ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6963 HOUSE JUDICIARY

sentencing proceedings, except as provided by AS 12.55.125(a)(3), 12.55.125(k), 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment has the effect of reversing a recent Court of Appeals ruling. Because the amendment is a sentencing provision, it will not have a fiscal impact on the department.

Section 19. This section amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years would also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or homicide under the laws of another jurisdiction when the offense contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110. This section would also require a court to impose a mandatory 99 year sentence when the court finds clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture. These sentencing provisions are not expected to have a fiscal impact on the department.

Section 21. This section amends AS 12.55.125 to provide that a defendant sentenced to a mandatory term of 99 years may apply for a modification or a reduction in the sentence of one-half of the mandatory term. The section also provides that a first felony offender convicted on an offense for which a presumptive term is not specified may not be sentenced to a term of unsuspended imprisonment that exceeds the presumptive term for a second felony offender convicted of the same crime. These are sentencing provisions and they will not have an impact on the Department of Law.

Section 22. This section amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present. This sentencing provision will not have a fiscal impact on the department.

Section 23. This section amends AS 12.55.175 to provide that, except as provided in Section 22 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less

than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. This sentencing provision is not expected to have a fiscal impact on the department.

Section 24. This section amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term, under the amendment to AS 12.55.125(a) proposed in Section 19, shall not be eligible for discretionary parole during the entire term. This sentencing provision will not have a fiscal impact on the department.

Section 25 and Section 26. These sections amend AS 33.16.090 to provide that a prisoner may be eligible for discretionary parole during the second half of a sentence imposed under the amendment to AS 12.55.175(e) proposed in Section 23, above.

Section 27. This section makes the extension of the statute of limitations on criminal prosecutions, set out in Section 15 above, prospective.

Section 28. This section amends Alaska Rule of Criminal Procedure 35 to permit a court to reduce or modify a mandatory sentence of imprisonment of 99 years, in accordance with the sentencing provision contained in Sections 19 and 21.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. H.B. 396

Revision Date: _____ **Department Affected:** Department of Corrections

Title: "An Act relating to violent crimes and criminal law and procedures." **BRU:** Statewide Operations

Component: Various

Sponsor: House Judiciary

Requestor: House Judiciary **COMPONENT SERIAL NO.** | | | | |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analys.s.

Prepared By: Carl Nickel, Director **Phone:** 465-3376

Division: Administrative Services **Date:** 1-16-92

Approved by Commissioner: Lloyd Hames, Commissioner for

Agency: Department of Corrections **Date:** 1-16-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

HB 396: "An Act relating to violent crimes and criminal law and procedures."

This bill makes numerous changes to Alaska's Criminal Code involving violent crimes. By raising the seriousness of certain crimes from one class to another and by providing for mandatory sentences for certain crimes, the bill will impact the Department by increasing the prisoner population and lengths of sentences of some prisoners. However, most of the offenses addressed are anticipated to occur infrequently and some of the effects will not become apparent for at least five years. Therefor, no significant fiscal impact is expected. A sectional analysis follows:

Section 1: Title.

Sections 2-4: These sections amend the statutes addressing certain forms of assault, such as those which cause serious physical injury as a result of repeated, rather than single assaults, and those committed by an adult against a child under 10 years of age. Because of the infrequency of the offenses, these amendments are unlikely to have significant fiscal impact.

Sections 5-9: These sections amend the sexual offense statutes to include the conduct of engaging in sexual acts or contact with a person who is unaware that the sexual contact or act is being committed, and sexual offenses committed by a health care professional during professional treatment. Section 9 adds sexual sadism or masochism to the list of prohibited behaviors described under unlawful exploitation of a minor. The amendments are unlikely to have fiscal impact because of the infrequency of the offenses.

Sections 10-12: These sections address "drive by shootings" which would become Class C felonies even when no one is injured or placed in fear by the conduct. The amendments are unlikely to have fiscal impact because of the infrequency of the offenses.

Section 13: This section would include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. The amendment is unlikely to have significant fiscal impact because of the anticipated infrequency of the offense.

Section 14: This section prohibits persons under age 21 from possessing defensive weapons on the grounds of or on a parking lot immediately adjacent to a public or private school, without permission of the school administration. This offense would be a misdemeanor. This section is unlikely to have significant fiscal impact because of the infrequency of the offense being committed by adults.

HB 396

Sections 15, 24, and 25: These sections extend the statute of limitations from five to ten years for the following felonies: Manslaughter, Criminally Negligent Homicide, Assault in any degree, Kidnapping and Custodial Interference, Arson in the First Degree, Sexual Assault in any degree, Sexual Abuse of a Minor in any degree, Incest, Unlawful Exploitation of a Minor, Robbery, Extortion, or Coercion. The statute of limitations is extended from five to twenty years for felony sexual offenses involving a victim under age 16. The fiscal impact will not be felt for at lease five years. No information is available on how many crimes go uncharged because of the current five year limitation, however the fiscal impact is not expected to be significant.

Section 16: This section clarifies that a person convicted of two or more crimes, including murder in the first degree, may be sentenced to consecutive sentences in excess of the term of imprisonment for the murder conviction. There are already a number of prisoners within the Department who are serving such consecutive terms, so this amendment is not expected to have significant impact.

Section 17: This section provides that the preponderance of evidence standard of proof applies to sentencing proceedings, except as provided by AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment reverses a recent Court of Appeals ruling and is not expected to have significant fiscal impact.

Sections 18 & 21: These sections provide that a person convicted of Murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years and shall not be eligible for discretionary parole when the conviction is for the murder of a clearly identified peace officer, fire fighter, or correctional officer engaged in official duties, or when the person has been previously convicted of Murder in the first or second degree. Due to the infrequency of the offenses, no significant fiscal impact is anticipated.

Sections 19, 20, 22, and 23: These sections provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds certain factors in aggravation. If a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and also finds that the defendant has excellent potential for rehabilitation, the panel shall sentence the defendant to the presumptive term and order the defendant to engage in appropriate rehabilitation programs. The panel may then provide that the defendant is eligible for discretionary parole during the second

half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. There are not significant numbers of prisoners incarcerated at this time who had their sentences reduced by a three-judge panel, based on excellent potential for rehabilitation, therefor the fiscal impact is not expected to be significant.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____ Department Affected: Public Safety

Title: An Act relating to violent crimes and criminal law and procedure

BRU: Alaska State Troopers

Component: Detachments

Sponsor: House Judiciary

Requestor: House Judiciary

COMPONENT SERIAL NO. 7 9 9

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Gayle A. Horetski Phone: 465-4322

Division: Commissioner's Office Date: 1/21/92

Approved by Commissioner: Gayle A. Horetski for Richard L. Burton

Agency: Department of Public Safety Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____
Title: An Act relating to violent crimes and criminal law and procedures.
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 4 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	76.7	79.0	81.4	83.8	86.3	88.9
TRAVEL	2.0	2.1	2.2	2.3	2.4	2.5
CONTRACTUAL	20.0	20.6	21.2	21.8	22.5	23.2
SUPPLIES	1.5	1.6	1.7	1.8	1.9	2.0
EQUIPMENT	2.0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	102.2	103.3	106.5	109.7	113.1	116.6
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	102.2	103.3	106.5	109.7	113.1	116.6
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	102.2	103.3	106.5	109.7	113.1	116.6

POSITIONS:

FULL-TIME	1.0	1.0	1.0	1.0	1.0	1.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)
See Attached.

Prepared by: John B. Salemi, Director
Division: Public Defender Agency
Phone: 279-7541
Date: January 17, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/21/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
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Position Title	No. of Positions	Range / Step	Barg. Unit
Attorney III	1	22A	PX

Time Status	Staff Months		Location	Election District
PFT	12.0		EBA	92

TYPE OF EXPENDITURE		AMOUNT
Salary	56.0	
Benefits	20.7	
Premium Pay		
Other		
Total Personal Services	76.7	76.7
Travel		2.0
Contractual		20.0
Commodities		1.5
Equipment		2.0
Other		
Total Cost		102.2
FUNDING SOURCE FOR TOTAL COST		
Federal Receipts 1002		
G.F. Match 1003		
General Fund 1004		102.2
I-A Receipts 1007		
CIP Receipts 1061		
Other		

Justification

HB 396 will increase the workload of the Public Defender Agency. Its provisions will 1) elevate certain criminal conduct from misdemeanor level to a felony classification, 2) elevate certain felony conduct to a higher classficiation of offense, thereby increasing potential penalties, 3) extend significantly the statute of limitations for many criminal acts, including doubling the period for charging crimes against persons and increasing by 15 years the statute of limitations for sex offenses against persons under 16 years of age, 4) create a more severe criminal penalty for certain homicide offenses (99 years without parole), and 5) modify certain sentencing procedures which will restrict the court's ability to reduce sentences.

While it is difficult to quantify the extent to which these provisions will increase the Public Defender case/workload, a real increase will occur. The proposed budget increment (one attorney and associated expenses) represents a conservative estimate of the fiscal impact of HB 396.

8/LEG92/02127B.KP/1

Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 93

Revised Date:

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Title: "An Act relating to violent crimes and criminal law and procedures."

This bill makes a variety of changes in Alaska's Criminal Code, including changes in the definition of some crimes, changes as to the severity of certain offenses and significant revisions in sentencing procedures.

This analysis is not intended as a position paper by the Public Defender. Instead a short description of each of the sections of the bill follows along with the anticipated fiscal impact on the Alaska Public Defender Agency.

Section 1. Title.

Section 2. This section amends AS 11.41.200(a). It elevates repeated misdemeanor assaults to the level of a felony and apparently is a response to a recent court of appeals decision wherein the state initially successfully prosecuted an individual for a felony only to have the conviction reversed. (S.R.D. v. State (citation omitted). As an aside, if the state had initially proceeded on a theory of prosecution based on a "continuous course of conduct" as relates to the repeated assaults, the felony conviction would likely have been left undisturbed by the appellate court. It is not an area which necessarily needs new legislation in that the same result could be achieved adjusting prosecutorial tactics.

It is unlikely this section will have a fiscal impact on the Public Defender Agency in that it will not result in many additional felony cases.

Section 3. This section amends AS 11.41.210(a) with the same result as section 2 except the repeated assaults are only elevated to a class B felony as opposed to the A felony above. No likely fiscal impact.

Section 4. This section amends the assault in the third degree statute [AS 11.41.22(a)] by providing that a misdemeanor assault committed against a victim who is under the age of 10 can be charged with a felony assault. This amendment is based on criminal conduct defined as recklessly causing physical injury to another person, or with criminal negligence causing physical injury to another person by means of a dangerous instrument. The effect will be to considerably broaden felony assault conduct against children. In fact the revision may be overbroad and subject to a constitutional challenge. While any projection as to the number of cases which will be made under this section is speculative, there is a real possibility that such an amendment will have a fiscal impact on the Public Defender Agency.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Section 5. This amendment to AS 11.41.410(a) is in direct response to the Dr. Ake case wherein said health care worker was convicted of having sex with his patients while they were on the examining table. Because of a perceived loophole in the law this amendment has been proposed. In fact Dr. Ake was convicted and sentenced. it It is unlikely that this proposed change in the law will have fiscal impact on the Public Defender Agency.

Section 6. Similar to section 5 above. No impact.

Section 7. An amendment to AS 11.41.425(a). It amends the statute to create a felony offense for one who engages in sexual contact with a person who is unaware that a sexual act is being committed. These cases are exceedingly rare and would not likely have a fiscal impact on this agency.

Section 8. This section amends AS 11.41.455(a). The amendment adds sexual masochism or sadism to a list of proscribed sexual activities with children under the age of 18 years. No fiscal impact.

Section 9. Definitions only. No fiscal impact.

Section 10. This amendment to AS 11.61.200(a) modifies the crime of Misconduct Involving Weapons wherein someone discharges a firearm from a moving vehicle. It would change the offense from a class A misdemeanor to a class C felony. Apparently it is in response to "drive-by" shootings, although it would probably more commonly be committed in Alaska by people shooting at road signs from their cars. No fiscal impact.

Section 11. This allows peace officers to fire from their vehicles without violating the law. See section 10 above. No fiscal impact.

Section 12. This provides an affirmative defense for hunting and fishing (?) from a moving vehicle as relates to section 10 above. Apparently it is the snow machine or three wheeler exception to shooting from a moving vehicle. No fiscal impact.

Section 13. An amendment to AS 11.61.210(a). This proposed change in the law precludes someone from selling a firearm or defensive weapon to a person under 18 years of age. Unknown fiscal impact.

Section 14. This section deals with the creation of a new crime wherein an individual who possessed a defensive weapon on a school ground is subject to prosecution. No significant fiscal impact.

Section 15. This section increases the statute of limitations for many of the crimes against persons. For example under present law manslaughter, criminally negligent homicide, felony assaults,

sexual assaults, and other serious crimes against persons must be initiated within 5 years of their commission. The amendment contained in section 15 doubles the amount of time (to 10 years) available to prosecute these and other offenses. Furthermore the amendment extends to 20 years the statute of limitations for felony sexual offenses involving victims under the age of 16. Because this amendment was prompted by law enforcement complaints that many cases were lost because of the present statute of limitations it is expected that this change will have a real fiscal impact on the Public Defender Agency. Obviously the impact will be deferred somewhat in that Section 25 of this bill makes this proposed change prospective only. In other words, the amendment would not apply to offenses which may have occurred before the effective date of the change in the law.

