined in (e) of this section may request from the commis-
18 sion records of all convictions for crimes that might pose a risk to a
19 child [INVOLVING CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND ANY
20 SEX CRIMES] of a person who holds or applies for a position in which
21 the person has or would have supervisory or disciplinary power over a
22 minor. The commission shall authorize the disclosure of the informa-
23 tion to the requesting interested person and shall provide a copy of
24 the information to the person who is the subject of the request.

25 * Sec. 8. AS 12.62.035(e)(1) is repealed and reenacted to read:

26 (1) "crime that might pose a risk to a child" includes a
27 violation or attempted violation of present or former Alaska statutes
28 regarding the offenses now designated as murder, manslaughter, negli-
29 gent homicide, assault, reckless endangerment, kidnapping, custodial

Senator reveals sexual abuse

WASHINGTON (AP) — A national conference on the sexual abuse of children opened yesterday morning with the startling disclosure by Sen. Paula Hawkins that she was sexually abused by a 60-year-old neighborhood man when she was 5.

"It affects you for a lifetime," Hawkins said of the molestation, which occurred when her family lived in California.

Equally traumatic, she said, was her ensuing court appearance before a judge who thought she was lying about the incident.

Hawkins, 57, R-Florida, said her disclosure of the childhood episode was unplanned and very difficult. She never had even told her husband. She said she decided it was important to reveal the incident to show that sexual abuse can happen to anyone.

The freshman senator spoke at

the opening session of the Third National Conference on Sexual Victimization of Children, sponsored by the Children's Hospital, National Medical Center.

"I'm lucky, I told my mother," she said, adding that her parents believed her, supported her and helped her avoid lasting problems from the incident.

Hawkins said the elderly neighbor who once reached inside her clothing had attracted children to his home by giving them candy and toys, and offering to baby-sit while their mothers went shopping.

She said the man involved was taken to court after her mother checked with other parents and learned that several neighborhood children had suffered similar abuse.

But when she appeared in court, Hawkins said, "I was embarrassed

and humiliated" because the judge treated her as if she were lying.

The elderly man was released and continued to abuse children, she said.

Now, she said, "when children complain, I believe them."

Hawkins said the court memory is "very vivid . . . how tiny I was and how huge the other people were." The lawyers, she said, were terrible.

"It took me a long time to get over it," she said. "If there is a scar in my mind, it's that we didn't win the case."

Hawkins appeared on a panel of the Senate Children's Caucus headed by Sen. Christopher Dodd, D-Conn., who estimated that an incident of child sexual abuse occurs in the United States about once every two minutes. He said one victim in five is



Sen. Paula Hawkins urges parents to be more explicit in telling children how to handle improper sexual advances.

Senator reveals she was sexually abused as child

From Page A-1
younger than 7.

Most abused children are victims of people they know and trust, such as friends, family members and neighbors, Dodd said. Boys and infants are not exempt.

Keefe McFarlane of the Child Sexual Abuse Diagnostic Center in Los Angeles confirmed Dodd's estimates. She said she knows of cases involving infants only 15 months old, in which diapers were removed to abuse the child.

Judge Reggie Walton of the District of Columbia Superior Court agreed with Hawkins' comments about her court appearance as a child.

"It is a traumatic experience for a child to come into a courtroom before a group of strangers and testify about something they probably consider humiliating and dirty," Walton said.

Hawkins urged parents to listen to their children and to warn them in explicit terms about wrong behavior, shunning vague talk about "improper hugs."

"The delicateness of the subject is for a bygone era, the Victorian era," she said. "You have to directly tell a child. 'If a man holds you in his

arms and puts his hands in your panties, that's wrong.'

"That's all that happened to me. I told my mother, I didn't understand why this man put his hands in my panties."

McFarlane said that simply warning children to say "no" isn't enough. "I know of hundreds of cases of children who said 'no,' who begged 'no,' and it didn't help," she said.

Court procedures providing a confrontation with the accuser are designed for adults, said McFarlane, and they cause special problems for children who may be facing a teacher or neighbor.

She explained that children must be convinced that parents are aware that sexual abuse can happen and that they can confide in their parents without losing their love.

"If they (children) have never heard about it from us and the first

time they hear about these things is someone tricking them, or threatening them," the children don't know how to respond, McFarlane said.

She cautioned, "Do not underestimate the extremes to which people will go to silence children."

Hawkins, one of two woman senators, was born in Salt Lake City, Utah. She and her husband, businessman Walter Hawkins, reside in Winter Park, Fla. They have three children.

Elected in 1980 to the seat formerly held by Sen. Richard Stone, D-Fla., Hawkins is viewed as a conservative on some social and economic issues.

She describes herself as a housewife and has long been interested in legislation to protect and help children. In 1982, she pushed a measure through Congress that set up a nationwide system for locating missing children.

(12)

FROM: ATTORNEY GENERAL'S

TASK
FORCE ON
VIOLENCE
SEPT. 1984

Recommendations for Prosecutors

ence victims do not first seek help
nt. Rather, they obtain formal pro-
he courts in an effort to temporarily
iolence and harassment from the
ny of these orders are issued by civil
ation is a civil offense not subject
sider the matter to be one in which
ntervene. By their inaction, law en-
re unintentionally eroding the pro-
secured from the court and possibly
scalation of violence.

pal objective of the protection order
harm, law enforcement personnel
enforce the intent of the order.
on of the order is usually a civil of-
olve criminal behavior. The existence
rder often gives the officer a basis
o file charges for trespass, disturb-
r appropriate criminal offense. The
rest then in turn becomes the basis
lose a contempt order or other ap-
n the abuser.

ith prosecutors and judges, law en-
should develop special policies for
ropriate enforcement of all protection
olicies have been articulated, com-
f law enforcement supervisors, of-
ers must be initiated, followed by
ing to ensure that the policies are
Education and Training Recom-

1. Prosecutors should organize special units to process family violence cases and wherever possible should use vertical prosecution.
 - The units should work closely with victim assistance providers.
 - The units should review all law enforcement reports involving incidents of family violence whenever possible.
2. The victim should not be required to sign a formal complaint against the abuser before the prosecutor files charges, unless mandated by state law.
3. Whenever possible, prosecutors should not require family violence victims to testify at the preliminary hearing.
4. Prosecutors should adopt special policies and procedures for child victims. These should include:
 - Presenting hearsay evidence at preliminary hearings so the child is not required to testify in person;
 - Presenting, with consent of counsel, the child's trial testimony on videotape;
 - Use of anatomically correct dolls and drawings to describe abuse; and
 - Limiting continuances to an absolute minimum.
5. If the defendant does not remain in custody and when it is consistent with the needs of the victim, the prosecutor should request the judge to issue an order restricting the defendant's access to the victim as a condition of setting bail or releasing the assailant on his own recognizance. If the condition is violated, swift and sure enforcement of the order and revocation of release are required.

Recommendation 5:
protection orders should be available
at all sheriffs' offices.

Recommendation 4.

Recommendation 6:
disturbance calls, law enforcement
ment violations of pre-trial release
rt should verify the facts and cir-
ry for the prosecutor to request
lease.

Recommendation 8.

Discussion

Prosecutors Recommendation 1:
Prosecutors should organize special units to process fam-
ily violence cases and wherever possible should use ver-
tical prosecution.

- The units should work closely with victim assistance providers.

The units should review all law enforcement reports involving incidents of family violence whenever possible.

He's a very good liar. He looks very sincere. He promises anything you want to hear. He promises that he will do anything, lots of tears and, 'I'm so sorry, and I love these children, I would never do it again . . .' You want to believe that it's just a mistake, but it's not a mistake.—a victim

The beatings started gradually and escalated over the fifteen year period we lived together. First [they] were accidents, then something I deserved or provoked.—a victim

Because family violence involves offenses inflicted not only against the individual but against the state as well, prosecution is a critical element of intervention. Prosecutors can play a key role in holding abusers accountable for their actions and at the same time help to prevent future violence. But without special units successful prosecution of family violence cases is rare. At each successive stage in the justice system, the number of active cases drops dramatically.¹⁹

The trauma and aftermath of violence within the family has a profound and significant effect upon both the abuser and victim. Too often abusers deny, minimize or excuse their violent behavior. Even after the most violent and destructive episodes, abusers typically go through a period of remorse seeking reconciliation and forgiveness. Unfortunately, repentance is generally shortlived. Without some type of intervention, the violence commonly escalates in frequency and intensity.

In addition to suffering physical injuries inflicted by the abuser, victims of family violence often blame themselves for the abuse. Guilt, shame and embarrassment make them reluctant to seek help and increases their feelings of isolation and hopelessness. Because violence is often learned behavior, many victims may even regard violence as a normal part of a relationship.

Fear of further violence, particularly fear of reprisals from an abuser who is angered by the steps the victim has taken for protection, often makes the victim hesitant to participate in the criminal justice system. Economic or emotional dependence, promises of change from the abuser, or a fear that the family might separate also contributes to a victim's reluctance to cooperate with criminal proceedings.

Prosecutors must recognize that these special concerns of family violence victims need not make them unwilling or uncooperative complainants and witnesses. Rather, prosecutors must approach cases of family violence from a fresh perspective and be flexible and sensitive in dealing with the emotional complexities of these cases. To most effectively build upon police intervention, prosecutors should organize special units to process family violence cases.²⁰

Staffed with both attorneys and victim assistance professionals or volunteers, the unit should review all law enforcement reports involving incidents of family violence whenever possible (See Law Enforcement Recommendation 1). Not all cases will be appropriate for prosecution. However, in all cases, victim assistance personnel can provide important referral information to both the victim and abuser. Sources of treatment and counseling are particularly important for families working to resolve the underlying causes of abuse and break the cycle of violence. Prevention of future violence is definitely the goal. Referrals also can be made for housing, medical services, financial aid and other sources of emergency assistance.

In cases that do go forward, the victim assistance professionals and volunteers can provide important advice and support to the victims as well as the prosecutors. In addition to making referrals to service and treatment resources in the community, victim assistance personnel can familiarize the victim with the criminal justice process and ensure victim participation in every stage of the court proceeding. The companionship and reassurance of the victim assistance professionals and volunteers also can help the victim to deal with harassment or intimidation by the abuser and to prevent further victimization. Victim assistance personnel also can help to facilitate convenient court dates, arrange transportation to court proceedings, ensure that the victim has a secure place to wait before testifying, and intercede with employers or creditors of the victim. Working closely to support the victim, victim assistance professionals and volunteers also can aid the prosecutor by increasing victim understanding and cooperation.

The attorneys of the unit develop an expertise in dealing with family violence that results in more accurate case evaluation and more effective prosecution. The creation of a special unit also fosters the development of an individual bond of trust and concern between the victim and a prosecutor sensitive to the complexities of family violence.

Prosecutors Recommendation 2:

The victim should not be required to sign a formal complaint against the abuser before the prosecutor files charges, unless mandated by state law.

Vertical prosecution develops trust between the victim and the prosecutor. An individual relationship of trust and concern that both minimizes the negative aspects of the legal process and also strengthens the case.— Prosecuting Attorney Norm Maleng

The fact is that more cases end up not being prosecuted because the victim... decides to fold his tent. This fact of life has to be dealt with and the advocate program is our way of doing that.—District Attorney Sam Millsap

As a prosecutor, I have seen relief on a woman's face, relief when I have said, 'I am sorry, I am not waiving'... it works, it really does work.—Prosecutor "Sam" Aaron

When there is sufficient evidence of criminal conduct to file charges against the abuser, the prosecutor should not first require the victim to sign a formal complaint.²¹ Requiring the victim to do so makes it appear that the victim is responsible for charging the abuser. Given that impression, the defendant will often harass, threaten or otherwise attempt to intimidate the victim into dropping the complaint. The prosecutor must relieve the victim of this pressure by filing charges without requiring the victim to sign the formal complaint. It is the prosecutor, on behalf of the state, and not the victim, who initiates prosecution when the elements of criminal conduct have been determined. The prosecutor and the judge, not the victim, determine whether the case is prosecuted or dismissed.

Anyone who has worked in this area has experienced situations when the victim does not want to go forward. That desire is manifested in several situations.

A witness simply may fail to appear even though subpoenaed. Such a failure may reflect the witness' desire to no longer see the case proceed, but it also may be the result of intimidation or actual injury. It is incumbent on the prosecutor to investigate the case.

Another situation arises when the victim voices a desire to have the matter dropped. As has been discussed, these victims are frequently ambivalent about the entire process and what would best suit their needs.

Some hesitation may be fear of the unknown. But when victims actually find themselves in court presented with the opportunity to testify, they frequently become confident enough to do so.

If victims absolutely refuse to testify, the prosecutor should still require that they make a statement under oath to the court to that effect.

In appropriate cases, it may be possible to proceed by basing prosecution on prior inconsistent statements of the victim or other witnesses to the crime. Such a decision is not lightly undertaken but the prosecutor might feel a given case is of sufficient seriousness to merit this approach.

Prosecutors Recommendation 3:

Whenever possible, prosecutors should not require family violence victims to testify at the preliminary hearing.

Testifying in court against another family member or loved one can be a very painful experience. As unpleasant as it may be to discuss the family situation and history of abuse in open court in front of strangers, it is even more disturbing to do so in the presence of the abusive family member. The preliminary hearing is one proceeding at which it should not be necessary for the victim to testify in person. At this initial examination of the evidence to consider whether there is a sufficient basis for prosecution, there is no federal constitutional right to confrontation as there is at trial.

The sufficiency of hearsay evidence at a preliminary hearing is firmly established in the federal courts as well as a number of local jurisdictions. For the purposes of the preliminary hearing, the testimony of the law enforcement officer, or investigator or other appropriate witness, that initially interviewed the victim, should be sufficient. The victim of family violence is spared the harassment and intimidation caused by repeated unnecessary appearances, continuances, and confrontations with the abuser.

Prosecutors Recommendation 4:

Prosecutors should adopt special policies and procedures for child victims. These should include:

- Presenting hearsay evidence at preliminary hearings so the child is not required to testify in person;
- Presenting, with consent of counsel, the child's trial testimony on videotape;
- Use of anatomically correct dolls and drawings to describe abuse; and
- Limiting continuances to an absolute minimum.

Children who have been abused or sexually molested have suffered an extreme trauma. Successful case prosecution requires sensitive treatment of these children to ensure that they are not further victimized in the courtroom. Special procedures will also result in the child being a more articulate and effective witness.

The special needs of the child must be considered from the initial investigative interview through case

Appropriate consideration of the victim results in better cooperation with law enforcement, helps restore confidence and will, therefore, make the system work more effectively. This really is the bedrock, improving the confidence in our criminal justice system.—Attorney General Kenneth Eikenberry

These children do not suffer from the trauma, usually of one sudden, frightening attack, but in most cases were subjected to an abusive and secret relationship over a period of months, or years.—Doris Stevens

development and prosecution, and imposition of sentence. Task Force testimony cited many instances where children were put through numerous and grueling interviews, repeated continuances and painful questioning in the courtroom.²² Rather than giving the child the respect and compassion needed, these procedures reduce the child to an automaton, caught in the adult drama of the courtroom.

To enable children to more easily and effectively relate the abuse they have suffered, prosecutors should adopt special procedures for child abuse and molestation cases.

At the preliminary hearing the court considers only whether the evidence is sufficient to go forward with prosecution. The prosecutor should not require the child to testify in person. Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. If the state rules of procedure do not provide for such presentation, the prosecuting offices should work with concerned citizen groups and lawmakers to modify the rules of procedure to make such a presentation possible (See Judges Recommendation 3).

The child's videotaped testimony also may be sufficient for use at trial with the consent of counsel and appropriate waivers and stipulations from the defendant (See Judges Recommendation 3). While it may appear that the defense may not consent to such a procedure, the defense runs a tremendous risk by insisting on the appearance of the child victim and subjecting a sympathetic victim to cross examination. Thus it may be in the interest of both parties, and certainly in the interest of the child, to allow for the presentation of testimony on videotape.

In interviewing the child, it is particularly important that the prosecutor recognize the profound impact that crimes of abuse and molestation have on a child. Interviews and statements required for trial preparation should be kept to a minimum. The initial interview with the child should be videotaped to avoid repeated sessions of questioning. The prosecutor also should use anatomically correct dolls or drawings to help the child describe the abuse.²³

Repeated continuances can be extremely damaging to a child. It is important for a child to be able to put the incident behind him and get on with his life. Certainly parents may be reluctant to permit their child to continue in a system fraught with unnecessary delay. Delay also

can weaken the prosecution's case as the child's memory of the crime may diminish. Prosecutors should vigorously oppose any attempt to delay cases involving child victims and should absolutely minimize continuances.

Prosecutors Recommendation 5:

If the defendant does not remain in custody and when it is consistent with the needs of the victim, the prosecutor should request the judge to issue an order restricting the defendant's access to the victim as a condition of setting bail or releasing the assailant on his own recognizance. If the condition is violated, swift and sure enforcement of the order and revocation of release are required.

See Judges Recommendation 8.

Recommendations for Judges

1. A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, judges should carefully review and consider the consequences of the crime on the victim.

2. Judges should treat incest and molestation as serious criminal offenses.

3. Judges should adopt special court rules and procedures for child victims. These should include:

- The use of hearsay evidence at preliminary hearings;
- Appointment of a special volunteer advocate for children, when appropriate;
- A presumption that children are competent to testify;
- Allowing the child's trial testimony to be presented on videotape with agreement of counsel;
- Flexible courtroom settings and procedures; and
- Carefully managed press coverage.

4. Protection orders should be available on an emergency basis in family violence cases.

5. Judges should establish guidelines for expeditious handling of family violence cases.

6. Judges should admit hearsay statements of family violence victims at the preliminary hearing.

I feel that being a victim of the criminal is terrible enough, but when you're then . . . a victim at the hands of the justice system, it is a travesty.—a victim

She was asked exact times and dates, which she told them she could not remember. She was then made to feel that because she could not remember, she was lying.—a victim's mother

7. Expert witnesses should be allowed to testify in family violence cases to familiarize the judge and jury with the dynamics of violence within the family.

8. In granting bail or releasing the assailant on his own recognizance, the judge should impose conditions that restrict the defendant's access to the victim and strictly enforce the order.

Discussion

Judges Recommendation 1:

A wide range of dispositional alternatives should be considered in cases of family violence. In all cases, prior to sentencing, judges should carefully review and consider the consequences of the crime on the victim.

Just as the courtroom is the ultimate focus of the criminal justice system, the imposition of a just sentence is the desired culmination of any criminal judicial proceeding. The sanction rendered is not only punishment for the offender but also an indication of the seriousness of the criminal conduct and a method of providing protection and support to the victim. Too often, in family violence cases, the sentence fails on all three counts.

The criminal justice system has traditionally considered family violence to be a personal matter that should be resolved without resort to the legal process. Placing the family, ideally a source of unity and support, into the adversarial setting of a courtroom seemed unthinkable and inappropriate. However, the testimony of hundreds of family violence victims demonstrates that judges and judicial proceedings are critical components necessary to end the violence and restore the vitality of families caught in the abusive cycle.²⁴

In all cases when the victim has suffered serious injury, the convicted abuser should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition. In serious incidents of violence, incarceration is the punishment necessary to hold the abuser accountable for his crime. It also clearly signals the seriousness with which the offense is viewed by the community and provides secure protection to the victim.

