ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4692 HJUD HB 237

Sixty-eight cases were decided by the 3-judge panel from May of 1985 through November of 1987. Only 18 of these cases involved sexual assault or abuse in the first degree where a minor was the victim. In 15 of the 18 cases the sentence was reduced in some fashion (occasionally that occurred by imposition of a sentence of the same length but making it non-presumptive). The 18 cases represent less than 12% of the total number of serious sexual cases (approx. 160) over the same 31-month period. In other words, superior court judges determined that manifest injustice would not result if the presumptive sentence were imposed in approximately 88.8% of the estimated 160 serious sex abuse cases involving a minor that went to conviction.

Interestingly, the largest number of referrals to the 3-judge panel fell into the violent crime category. Nearly half (44.1%) of the referrals were either first-degree assault or first-degree robbery. I am enclosing Teri's analysis for your information. Table 1 reflects the types of offenses referred to the 3-judge panel from May of 1985 through November 23, 1987. Table 2 shows the dates on which the charges were originally filed. Table 3 provides the location of the court from which the case was referred to 3-judge panel consideration. Note that there were no referrals from Bethel, Juneau, Kotzebue, Nome, Sitka and Valdez. Table 4 provides a breakdown of the serious sexual abuse and assault cases by court of referral by year. Please note that the date does not reflect the date upon which the panel rendered its decision but, rather, the date the case was originally filed. For example, only 6 of the 64 cases involving convictions for sex abuse of either a minor or an adult that were filed in 1984 were referred to a 3-judge panel. Only 4 received a reduced sentence. Only 7 of such cases filed in 1986 were referred to the 3-judge panel. Table 5 reflects the action taken by the 3-judge panel on each category of crime.

Table 6 uses estimated data to reflect the relation between the number and type of cases referred to the panel and the number of all such types of cases in superior court going to conviction during that period. In other words, using standard acceptable means to project overall filing rates we can estimate that Sexual Assault I/Abuse I cases involving a minor represented 26.5% of all cases referred to the panel during the 31-month period between May 1, 1985 and November 30, 1987. The number of cases referred to the panel involving that crime, whether the victim was a minor or an adult, accounted for only 14.4% of the total number of estimated convictions (160) for that type of crime during the 31-month reporting period. We estimate that the number of Sex Assault/Abuse I cases involving a minor referred to the panel represented approximately 1/2 of 1% of the estimated 3,348 convictions during the reporting period.

Sixty-eight cases were decided by the 3-judge panel during the 31-month reporting period. Currently 10 cases are pending before the panel with 4 scheduled to be heard on December 4, 1987. We do not have sufficient data to accurately assess the trends in the numbers and types of cases referred to the panel. However, a breakdown in the numbers of cases decided during the 31-month period would indicate that the number of cases being decided by the 3-judge panel during each subsequent calendar year is increasing, but that the percentage of cases involving

sexual assault/abuse remains a relatively constant 33% over the entire reporting period. It would be interesting and informative to examine the data in more detail. We are enclosing proposed budgets necessary to accomplish that project and a more comprehensive one dealing with an analysis of convictions in general for calendar years 1985 and 1986.

Having had occasion to review HB237 since our breakfast meeting I thought I would pass along a few observations and comments. I represented approximately two dozen persons charged with crimes involving some form of sexually deviant behavior during the 11 years between 1974 and 1985. These years were a time of great changes, all of which affected the treatment of sexual cases and offenders. A policy banning plea bargaining was implemented in 1975. The criminal code was rewritten in 1978. Presumptive sentencing was instituted in 1980 and subsequently modified in 1982 and 1983 by increasing the length of certain presumptive sentences and making presumptive sentences applicable to first felony offenders in certain categories of crimes. The budgets of criminal justice agencies (both state and municipal) multiplied geometrically over the years until just recently. Prison populations between 1980 and 1987 grew from approximately 770 in January of 1980 to 2,245 in January of 1987. This represented a growth of 292%. Today (or at least as of October 28, 1987) there are 2,368 inmates in institutions under the custody of Alaska's Department of Corrections. As of December 31, 1986, 564 of 2,245 inmates were confined on charges of sexual assault or abuse.

Prior to the passage in early 1986 of HB104 (the good time bill) the net gain in prison population was approximately 29 per month or 348 annually. According to recent information from the Department of Corrections, the post-HB104 net increase per month approximates 7, or 84 prisoners per year. It is likely that prisoners will have to be released under the Early Conditional Commutation Release Plan in the near future.

In 1986, I am advised by Corrections, it cost $87.56 per day to house each prisoner. It would be cheaper to send them to Harvard. I can only assume that it is more expensive today than it was a year ago. Right now, approximately fifty thousand dollars a day is spent housing and feeding sex offenders in Alaska. Given the finite resources of the Department of Corrections, if there is a way consistent with the public safety to take advantage of less expensive alternatives than long term incarceration, then it should be done.[1]

---

[1]An analysis of prison versus probation in California was published by the Rand Corporation in July of 1986. The report presented the findings and recommendations of the second phase of a Rand study funded by the National Institute of Justice, U.S. Department of Justice that examined the use of prison and probation for felony offenders. They found that the correctional system, generally, spent about twice as much on supervising and reprocessing prisoners as it did on probationers over a three-year period. This was after including in the cost of supervising probationers the correction costs of the initial confinement in jail, the costs of post-release probation or parole supervision, police and court costs associated with processing post-release arrests, and costs of any post-release incarcerations resulting from new crimes.

The proposition has been often stated that there is no known cure for persons who fit the topologies of the pedophile, a fixated offender or a regressed offender. If that is true, then we have been going to a lot of expense to create a system whereunder a perfect balance will at some point in the future, be achieved. That is, the number of "uncured sex offenders" being released from prison will be equivalent to those entering the institution and a state of equilibrium will have been achieved. It is more likely, I think, that sexual offenders, like other criminal types, come in all shapes and sizes and that some will respond to treatment (even if it is learning to "control" their behavior) and some will not. While it is difficult to separate those that have the capacity and will to respond to treatment from those that do not, we simply cannot afford to do otherwise.

HB237 would make it easier to convict an offender and put him or her in jail for a longer period of time. However, it does nothing for the victim of child abuse. Our juvenile system is a mess despite the efforts of many good people. Decent treatment programs for juvenile sex offenders are almost nonexistent. If it is true that the victims of child abuse are tomorrow's child abusers, then it would seem to me that a top priority amongst others, should be approved community-based out-patient therapy programs that would offer individual, peer and family therapy to victims and appropriate offenders. Given the tough quality of life decisions precipitated by a declining budget, I do not feel that the State can afford to increase the number of offenders in jail and the length of their sentences and at the same time institute new and beneficial programs for victims and juvenile offenders.

I appreciate the efforts of dedicated people like Floyd Richmond. He makes no bones about the lengths that he would go to to protect children who are vulnerable to abuse. But it seems to me that he is willing to advance the cause of increased protection for children even at the expense of important civil liberties. There is no need to make it easier to convict or to increase the length of sentences to protect and provide greater support for children. The remedies are not mutually exclusive. I would urge you to review the Alaska Corrections Master Plan that was issued in 1979 after revision of the Criminal Code and adoption of a presumptive sentencing scheme but before its institution in 1980. This plan was developed at considerable expense and effort by Moyer Associates, Inc., Justice System Planning Consultants and other advisors, including the Alaska Corrections Master Plan Advisory Committee. A number of observations made in the executive summary of the Alaska Corrections Master Plan deserve repeating:

> 1. "Incarceration of both presentence and post-sentence offenders should be used as a last resort, and then for as short a period as possible, only for offenders who present a demonstrable risk to public safety and/or who are convicted of crimes for which society demands punishment through imprisonment." (See page 6)

2. "In many ways, community corrections services offer the brightest hope for the future of corrections. Probation and parole are indisputably less costly than incarceration, and are no less effective in reforming offenders." (See page 8)

3. "In general, expansion of the total institutional system's bedspace capacity should not outpace the Division's and the State's efforts to maximize diversion from incarceration (both pre and post-sentence). The State of Alaska should not make the costly mistake of overbuilding to accommodate a temporary "bulge" in the growth rate of the inmate population." (See page 12)

4. "Since the Alaska inmate population ratio (inmates per 100,000 population) is currently very high in comparison to other states, it is most likely to fall moderately rapidly towards the national average (77:100,000). Any long term projections for Alaska's prison population should thus reflect a gradually declining inmate population ratio rather than a rising ratio due to "normalizing" of the age and sex distribution of Alaskan population." (Emphasis supplied) (See page 13)

5. "Equity in sentencing is a goal which most would agree is essential. This was a primary motivation for enactment of Alaska's new Criminal Code, which will take effect January 1, 1980, and which provides for determinate sentences (prescribed minimum incarceratory sentences) for selected classes of felons. There is some reason to believe that this new Code will result in an increased prisoner population in the long run (perhaps as much as 40 percent by the year 2000), due to increases in average lengths of stay for the affected categories of offenders. The actual impact of the Code should therefore be carefully and continuously monitored to ascertain whether average daily population increases result from its implementation. If so, and if this is considered an undesirable side effect of equity in sentencing, the State could consider several approaches: 1) shortening the length of prescribed minimum sentences for repeat felons, 2) specifying in greater detail the weight (in months and/or years) which each aggravating or mitigating factor should be given in modifying the prescribed term, and/or, 3) appointment of a Sentencing Commission to develop a "matrix" approach to sentencing which would include consideration not only of current offense and prior record, but also of the risk-level presented by each offender....In any case, it is essential to balance concerns for equitable punishment with the realistic limits of Alaska's correctional resources (particularly its institutions)." (Emphasis supplied) (See page 23)"

The opinions expressed herein are my own and not those of the Judicial Council. Despite my personal opinions, I hope you understand that the Judicial Council has in the past, and will in the future, exert every effort necessary to maintain its reputation for objective, neutral and detached information gathering and analysis. The Judicial Council has a long-standing commitment to provide sentencing and disposition data to the legislature for its use in making the types of policy decisions embodied in HB237. With that in mind, please review the two enclosed budgets. We would be delighted to have the opportunity to further analyze the areas of concern to all of us.

Sincerely,

Harold M. Brown
Executive Director

HMB/jmz

Enclosures

Alaska Court System

State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-8611

February 9, 1988

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

Dear Representative Sund:

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

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

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

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

st[illegible]ide participation. These committees are composed of attorneys and judg[illegible] appointed by the chief justice. The appropriate committee evaluates the merits of the proposal and also attempts to anticipate any unintentional consequences of the proposal, whether legal or practical. The committees and the court rules attorney strive to determine the effects of proposed amendments on other court rules. For example, the argument in favor of chan[illegible]ng a particular civil rule may also apply to a criminal rule. Often one rule ch[illegible]ge may require that several other rules also be amended.