Section 16. This section amends AS 12.55.025(e) and relates to the rules concerning consecutive sentences in the context of murder convictions. No fiscal impact.

Section 17. This is another amendment to Title 12 and concerns sentencing procedure. It is an effort to reverse a Court of Appeals decision concerning the applicable standard of proof in sentencing hearings. If passed it is expected to generate additional litigation related to sentencing hearings as well as additional appeals based on the challenged use of prior bad acts, convictions, etc. It is expected to have an effect on public defender work.

Section 18. This amendment to Title 12 provides that an individual convicted of murder in the first degree, where the victim was a peace officer, fire fighter, or correctional officer engaged in the performance of official duties, will receive a 99 year sentence without parole. This amendment in essence resurrects the sentence of life imprisonment for this character of crime. This mandatory sentence would also apply to an individual convicted of murder in the first or second degree who has a prior murder conviction. In terms of fiscal impact it is anticipated that these cases would put a significant drain on the public defender contractual budget in that they would carry the highest sanction possible under Alaska law and would therefore demand a disproportionate amount of attorney time, investigative time and contractual resources. Fortunately it is not anticipated that there would be many of these cases on a per year basis. Still there would be some fiscal impact, on both attorney resources and the contractual budget.

Section 19. This section modifies the sentencing laws of Alaska through an amendment of AS 12.55.165. This amendment proposes to severely restrict referral of cases to the three judge panel for consideration of rehabilitation potential of a defendant. With reduced hope of getting a referral to the three judge panel, many defendants who are subject to presumptive sentencing may elect to

take their case to trial. In effect they will have nothing to lose by exercising their right to a jury trial. Furthermore sentencing hearings themselves will become more adversarial and the calling of witnesses will become more frequent at such hearings in an effort to avoid the finding of certain aggravators which would preclude referral to the three judge panel under the proposed amendment. This translates into some increase in the public defender work, although it is difficult to quantify.

Section 20. This section, to a lesser extent, will have the same fiscal impact on the Public Defender Agency as section 19 in that it restricts the ability of the three judge panel to reduce presumptive sentences. The trial option for a defendant facing presumptive jail time would look more attractive if sections 19 and 20 are passed in to law. As trials are by far the most time consuming and expensive form of litigation for the Public Defender Agency the fiscal impact could be significant.

Section 21. This section amends the parole statute so as to make it consistent with section 18 above.

Section 22 and 23. These sections make amendments to the parole statute consistent with the changes in the three judge panel procedure outlined in section 20.

Section 24. This section repeals AS 12.10.020(c) for purposes of extending the statute of limitation in certain sex cases as discussed in section 15 above.

Section 25. This section contains the prospective application of the expanded statute of limitations amendments contained in section 15 above.

SUMMARY

The discussion above indicates that many of the provisions contained in HB 396 are fiscally insignificant. Others, however, will have a fiscal impact on the Alaska Public Defender Agency. Additional cases, additional trials, more protracted sentencing hearings all add up to an increased work load. It should be noted that the statute of limitations provisions, for example, were introduced in this bill because police were complaining that many cases were going unprosecuted because they fell outside of the applicable statute of limitations. While neither the police nor the Department of Law have provided statistics concerning additional cases which might be prosecuted, suffice it to say the work load is going to go up, not down, if HB 396 passes. No reasonable person would conclude otherwise.

It is difficult to project the amount of additional work which will be generated by HB 396. For that reason a very conservative

ANALYSIS: (continued)

Approach is taken by this agency in terms of fiscal impact. It is anticipated that one additional attorney will be needed in Anchorage to absorb the work created through this bill. This lawyer would travel on an "as needed" basis to other office locations.

BUDGET ANALYSIS - HB 396

100 - Attorney III (Anchorage)	76.7
200 - Travel	2.0
300 - Contractual Office Space, Experts	20.0
400 - Supplies	1.5
500 - Equipment (One Time)	2.0
Total	102.2

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 396

Revision Date: _____ Department Affected: Department of Law

Title: "An Act relating to violent crimes and criminal law and procedure." BRU: Prosecution

Component: All

Sponsor: House Judiciary Committee

Requestor: House Judiciary Committee COMPONENT SERIAL NO. [ ][ ][ ][ ]

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: January 13, 1992

Approved by Commissioner: Richard I. Pegues /FOR/ Charles E. Cole, Attorney General

Agency: Department of Law Date: January 13, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 396

Title: "An Act relating to violent crimes and criminal law and procedures."

This bill makes numerous changes to Alaska's Criminal Code involving violent crimes. A section-by-section analysis follows below.

Section 1. Title.

Section 2. This section amends AS 11.41.200(a) to include within the crime of assault in the first degree recklessly causing serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury. This amendment is in response to the recent court of appeals decision in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991). It will not have an impact on the Department of Law because, where it is now necessary to prove several misdemeanors, the amendment will allow the state to prove a single class A felony, instead. This crime usually arises when a child is subjected to repeated physical abuse.

Section 3. This section amends AS 11.41.210(a) to include in the definition of the crime of assault in the second degree recklessly causing serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury. The result of this amendment is the same as Section 2, except that assault in the second degree is a class B felony because of the absence of a dangerous instrument.

Section 4. This section amends AS 11.41.220(a) to provide that a person, who is 18 years of age or older and who violates AS 11.41.230(a)(1) or (a)(2) when the victim of the offense is under the age of 10, commits the crime of assault in the third degree. This conduct, recklessly causing physical injury to another person, or with criminal negligence causing physical injury to another person by means of a dangerous instrument, is usually a class A misdemeanor. Under this amendment, however, the offense is increased to a class C felony when it is committed by an adult against a child under 10 years of age. The amendment is unlikely to have a fiscal impact because of the infrequency of the offense.

Section 5. This section amends AS 11.41.410(a) to include in the crime of sexual assault in the first degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment of the victim. This amendment will have little impact on the department because of the infrequency of the offense.

Section 6. This section amends AS 11.41.420(a) to include in the crime of sexual assault in the second degree the conduct of

engaging in sexual contact with a person who is unaware that a sexual act is being committed if the offender is a health care worker, and the conduct occurs while the offender is providing professional treatment to the victim. The amendment also adds to the offense of sexual assault in the second degree the conduct of engaging in sexual penetration with a person who is unaware that a sexual act is being committed (when the offender is not a health care provider). These changes are not expected to have a fiscal impact on the department.

Section 7. This section amends AS 11.41.425(a) to include in the crime of sexual assault in the third degree the conduct of engaging in sexual contact with a person who is unaware that a sexual act is being committed. This section is not expected to have a fiscal impact on the department.

Section 8. This section amends AS 11.41.455(a) to include within the crime of unlawful exploitation of a minor the conduct of knowingly inducing or employing a child under 18 years of age to engage in, or photographing, filming, recording, or televising a child under 18 years of age engaged in sexual masochism or sadism. This change should have no fiscal impact on the department.

Section 9. This section provides definitions for the terms "health care worker" and "sexual act."

Section 10. This section amends AS 11.61.200(a) to include within the crime of misconduct involving weapons in the first degree the act of discharging a firearm from a moving propelled vehicle. Consequently, "drive-by" shootings would become a class C felony even when no one is injured or placed in fear by the conduct. This section is not expected to have a fiscal impact on the department.

Section 11. This section amends AS 11.61.200(d) to provide that as an exception to AS 11.61.200(a)(11), a peace officer acting within the scope and authority of employment may fire a weapon from a moving vehicle. This amendment will have no fiscal impact on the department.

Section 12. This section amends AS 11.61.200 to make it an affirmative defense to a prosecution under AS 11.61.210(a)(11) that the person who discharged the firearm from a moving vehicle was engaged in a lawful hunting or fishing activity at the time. This amendment will have no fiscal impact on the department.

Section 13. This section amends AS 11.61.210(a) to include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. This amendment will not have a fiscal impact.

Section 14. This section amends AS 11.61.220(a) to provide that a

person commits the crime of misconduct involving weapons in the third degree if the person knowingly possesses a defensive weapon within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer. A person 21 years of age or older is exempted from this provision. This amendment will not cause a fiscal impact.

Section 15. This section amends AS 12.10.010, the state's general statute of time limitations for criminal prosecutions, to provide that the current 5-year limitation within which an indictment must be found or an information or complaint must be instituted, shall be extended to 10 years for the following felonies:

Manslaughter
Criminally Negligent Homicide
Assault in any degree
Kidnapping and Custodial Interference
Arson in the first degree
Sexual Assault in any degree
Sexual Abuse of a Minor in any degree
Incest
Unlawful Exploitation of a Minor
Robbery, Extortion, or Coercion

However, the section also provides that the current 5-year limitation shall be extended to 20 years after the commission of a felony sexual offense, including those listed above, involving a victim under the age of 16. As provided in Section 25 of the bill, the amendment of the statute of limitations will be prospective only. Consequently, there will be no fiscal impact for at least 5 years. Although information that would indicate how many crimes go uncharged under the current 5-year limitation is not available, the department does not anticipate that this amendment will have a significant fiscal impact.

Section 16. This section amends AS 12.55.025(e) to clarify that a person convicted of two or more crimes, including murder in the first degree, may be sentenced to consecutive sentences in excess of the term of imprisonment for the murder conviction. This is a sentencing provision and will not have an impact on the department.

Section 17. This section amends AS 12.55.025 to provide that the preponderance of the evidence standard of proof applies to sentencing proceedings, except as provided by AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment has the effect of reversing a recent Court of Appeals ruling. Because the amendment is a sentencing provision, it will not have a fiscal impact on the department.

Section 18. This section amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years would also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or homicide under the laws of another jurisdiction when the offense contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110. This sentencing provision is not expected to have a fiscal impact on the department.

Section 19. This section amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present. This sentencing provision will not have a fiscal impact on the department.

Section 20. This section amends AS 12.55.175 to provide that, except as provided in Section 19 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all rehabilitative programs ordered by the panel. This sentencing provision is not expected to have a fiscal impact on the department.

Section 21. This section amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term, under the amendment to AS 12.55.125(a) proposed in Section 18, shall not be eligible for discretionary parole during the entire term. This sentencing provision will not have a fiscal impact on the department.

Section 22 and Section 23. These sections amend AS 33.16.090 to provide that a prisoner may be eligible for discretionary parole during the second half of a sentence imposed under the amendment to AS 12.55.175(e) proposed in Section 20, above.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____

Section 24. This section repeals AS 12.10.020(c), relating to the statute of limitations for certain sex offenses, which are amended in Section 15 above.

Section 25. This section makes the extension of the statute of limitations on criminal prosecutions, set out in Section 15 above, prospective.

SECTIONAL ANALYSIS - CSHB 396 (JUD)

Anti-Violent Crime Act of 1992

Section 1: Short title.

Section 2: The bill section clarifies that a person commits first degree assault whenever the person recklessly causes serious physical injury to another person by using a dangerous instrument. The amendment is in response to S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), in which the court held that the current assault statute does not allow injuries inflicted over the course of several separate assaults to be cumulated for purposes of establishing that a first degree assault had been committed. First degree assault is a class A felony.

Section 3: The bill section clarifies that a person commits second degree assault whenever the person recklessly causes serious physical injury to another person. The amendment is in response to S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), discussed under bill section 2. Second degree assault is a class B felony.

Section 4: The bill section elevates what is currently classified as fourth degree assault to third degree assault if an offender is 18 years of age or older and repeatedly assaults a child under the age of 10, or assaults a child under 10 and the assault requires medical treatment. This amendment is in response to several recent Anchorage cases including one in which an infant had 56 different bruises on its body caused by a series of beatings committed over a three week time period and one in which a 5 year old child was intentionally burned by being placed in a bath of scalding water. Because there was not a substantial risk that either child would die and neither child was permanently disfigured, the offenders could only be charged with misdemeanors. Third degree assault is a class C felony.

Section 5: The bill section amends the first degree sexual assault statute to make it illegal for a health care worker to engage in sexual penetration with a patient who the offender knows is unaware that a sexual act is being committed. By specifically including this conduct within the statute, the amendment closes the door on a technical legal defense to a charge of sexual assault in a future case similar to the one involving Dr. Ake. First degree sexual assault is an unclassified felony.

Section 6: The bill section amends the second degree sexual assault statute to make it illegal for a health care worker to engage in sexual contact with a patient, and for anyone to engage in sexual penetration with a person, who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the amendment closes the door on a technical legal defense to

a sexual assault charge. Second degree sexual assault is a class B felony.

Section 7: The bill section amends the third degree sexual assault statute to make it illegal for anyone to engage in sexual contact with a person who the offender knows is unaware that a sexual act is being committed. As with bill sections 5 and 6, the amendment closes the door on a technical legal defense to a sexual assault charge. Third degree sexual assault is a class C felony.

Section 8: The bill section amends the unlawful exploitation of a minor statute by making it illegal to induce or employ a child under 18 to engage in sexually masochistic or sadistic behavior in written or recorded materials. The amendment closes a gap in the statute that was brought to light as a result of the prosecution of former Anchorage police officer Feichtinger. Unlawful exploitation of a minor is a class B felony.

Section 9: The bill section defines the term "health care worker" as used in bill sections 5 and 6. The definition includes those persons who are employed in jobs in which it is possible to the person to sexually assault a patient without the patient's knowledge.