In many instances, the victim simply wants an end to the violence. Particularly when financially dependent on

the abuser, the victim, fearing incarceration of the person who is the sole source of economic support, is reluctant to seek the aid of the court. In these and other appropriate cases, judges should use a variety of sentencing and incarceration alternatives.

When some type of confinement is essential, judges may sentence abusers to weekend or evening incarceration. Such sentences punish the abuser yet still allow him to continue to work and provide financial support to his family. Judges also should use other creative types of sentences that include no-contact orders or work furloughs that hold the abuser accountable for his crime and yet permit continued economic support to the family.

When appropriate, other alternatives should be used. With criminal charges and formal courtroom proceedings pending, pre-trial diversion requires an abuser to participate in a treatment or counseling program. Components of court-mandated treatment programs should include instruction in anger management and non-violent conflict resolution. Upon successful completion of the treatment program and any other conditions of diversion, the trial is indefinitely postponed.

Pre-sentence diversion, while allowing conditional release, requires a convicted abuser to participate in the same kind of treatment program. As in pre-trial diversion, sentencing and possible incarceration are indefinitely delayed upon successful completion of treatment and any other diversion condition. In either type of diversion, failure to participate in or successfully complete treatment should result in immediate resumption of prosecution or sentencing.

Making the abusers accountable for their conduct includes financial responsibilities. In addition to contributing to the cost of their own treatment, abusers should also, when appropriate, provide restitution to the victim for expenses incurred as a result of the violence. Judges should order the abuser to reimburse the victim for all expenses resulting from the crime. These should include lost wages, medical, counseling and other treatment fees, and replacement value of any property destroyed by the abuser. In the event that a judge does not issue such an order, he should specifically state his reasoning for not doing so in the record. In many cases, members of the family, other than the direct victim, are affected by the abuse. This is particularly applicable to children who have witnessed spouse abuse or the

We should attempt to look at the crime they have committed, the length and extent of their abuse of a child, and that should be the determining factor on what happens to them, not lots of extraneous factors.—Jennifer James, Radio and Television Commentator

I think that . . . when we venture too far away from notions of accountability and punishment and too far into a straight treatment modality with no components of punitive sanctions, that we allow offenders to look at themselves as 'sick' and therefore somehow less accountable for their actions than other people.—Prosecutor Rebecca Roe

The physical abuse escalated during the marriage in frequency and seriousness over time and so did my feelings of guilt, of shame about it, of dependence on the relationship and a desperate desire to be a better person so he would not beat me.—a victim

innocent parent in cases of incest. Their treatment fees also should be paid by the abuser.

As noted by the President's Task Force on Victims of Crime, only the victims can truly convey the consequences of the crime they have suffered. It is especially important in family violence cases that judges consider victim impact statements prior to sentencing. In the calm of the courtroom, weeks or months after the abuse, with obvious physical injuries healed, violence within the family may seem very far removed. But for the victim, the physical and emotional scars, to say nothing of the financial burden, continue. Judges must carefully weigh these very painful and long-lasting effects of abuse in rendering a punishment that is commensurate with the injury.

Judges and the sentences they impose can strongly reinforce the message that violence is a serious criminal matter for which the abuser will be held accountable. Judges should not underestimate their ability to influence the defendant's behavior. Even a stern admonition from the bench can help to deter the defendant from future violence.²⁵ In serious cases, incarceration is the only punishment that fits the crime. In other cases judges should carefully consider the impact of the abuse and the punishment on not only the victim and the abuser, but the entire family. Using innovative and creative sentences that include an effective treatment provision for the abuser, judges play a significant role in ending the present abuse and help to break the tragic cycle of violence.

Judges Recommendation 2:

Judges should treat incest and molestation as serious criminal offenses.

Because incest and child molestation are such heinous and reprehensible offenses, many in the community continue to minimize or deny the existence of the problem. The very children and parents whose lives are shattered by these horrible crimes may conceal or deny their unthinkable victimization. Even the criminal justice system, confronted with these crimes, wants to believe they are the result of mistakes or misunderstandings. This disbelief not only compounds the unjust guilt and blame suffered by the child, but also allows the offender to continue to prey on children with impunity.

The judge represents the law to individual offenders who are brought into court. The judge's attitude, statements and actions can communicate to an abuser that their violence is cruel, it is cruel and criminal behavior which will not be tolerated by our society.—Judge Roy O. Gulley

Believe what kids say. If a child says something. . . I think you need to pay attention to that.—a victim

Judges must take the lead in exploding the myths surrounding the sexual assault of children and treat incest and molestation as serious criminal offenses. Children rarely ever lie about sexual abuse. However, false retractions of true complaints may be common where children are pressured not to testify against a relative or friend. While a child might not suffer obvious physical injury, the deep emotional and psychological scars may never heal. The child's youth and innocence are marred by a crime whose name they do not even know.

Yet the perpetrator is most often someone the child does know, or even loves and trusts. Just as the children who are victims of sexual assault come from every social and economic level, so too, do the offenders. In fact, the incest perpetrator or child molester may well be a respected, prominent member of the community. Although the perpetrators may be dangerously violent or use other means of intimidation or threats of harm to sexually assault children, other molesters never use force. Rather, they seduce children into sexual activity with trickery and deception.

Task Force testimony suggests that incest offenders may act with motivations far different than other child molesters and may in some instances be amenable to treatment.²⁶ However, the molester, a stranger or an unrelated, trusted adult, who sexually assaults a child is rarely, if ever, susceptible to treatment.²⁷ Moreover, the despicable sexual preference for children is a conscious choice that escalates in frequency throughout the pedophile's life. Judges must hold these offenders accountable for their contemptible behavior by imposing sentences commensurate with the devastating harm suffered by the child. Incarceration, whether in hospitals, treatment centers or prisons, is absolutely essential to the protection of the nation's children. The only true protection for children from a pedophile is incapacitation of the offender.

Judges Recommendation 3:

Judges should adopt special court rules and procedures for child victims. These should include:

- The use of hearsay evidence at preliminary hearings;
- Appointment of a special volunteer advocate for children when appropriate;
- A presumption that children are competent to testify;

Contrary to lingering myths, the pedophile child molester is neither a strong man nor a dirty old man in a wrinkled raincoat with a bag of candy. He typically knows his victims. . . He dresses and looks like everyone else.—FBI Special Agent Kenneth Lanning

From my own experience. . . once it is out in the open within the family that the incest is happening. . . the person doing the abusing isn't likely to continue because everybody knows then. You can't get away with it.—a victim

[The sex offender] needs to be policed for the rest of his life.—a victim

There is no known cure for pedophilia. Pedophilia. . . is a way of life.—Det. Lloyd Martin

- Allowing the child's trial testimony to be presented on videotape with agreement of counsel;
- Flexible courtroom settings and procedures; and
- Carefully managed press coverage.

Testifying in court can be an overwhelming and extremely trying experience for any victim of crime. The ordeal can be even more devastating for victims of family violence who must publicly reveal the humiliating and embarrassing details of abuse. Children are especially vulnerable in the courtroom. They typically feel they are somehow to blame for their victimization. Repeating and reliving the abuse through direct testimony and vigorous cross-examination further compounds their guilt and confusion. They become the pivotal players in an unfolding adult drama they cannot understand. The initial trauma inflicted upon the very young must not recur in the courtroom. Judges should adopt special rules and procedures that enable these victims to more comfortably and effectively communicate the harm they have suffered.

The preliminary hearing is not a trial. It is the initial judicial examination of the facts and circumstances of the case where the court determines only whether the evidence is sufficient to continue with further prosecution. Children should not be required to testify in person (See Prosecutors Recommendation 4). Videotaped statements or other hearsay testimony made to an appropriate official should be sufficient.

For all court hearings and proceedings, judges should consider assigning a specially trained, volunteer advocate to represent the interests of the child. In addition, the volunteer may complete an independent investigation of the case, separate and apart from those conducted by the court or protective services. Concentrating on one child's case, the volunteer will have sufficient time to research the facts of the case.²⁸ The volunteer also can facilitate communication among all elements of the system working on the case, whether it be the court, protective services, foster care, school system or health facilities, to ensure that the child receives the proper care and services.

Young children have traditionally been deemed incompetent to testify in any court proceeding because they are believed to be unable to distinguish right from wrong, fact from fantasy. Because the victim is often the only

witness to the crime, a child's testimony may be critical to the prosecution of the case. Children, regardless of their age, should be presumed to be competent to testify in court. A child's testimony should be allowed into evidence with credibility being determined by the jury. The jury should be carefully instructed not to hold the child to adult standards of credibility, but to consider the testimony in light of the child's age, maturity, and level of development.

To lessen the victim's trauma of testifying in court, innovative methods must be explored. For instance, testimony could be videotaped in a therapeutic atmosphere, for presentation at trial with stipulation by the parties to both procedure and identification (See Prosecutors Recommendation 3). The questioning could be done by an objective therapist in a relaxed setting with one-way mirrors. The defendant could observe the questioning but the child would not be required to actually see the defendant. The person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and the defense attorney to be presented in a nonthreatening manner.²⁹

The Task Force recognizes that these are substantial changes in procedure but modification of this nature may be requisite. Situations occur where time and again cases go unprosecuted because children are too frightened to testify before strangers and because parents refuse to subject them to such an ordeal. To reach a point at which these cases can be prosecuted and children can be protected, procedures must be devised which both safeguard the rights of the accused and shield these children from further harm.

When the child does appear at trial, the formal setting and procedures of the courtroom can be terrifying. The intimidation may be mitigated greatly by special care. Prior to testimony, the judge should take the child into chambers, introduce the attorneys and explain how the proceedings will be conducted. When testifying, the child should be allowed to use a smaller version of the adult witness chair or sit at a table with the judge and attorneys. The child also should be allowed to use drawings or anatomically correct dolls to describe the victimization if appropriate. Language that children can understand must be used for all questions. Prior videotaping of testimony must be used whenever possible (See Prosecutors Recommendation 4).

*... the protection of children, as far as I am concerned, is as important a right. And I believe that videotaping children's testimony is extremely important, especially in the tender years.—Jeanine Pirro
District Attorney*

My daughter had been abused not only by her father but by a criminal justice system entangled in it's own ambiguities.—a victim

*The inability of young sexual assault victims to testify as effectively as adults and to confront their perpetrators result in failure to provide justice for them in many cases.—Dr.
Bruce Woodling*

Court proceedings involving a child victim or witness must not become a media event. When a youngster is a juvenile offender, his name is withheld and the court proceedings are closed to the public. At a minimum, the same considerations should be given to the child victim.

Judges Recommendation 4:

Protection orders should be available on an emergency basis in family violence cases.

Family violence is not a nine-to-five, Monday through Friday only, occurrence. In fact, family violence most often occurs after regular business hours and on weekends and holidays.³⁰ To provide effective protection, courts must be readily accessible to family violence victims. Protection orders should be available on an emergency basis, 24-hours a day.

The protection order, usually a civil order, is granted by a judge based on his independent review of the facts and a finding that the abuser poses a serious threat of intimidation, harassment or physical harm to the victim. For a limited period of time, the order restricts the abuser's access or contact with the victim. Family members who have the misfortune to suffer injury, threats or other abuse from another family member after hours should not have to wait until the start of the next judicial day to obtain a protection order. Neither should the order be costly or require the assistance of an attorney.

Simple forms for obtaining the order and directions for filling them out should be available at the courtroom, all police stations and sheriffs' offices (See Law Enforcement Recommendation 5). Victims could pick up the forms and instructions at the courthouse during business hours and at the police station or sheriff's office at all other times. Victims should then complete the form providing all pertinent and necessary information about the abuser, the danger of further harm or injury and the relief requested. The duty judge or night judge would then review the application and render a decision in much the same way he considers after-hours requests for bail or search warrants.

Judges Recommendation 5:

Judges should establish guidelines for expeditious handling of family violence cases.

Judges are the ultimate legal authority in the criminal justice system. If they fail to handle family violence cases with the appropriate judicial concern, the crime is trivialized and the victim receives no real protection or justice. Using the yardstick of the court to measure conduct, the attacker will perceive the crime as an insignificant offense. Consequently, he has no incentive to modify his behavior and continues to abuse with impunity. The investment in law enforcement services, shelter support and other victim assistance is wasted if the judiciary is not firm and supportive.

Family violence is a complex criminal offense that has the seriousness of stranger-to-stranger crime but involves a victim and perpetrator who know and care for one another and usually live in the same house. The victim is a reluctant, fearful witness faced with equally undesirable alternatives: testifying against the abuser, which may lead to his incarceration and the loss of the sole source of economic support, or hedging the testimony, which may jeopardize the conviction and allow the abuser to continue the violence.

Judges must recognize this enormous personal conflict faced by the victims of family violence who so often simply want an end to the abuse. They should develop guidelines to expedite the processing of these cases and provide the protection necessary to the victim. Further, to ensure that family violence cases receive the appropriate judicial consideration, judges should establish special dockets so that these matters do not compete with other criminal cases.³¹

Judges Recommendation 6:

Judges should admit hearsay statements of family violence victims at the preliminary hearing.

See Prosecutors Recommendations 3 and 4.

Judges Recommendation 7:

Expert witnesses should be allowed to testify in family violence cases to familiarize the judge and jury with the dynamics of violence within the family.

Of all the crimes that the legal system deals with, family violence is perhaps the most perplexing and

*As we ready ourselves for the holiday celebrations, battered women's shelters throughout the U.S. are readying themselves for their busiest time of the year. More women will seek help during this holiday season than any other time of the year.—
Donna Medley, Service Provider*

My sister asked what the record number of postponements on a case such as this was. The clerk said that he remembered one case was delayed twelve times. . . . She then said 'Well, I guess he will have to kill me before this comes to trial.' We were postponed again that day to July 14, 1983—on that day we buried my sister.—a victim's sister

misunderstood. It seems unthinkable that one family member would violently abuse another. Judges and jurors too often assume that the victim could simply leave home if the attacks were truly threatening or dangerous. Further, many believe the courts are an unsuitable forum for family violence cases. That members of the same family should participate on opposite sides of an adversarial proceeding seems disturbingly incongruous.

But intervention by the criminal justice system, particularly the courts, can provide the real and necessary protection for the victim and the appropriate sanctions and deterrents for the abuser. To effectively accomplish both these objectives, the judge and the jury must have a clear understanding of the dynamics and complexities of family violence. Expert testimony from qualified authorities is essential to acquire that insight.

Many judges now permit authorities to testify on the battered child syndrome.³² A few judges are beginning to allow expert testimony on the battered spouse syndrome.³³ Courts should, when appropriate, admit into evidence testimony on the battered child and spouse syndromes. In addition, courts should allow testimony explaining the characteristics and effects of child sexual assault and elder abuse. Judges and jurors will gain an explicit understanding of the shame, guilt, fear, and embarrassment associated with family violence. Cognizant of the cyclical nature of violence within the family, the emotional, economic, and psychological dependencies between the victim and abuser, and the other fundamental aspects of abuse, they will be better able to understand the victim's actions. Judges can develop effective remedies and render appropriate sanctions.

Judges Recommendation 8:

In granting bail or releasing the assailant on his own recognizance, the judge should impose conditions that restrict the defendant's access to the victim and strictly enforce the order.

An important reason for intervention and arrest of the perpetrator is to provide safety for the victim. But unconditional release from custody may endanger the victim and allow the defendant to inflict further harm.

At arraignment, the defendant may have reasonable bail set or be released on his own recognizance. In

I feel a person who is the abuser should be taken out of the home, not the one who's being abused.—a victim

granting pre-trial release, the judge should impose conditions or terms that restrict the offender's access to the victim. The conditions imposed should prohibit the defendant from making any contact, personal or otherwise, with the victim. If the parties were living together, the conditions should require the defendant, not the victim, to stay away from the home. These conditions preserve the defendant's right to release but at the same time consider and provide for the victim's safety. With these restrictions imposed, the victim will not have to initiate a separate proceeding to obtain a civil protection order.

In addition to ordering the restrictions, the judge should verbally warn the offender that abuse is a criminal matter for which serious sanctions may be imposed. The judge should caution the abuser that release does not mean he is free to continue to harm or intimidate the victim. The judge should further inform the abuser that violation of the conditions will result in revocation of release. This judicial admonition sends a strong message to the abuser that he is accountable for his actions and that the victim has the support and protection of the criminal justice system. But the judicial admonition is for naught if the judge does not enforce the order.

I also make it very clear that society will not tolerate this sort of behavior and that if he does not follow through with the counseling, if he does not continue the no contact order, whatever, the court will respond quickly, issue a warrant, have him brought immediately forth and off he will go to jail.—Judge Barbara T. Yanick

OPINION

Harold F. GREENWAY, Appellant,
 v.
 STATE of Alaska, Appellee.
 No. 4754.
 Supreme Court of Alaska.
 Nov. 7, 1980.

Before RABINOWITZ, C. J., CONNOR,
 BURKE and MATTHEWS, JJ., and DI-
 MOND, Senior Justice.

PER CURIAM.

Defendant was convicted in the Superi-
 or Court, Fourth Judicial District, Warren
 W. Taylor, J., of rape, and he appealed.
 The Supreme Court held that testimony of
 rape victim's mother and her school counsel-
 or concerning victim's complaint of rape
 was admissible.

Harold Greenway was convicted of rap-
 ing his thirteen year old stepdaughter. The
 rape occurred in July, 1978, on the banks of
 the Yukon River, near Greenway's summer
 fish camp. According to the victim, Green-
 way threatened to kill her if she told any-
 one about the rape and, as a result, she told
 no one other than her mother¹ until Sep-
 tember, when she reported the rape to her
 school counselor. At trial the State, over
 Greenway's objections, presented testimony
 by the victim's mother and her school coun-
 selor concerning her complaints of rape.
 Greenway now contends that the trial
 court's failure to exclude this testimony as
 inadmissible hearsay constituted reversible
 error.²

Affirmed.

Matthews, J., filed concurring opinion
 in which Rabinowitz, C. J., concurred.

The State contends that the statements
 in question were admissible under the spe-
 cial hearsay exception concerning com-
 plaints of the victim in sex crimes. We find
 this argument persuasive.

1. Rape \Leftarrow 48(1)

Testimony of rape victim's mother and
 her school counselor concerning victim's
 complaint of rape was admissible under spe-
 cial hearsay exception concerning com-
 plaints of victims in sex crimes.

[1,2] We recognized this exception in
Torres v. State, 519 P.2d 788, 793 n.9 (Alas-
 ka 1974):

2. Rape \Leftarrow 48(2)

Testimony from either victim or wit-
 nesses pertaining to details of victim's com-
 plaint is generally not admissible in crimi-
 nal prosecution.

[A]s Wharton points out, statements con-
 cerning the crime of rape or sexual as-
 sault, shortly after the commission of the
 act are admissible as a recognized excep-
 tion to the hearsay rule:

Dick L. Madson, Cowper & Madson, Fair-
 banks, for appellant.

Natalie K. Finn, Asst. Dist. Atty., Harry
 L. Davis, Dist. Atty., Fairbanks, Avrum M.
 Gross, Atty. Gen., Juneau, for appellee.

In a prosecution for a sex crime, such
 as rape or assault with intent to rape, it
 social worker but again denied admitted knowl-
 edge of the rape prior to her daughter's report
 to the school counselor.