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

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

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

Very truly yours,

Arthur H. Snowden, II
Administrative Director

Original sponsors: Swackhammer, Gruenberg, Rieger, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 367 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act altering the composition, membership, and duties of the Alaska Police Standards Council; providing for certification of probation and parole officers and correctional officers by the Alaska Police Standards Council; and providing for an effective date."

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

* Section 1. AS 18.65.130 is amended to read:

Sec. 18.65.130. POLICY. The administration of criminal justice affects the health, safety and welfare of the people of this state, and requires education and training of a professional quality. It is a primary public interest that applicants meet minimum standards for employment as police officers, probation and parole officers, and correctional officers, and that criminal justice education and training be made available to police officers, probation and parole officers, and correctional officers serving in a probationary capacity and police officers, probation and parole officers, and correctional officers already in regular service. It is of secondary public interest to encourage the establishment of preliminary training programs for persons seeking to become police officers, probation and parole officers, and correctional officers.

* Sec. 2. AS 18.65.150 is amended to read:

Sec. 18.65.150. COMPOSITION OF COUNCIL. The council consists of the following persons:

(1) four chief administrative officers or chiefs of police of local governments;

(2) the commissioner of public safety or a designee of the commissioner;

(3) the commissioner of corrections or a designee of the commissioner;

(4) one probation or parole officer;

(5) [(3)] four members of the public at large with at least two from the communities of 2,500 population or less.

* Sec. 3. AS 18.65.160 is amended to read:

Sec. 18.65.160. APPOINTMENT. The commissioner of public safety or a designee and the commissioner of corrections or a designee shall serve during each [THE] commissioner's continuance in office. Other members of the council shall be appointed by the governor for staggered terms of four years, except that a member may not serve beyond the time the member holds the office that established eligibility for appointment. A vacancy on the council shall be filled for the remainder of a member's unexpired term in the same manner as the original appointment.

* Sec. 4. AS 18.65.220 is amended to read:

Sec. 18.65.220. POWERS. The council has the power to

(1) adopt regulations for the administration of AS 18.65.-130 - 18.65.290;

(2) establish minimum standards for employment as a police officer, probation or parole officer, and correctional officer in a permanent or probationary position [POSITIONS] and certify persons to be qualified as police officers, probation or parole officers, and correctional officers under AS 18.65.130 - 18.65.290;

(3) establish minimum criminal justice curriculum

requirements for basic, specialized, and in-service courses and programs for schools operated by or for the state or a political subdivision of the state for the specific purpose of training police recruits, [OR] police officers, probation and parole officers, and correctional officers;

(4) consult and cooperate with [BOROUGHS,] municipalities, agencies of the state, other governmental agencies, universities, colleges, and other institutions concerning the development of police, probation and parole officer, and correctional officer training schools and programs of criminal justice instruction;

(5) employ an administrator and other persons necessary to carry out its duties under AS 18.65.130 - 18.65.290;

(6) investigate when there is reason to believe that a police officer, probation or parole officer, or correctional officer does not meet the minimum standards for employment; in connection with the investigation the council may subpoena persons, books, records, or documents related to the investigation and require answers in writing under oath to questions asked by the council or the administrator.

* Sec. 5. AS 18.65.230 is amended to read:

Sec. 18.65.230. [POLICE] TRAINING PROGRAMS. The council shall establish and maintain police training programs, probation and parole officer training programs, and correctional officer training programs through those agencies and institutions that the council considers appropriate.

* Sec. 6. AS 18.65 is amended by adding new sections to read:

Sec. 18.65.242. STANDARDS FOR CORRECTIONAL, PROBATION, AND PAROLE OFFICERS. (a) The council shall establish qualifications for employment of persons as correctional, probation, and parole officers,

including

(1) minimum age, physical and mental standards, citizenship, moral character, and experience; and

(2) minimum education standards.

(b) The council shall

(1) prescribe the means of presenting evidence of fulfillment of the requirements set out in (a) of this section; and

(2) issue a certificate evidencing satisfaction of the requirements of (a) of this section to an applicant who

(A) satisfies the requirements of (a)(1) of this section; and

(B) meets the minimum education standards of (a)(2) of this section by satisfactorily completing a training program for correctional, probation, or parole officers established under AS 18.65.230 or a course of instruction in another jurisdiction equivalent in content and quality to that required by the council for approved correctional, probation, or parole officer education and training programs in this state.

Sec. 18.65.245. DENIAL OR REVOCATION OF CERTIFICATE. The council may

(1) deny a certificate to an applicant for a correctional officer certificate or a probation or parole officer certificate if the applicant does not meet the standards adopted by the council under AS 18.65.242(a);

(2) revoke the certificate of a correctional officer or a probation or parole officer who, having been issued a certificate, fails to meet the standards adopted by the council under AS 18.65.-242(a).

Sec. 18.65.248. EMPLOYMENT OF CORRECTIONAL, PROBATION, AND

PAROLE OFFICERS. (a) A person may not be appointed as a correctional officer or as a probation or parole officer unless the person has a valid certificate issued by the council under AS 18.65.242.

(b) The provisions of (a) of this section do not apply to a person employed on a probationary basis, except that employment on a probationary basis may not exceed the period authorized for probationary employment determined by the council.

* Sec. 7. AS 18.65.280 is amended by adding a new subsection to read:

(c) A municipality that employs persons in a municipal correctional facility may, by ordinance, require that those persons meet the requirements of AS 18.65.130 - 18.65.290 that are applicable to correctional officers.

* Sec. 8. AS 18.65.290 is amended by adding new paragraphs to read:

(4) "correctional officer" means a person employed by the state in a correctional facility established for the custody, care, and discipline of persons charged or convicted of offenses against the state or held under authority of state law to control those persons;

(5) "parole officer" means a person appointed by the commissioner of corrections to supervise a prisoner's parole under AS 33.16;

(6) "probation officer" means a person appointed to supervise probation who has the duties assigned by AS 33.05.040.

* Sec. 9. APPLICATION TO PERSONS WHO ARE CURRENTLY EMPLOYED AS CORRECTIONAL OFFICERS. (a) Notwithstanding AS 18.65.248, added by sec. 6 of this Act, a person employed by the state as a correctional, probation, or parole officer on the effective date of AS 18.65.248, may continue to be employed as an officer without a certificate issued by the Alaska Police Standards Council.

(b) A person continuing in employment under the exemption provided in

(a) of this section who terminates that employment after the effective date of AS 18.65.248 may be reemployed by the state as a correctional, probation, or parole officer only if the person holds a valid certificate issued by the Alaska Police Standards Council.

* Sec. 10. AS 18.65.248, added by sec. 6 of this Act, takes effect six months after the date on which the Alaska Police Standards Council adopts regulations establishing training programs for correctional, probation, and parole officers under AS 18.65.230, as amended by sec. 5 of this Act, and defining qualifications for employment as those officers under AS 18.65.-242, added by sec. 6 of this Act.

* Sec. 11. Except for AS 18.65.248, added by sec. 6 of this Act, this Act takes effect July 1, 1988.

MEMORANDUM State of Alaska

TO: Representative Fran Ulmer

DATE: February 3, 1988

FILE NO.:

THRU:

TELEPHONE NO.:

SUBJECT: HB 237

FROM: Dana Fabe
Public Defender

The bill looks fine to me. As we discussed in our meeting, essential to my agreement to any mandatory sentencing scheme is the intent that judges be free to give any amount of consecutive time which they deem appropriate. Since this was the premise of our agreement, I have drafted commentary which I believe necessary to clarify this intent for future judicial interpretation of the statute.

I have also drafted commentary on the prior bad acts rule to reflect our agreement that the provision, while broadening existing appellate case law to cover other similarly situated victims, still requires a probative versus prejudicial balancing under Evidence Rule 403.

With your adoption of this intent language to reflect the agreement which we reached in our meeting, I withdraw my opposition to the bill and support passage of this Committee Substitute. I would be happy to work with you on refining this language if you feel it is necessary. I am pleased that we were able to reach a compromise on this bill. I will send a copy of this memo to Representative Sund to confirm that agreement.

DF:sh

cc: Representative John Sund

Dana Fabe

COMMENTARY TO SECTIONS 6 AND 9 OF HB 237

Section 6 (Consecutive Sentencing Provision). By enacting this section, which requires judges to impose some consecutive period of incarceration for each sexual or physical assault against a child, the legislature intends to leave to the court full discretion in determining the length of the consecutive term of incarceration. The court can impose as much or as little consecutive time as it decides is appropriate pursuant to the sentencing considerations contained in AS 12.55.005. One of the purposes of adopting a mandatory consecutive sentencing scheme for offenses against children, is to express the legislature's preference for judges to fashion some consecutive period of suspended time with conditions of probation to help solve the problem of presumptive offenders being released from prison without an adequate period of supervision by the court or Department of Corrections. A second purpose of mandatory consecutive sentences is to encourage lengthy periods of incarceration for those offenders with a poor prognosis for rehabilitation and a high risk of reoffending.

Section 9 (Alaska Rule of Evidence 404(b)). This section clarifies the application of Evidence Rule 404(b) in physical and sexual assault cases against children. The intent of this section is to permit admission of evidence of prior offenses against similar children where those offenses are sufficiently recent and similar to the present offense that a common scheme or plan is shown. The legislature intends that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. Although specific statutory citations are not included in the scope of the rule, it is the intent of the legislature that this evidentiary provision will apply not only to sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and criminal exploitation of children.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 237
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES				850.0	1,700.0	2,550.0
TRAVEL				3.1	6.2	9.3
CONTRACTUAL				66.6	133.2	199.8
SUPPLIES				89.1	178.2	267.3
EQUIPMENT				5.0	10.0	15.0
LAND & STRUCTURES						
GRANTS, CLAIMS				10.2	20.4	30.6
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	1,024.0	2,048.0	3,072.0
CAPITAL	0	14,496.0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	14,496.0	0	1,024.0	2,048.0	3,072.0
FEDERAL FUNDS						
OTHER						
TOTAL	0	14,496.0	0	1,024.0	2,048.0	3,072.0

POSITIONS:

FULL-TIME	0	0	0	18	36	54
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis for 5 possible scenarios. This fiscal note represents the 10% scenario.

Susan Knighton

Prepared by: Susan E. Knighton, Director — Phone: 465-3376
Division: Administrative Services — Date: 2-2-88

Susan Humphrey-Barnett

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

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS HB 237

ANALYSIS

This analysis addresses the effects of sections 5, 6, 8, 9, 10 and 13 on the Department of Corrections. These sections would create three new offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second and Third Degree and provide penalties for them.