Section 10: The bill section amends the misconduct involving weapons in the first degree statute to make it a crime to discharge a firearm from a moving vehicle. The amendment is in response to a series of "drive-by" shootings that have occurred in the past year, and prohibits inherently dangerous conduct. Misconduct involving weapons in the first degree is a class C felony.

Section 11: The bill section clarifies that the crime created by bill section 10 does not apply to a peace officer acting within the scope and authority of the officer's employment.

Section 12: The bill section clarifies that the crime created by bill section 10 does not apply to a person using a firearm while hunting, trapping, or fishing in a manner not prohibited by law.

Section 13: The bill section amends the misconduct involving weapons in the second degree statute to make it illegal to sell firearms and defensive weapons to people under 18. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the second degree is a class A misdemeanor.

Section 14: The bill section amends the misconduct involving weapons in the third degree statute to make it illegal for people under the age of 21 to possess defensive weapons on school property. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors in the

schools. Misconduct involving weapons in the third degree is a class B misdemeanor.

Section 15: The bill section extends the statute of limitations for violent felony crimes from five years to ten years. The amendment removes a technical legal defense to charges that a person has committed a serious violent felony.

Section 16: The bill section eliminates the statute of limitations for felony crimes involving child sexual abuse. As with bill section 15, the amendment removes a technical legal defense to child sexual abuse charges and eliminates a practical barrier to prosecuting child abusers.

Section 17: The bill section makes a technical amendment to conform to the changes made by bill section 19.

Section 18: The bill section clarifies that, unless the legislature has provided otherwise, the "preponderance of the evidence" standard of proof applies in sentencing proceedings. The amendment codifies Brakes v. State, 796 P.2d 1368 (Alaska App. 1990) and codifies the standard of proof that is generally applied to sentencing issues under current law.

Section 19: The bill section requires a sentence of 99 years, without possibility of probation or parole, to be imposed on persons convicted of first degree murder who have previously been convicted of murder; who murder a peace office, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder; or who commit a torture murder.

Section 20: The bill section clarifies that by imposing the mandatory 99 year prison term in the circumstances listed in bill section 19, the legislature does not intend to limit the court's discretion to impose this type of sentence in other circumstances.

Section 21: The bill section adds a new subsection (j) to AS 12.55.125 to allow a person who has been sentenced to a mandatory 99 year prison term under bill section 19 to apply for modification or reduction of sentence under Criminal Rule 35(b) after having served half of the mandatory term (49.5 years). In order to actually receive a sentence reduction under Criminal Rule 35(b), an offender would need to prove "that conditions or circumstances have changed since the original sentencing hearing such that the purposes of the original sentence are not being fulfilled."

The bill section also adds a new subsection (k) to AS 12.55.125 to codify Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991) and Austin v. State, 627 P.2d 657 (Alaska App. 1981).

Section 22: The bill section prohibits referring certain aggravated cases to the three judge panel based on the defendant's potential for rehabilitation. The presence of any of the following aggravators triggers the prohibition: the defendant's conduct manifested deliberate cruelty, the defendant has a history of aggravated or repeated instances of assaultive conduct, the defendant's conduct was among the most serious conduct included in the definition of the offense, the defendant was on bail, probation, parole, or furlough release for another crime at the time of the offense, the defendant has three or more prior felony convictions, the offense was one of a continuing series of criminal offenses, the offense was a crime against a minor and the defendant has engaged in the same or similar conduct against another minor, or the offense was committed in retaliation against someone who had previously testified against the defendant.

Section 23: The bill section changes the powers of the three judge panel in cases where it finds that manifest injustice would result from imposition of the presumptive term, that the defendant has an exceptional potential for rehabilitation, and that a sentence of less than the presumptive should be imposed. Under current law, the three judge panel can reduce a sentence based on its prediction of whether the defendant will be rehabilitated. Instead of this approach, the bill section allows the three judge panel to make it possible for the defendant to be released from jail early if the defendant succeeds in being rehabilitated and requires the three judge panel to order the defendant to engage in appropriate programs of rehabilitation. The amendments made in this bill section and in bill section 26 change the focus from predicting the defendant's future behavior to evaluating the defendant's past behavior.

Section 24: The bill section makes two technical amendments to conform to the changes made by bill section 19 and bill section 23.

Section 25: The bill section makes a technical amendment to conform to the changes made by bill section 23.

Section 26: The bill section makes an amendment to conform to the changes made by bill section 23.

Section 27: The bill section clarifies the applicability of bill sections 15 and 16 to be consistent with the Alaska and United States Constitutions.

Section 28: The bill section acknowledges that the addition of AS 12.55.125(j) in bill section 21 has the effect of amending a court rule.

SECTIONAL ANALYSIS

Anti-Violent Crime Act of 1991

Section 1: Short title.

Section 2: The bill section clarifies that first degree assault is committed whenever a person recklessly causes serious physical injury to another person by using a dangerous instrument. In so doing, the amendment defines the crime by the nature of the injury caused by the defendant to the victim. This amendment is in response to the Court of Appeals opinion in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), in which the court held that the current assault statute did not allow injuries inflicted over the course of several separate assaults to be cumulated for purposes of establishing that a first degree assault had been committed. First degree assault is a class A felony.

Section 3: The bill section clarifies that second degree assault is committed whenever a person recklessly causes serious physical injury to another person by using a dangerous instrument. In so doing, the amendment defines the crime by the nature of the injury caused by the defendant to the victim. This amendment is in response to the Court of Appeals opinion in S.R.D. v. State, 817 P.2d 484 (Alaska App. 1991), discussed under bill section 2. Second degree assault is a class B felony.

Section 4: The bill section increases the penalty from an A misdemeanor to a C felony for a person 18 years of age or older who assaults a child under the age of 10. This amendment is in response to several recent cases investigated by the Anchorage Police Department, including one in which an infant child had 56 different bruises on its body caused by a series of beatings committed over a three week time period. Because there was not a substantial risk that the child would die and the child was not permanently disfigured, despite the egregious conduct, the offender could only be charged with a misdemeanor.

Section 5: The bill section amends the first degree sexual assault statute to make it illegal for a health care worker to engage in sexual penetration during the course of professional treatment with a person who the offender knows is unaware that a sexual act is being committed. By specifically including this conduct within the statute, the legislation closes the door on a technical legal defense to a charge of sexual assault in a future case similar to the one involving Dr. Ake. First degree sexual assault is an unclassified felony.

Section 6: The bill section amends the second degree sexual assault statute to make it illegal for a health care worker to

engage in sexual contact during the course of professional treatment, and for anyone to engage in sexual penetration, with a person who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the legislation closes the door on a technical legal defense to a charge of sexual assault. Second degree sexual assault is a class B felony.

Section 7: The bill section amends the third degree sexual assault statute to make it illegal for anyone to engage in sexual contact with a person who the offender knows is unaware that a sexual act is being committed. As with bill section 5, the legislation closes the door on a technical legal defense to a charge of sexual assault. Third degree sexual assault is a class C felony.

Section 8: The bill section amends the unlawful exploitation of a minor statute by making it illegal to induce or employ a child under the age of 18 to engage in sexually masochistic or sadistic behavior in written or recorded materials. The amendment closes a gap in the statute that was brought to light as a result of the prosecution of former Anchorage police officer Feichtinger. Unlawful exploitation of a minor is a class B felony.

Section 9: The bill section defines the term "health care worker" as used in bill sections 5 and 6. The definition includes those persons who are employed in a job in which it is possible to engage in sex with a patient without the patient being aware that sex is occurring.

Section 10: The bill section amends the misconduct involving weapons in the first degree statute to make it a crime to discharge a firearm from a moving vehicle. The amendment is in response to a series of "drive-by" shootings that have occurred in Anchorage and Fairbanks in the past year, and prohibits conduct that is inherently dangerous. Misconduct involving weapons in the first degree is a class C felony.

Section 11: The bill section clarifies that the crime created by bill section 10 does not apply to a peace officer acting within the scope and authority of the officer's employment.

Section 12: The bill section clarifies that the crime created by bill section 10 does not apply to a person using a firearm while hunting or fishing in a manner not prohibited by law.

Section 13: The bill section amends the misconduct involving weapons in the second degree statute to make it illegal to sell firearms and defensive weapons to people under 18. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the second degree is a class A misdemeanor.

Section 14: The bill section amends the misconduct involving weapons in the third degree statute to make it illegal for people under the age of 21 to possess defensive weapons on school property. The amendment is in response to a growing problem in Anchorage with the use and possession of stun guns by minors. Misconduct involving weapons in the third degree is a class B misdemeanor.

Section 15: The bill section extends the statute of limitations for violent crimes from five years to ten years, and for child sexual abuse from five years to twenty years. The amendment removes a technical legal defense to charges that a person has committed a serious violent felony, and eliminates a practical barrier to prosecuting child abusers.

Section 16: The bill section makes a technical amendment to conform to the changes made by bill section 18.

Section 17: The bill section clarifies that, unless the legislature has provided otherwise, the "preponderance of the evidence" standard of proof applies in sentencing proceedings. This amendment has the effect of reversing the court of appeals recent ruling in Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991), and of codifying the standard of proof that is currently applied for "prior verified criminal conduct."

Section 18: The bill section requires a sentence of 99 years, without possibility of probation or parole, to be imposed on persons convicted of first degree murder who have previously been convicted of murder, or who murder a peace office, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder.

Section 19: The bill section prohibits referring aggravated cases to the three judge panel based on the defendant's potential for rehabilitation. The presence of any of the following aggravators triggers the prohibition on referring a case to the three judge panel: the defendant's conduct during the offense manifested deliberate cruelty, the defendant has a history of aggravated or repeated instances of assaultive actions or of a juvenile felony adjudication other criminal behavior, the defendant's conduct was among the most serious conduct included in the definition of the offense, the defendant was on bail, probation, parole, or furlough release for another crime at the time of the offense, the defendant has three or more prior felony convictions, the offense was one of a continuing series of criminal offenses, the offense was a crime against a minor and the defendant has engaged in the same or similar conduct against another minor, or the offense was committed in retaliation against someone who had previously testified against the defendant.

Section 20: The bill section changes the powers of the three

judge panel in cases where it finds that manifest injustice would result from imposition of the presumptive term, that the defendant has an exceptional potential for rehabilitation, and that a sentence of less than the presumptive should be imposed. Under current law, the three judge panel can simply reduce a sentence based on its prediction of whether the defendant will be rehabilitated. Instead of this approach, the bill section allows the three judge panel to make it possible for the defendant to be released from jail early if the defendant succeeds in being rehabilitated. The bill section also requires the three judge panel to order the defendant to engage in appropriate programs of rehabilitation. The amendments made in this bill section and in bill section 23 change the focus from predicting the defendant's future behavior to evaluating the defendant's past behavior.

Section 21: The bill section makes two technical amendments to conform to the changes made by bill section 18 and bill section 20.

Section 22: The bill section makes a technical amendment to conform to the changes made by bill section 20.

Section 23: The bill section makes an amendment to conform to the changes made by bill section 20.

Section 24: The bill section makes a technical amendment to conform to the changes made by bill section 15.

Section 25: The bill section clarifies the applicability of bill section 15 in a manner that is consistent with the requirements of the Alaska and United States Constitutions.

Alaska State Legislature

House of Representatives
House Judiciary Committee

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M E M O R A N D U M

TO: Representative Dave Donley, Chair
House Judiciary Committee

FROM: Laurie H. Otto, Staff Counsel

RE: HB 396 - Section 17
Standard of Proof at Sentencing Hearings

DATE: June 15, 1991

Under Section 17 of HB 396, the "preponderance of the evidence" standard of proof applies to sentencing hearings. This provision is intended to clarify the law relating to the type of evidence that the court can consider during sentencings. Imposition of a "preponderance of the evidence" standard of proof is supported by public policy considerations, the ABA standards, and the clear weight of federal authority.

General Legal Authority

The United States Supreme Court has concluded that the preponderance of the evidence standard satisfies due process under the federal constitution in the context of state sentencing proceedings, noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." McMillan v. Pennsylvania, 477 U.S. 79, 91-93, 106 S.Ct. 2411, 2419-20, 91 L.Ed.2d 67 (1986). Moreover as the Alaska court of appeals noted in Brakes, the federal courts have uniformly held that the preponderance of the evidence is the appropriate standard for making factual determinations under the new federal sentencing guidelines and that no greater standard of proof is required by due process.[1]

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[1] See e.g., United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990); United States v. Fredericks, 897 F.2d 490 (10th Cir. 1990); United States v. Fernandez-Vidana, 857 F.2d 673 (9th Cir. 1988); United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989); United States v. Guerra, 888 F.2d 247 (2nd Cir. 1989).

The ABA Standards also declare that proof by a preponderance of the evidence is sufficient for resolving factual disputes that would arise in the context of non-presumptive sentencing cases:

> In reaching its findings on all controverted issues ..., the sentencing court should employ the preponderance of the evidence standard and may treat the contents of a verified presentence report as presumptively accurate, provided however, that material factual allegations made in the presentence report and effectively challenged by the defendant should not be deemed to satisfy the government's burden of persuasion unless reasonable verification of such information can be shown to have been made ... or adequate factual corroboration otherwise exists in the sentencing or trial record.