1. There is conflicting testimony as to whether
 or not the victim actually told her mother of
 the rape. The victim testified that she told her
 mother of the rape about three days after the
 incident but the mother interpreted this conver-
 sation differently and denied that she knew of
 the rape until after the victim told her school
 counselor in September. A social worker also
 testified that she and the mother had discussed
 the victim's rape and that the mother had indi-
 cated that her daughter had told her of the rape
 shortly after the incident. The mother admit-
 ted to having several conversations with the

2. Appellant also claims as error the admission
 of the testimony of the victim that she had told
 her mother, best friend, social service worker
 and her school counselor about the rape. How-
 ever, no objection was made to this testimony
 and, in fact, the appellant agreed that it should
 be admissible. Therefore, this claim of error
 was waived.

tive to fabricate which antedated the rape there was also a specific event which could have supplied a motive to fabricate which occurred after the victim complained of the rape to her mother but before she complained of the rape to the school counselor.

Where there are several events which supply a motive to fabricate, evidence of a statement consistent with the declarant's testimony which was made before the latest event, but after the others, may be admitted:

Otherwise, it would never be proper to rehabilitate a witness by proof of prior consistent statements in cases where numerous impeaching circumstances were shown to exist at the time of the trial but where there may be found a theoretical possibility that the witness might have been motivated by one of them at the time of making the prior consistent statement. . . . The principle involved is that where the circumstances are such as to leave it reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.

United States v. Grunewald, 233 F.2d 556, 566 (2nd Cir. 1956), rev'd on other grounds, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

Applying this rule to this case, the victim's complaint to her mother was admissible under the recent fabrication exception.



Walter John DALE, Appellant,
v.
STATE of Alaska, Appellee.
No. 4506.
Supreme Court of Alaska.
Nov. 7, 1980.

Defendant was convicted, on guilty plea, before the Superior Court, Third Judi-

cial District, Anchorage, Victor D. Carlson, J., of five counts of sale of cocaine and was sentenced to five concurrent five-year terms, and he appealed. The Supreme Court, Matthews, J., held that: (1) even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, and (2) trial judge was shown to have considered the possibility of defendant British citizen's deportation when sentence was determined, and judge's failure to articulate the role which such factor played in his decision was not error.

Affirmed.

Rabinowitz, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1177

In proceeding in which defendant pled guilty to five counts of sale of cocaine, even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as a middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, in view of the substantial, uncontradicted evidence suggesting that defendant was a "professional" cocaine dealer. AS 17.10.010.

2. Drugs and Narcotics ⇐133

On appeal from proceeding in which defendant British citizen pled guilty to five counts of sale of cocaine and was sentenced to five concurrent five-year terms, trial judge was shown to have considered the possibility of defendant's deportation when sentence was determined; judge's failure to articulate the role which such factor played

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may be shown by testimony of the prosecutrix or by that of some other witness, that the prosecutrix made complaint of the crime shortly after its commission. Such evidence tends obviously to indicate the truth of the charge and is corroborative thereof; conversely, evidence of the failure to make a prompt complaint casts doubt upon the truth of the claim that a crime had been committed.

2 F. Wharton, Criminal Evidence § 313, at 113-114 (13th ed. Charles E. Torcia 1972) (footnotes omitted).

See also 4 J. Wigmore, Evidence §§ 1134-36 (Chadbourn rev. ed. 1972) (discussing at length the justifications behind the exception). It is true that, other than the disputed complaint made to her mother approximately three days after the incident, the victim here did not complain of the rape until September, over a month after its commission. However, her delay is both explained and excused by Greenway's threats against her and her young age. See, e. g., *Hunt v. State*, 213 So.2d 664 (Ala.App.), cert. denied, 213 So.2d 666 (Ala. 1968) (delay of nine months does not bar admission of testimony, in light of, *inter alia*, defendant's threats to kill victim); *State v. Twyford*, 85 S.D. 522, 186 N.W.2d 545 (1971) (delay of over two months not reason to exclude testimony, since victim was only twelve years old).³ We therefore

3. We realize that the list of hearsay exceptions found in our present Rule 803, Alaska R. Evid., does not include this exception. This omission, however, was more in the nature of an oversight on our part, and not a repudiation of *Torres*; we shall refer the question of whether the rules should be amended to include the exceptions noted in *Torres* to our standing committee on the Evidence Rules. In any event, Evidence Rule 803 was not in effect at the time of Greenway's trial, and so does not govern this appeal.

4. We find no merit to appellant's argument that the victim's testimony went beyond the "fact of the complaint" limitation which is part of the special hearsay exception concerning complaints of the victim in sex crimes. Appellant argues that it was error to allow the victim to testify that she had mentioned the location of the event and, impliedly, the perpetrator, to third persons. Testimony from either the victim or witnesses pertaining to "detail" of the victim's complaint is generally not admissible.

conclude that the trial judge did not err in admitting the testimony of the rape victim's mother and her school counselor concerning her complaint of rape.⁴

The conviction is AFFIRMED.

MATTHEWS, J., with whom RABINOWITZ, C. J., joins, concurs.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I agree with the Per Curiam opinion. Moreover, I believe that the questioned evidence was properly admitted under the recent fabrication exception¹ to the common law rule prohibiting the admission of prior consistent statements, for the following reasons.

Defense counsel in this case elicited testimony that the victim was generally unhappy living with her mother and stepfather before the rape, and that thereafter, in early September, her mother and stepfather were in a violent fight involving a gun during which the victim and her younger sister were forced to flee to a neighbor's house and the police were called. It was just a few days after this incident that the victim complained of the rape to her school counselor, which resulted in her being taken from the home of her mother and stepfather. Thus, while there was a general mo-

See generally 4 J. Wigmore, Evidence § 1136, at 306 (Chadbourn rev. ed. 1972). However, in her testimony the victim did not, in fact, state anything about the rape or the name of the perpetrator in her complaints to third persons. The victim's testimony was only to the effect that she had told third persons of the rape. She gave no details pertaining to her complaints and nothing else in the record indicates that either the victim or the witnesses gave such testimony.

1. This exception has been codified in the Alaska Rules of Evidence as Rule 801(d)(1)(B). It provides:

A statement is not hearsay if

(1) The declarant testifies at the trial or hearing and the statement is ...

(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or moth ...

should be modified to take into account the Sixth Amendment's fair cross-section requirement, the U.S. District Court for the Eastern District of New York rules. Addressing in particular the discriminatory use of peremptory jury challenges, the court adopts the procedure used by California courts to determine when a prima facie case of discrimination has been established. (*McCray v. Abrams*, 12/19/83)

Swain essentially held that the use of peremptory challenges in a particular case could not be scrutinized unless a statistical showing of repeated discriminatory use of such challenges was presented. However, the court points out, the fact that most voir dices are not recorded creates insurmountable difficulties for application of the Swain test. The Supreme Court has acknowledged as much, the court says; in denying certiorari when the case at bar was on direct appeal from the state courts, five Justices indicated that the time for reconsideration of Swain might be near. 51 LW 3855 (1983).

Thus, the district court reexamines Swain in light of this black habeas petitioner's claim that a New York state prosecutor improperly used her peremptories to produce an all-white jury. The Supreme Court's decisions in Sixth Amendment cases decided since 1965 have cut away at Swain's integrity, the court asserts. Those cases establish that a state defendant is entitled to a jury selected from a fair cross-section of the community and prohibit racial discrimination in the selection process. Moreover, Swain's warning that an inquiry into the prosecution's motives for employing its challenges "would establish a rule wholly at odds with the peremptory challenge system" has also been eroded by later case law.

The court decides to adopt a procedure used by the California courts. Under this approach the presumption that peremptory challenges are being used in a constitutional manner may be rebutted by a prima facie showing of discrimination. This is done by establishing that the excluded jurors are members of a cognizable group and that a strong likelihood exists that they were dismissed because of their association with that group. At this point the burden shifts to the other party to show that the challenges were exercised for reasons relevant to the trial and not due to any bias. (Page 2369)

Mishandling Of Benefit Claim Gives Rise To Damages Action Under ERISA

A lawsuit alleging that an employer processed an employee's claim for disability benefits in an arbitrary and untimely manner gives the U.S. Court of Appeals for the Ninth Circuit occasion to issue several rulings interpreting the Employee Retirement Income Security Act. Most importantly, the court holds that while ERISA preempts a claim that the employer's conduct violated state law, such conduct gives rise to a damages action against the employer under ERISA for breach of

fiduciary duty. (*Russell v. Massachusetts Mutual Life Ins. Co.*, 12/16/83)

The preemption issue does not detain the court long, as ERISA's broad preemption language was designed to establish national uniformity in regulating ERISA-covered benefit plans. The tougher issue is whether ERISA provides the employee with an action against the employer. The district court thought not. The Ninth Circuit, however, finds that ERISA regulates fiduciary conduct not only in the management of plan assets, but also in the handling and disposition of claims. A fiduciary's failure to act on a benefit claim "promptly" and within the period specified by regulation constitutes a breach of fiduciary duty, the court concludes.

The court next determines, contrary to the district court, that compensatory damages need not be limited to a plan participant's loss of benefits. ERISA empowers a court to award any "equitable or remedial relief as [it] may deem appropriate" for a breach of fiduciary duty. The court says such relief should be calculated to make an injured employee whole and thus should account for all losses proximately caused by the breach. Finally, although courts are divided on the issue, the Ninth Circuit decides that punitive damages are recoverable under ERISA as long as there is a showing that the fiduciary acted with "actual malice" or "wanton indifference." (Page 2375)

Child Abuse Victim's Statement To Doctor, Naming Abuser, Is Admissible

In an effort to address "the most pernicious social element which afflicts our society," the Wyoming Supreme Court decides that the statements made by a four-year-old child abuse victim who identified her abuser to medical personnel during her medical examination are admissible in evidence under an exception to the hearsay rule for statements "reasonably pertinent to medical diagnosis or treatment." (*Goldade v. Wyoming*, 12/12/83)

At the child abuse trial of the child's mother, the girl was unable to answer questions and was ruled an incompetent witness. The critical testimony at trial came from the hospital's medical personnel, who asked the girl how she had gotten her injuries.

Although Wyoming's Rule of Evidence 803 provides that statements reasonably pertinent to medical diagnosis or treatment are not excluded by the hearsay rule, statements attributing fault usually are not admissible. The court, however, notes the responsibility, imposed by Wyoming's child abuse statutes upon physicians, to immediately report child abuse to child protection agencies or local law enforcement agencies. Physicians are required to ascertain whether a child victim's injuries were accidental or deliberate, and they are empowered to take the child into temporary protective custody if there is imminent danger to the child's life or safety. Absent information as to the identity of any assailant,

the court reasons, "this latter decision cannot be made in a rational way."

A liberal interpretation of the medical diagnosis exception to the hearsay rule, when applied to child abuse cases, is only "a logical extension" of the court's minimal standard of proof policy in child homicide cases, the court concludes. Given the physician's duty and his professional responsibility to determine whether child abuse syndrome was present, the statements were pertinent to his diagnosis and treatment, the court says. (Page 2372)

U.S. May Be Liable For Murder Of Serviceman By Fellow Soldier

The doctrine of *Feres v. U.S.*, 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit against the government for injuries to military personnel arising in the "course of activity incident to service." Despite the continuing viability of this rule, the U.S. Court of Appeals for the Third Circuit allows the mother of a murdered Army private to proceed with her claim against the government. She maintains that her son's death resulted from the negligence of his military superiors in failing to discharge or warn of the dangerous propensities of the murderer, a fellow serviceman who had just served a military prison sentence for a previous murder. (*Shearer v. U.S.*, 12/19/83)

The court observes that, generally, an off-duty serviceman not on the military base or engaged in military activity at the time he suffers an injury through the government's negligence can recover under the FTCA. In this case, the decedent was on leave in another state when he was kidnapped at gunpoint and shot by his fellow serviceman. The court says the district court, which dismissed the suit on the basis of *Feres*, erred by focusing on the status and activity of the fellow serviceman's allegedly negligent superior officers, rather than on the status and activity of the injured party.

The government also sought dismissal of the action under the FTCA's exception for any claim arising out of an assault and battery by a government employee. But the court says the intentional tort exception to FTCA liability does not necessarily bar a negligence action, even though the injury is directly caused by an assault and battery. An FTCA claim may proceed, it says, as long as the plaintiff alleges sufficient facts that, if proven, would demonstrate that the government should have reasonably anticipated that its employee would commit an intentional tort. (Page 2365)

Consent Decree Doesn't Bar Separate Title VII Suit By Nonparty Employees

An issue that has troubled various courts is the extent to which *res judicata* and collateral estoppel principles preclude a nonparty from attacking the legality of a consent decree. The U.S. Court of Appeals for the

Eleventh Circuit now indicates that a consent decree settling employment discrimination charges and incorporating affirmative action remedies would not preclude a lawsuit by nonparty employees alleging that the decree violates their rights under Title VII of the 1964 Civil Rights Act. (*U.S. v. Jefferson County*, 12/12/83)

The consent decree at issue contained affirmative hiring and promotion remedies for black employees in certain public service jobs. Just as the district court was about to approve the settlement, white firefighters sought to intervene, claiming that the decree would result in reverse discrimination. The district court denied their motion to intervene as untimely and the white firefighters appealed.

The Eleventh Circuit observes that in deciding whether to deny intervention on timeliness grounds a court must consider the extent to which denial would prejudice the would-be intervenor. That inquiry in turn involves determining the extent to which the final judgment or consent decree might bind the would-be intervenor.

The court decries those decisions indicating that any action having a burden upon a consent decree constitutes an "impermissible collateral attack" on the decree. A consent decree may be attacked, it says, "to the extent that it deprives a nonparty to the decree of his day in court to assert a violation of his civil rights." Assuming that a court hearing any future Title VII suit by the white firefighters would consider their claims carefully, the court says the district court did not abuse its discretion in finding that the white firefighters would not be prejudiced by denial of intervention. (Page 2370)

CA 7 Determines Proper Filing Time For Equal Access To Justice Act Fees

Under the Equal Access to Justice Act, a prevailing party must apply for attorney's fees "within 30 days of final judgment in the action." According to the U.S. Court of Appeals for the Seventh Circuit, "final judgment" does not refer to the district court's judgment, but rather to the completion of all appellate proceedings. (*McDonald v. Schweiker*, 12/12/83)

While requiring a fee application to be filed within 30 days of the district court's judgment would allow the application to be acted on in time for any appeal from the fee award to be consolidated with the appeal from the judgment—thus effecting a judicial economy at the court of appeals level—there is no indication that Congress was worried about the burdens the EAJA might place on the appellate courts. Moreover, the court finds, the EAJA allows a prevailing party in appropriate cases to obtain fees for time spent litigating an appeal as well as for time spent in the district court. Thus, if "final judgment" meant the district court's judgment, an application for fees on appeal would have to be filed before the amount of those fees was known.

Additionally, requiring a claimant to apply for fees

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

9A.44.070 Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

9A.44.080 Statutory rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

9A.44.090 Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

9A.44.100 Indecent liberties. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

9A.44.110 Communication with a minor for immoral purposes. Any person who communicates with a child

[Title 9A RCW—p 14]

under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: *RCW 9.79.130 was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.98.010(212).

9A.44.120 Admissibility of child's statement—Conditions. A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. [1982 c 129 § 2.]

Severability—1982 c 129: See note following RCW 9A.04.080.

9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. RCW 9.79.140, 9.79.150, 9.79.160, 9.79.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

9A.44.901 Construction—Sections decodified and added to this chapter. The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

9A.44.902 Effective date—1979 ex.s. c 244. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. If the court determines that the interests of justice so require, the party calling an expert appointed under this rule may cross-examine the witness.

(b) Disclosure of appointment. In the exercise of its discretion, the court may disclose to the jury the fact that the court appointed the expert witness.

(c) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII

Hearsay

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if

(1) Prior statement by witness. The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with his testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

(B) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

(C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E)

a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

RULE 803. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove his present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general char-

acter of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of record. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the

matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of truthworthiness.

(8) Public records and reports. (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

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(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, codes, standards, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied

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upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment as to personal, family, or general history, or boundaries. A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(23) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of truthworthiness, in the court deter-

mines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

RULE 804. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, his attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in the civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim

by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A)

A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of truthworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in

advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

*Police
medical
reports*

ARTICLE IX

Documentary Evidence

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissi-

intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony. [1975 1st ex.s. c 260 § 9A.40.030.]

9A.40.040 Unlawful imprisonment. (1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony. [1975 1st ex.s. c 260 § 9A.40.040.]

9A.40.050 Custodial interference. (1) A person is guilty of custodial interference if, knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

(2) Custodial interference is a gross misdemeanor. [1975 1st ex.s. c 260 § 9A.40.050.]

Chapter 9A.44 SEXUAL OFFENSES

Sections	Definitions.
9A.44.010	Definitions.
9A.44.020	Testimony—Evidence—Written motion — Admissibility.
9A.44.030	Defenses to prosecution under this chapter
9A.44.040	Rape in the first degree.
9A.44.045	Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984.
9A.44.050	Rape in the second degree.
9A.44.060	Rape in the third degree.
9A.44.070	Statutory rape in the first degree.
9A.44.080	Statutory rape in the second degree.
9A.44.090	Statutory rape in the third degree.
9A.44.100	Indecent liberties.
9A.44.110	Communication with a minor for immoral purposes.
9A.44.120	Admissibility of child's statement — Conditions.
9A.44.900	Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter.
9A.44.901	Construction—Sections decodified and added to this chapter.
9A.44.902	Effective date—1979 ex.s. c 244.

Council on child abuse and neglect: Chapter 43.121 RCW.

Witnesses: Rules of court: ER 601 through 615.

9A.44.010 Definitions. As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same

or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(3) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

(4) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

(5) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped;

(6) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse. [1981 c 123 § 1; 1975 1st ex.s. c 14 § 1. Formerly RCW 9.79.140.]

9A.44.020 Testimony—Evidence—Written motion—Admissibility. (1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the

defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence. [1975 1st ex.s. c 14 § 2. Formerly RCW 9.79.150.]

9A.44.030 Defenses to prosecution under this chapter. (1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: *Provided*, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be older based upon declarations as to age by the alleged victim. [1975 1st ex.s. c 14 § 3. Formerly RCW 9.79.160.]

9A.44.040 Rape in the first degree. (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

- (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
- (b) Kidnaps the victim; or
- (c) Inflicts serious physical injury; or
- (d) Feloniously enters into the building or vehicle where the victim is situated.

(2) Rape in the first degree is a class A felony. [1983 c 118 § 1; 1983 c 73 § 1; 1982 c 192 § 11; 1982 c 10 § 3. Prior: (1) 1981 c 137 § 36; 1979 ex.s. c 244 § 1; 1975 1st ex.s. c 247 § 1; 1975 1st ex.s. c 14 § 4. (2) 1981 c 136 § 57, repealed by 1982 c 10 § 18. Formerly RCW 9.79.170.]

Reviser's note: This section was amended by 1983 c 73 § 1 and 1983 c 118 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability—1983 c 73: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 73 § 2.]

Severability—1982 c 10: See note following RCW 6.12.100.

Severability—1981 c 137: See RCW 9.94A.910.

Effective date—1981 c 136: See RCW 72.09.900.