The profile of Alaska's prison population shows that approximately 200 persons are incarcerated at any time for Sexual Abuse of a Minor in the First, Second, Third and Fourth Degree. A large proportion of the offenders have probably committed the crime several times before the victim felt sufficiently endangered and compelled to seek the assistance of others and they would therefore possibly be charged with one of the new offenses.

In order to determine the fiscal impact of this legislation, five scenarios were created based on the profile of sentenced Sexual Abuse of Minor offenders currently being placed in the custody of the department and the length of sentences being served. The scenarios present the effects if 10% of these offenders were sentenced under the proposed statutes, 25%, 50%, 75% and 100%. The scenario which occurs will depend upon the charging policies of the Department of Law.

Scenario	10%	25%	50%	75%	100%
Additional Man Years to be Served	96	239	476	712	951
Additional Operating Costs	$14,496.0	$36,089.0	$71,876.0	$107,512.0	$130,500.0
Additional Capital Costs	$ 1,024.0	$ 2,549.3	$ 5,077.3	$ 7,594.7	$ 12,097.4

The impact of HB 237 will be to increase the State's inmate population requiring the additional beds to be built and associated operating costs.

Capital construction and operational costs are based on $31,960.00 per man year inflated by 5% per year and $151,000 per bed constructed.

S. T. A. R.

Bus: 276-7279
24-Hour Crisis:
276-STAR (7827)

BEFORE HOUSE JUDICIARY COMMITTEE
ORAL TESTIMONY ON HB 237
January 25, 1987

Good afternoon Representative Ulmer, and committee members. My name is Carrie Longoria, and I thank you for the opportunity to comment on behalf of STAR. STAR is a sexual assault crisis agency, based in Anchorage which provides a 24-hour crisis line, counseling, medical and legal accompaniment, and prevention programs.

STAR supports HB 237 and has particular interest in the provisions designed for the joinder, severability and evidence rules. STAR contends the criminal and evidentiary rules do not always do full justice for victims. The legal issues related in the drafting of HB 237 are complex and many-sided, but careful consideration must be made to recognize and balance the rights of victims.

As many of you may already know, Alaska's rate of rape in 1985 was the highest in the nation, being 2.1 times greater than the national rate. Reported child sexual abuse in Alaska in 1986 was 5 times greater than the national rate. National child sexual abuse figures also show that more than 85% of child victims are abused on a recurring basis, by someone they know and oftentimes trust. And while these figures alone may be disturbing, the emotions and trauma a victim must endure from an assault are far more devasting.

In child sexual abuse cases, apart from the one-time sexual abuse by a stranger, which accounts for 5-10% of child sexual abuse cases, almost all children are "groomed" or prepared for the abuse. The abuser often has caretaking responsibility, or has assumed a position of trust or authority. Trust and time are used by the offender. Once abuse has occured, the child feels responsible, guilty and betrayed by the trusted figure. A long list of symptoms recognized by clinicians for sexually abused children include, to name a few, phobias, withdrawal, guilt, depression, suicidal ideation, nightmares, loss of appetite, and somatic complaints. Long term effects of child sexual abuse, show that victims are at a higher risk than average for severe mental disorders such as disassociative and multiple-personality disorders, psychoneurosis, somatic anxiety, suicidal gestures, and a tendency to abuse alcohol and chemicals. In short, rapidly mounting research and study indicate child sexual abuse is a serious risk factor for a wide variety of mental and social health outcomes.

For sexually assaulted adults there is an equal array of behavioral affects. These include, to name a few, depression, suicidal ideation or attempts, substance or chemical abuse, eating and sleeping disorders, nightmares, somatic complaints, and feelings of guilt, fear, shame, stigmatization and betrayal by society. Medical attention may also be necessary, as well as counseling the remainder of the victims' life. Studies also show sexual assault victims suffer a greater economic loss than other violent crime victims.

Family members and loved ones of the adult and child victim also suffer a myriad of similar feelings and behaviors. And while the victim and family suffer, society also suffers in the harm borne by its citizens.

According to David Finklehor, a nationally recognized leader in the child sexual abuse field, societal efforts to respond to the problem of sexual abuse can be grouped into four categories:

1) to provide public and professional education to increase the detection and disclosure of sexual assault;

2) to work towards efforts in assisting people to learn to protect themselves against victimization;

3) to provide treatment programs to help victims overcome the aftermath of the assault; and

4) to reform the criminal justice system in reducing the trauma to victims, insure more effective sanctions against offenders, and to protect society from further harm.

The last category cannot be fully comprehended without judical or legislative action. So while the Committee deciphers the proper and orderly legal craftwork for HB 237, consider the impact of lessening the trauma inflicted on victims, and weigh the serious sexual assault problem our state offers its citizens.

Thank you.

STATE OF ALASKA

REPRESENTATIVE
FRAN ULMER

HOUSE OF REPRESENTATIVES

P.O. Box V
JUNEAU, ALASKA 99811
(907) 465-4947

May 11, 1987

Dana Fabe, Public Defender
900 W. 5th Avenue
Suite 200
Anchorage, AK 99501

Dear Ms. Fabe:

Thank you for your analysis of House Bill 237. I have carefully reviewed it, but after serious consideration, have concluded that the bill is necessary and advisable for the protection of children from physical and sexual abuse. I will answer your objections below in the order you raised them.

Second Degree Murder

The bill proposes a new subsection defining the offense of Murder in the Second Degree -- AS 11.41.110(a)(4). This provides that murder in the second degree is committed by engaging in a pattern or practice of abuse of a child under 16 years of age which results in the death of the child, under circumstances manifesting extreme indifference to the welfare of the child. You claim that this provision is not necessary because the conduct is prohibited by AS 11.41.110(a)(2). I don't agree. AS 11.41.110(a)(2) provides:

> A person commits the crime of murder in the second degree if
> (2) the person intentionally performs an act that results in the death of another person under circumstances manifesting extreme indifference to the value of human life.

Under the quoted section a person, to be convicted, must act with extreme indifference to human life -- the example I have often heard is shooting into an occupied tent. Child abuse often consists of a series of acts which, although all

reasonable discipline three times and the child was accidentally seriously injured there. One should attribute some common sense to the criminal justice system. The commentary to the legislation could make it clear that such an extreme interpretation was not intended, if this fear is legitimate.

Repeated Sexual Abuse of a Minor

Sections 5-8 of the bill set forth new statutes which prohibit repeated sexual abuse of a minor. You raise several objections to these provisions: that the penalties are too high, that the prohibitions are not necessary, and that they are too broad.

I agree that the penalties for repeated sexual abuse of a minor are high, and in my opinion properly so. For example, a person over 16 years of age convicted of repeated sexual penetration of a person under 13 years of age would be subject of a 13 year presumptive term as the bill was originally drafted. This is a higher term than that provided for (to use your example) the bike path stranger rapist. I believe the former conduct to be more serious and thus deserving of a longer sentence, because of the particular vulnerability of the child victim. Persons who repeatedly abuse children are often in a position of special trust -- either a family member or a close friend. Thus, not only does the child suffer the sexual assault, but also endures the fear, loss of trust, and guilt so often connected with these cases.

You also state that the sentences should not be so high because the typical offender will be a middle class person with no criminal record and otherwise an upstanding member of the community. To me, however, the fact that an offender can manage other aspects of his or her life in a creditable way does not make his or her victimization of children any less deserving of punishment. Additionally, experts in the area of treatment of sexual offenders tell me that these offenders often abuse people outside the home as well as those subject to their domination at home, that they rarely seek treatment on their own, and that treatment for them is very difficult.

Thus, I believe high sentences for these offenders to be justified. In the committee substitute by the House HESS committee, however, the sentences were lowered, perhaps in response to your comments.

You claim that the proposed statutes are not necessary because, if the state can prove three incidents of sexual abuse, a convicted defendant could be sentenced to consecutive terms totalling more than the sentences originally drafted for repeated sexual abuse of a minor. In some cases of repeated sexual abuse, however, the state is not able to obtain convictions on separate counts. The problem arises in some cases involving abuse over a long period of time where the young victim may not be able to specifically recall particular incidents of abuse. In Covington v. State, 703 P.2d 436 (Alaska App. 1985), the defendant began abusing his daughter when she was 9 or 10 years old. When she was 15 years old he began having sexual intercourse with her. The abuse occurred so often that the victim was not able to testify to a specific date on which individual acts occurred. The Court of Appeal sua sponte reversed the convictions because of the possibility that the jury had not agreed on specific incidents when reaching their verdicts. Although the court reinstated the convictions on rehearing because the issue had not been raised at trial, the principle applies in future cases. The possibility of such a situation arising again convinces me that the proposed statute is necessary.

Finally, you claim that the proposed statutes are too broad because the definition of a person "having authority over a child" would include people such as stepbrothers and siblings who live in the same home with the child. It is true that the definition is broad, but I believe it to be appropriately so. It includes persons whom a child must trust and rely upon, even if temporarily. The stepbrother or babysitter, if he or she engages in a pattern or practice of sexual abuse of a child over 3 years younger, has seriously victimized the child and should be subject to prosecution, if the high standards for waiver from juvenile court are met. I agree, however, that careful attention should be given to this part of the bill, and I welcome suggestions for improvement.

Prior Inconsistent Statements

Section 11 of the bill was an attempt to alter a Court of Appeals decision in Brower v. State, 728 P.2d 645 (Alaska App. 1986), which held that a prior inconsistent statement, on its own, cannot support a conviction. Unfortunately, this section was deleted in the committee substitute passed by the House HESS committee. I think the original language is a good idea. I believe that it would be only the rare case which would go to trial where the only evidence of child sexual abuse or assault is an uncorroborated statement. In the rare case

where such evidence was sufficiently persuasive, however, it should be left to the trier of fact to decide if proof beyond a reasonable doubt has been presented to convict the defendant. It should not be held as a matter of law, by an appellate court, that in all cases such evidence is insufficient.

Unanimous Jury Verdicts

You assert that there is a constitutional problem with the section which allows, in connection with a charge of a pattern or practice of child abuse, the jurors to unanimously decide that a pattern or practice occurred without necessarily agreeing on specific incidents of abuse. While I agree that if a person is charged with a particular incident of abuse our constitution requires a unanimous verdict to convict, the bill makes a pattern or practice of abuse an element of the crime. If the jury is able to unanimously agree that a pattern or practice occurred (under the definition provided by statute), the constitutional requirement is met.

A careful consideration of the authority cited by your office at the teleconference on April 28, 1987, has not persuaded me that this aspect of the bill is flawed. For example, United States v. Morse, 785 F.2d 771 (95h Cir. 1986), involved a conviction for a scheme to defraud which was based upon evidence of four tax shelter/investment programs. The court held that the indictment was not duplicitous and that there was no violation of the unanimous verdict requirement. The court said:

> The law of this circuit, however, takes a broad view of a single scheme: "the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme." (Citations omitted.)