III ABA Standards for Criminal Justice 18-6.4(c) (2d ed. 1980).

Notably, the ABA Standards recognize that a higher standard of proof by "clear and convincing evidence" may be applicable in cases where a disputed fact, if established, may be relied upon to impose an enhanced penalty. See III ABA Standards for Criminal Justice 18-6.5(b)(ii) (2d ed. 1980). This is consistent with Alaska's requirement that, in presumptive sentencing cases, disputed issues involving prior convictions, statutory aggravating and mitigating factors, and extraordinary circumstances are to be determined under a more rigorous standard than preponderance of the evidence.

Current Alaska Law

Although the legislature has set the standard of proof with respect to elements of presumptive sentencing, the statues are silent as to the standard of proof that otherwise applies to sentencing proceedings.[2] The Alaska appellate courts have

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[2] See e.g., AS 12.55.145(d) (disputed prior convictions must be proved beyond a reasonable doubt); AS 12.55.155(f) (aggravating and mitigating factors must be proved by clear and convincing evidence); AS 12.55.165 (extraordinary circumstances justifying referral to the three-judge panel must be proved by clear and

traditionally allowed the widest possible range of information to be presented during sentencing hearings.

In the leading case of Nukapigak v. State, 562 P.2d 697, 701 N.2 (Alaska 1977), aff'd on rehearing, 576 P.2d 982 (Alaska 1978), the Alaska Supreme Court stated that a sentence will not be disturbed "if ... the information relied on by the sentencing judge was sufficiently verified to appear trustworthy and the defendant was given the opportunity to deny it or present contrary evidence of his [or her] own." In this context, the court defined "verified" as meaning "corroborated or substantiated by supporting data or information." Id. at 701 n.2. This language, which has been quoted or referred to in many Alaska cases in the years since Nukapigak was decided, is more consistent with the preponderance of the evidence standard than with the clear and convincing standard. If Section 17 of HB 396 is adopted, the defendant would still have the opportunity to challenge any adverse information in the sentencing or trial record as contemplated in Nukapigak.

Recently, however, the court of appeals has veered away from the test used in Nukapigak, and has specifically articulated a standard of proof for certain disputed factual issues at sentencing. For example, in Brakes v. State, 796 P.2d 1368 (Alaska App. 1990), the court of appeals held that "preponderance of the evidence" is the appropriate standard of proof in misdemeanor sentencings. On the other hand, in Buoy v. State, ___ P.2d ___, Op. No. 1169 (Alaska App. October 25, 1991), the court of appeals held that in certain felony cases, the "clear and convincing" standard of proof applies.

There are countless issues presented during sentencing proceedings that do not fall into the categories addressed in Brakes and Buoy. And, unlike the type of findings for which the legislature has set a higher burden of proof, most disputed facts considered during sentencing are not specifically relied upon in and of themselves to adjust a sentence up or down. Instead, the finding of a disputed fact is only one factor among the totality of the circumstances which the judge must weigh in exercising discretion within the available sentencing range.

Even in presumptive sentencing cases after statutory aggravating and mitigating factors have been established, the judge is required to determine the weight given these factors in deciding whether to adjust the presumptive term up or down. Ordinarily, the decision whether to adjust the presumptive term will be based upon findings of fact related to such matters as the defendant's

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convincing evidence).

background and character, the defendant's need for or amenability to treatment for a drug or alcohol problem, the danger the defendant poses to the public, and the defendant's potential for rehabilitation.

To require such basic findings to be made by more than the preponderance of the evidence goes far beyond the requirements of due process and would severely limit the traditionally broad discretion given to judges to fashion an appropriate sentence based on the needs of the individual defendant and the need to protect the public. Moreover, requiring the state to prove any and all disputed factual issues by greater than a preponderance of the evidence would, in effect, turn the sentencing hearing into a second trial. The public interests of judicial economy and the already over-burdened trial courts will be greatly disserved by such a result.

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January 14, 1992

The Honorable Dave Donley, Chairman
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 396 (Violent Crimes and Criminal Law and Procedure)

Dear Representative Donley:

At your request, we have reviewed HB 396 and by this letter we wish to indicate our support for the bill. We particularly favor those sections that are in response to recent appellate and trial court decisions.

Sections 2 and 3 cure the problem noted by the court of appeals in S.R.D. v. State, 817 P.2d 484 (Alaska 1991); namely, that under existing law the state cannot prosecute as felons those adults who ultimately cause serious physical injury to a child by subjecting the child to repeated assaults over a period of time. Section 4 amends AS 11.41.220(a) to make it a felony when an adult either recklessly causes physical injury to a child under ten years of age or causes physical injury to such a child by means of a dangerous instrument.

Sections 5, 6, and 7 amend the state's sexual assault statutes to make it a crime for a person to engage in sexual contact or penetration with a person known by the offender to be unaware that a sexual act is occurring. The level of offense is elevated one class if the offender is a health care provider, as defined in section 9 of the bill, and if the conduct occurs while the offender is providing professional treatment to the victim.

Section 8 amends AS 11.41.455(a), another of the state's sexual offenses ("Unlawful Exploitation of a Minor") to prohibit a person from inducing or employing a child under 18 years of age to engage in acts of sexual masochism or sadism. The amendment also prohibits a person from photographing, filming, recording, or televising a child engaged in such acts.

The next five sections of the bill amend the state's laws relating to weapons offenses. Section 10 amends AS 11.61.200(a) to include within the crime of misconduct involving weapons in the first degree the act of discharging a firearm from a moving propelled vehicle. Consequently, "drive-by" shootings will be at least a class C felony offense even if no one is injured or placed in fear by the conduct. Section 11 amends AS 11.61.200(d) to provide that, as an exception to AS 11.61.200(a)(11), a peace officer acting within the scope and authority of employment may fire a weapon from a moving vehicle. Section 12 amends AS 11.61.200 to make it an affirmative defense to a prosecution under AS 11.61.210(a)(11) that the person who discharged the firearm from a moving vehicle was engaged in a lawful hunting or fishing activity at the time.

Next, section 13 amends AS 11.61.210(a) to include knowingly selling a firearm or defensive weapon to a person under 18 years of age within the crime of misconduct involving weapons in the second degree. The last amendment relating to weapons, section 14, amends AS 11.61.220(a) to provide that a person commits the crime of misconduct involving weapons in the third degree if the person knowingly possesses a defensive weapon within the grounds of or on a parking lot immediately adjacent to a public or private school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer. A person 21 years of age or older, however, is exempted from this provision.

Section 15 amends AS 12.10.010, the state's general statute of limitations for criminal prosecutions, to extend to ten years the current five-year limitation within which an indictment must be found or an information or complaint must be instituted for the following felonies: manslaughter; criminally negligent homicide; any felony assault; kidnapping and custodial interference; arson in the first degree; sexual assault in any degree; sexual abuse of a minor in any degree; incest; unlawful exploitation of a minor; and robbery, extortion, or coercion.

In section 24, the bill repeals current AS 12.10.020(c), relating to the statute of limitations for sexual offenses involving victims under the age of 16. In its stead, section 15 extends the limitations period for these offenses to 20 years. As specified in section 25 of the bill, these amendments to the statutes of limitations will have prospective effect only.

Section 17 amends AS 12.55.025 to make clear that the preponderance of the evidence standard of proof applies to sentencing proceedings, except as provided in AS 12.55.145(d), 12.55.155(f), and 12.55.165. This amendment, effectively reversing the court of appeals' decision in Buoy v. State, ___ P.2d ___ (Op. No. 1169 Alaska Oct. 25, 1991), codifies both the court's decision

in Brakes v. State, 796 P.2d 1368 (Alaska App. 1990), and current practice on verified prior criminal conduct. It is also consistent with practice in federal courts and with the American Bar Association standards for criminal justice. III Standards for Criminal Justice § 18-6.4(c) (2d ed. 1980).

Section 18 amends AS 12.55.125(a) to provide that a defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when the conviction is for the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder. The mandatory term of imprisonment of 99 years will also apply if the person convicted of murder in the first degree has been previously convicted of murder in the first or second degree in Alaska, or of a similar offense under the laws of another jurisdiction. Section 16 amends AS 12.55.025(e) to clarify that nothing in AS 12.55.125(a) limits the court's ability to impose consecutive sentences; i.e., a defendant may be given consecutive sentences that exceed the term of imprisonment specified for murder in the first degree. Section 21 amends AS 33.16.090(b) to provide that a prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) is not eligible for discretionary parole during that entire term.

Sections 19, 20, 22, and 23 relate to the nonstatutory mitigator of "extraordinary potential for rehabilitation." Section 19 amends AS 12.55.165 to provide that a court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (19), (20), (21), or (28) is present.

Section 20 amends AS 12.55.175 to specify that, except as provided in section 19 above, if a three-judge panel determines that manifest injustice would result from imposition of a presumptive term and the panel also finds that the defendant has excellent potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel shall sentence the defendant to the presumptive term under AS 12.55.125 and order the defendant to engage in appropriate rehabilitative programs under AS 12.55.015. The panel may then designate the defendant as eligible for discretionary parole under AS 33.16.090 during the second half of the sentence, if the defendant successfully completes all of the rehabilitative programs ordered by the panel. Sections 22 and 23 amend AS 33.16.090 to make provision for the discretionary parole authorized by section 20.

As previously indicated, we support this legislation and we appreciate the opportunity to comment on the bill.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

ALASKA PUBLIC DEFENDER AGENCY

POSITION PAPER

RE: HB 396 "An Act Relating to Violent Crimes and Criminal Law and Procedure"

Analysis This position paper will only cover selected sections of the proposed legislation.

Sec. 4. This section increases assault from a misdemeanor to a felony when an adult causes physical injury to a child under the age of 10. Previously charged as assault in the fourth degree, this section makes it a class C felony assault in the third degree.

The likely effect of this proposal is that minimal or non-injuries to children under 10 will now only be able to be charged as felonies. The definition of physical injury is "a physical pain or an impairment of physical condition." AS 11.81.900(b)(41). An example might best serve to show the broad range of conduct that will now be a felony offense. A parent is driving in Anchorage on icy roads. Negligently not realizing the slickness of the streets, the parent slides through a stop sign and is bumped or bumps another car. The child in the car seat bumps his head and cries because it hurts, it is a physical pain. This is now a felony crime because the parent has negligently caused physical injury to another person by means of a dangerous instrument (the car).

Other examples abound. There has recently been discussion among educators as to the use of corporal punishment as a reasonable disciplinary technique. AS 11.81.430 permits the use of force "when and to the extent reasonably necessary and appropriate to promote the welfare of the child..." Do we want parents and teachers to face felony charges of assault when there is uncertainty as to the reasonableness of their discipline?

In sum, this section broadly increases the possibilities of felony assault charges based simply upon the age of the complaining witness. This conduct already appears to be adequately addressed and punished under the assault in the fourth degree statutes. It appears unnecessary to make this a felony offense. Even the Department of Law in their fiscal note claims that this offense is "infrequent." Any parent who loses his temper momentarily and spanks his child could become a convicted felon. The criminal justice system is not the best choice for teaching proper parenting techniques.

1 TO: House Judiciary Committee

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From	B. Brink
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trial. The Alaska Supreme Court has also recognized the importance of statutes of limitation, even in the civil context.

> It is generally recognized that the purpose of statutes of limitation is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from prosecution of stale claims. Statutes of limitations attempt to protect against difficulties caused by lost evidence, faded memories, and disappearing witnesses.

Byrn v. Ogle, 488 P.2d 716, 718 (Alaska 1971). Therefore, any statute of limitation is intended to assure fairness in the court process. It limits the circumstances in which guilt may be found and is aimed at preserving the accuracy and basic integrity of the adjudicative process where the guilt or the innocence of a person is ultimately decided.

Under the due process clauses of the 15th and 14th Amendments, a person may argue that an excessive delay in his trial has caused his evidence and witnesses to disappear and his case to be compromised. A defendant does not have an adequate remedy to argue a violation of his constitutional speedy trial guarantees by demonstrating such prejudice. The real problem arises when the case is so stale, the information so cold, and the ability to investigate so hampered that the delay has also prevented the possibility of proving the prejudice.

The public has a strong interest in determining the truth of a criminal charge and a prompt conviction of the guilty party. The statute of limitations is not a "loophole." It is not a "technicality." Limitations are for the benefit both of the public and those accused. The report prepared by the Legislative Research Agency regarding statutes of limitations (dated December 4, 1991) recognizes that even with no change in the statute of limitations, an adult survivor of child abuse still has the capacity to initiate a civil cause of action, which "may offer several advantages over a criminal proceeding for the state, the victim, and society ..." (p.3).

The time limits are to some extent clearly arbitrary line drawing. Where there is a problem, it may make sense to alter the lines. The 20 years for any of the enumerated crimes in Section 15 is unjustified by any showing that crimes are not being prosecuted. To the extent that changes in limitations for child sex-abuse crimes should be made, the lines should be drawn as narrowly as possible.

A proposal to modify AS 12.10.020(c) to change to "a person under the age of 18 [16] may be commenced within one year after the crime is reported to a peace officer", eliminating the

CORRECTION

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ALASKA PUBLIC DEFENDER AGENCY

POSITION PAPER

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TO: House Judiciary Committee

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From	B. Brink
Co.	
Phone #	
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Sec. 15. This section amends the current statute of limitations with regard to criminal prosecution. Subsection 1 extends the statute of limitations to 10 years for what can be classified as crimes against a person.