9A.44.045 Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984. No person convicted of rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility: *Provided*, That every person convicted of rape in the first degree shall be confined for a minimum of three years: *Provided further*, That the board of prison terms and paroles shall have authority to set a period of confinement greater than three years but shall never reduce the minimum three-year period of confinement; nor shall the board release the convicted person during the first three years of confinement as a result of any type of good time calculation; nor shall the department of corrections permit the convicted person to participate in any work release program or furlough program during the first three years of confinement. This section applies only to offenses committed prior to July 1, 1984. [1982 c 192 § 12.]

9A.44.050 Rape in the second degree. (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion; or
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

(2) Rape in the second degree is a class B felony. [1983 c 118 § 2; 1979 ex.s. c 244 § 2; 1975 1st ex.s. c 14 § 5. Formerly RCW 9.79.180.]

9A.44.060 Rape in the third degree. (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

9A.44.070 Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

9A.44.080 Statutory rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

9A.44.090 Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

9A.44.100 Indecent liberties. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

9A.44.110 Communication with a minor for immoral purposes. Any person who communicates with a child

under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: "RCW 9.79.130" was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.98.010(212).

9A.44.120 Admissibility of child's statement—Conditions. A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. [1982 c 129 § 2.]

Severability—1982 c 129: See note following RCW 9A.04.080.

9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. RCW 9.79.140, 9.79.150, 9.79.160, 9.79.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

9A.44.901 Construction—Sections decodified and added to this chapter. The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

9A.44.902 Effective date—1979 ex.s. c 244. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 3
 Title: Admissability of Hearsay Evidence
 Sponsor: Sen. Kerttula
 Requestor: Sen. HESS
 Date of Request: 1-23-85

FISCAL DETAIL

Agency Affected: Public Safety
 Program Category Affected: Administration of Justice
 BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger Phone: 465-4338
 Division: Administrative Services Date: 1-23-85

Approved by Commissioner: *[Signature]* Date: 1/23/85
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

SB 3
Fiscal Note Attachment
01/23/85

No additional costs are directly associated with passage of this legislation. However, it should be noted that the Governor's Requested CIP budget contains a \$59,700 Sexual Assault Investigation Equipment Purchase project. This project was submitted in anticipation of passage of this type legislation.

The project involves the purchase of video taping equipment to record interviews with victims. This equipment would be located in the eleven Alaska State Troopers posts throughout the state.

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER

SB 3

"An Act relating to admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure."

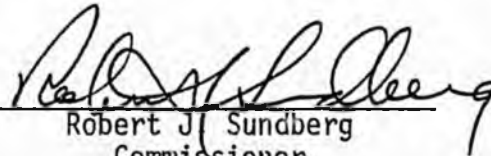
The Council on Domestic Violence and Sexual Assault supports the allowance of hearsay evidence in grand jury proceedings for child sexual assault cases. Many victims of child sexual assault are too young to withstand the rigors of the proceedings or to be effective witnesses. Yet their disclosure of sexual assault to police officers and other individuals in less threatening circumstances should be available for consideration. Children often block out their very negative experiences and cannot remember specifics of the experience, particularly under pressure. These children deserve the protection of the criminal justice system as much as older, more articulate individuals.

The U.S. Attorney General's Task Force on Family Violence, which heard testimony in six U.S. cities, reviewed state statutes and researched issues, has recommended that hearsay evidence be allowed in preliminary hearings so the child is not required to testify repeatedly. To quote the Task Force Report:

"To enable children to more easily and effectively relate the abuse they have suffered, prosecutors should adopt special procedures for child abuse and molestation cases.

At the preliminary hearing the court considers only whether the evidence is sufficient to go forward with prosecution. The prosecutor should not require the child to testify in person. Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. If the state rules of procedure do not provide for such presentation, the prosecuting offices should work with concerned citizen groups and lawmakers to modify the rules of procedure to make such a presentation possible."

Three bills (SB 3, HB 88 [Section 5] and HB 67) which allow the admittance of hearsay evidence in grand juries have been introduced this session. The Council does not have the legal expertise to determine the most effective bill. However, the Council is strongly committed to the passage of a bill that provides for the admittance of hearsay evidence in grand jury proceedings to protect the child.


Robert J. Sundberg
Commissioner
Department of Public Safety

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - SB 3

SUPPORT

January 23, 1985

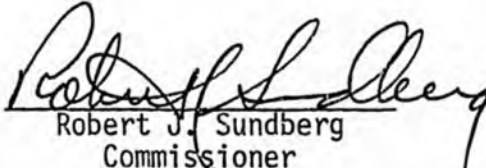
Alaska State Troopers

SB3 - "An Act relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending rule 6(R), Alaska Rules of Criminal Procedure."

This Bill will allow the use of hearsay evidence from sexually abused children in grand jury proceedings. It is an attempt to shield victims from additional emotional trauma.

Senate Bill 3 will allow an individual trained in child abuse cases who has interviewed the victim to testify in his or her place or it will allow the submission of a video tape of the interview. Courtroom atmosphere often inhibits and intimidates the young victims - particularly one who may be discussing a sexual encounter with a parent or relative.

This legislation will not result in abuse of the grand jury system and only addresses cases of sexual abuse of minors. Although the admittance of hearsay evidence is not traditional in grand jury proceedings in Alaska cases of this type warrant an exception to protect the victims.


Robert J. Sundberg
Commissioner

Children and the Courts

"He touched me with his peanut," the 12-year-old girl told a St. Paul, Minn., jury. "What's a peanut?" asked prosecuting attorney Kathleen Gearin. Then she handed the frightened child, who is retarded, two anatomically correct dolls and gently asked her to explain. Weeping, the child used the dolls to graphically demonstrate a sexual act. The shock in the courtroom was audible. "I thought the jury was going to jump over the rail and attack the defendant," Gearin said. Instead, the jurors convicted

Children are being seen, heard and believed in cases that previously were consigned to the closet. And jurists are trying to make the experience less traumatic.



the child's stepfather on two felony counts—and the judge sentenced him to 42 months in jail.

There was a time when a sexually abused child who complained to the police had only one thing to look forward to: another rape in the courtroom. But for many youngsters, in many courts, that is no longer true. Children are being seen, heard and believed in cases that previously were consigned to the closet. "The trend," says University of Nebraska Prof. Gary Melton, "is to let the testimony of children in and to be fairly liberal in the procedure."

Children have been permitted to testify under Anglo-American law at least since 1779, provided that they satisfied a judge

that they both knew the difference between the truth and lies and could express what they had seen. What's different about the current situation is that judges are not only permitting more kids to get their day in court, but their claims are being taken seriously. Judges have learned that often there is no correlation between age and honesty, and, with the zeal of all converts, have tried to make their courtrooms more inviting places for children. Properly handled, some experts believe that the experience

can be helpful for the child. Says San Francisco counselor Julie Robbins, who has tracked 400 cases, "I see court as a necessary step for abused kids—it's cathartic."

Show and Tell: In Massachusetts, judges bring in pint-size witness chairs so youngsters' feet won't dangle. In Maryland, children who have trouble speaking may draw what happened. In Minnesota, a child frozen with fear was permitted to testify from under the prosecutor's table. And from Manhattan Beach, Calif., to Brooklyn, N.Y., children in court use dolls to describe crimes whose names they don't know. "We have to quit pretending that kids have to testify like adults," says Kathleen Morris, a prosecutor in Minnesota. "If all they

can do is show, that should be enough."

Can children be believed? "We have a very long intellectual tradition that discredits the testimony of women and children when they complain of sexual assault," says Harvard Medical School psychiatrist Judith Herman. False charges are rare, she insists. "More commonly there are false retractions of true complaints" after a child gives in to family pressure not to testify against an abusive relative. Child advocates won't deny that children invent tales sometimes. But attorney David Lloyd of Washington's Children's Hospital has a simple test: listen for details the child would not know if he or she had not witnessed sexual conduct. As Minneapolis psychologist Michael O'Brien says, "Children just don't fantasize about Daddy going pee-pee in their mouth."

Evidence: Technically, in most states, the victim's testimony alone is enough to win a conviction, but in practice prosecutors prefer to have more evidence. Only Nebraska and the District of Columbia still require independent corroboration to prove sexual abuse. Two weeks ago, New York finally repealed that requirement—and none too soon, prosecutors say. "It was heartbreaking," recalls New York County sex-crimes chief Linda Fairstein. "The kids would come in, tell their stories, and there was nothing we could do."

Judges and juries tend to be most suspicious of abuse charges that are part of a divorce or custody fight. "It's not that children are vicious," says New York lawyer Norman Reimer, "but they're used as pawns." Judges and juries recognize that possibility, and as a result may overlook serious abuses, says Washington, D.C., psychologist-lawyer Donald Bersoff—especially given the mix-and-match nature of the modern family. Bersoff urges judges to look for "specific physical and psychologi-

cal reactions" that abused children show.

Defending an alleged abuser is not child's play. A defense attorney who rips into a young witness may irreparably hurt his client. "That approach doesn't have much jury appeal," says San Francisco Judge Robert Dossee. Most defenders assert that the assault never happened and confine their cross-examination to just enough questions to point out inconsistencies or lapses in a child's memory—a tactic that is particularly effective if the child has been testifying for a long time. And there is good reason to give the defense considerable latitude. "Nobody wants to victimize the victim again," says Houston Judge Ted Poe. "But we can't allow emotion to take over, either. Just the stigma of being charged is so great that the defense must have a real chance."

Frustration: In fact, the odds still favor the molester. Most cases still go unreported. Most complaints never lead to charges. Most charges are reduced in plea bargains. Those that survive can drag on for years. Ft. Lauderdale prosecutor Carl Weinberg quit his job after 18 months because he couldn't stand the frustrations any longer. "I can think back on maybe two or three cases in which I really helped the child," he recalls. "It's a futile battle that tears your heart out."

Several states are now trying out reforms to ease a few of the problems. In Texas, victims' statements are videotaped early in investigations and can even be introduced at trial—so long as the child is available for cross-examination. In Colorado, courts are experimenting with funneling lawyers' questions through a friendly therapist. In Washington and Colorado, state laws permit a counselor to tell the jury what a young child told him, even though it's hearsay that can't be cross-examined. Each of these new ideas may run afoul of a defendant's constitutional right to "confront" his accuser. And they all may be tied up in appeals courts for years. In the meantime, parents and teachers would do well to tell their children when to scream for help—so they never have to learn what the view is from the witness stand.

ARIC PRESS with PATRICIA KING in Minneapolis, ANN McDANIEL in Washington, RICHARD SANDZA in San Francisco, SHAWN DOHERTY in New York and bureau reports

Sec. 12.45.047. Videotaping of testimony by young victims of sexual offenses. (a) Upon application by the prosecuting attorney and notice to the defendant, the court shall permit the state to videotape the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455 and who is 16 years of age or younger at the time the court issues the order permitting the videotaping.

(b) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. The defendant shall be afforded all rights applicable to defendants during trial, including the right to an attorney and the right to confront and cross-examine the witness. The trial judge shall determine those persons other than the prosecuting attorney, the defendant, and the defendant's attorney who may attend the videotaping proceeding.

(c) Videotaped evidence taken in accordance with this section is admissible in evidence in the criminal trial of a defendant charged with a violation of AS 11.41.410 — 11.41.455. (§ 2 ch 67 SLA 1982)

Editor's notes. — For provisions setting forth the policy of the state, the purposes of the enacting legislation, and legislative findings, see § 1, ch. 67, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

Section 3, ch. 67, SLA 1982, provides:

"AS 12.45.047 added by sec. 2 of this Act has the effect of changing Rule 804. Rules of Evidence, by adding the videotaped evidence of a young victim of a violation of AS 11.41.410 — 11.41.455 to the list of exceptions to the hearsay rule."

Sec. 12.45.048. Exclusion of public from trial during testimony by young victim of sexual offense. (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455. The order shall be granted if the court finds that the child is 16 years of age or younger at the time of the trial.

(b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a reasonable time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except

- (1) the judge presiding over the trial;
- (2) the members of the jury;
- (3) the defendant and the attorney and an investigator for the defendant;
- (4) the prosecuting attorney and an investigating officer for the state;
- (5) the parents or legal guardians of the child;

developed a significant emotional attachment who can provide emotional support for the child while the child testifies;

(8) court personnel, including those essential for taking the testimony. (§ 2 ch 67 SLA 1982)

Editor's notes. — For provisions setting forth the policy of the state, the purposes of the enacting legislation, and

legislative findings, see § 1, ch. 67, SLA 1982 in the 1982 temporary and special acts and resolves.

Sec. 12.45.050. Discovery after direct examination of witness.

NOTES TO DECISIONS

Based on Jencks Act. — This statute was modeled after the federal Jencks Act, 18 U.S.C. § 3500, et seq. Therefore, when faced with questions requiring the interpretation of the statute the court has turned to federal case law for instruction. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Criminal R. 16 and Jencks Act not inconsistent. — Criminal R. 16 governs pretrial discovery while the Jencks Act governs discovery during trial. Although the same evidence may be discoverable under both the rule and the statute, they are not so overlapping as to be inconsistent. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Duty of state to preserve evidence. — The duty of preservation is the state's duty to preserve any evidence which is discoverable by the defendant. This duty attaches once any arm of the state has first gathered and taken possession of the evidence in question. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

When sanctions appropriate. — In cases where the defendant cannot reasonably be said to have been prejudiced by the state's good faith failure to preserve the evidence, sanctions will generally not be appropriate. Where, however, the defendant has suffered prejudice, sanctions will generally be warranted. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Where it appears that the evidence was lost or destroyed in good faith, the imposition of sanctions will depend upon the degree to which the defendant has been prejudiced. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Where the evidence in question was destroyed in bad faith or as part of a deliberate attempt to avoid production, sanctions will normally follow. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Discretion of trial court. — What sanction is appropriate in a given case is best left to the sound discretion of the trial court. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Good faith alone does not excuse breach. — That evidence was deliberately not preserved in good faith as a result of ignorance or as part of a department policy, established practice, or anything of this nature will not automatically excuse the state's breach of its duty. The mere fact of good faith does not make the state's breach any less a violation of Cr. R. 16 or the Jencks Act. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Burden of proof. — The heavy burdens of establishing that the failure to preserve the evidence occurred in good faith and not out of a desire to suppress evidence and of demonstrating that the defendant has suffered no resulting prejudice rest squarely on the shoulders of the state.

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ings applying aggravating and mitigating factors, as well as his overall assessment of the exceptional severity of Lee's offense. Given the unusually aggravated nature of this offense, the fact that Lee's prior felony may still be considered by the sentencing court on remand, and the fact that, in originally imposing Lee's sentence, the court discounted the significance of his prior felony because it was of a lesser class than the current offense, we recognize that this case may well be one in which little if any change will be necessary on remand.⁶ The need for a remand, however, is clear. Under these circumstances, determination of the actual sentence that Lee should receive upon remand must be left to the sentencing court.

The sentence is VACATED, and this case is REMANDED for imposition of a non-presumptive sentence.



Ernest MORGAN, Appellant,

v.

STATE of Alaska, Appellee.

No. 6991.

Court of Appeals of Alaska.

Dec. 23, 1983.

After the Supreme Court, 635 P.2d 472, reversed defendant's conviction, the Superior Court, Fourth Judicial District, Charles R. Tunley, J., convicted defendant of rape, assault with a dangerous weapon, assault with intent to commit rape, and assault and battery, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) evi-

6. We note that the unsuspended fifteen-year period of incarceration originally ordered by Judge Buckalew is equal to the presumptive term for a person convicted of a class A felony who has two prior felony convictions. We

dence relative to reinstatement of original rape charge following defendant's successful appeal did not support even a prima facie finding of prosecutorial vindictiveness; (2) trial court did not abuse its discretion in permitting dismissed rape charge to be reinstated without indictment; (3) time from entry of defendant's guilty pleas to reversal of his conviction on appeal was properly excluded from computation under 120-day speedy trial rule, and (4) sentencing judge was not barred from imposing sentence higher than eight-year term originally imposed for his conviction of assault with a deadly weapon and assault with intent to commit rape.

Affirmed.

1. Constitutional Law ⇐257.5

Requirements of due process protect accused from both actual and apparent prosecutorial vindictiveness. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1 § 7.

2. Criminal Law ⇐31, 330

When totality of circumstances in case, objectively viewed, indicates realistic likelihood of prosecutorial vindictiveness, a prima facie showing of vindictiveness must be found; burden is then on prosecution to rebut showing of vindictiveness by negating appearance of vindictiveness as well as possibility of actual vindictiveness. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1 § 7.

3. Criminal Law ⇐31

Record unequivocally established that only reason for State's dismissal of defendant's rape charge was his willingness to waive his right to trial by pleading guilty to three other offenses with which he was charged; therefore, record failed to support even a prima facie finding of prosecutorial vindictiveness where, after defendant succeeded on appeal and an order was entered that he be permitted to withdraw his guilty pleas, State informed defendant that it in-

have previously approved sentences in this range in exceptionally severe cases involving first felony offenders. See *Maal v. State*, 670 P.2d 708, 712 (1983).

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tended to reinstate previously dismissed rape charge if he elected to withdraw his guilty pleas to the three other charges for which he had already been convicted.

4. Criminal Law ⇨31

Normally, a prima facie case of vindictiveness will be established by proof of a prosecutorial threat to reinstate a previously dismissed charge following a successful appeal by accused; however, where record shows that State originally dismissed charge against accused in reliance on his willingness to relinquish his right to trial and to accept punishment for related charges, no inference of vindictiveness can fairly be said to arise if accused subsequently elects to reassert his right to trial and the State, in response, simply restores the case to its original posture.

5. Indictment and Information ⇨144.2

Trial court, after dismissal of rape charge and waived by defendant of his right to trial by pleading guilty to three other offenses with which he was charged, and after defendant obtained order on appeal allowing him to withdraw his guilty pleas, did not abuse its discretion in permitting dismissed rape charge to be reinstated, without reindictment, pursuant to criminal rule providing, inter alia, that criminal rules may be relaxed or dispensed with in any case where it is manifest to court that strict adherence to them will work injustice. Fed.Rules Cr.Proc.Rule 48(a), 18 U.S.C.A.; Rules Crim.Proc., Rules 7(a), 43(a); Const. Art. 1 § 8.

6. Criminal Law ⇨577.8

Where no trial on rape charge was anticipated after State dismissed that charge on basis of defendant's willingness to waive his right to trial by pleading guilty to three other offenses with which he was charged, time from entry of defendant's guilty pleas to reversal of his conviction on appeal by Supreme Court, which concluded that defendant should be permitted to withdraw his guilty pleas, was properly excluded from computation under 120-day speedy trial rule, and therefore prosecution for

rape was not barred thereunder. Rules Crim.Proc., Rule 45.

7. Criminal Law ⇨189

Rule that courts sentencing offenders convicted upon retrial after successful appeal may not impose higher sentences than were originally imposed on same charges did not apply where State, after defendant waived his right to trial by pleading guilty to three other offenses with which he was charged, dismissed rape charge, but reinstated it after defendant succeeded on appeal and was permitted to withdraw his guilty pleas; therefore, sentencing judge was not barred from imposing, on retrial, sentence higher than eight-year term originally imposed for assault with a deadly weapon and assault with intent to commit rape, as defendant was not given a higher sentence for those crimes, but rather was sentenced to a ten-year term for rape, a crime for which he had not been previously sentenced.