United States v. Morse, at 774. The court held that as long as the jury unanimously agrees that the defendants participated in a single particular scheme, the verdict is unanimous as required by the sixth amendment. This case, it seems to me, supports my position that if an offense is charged as a pattern or practice a jury may constitutionally convict a defendant if the jurors unanimously agree that the pattern or practice occurred.

Evidence Rule 404

Finally, you argue that the proposed change to Evidence Rule 404 is both unnecessary and arguably unconstitutional. Generally, the rule excludes evidence of prior bad acts unless the evidence qualifies as an exception as set forth in the rule. While it is true that the courts have admitted evidence of prior sexual abuse in some cases (e.g., Burke v. State, 624 P.2d 1240 (Alaska 1980); and Soper v. State, 731 P.2d 587 (Alaska App. 1987)), in other cases such evidence has not been allowed. Bolden v. State, 720 P.2d 957 (Alaska App. 1986).

The argument against the admission of prior acts of the defendant is that, though highly probative, the evidence is simply too prejudicial. It seems to me that because children are in need of special protection, and because of their vulnerability both as victims and as witnesses of child abuse cases, an exception is justified, and evidence of prior acts should as a general principle be allowed. The trial court could still exclude the evidence under Evidence Rule 403, which allows the trial court to exclude evidence if the probative value is outweighed by unfair prejudice or other considerations. No authority has been shown to me that would support a conclusion that such an approach would be unconstitutional. Moreover, the proposed change brings this rule closer to conformity with the federal rule and to the rule prevailing in many other states.

I encourage you to reconsider your position on this bill and to become a supporter of this effort to increase our ability, through the criminal justice system, to adequately protect children.

Sincerely,

Fran Ulmer
Representative

/Ng

M E M O

TO: Representative John Sund, Chairman, House Judiciary Committee

DATE: April 8, 1987

FROM: Dana Fabe
Public Defender

RE: House Bill No. 237

I have received your request for an analysis of HB 237. This bill is a wide-ranging collection of amendments to the criminal laws and rules of evidence. It appears to be designed to overrule a variety of appellate decision unfavorable to the state in cases involving child victims. Since some of the decisions are constitutionally based, the corresponding attempted changes appear unconstitutional. The changes do not appear to be necessary to vigorous prosecution and effective enforcement of laws preventing assaults on children. Their primary consequence will be increased costs in processing the cases through the court system and increased populations in the already overcrowded prison system.

A. SECOND DEGREE MURDER

Section 1 proposes two changes to the second degree murder statute (AS 11.41.110(a)):

1. Neitzel change. The bill would change AS 11.41.110(a)(2) to define second degree murder as "knowingly engaging in conduct [instead of: intentionally performing an act] that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." This change simply brings the language of the statute in accordance with the interpretation of the statute adopted by the Court of Appeals in Neitzel v. State, 655 P.2d 325 (Alaska App. 1982). The change does not present a problem and could reduce confusion without substantively changing the law. Section 3 proposes a parallel change in the first degree assault statute, AS 11.41.200(a)(3), and is also not a substantive change in the law as it is presently applied.

2. Extreme indifference to the welfare of a child under 16. Proposed AS 11.41.110(a)(4) creates a new subsection of second degree murder, defined as "under circumstances manifesting an

extreme indifference to the welfare of a child under 16, the person engages in a pattern or practice of abuse of that child that results in the death of the child." Abuse is defined in section 2 to include bodily impact, restraint, and confinement. "Pattern or practice" is defined in section 8 (proposed AS 11.41.610(2)) to mean "three or more incidents of the prohibited conduct."

It is not clear to me what the purpose of this section is. It appears to be unnecessary since if a person's conduct, even once, displays manifest indifference to the value of a child's life, and the child dies, that is unambiguously included in AS 11.41.110(a)(2). Requiring a "pattern or practice of abuse" might be interpreted to exclude murder prosecutions under AS 11.41.110(a)(2) when the person has only abused the child once or twice.

If the point of the new section is to insure that evidence of any pattern or practice of abuse will always be admissible, the statute is still unnecessary. Existing case law establishes that a history of abuse will ordinarily be admissible. E.g., Kelley v. State, 711 P.2d 1191 (Alaska App. 1985); see also Ahlquist v. State, 705 P.2d 1261, 1264 & n.1 (Alaska App. 1985).

B. FIRST DEGREE ASSAULT

Section 3 creates a new category of first degree assault for any person who engages in a pattern of abuse which results in serious physical injury to a child under 16.

The proposed new assault provision is unnecessary. Given the broad definition of "dangerous instrument" accepted in Wettanen v. State, 656 P.2d 1213 (Alaska App. 1983), many assaults on a child would fit under existing AS 11.41.200(a)(1) (recklessly causes serious injury with a dangerous instrument). Many other assaults, particularly those as part of a pattern of abuse, would fit under AS 11.41.200(a)(3) (the Neitzel-type assault statute). Further, a prosecution under AS 11.41.200(a)(3) would be more likely than a charge under the new offense to open the door to evidence of assaults on other victims; evidence of such other assaults would not be relevant under proposed AS 11.41.200(a)(4) and the current rules of evidence, but such evidence could often be relevant to establish extreme indifference to the value of life by showing that the defendant knew the likely consequences of his actions.

Further, AS 11.41.200(a)(4) could be read dangerously broadly. A parent who three times "confined" his child to his room for reasonable discipline could be liable under this class A felony if, one time, the child hurt himself seriously while in his room.

C. REPEATED SEXUAL ABUSE OF A MINOR

Sections 5-8 create a new set of offenses titled Repeated Sexual Abuse of a Minor (RSAM) in the First, Second, and Third Degree. "Repeated" is given meaning in section 8 as "pattern or practice," defined as three or more incidents. Section 13 provides penalties for RSAM in the First Degree, an unclassified felony, setting a presumptive term for first offenders of 13 years (and 25 and 35 years, respectively, for second and third offenders), with a maximum of 50 years. RSAM in the Second Degree is an A felony, with a presumptive five-year term for a first offender.

Effectively, the proposed offense of RSAM in the first degree declares that all family sexual abuse cases will be treated far more harshly than violent rape of a stranger. As the Court of Appeals has noted, virtually all family sexual abuse cases involve repeated abuse. State v. Andrews, 707 P.2d 900, 908-09 (Alaska App. 1985), aff'd, 723 P.2d 85 (Alaska 1986); see Benboe v. State, 698 P.2d 1230, 1232 (Alaska App. 1985) (single incident of abuse may make crime among least serious in its class). To penalize the family offender more harshly than the bike-path rapist is an illogical and unfair result. The typical defendant charged under RSAM will be a middle-aged man who has abused his step-daughter on a number of occasions. He will have no criminal record of any sort and will be an upstanding member of the community in all other respects than his sexual offense. Yet, he will face a presumptive term of 13 years. If he had a prior felony conviction as a young adult, perhaps for a property crime such as theft, he would face a presumptive term of 25 years.

By contrast, the bike-path rapist, who is convicted of one sexual assault and has a misdemeanor record, a serious alcohol problem, or a sociopathic personality which makes him predictably dangerous, faces a presumptive term of only 8 years for his first offense and 15 years for his second violent rape.

RSAM in the second degree parallels the first degree offense and covers any pattern of sexual contact with a child under 16 or of

sexual penetration with a child aged 13-15 who is at least 3 years younger than the defendant. This is made a class A felony, in contrast to the present statute, which treats basically the same conduct as a class B felony. See AS 11.41.436. The father who fondles his 12-year-old on a few occasions would now face a presumptive term of 8 years in prison; the bike-path assailant who grabs and fondles a child once would face no presumptive term.

Increasing the presumptive terms for sexual offenses will undoubtedly increase the number of cases going to trial. While the present 8-year presumptive term for first degree sexual abuse of a minor is certainly long, more defendants will plead guilty to an 8-year term than a 13-year term. Similarly, although the present sanctions for sexual contact with a minor are stiff (0-10 years), there is no presumptive term applicable to first offenders. Clearly more people will plead guilty to class B charges than to the new class A charge. Any increase in the number of trials will mean increased costs for the prosecutors, court system, and Public Defender Agency. Every time the number of trials increases, appeals increase, too, with corresponding extra burdens on the appellate courts, Office of Special Prosecutions & Appeals and the Public Defender appellate case load.

The proposed new statutes are not necessary. If the state can prove three incidents of sexual abuse, the state is presently free to file three charges of sexual abuse of a minor in the first degree. Although the convicted defendant would face a presumptive term of 8 years, rather than 13, Andrew v. State establishes that consecutive terms can be imposed, and the possible maximum term would be 90 years. Thus, the defendant whose pattern of abuse deserves more serious punishment than 8 years can be sentenced more severely by imposition of consecutive terms.

The problems with the proposed RSAM crimes are compounded when considered in the light of other provisions in the bill. All of the repeated sexual abuse of a minor crimes described above include as an element that the defendant "hav[e] authority over a child under the age of 16." "Having authority over a child" is defined in section 8, proposed AS 11.41.610(1), to mean:

> (a) the child is entrusted to the defendant's care by authority of

law [e.g., foster parents];

(b) the child is the defendant's son or daughter, including adopted children and step-children;

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

(d) the child has been temporarily entrusted to the defendant's care [e.g., babysitter, older sibling, day care worker].

These definitions, particularly (c) and (d), are so broad that virtually every sexual abuse of a minor case would involve a person having authority over a child. The definition of "having authority over a child" is so far reaching that a 16-year-old boy who, on several occasions has consensual sexual foreplay involving digital penetration with his new step-sister just prior to her 13th birthday, would be exposed to the 13-year presumptive term should he be waived into adult court. An 18-year-old involved with a 15-year-old step-sister under similar circumstances could be prosecuted for RSAM in the second degree with a presumptive 8-year term on the first offense.

D. PRIOR INCONSISTENT STATEMENTS AS SOLE EVIDENCE AT TRIAL

Section 11, proposed AS 12.845.025, is an attempt to overrule Brower v. State, 728 P.2d 645 (Alaska App. 1986). This proposal states that in a prosecution for any offense, evidence of a prior inconsistent statement is sufficient to support a conviction despite a complete dearth of corroborating evidence.

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

this question. The constitutional minimal standard for the proof required for a conviction cannot be reduced by legislative action. Section 11 is, therefore, unconstitutional.

E. NONUNANIMOUS JURY VERDICTS

Section 8, proposed AS 11.41.600, provides that in the statutes requiring a "pattern or practice," each juror must be convinced beyond a reasonable doubt that at least three incidents of the prohibited conduct occurred, but the jury need not be unanimous as to any particular incident. This provision is an attempt to overrule Covington v. State, 703 P.2d 436, opin. on reh., 711 P.2d 1183 (Alaska App. 1985).