Subsection 2 provides that the statute of limitations is extended to 20 years for any sex offense or promoting prostitution, former sex offense or former contributing to the delinquency of a minor charges where the complaining witness was under the age of 16. The five year period of limitations on sexual abuse of a minor offenses for victims under the age of 16 has already previously once been extended. In 1983, the statute changed to provide that charges could be commenced within one year after the crime is reported to a peace officer or the person reaches age 16 whichever occurs first, operating to extend the limitation an additional five years. (AS 12.10.020(c)).

Both of these extensions are objectionable and overbroad when one understands the basic purposes of statutes of limitations. The United States Supreme Court has recognized that statutes of limitation provide "the primary guarantee against bringing overly stale criminal charges." United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

> The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanction. Such limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time limit may also have the salutary affect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Commentators have recognized other useful purposes served by these statutes of limitation. These statutes prevent prosecution of those who have been law-abiding for many years, they avoid prosecution after the community's retributive impulse is lessened and they have been recognized to lessen the possibility of blackmail. However, foremost of all of the goals is the desirability of requiring that prosecutions be based upon reasonably fresh evidence in order the lessen the horrendous possibility of an erroneous conviction. These statutes therefore share important purposes with other speedy trial protections, and are grounded in the constitutional rights to due process and speedy

trial. The Alaska Supreme Court has also recognized the importance of statutes of limitation, even in the civil context.

> It is generally recognized that the purpose of statutes of limitation is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from prosecution of stale claims. Statutes of limitations attempt to protect against difficulties caused by lost evidence, faded memories, and disappearing witnesses.

Byrn v. Ogle, 488 P.2d 716, 718 (Alaska 1971). Therefore, any statute of limitation is intended to assure fairness in the court process. It limits the circumstances in which guilt may be found and is aimed at preserving the accuracy and basic integrity of the adjudicative process where the guilt or the innocence of a person is ultimately decided.

Under the due process clauses of the 15th and 14th Amendments, a person may argue that an excessive delay in his trial has caused his evidence and witnesses to disappear and his case to be compromised. A defendant does not have an adequate remedy to argue a violation of his constitutional speedy trial guarantees by demonstrating such prejudice. The real problem arises when the case is so stale, the information so cold, and the ability to investigate so hampered that the delay has also prevented the possibility of proving the prejudice.

The public has a strong interest in determining the truth of a criminal charge and a prompt conviction of the guilty party. The statute of limitations is not a "loophole." It is not a "technicality." Limitations are for the benefit both of the public and those accused. The report prepared by the Legislative Research Agency regarding statutes of limitations (dated December 4, 1991) recognizes that even with no change in the statute of limitations, an adult survivor of child abuse still has the capacity to initiate a civil cause of action, which "may offer several advantages over a criminal proceeding for the state, the victim, and society ..." (p.3).

The time limits are to some extent clearly arbitrary line drawing. Where there is a problem, it may make sense to alter the lines. The 20 years for any of the enumerated crimes in Section 15 is unjustified by any showing that crimes are not being prosecuted. To the extent that changes in limitations for child sex-abuse crimes should be made, the lines should be drawn as narrowly as possible.

A proposal to modify AS 12.10.020(c) to change to "a person under the age of 18 [16] may be commenced within one year after the crime is reported to a peace officer", eliminating the

language of "or the person reaches the age of 16." The five year extension already provided by AS 12.10.020(c) for a total of 10 years would appear to be adequate given the cases sought to be included. This would allow these reasons for non-reporting (still in the hands of the abusers, unawareness or criminal nature, repressed memories) to be taken care of.

Sec. 17. This section amends AS 12.55.025 to provide that proof by a preponderance of the evidence standard applies to sentencing proceedings except as already explicitly provided by law. This section is unfair, inconsistent with the legislative scheme so far, specifically disfavored by the Court of Appeals, and is strenuously opposed. The legislature has already recognized that in the presumptive sentencing context there should be high burdens of proof of specific facts that affect the sentence a person will receive. Prior convictions that will automatically enhance a sentence are required to be proven beyond a reasonable doubt. Aggravating factors that allow a judge to increase a sentence and mitigating factors that allow a judge to decrease a sentence must be proven by clear and convincing evidence. Extraordinary circumstances warranting referral to the three-judge panel must be proven by clear and convincing evidence. Any other facts to be proven at a sentencing proceeding (in particular allegations of "prior bad acts") that would reflect upon the person's character, rehabilitation potential, should also be reliable determinations. In non-presumptive sentencing situations, the consequences of finding certain "bad acts" as true can be as great or greater than the consequences of finding prior convictions, aggravators, mitigators, or extraordinary circumstances.

The majority of the Criminal Rules Committee for the State of Alaska in drafting tentative rules regarding sentencing proceedings reached the same conclusion, that the relatively strict standard of clear and convincing evidence should apply, given the seriousness of the potential consequences. Austin v. State, 627 P.2d 657 (Alaska App. 1981) provides that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. The Austin rule can be deviated from only in exceptional cases and is recognized as promoting uniformity in sentencing, one of the legislative goals of the presumptive sentencing statutes. In determining the sentence for a first felony offender, aggravating and mitigating factors do not specifically apply by statute. However, they are used by sentencing courts to determine whether or not these are the kinds of exceptional cases that warrant exceeding the Austin rule.

In Buoy v. State, __ P.2d __ (Alaska App. 1991), the Court of Appeals recognized that unless the standard was clear and convincing evidence in these situations, the Austin rule would be

meaningless. If the preponderance of the evidence standard applies to determining aggravating factors or extraordinary circumstances in first offender cases, the first felon may in fact receive a more serious sentence than the same person with the same background committing the same offense would have received as a second felony offender. The higher burden of proof keeps the Austin rule intact and lends uniformity to sentencing. This clear and convincing standard does not make sentencing hearings unnecessarily cumbersome. Given the very broad sentencing ranges for both unclassified felonies as well as first felony offenders not governed by presumptive sentencings, often far greater consequences will attach in a non-presumptive case. Given such potentially drastic consequences, and the goal of achieving uniformity in sentencing, the legislature should not allow non-presumptive aggravators to be established by some burden of proof less than clear and convincing evidence. Sentences should be imposed based upon proven, reliable information not suspicion, conjecture, rumor, speculation, and unsupported allegations. See e.g., Note, A Proposal to Insure Accuracy in Presentence Investigation Reports, 91 Yale Law Journal 1225, 1245 n. 115-117 (1982). It is recommended that existing laws not be tampered with, and this section be deleted.

Sec. 19 and 20. This section proposes modifications to the way that the three-judge panel is referred cases, and the exercise of discretion by the three-judge sentencing panel. Section 19 specifically limits the discretion of a court to refer a case to a three-judge panel based upon the nonstatutory mitigating factor of the defendant's potential for rehabilitation if in addition to that finding the court has also found one of several specific factors in aggravation already set out in the statutes.

Section 20 is another limitation on the discretion of the sentencing court, this time on the three-judge panel. If the case is referred to the three-judge panel based upon manifest injustice and the defendant's exceptional potential for rehabilitation, the three-judge panel's power to sentence to less than the presumptive term is eliminated. The three-judge panel is still required to give the defendant the presumptive term, and is required to order the defendant to engage in "appropriate programs of rehabilitation." The only discretion left to the three-judge panel is that they may provide that during the second half of the presumptive sentence required to be imposed, the defendant may be eligible for discretionary parole if "the defendant successfully completes all rehabilitation programs ordered under Section 2 of this subsection."

Making any major modifications to the sentencing provisions as a whole is fraught with peril and a piecemeal approach which should be avoided. In fact, the Alaska Sentencing Commission is in the middle of its three year life span. This Commission is engaging in exhaustive research, taking testimony of experts and lay people,

gathering information, and compiling data bases in order to reach consensus upon what the appropriate changes to the sentencing law should be. The Alaska Sentencing Commission is a diverse group representing every aspect of law enforcement, criminal justice, and victim's rights. Major proposals are expected from the Commission based on its exhaustive study. It is unwise to make minor changes to portions of the statutory scheme when an exhaustively researched and prepared report and proposals are forthcoming. Therefore, it is recommended that no changes be made to the sentencing statutes.

Additionally, the specific changes proposed here appear to attempt to fix problems that in fact do not exist and create more problems than will be rectified. For example, under Section 19, it is a rare instance that where the sentencing court has found an aggravating factor the case will still be referred to the three-judge panel. However, there may be cases where this is appropriate (e.g. juvenile felony joy-riding conviction 20 years ago.) It is not necessary to limit the sentencing judge's jurisdiction, since it is already subject to further review and evaluation by the three-judge sentencing panel.

Similarly, limiting the discretion of the three-judge panel is not necessary nor useful. The three-judge panel has only rarely modified a presumptive term in those most exceptional cases. A recent Memorandum to Members of the Alaska Sentencing Commission specifically discussed three-judge panel referrals based on the Non-Statutory Mitigator "Extraordinary Potential for Rehabilitation." This memo analyzed the data and found that only 75 total cases in the State of Alaska were referred to the three-judge panel on that basis from January 1986 to October 1991. The three judge panel accepted the trial court's conclusion of extraordinary prospects for rehabilitation in 39 cases, but rejected that finding in 36 cases. Even in those cases where the mitigator was accepted, the three-judge panel did not always reduce the sentence. Since 1988 there have been only 15 referrals to the three-judge panel in cases involving sexual abuse. In 8 of those cases the three-judge panel rejected the finding of unusual prospects for rehabilitation. Even when it was accepted, the three-judge panel generally recommended sex offender treatment during incarceration and as a condition of probation. Therefore, the Sentencing Commission reviewed the data specifically regarding referrals to the three-judge panel for unusual rehabilitation potential, generally found in favor of the status-quo, and proposed taking no action. The minutes of that meeting show that many members of the commission found the decisions of the three-judge panel to be consistent, uniform, and fair. Only a single member wanted to eliminate the non-statutory mitigator, which in effect is what this section does.

Therefore, the three-judge panel reduces sentences only extremely rarely. Most sentences that are reduced simply have the amount of jail time that previously was required to be imposed, suspended

over the defendant's head. The defendant is ordered to be released on probation for an extensive period of time and required to participate in any kind of counseling and program that the court may think is appropriate. The only difference is that the counseling and programming is conducted outside of the Department of Corrections' prison system. Counseling and participation is closely monitored by parole and probation officers. It is true the court cannot go back and increase his sentence, but the court has absolute power to consistently evaluate performance and impose the entire suspended terms of imprisonment.

The other major problem with the proposal as listed here is that it assumes that the Department of Corrections will have appropriate programs of rehabilitation available to each and every individual person and their individual rehabilitative needs in every custodial setting. This is a false assumption. The quality and variety of programming varies widely within the prison system of the Department of Corrections. Even though a judge may recommend appropriate programs of rehabilitation, the judge may not order a prisoner to a particular institution and may not order that the institution provide specific things for him. That invades the province of the Department of Corrections. If, based upon the Department of Corrections' regulations, prisoner needs, bed space, and other concerns, a prisoner is designated to a facility that does not offer any of the appropriate programs, he will not be able to engage in the rehabilitation deemed appropriate. He will have no ability to try to prove that he has been rehabilitated and he will end up serving an entire sentence not because of any lack of initiative or rehabilitative desire on his part, but because of factors completely outside of his control.

It is also important to know that the Department of Corrections has limited space in the programs that it does offer. In part, due to this, the Department of Corrections has a policy of not sending a prisoner to a rehabilitative program until that prisoner is near the end of their incarcerative period. For example, a prisoner with an eight year presumptive sentence on a sex offense who is found to have excellent prospects for rehabilitation, an extreme desire and potential for successful treatment in a sex offender program will not be classified by the Department of Corrections to the Hiland Mountain Correctional Center for placement in the sex offender program immediately. Because of limited space in that program a waiting list is maintained. Because the program is approximately 18 months to two years in duration, and because part of the goal of the program is to teach people rehabilitative skills and non-criminal behavior that they can utilize in life on the outside world, the Department of Corrections will not send anybody to that program until they only have approximately two to three years left on the time that they need to serve. Therefore, it is impossible for a prisoner to participate in his own rehabilitation until the second half of his sentence. All the time he has done initially in the first half of

his sentence is dead time where he may not avail himself of rehabilitative programs. This is not in the interest of the defendant nor in the interests of society. Why should a person be warehoused with no treatment when he is ready, willing, and eager to participate? Remember again, this is the unusual offender. Why should a person be warehoused in jail if there has been a factual finding that he is not dangerous, that rehabilitation can be accomplished in an out-patient setting?

This legislation is unnecessary, and will not accomplish rehabilitation. It will greatly increase the numbers of people incarcerated who do not need to be incarcerated to protect the public or to rehabilitate themselves.

Sec. 18. Section 18 modifies the sentencing provisions with regard to the charges to Murder in the First Degree. It provides that the sentence shall be a mandatory term of imprisonment for 99 years when the deceased is a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who is engaged in the performance of his official duties at the time he was murdered or if the person being sentenced has previously been convicted of Murder in the First Degree, Murder in the Second Degree or similar offenses under the laws of another jurisdiction.

Sec. 21. Section 21 amends AS 33.16.090(b) to provide that anybody who receives the mandatory 99 year term under those pre-existing conditions shall not be eligible for discretionary parole during the entire 99 year term.