Mary E. Greene, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Richard W. Maki, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

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

OPINION

BRYNER, Chief Judge.

Ernest Morgan was convicted by a jury of rape (former AS 11.15.120), assault with a dangerous weapon (former AS 11.15.220), assault with intent to commit rape (former AS 11.15.160), and assault and battery (former AS 11.15.230). Superior Court Judge Charles R. Tunley sentenced Morgan to concurrent terms of ten years for rape, eight years for assault with a dangerous weapon (ADW), six years for assault with intent to commit rape, and six months for assault and battery (A & B). On appeal, Morgan challenges only his conviction and sentence for rape. Morgan argues that Judge Tun-

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ley erred in permitting the rape charge to be reinstated after it had previously been dismissed. He further contends that prosecution of the rape charge was barred by Alaska's speedy trial rule. Alaska R.Crim.P. 45. Finally, he maintains that Judge Tunley was barred from imposing a sentence in excess of eight years for the rape conviction. We affirm.

FACTS

A brief discussion of the procedural background of this case is necessary to place Morgan's arguments in context. On April 20, 1978, Morgan, his wife, and another individual attacked a Bethel woman and subjected her to repeated acts of rape, torture and violent assault. Morgan was arrested shortly after the incident and was subsequently indicted for rape, ADW, assault with intent to commit rape, and A & B. At the arraignment following his indictment, Morgan attempted to peremptorily disqualify Superior Court Judge Christopher Cooke pursuant to Alaska Criminal Rule 25(d). Judge Cooke ruled that Morgan's peremptory challenge was untimely.

On August 7, 1978, the date set for trial, Morgan withdrew his original pleas of innocence and pled guilty to three charges: ADW, assault with intent to commit rape, and A & B. Although there was no formal plea agreement, Morgan was aware that the state would not try the rape charge alone if he pled guilty to the three other charges against him. After Morgan entered his guilty pleas, the state did in fact dismiss the rape charge. The decision to dismiss was based primarily on the state's conclusion that the interest of justice would not be served by subjecting Morgan's victim to the trauma of a jury trial in light of Morgan's guilty pleas to three of the four charges against him.

Prior to sentencing, however, Morgan obtained a new attorney and moved to withdraw his guilty pleas. One of the grounds for his motion was that Judge Cooke had improperly denied Morgan's peremptory challenge. Judge Cooke denied Morgan's motion and sentenced him to con-

current eight-year terms for ADW and assault with intent to commit rape; Judge Cooke imposed an additional six-month term, also concurrent, for A & B. Morgan appealed, again claiming that Judge Cooke improperly denied his peremptory challenge. The Alaska Supreme Court reversed Morgan's conviction. The court concluded that Morgan's peremptory challenge had been timely, that Judge Cooke improperly refused to disqualify himself, and that Morgan should therefore be permitted to withdraw his guilty pleas. *Morgan v. State*, 635 P.2d 472 (Alaska 1981).

Upon reversal of Morgan's conviction, the state informed Morgan that it intended to reinstate the previously dismissed rape charge if he elected to withdraw his guilty pleas to the three charges for which he had already been convicted. Morgan nevertheless withdrew his guilty pleas. Subsequently, over Morgan's objection, Judge Tunley permitted the prosecution to reinstate the original rape charge. Morgan was eventually tried and convicted of the four charges contained in the original indictment.

Before sentencing, Morgan argued that Judge Tunley was barred from imposing a sentence exceeding the aggregate eight-year term Morgan received from Judge Cooke after pleading guilty to ADW, assault with intent to commit rape, and A & B. Judge Tunley rejected this argument and imposed a ten-year sentence for Morgan's conviction of rape.

PROSECUTORIAL VINDICTIVENESS

[1, 2] Morgan first claims that reinstatement of the original rape charge following his successful appeal created an impermissible appearance of prosecutorial vindictiveness, thereby violating his constitutional right to due process. Morgan relies on our decision in *Atchak v. State*, 640 P.2d 135 (Alaska App.1981). In *Atchak*, we observed that fundamental fairness precludes the state from "upping the ante" by increasing or threatening to increase charges in retaliation for an assertion by the accused of his constitutional or statutory rights. *Atchak*, 640 P.2d at 149. We emphasized that the

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requirements of due process¹ protect the accused from both actual and apparent prosecutorial vindictiveness. Accordingly, we held that when the totality of the circumstances in a case, objectively viewed, indicates a realistic likelihood of prosecutorial vindictiveness, a *prima facie* showing of vindictiveness must be found. The burden is then on the prosecution to rebut the showing of vindictiveness by negating the appearance of vindictiveness as well as the possibility of actual vindictiveness. *Atchak v. State*, 640 P.2d at 144-45.²

[3] We believe that the record in this case fails to support even a *prima facie* finding of prosecutorial vindictiveness. As we have already indicated, in determining whether a *prima facie* case of vindictiveness has been made, we must consider all relevant circumstances in the record. The record unequivocally establishes that the only reason for the state's dismissal of Morgan's rape charge in 1978 was his willingness to waive his right to a trial by pleading guilty to the three other offenses with which he was charged.

[4] Normally, a *prima facie* case of vindictiveness will be established by proof of a prosecutorial threat to reinstate a previously dismissed charge following a successful appeal by the accused. However, where the record shows that the state originally dismissed a charge against the accused in reliance on his willingness to relinquish his right to trial and to accept punishment for related charges, no inference of vindictiveness can fairly be said to arise if the accused subsequently elects to reassert his

right to trial and the state, in response, simply restores the case to its original posture. Under these circumstances, the state's conduct is not retaliatory or vindictive in nature. Rather, the state, like the accused, seeks only to reassert its initial position. Hence, no realistic likelihood of vindictiveness is indicated by the state's conduct.

Morgan attempts to bolster his claim by pointing out that, in the absence of a formal plea bargain, the state's decision to dismiss the rape charge must be deemed binding, since the dismissal was not required. We believe this position is unrealistic. When an accused decides to enter guilty pleas to a number of charges and apparently acquiesces to conviction and sentencing, we think the state is reasonably entitled to rely on the accused's decision in determining how to dispose of any remaining charges. If the accused subsequently seeks to reassert his innocence, there seems to be little reason to characterize a corresponding effort by the state to reinstate the original charges as being retaliatory or vindictive, regardless of whether dismissal of the charges was originally based on a formal plea bargain. In this case, the evidence is uncontroverted that Morgan's rape charge was dismissed in reliance on his guilty pleas to the related charges of ADW, assault with intent to commit rape, and A & B. Given this evidence, the prosecution's decision to reinstate the rape charge after Morgan elected to withdraw his guilty pleas does not amount to an impermissibly vindictive act, even if no formal plea agreement

1. Alaska Const. art. 1, § 7; U.S. Const. amends. V and XIV.

2. Our holding in *Atchak* was based in part on the United States Supreme Court's holdings in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). We also relied on the Alaska Supreme Court's extension of these decisions in *Shagloak v. State*, 597 P.2d 142 (Alaska 1979). We acknowledged in *Atchak* that the United States Supreme Court had created a specific exception to the prosecutorial vindictiveness doctrine in cases involving plea bargaining. *Bordenkircher v. Hayes*, 494 U.S. 357, 98 S.Ct.

663, 54 L.Ed.2d 604 (1978). Since no plea bargain was involved in *Atchak*, however, we did not address the applicability of *Bordenkircher* under Alaska law. *Atchak*, 640 P.2d at 145 n. 21. Since our decision in *Atchak*, the United States Supreme Court has further restricted the scope of the prosecutorial vindictiveness doctrine, holding that it applies only to post-conviction situations. *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Because this case involves a post-conviction threat to increase charges and there was no plea bargaining, we need not address the applicability of either *Bordenkircher* or *Goodwin* under Alaska law.

compelled the earlier dismissal of the rape charge.

FAILURE TO REINDICT

Morgan next argues that Judge Tunley erred in permitting reinstatement of the dismissed rape charge without reindictment. Morgan relies on the language of Criminal Rule 43(a), which states, in relevant part, that when the state files notice of dismissal, "the prosecution shall thereupon terminate." Whether a previously dismissed case may be reinstated by court order following a dismissal entered pursuant to Criminal Rule 43(a) is a question of first impression in Alaska. Under the comparable federal rule, Fed.R.Crim.P. 48(a), reindictment seems to be accepted as the appropriate means of reinstating dismissed charges. See, e.g., *United States v. Senak*, 477 F.2d 304 (7th Cir.1973), cert. denied, 414 U.S. 856, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973). In the present case, however, Judge Tunley ruled that even if Criminal Rule 43(a) technically required reindictment, good cause existed to relax the rule and permit reinstatement of the original charge. Judge Tunley stated:

If Criminal Rule 43(a) can in any way be read to require a reindictment (which I do not believe it can), said Rule is hereby dispensed with by this court in this case, for I believe it is manifest to this court that a strict adherence to Rule 43(a) would work an injustice. See: *Criminal Rule 53*. I just cannot see any reason for a reindictment, which would undoubtedly require putting a young girl through the

3. Alaska R.Crim.P. 53 provides:

These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice.

4. Alaska R.Crim.P. 45 provides, in relevant part:

(b) *Speedy Trial Time Limits*. A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.

embarrassment and trauma of testifying yet again, to yet another grand jury.

[5] We do not believe that Judge Tunley abused his discretion in permitting the dismissed charge to be reinstated pursuant to Criminal Rule 53.³ Moreover, given the lack of any significant change in the factual basis supporting the reinstated charge, we do not think Judge Tunley's ruling deprived Morgan of his right to be prosecuted only upon indictment. Morgan has presented no reason, and we can think of none, why the reinstated charge of rape, which was included as a part of the original indictment returned against him, should be deemed insufficient to protect his right to indictment as provided for by Alaska Criminal Rule 7(a) and by the Alaska Constitution, article 1, section 8.

SPEEDY TRIAL VIOLATION

[6] Morgan further contends that his prosecution for rape was barred by Alaska Criminal Rule 45, which generally requires criminal trials to be held within 120 days of arrest.⁴ However, we conclude that the time from entry of Morgan's guilty pleas to reversal of his conviction on appeal by the supreme court must be excluded from computation under the 120-day rule. Exclusion of this time period is warranted for good cause.⁵

An analogous case is *State v. Fevos*, 617 P.2d 490 (Alaska 1980). After being indicted for assault charges, Fevos entered a no contest plea; a date for sentencing was scheduled. Prior to sentencing, Fevos successfully moved to withdraw his no contest plea and reinstated his original plea of not

(c) *When Time Commences to Run*. The time for trial shall begin running, without demand by the defendant, as follows:

(1) from the date the defendant is arrested, initially arraigned, or from the date the charge ... is served upon the defendant, whichever is first....

5. Alaska R.Crim.P. 45(d) provides, in relevant part:

(d) *Excluded Periods*. The following periods shall be excluded in computing the time for trial:

(7) other periods of delay for good cause.

guilty. He later moved to dismiss his case for violation of the 120-day rule. On appeal, the supreme court held that the period between entry of Fevos's plea of no contest and his sentencing date was excluded from the 120-day rule for good cause:

Since Fevos entered a plea of no contest on March 8, and sentencing was set for April 12, this time span is also excludable for good cause under Rule 45 because no trial was anticipated.

Fevos, 617 P.2d at 492 (footnote omitted); see also *id.* at 492 n. 5.

Here, as in *Fevos*, no trial was anticipated after entry of guilty pleas. The prosecution relied on Morgan's pleas to three of the four charges against him and concluded that prosecution of the remaining count was not justified. We believe the prosecution's reliance on Morgan's guilty pleas was reasonable, and we find no good reason why the reinstated charge of rape should be treated differently from Morgan's other charges for purposes of applying the 120-day restriction of Criminal Rule 45.⁶

INCREASE IN SENTENCE AFTER APPEAL

[7] Morgan's last argument is that Judge Tunley was barred from imposing a sentence higher than the eight-year term originally imposed for his conviction of ADW and assault with intent to commit rape. Morgan relies on *Shagloak v. State*, 597 P.2d 142 (Alaska 1979). However, we think *Shagloak* is largely inapposite. *Shagloak* holds that courts sentencing offenders convicted upon retrial after a successful appeal may not impose higher sentences than were originally imposed on the

6. It might be argued that the state was placed on notice of the potential need for a trial on the rape charge by Morgan's motion to withdraw his guilty pleas. However, we think it would be unreasonable to hold that good cause for exclusion of time under Rule 45(d)(7) terminated when Morgan moved to withdraw his guilty pleas. If Morgan ultimately failed in his efforts to withdraw his plea, the prosecution's position with respect to the dismissed rape charge would not have been altered. Accordingly, the prosecution had good reason to await a final ruling on the merits of Morgan's motion to withdraw his pleas prior to reinstating the rape

same charges. Thus, *Shagloak* would have directly prohibited Judge Tunley from exceeding Judge Cooke's original sentences for Morgan's convictions of ADW, assault with intent to commit rape, and A & B. However, Morgan was not given a higher sentence for any of these crimes. Rather, he was sentenced to a ten-year term for rape, a crime for which he had not been previously sentenced. The supreme court's holding in *Shagloak* thus does not directly control this case. Nor do we believe that the policies underlying the decision in *Shagloak* warrant extension of its holding to the present case.

In *Shagloak*, the court explained its ruling in the following terms:

We believe if a more severe sentence may be imposed after retrial for any reason, there will always be a definite apprehension on the part of the accused that a heavier sentence may be imposed. Such apprehension or fear would place the defendant in an "incredible dilemma" in considering whether to appeal the conviction. A "desperate" choice exists, and may very well deter a defendant from exercising the right to assert his innocence and request a retrial. Such deterrence violates the due process clause of the Alaska Constitution. The fundamental standard of procedural fairness, which is the basic due process right claimed in this case, forbids placing a limitation on the defendant's right to a fair trial by requiring the defendant to barter with freedom for the opportunity of exercising it.

charge. Similarly, if Morgan ultimately prevailed in his efforts to withdraw his guilty pleas, the three charges to which he had pled guilty would have to be tried. It would seem purposeless to construe Criminal Rule 45 as requiring the state to proceed with trial of the originally dismissed rape charge while the other charges were on appeal, since essentially the same trial would have to be repeated if Morgan ultimately succeeded in withdrawing his guilty pleas. Thus, we hold that Morgan's efforts to withdraw his guilty pleas do not affect good cause for delaying prosecution of the rape charge.

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Shagloak, 597 P.2d at 145 (footnote omitted).

Here, the possibility that Morgan might be prosecuted and separately sentenced for the additional crime of rape after a successful appeal simply did not, in and of itself, place Morgan in an "incredible dilemma" or force him to make a "desperate choice" within the meaning of *Shagloak*. The dilemma and choice faced by Morgan following his successful appeal was precisely the same as that which he had faced at the inception of his case.

Prior to trial, when Morgan was charged with four separate offenses, including rape, he was aware that the prosecution would dismiss the rape charge if he pled guilty to the three remaining charges. Morgan certainly must have been aware that, if convicted of all four offenses, he faced a potentially higher sentence than that which he would receive if he pled guilty to three offenses and obtained a dismissal of the rape charge. Faced with this choice, Morgan elected to plead guilty to three charges and to allow the charge of rape to be dismissed. Prior to sentencing, Morgan changed his mind and sought to withdraw his guilty pleas. At that time, the same basic choice confronted him: to accept conviction and sentencing for three offenses or to assert his right to trial on the original indictment at the risk of being convicted and sentenced for all four charges.⁷ By changing his mind and moving to withdraw his pleas, Morgan chose to take the risk of conviction and punishment on the original charges; he was prevented from doing so

by Judge Cooke, whose ruling was subsequently reversed. The prosecutorial threat to reinstate Morgan's rape charge after he successfully appealed presented Morgan with precisely the same choice that he had previously faced: to accept conviction and sentencing for three offenses or to assert his right to trial at the risk of being convicted and sentenced for an additional offense. Thus, in no meaningful sense did the threat of an increased charge and sentence following appeal force Morgan to make a choice more desperate than that which he originally made and that with which he was faced throughout his prosecution.

In summary, our decision that reinstatement of the dismissed rape charge was not vindictive is largely dispositive of Morgan's claim that his maximum sentence could not exceed the eight-year term originally imposed. Just as the threat of reinstatement did not give rise to an inference of prosecutorial vindictiveness, imposition of the separate and higher sentence for the crime of rape does not create an appearance of judicial vindictiveness. Essentially, Morgan's argument is that, by pleading guilty to three of the original charges against him and procuring dismissal of the fourth, and then later deciding to reassert his innocence, he somehow gained a constitutionally protected right against prosecution and punishment for the charge dismissed in reliance on his guilty pleas. We find this argument to be unpersuasive and do not believe the supreme court's holding in *Shagloak* compels a contrary conclusion.⁸

7. When Morgan moved to withdraw his pleas of guilty, his counsel did not assert that the state would in any way be foreclosed from reinstating the original charge of rape. Nor has Morgan's current counsel argued that reinstatement of the rape charge would have been impermissible at any time prior to Morgan's successful appeal. We think it apparent that, if Morgan had been permitted to withdraw his guilty pleas prior to the original sentencing, reinstatement of the rape charge would have been permissible, and any assertion of prosecutorial vindictiveness would have been without merit.

8. Morgan separately maintains that a sentence in excess of eight years was not justified be-

cause Judge Cooke took Morgan's rape into account in sentencing Morgan on his pleas of guilty to the charges of ADW, assault with intent to rape, and A & B. This argument is unpersuasive. In sentencing Morgan for those three charges, Judge Cooke did indicate that he would take into account all relevant circumstances, including the injuries suffered by M.P. However, Judge Cooke made it clear that he did not intend to make any finding as to whether Morgan actually committed the offense of rape and that he did not intend to sentence Morgan for any crimes other than those to which he had pled guilty.

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The conviction and sentence are AFFIRMED.

chorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

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



William M. CULLOM, Appellant,

v.

STATE of Alaska, Appellee.

No. 7505.

Court of Appeals of Alaska.

Dec. 30, 1983.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., of possession of cocaine, and defendant appealed. The Court of Appeals, Coats, J., held that search of defendant by store security guards after security guard saw defendant conceal cologne set on his person was not state action and therefore not subject to exclusionary rule.

Affirmed.

Searches and Seizures ⇐ 7(4)

Where store security guard was not hired or paid by police and was not acting in any way in concert with police, search by security guard of individual that security guards saw conceal cologne set on his person was not state action and therefore not subject to exclusionary rule.

Charles R. Pengilly, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Kristen Young, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, An-

OPINION

COATS, Judge.

An unarmed security guard for Fred Meyer, Larry Garcia, saw William Cullom conceal a cologne set on his person. The guard followed Cullom to the store exit, and showed Cullom his security identification. The guard took Cullom to the store's security office, recovered the cologne set, read Cullom his *Miranda* rights, and then frisked Cullom for weapons. The weapons search is apparently a routine procedure.

During the weapons search, Garcia found a glass vial, a syringe and a spoon in Cullom's sock. He also found a concealed shoe polish kit belonging to Fred Meyer. Garcia made out a citizen's arrest report, and then called the police. Residue on the spoon was found to be cocaine. Cullom was charged with possession of cocaine, AS 17.10.010. He moved to suppress the evidence on the basis that it was illegally seized.