Covington requires that, where a defendant is charged with one count of criminal conduct, in order to convict the defendant, jurors must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. The Covington holding is based upon the defendant's constitutional right to a unanimous verdict. Johnson v. Louisiana, 406 U.S. 356, 362 (1972). No state has reached a contrary result. The legislature cannot overrule Covington. Proposed AS 11.41.600(2) is unconstitutional.

F. CHANGES TO EVIDENCE RULE 404

Section 14 proposes a new subsection to Evidence Rule 404. The proposed new section states that, notwithstanding A.R.E. 404(b), in a prosecution for physical or sexual assault on a child, evidence of prior acts by the defendant involving the same or another victim is admissible to show the defendant's disposition to commit the offense.

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

because he appears to be a bad person, not because the evidence proves beyond a reasonable doubt that he committed the crime with which he was charged. Michaelson v. United States, 335 U.S. 469 (1948).

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

The existing Rules of Evidence, as interpreted by the Alaska courts, broadly open the doors to evidence of prior bad acts when such evidence is probative of something other than criminal disposition. E.g., Colemen v. State, 621 P.2d 869 (Alaska 1980); Adkinson v. State, 611 P.2d 528 (Alaska 1980); Oswald v. State, 715 P.2d 276 (Alaska App. 1976). Further, the Alaska courts already recognize and have recently expanded an exception to Evidence Rule 404(b) for cases where the defendant is charged with sexual misconduct and the state wishes to offer evidence of prior misconduct with the same victim or another victim having highly relevant common characteristics (e.g., another child in the same family), particularly where the evidence of misconduct with the other[s] approaches being evidence of a habit. Burke v. State, 624 P.2d 1240 (Alaska 1980); Soper v. State, Op. No. 675 (Alaska App., Jan. 23, 1987), pet. hearing denied (April 3, 1987). Thus, the state is currently able to introduce evidence of prior bad acts in child sexual assault cases when it is probative.

Thank you for requesting my input on this bill. Please feel free to contact me if I can provide you with further information on this or any other proposed legislation.

#1

5-0809X
Chenoweth
1/21/88

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

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to crimes against persons, and to the physical and sexual assault and sexual abuse of children; amending Rules 8(a) and 14 of the Alaska Rules of Criminal Procedure; and amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

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

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

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

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

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

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

than one of the participants; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the offender at the time of the offense

(A) is residing as a member of the social unit in the same household as the person; or

(B) has real or apparent authority, influence, or control over the person. changed in 1/22/88 version.

does this relate to SB /

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

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

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

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

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

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

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

(4) being 16 years of age or older, the offender aids,

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the offender at the time of the offense

(A) is residing as a member of the social unit in the same household as the person; or

(B) has real or apparent authority, influence, or control over the person. changed in 1/27/98 draft

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

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

corrections fiscal note

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

SA minors

(h) If the defendant has been convicted of two or more crimes under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which the victim or victims of the crimes were minors and the judgment on any of the convictions has not been entered, the court shall impose a sentence of imprisonment for the convictions in which at least one-half of the sentence for each of the convictions is served consecutively with the sentence for the other conviction or convictions.

change beginning

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

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

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

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

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

(4) the defendant employed a dangerous instrument in furtherance of the offense;

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

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

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

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

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

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

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

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

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

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

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

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

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

(18) the offense was a crime

(A) specified in AS 11.41 and was committed against a spouse or [,] a former spouse; [,] or [A MEMBER OF THE SOCIAL UNIT COMPRISED OF THOSE LIVING TOGETHER IN THE SAME DWELLING AS THE DEFENDANT]

(B) specified in AS 11.41.410 - 11.41.460 and the court finds, on the basis of reliable evidence, that the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor;

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

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

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

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

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

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

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

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

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

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

(1) are of the same or similar character and it is likely that evidence of one charged offense would be admissible to provide

another charged offense,

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

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

* Sec. 9. Rule 14, Alaska Rule of Criminal Procedure, is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this rule, if joinder of offenses charged under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which one or more victims were minors is permissible under Rule 8(a)(1), Rules of Criminal Procedure, prejudice is not established for purposes of (a) of this section if the court determines after the trial has begun that evidence of one of the charged offenses will not be admitted to prove another of the charged offenses.

* Sec. 10. Rule 404, Alaska Rules of Evidence. is amended by adding a new subsection to read:

(c) Notwithstanding (a) and (b) of this rule, in a prosecution for a crime involving

(1) a physical assault upon a child, evidence of other acts of physical assault by the defendant toward the same or another child is admissible; and

(2) a violation of AS 11.41.434 - 11.41.460, evidence of other acts described in AS 11.41.434 - 11.41.460 by the defendant toward the same or another child is admissible.

* Sec. 11. Section 10 of this Act is retroactive and applies

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

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

* Sec. 12. This Act takes effect immediately under AS 01.10.070(c).

5-0809X
Chenoweth
1/22/88

#2

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

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to crimes against persons, and to the physical and sexual assault and sexual abuse of children; amending Rules 8(a) and 14 of the Alaska Rules of Criminal Procedure; and amending Rule 404 of the Alaska Rules of Evidence; and providing for an effective date."

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

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

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

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

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

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

than one of the participants.

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

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

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

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

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

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

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender; or

(B) entrusted to the offender's care by authority of law, or is temporarily entrusted to the offender's care.

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

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

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

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

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

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

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

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender; or

(B) entrusted to the offender's care by authority of law, or is temporarily entrusted to the offender's care.

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

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

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

(h) If the defendant has been convicted of two or more crimes under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which the victim or victims of the crimes were minors and the judgment on any of the convictions has not been entered, the court shall impose a sentence of imprisonment for the convictions in which at least one-half of the sentence for each of the convictions is served consecutively to the sentence for the other conviction or convictions.

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

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

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

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

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

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that

the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

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

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

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

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

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

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

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

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

(14) the defendant was a member of an organized group of

five or more persons, and the offense was committed to further the criminal objectives of the group;

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

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

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

(18) the offense was a crime

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or, except as to offenses under AS 11.41.434(a)(3)(A) or 11.41.436(a)(5)(A), a member of the social unit comprised of those living together in the same dwelling as the defendant; or

(B) specified in AS 11.41.410 - 11.41.460 and the court finds, on the basis of reliable evidence, that the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor;

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

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

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

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

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

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

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

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

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

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

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

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

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

* Sec. 9. Rule 14, Alaska Rule of Criminal Procedure, is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this rule, if joinder of offenses charged under AS 11.41.200 - 11.41.250 or 11.41.410 - 11.41.460 in which one or more victims were minors is permissible under Rule 8(a)-(1), Rules of Criminal Procedure, prejudice is not established for purposes of (a) of this section if the court determines after the trial has begun that evidence of one of the charged offenses will not be admitted to prove another of the charged offenses.

* Sec. 10. Rule 404, Alaska Rules of Evidence, is amended by adding a new subsection to read:

(c) Notwithstanding (a) and (b) of this rule, in a prosecution for a crime involving

(1) a physical assault upon a child, evidence of other acts of physical assault by the defendant toward the same or another child is admissible; and

(2) a violation of AS 11.41.434 - 11.41.460, evidence of other acts described in AS 11.41.434 - 11.41.460 by the defendant toward the same or another child is admissible.

* Sec. 11. Section 10 of this Act is retroactive and applies

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

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

* Sec. 12. This Act takes effect immediately under AS 01.10.070(c).

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 264-4111

Tom Fink
MAYOR

MUNICIPAL HEALTH & HUMAN SERVICES COMMISSION

MAR 16 1988

March 9, 1988

Representative John Sund, Chair
House Judiciary Committee
Alaska State Legislature
POB V
Juneau, Alaska 99811

Dear Representative Sund,

The Municipal Health and Human Services Commission would like to lend their support to passage of HB237. Child abuse and neglect is ranked as the highest behavioral health problem priority in the Anchorage Health and Human Services Plan (January 1988).

Child sexual abuse agencies in Anchorage are reporting increasing numbers of offenders committed by non-familial, custodial adults who reside in the same home as the child. Inclusion of non-familial, custodial adults as perpetrators of child sexual abuse is an important measure in Alaska's continuing efforts to control child sexual abuse. Passage of HB237 is consistent with objective #3 (Child Abuse and Neglect, Page 4-35) in Volume 3 of the plan, Policy Recommendations and Objectives for Anchorage's Service Delivery System which promotes adequate funding of treatment services for child sexual abuse victims and their families and the prevention of child abuse and neglect. Broadening the definition of perpetrator and strengthening existing laws which address child sexual abuse will increase the state's ability to reduce child sexual abuse.

If you have any questions, don't hesitate to call me (562-2828) or our staff staff at 343-4674.

Sincerely,

Gari B. Andreini, Chair
Municipal Health and Human Services Commission

cc: House Judiciary Committee
Representative Fran Ulmer, Sponsor
Anchorage Municipal Assembly
Tom Fink, Mayor, Municipality of Anchorage
Ron Garzini, Manager, Municipality of Anchorage
Robert A. (Bert) Hall, Director, Department of Health and Human Services, Municipality of Anchorage

SJ27/dPD20

HOUSE AMENDMENT #1 (failed)

TO: CS HB237 Jud BY: Pettyjohn

Page 1 Line 13

after "404", delete: "(b)"

Page 7 line 29 through Page 8 line 15:
delete Sec. 9

Page 7, line 29 insert ~~and~~ new
Section 9:

" Sec. 9. Rule 404, Alaska Rules of Evidence, is amended by adding a new subsection to read:

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

Submit original amendment to the Chief Clerk.
It will then be numbered and duplicated.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/4/87

FURTHER REFERRALS: Finance

DATE: Feb 10, 1988

The Judiciary Committee has considered HB 237

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

RECOMMENDS:

[✓] replace with CSHB 237(JUD) [ ] the same title

[ ] attached amendment(s) [✓] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Adopted w/ Amendments 2-19-88

DRAFT

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

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

Sections 3 and 4

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

Sections 5 and 6

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

Section 7

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

Section 8

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

Section 9

As the Alaska Court of Appeals has emphasized, "[a] sexually abusing parent has tremendous control over his dependent children. He can pick his time and place to minimize the risk of discovery." 731 P.2d at 590. Evidence of past acts is therefore particularly important when there is "a swearing contest between the parent denying unlawful conduct and the child alleging it" because the evidence "may tend to make the alleged incident appear much more plausible and probable." Id. at 590-1. However, having heard testimony about patterns of behavior of many of these offenders, the Legislature finds that the judiciary has drawn the line too narrowly in excluding evidence of prior misconduct,

Add Cite i.e. name of Case (Sopp)

particularly as to non-family members, ~~and that it is appropriate to re-draw the line.~~ The Legislature therefore specifically intends to reverse the decision in Bolden v. State, 720 P.2d 957 (Alaska App. 1986). The intent of the Legislature is that, if the court finds that such prior bad acts are relevant to a disputed fact at trial under a common scheme or plan analysis, the court must still balance the probative impact against the prejudicial effect of the evidence pursuant to Evidence Rule 403. As used in this rule, the phrase "similar acts" is not intended to be limited to statutory offenses nor require a strict analysis of statutory elements. ~~Although specific statutory citations are not included in the language of the rule,~~ it is the intent of the Legislature that this evidentiary provision will apply not only to cases involving sexual assault, sexual abuse and physical abuse against a child, but also to homicides where the victim is a child and to cases involving unlawful exploitation of children.