The combined effect of the mandatory nature of the maximum term, and the absolute prohibition of any possible future relief through discretionary parole is troubling.

A. The Principle of Reformation Article I, Section 12 of the Alaska Constitution provides in pertinent part:

"Penal administration shall be based upon the principle of reformation and upon the need for protecting the public."

Nall v. State, 642 P.2d 1361 (Alaska App. 1982) specifically upheld the current presumptive sentencing scheme because it restricted judicial discretion but did not eliminate it. If a judge's discretion is so limited that the trial court is prevented from carrying out the constitutional goals of reformation and rehabilitation, the sentencing statute may be subject to constitutional challenge. A mandatory 99 year sentence without any possibility of parole provides absolutely no basis for or incentive for rehabilitation.

B. Due Process and Equal Protection. A mandatory 99 year sentence without the possibility of parole may deny the constitutional rights to due process and equal protection. United States Constitution Amendment XIV; Alaska Constitution Article I, §§ 1, 3. While similar arguments were rejected in the analysis of presumptive sentencing for first offenders, none of those cases dealt with sentences of this magnitude. Martin v. State, 664 P.2d 612, 620 (Alaska App. 1983) (upheld the 20 year minimum sentence for murder in the first degree.) It is unclear whether a maximum mandatory term with no possibility of parole will satisfy due process.

C. Separation of Powers.

In Nell v. State, 642 P.2d 1361 (Alaska App. 1982) the current presumptive sentencing scheme survived a constitutional challenge that it violated the separation of powers doctrine by infringing on the power of the judiciary to sentence an offender on the particular facts of the case and the nature of the particular offender. The reasons presumptive sentencing did not violate the constitution were "safety valves" provided by the mitigating factors and the three-judge panel. The court specifically noted that the statute limited, but did not eliminate judicial discretion. Without the ability to exercise any discretion, Article IV, § 1 of the Alaska Constitution may be violated by this absolute infringement on the power of the judiciary.

To avoid these claims of constitutional violation which might arise should a mandatory 99-year sentence be automatically imposed for all these individuals, the Legislature might add a provision whereby individuals subject to the mandatory sentence could, after serving a portion of their sentence, apply for modification of the sentence under Criminal Rule 35(b) provisions. This safety valve could provide a mechanism for review in the future only if warranted, and save the statute from Constitutional challenge.

The American Bar Association's Standards for Criminal Justice specifically deal with the ideal role of the legislature with respect to sentencing. While recognizing the wisdom of providing sentencing authorities with the range of alternatives, the American Bar Association recommends that the legislature should not specify a mandatory sentence for any sentencing category or for any particular offense. Criticism of legislatively required mandatory sentences includes the tendency to produce rigidity, the inflation

of the penal code whose authorized sentence lines are already believed to be the longest in the western world, a pattern of covert nullification by judges, prosecutors and juries as they decline to enforce penalties they consider overly harsh, and transferring all of the power from the court to the prosecutor whose discretion, charge bargaining, and initial charging decisions would take on enhanced significance.

It appears wiser to try to tame discretion than to abolish it. It has been the experience of the Federal District Court Judiciary that the straight-jacket approach represented by the federal sentencing guidelines is not a workable solution and is not fair. At the recent Judicial Conference of the 9th Circuit, including both District and Appellate court judges, Resolution Number 5 calling for the repeal of mandatory minimum sentences was passed unanimously. The resolution noticed the actual effect of hampering the cause of justice, the extreme injustice in allocating all of the power and the initial charging decision to the prosecutor and the federal experience of backlogs of cases, demands for trial and the resultant impact on the civil calendar as well as the criminal. It is also important to notice that this resolution is identical to a resolution passed unanimously previously by the 7th Circuit also calling for the repeal of all mandatory minimum sentences. It appears that Alaska should be able to benefit from the experience of the federal guidelines and should gain wisdom from that experience.

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT
419 6th Street, No. 116 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC); Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC);
Maniilaq Regional Women's Crisis Program; Parent Aid Family Support Center;
Safe & Fear-Free Environment (SAFE); Seward Life Action Council (SLAC);
Sisters Against Family Violence (SAFV); South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR);
Tongass Community Counseling Center; Tundra Women's Coalition (TWC);
Unalaskans Against Sexual Assault & Family Violence (USAFV);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

HB396
CRIME ACT 1992

The Alaska Network on Domestic Violence and Sexual Assault is a non-profit organization with 22 member programs around Alaska which serve victims and their families. The Network would like to testify in favor of HB396, specifically would like to address the following sections:

Sections 2 and 3 of the bill address a problem domestic violence programs have seen when working with both child abuse victims and adult victims of domestic violence. Repeated assaults causing great physical damage cannot be prosecuted as felonies because no one assault can be proven to have caused the injuries. Domestic violence often involves this kind of chronic battering. The Network believes that this provision will aid in providing a better response to such cases by the criminal justice system.

The Network also supports the provisions of Sections 5, 6, 7 and 9, which clarify current statute regarding sexual assault by persons in the health care field. Women should not be forced to choose between caring for their basic health needs and their physical safety. Clearly no consent exists when victims are unaware of the act taking place due to deception. In the wake of the Ake case, the Network believes that these changes are vital to ensure that health care workers understand that rape laws apply to them as well.

Section 15 includes a provision that would increase the statute of limitations for child sexual assault. The Network is very supportive of this provision and, in fact, would advocate that the statute of limitation be extended even further or eliminated.

According to a study by Harborview Sexual Assault Center in Seattle, about 2/3rds of child victims are pre-teens, and almost 1/4 are younger than six years old at the time abuse is disclosed -- though obviously it may have begun at significantly younger ages. Under the proposed 20-year limit in this bill, many victims will only be

in their early to mid-twenties at the time the limit expires. While this is a significant improvement, research indicates that many victims do not begin to deal with their victimization, or actually feel its most debilitating impacts until they are in their twenties and thirties. This is echoed in a survey of Network programs that work with adult survivors. Median age in these groups tends to be about mid-thirties.

For these reasons, the Network recommends that either the 20 year statute be amended to begin tolling when the victim reaches the age of majority, or that it be eliminated. One example of a State with a similar statute is that of New Hampshire which amended its child sexual assault statute in 1990 to 22 years past the victim's 18th birthday.

Since child molesters have many victims per offender, and since they tend to offend against children over very long periods of time, some one who was molesting children twenty years ago is most likely still molesting them now. Offenders rely on the very fact of the age of their victims as protection against the consequences of their actions. The Network believes that by allowing victims to act in their own behalf as adults will only aid in combatting this crime.

The provisions of Section 17 are important in sexual assault cases, where statements from other victims who may not have pressed charges are important in determining appropriate sentence length. It is also important to know the defendant's background in determining appropriate treatment and rehabilitation programs.

ANCHORAGE TASK FORCE ON SEXUAL ASSAULT

Testimony for HB 396
"An act relating to violent crimes and
criminal law and procedure."
January 22, 1992

Good afternoon Chairman Donley and House Judiciary Committee members.

My name is Carrie Longoria, and I am here this afternoon to testify on HB 396. I am representing the Anchorage Task Force on Sexual Assault (ATFSA), a group of professionals coordinated by the Municipal Department of Health and Human Services, Abuse Prevention Program. The ATFSA includes representatives from various governmental and private agencies, which include the Anchorage Police Department, the Anchorage District Attorney's office, local hospitals (Humana, Providence, ANS), victim-support agencies (STAR, Victim's for Justice, South Central Counseling), private professionals (mental health counselors), the Department of Corrections (Hiland Mt.), and McLaughlin Youth Center.

Members of the ATFSA would like to extend their appreciation to the Committee & Committee's staff for the effort and serious consideration which has already gone into the development of HB 396. Today, the ATFSA will be providing testimony on a few key provisions of the bill, but will provide testimony on the other important provisions of this bill at a later date.

Section 5 & 6., where an "offender engages in sexual penetration or contact with a person who the offender knows is unaware that a sexual act is being committed, and (A), the offender is a health care worker; and (B) the offense takes place during the course of professional treatment of the victim.

This is a particularly timely provision in lieu of a recent physician/patient case where victims were in a trusting position and subjected to physical examinations, which were in fact, incidents of sexual offenses. These examinations were the doctor's guise to perform unwanted sexual acts on them. This provision would hold certain professionals, such as physicians, accountable for their sexual violations, and allow for efficient prosecution.

Section 9., defines "health care worker" and "sexual act."

ATFSA is particularly pleased with the broad inclusion of various professionals who would have access to "bodies" of individuals.

Rep. Boyer's HB 370

Section 15., where the "general time limitations for sexual offenses against minors are extended."

The ATFSA commends the bill's twenty-year limitation, but requests that "NO LIMITATION" be enacted so that a victim at <u>any age, whenever recall is possible,</u> may come forward and bring criminal charges against their offender.

Section 19., where the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation.

The ATFSA applauds the special emphasis which this provision provides by prohibiting referrals to a three judge panel based on the defendant's potential for rehabilitation.

Section 20., where "the three-judge panel determines that manifest injustice would result from imposition of the presumptive term..."

The ATFSA supports the concept behind this provision, where the defendant is eligible for discretionary parole during the second half of the sentence imposed, if the defendant successfully completes all rehabilitative programs ordered to do so.

Section 21, which reads, "as provided in this section", a prisoner is not eligible for discretionary parole during the term of presumptive sentence..."

Consistent with sections 19-20, this provision has unanimous support.

House Judiciary

Thank you for considering comments presented by the ATFSA, and the committee members' individual dedication to making our communities violent free.

Prepared by Carrie Longoria, MOA/DHHS/Abuse Prevention Program, P.O. Box 196650, Anchorage, AK 99519-6650, Teleph: 343-4876

Barbara Burke

Public defender's

- Greenberg (Parnell)

Martin Wade Hanley -

BOB ANDRES—TIMES TRIBUNE

SAL VEDER—AP

A family divided by tragedy: *Franklin in court last week and his daughter*

MIND

Forgetting to Remember

In California, a glance unlocks a horrific secret

For two decades, the murder of 8-year-old Susan Nason was a mystery. Police in the San Francisco suburb of Foster City, Calif., ran out of leads not long after finding Susan's decomposed body in a wooded ravine. Then, in January 1989, Eileen Franklin-Lipsker, Susan's best friend at the time of the murder, looked into her 6-year-old daughter's eyes and suddenly remembered. The murderer, she claims, was her father, George Franklin Sr. Franklin-Lipsker, now 30, says she watched helplessly as her father molested Susan and then smashed the child's skull with a rock. When her father threatened to kill her if she told anyone, Franklin-Lipsker locked the horror deep in her subconscious, a traumatic response psychiatrists label "repressed memory." Years later her daughter's blue eyes—the same color as Susan's—triggered the flood of remembrances.

As incredible as the story seems, Franklin-Lipsker's recollections were vivid enough to convince a jury that her father was guilty. Last week Franklin, now 51, was sentenced to life in prison. "This may be the only case in which someone is convicted of murder solely on the basis of repressed memory," says Elizabeth Loftus, a professor of psychology at the University of Washington who testified for the defense.

No other eyewitnesses nor any other physical evidence tied Franklin to the crime. Instead, the trial hinged on a complex debate over the validity of the concept of repressed memory. The prosecution's expert witness, San Francisco psychiatrist Lenore Terr, believes that traumatic memories can be "far clearer, more detailed and more long-lasting" than ordinary memory—even when repressed for so many years. But Loftus contends that memories of terrible events are often distorted by shock or fear. Both experts agreed, however, that repressed memory is a real phenomenon that can be unblocked spontaneously by an unrelated event.

Even without Susan's murder, Franklin-Lipsker says she had a nightmarish childhood. She testified that her father sexually abused her numerous times and that she learned to protect herself by "forgetting" what had happened. Defense lawyers presented other possible motives for Franklin-Lipsker's sudden recall. They claimed that she could have unconsciously woven a false memory out of her anger and fear of her father. Or, they suggested, she might have made up the whole story for the $500,000 book and movie deal she has signed.

Franklin's probation report, not part of the trial but given to the judge before sentencing, corroborates some of his daughter's testimony. An ex-girlfriend interviewed by police said Franklin asked if he could have sex with her 8-year-old daughter. He also reportedly told the woman he belonged to a society whose motto was "Sex before 8 or it's too late." Franklin's lawyer, Douglas Horngrad, says his client will appeal.

Whatever the outcome, it won't be the final verdict on repressed memory. Psychiatrists still aren't certain whether such cases represent fact or fantasy—or both. For now, the phenomenon remains as mysterious as Susan Nason's murder once was.

BARBARA KANTROWITZ *with* NADINE JOSEPH *in San Francisco*

HEALTH

A Grim Legacy for Longtime Smokers

Although fewer Americans are smoking now, more are dying from tobacco-related illnesses—the result of past smoking habits. In a report issued last week, the federal Centers for Disease Control said that in 1988, more than 434,000 Americans died from health problems caused by smoking. That's an 11 percent increase over 1985, the CDC said. In that same period, the number of Americans who smoke declined slightly, from 30 to 29 percent. "The problem is, we are now paying for what happened 20, 30 years ago when large numbers of people smoked in large amounts," said Dr. William Roper, director of the CDC. He added that it can take up to 20 years for cancer caused by smoking to develop. In 1965, the year of the surgeon general's landmark warning against smoking, 40 percent of Americans smoked.