Judge Hodges denied the motion, finding that the search was not state action, and therefore not subject to fourth amendment limitations. Even if there were state action, ruled the court, the search was constitutional and reasonable under the circumstances.

Cullom pled guilty and brought this *Cooksey-Oveson* appeal.¹ We conclude that the weapons search which resulted in the seizure of the cocaine was not state action and therefore the actions of the security guard were not subject to the fourth amendment of the United States Constitution or Article I § 14 and Article I § 22 of the Alaska Constitution.

It is clear that private searches are not generally subject to the fourth amendment. *Walter v. United States*, 447 U.S. 649, 656,

1. *Oveson v. Anchorage*, 574 P.2d 801 (Alaska 1978); *Cooksey v. State*, 524 P.2d 1251 (Alaska

1974).

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 ALASKA COURT OF APPEALS
 ANCHORAGE

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 3
 Title: An Act relating.....
hearsay evidence in grand jury...
 Sponsor: Sen Kerttula
 Requestor: _____
 Date of Request: 1/18/85

FISCAL DETAIL

Agency Affected: Health and Social Services
 Program Category Affected: _____
 BRU, Program or Subprogram(s) Affected:
Social Services, Juvenile Custody

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-				
CAPITAL	-0-	-0-				
REVENUE	-0-	-0-				

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: Attach a separate page if necessary

N/A

Prepared By: Michael L. Price *Michael L. Price* Phone: 465-3170
 Division: Family and Youth Services Date: 1/18/85

Approved by Commissioner: J. A. By *J. A. By* Date: 1/22/85 *JAC*
 Agency: Health & Social Services

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

POSITION PAPER

SENATE BILL NO. 3

For an act entitled "An Act relating to the admissibility of certain hearsay evidence in grand jury proceedings for certain sexual offenses and amending Rule 6(r), Alaska Rules of Criminal Procedure".

This bill would allow admission at grand jury proceedings of hearsay statements of children under 16 years of age relating to sexual offenses. The bill would provide a means for admitting evidence from children at grand jury proceedings while protecting those children from additional emotional trauma. The bill may also increase the likelihood of successful prosecution of sexual offenses committed against children.

The department is extremely pleased that the legislators have addressed the problem and offered a solution to reduce child sexual abuse in Alaska. The department supports admitting certain hearsay evidence by children under 16 years old but believes that SB 3 should adopt the language in the Governor's Child Protection packet (HB 88). Section 5 of HB 88 defines under what conditions the hearsay evidence can be admitted. Section 5 states that there must be some indication of reliability of the hearsay statement and that either the child testifies at the grand jury proceeding or is unavailable (Sec. 12.40.055(a)(1)(2)). The bill then defines unavailability (Sec. 12.40.055(b)(2)). The Governor's bill also defines the child's "statement" to include non-verbal conduct. (Sec. 12.40.055(b)(1)). SB 3 does not define statement nor does the bill address availability or reliability of the witness.

HB 88 addresses potential legal issues and may better withstand a constitutional challenge than would SB 3.

The department supports the concept in SB 3 but prefers the language in HB 88.

RECOMMENDED: Michael L. Price
Michael L. Price, Director
Division of Family
and Youth Services

DATE: 1/21/85

APPROVED: John R. Pugh
John R. Pugh, Commissioner
Department of Health
and Social Services

DATE: 1/22/85

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

POSITION PAPER

SB 3

The Alaska Network on Domestic Violence and Sexual Assault, a non-profit corporation representing 20 domestic violence and sexual assault programs statewide, support SB3, allowing for the admission of certain hearsay evidence in grand jury proceedings for certain sexual offenses.

The state of Alaska is to be credited for enacting many measures over the past several years which serve to protect children from sexual and physical abuse. Domestic violence and sexual assault programs across the state have devoted much time and energy to educating both professionals and members of the public about issues involving child sexual assault. These combined efforts have resulted in a dramatic increase in the number of self-reports made by child victims, and a greater understanding on the part of the general public as to the extent of the problem.

We now know that child victims will often disclose incidences of sexual assault to the non-offending parent, a teacher, a day care provider, and other trusted adults. Such statements by the child victim to an adult are often viewed as the most reliable sources of evidence concerning the assault. However, since such evidence is legally considered to be "hearsay" and is not admissible even in grand jury proceedings, some cases of child sexual assault are not being fully investigated or prosecuted.

Because of the unique nature of cases of child sexual assault, cases in which the primary witness is a child, certain limited allowances must be permitted in order to adequately provide protection. For this reason, the Network supports the passage of SB3.

Richard VAN HATTEN, Appellant,

v.

STATE of Alaska, Appellee.

No. 5877.

Court of Appeals of Alaska.

July 15, 1983.

Defendant was convicted in the Superior Court, Fourth Judicial District, Warren W. Taylor, J., of attempted sexual assault in the first degree and sentenced to serve a term of ten years imprisonment, with eight years suspended on condition that he be placed on probation for five-year period following release from prison, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) defendant's constitutional right of confrontation was not violated by use of prior testimony before grand jury when witness feigned loss of memory; (2) trooper's testimony concerning defendant's decision to remain silent until he obtained attorney was inadmissible, but testimony did not constitute plain error; and (3) trial judge was not clearly mistaken in imposing sentence of ten years with eight suspended.

Affirmed.

Serdahely, Superior Court Judge, concurred in part and dissented in part and filed opinion.

1 Witnesses ⇨ 386

Where witness deliberately seeks to avoid testifying by claiming loss of memory in response to specific questions, prior statements of witness relating to subject matter of question are inconsistent, within meaning of Rules of Evidence governing use of prior inconsistent statement. Rules of Evid., Rules 613, 801(d)(1)(A).

2 Criminal Law ⇨ 662(1)

In attempting to determine whether defendant's constitutional right of confrontation will be violated by use of prior extrajudicial statements of witness as substantive evidence of guilt when witness is eva-

sive or suffers from loss of memory, best approach lies in case-by-case analysis, focusing on extent to which witness actually testifies and can be cross-examined, as well as on nature and reliability of his prior, out-of-court statement; relevant factual inquiry in such an analysis is whether, under the circumstances, jury will be afforded satisfactory basis for evaluating truth of out-of-court statement. Rules of Evid., Rules 613, 801(d)(1)(A); U.S.C.A. Const. Amend. 6; Const. Art. 1, § 11.

3. Criminal Law ⇨ 662(6)

Defendant's constitutional right of confrontation was not violated by use of prior testimony before grand jury after witness feigned loss of memory, where witness' prior statement was given under oath and was based on her personal observations, her testimony was corroborated, and, more significantly, despite her stated intention to refuse to testify, and despite her numerous lapses of memory in response to particular questions, witness offered substantial testimony concerning alleged assault and her prior grand jury statements. Rules of Evid., Rules 613, 801(d)(1)(A); U.S.C.A. Const. Amend. 6; Const. Art. 1, § 11.

4. Criminal Law ⇨ 407(1), 1036.1(5)

Trooper's testimony concerning defendant's decision to remain silent until he obtained attorney was inadmissible, but admission of testimony did not constitute plain error, where testimony only referred to, but did not comment on, defendant's decision to remain silent and evidence of defendant's guilt, while less than overwhelming, was certainly compelling. Rules Crim. Proc., Rule 47(b); U.S.C.A. Const. Amend. 5.

5. Criminal Law ⇨ 1030(1)

Party relying on plain error must go beyond mere showing that error was committed and that error involved constitutional right. Rules Crim. Proc., Rule 47(b).

6. Criminal Law ⇨ 1030(1)

Correct measure of obvious prejudice under plain-error rule falls closer to more

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flexible standard of harmless error employed in cases where nonconstitutional error is involved: whether it can be fairly said that alleged error did not appreciably affect jury's verdict. Rules Crim.Proc., Rule 47(b).

7. Criminal Law ⇐ 1208.2

Trial court is assigned primary responsibility for sentencing; included in this responsibility is task of weighing and determining priorities to be given to various sentencing goals.

8. Rape ⇐ 64

Given defendant's conduct, given his longstanding history of similar conduct, and given his prior record of criminal misconduct, trial judge was not clearly mistaken in imposing sentence of ten years with eight suspended, on defendant convicted of attempted sexual assault in first degree. AS 11.41.410.

Geoffrey B. Wildridge and Mary E. Greene, Asst. Public Defenders, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Peter A. Michalski, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., SINGLETON, J., and SERDAHELY, Superior Court Judge.*

OPINION

BRYNER, Chief Judge.

Richard Van Hatten was convicted of attempted sexual assault in the first degree, a class B felony. AS 11.41.410. He was sentenced to serve a term of ten years' imprisonment, with eight years suspended on condition that he be placed on probation for a five-year period following release from pris-

on. On appeal, Van Hatten raises three contentions: (1) that he was deprived of his right to confront and cross examine¹ the state's key witness; (2) that certain testimony elicited by the prosecution violated his rights to counsel² and to remain silent,³ and (3) that his sentence was excessive

FACTS

A review of the facts is necessary for consideration of Van Hatten's first argument. The indictment against Van Hatten alleged that he attempted to have non-consensual sexual intercourse with his step-daughter, T.M.W., on October 1, 1980, at the family's home in Fairbanks. At the time, T.M.W. was seventeen years old.

T.M.W. appeared as a witness before the grand jury and testified in support of the indictment. She stated that, in the early morning hours of October 1, 1980, Van Hatten entered her room and sat down on her bed. He reached under her robe, attempting to touch her vagina. T.M.W. struggled and managed to slide off her bed onto the floor. Van Hatten left the room, but returned shortly. He picked T.M.W. off of the floor, placed her on the bed and climbed into bed on top of her. T.M.W. was terrified. She struggled with Van Hatten, bit him in the area of his shoulder, and screamed loudly. Van Hatten terminated his attack when T.M.W.'s mother entered the room.

Adrianna Van Hatten, Richard Van Hatten's wife and T.M.W.'s mother, also testified before the grand jury, corroborating her daughter's statements. According to Mrs. Van Hatten, she was awakened by her daughter's screams and went to her bedroom. She found Van Hatten on the bed, clad in a t-shirt and underpants. T.M.W. was crying and trembling; she told her mother that Van Hatten had tried to rape

* Serdahely, Superior Court Judge, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

1. U.S. Const. amend. VI; Alaska Const. art. I, § 11.

2. U.S. Const. amend. VI; Alaska Const. art. I, § 11.

3. U.S. Const. amend. V; Alaska Const. art. I, § 9.

her. Mrs. Van Hatten immediately summoned the Alaska State Troopers.

Officer Adams and Sergeant Murphy of the Alaska State Troopers went to the Van Hatten residence in the early morning hours of October 1, 1980, in response to Mrs. Van Hatten's complaint. Sergeant Murphy interviewed T.M.W., who gave him a statement substantially similar to the testimony which she later gave to the grand jury. Sergeant Murphy also interviewed Mrs. Van Hatten. Upon completion of the interviews, Van Hatten was arrested and taken to trooper headquarters. An examination of Van Hatten disclosed fresh scratches on his face and a distinct bite mark on his left arm.

Immediately before the scheduled start of Van Hatten's jury trial, T.M.W. and Mrs. Van Hatten informed Superior Court Judge Warren Taylor that they did not want the prosecution of Van Hatten to proceed. Both indicated that they did not desire to testify and that, if called to testify, they would refuse to do so. At the state's request, depositions of T.M.W. and Mrs. Van Hatten were taken; both witnesses responded to questions concerning the specifics of Van Hatten's assault, either by claiming an inability to remember or by expressly refusing to answer.

Trial was thereafter commenced. After Officer Adams and Sergeant Murphy testified, T.M.W. was sworn as a witness for the prosecution. She answered preliminary questions without reluctance but when questioning turned to the specific occurrences of October 1, 1980, she maintained that she was unable to recall most details. Over objections by defense counsel, the prosecutor then played a recording of T.M.W.'s grand jury testimony for the jury. The recording was ruled admissible as a prior inconsistent statement.

After T.M.W. testified, the prosecutor recalled Sergeant Murphy, who, again over objection by the defense, testified as to the substance of T.M.W.'s statements to him on the morning of the assault. This testimony was also admitted as proof of a prior state-

ment by T.M.W. inconsistent with her trial testimony.

Adrianna Van Hatten was later called as a witness for the defense. Much like T.M.W., Mrs. Van Hatten denied any ability to recall the particulars of the October 1 incident. The thrust of her testimony, however, was that she had quarreled with Van Hatten over domestic problems on the night of the alleged assault, that she had been drinking and was extremely upset with Van Hatten at the time, and that, for these reasons, it was likely that she had exaggerated Van Hatten's conduct in her complaint to the troopers. During cross-examination, the prosecution was allowed to impeach this testimony by playing the recording of Mrs. Van Hatten's testimony before the grand jury.

ADMISSIBILITY OF T.M.W.'S GRAND JURY TESTIMONY

In his first point on appeal, Van Hatten challenges the admissibility at trial of the grand jury testimony given by T.M.W. Van Hatten asserts that T.M.W.'s lapses of memory at trial were not inconsistent with her prior testimony, since they effectively constituted a refusal to answer and did not amount to testimony. He further asserts that T.M.W.'s unwillingness or inability to recall the details of the alleged assault rendered her functionally unavailable for cross-examination, thereby depriving him of his constitutional right to confront and cross-examine prosecution witnesses.

The admissibility of prior inconsistent statements for impeachment of a witness is generally governed by Alaska Rule of Evidence 613(a), which states:

(a) *General Rule.* Prior statements of a witness inconsistent with his testimony at a trial, hearing or deposition . . . are admissible for the purpose of impeaching the credibility of a witness.

Under the provisions of Evidence Rule 801(d)(1)(A), prior inconsistent statements may be used not only as impeachment, but also for proof of the facts contained in the prior statements. In relevant part, Rule 801(d)(1)(A) states:

(d) *Statements which are not hearsay.* A statement is not hearsay if

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with his testimony....

Thus, if T.M.W.'s statements at trial can properly be regarded as testimony, and if her testimony was inconsistent with her prior testimony before the grand jury, recordings of T.M.W.'s grand jury testimony were admissible not only to impeach her testimony at trial, but also to prove the substance of the matters addressed in her grand jury testimony.

With respect to the admissibility of T.M.W.'s grand jury testimony under Evidence Rule 801(d)(1)(A), the state has argued, and we are inclined to agree, that the Alaska Supreme Court's ruling in *Richards v. State*, 616 P.2d 870 (Alaska 1980), is highly significant. In *Richards*, the defendant was accused of manslaughter in connection with the death of his six-week-old son. The incident had been viewed by the defendant's eight-year-old son, who was called by the prosecution as a witness at trial. In his testimony, however, the boy had forgotten much of what he had witnessed. The state was permitted to show a videotape of the boy, made shortly after the incident, in which he reenacted what he had seen. The videotape was the primary evidence supporting the state's manslaughter charge. On appeal, the supreme court upheld admission of the videotape as a prior inconsistent statement of the witness. Although the offense occurred before adoption of the Alaska Rules of Evidence, the Alaska Supreme Court noted the similarity of Evidence Rule 801(d)(1)(A) to former Civil Rule 43(g)(11)(C), which applied to the case. See *Richards*, 616 P.2d at 871 n. 1.

Van Hatten urges that *Richards* is distinguishable for two reasons. First, Van Hatten asserts that the witness' inability to remember in *Richards* was genuine. Van Hatten contends that, by contrast, T.M.W.'s loss of memory was obviously feigned and amounted to a refusal to testify. Second,

Van Hatten points to the fact that the witness in *Richards* was available at trial and could be cross-examined about his lack of memory. He contends that, in this case, T.M.W.'s disingenuous memory loss made her unavailable for effective cross-examination, thereby depriving him of his constitutional right to confrontation. Neither of these distinctions is persuasive in the context of the present case.

We first consider whether T.M.W.'s statements at trial indicating an inability to recall the events of October 1, 1980, can properly be considered inconsistent with her grand jury testimony, in which her recollection was intact. As Van Hatten has correctly pointed out, a number of courts have adopted a narrow definition of inconsistency and would not hold that a loss of memory at trial is inconsistent with a previous ability to recall. See, e.g., *United States v. Palumbo*, 639 F.2d 123 (3rd Cir.), cert. denied, 454 U.S. 819, 102 S.Ct. 100, 70 L.Ed.2d 90 (1981); and *State v. Lomax*, 227 Kan. 651, 608 P.2d 959, 966 (1980).

Other courts, however, have distinguished between outright refusal to testify and evasive answers, holding that only refusal will preclude a finding that prior statements of a witness are inconsistent with his trial testimony. See, e.g., *United States v. Inzana*, 423 F.2d 1165, 1169-70 (2d Cir.), cert. denied, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970). Similarly, many decisions have expressly concluded that inconsistency may be found when a witness is unable to recall at trial matters contained in prior testimony or statements. See, e.g., *United States v. Distler*, 671 F.2d 954, 958 (6th Cir.1981); *United States v. Dennis*, 625 F.2d 782, 794-96 (8th Cir.1980); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir.1977); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 & n. 2 (3rd Cir.1977); and *United States v. Rogers*, 549 F.2d 490, 496 (8th Cir.1976), cert. denied, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977). As stated by Judge Weinstein:

[S]ome jurisdictions . . . take the highly technical view of finding an inconsistency only when this is apparent on the face of

Cite as 666 P.2d 1047 (Alaska App. 1983)

the two statements and the only possible inference. The better view, urged by Wigmore, McCormick, and others, and followed by the federal courts, allows the prior statement whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs. In other words, the keystone for impeachment use is relevancy—would the prior statement of the witness help the trier of fact evaluate the credibility of the witness The approach under [Federal Rule of Evidence 801(d)(1)(A)] should be the same. Here the question is not whether the statement is helpful in evaluating credibility, but whether it is helpful in resolving a material, consequential fact in issue

4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)(A)[01], at 801-88--801-89 (1981) (footnotes omitted).

We believe that an intent to adopt a broad definition of inconsistency, such as that favored by Judge Weinstein, is implicit in the supreme court's decision in *Richards v. State*. Nor is there any reason to impose a stricter standard in cases involving deliberate failure to recall. To the contrary, commentators have indicated that in some cases genuine forgetfulness or loss of memory may not justify a finding of inconsistency for purposes of introducing a prior statement, but that intentional loss of memory will. As Judge Weinstein has written:

[I]t would seem that the prior statement should not be included under [Federal Rule of Evidence] 801(d)(1)(A) if the judge finds that the witness genuinely cannot remember, and the period of amnesia or forgetfulness is crucial as regards the facts in issue.

4. Fed.R.Evid. 801(d)(1)(A) differs from A.R.E. 801(d)(1)(A) primarily in its requirement that, in order to be admitted as substantive evidence of guilt rather than as impeachment, prior inconsistent statements must have been made under oath and subject to the penalties of perjury. To this extent, the federal rule is narrower than the Alaska rule; it is also narrower than the minimal standards set out in *California v. Green*. See, e.g., *United States v. Distler*, 671 F.2d 954, 959 (6th Cir.1981). For a comparison of A.R.E. 801(d)(1)(A) with Fed.R.Evid.