5-0809X
Chenoweth
2/4/88

Adopted w/ title change + Amd to Pg 8

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

IN THE HOUSE

CS FOR HOUSE BILL NO. 237 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to crimes against persons, and to the physical and sexual assault and sexual abuse of children; amending Rule 8(a) of the Alaska Rules of Criminal Procedure; amending Rule 404(b) of the Alaska Rules of Evidence; and providing for an effective date."

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

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

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

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

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

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

than one of the participants.

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

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

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

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

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

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

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

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

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

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

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

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position

of authority over the victim; or

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

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

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

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

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

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

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

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

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position

of authority over the victim; or

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

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

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

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

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

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

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

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

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

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

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme

youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

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

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

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

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

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

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

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

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

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

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

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

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

(18) the offense was a crime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Other Crimes, Wrongs, or Acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if the prior offenses

(i) are not too remote in time;

(ii) are similar to the offense charged; and

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

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

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

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

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

House Judiciary Committee

LETTER OF INTENT
CSHB 237(Judiciary)

Sections 1 and 2

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

Sections 3 and 4

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

Sections 5 and 6

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

court or the Department of Corrections.

Section 7

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

Section 8

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

Section 9

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

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

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

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

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

DEPARTMENT OF PUBLIC SAFETY

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

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

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

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

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

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

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

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

Arthur English
Commissioner

STATE OF ALASKA
1988 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

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

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

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

page ____ of ____

WISH

Women In Safe Homes

A Safe Alternative to Family Violence

P.O. Box 6552
Ketchikan, Alaska 99901
(907) 225-9474

MAR 23 1987

March 16,1987

John Sund
P.O.Box V
Juneau, Ak 99811

Dear John:

The most current literature and research in the field of sexual assault offenders would be in serious conflict with the statistics and treatment methods proposed by Dorothy L. Peavey of Anchorage Parents United.

No responsible professional in this field today would claim that sexual deviancy can be cured. Parent's United claims that nationally 30% of their fathers return home and report less than 1% recidivism rate. The Anchorage program maintains that not one perpetrator has re-offended while participating in the program.

The philosophy of Parent's United (P.U.) is that incest is a family problem. Their treatment program is based on this belief and the goal is to reunite the family. Therapy to the family is offered in conjunction with the court system. Henry Giarrelto, the founder of P.U., states that if the offender is not threatened with prison he will not be motivated to stay in therapy. This is a sad commentary for incest offenders who are so eager and desireous to change their offending behavior! The least recidivism rate appears to be with offenders who voluntarily participate in treatment programs while incarcerated in prison.

A.Nicholas Groth, psychologist and director of the Sex Offenders Program for the Connecticut Department of Corrections and author and researcher of numerous books in this field, considers sexual abuse a chronic, repetitive problem like alcoholism. The most prominent view among veteran professionals is that the problem cannot be cured with traditional therapy and insight. This "addiction theory" has become the basis for treatment in offender treatment programs across the country. Authors and researchers such as David Finkelhor, Irwin S. Dreiblatt, Gene Abel, Judith Becker, Vernon L. Quinsey, Fay Knopp, Lucy Berliner and Robert Longo are respected pioneers in this

field that do not raise false hopes with statistics of a "cure rate." They acknowledge that sexual offenders can be given skills and methods for controling their deviant behavior, but they agree it can seldom be eliminated. Behavior that is compulsive, heavily ritualized and patterned always will remain in the brain. It can be re-learned and re-energized, but it cannot be erased. Offenders are dependent on internal controls for the rest of their lives.

The family systems theory adhered to by P.U. can be dangerous if professionals, law makers, and society relax and accept the premise that incest fathers usually are not harmful to the rest of his family or to other children outside the home. The most notable study, by psychiatrist Gene Abel of Emory University involving non-incarcerated, out-patient volunteer offenders, reports that over 44% of all incest offenders will admit molesting other children and 18% will admit to forcible rape. Over 2/3 reported multiple deviances. Studies also indicate that over 67% of incestous assaults occur for the duration of 1 to 3 years. The largest study to date done by Diana Russell of Mills College found that 32% of incest offenders sexually abused other family members also when the older daughter left home or refused their advances. Incest offenders are not basically harmless men that have been lead astray by a dysfunctional family.

New knowledge and research is indicating that the family is not the cause nor responsible for the sexual assaults. Contributing factors within the family can hasten and precipitate the offense, but the responsibility for the act lies totally with the offender. Parent's United believes that if the family is treated as a dysfunctional unit the incest will stop. Yes, the offender must admit that he sexually abused his child, but unlike other treatment programs working with the addiction model P.U. does not demand that the offender list all his other victims.

The more an offender voluntarily admits his responsibilites and displays empathy for his victims the greater the opportunity is for treatment to control his deviant fantasies and relearn appropriate arousal patterns. Offenders are experts at hiding or covering up their sexual deviancy problems. How then does Parent's United, utilizing forced treatment without collective responsibility, claim their astounding success rate? The recidivism rate for sex offenders who have completed state run treatment programs is estimated to be up to 25%. This does not take into account the 50% who drop out of the program.

If sexual offenders are addicted to children and maintain this chronicity throughout their lives it is almost impossible to state with any accuracy the degree of recidivism. As with the alcoholics we have only their word

that they did not "slip" and have a drink. It is well documentated that a majority of children do not disclose on the family member so children cannot be utilized as a measurement to document recidivism.

In summary, Parents' United cannot claim for purposes of funding that they report only 1% recidivism rate of the 80% of offenders that return home. The most current literature and research contradict these assertions, clearly showing how this young field cannot guarantee absolute change in behavior or complete rehabilitation of sex offenders. The offenders crime is his and his alone. Family treatment will not prevent the crime from reoccuring. The purpose of family treatment should be for support, insight and verification that they were not responsible. Parent's United does not "cure" the incestuous family nor does it prevent future sexual assaults upon family members or other children.

Sincerely,

Patty Barnes
Children's Counselor

Floyd Richmond

References:

1. The Unspeakable Family Secret by Elizabeth Stark, Psychology Today, May 1984.
2. Child Sexual Assault: New Theroy and Research by David Finkelhor,1986.
3. The Silent Trauma by Diana Russell, 1986.
4. Issues in the Evaluation of the Sex Offender by Irwin S. Dreiblatt,Ph.D. A paper presented in May,1982.
5. Changing a Lifetime of Sexual Crime by Robert E. Longo, Psychology Today, March 1986.
6. The Characteristics of Men who Molest Young Children by Gene Abel and Judith Becker, presented December 10, 1983 to the World Congress on Behavior.
7. Sexual Violence Quarterly, Characteristics of Adult Sexual Offenders, Northwest Treatment Association, Seattle, Fall 1985.
8. The Youthful Sex Offender by Fay Knopp, 1985.
9. The Offenders, Life Magazine by Cheryl McCall, December 1984.

GILMORE & FELDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501-2095

JAMES D. GILMORE
JEFFREY M. FELDMAN
STUART A. OLLANIK
JANET L. CREPPS

TELEPHONE
(907) 279-4506

April 9, 1987

Representative John Sund
Alaska State Legislature
P.O. Box V
Mail Stop 3100
Juneau, Alaska 99811

Re: House Bill 237

Dear Representative Sund:

I am writing concerning House Bill 237 which creates the new offense of "Repeated Sexual Abuse of a Minor" and proposes certain changes to Alaska's law on sentencing and the Rules of Evidence. This Bill has serious problems and should not be passed.

In opposing House Bill 237, I do not mean to minimize the seriousness of the problem of sexual abuse of children. No intelligent or reasonable person would quarrel with the notion that children should be protected from abusive adults and that adults who abuse children should be prosecuted. But the existing criminal code provisions provide an ample framework for the prosecution of child abusers. Statistics reflect that the incidence of child abuse prosecution and conviction has risen significantly in recent years and I do not believe that a compelling case can be made in support of the proposition that the existing laws do not provide an opportunity to impose serious and severe criminal punishment on those convicted of sexually abusing children.

The proposed offense of repeated sexual abuse of a minor would provide an enhanced penalty for those individuals found to have engaged "in a pattern or practice" of sexual misconduct. The term "pattern or practice" is defined in the proposed statutes as three or more incidents of misconduct. The fact of the matter is that only rarely is sexual misconduct with children detected upon the first episode. The reality is that nearly all adults prosecuted for one level or another of sexual misconduct misbehaved for a period of time (sometimes long and sometimes short) before being reported and prosecuted.

The existing laws, by mandating a substantial minimum sentence of seven years, already virtually ensure that punishment, rather than rehabilitation, is the focus of sexual abuse prosecutions. Even in families that are relatively "intact" and have a severe and motivated interest in working out their problems, the existing laws governing the prosecution of sexual abuse make it difficult, and often times impossible, to keep a family together, even when it is their strong desire to remain together and professional therapists and counselors are supportive of such plan. The new law will have the effect of taking virtually every person who has engaged in sexual misconduct (since nearly all engaged in more than three instances) and essentially turn them into lifetime prisoners. Many of these individuals are not "hard core criminals", in the classic sense, but fathers and stepfathers who have a real, and often times curable, emotional or psychological problem. To be sure, their conduct is improper and harmful. Careful thought should be given, however, before a policy decision is made to turn all of these people, regardless of their past circumstances, their family settings, their prior criminal records or absence of records, their emotional conditions, their physical conditions, and the circumstances of their offenses, into long-term prisoners. Such a decision inevitably will impose enormous hardship on a large number of individuals and their families without a rational basis and will cost the State literally millions of dollars of funds to warehouse these individuals for decades.

Most ironic is the provision in Section 7 of the Bill which would provide that the prosecution for repeated sexual abuse does not preclude charges for the separate incidents that comprise the sexual abuse. As a result, charges could be stacked upon charges, all arising out of the same conduct. The law on consecutive sentencing in this state is such that it is entirely conceivable that a stepfather who engages in sexual misconduct on three or four occasions with his teenage stepdaughter and who has a sincere interest and good prognosis for rehabilitation, and who enjoys the support of his family, might be prosecuted and never see the light of day.