Smoking is the nation's leading cause of preventable deaths and is believed to be responsible for a wide variety of diseases. The CDC count for 1988 included 111,985 deaths from lung cancer, 30,860 deaths from other smoking-related cancers such as mouth and pancreatic cancer, 197,820 deaths from cardiovascular diseases and 82,857 deaths from lung diseases such as emphysema. An additional 1,303 people died in fires caused by smoking and 2,552 babies' deaths were attributed to their mothers' smoking habits. The CDC report also said that that 3,825 nonsmokers died from lung cancer caused by passive smoking—inhaling others' smoke.

In spite of these grim statistics, there's still some hope for smokers. Roper said that kicking the habit at any age lowers the risk. "It's never too late to quit," he said. "People at whatever age—25 or 85—will benefit from stopping smoking."

ANCHORAGE TASK FORCE ON SEXUAL ASSAULT

Testimony for HB 396
"An act relating to violent crimes and
criminal law and procedure."
January 22, 1992

Good afternoon Chairman Donley and House Judiciary Committee members.

My name is Carrie Longoria, and I am here this afternoon to testify on HB 396. I am representing the Anchorage Task Force on Sexual Assault (ATFSA), a group of professionals coordinated by the Municipal Department of Health and Human Services, Abuse Prevention Program. The ATFSA includes representatives from various governmental and private agencies, which include the Anchorage Police Department, the Anchorage District Attorney's office, local hospitals (Humana, Providence, ANS), victim-support agencies (STAR, Victim's for Justice, South Central Counseling), private professionals (mental health counselors), the Department of Corrections (Hiland Mt.), and McLaughlin Youth Center.

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Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 I Street, Suite 104 • Anchorage
(907) 258-4040

MEMORANDUM

January 26, 1992

TO: Rep. Dave Donley, Chairman; Rep. Max Gruenberg, Vice Chair; and Honorable Members of the House Judiciary -- Johnny Ellis, Pat Parnell, Mark Hanley, Terry Martin, Mike Miller

FROM: Christine Schleuss, Steering Committee
Alaska Action Trust

RE: Proposed Amendments to HB 396

Enclosed is the Position Paper of the Alaska Action Trust.

Please feel free to call me at 258-7807 if you have any questions, or if I can provide you with further information.

Christine S. Schleuss

Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 I Street, Suite 104 • Anchorage
(907) 258-4040

POSITION PAPER REGARDING HOUSE BILL 396
The Anti-Violent Crime Bill of 1992

This position paper is prepared on behalf of the Alaska Action Trust. It is prepared by the Criminal Section of the Trust. The Alaska Action Trust suggests that the following revisions to the Bill be adopted before it is passed out of Committee.

(Sections 1-4) The purpose of the proposed amendments to AS 11.41.200(a), .210(a), and .220 is to provide broader protection to children who are victims of physical assaults. Certainly that is a laudable purpose. The changes to AS 11.41.200(a) and .210(a) are appropriate. However, we suggest that the proposed change set out in AS 11.41.220(a)(3) is too broad and should not be adopted. Apparently, the Legislature's concern in amending AS 11.41.220(a) to include (a)(3) is to make it a felony rather than a misdemeanor to repeatedly or severely beat a child. While we agree that it may well be appropriate to make repeated or severe beatings of a child a felony, the proposed amendment would make it a felony even to cause pain to a child without actual injury or to bruise a child. That lesser conduct should not be punishable by a felony conviction.

Our concern about this proposed amendment is that it would make a convicted felon of a person who one time "recklessly causes physical injury" to a child under the age of 10, or who "with criminal negligence" causes physical injury to a child under

the age of 10 by means of a dangerous instrument. The difficulty with the proposed revision is that physical injury is very broadly defined as "a physical pain or an impairment of a physical condition." AS 11.81.900(b)(40). Therefore, if this amendment becomes law, any person can be a convicted felon for recklessly causing a pain to a child, even when the child suffers no actual injury whatsoever or when a person with criminal negligence causes pain to a child by means of a dangerous instrument.

Even the most caring and loving person who is around a child might sometimes recklessly cause a pain to that child. A person who angrily briefly touches a child causing a pain but no actual injury would become a convicted felon. Under Alaska law, an automobile is a dangerous instrument. Even the most caring and loving person who is around a child might negligently cause a pain to a child by causing an automobile accident. Thus, a person involved in an accident in which there was no actual injury whatsoever to the child because the child was buckled in a seat belt would become a convicted felon. A person who slammed a child's finger in a car door would become a convicted felon under this law. A relatively minor lapse by an ordinarily caring parent or other person should not cause the person to suffer a felony conviction.

Instead, we suggest the Legislature could consider as an alternative the following:

AS 11.41.220(a)(3): Being 18 years of age or older repeatedly violates AS 11.41.230(a)(1) when the

victim of the offense is under the age of 10, or violates AS 11.41.230(a)(1) and causes physical injury that requires medical treatment when the victim of the offense is under the age of 10. Repeatedly means three or more times.

(Section 15) The Trust also has concerns about the proposed amendments to AS 12.10.010 regarding the criminal statute of limitations. It may well be true that the present statute of limitations is inadequate in cases of sexual assault or abuse of victims under the age of 16. Appropriately, the Legislature is concerned with cases where a victim under the age of 16 is unable to report the crimes for some years, either because the victim has repressed all memory of the crimes or perhaps because the victim remains under the control of the perpetrator. Protection for these victims could be achieved by amending AS 12.10.020 to allow that an offense committed against a victim under the age of 16 may be commenced within three years after the victim reports the crime to a peace officer. The present clause in AS 12.10.020 limiting prosecutions to the time when the victim turns 16 can simply be eliminated. In addition, provisions of AS 12.10.020 could be extended from the present five-year limit to ten or fifteen years.

Otherwise, the time limitations should remain as set. All people have a right not to be prosecuted when the case is so old that it is impossible to locate truthful evidence on which to base a defense of innocence.

(Section 17) We suggest that AS 12.55.025 not be amended. Present caselaw is that with the statutory exceptions and the exceptions in Buoy v. State, ___ P.2d ___ (Slip Op. No. 1169) (Alaska app. 1991), the preponderance of evidence standard of proof already applies to sentencing proceedings.

The clear and convincing evidence standard carefully thought out and adopted in presumptive sentences for determining whether mitigating or aggravating factors apply and the clear and convincing evidence standard which must be shown before a case can be referred to the three-judge panel for extraordinary circumstances should also apply to the Buoy situation.

Non-presumptive first offenders should not face sentences exceeding the presumptive term for repeat offenders unless the aggravating factors and extraordinary circumstances causing the increased sentences are based on facts proved by clear and convincing evidence. The unfair treatment to first offenders which would otherwise result was remedied by Buoy. that remedy should not be changed by the Legislature. If the Legislature feels amendment is appropriate to recognize this rule, the Trust suggests the following proposal:

> Except as provided in AS 12.55.145(d), 12.55.155(f) and 12.55.165, and in this section, the preponderance of the evidence standard of proof applies to sentencing proceedings. For a first offender subject to a non-presumptive sentence, aggravating factors or extraordinary circumstances which would cause the sentence to

exceed the presumptive sentence for a repeat offender must be proved by clear and convincing evidence.

(Section 18) We recognize that the proposed amendments to AS 12.55.020 providing for mandatory 99-year sentences for certain individual convicted of murder may be an appropriate alternative to the death penalty. The class of individuals must be narrowly and clearly drawn. It should not be expanded beyond the situation in this amendment, otherwise it may be held unconstitutional. Suggestions have been made to include a murder of a person under 18 or that manifests deliberate cruelty. Those proposals are unconstitutionally broad. For example, the Court of Appeals held that "talking dirty" may be deliberate cruelty. Peetok v. State, 655 P.2d 1308 (Alaska App. 1982). It is not the type of conduct which should appropriately result in a mandatory 99-year sentence.

To avoid potential claims of due process violations which might occur should a mandatory 99-year sentence be automatically imposed for all these individuals, and to conform with the constitutional requirements that sentences must take into consideration reformation of the individual as well as protection of the public, the Legislature might add a provision whereby individuals subject to the mandatory sentence could, after serving one-half their sentence, apply for modification of the second half of the sentence under Criminal Rule 35(b) provisions with the defendant being required to shoulder the burden for proving his or her full rehabilitation.

We suggest the following:

A defendant sentenced to a mandatory term of imprisonment of 99 years may apply for a modification of sentence when he or she has served one-half the mandatory term. The defendant bears the burden of proving his or her rehabilitation.

(Section 19) We urge that AS 12.55.165 not be amended as suggested. We strongly urge that the Legislature wait until the Sentencing Commission has completed its detailed study of sentencing in Alaska before amending one part of Alaska's sentencing law. Preliminary findings are that the three-judge panel is functioning very well and is not lowering inappropriately the sentences of dangerous defendants. We suggest that the Committee inquire of the Judicial Council as to the number of individuals who are referred to the three-judge panel for extraordinary potential for rehabilitation, the number of times the three-judge panel actually reduces the sentence, and the crimes for which referrals are made and granted. We believe the numbers are quite small.

Review of the sentencing summaries of the three-judge panel sent by the Judicial Council every six months indicates that very few individuals actually receive mitigated sentences for extraordinary potential for rehabilitation. Generally, these individuals are quite young and more likely can be turned into non-repeat offenders outside the prison system rather than inside the system. For this rare group of individuals, the public is more protected by a sentence under the presumptive sentence.

If amendment is deemed necessary, a suggested alternative to requiring the sentencing panel to impose the presumptive sentence and only make the defendant eligible for discretionary parole during the second half of his sentence if he completes all rehabilitation programs ordered would be to amend the statute so that the three-judge panel is given authority to impose the presumptive sentence, but to suspend one-half of the sentence and require as conditions of probation that the defendant enter into and complete rehabilitation programs both while incarcerated and while on probation. This suggested alternative would keep young offenders who do have high potential for rehabilitation from receiving lengthy sentences causing them to be incarcerated with career criminals who would inevitably have an extremely adverse influence on these youthful offenders.

Finally, the number of aggravating factors prohibiting referral altogether should be decreased. Particularly problematic is (19): the juvenile adjudication factor. Often times juvenile adjudications result only in informal probation and are for minor conduct. Many youths waive counsel. Because the consequences of adjudication are minimal, many do not contest them even when they are innocent just because their parents tell them to go along with the probation department. These people have not been through the system. They can be very good candidates for rehabilitation. They should not automatically be excluded from consideration by the three-judge panel.

Page 1 of 2

Not a Constituent
old or new

RECEIVED 1-21-92

Called 1/22/92 5:00 5:30

333-2920

1-17-1992

Mr. Jewel Walker
9121 Peck Ave #129C
99504

Dear Rep. Dave Donley.

This writing is going to go over the 50 Word guideline and you will not be pleased since you have gone off the trail and beyond your leagues of your knowledge on this making life long Criminals out of men only.

I never heard of you before now Ellis & Gruenberg I have written on other issues and was surprised-upset that they joined your party because they are reasonable people. Where you come out of is beyond me. I see you support our 2/3 ~~the~~ majority of Women leagues ERA, Women only Groups of excessive Clout in congress over these Child Support, abuse, AFDC, CSED, IRS illigal Gibings, that inhanely start with lies unfounded, false allegations subjected upon mostely Fathers-men. When a-any, Woman, goes for Energ. Temp, shelter she is required to lie !!, is abuse from there through Divorce custody Court and continued tolerated lies are instilled Brain Washed into mothers and Childrens, that abuse can be colored in many Colors, into adult Hoods, of this grudge hatred toward Ex husbands Boyfriends and after 6-10-20 or 50 years the man can become a Criminal in Jail no Proof submitted or questioned

1-17-92

These cases come through our Family Courts many each day. This matter is not nearly as minor as you would like to lead our populus to believe. you call names and assert false beliefs and have no idea where you are heading With your ideals, we see where any & all correcting of Kids is now a criminal offense. Then ask Why, our youth's are turning to crime. Then you're saying, we treat parents, men, Fathers especially, as murderers we black ball em we tar an feather em we put on our Cloaks & hoods send em all to Jail for life, you are on the bon wagon With ERA, Gay Libbers, Women only movements, of men grudges most of which all hide behind children as shields to express their beliefs or as they Call Rights. These groups actually abuse and suffer Children beyond all human aspects. These could Care less about Kids they Want equality not Justice for all. This isn't gender here we speak of We are talking truth to yours blind eyes and deft ears. you have over exerted your position on this issue you are un informed and on the 100% incorrect road. Do some open eye searching of your self.

333-2920 (RM's only) Mrs Jewel Walker Ch,

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Alaska Association Chiefs of Police

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 1
To Rep. Dave Donley	From Deputy Chief Udland
Co.	Co. APD
Dept.	Phone # 786-8552
Fax # 465-2399	Fax # 786-8638

January 21, 1992

Representative Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Donley,

On behalf of the Alaska Association of Chiefs of Police, I want to express our support for House Bill 396. We see this as extremely important legislation and we support your efforts in its passage.

This bill addresses a number of timely subjects that are important to public safety in Alaska. House Bill 396 would correct several deficiencies in current law and we would be willing to assist you in any way that we can to ensure that it becomes law.