4 J. Weinstein & M. Berger, *supra*, § 801(d)(1)(A)[04], at 801-98 (footnote omitted).

[1] We conclude that where, as here, a witness deliberately seeks to avoid testifying by claiming loss of memory in response to specific questions, prior statements of the witness relating to the subject matter of the question are inconsistent, within the meaning of Evidence Rules 613 and 801(d)(1)(A).

We turn next to Van Hatten's contention that T.M.W.'s lack of memory precluded effective cross-examination and violated his constitutional right of confrontation. In *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the United States Supreme Court squarely held that the admission into evidence of prior inconsistent statements as substantive evidence of a defendant's guilt is not violative of the confrontation clause as long as the witness who made the prior statements testifies and is subject to cross-examination at trial. The holding of the court in *Green* is reflected in Alaska Rule of Evidence 801(d)(1)(A) and, to a lesser extent, in the corresponding Federal Rule of Evidence.⁴

The primary question left unanswered by the decision in *California v. Green* was the extent to which, under the confrontation clause, a witness must testify and be open to cross-examination before evidence of a prior inconsistent statement could be deemed admissible.⁵ Since the ruling in *Green*, however, numerous federal courts have addressed this issue, often with conflicting results. At one end of the spectrum, there are cases holding that feigned memory loss by a witness hampers full and effective cross-examination and is equiva-

801(d)(1)(A), see Commentary to the Alaska Rules of Evidence, § 801(d)(1)(A) at 220-21.

5. *California v. Green* does, however, make clear the fact that the confrontation clause is satisfied by the availability of a witness for cross-examination as to his memory at the time of trial and does not require an ability to cross-examine as to memory at the time a prior inconsistent statement was made.

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lent to a failure to testify, thus precluding introduction of prior inconsistent statements for substantive purposes. See, e.g., *United States v. Palumbo*, 639 F.2d 123, 128 n. 6 (3rd Cir.), cert. denied, 454 U.S. 819, 102 S.Ct. 100, 70 L.Ed.2d 90 (1981); *United States v. Fiore*, 443 F.2d 112, 115 (2nd Cir. 1971); and *State v. Loman*, 227 Kan. 651, 608 P.2d 959, 964-67 (1980). Cf. *United States v. Balano*, 618 F.2d 624, 626-27 (10th Cir. 1979), cert. denied, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980), and *United States v. Carlson*, 547 F.2d 1346, 1357 (8th Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (defendant's right to confrontation would preclude introduction of the witness' prior statements, except for the fact that defendant himself procured the witness' refusal to testify at trial). At the opposite end of the spectrum are cases adopting the position advocated by Justice Harlan in his concurring opinion in *California v. Green*⁶ and holding, essentially, that the presence of a warm body in the witness chair satisfies the requirements of the confrontation clause, opening the door to introduction of prior, out-of-court statements for substantive purposes. See, e.g., *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 & n. 2 (3rd Cir. 1977) (citing cases); and *United States v. Insana*, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970).

6. In *California v. Green*, 399 U.S. at 189, 90 S.Ct. at 1951, 26 L.Ed.2d at 514, Justice Harlan, in a separate concurring opinion, specifically addressed the principal issue left open by the opinion of the court. Justice Harlan stated:

The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts . . . I think confrontation is nonetheless satisfied.

Justice Harlan concluded that, "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to pro-

Thus, the court in *Cuyler* stated, 548 F.2d at 463 (footnotes omitted):

A witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination. But if he has been sworn and made available the fact that he suffers or feigns a loss of memory does not lessen the fact that the defendant has been confronted with him and presented with the opportunity to cross-examine him to the extent possible, which is all that the Sixth Amendment requires.

[2] As evidenced by the divergent views taken by courts considering the issue, difficult issues are presented in attempting to determine whether a defendant's constitutional right of confrontation will be violated by use of prior, extra-judicial statements of a witness as substantive evidence of guilt when the witness has been evasive or suffers from a loss of memory. These issues do not, in our view, readily lend themselves to resolution by the application of a general formula. We believe that the best approach lies in a case-by-case analysis, focusing on the extent to which the witness actually testifies and can be cross-examined, as well as on the nature and reliability of his prior, out-of-court statement. See *United States v. Rogers*, 549 F.2d 490, 500 (8th Cir. 1976), cert. denied, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977).⁷ The

duce any available witness whose declarations it seeks to use at a criminal trial." 399 U.S. at 174, 90 S.Ct. at 1943, 26 L.Ed.2d at 506 (Harlan, J., concurring) (emphasis in original.)

7. Although reliability is a question to be considered on a case-by-case basis, a number of criteria relevant to evaluating the reliability of prior, out-of-court statements have been suggested by other courts. For example, in *United States v. Snow*, 521 F.2d 730, 734-35 (9th Cir. 1975), cert. denied, 423 U.S. 1090, 96 S.Ct. 883, 47 L.Ed.2d 101 (1976), the court dealt with the analogous issue of whether the confrontation clause was violated by admission against the defendant, under the co-conspirator exception to the hearsay rule, of prior statements made by an accomplice. Noting that the co-conspirator exception does not automatically assure compliance with the requirements of the confrontation clause, the court in *Snow* focused on the reliability of the out-of-court statement.

relevant factual inquiry in such an analysis is whether, under the circumstances, the jury will be afforded a satisfactory basis for evaluating the truth of the out-of-court statement. *Id.* at 499.⁸

[3] Reviewing the facts of the present case in this manner, it is apparent that introduction into evidence of T.M.W.'s grand jury testimony was not violative of Van Hatten's confrontation right. T.M.W.'s prior statement was given under oath and was based on her personal observations. Moreover, T.M.W.'s testimony was corroborated by physical evidence obtained shortly after Van Hatten's assault, by statements which T.M.W. made to her mother and to Sergeant Murphy immediately after the assault, and by statements of T.M.W.'s mother in the course of her testimony before the grand jury.⁹

More significantly, despite her stated intention to refuse to testify, and despite her numerous lapses of memory in response to particular questions, T.M.W. offered substantial testimony concerning the alleged

assault and her prior grand jury statements. Notably, T.M.W. admitted being present in her home, together with her father at the time of the incident, and she admitted having been interviewed by Alaska state troopers, who had been summoned to her home in the early morning of October 1, 1980. T.M.W. did not deny making the statements attributed to her by Sergeant Murphy or the statements attributed to her in her mother's grand jury testimony. T.M.W. confirmed the fact that prior to testifying before the grand jury she had talked with a prosecutor for the state about Van Hatten's attitudes and sexual advances towards her. T.M.W. stated that she recalled appearing and testifying before the grand jury, and she acknowledged that she was under oath at the time. Furthermore, T.M.W. identified her own voice on the grand jury tape and stated that, when testifying before the grand jury, she told the truth. T.M.W. readily acknowledged that she did not want to testify against Van Hatten. Yet she was willing to state that

The court relied on the United States Supreme Court's plurality opinion *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 219-220, 27 L.Ed.2d 213, 226-27 (1970), to indicate four factors relevant to the issue of reliability:

The *Dutton* plurality opinion sets forth a number of factors which were indicative of reliability in that case: (1) the declaration contained no assertion of a past fact, and consequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying upon faulty recollection was remote; and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

521 F.2d at 734. While not an exhaustive list of factors bearing on the question of reliability of a prior, out-of-court statement, we think the four considerations listed in *Snow* provide guidance on the issue and can be of assistance to trial courts faced with issues such as that presented in Van Hatten's case.

8. A very similar approach was recently taken by the Arizona Supreme Court in *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982). In *Allred*, a child who had been sexually assaulted by her father gave testimony at trial exculpating him. She was impeached by statements

she had given earlier to an investigating officer and a psychologist. The supreme court approved the use of the child's prior statements, finding, under the circumstances, that the reliability of the prior statements was capable of being sufficiently evaluated through corroborating evidence. The court in *Allred* considered the issue as an evidentiary one calling for determination of whether the probative value of the prior statement outweighed its potential for prejudice under Ariz.R.Evid. 403. *Id.* 655 P.2d at 1329-30.

9. Evidence concerning statements made by T.M.W. to Sergeant Murphy was introduced at trial through testimony of Sergeant Murphy; this testimony was admitted under A.R.E. 801(d)(1)(A) as evidence of a prior statement by T.M.W. inconsistent with her testimony at trial. Evidence of T.M.W.'s statements to her mother following the assault, as well as evidence concerning the observations of T.M.W.'s mother at the time of the incident, was presented at trial in the form of a recording of Mrs. Van Hatten's grand jury testimony; this evidence was also admitted under A.R.E. 801(d)(1)(A), after Mrs. Van Hatten's testimony as a witness for the defense. On appeal, Van Hatten has not challenged the admissibility of Sergeant Murphy's testimony or of the recordings of Mrs. Van Hatten's grand jury testimony.

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her reluctance was due to the fact that, prior to testifying before the grand jury, the prosecutor had given her a "verbal guarantee" that if Van Hatten was indicted T.M.W. could later decline to press charges. T.M.W. specifically indicated, both on cross-examination and on re-direct examination, that she had testified against Van Hatten before the grand jury as a means of coercing him into obtaining counseling or psychiatric assistance for his problem.

There is widespread agreement that a defendant's right to confrontation will not be violated by introduction of the prior inconsistent statement of a witness if, in the course of testifying at trial, the witness acknowledges that the statement was made and that it was true. In this regard, the Commentary to the Alaska Rules of Evidence states:

Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth.

Commentary to the Alaska Rules of Evidence, Section 801(d)(1), at 219.

In the present case, T.M.W. acknowledged appearing before the grand jury, admitted that she was under oath, identified

her testimony for the jury, and expressly stated that her grand jury testimony was truthful. Moreover, in testifying as to her reluctance to be a witness at trial and her reasons for testifying before the grand jury, T.M.W. afforded the jury with a more than ample basis upon which to evaluate her credibility at trial and the truthfulness of her testimony before the grand jury. Numerous cases support the proposition that admission of prior inconsistent statements under such circumstances is appropriate and does not amount to a denial of the right to confrontation.¹⁰ We therefore hold that introduction of T.M.W.'s grand jury testimony was proper and did not deprive Van Hatten of his constitutional right of confrontation.

TESTIMONY CONCERNING INVOCATION OF RIGHTS TO COUNSEL AND TO REMAIN SILENT

Van Hatten also argues that his conviction must be reversed because evidence presented by the state at trial violated his constitutional rights to counsel and to remain silent. The prosecution's first witness at trial was Alaska State Trooper John Adams. Trooper Adams testified briefly, indicating that early in the morning of October 1, 1980, Mrs. Van Hatten contacted him and complained that her husband had attempted to rape T.M.W. Trooper Adams stated that he went to the Van Hatten residence together with Sergeant Murphy, that he eventually arrested Van Hatten, and that, following the arrest, he observed fresh scratches and an apparent bite mark

10. See, e.g., *United States v. Distler*, 671 F.2d 954 (6th Cir.1981); *United States v. Woods*, 613 F.2d 629, 637 (6th Cir.), cert. denied, 446 U.S. 920, 100 S.Ct. 1856, 64 L.Ed.2d 275 (1980); *United States v. Dennis*, 625 F.2d 782, 794-96 (8th Cir.1980); *United States v. Mosley*, 555 F.2d 191, 193 (8th Cir.1977), cert. denied, 434 U.S. 851, 98 S.Ct. 163, 54 L.Ed.2d 120 (1978); *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir.1977); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 (3rd Cir.1977); *United States v. Rogers*, 549 F.2d 490, 498-500 (8th Cir.1976), cert. denied, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977); *United States v. Castro-Ayon*, 537 F.2d 1055, 1057 (9th Cir.), cert. denied, 429 U.S. 983, 97 S.Ct. 501, 50

L.Ed.2d 594 (1976); *United States v. Payne*, 492 F.2d 449, 454 (4th Cir.), cert. denied, 419 U.S. 876, 95 S.Ct. 139, 42 L.Ed.2d 116 (1974); and *United States v. Insana*, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841, 91 S.Ct. 83, 27 L.Ed.2d 76 (1970). Cf. *United States v. Orrico*, 599 F.2d 113, 117-19 (6th Cir.1979) (witness' alleged grand jury testimony, although properly received in evidence when witness could not recall details of the crime, was insufficient to support a conviction because the evidence was only marginally admissible due to lack of proper foundation and because no other evidence was presented connecting defendant with the crime).

on Van Hatten. At the conclusion of Trooper Adams' direct examination, the following dialogue occurred:

Q Okay. And it was Sergeant Murphy that talked with [T.M.W.].

A Right.

Q Okay. And I take it you did not talk with the defendant about this matter in any detail.

A No. Basically after we woke him up we asked—Sergeant Murphy asked him what happened to his face and that stuff and he stated that a muf-fler had fell on his face at work.

Q Okay.

A He was then advised of his rights and he requested to have his attorney present . . .

Q Okay.

A . . . before any more questioning.

Q You did not ask him any further questions?

A No, I did not.

Q MR. MURPHREE: I'll pass the witness.

There was no objection or motion to strike voiced in response to this testimony, nor was it subsequently called to the attention of the trial court.

Van Hatten nevertheless contends on appeal that Trooper Adams' reference to Van Hatten's invocation of his right to remain silent and to obtain counsel constitutes plain error and warrants a new trial. In advancing this argument, Van Hatten relies primarily on *Dorman v. State*, 622 P.2d 448, 457 (Alaska 1981), and *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980). In *Dorman*, the supreme court held that reversal of a murder conviction was required as a matter of plain error when the prosecutor, during his final argument to the jury, specifically referred to the fact that Dorman had remained silent when interviewed by the police. In determining that plain error under Criminal Rule 47(b) existed, the court relied on the fact that the prosecutor had specifically asked Dorman's jury to draw an inference of guilt from exercise of the privilege to remain silent. *Gunnerud v. State* is fac-

tually closer to Van Hatten's case but did not involve plain error. In *Gunnerud*, the trial court permitted the jury to hear a tape recording of a search conducted at Gunnerud's apartment. Gunnerud was at the apartment when the search was made, and the recording contained a passage in which she was given *Miranda* warnings and invoked her right to remain silent. Over objection by the defense, the trial court permitted the jury to hear this portion of the recording. 611 P.2d at 75. On appeal, the supreme court found that Gunnerud's constitutional rights to counsel and to remain silent were violated when the jury was allowed to hear her assertion of these rights; finding the evidence against Gunnerud to be strong but not overwhelming, the court concluded that the error was not harmless beyond reasonable doubt. 611 P.2d at 76.

[4] When the circumstances of the present case are considered in the light of *Dorman* and *Gunnerud*, we believe that the question of plain error is extremely close. Criminal Rule 47(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule has been interpreted as follows:

Under the doctrine of "plain error" embodied in Alaska Rule of Criminal Procedure 47(b), this court will not take notice of an error not brought to the attention of the trial court unless it affects a substantive right and is obviously prejudicial. Not all errors of constitutional dimension must be examined in depth under this standard. See *Gilbert v. State*, 593 P.2d 87, 92 (Alaska 1979).

Dorman v. State, 622 P.2d at 457 (footnotes omitted). *Gunnerud v. State*, which was decided by the Alaska Supreme Court prior to Van Hatten's trial, makes clear the fact that Trooper Adams' testimony concerning Van Hatten's decision to remain silent until he obtained an attorney was inadmissible. In this sense, the error was obvious. It is also apparent that the error affected a substantive right, since it directly impinged on Van Hatten's constitutional rights to coun-

sel and to remain silent. In context, however, it is far less obvious that Trooper Adams' testimony was actually prejudicial.

While the court in *Dorman* found plain error where there was an express comment on the defendant's exercise of his right to remain silent, in the present case no comment was involved; Trooper Adams' testimony constituted a reference to, but not a comment on, Van Hatten's decision to remain silent. Moreover, the reference was a brief and passing one, and it was not directly elicited by the prosecutor's questioning. At no point in his final argument did the prosecutor mention this evidence. In fact, the prosecutor made no specific reference to any part of Trooper Adams' testimony during final argument, focusing instead on the statements of T.M.W. and Mrs. Van Hatten.

All of these circumstances significantly diminish the possibility of any prejudicial impact flowing from the improper testimony concerning Van Hatten's decision to remain silent. While the evidence of Van Hatten's guilt was, perhaps, less than overwhelming, it was certainly compelling. Furthermore, it is particularly significant that the basic thrust of the final jury argument made by Van Hatten's counsel was that Van Hatten had been attempting to have sexual contact with T.M.W.—a lesser form of assault than that involved in an attempted rape—but that he did not intend to rape her. Even assuming the jury might have been inclined to infer a consciousness of guilt from Van Hatten's silence, any such inference would have been equally consistent with either an intent to rape or an intent to have sexual contact on Van Hatten's part.¹¹

Even given these considerations, the holding in *Gunnerud* makes it evident that, if a

11. Van Hatten did not testify at trial; the jury was given an instruction stating that the defendant had a right not to testify and that no inferences could be drawn from his exercise of that right. We consider this instruction to lessen the possibility that actual prejudice resulted from Trooper Adams' statement. Trooper Adams' testimony constituted a reference to Van Hatten's silence, and did not involve a direct comment on the silence. The testimony was thus less likely to cause prejudice and was

timely objection had been made, the error in referring to Van Hatten's silence could not be deemed harmless beyond a reasonable doubt. Van Hatten emphasizes this fact on appeal. Van Hatten insists that he has established plain error and is entitled to relief because the obviousness of the error in this case is uncontroverted and because the error involved the violation of a constitutionally protected right.

[5] We believe, however, that Van Hatten misperceives the requirements of the plain error rule. A party relying on plain error must go beyond a mere showing that error was committed and that the error involved a constitutional right. As held in *Gilbert v. State*, 598 P.2d 87, 92 (Alaska 1979):

[N]ot all constitutional claims require extensive review under the plain error rule. To say that asserted errors of constitutional dimension must all be examined in depth under the plain error rule would circumvent the strong basic policy which requires that, in order to preserve an error for appeal, an objection must have been made in the trial court.

Thus, the plain error rule has been held to embody the requirement that the error complained of be obviously prejudicial. *Id.* There has been little effort to define the obvious prejudice requirement of the plain error rule. We think it clear, however, that the term obvious prejudice demands the application of a standard more stringent than the harmless beyond a reasonable doubt test applied to determine harmless error in cases where errors of constitutional dimension are preserved for appeal by timely objection. *See Chapman v. California*,

more susceptible of being mitigated by a curative instruction. *Cf. Padgett v. State*, 590 P.2d 432, 434-35 (Alaska 1979) (differentiating between an improper comment in testimony and an improper comment during final argument and noting that the former is more likely to be cured by a jury instruction). *See also Jolley v. State*, 655 P.2d 784, 785-86 (Alaska App.1982) (holding that an error similar to that in the present case was cured by an appropriate jury instruction).

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[6] The correct measure of obvious prejudice under the plain error rule must, we believe, fall far closer to the more flexible standard of harmless error employed in cases where non-constitutional error is involved: whether it can be fairly said that the alleged error did not appreciably affect the jury's verdict. See *Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969). We think that the *Love* standard of harmless error is particularly well suited for determining whether obvious prejudice has occurred, since the primary goal of the standard is to assure fundamental fairness to the accused, the same basic goal with which the plain error rule is concerned.