Another portion of the Bill is seemingly aimed at making convictions easier to obtain. Section 12 provides that a prior inconsistent statement of a witness is, alone, sufficient to support a conviction. What this means is that if an individual makes an unsworn statement out of court and then later recants the statement when he or she is placed under oath, the unsworn prior inconsistent statement is, alone, sufficient to support a

conviction. This is quite bizarre. Convictions should be predicated on competent and sworn testimony. I do not think that it is an oversimplification to say that if an individual is not willing to swear that the facts comprising the offense are true, that the individual charged should not be convicted of the offense. I know that the prosecution response to this argument is that there are times when children will make allegations of abuse and then later recant them in court. I, personally, have seen evidence of such occurrences only rarely. It is certainly not a sufficiently frequently or consistently occurring phenomenon to justify creating a framework by which individuals can essentially be convicted upon unsworn prior statements. Police officers, investigators, and social workers often times, perhaps with the best of motivations, interrogate children with leading questions that suggest the answer. The phenomenon of children and those in dependent positions desiring to provide answers that the parental or authority figure desires is well known and frequently observed. As a consequence, it is not at all uncommon to have individuals, not only in sexual abuse cases but in other cases as well, provide responses to interrogations out of court that are quite different from what the individual would state in court, when properly questioned and placed under oath.

In summary, House Bill 237 has a lot of problems. It is a bad Bill and should not be passed. It is easy and popular to take positions that make one appear "tough" on problems such as child abuse. And to be sure, child abuse is a problem worth being "tough" over. Being "tough" does not necessarily mean being irrational, unfair and misguided, which I think is how House Bill 237 is best described. If you have any further questions concerning this issue, I would be pleased to confer with you.

Very truly yours,

Jeffrey M. Feldman

JMF:jd

Changes between HB 237 and CS HB 237 (HESS)

1. page 2, line 2 - adds "gross neglect".
2. page 2, line 4 - expanded definition of "abuse or gross neglect"
3. page 2, line 23 - adds "gross neglect"
4. page 2, line 25 - expanded definition of "abuse or gross neglect"
5. page 3, line 8 - changes age of having authority over a child from 16 to 13
   change needs to be made page 3, line 18 and is also made on page 4, line 14
6. page 7, line 20 - AS 12.45.025 - "Prior Inconsistent statements" deleted
7. page 6 - deletes ~~see~~ AS.12.55.125(i) which allows up to 50 years sentence
   adds ~~RS~~AM to (i) = not more than 30 years
   reduces the presumptives proposed from 13 to 8 yrs for first felony
   from 15 to 10 yrs for first felony w/dangerous weapon etc.
   from 25 to 15 yrs for second felony
   from 35 to 25 yrs for third felony

DISTRIBUTED FOR YOUR INFORMATION BY REP. FRAN ULMER

SPEC

Society to Prevent Exploitation of Children

P.O. Box 3027 *Homer, Alaska 99603*

To HESS
RE: Written testimony on H.B. 237

Dear sir or Madame,

I am sorry that I was not able to testify on behalf of SPEC's members and affiliates on 4/22/87 regarding HB237 due to an oversight on the moderaters part. I would like the oportunity however to let you know how we feel on HB 237.

We are most concerned about victims and lack of justice on their part and/or the inability of the victim to have his/her "day in court". This is especially true of children as when they are victims the court system seems to put special road blocks in their way making it extremely difficult to be heard. According to the N.I.J. publication "When the Victim is a Child" over 90% of known sexual abuse cases do not go forward to prosecution.

In the Homer area of the 38 reported sexual abuse cases in 1986 three were unfounded and 35 were either partially or fully substantiated according to D.F.Y.S. Of these 35 cases only two went forward to prosecution. There are a number of reasons for this to include fear of the defendant, delayed reporting, children not able to pinpoint dates or times, age of the child, etc.

The upshot of all this is that we have in the State of Alaska a very big fiscal note in treating these victims and in a continuing cycle of crime. Since the average sexual abuser can molest up to 80 victims we have a problem in not identifying the abuser to the public thus not making it more difficult for him to continue his crime.

We therefore support HB 137 and others that make it possible for increased evidence to be entered into the courts. This hopefully will result in a greater number of prosecutions.

I would like to take the opportunity now to adress Dana Fabes' remarks. I would suggest that she has misinterpreted the intent of section 6 or the "pattern of abuse aspect" of the legislation as she states it is "unconstitutional". Obviously this is not true as the jury still needs a unanimous decision that the act occured at least three times. In fact the act may haveoccured fifteen to two hundred times. We victims of crime are tired of hearing the twenty five cent catch word "unconstitutional" when we speak of equal rights for the victim under the law.

Where is the victim in the process? Why don't they have a constitutional right to be heard? Why is there no parity or justice for the child victim in our system?

She also stated in her testimony that legislation regarding a "pattern of abuse" is not necessary because seperate counts can be brought by establishing seperate dates and times. She is disregarding a major stumbling block in the ability to prosecute as very young children do not orient well to dates and times and many times it takes up to two years or more before disclosure is made on the part of the child.

In adressing her remarks on the need to differentiate between incest and other offenders, it is true that there appears to not be much difference in offenders. however "incest is not best". As the research and common sense dictates, incest is much more devistating to the victim than non-incestuous offenses. I can tell you from first hand experience about the "non-violent" crime of incest and how it creates the runaways on the streets of Alaska and how it puts 16 year old girls in the hospital with drug overdoses and attempted suicide by knife wounds. Non-violent? Give me a break. When a childs universe i.e. parent or parents or gaurdian turns against them they have no where to go. There is no way out, the adult-child trust relationship has been totaly breeched. A child may suffer very much who has been abused by a friend of the family, neighbor, baby sitter, etc. but usually they have the support of the parents. Because of the greater responsibility of parent and or gaurdian I feel this bill is a step in the right direction.

Lastly, when she states there is "no problem" regarding the ability to prosecute these cases, and cites the full prisons as her documentation it is obvious she is not informed on the issue. Many of the three hundred people in the Homer area affiliated with SPEC can document the national statistics of only one in ten known sexual assault cases going forward to prosecution. We can document first hand the difficulties of this type of prosecution in a system that treats children with mistrust and expects them to perform as adults. Our statistics are much worse than the national average on lack of prosecution and on the frequency of abuse. These two things are undenyably linked.

Thank you for your time. Please find enclosed a brochure introducing SPEC and some legislative proposals we are currently working on.

Sincerly,

Timothy F. Bean
President Board of Directors

When the Victim
Is a Child

Society to Prevent the Exploitation of Children

A group of parents and concerned citizens in Homer have formed a non-profit organization called Society to Prevent the Exploitation of Children (SPEC). Our fundamental purpose is to decrease the alarming number of child sexual abuse cases in our state. Our primary tool for accomplishing this will be public eduation and development of public awareness. Some of our specific goals are:

--Arranging workshops and seminars for professionals and lay people.
--Developing resource material for professionals and parents.
--Publicizing the unique plight of sexually victimized children.
--Advocating child safety and the child's absolute right to be free from sexual abuse and sexual exploitation.
--Monitoring the handling and disposition of child sexual abuse cases within the court system.
--Working to make the public and the legislature aware of legislation that will lessen the trauma of child victims in the courtroom and legislation that will help ensure that truly guilty offenders don't escape justice if at all possible.

Recent nationwide statistics show that one in every three or four children will become a victim of some type of sexual abuse or assault. This is alarming information, but even more appalling is the knowledge that more than ninety percent of all reported child sexual abuses cases never go forward to prosecution (according to the National Institute of Justice in Washington, D.C.). Since the average pedophile molests approximately eighty victims, the children are indeed between a rock and a hard place.

Legislative reform is an absolute necessity if we are to see a change in the way our children are handled in the courts. Other states are already ahead of Alaska in addressing this problem. Within our judicial system children are specially handicapped. First, the criminal justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the system seems indifferent to the legitimate special needs that arise from a childs participation in the courtroom.

We have researched child abuse legislation from many other states and have examined studies and recommendations from a variety of groups and governmental agencies. Legislation that we support for the 1987 session follows:

S.P.E.C.

SOCIETY TO PREVENT THE EXPLOITATION OF CHILDREN

Summary of goals and objectives in the area of legislation dealing with child sexual abuse.

The following issues represent a random compilation and are not intended to be presented in any order of perceived importance.

MANDATORY RECORD CHECKS

Professionals dealing with child molesters have learned that offenders will often seek out activities which will bring them into frequent contact with children. Criminal history checks should be required for all teachers in Alaska (before they are allowed into the classroom) and for all licensed day care providers. This criminal history check must be accomplished through the use of fingerprint cards in order to be effective. The only truly reliable way to check a person's criminal record is by having a set of applicant fingerprint cards which can be sent to the F.B.I. We feel that it would be possible to implement a system whereby other criminal history entries (for crimes other than sex offenses) are not disclosed to the school district.

EXTENDING THE STATUTE OF LIMITATIONS FOR CHILD ABUSE

It is common for victims of child sexual abuse to hide the fact of the molestation for years. Offenders freqently use threats or intimidation to ensure the victim's silence. Prosecution should not be impossible merely because the offender was successful in silencing the victim for a period of time. Although most other crimes cannot be prosecuted unless an arresthas occured within a certain amount of years (usually 3 to 5 years for felonies) the reality of molestation requires a much longer period (perhaps 10 years) within which charges may be brought against an offender.

VICTIM ADVOCATE PROVISION

A child victim should be allowed to have a person present during any testimony (including Grand Jury) for moral support. Legislation should also allow the courtroom to be cleared of spectators, in legally appropriate cases, while a child victim is testifying.

REMOTE VICTIM TESTIMONY

The United States Constitution gives all criminal defendants the right to confront and cross-examine all witnesses against them. Nevertheless, child abuse cases are unique in that the victim is a child and children are obviously going to be traumatized by the ordeal of facing their abuser in an intimidating courtroom

REMOTE VICTIM TESTIMONY, (cont.)

setting and then undergoing cross-examine, often more than once. We recognize that a fair trial requires that the child provide testimony and undergo examination by defense counsel and be visible and audible to the judge, jury, defendant and counsel. We feel that the requirements of the Constitution, and of a fair trial, would be met by having the child victim give testimony from a room adjacent to the courtroom and via closed circuit television. The only difference here is that the person is not physically present on the witness stand; the witness can be seen and heard and questioned remotely. Conversely, the witness can also see the attorneys, defendant, jury and judge. Many courts throughout the country now utilize closed-circuit television for court proceedings, including the arraignment of defendants (who remain in the correctional facility and are arraigned by a judge via closed circuit television).

OFFENDER REGISTRATION

Some states require convicted sex offenders to register with local police wherever they go and both statewide and local records are kept. Only law enforcement and the courts have access to these records. California has had such a law since the 1950's and it has withstood constitutional challenges. This law becomes more important as we realize that treatment specialists still do not know the underlying root cause of child sexual abuse. We know that offenders frequently reoffend and tend to be very mobile, traveling to avoid detection and come into contact with other victims.

PAYMENTS FOR VICTIM TREATMENT

If payment is not a means of avoiding imprisonment, convicted molesters should be required by statute to reimburse the victim or the state for the cost of victim counseling or treatment made necessary by the abuse.

QUALIFICATION OF CHILDREN AS WITNESSES (COMPETENCY)

Children of any age should not have to "qualify" at a hearing before being allowed to testify. A child's competency should be a matter for the jury to weigh. Currently, adults who may be murderers, perjurers or habitual liars do not have to specially qualify in order to provide testimony; nor should children. Legislation should establish that all child victims are competent to testify. Only the jury should decide the truthfulness and accuracy of a witnesses' testimony.

CHILD VICTIM HEARSAY

In situations where a child victim made a statement describing a sexual act, under circumstances strongly indicating the statements reliability, the statement should be used as evidence, particularly where the child is too psychologically traumatized to testify.

PRESUMPTIVE SENTENCING

The State of Alaska should retain,,in it's original form, mandatory jail sentences for first degree offenses. The State Court of Appeals has recently begun handing down reversals of major child abuse cases involving presumptive sentencing. The Court of Appeals has said that the presumptive sentencing legislation is not clear on several issues. The legislature should act speedily to clean up any problem areas in the legislation so that the intent of the original legislation is carried out by the courts. Additionally, the legislature should recognize that eight year presumptive sentences have had the side effect of causing numerous plea bargains resulting in second degree convictions. While this is often a desireable disposition (frequently sparing the victim the trauma of a trial and ensuring a conviction), it also frequently results in little or no jail time. Recognizing that treatment programs generally take at least two or three years, and that jail time can be an effective deterrant, we advocate a presumptive sentencing law that would require jail sentences of two to three years for convictions of sexual abuse of a minor in the second degree (AS11.41.436). This would have the added benefit of separating the offender from any children at least for the period of time that the offender is in custody.

MANDATED PUBLIC SCHOOL PROGRAMS

Legislation should require and fund school programs which involve educating children to recognize, report and avoid sexual abuse and abduction. Educating children about sexual abuse and what to do about it is our best way of breaking the cycle of child sexual abuse.

DIVERSION OF CHILD MOLESTERS

Diversion should be specifically forbidden in all classes of child sexual abuse. Diversion involves the prosecutor agreeing to forego prosecution if the offender enters into an agreement where he/she promises to abide by certain conditions, i.e. receiving treatment.

SPECIALIZED INVESTIGATION AND PROSECUTION

Legislation should create and fund a task force(s) of specially trained investigators and prosecutors within the Department of Law who would be responsible for prosecution of most child abuse cases in the state. Such units would utilize "vertical prosecution" (the same prosecutor at all stages), limited plea bargaining and other techniques designed to increase the chances of conviction and imprisonment of the offender while minimizing the trauma to the victim(s).

Remarks by Representative Fran Ulmer
On the Floor of the House
March 27, 1987

The Safety of Our Children

I would ask permission of this body to speak on the safety of our children.

The death in this community of a seven year old boy who was accidentally electrocuted has brought to mind for all of us the need to be particularly concerned about the safety of young children. When a young child dies for what appears to be no good reason, it makes us all very sad. But when young children in our community and in our state die because of abuse, it makes us not only sad but also mad.

April is Child Abuse Prevention Month and on the first of April, next Wednesday, I will be introducing some legislation which will increase penalties for child abuse and which, I believe, will make it easier for the prosecutors in the State of Alaska to successfully obtain convictions of child abusers. I'd like to talk just very briefly this morning about that, because nothing would be greater than to have 40 co-sponsors on this legislation.

Child sexual assault and child abuse in Alaska have reached epidemic proportions. In FY 80 there were 185 cases of child sexual assault. That number has grown to 1,447 in FY 86. And national statistics show that only one out of seven cases actually gets reported, and a much smaller percentage than that actually get successfully prosecuted. Moreover, the number of children who receive protective services due to child abuse has also risen in what I would describe as an astronomical number. One out of nineteen children in Alaska last year received some kind of child protection services. Indeed, 9,222 children had such serious problems that some kind of assistance was requested and received from the State of Alaska due to child abuse or neglect.

The cycle of violence if gone unbroken creates not only undue anguish and injury within the family but also on the streets. Sons who witness their father's violence in the home have a 1,000 percent greater chance of creating that kind of abuse for either their spouses or their children. We don't know what the statistics are on the number of people who commit crimes when they are adults who were abused as children, but experts in the field indicate that a very large percentage of these adults were abused as children.

As a society, how do we break that cycle of violence? What do we here in the Alaska Legislature do about this problem? Well, we first have to recognize it exists. It is a problem that

we cannot hide from and we cannot cover up. It is a problem which needs our resources, not only in terms of intervention and protection of the victim, but prevention and treatment of the abusers and the victims. We have many worthwhile programs in the State of Alaska but they are at risk, both in terms of funding and in terms of support from those of us who choose to ignore the problem as we often do.

We also need to tighten the prosecution of these offenses. Our resources must first and foremost go to the victims to get them out of the abusive situation and to get them treatment and protection. I believe it is also time for us to face up to the fact that we make it incredibly easy for those who commit the abuse to never be punished for the offense. Part of the problem is a fairly recent ruling by Alaska's Court of Appeals which makes it much more difficult to prosecute these cases.

I'd like to explain that this morning because that will be the first of the bills that I introduce and with which I would like your assistance. In Covington vs. State of Alaska, the Court of Appeals made it much more difficult to obtain successful convictions for sexual abusers who abuse more than once. Covington's victim was his natural daughter. He started abusing her at about age 9, continued to do so; he forced her to have sexual intercourse with him at age 16. This conduct continued night after night, week after week, year after year. In this case the Court of Appeals reversed Covington's conviction because his daughter could not be specific with the jury as to any particular instance. Hence, it was possible that some members of the jury were thinking of one instance of sexual intercourse and convicting him for that offense, while others were thinking of a different instance of sexual assault and convicting Covington for that offense. In effect, Covington, because of the frequency and number of occasions that he attacked his daughter, was able to convince the Court of Appeals that the jury could not be unanimous as to any specific act that he engaged in. Therefore his conviction was reversed. This case all but eliminates the prosecution of multiple sexual assaults on young children who cannot readily distinguish between events or remember specific nights. Indeed, the Covington decision rewards multiple sex offenders who offend against young children.

Recently in a Ketchikan case, during the middle of a trial, the State was forced to dismiss a sexual abuse case, although the child's testimony was that he was consistently abused by his father. On cross examination the child gave different dates than the State had elicited in direct examination.

I give these two examples and there are indeed hundreds of other cases just like these in the State of Alaska. Because the child cannot remember the specific event and cannot testify as to these specific events, the abuser gets off scot free or with a significantly reduced charge.

There's another problem regarding admissibility of evidence in child abuse cases that I'd like to bring to your attention and that I hope you will join me in dealing with in this legislation. It is the multiple offense of child abuse. A recent case in Juneau, which you have probably read about in the newspaper because a citizens group has become very involved with it, involves the death of a 20-month-old child. Next Monday will be the one year anniversary of the death of that child. He died as a result of a kick or a punch to the stomach which was so hard as to rupture his intestines. He died in the middle of the night without any medical care. Had that case gone to trial, the prosecution would have tried to admit evidence that this was not the first but a series of abuse which this child received from the live-in boyfriend of his mother. Indeed, a couple of weeks earlier his arm was broken, a month or so earlier his arm had been tied behind his back because he was using the wrong arm to eat with. But because of evidentiary restrictions imposed by prior decisions, that evidence could not be presented.

I force you to deal with these facts so that you can understand prosecution has been made very difficult by Court of Appeals rulings. The prosecutor would not have been allowed to bring into evidence the fact that this child's arm had been broken or any of the other abuse of which there was good evidence, because of a ruling that shows that this kind of previous incidents or previous events are inadmissible as being too prejudicial.

Having reviewed these cases and a recent case in the State of Washington where a young child died as a result, again, of a series of abuse, I have come to the conclusion that we should create a new statutory offense: It is a child abuse offense which recognizes a pattern of conduct. When a child is being abused in his or her home by a parent or authority figure, night after night, day after day, week after week, year after year, it is a very different kind of offense than a simple assault case. If I'm walking down South Franklin Street in front of the Red Dog Saloon and some drunk slugs me, there are likely to be witnesses, it is one event, it is a relatively simple case to prove and would probably be dealt with by our court system. Child abuse cases, by their very nature, take place in the privacy of people's homes where there frequently aren't witnesses, and recent rulings are making it even more difficult for the proof to be presented. I submit to you it is a different kind of offense; it deserves a more serious penalty; and we ought to have different rules of evidence associated with what kind of proof is permissible to be able to get successful convictions in these hideous cases. I speak not only to those which result in death of a child but also serious abuse, of which there are many.

I will be submitting these bills on April 1. I will hold a briefing session Monday at 9:00 a.m. for those of you who are interested in learning more about the bills. I would welcome you

to come to my office at 9:00 on Monday morning to discuss it. I would, again, welcome your participation and your co-sponsorship. I sincerely believe that child abuse, because it is so incredibly painful for us to consider, is an example of a problem that has been long overlooked and inadequately dealt with in our society. I would urge you, during April, Child Abuse Prevention Month, to put as much energy as you can into helping those who want to reduce child abuse in Alaska.

Thank you very much.

HOUSE COMMITTEE REPORT

(7)

Date referred: 4/1/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 5/1/87

The Health, Education and Social Services Committee has considered HB 237

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

RECOMMENDS:

[ ] replace with CSHB 237 (HESS) [ ] the same title
[✓] a new title
[ ] attached amendment(s)

- [ ] do pass
- [ ] do not pass
- [✓] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the ________ Committee

ADOPTS: [ ] ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[/] fiscal impact
[4] zero fiscal note
[ ] zero with analysis

[ ] same as previous fiscal note published ________
[ ] same as previous zero fiscal note published ________

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

[signature] - No Rec
[signature] - no rec
[signature] no rec
[signature] No - Rec
[signature] No rec.
[signature] N. Rec
[signature] NoRec

[signature]
Co- Chairman's signature
[signature]

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM May 5, 1987

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

TO: Representative John Sund
Chair, House Judiciary Committee

FROM: Keith B. Levy KBL
Legislative Counsel

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

I. JURY UNANIMITY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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