The obviousness of the error committed in this case, the ease with which it could have been avoided, and the fundamental nature of the rights which it affected are all factors that weigh heavily in favor of a finding of plain error in this case. However, consideration of the totality of the circumstances presented in this case does not convince us that the improper reference to Van Hatten's silence had an appreciable effect on the jury's verdict. For this reason, we are compelled to find that Van Hatten has failed to make a showing of obvious prejudice, as required by Criminal Rule 47. We hold that Trooper Adam's testimony did not constitute plain error.

EXCESSIVENESS OF SENTENCE

Van Hatten's final contention is that his sentence of ten years' imprisonment, with eight suspended, is excessive. We reject this contention.

Evidence available to the sentencing judge established that Van Hatten had been convicted of robbery in 1959 and of embezzlement in 1963. For the latter offense, he received a sentence of three years' imprisonment. In addition, Van Hatten had accumulated a fairly extensive record of convictions for alcohol-related misdemeanors; most noteworthy were three drunk driving convictions entered against him in the two-year period immediately

preceding commission of this offense. Van Hatten's assault of T.M.W. was committed while he was intoxicated.

Evidence presented at trial and at the sentencing hearing also indicated that Van Hatten's assault of T.M.W. was not an isolated incident. Van Hatten had repeatedly assaulted T.M.W. over a period of approximately five years. Moreover, it was revealed that Van Hatten had been involved in a long series of sexual assaults against T.M.W.'s older sister, J.W. In 1976, Alaska State Troopers received a report that Van Hatten had assaulted J.W., who was then fifteen years of age. J.W. was interviewed and stated that Van Hatten had sexually assaulted her with varying degrees of intensity, including sexual intercourse, for approximately two years. T.M.W. was also interviewed at the time and indicated that she had witnessed some of the assaults and that Van Hatten had also attempted to molest her. Van Hatten was then interviewed, and he admitted involvement in the sexual assault of J.W., but explained that J.W. had instigated his conduct by leading him along. Formal prosecution was apparently dropped in return for a promise by Van Hatten to undertake a course of family counseling. According to the pre-sentence report in this case, however, Van Hatten made only one contact with a family counselor.

At the time of sentencing, Van Hatten was forty-two years of age. Despite his long-standing problem of alcohol abuse and his extensive misdemeanor history, he had maintained a good employment record and was active in the Fairbanks business community. Upon review of the circumstances involved in this offense, as well as other pertinent information concerning Van Hatten's background, the probation officer assigned to write Van Hatten's presentence report recommended the sentence that was ultimately imposed by the court.

[7, 8] Van Hatten's initial contention with respect to sentencing is that, in imposing the sentence, Judge Taylor penalized him for exercising his right to have a trial.

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A review of the sentencing remarks upon which Van Hatten predicates this claim reveals that it is unfounded. Van Hatten also argues that Judge Taylor improperly failed to give adequate consideration to the sentencing goal of rehabilitation. We are mindful of the fact that the trial court is assigned primary responsibility for sentencing; included in this responsibility is the task of weighing and determining the priorities to be given to various sentencing goals. *Asitona v. State*, 508 P.2d 1023, 1026 (Alaska 1973); *Nicholas v. State*, 477 P.2d 447, 448-49 (Alaska 1970). Given Van Hatten's conduct in the present case, given his long-standing history of similar conduct, and given his prior record of criminal misconduct, we cannot conclude that Judge Taylor was clearly mistaken in imposing the sentence of ten years with eight suspended. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).¹²

The conviction and sentence are AFFIRMED.

COATS, J., not participating.

SERDAHELY, Superior Court Judge, concurring in part and dissenting in part.

I generally agree with the majority's treatment of, and conclusions regarding, the issues of the admissibility of T.M.W.'s prior inconsistent statements, confrontation clause and cross-examination considerations regarding such statements, and the claim of excessiveness of Van Hatten's sentence. On the question of the effect of Trooper Adams' testimony, however, I am compelled to respectfully dissent from the majority's conclusions.

More specifically, I generally agree with the majority that "the question of plain error is extremely close" and that pursuant to *Gunnerud v. State*, 611 P.2d 69 (Alaska 1980), "if a timely objection had been made,

the error in referring to Van Hatten's silence could not be deemed harmless beyond a reasonable doubt." I further agree with the majority that *Dorman v. State*, 622 P.2d 448 (Alaska 1981) (wherein the prosecutor commented during final argument upon the defendant's invocation of his right to remain silent) is distinguishable from the instant case. And, I also agree with the majority's conclusion that in the absence of a timely objection at trial, a defendant seeking to establish plain error for the first time on appeal should meet a standard more stringent than the "harmless beyond a reasonable doubt" test, i.e., should show some prejudice or that the alleged error could well have affected the jury's verdict.

Given the foregoing, however, I am unable to conclude that the challenged testimony in the instant case was not prejudicial to the defendant or did not, in some meaningful way, affect the jury's verdict. Rather, I believe that the Alaska Supreme Court's comment in *Gunnerud* applies with equal force to this case:

We can see no reason why it was necessary for the prosecution to introduce the portion of the recording into evidence other than to show an inference of guilt at the expense of the appellant's rights to counsel and to remain silent.

611 P.2d at 76 (footnotes omitted).

Accordingly, consistent with the policy and holding of *Gunnerud*, I would reverse the judgment of the lower court on this issue and remand the case for a new trial.



12. In his reply brief, Van Hatten has argued, for the first time, that his sentence exceeded the presumptive term prescribed for a second offender (four years) and that it therefore violates our holding in *Austin v. State*, 627 P.2d 657 (Alaska App.1981). He also cites *Andrews*

v. State, 552 P.2d 150 (Alaska 1976), and maintains that the total length of his sentence, including the eight years of suspended imprisonment, is unjustified. We find no merit in these arguments. See *Tazruk v. State*, 655 P.2d 788, 789 (Alaska App.1982).

testimony of Miklik's medical expert, who said that "work aggravation of the hypertensive arteriosclerotic heart disease caused plaintiff's disability". The board later found that Miklik was the victim of heart damage, concluding that "the stressful employment aggravated the pre-existing arteriosclerotic heart condition". Such a bald assertion completely ignores *Kostamo*.

The main issue in two of the five cases which comprised *Kostamo* was whether there had been heart damage. The Court stated that the occurrence or non-occurrence of a heart attack is a purely medical dispute; faced with conflicting expert testimony, the WCAB was compelled to decide the issue. The board concluded that in neither case had a heart attack occurred; thus, there was no heart damage. This Court affirmed and emphasized that absent such "proof" of heart damage, the presence of arteriosclerosis alone would not support an award of benefits.

"Although there is a causal relationship between the underlying disability, arteriosclerosis, and [claimants'] inability to continue working, that disability was not caused and could not have been aggravated by their employment." *Kostamo*, 405 Mich. p. 118, 274 N.W.2d 411.

III

[7] Even if the WCAB had had adequate support for its finding of heart damage in *Miklik*, the board further failed to show a sufficient link between the damage and the workplace. There must be a relationship proved between the damage and specific incidents or events at work. General conclusions of stress, anxiety, and exertion over a period of time do not satisfy this second requirement. There must be enough detail about that which precipitated the heart damage to enable the factfinder to establish the legal connection by a preponderance of the evidence.

[8] The link between the work and the heart damage need only be one of reasonable relationship of cause and effect. Other possible or probable causes need not be excluded beyond doubt. Further, the work

need not be the sole cause of the damage; it is sufficient if the employment is a cause. The factfinder must identify and evaluate the discrete factors of employment which are connected to the damage. The *Kostamo* Court noted several examples which have been regarded as significant by courts and commentators: temporal proximity of the cardiac episodes to the work experience, hot and dusty conditions, repeated return to work after a cardiac episode, and mental stress.

The WCAB's conclusion in *Miklik* that general stress existed without a link between a specific incident of employment and a specific cardiac episode does not suffice. Accordingly, we reverse the decision of the WCAB.

The present Court, while unanimously concurring in this opinion, is equally divided on the question of whether, in light of the reversal of the WCAB, this case should be remanded for further proceedings. Not wishing to affirm the WCAB by such division, a majority of the Court directs that this case be remanded to the WCAB for further proceedings not inconsistent with this opinion.

LEVIN, KAVANAGH, WILLIAMS,
COLEMAN and RYAN, JJ., concur.



PEOPLE of the State of Michigan,
Plaintiff-Appellee,

v.

John L. KREINER, Defendant-Appellant.

Docket No. 68114.

Supreme Court of Michigan.

Dec. 22, 1982.

Rehearing Denied Feb. 22, 1983.

Defendant was convicted in the Circuit Court, Wayne County, Joseph B. Sullivan,

I

The defendant was charged with second-degree criminal sexual conduct³ as a result of what was alleged to have occurred between him and a six-year-old girl during the morning of July 3, 1979.

The child could not relate at trial the details of what had occurred on July 3. She would only say that the defendant had come into her bedroom and had done something "bad". Her mother explained that the defendant was a friend who had come to visit the preceding evening and had slept on the couch that night. The mother testified that she got up around 10:30 or 11 a.m. She dressed and took her daughter to eat. On the way home from the restaurant, she had a conversation with her daughter. Defense counsel interrupted with an objection that the contents of the conversation would be hearsay. The trial judge relied on the tender years exception to the hearsay rule to allow the testimony and noted also that there had been little delay in the communication to the mother:

"Here, in this instance, the child being seven [at the time of trial], apparently alleges to her mother the following morning that a certain act occurred. The passage of time is minor, comparatively speaking, as it was the first opportunity, a visit with the mother in the morning, the child had to talk to the mother, who took her out in the car to breakfast and on the way back the child related this incident. Therefore, I'm going to overrule the objection and permit the testimony. Thank you.

"I should comment further that I feel that is adequate explanation for what little delay there was. There really was very little delay."

The mother then testified as follows:

"Q. . . . What did she tell you?"

"A. She said that he had fondled her female genitals and, well, that he had—was playing with her too-too.

"Q. She said that he was playing with her too-too?"

"A. Yes. She said that he had done something that hurt and then he stopped.

"Q. What is a too-too, if you know?"

"A. That is what me and her refer to as her female genitals.

"Q. I see.

"A. And she had said that he had laid on top of her and that he had touched her with his penis.

"Q. Did she tell you where he touched her with his penis?"

"A. On her legs."

Again, over objection on hearsay grounds, a police officer was permitted to testify as to his conversation with the child later that day:

"A. . . . She said that he took out his thing and asked her to touch it. And she told him no that she wouldn't. And then he pulled down her pants and began touching her.

"I asked her where he touched you, 'where you pee?' And she said yes. And I said, 'Did it hurt?' And she said 'No, just a little bit', and I said, 'Did he put it inside where you pee a little bit?' and she said yes.

"And I said, 'Did you want him to do that?' And she said no. 'I told him to stop.'

"I said, 'Did he stop?' and she said no.

"I said, 'How long did he do that?'"

"She said he kept doing it until he started rubbing his thing.

"Q. I see.

"A. I said, 'Then how long did he rub his thing, for just a couple of seconds, or what?' And she told me he rubbed it for a long time, and at that point I didn't know how to exactly ask her if he had ejaculated and I asked her, 'Did it spit?' And she said no, that it hadn't and that was the extent of the interview at that time."

The defendant testified that nothing occurred that morning between him and the child. He had showered about 9 a.m. and left. The trial judge concluded that the defendant did have sexual contact with the

child, and he was charged. The Court held that the defendant's

[1, 2] Before the trial judge ruled on whether the defendant's testimony was admissible, the evidence was introduced by the court to examine the child that exception was here. The court's introduction of the infant victim's testimony was a crime; it permitted the testimony.

"The rule is that the victim is the only one who can introduce evidence, if he has been spontaneously of manufacture, a complaint is caused by the circumstances." Mich. 222 (Emphasis added.)

The rule was applied in *People v. O'Connell* (1886), as one of the reasons for the introduction of the evidence. In this case, the corroboration of the tender years exception is justified by the testimony.

[3] In *People v. O'Connell*, the tender years exception was applied to the complaint made.

4. The Court of Appeals held that the defendant's hearsay testimony was admissible.

"The law is that the defendant's testimony is admissible by the court. By the court's introduction of the evidence, the defendant's testimony is admissible."

3. M.C.L. § 750.520c; M.S.A. § 29.788(3).

child, and he found the defendant guilty as charged. The Court of Appeals affirmed the defendant's conviction.

II

A

[1, 2] Before addressing the precise issue whether the tender years exception survived the adoption of the Michigan Rules of Evidence, we believe the treatment of this case by the courts below⁴ suggests a need to examine the common-law definition of that exception and how it was misapplied here. The exception does not permit the introduction of any conversation with the infant victim regarding the details of the crime; it permits hearsay only to corroborate the testimony of the complainant:

"The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance." *People v. Baker*, 251 Mich. 322, 326, 232 N.W. 381 (1930). (Emphasis added.)

The rule came into Michigan jurisprudence in *People v. Gage*, 62 Mich. 271, 28 N.W. 835 (1886), as one allowing hearsay in corroboration of the testimony of a complainant. In this case, the hearsay was not used for corroboration, but to supply the very elements of the crime. Consequently, the tender years exception was not available to justify admission of either witness's testimony.

[3] In *Baker*, the Court also limited the tender years exception to the first complaint made:

4. The Court of Appeals did find the police officer's hearsay testimony inadmissible, but for a different reason:

"The hearsay account related by Officer Hayes presents another situation, however. By his own testimony, during his interrogation [of the child], the girl merely replied 'yes' or 'no' to his questions. Officer Hayes' questioning, then, actually constituted the hear-

"The statement by Dorothy to Mrs. Alarie was not an original complaint and was not admissible. But, because of admissions by defendant of Dorothy's charge of indecent liberties, substantially as she made it to Mrs. Schmidt and Mrs. Alarie, the testimony of her statement to the latter was not prejudicial or reversible error." 251 Mich. 326, 232 N.W. 381. (Emphasis added.)

The child's "statement" to the police officer, in this case, came after the original complaint to the mother, and therefore it was also inadmissible for that reason.

B

The tender years exception, as restated in *Baker*, did not survive adoption of the Michigan Rules of Evidence. MRE 101 provides that "[t]hese rules govern proceedings in the courts of this state to the extent and with the exceptions stated in rule 1101". None of the rule 1101 exceptions are applicable here. MRE 801(e) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". MRE 802 provides that "[h]earsay is not admissible except as provided by these rules". MRE 803 provides 23 exceptions to the hearsay rule, none of which encompass the tender years exception as *Baker* defines it.

[4] The Michigan Rules of Evidence were based on the Federal Rules of Evidence. The comparable FRE 803 contains 24 exceptions. The twenty-fourth would permit hearsay not otherwise qualifying "but having equivalent circumstantial guarantees of trustworthiness". The committee which assisted in creating the Michigan rules recommended to the Court the

say account related at trial. Additionally, the record fails to support a finding that [the child] was still under the effects of the startling event at the time of the officer's interrogation."

The Court nevertheless found the error harmless because the testimony duplicated that of the mother which had already been admitted.

adoption of a comparable MRE 803(21),⁵ even though the committee recognized it had "no counterpart in prior Michigan law".⁶ We did not, however, adopt an MRE 803(24).⁷ Finding no applicable exception in the Michigan Rules of Evidence, we conclude that the tender years exception did not survive the adoption of those rules.

C

Our inquiry is not at an end, however. MRE 803(2) allows the out-of-court statement of a declarant available as a witness to be admitted if it is:

"A statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition."

We addressed the excited utterance exception to the hearsay rule in *People v. Gee*, 406 Mich. 279, 282, 278 N.W.2d 304 (1979):

"Otherwise objectionable hearsay testimony may be admissible if it amounts to an excited utterance. . . ."

"To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion;⁸ (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion.

"⁴Startling enough to produce nervous excitement and to render the utterance spontaneous and unreflecting."

[5] This rule would support the admission of a hearsay statement by a child of tender years in a sexual assault case, if the foundation criteria of the rule are met.⁹

[6] The record in this case has not been developed sufficiently for us to determine if

the criteria were met so as to allow the mother's testimony to be admitted. For example, it is unclear how much time expired between the alleged assault and the point at which the child related to her mother what had occurred. It is clear that the child did not tell her mother at "the first opportunity", as the trial judge said, because the mother and child were alone during a car trip to a restaurant, during the meal at the restaurant, and during part of the trip home before the conversation in question occurred. A new trial is required, at which the prosecutor may attempt to establish a foundation for admitting the testimony under MRE 803(2).

In lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we reverse the judgments of the Court of Appeals and the circuit court and remand the case to the circuit court for a new trial.

FITZGERALD, C.J., and LEVIN, KAVANAGH and RYAN, JJ., concur.

WILLIAMS, Justice, concurring.

I concur except I believe the mother's testimony was admissible.

COLEMAN, Justice, dissenting.

I dissent in part. I would affirm the trial judge on the bases of the totality of the record before him and in light of the fact that defendant was a friend of the hapless child's mother, thus placing said child in a position totally unlike that of an assault by a stranger. Here, withdrawal till she might sort out her fears and explore her mother's temper was understandable—as opposed to crying out spontaneously against the assault of a stranger. I cannot fault the trial judge for his sensitivity to this distinction.

condition, the statement may be admitted as an excited utterance under MRE 803(2). See *People v. Cobb*, 108 Mich App 573 [310 NW2d 798] (1981). On the other hand, if these requirements are not met, the mere fact that the declarant is of 'tender years' and makes a statement in a sex-related case does not provide a basis for admitting the statement under the so-called 'res gestae' exception. 61 Mich Bar J 332."

5. 399 Mich. 1009.

6. 399 Mich. 1015.

7. 402 Mich. cxix. See also Robinson, *Current Issues in Michigan Evidence Law*, 61 Mich. Bar J. 330, 332-333 (May, 1982).

8. "If the utterance of a child of 'tender years' relates to a 'startling event or condition' and was made while the child was 'under the stress of excitement caused by the event or

Rules of Court

(r) **Admissibility of Evidence.** Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

(s) **Discharge and Excuse.** A grand jury shall serve until discharged by the presiding superior court judge of the judicial district but no grand jury may serve more than 5 months, unless for good cause such period is extended. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the presiding judge may excuse a juror either temporarily or permanently, and in the latter event said judge may impanel another person in place of the juror excused.

(t) **Delegation of Duties.** Whenever a superior court is sitting other than where the presiding judge is sitting, the presiding judge may delegate his duties under this rule to another superior court judge. (Amended by Supreme Court Order 136 dated August 27, 1971; by Supreme Court Order 136A dated September 13, 1971; by Amendment No. 1 to Supreme Court Order 136 dated October 17, 1972; by Supreme Court Order 146 effective October 31, 1971; by Amendment No. 1 to Supreme Court Order 146 effective October 31, 1971; by Supreme Court Order 157 effective February 15, 1973; by Supreme Court Order 216 effective October 1, 1975; by Supreme Court Order 261 effective December 30, 1976; and by Supreme Court Order 539 effective October 1, 1982)

(c) CROSS REFERENCE: Crim. Form 12

(d) CROSS REFERENCES: Crim. Forms 11, 12

(h) CROSS REFERENCES: AS 12.40.030; AS 12.40.040; AS 12.40.050; AS 12.40.060

(i) CROSS REFERENCE: AS 12.40.070

(l) CROSS REFERENCE: AS 12.40.090

(o) CROSS REFERENCE: Crim. Form 13