Sincerely,

Duane S. Udland

Duane S. Udland, President
Alaska Association of Chiefs of Police
4501 South Bragaw
Anchorage, Alaska 99507

SOUTHEAST ISLAND SCHOOL DISTRICT

1621 TONGASS AVENUE SUITE 301
POST OFFICE BOX 8340
KETCHIKAN, ALASKA 99901
(907) 225-9658 OR 225-9659

Robert Weinstein
SUPERINTENDENT

November 21, 1991

Representative Jerry Mackie
P.O. Box 73
Craig, Alaska 99921

Dear Representative Mackie:

Enclosed you will find a copy of a resolution recently passed by the Southeast Island School District Board of Education, requesting that Alaska Statutes be amended to extend the present time limitation provided by AS 12.10.020 for the reporting of crimes involving child sexual abuse.

In my opinion, there is considerable data indicating that victims of such crimes often do not make reports to law enforcement agencies until well after the age of 17, oftentimes because there has not been a conscious recollection of the abuse until many years after it occurred. I would appreciate your support of legislation which assures that persons who commit crimes involving child sexual abuse are not allowed to escape criminal penalties due to inappropriately brief time limitations.

Sincerely,

Bob Weinstein

Robert Weinstein
Superintendent

RW:eb

encl: Resolution No. 92-2
cc: Board Members

SOUTHEAST ISLAND SCHOOL DISTRICT

RESOLUTION NO. 92-2

A RESOLUTION URGING THE ALASKA STATE LEGISLATURE TO EXTEND THE STATUTE OF LIMITATIONS FOR THE REPORTING OF CHILD SEXUAL ABUSE.

WHEREAS, child sexual abuse is a serious problem throughout the nation and the State of Alaska; and

WHEREAS, existing Alaska Statutes require a victim of such abuse to report the abuse within one year after the person reaches the age of 16; and

WHEREAS, reports of child sexual abuse often occur after a victim reaches the age of 17, and

WHEREAS, existing Alaska Statutes allow perpetrators of child sexual abuse to escape criminal prosecution;

NOW, THEREFORE, BE IT RESOLVED that the Southeast Island School District Board of Education urges the Alaska Legislature to significantly extend the time limitation provided by AS 12.10.020 for the reporting of such crimes.

APPROVED AND ADOPTED, Ketchikan, Alaska this 14th day of November, 1991.

Board President

Board Clerk

Submitted by Sgt. Joe Austin
Anchorage Police Department
on HB 396

HUMANA HOSPITAL-ALASKA

NAME: [redacted]
MR#:
CLINTON LILLIBRIDGE, M.D.

HISTORY AND PHYSICAL

ADMISSION: 06/12/91

REASON FOR ADMISSION: This 4-1/2-year-old child was brought in by the police for probable battering.

The police were called by customers at Northway Mall who suspected this child was being abused. The parents were oppositional, but police prevailed and brought the child to the emergency room. Dozens of injuries were noted on all parts of the child's body, of various colors, indicating the child had been hit on multiple occasions over many days' time. I was called by Dr. Diana Johnson to consult on the child. Also involved in the case are Dr. Tom Johnson, case officer, officer Ron Sponholz, initial officer, Virginia Daun (officer Sponholz' associate), Rob Huen, uniformed investigator, Sgt. Austin, investigator, Gary Epperson, investigator Linda Branchflower, and Jessie Allen of DFYS, case #91-82433. The police interviewed the child, with one person speaking gently and age appropriate sentences as the others listened at a distance. Multiple photographs were taken by police.

The child explains the lesions that she had a flap of skin on the end of her nose which mother cut with scissors and then put alcohol on it which burned. She states that her father's girlfriend's son, seven-year-old [redacted] "beats up on me." Also, "Mama spanks me with a spoon."

Parents describe the child as having fallen out of a swing about two weeks ago and has been limping on her right leg ever since, but have not sought medical attention. They corroborate had picked her nose and had a flap of skin which they cut off and put alcohol on. They state that the two-year-old is a real tough kid and picks up [redacted] and throws her on the ground. He is a two-year-old who doesn't know his own strength and plays pretty rough with her. Neither parent seemed concerned that she had unusual marks on her body. They think some of the spots might have been mosquito bites that she has scratched.

SOCIAL HISTORY: Father appears to be in his mid-20's, nicely dressed and groomed. He did most of the talking. [redacted] with a [redacted] woman who has three children, [redacted] (age 7),

CONTINUED...

[redacted] (age 4), and a two-year-old boy. They have been living in their present apartment about a month. They don't know other children in the area, but mostly play with one another.

PAST HISTORY: Had one or two ear infections when younger. Has had only one immunization.

PHYSICAL EXAMINATION:

Vital Signs: Temperature 98.7, pulse 104, respirations 24, blood pressure 105/62, weight 38.25 lbs. (50th percentile), height 42" (50th percentile), triceps fat 8 mm (30th percentile).

General: Sullen in parents' presence, and during the first few hours of hospitalization the child was extremely apprehensive, held very still, and frequently apologized for perceived indiscretions (which had not occurred). When being photographed by the police, she would assume whatever position the officer placed her extremities, and would hold that position absolutely motionless for 5-10 minutes or until she was told to relax or put it back down again. Similarly, on the x-ray table, she lay in extremely uncomfortable, awkward positions for extended periods of time like a statue, not complaining, until the technician realized the child was still holding still and told her it was okay to move again. When asked if she wanted something to eat, [redacted] said "Mommy says I can have bubble gum." Historically, she has not eaten for nine hours at this point. After the child was away from the parents and visiting with the police and nursing staff, she relaxed. Before engaging in any play on the pediatric floor, she would ask once or twice very politely if it was okay that she might use the color crayons, the paints, or pick up a teddy bear. When the police asked [redacted] if she wanted to see her mother or dad as they finished their interview, she replied, "No," to both. She now has been painting in the book for nearly an hour by herself and seems quite content. She smiles and seems quite happy to interact with the nursing staff.

Skin: Approximately 56 different marks, abrasions, bruises and lesions are noted, as follows:

1) The entire tip of the nose and areas surrounding both nostrils are red and excoriated with some fine yellow crystalloid material.
2) Dark pink line horizontally below the left eyelid.
3) Left cheek, dark blue area 3 cm in length, indurated. The lesion is horizontal on the side of the left cheek.
4) Red, 2 x 3-mm area within the left ear canal.
5) 3 x 5-cm round, dark purple bruise which is flat and indurated behind the left ear.

CONTINUED...

6) Blue-green horizontal 2 x 4-cm mark on the left forehead.
7) In the center of the forehead is a 1 x 2-cm blue-green, slightly raised area.
8) 3 x 4-cm diameter bluish-green area with dark red center on the right side of the forehead.
9) Small round, dark-brown scabbed lesion underneath the right side of the chin.
10) Light pink swelling, 1-2 cm in length running vertically across the right ear.
11) In the center of the neck, underneath the chin, is a 4-mm dark red bruise.
12) Anterior to the left ear is a 3 x 4-mm grayish-brown indurated area.
13) A rather prominent 5-cm diameter brownish-red mark present over the lower end of the left sternocleidomastoid, which is quite indurated.
14) Encircling the neck is a band about 3-4 cm wide which is dark green in the center and yellowish-brown at the edges, which goes all the way around.
15) At the nape of the neck, in the hairline, is a 3-cm round, greenish-blue area which is not indurated.
16) On the right anterior neck is a 0.5-cm teardrop-shaped light pink abrasion.
17) On the right lateral side of the neck are three scabbed-over light pink areas just above the clavicle with raw skin.
18) Over the left clavicle is a narrow linear light-pink abrasion 2 cm long.
19) A red bruise measuring 3 cm x 0.5 cm on the left shoulder.
20) Right upper arm has a 1-cm purplish bruise.
21) Over the right elbow is a 2 x 4-cm indurated, raised, blue-green bruise.
22) On the right forehead, a 0.5-cm round, dark-blue bruise.
23) On the palmar side of the right wrist is a dark pink, 1-cm round bruise which is surrounded by green undertone.
24) On the dorsum of the right hand are two round pink abrasions.
25) On the dorsum of the right hand is a 0.5-cm dark reddish-brown scab.
26) In the right axilla is a triangular abrasion with removal of upper layers of skin which is dark pink and contains three red 1-cm deeper gouges.
27) Over the right ulna is a 1-cm round dark purplish bruise.
28) Over the posterior part of the left deltoid are two perfectly round dark pink 4-mm sharply demarcated raised scaly areas.
29) Over the left olecranon is an oblong pink area with green surrounding it.

CONTINUED...

30) On the left forearm is a 1.5-cm L-shaped light pink bruise.
31) On the dorsum of the left hand is a light green 1.5-cm bruise.
32) On the left index finger at the first knuckle is a 1-cm scabbed pink lesion.
33) On the left upper arm is a light brown 4-mm sharply demarcated round lesion.
34) Over the left scapula is a linear pink excoriation which overlies a 1-cm round bruise at the upper end.
35) Over the lumbar spine is a 1 x 1.5-cm light brown area.
36) On the left thoracic posterior area is a 0.5-cm round light pink scab.
37) On the left thoracic area are two vertical narrow abrasions, pink and 2.5 and 3 cm in length.
38) At the center of the back at waist height is a light brown round mark.
39) On the right upper quadrant are a 4-cm linear dark pink scrape and a 2-cm round light pink bruise on the lateral side.
40) On the left upper quadrant is a 5-cm oblong light green bruise.
41) On the left lower quadrant, from the waist to the iliac crest, is a 7-cm, 2-cm wide brownish green area with overlying brown and two round 1-cm pink areas on top.
42) On the left iliac crest is a 2 x 3-cm light brown with a small round 0.5-cm pink area posterior to that, and another 1-cm blue-green bruise.
43) In the left axilla is a 2 x 2-cm horizontal light-brown scrape with a mark above it.
44) Over the left scapular area, a 1-cm round, brownish bruise with a 2-cm brown scrape just below it.
45) Left mid-axillary line, along the rib cage, are two round scrapes which are brownish-yellow.
46) On the left buttock are two linear 0.5 x 5-cm blue marks with surrounding pink. The lower bruise has a small pinpoint scab on it.
47) On the left lateral thigh is a 1-cm dark pink with surrounding dark-red scab, 2.5 x 1.5 cm area with light pink bruise, and three small 8-mm blue bruises beside that.
48) Over the pubic area is a 5 x 7-cm rhomboid purplish-blue area with vertical blue irregular marks extending up onto the abdomen.
49) The entire right iliac crest is swollen with an area 9 x 10 cm dark green with multiple darker purple spots in the center. The posterior part of the crest is light green. The entire area is indurated and tender.

CONTINUED...

50) On the right lateral thigh is a half circular linear brown mark 4-5 cm in length.
51) On the right knee is a 2 x 3-cm round bluish bruise.
52) On the right anterior shin is a 12-cm long 2 x 4-mm wide L-shaped dark blue-green area with red scrapes 2 cm across the lateral side.
53) On the left knee are five 1-2 cm round purplish bruises.
54) On the left anterior shin is a 1-cm round blue bruise.
55) On the left lateral ankle is a 1-cm round dark pink bruise.
56) On the left buttock are five round scabs 3 mm in diameter.
57) A 6 x 20-mm patch of purplish petechia in the left lower anterior chest margin.

HEENT: PERRLA. Fundi well seen with no hemorrhages. Disks appear sharp. Full extraocular movements. Tympanic membranes are gray and pearly translucent. No blood behind them. The bony part of the nose is straight. Slight purulent discharge present from the nose. Throat is pink, with tonsils filling 30% of the pharyngeal volume. Incisors have a cross-bite with anterior extension of teeth #25 and #26. No caries.
Chest: Good air exchange. No rales and no rhonchi. No palpable rib deformities.
Heart: Sinus arrhythmia.
Abdomen: Quite scaphoid. Liver down 1 cm. Small amount of firm stool felt in left lower quadrant.
Genitourinary: Tanner stage 0. Labia majora have a shrunken, shriveled appearance. With traction on the labia majora, the vestibule opens, which is dark pink. Hymen is redundant and with traction opens 2 x 3 mm. The posterior fourchette is intact.
Anus: Clean. No tears, no hemorrhoids.
Extremities: Rather slender, but good strength. No joint swelling. Full, active range of motion.
Back: Straight. Good range of motion.
Neurologic: Cranial nerves intact. Deep tendon reflexes 2+ and bilaterally symmetrical.

DIAGNOSIS: The various colors, textures, and degrees of induration in the multiple skin lesions indicate that they have occurred, some as recently as within the last few hours, others at various stages as long as two weeks ago. It would seem she has acquired new lesions almost daily over the past 2-3 weeks. The round, sharply demarcated lesions would be consistent with cigarette burns or perhaps excoriated mosquito bites. The latter seems unusual because of the very sharpness of the edges of these lesions. The area of the nose appears to be a pre-existing lesion which has

CONTINUED...

gotten impetigo. The child's holding absolutely motionless like a statue for approximately ten minutes when left unattended is extremely pathological, indicating the child has been severely disciplined and required to remain motionless as a survival technique. The marks around the neck indicate that she has been choked. The parroting stereotyped conversation of only accepting bubble gum at a time when she would most likely be very hungry indicates she has been fed only when the mother figure allows it.

In summary, this is a chronically, repetitively battered child who appears to be a scapegoat for this family system (Blizzard syndrome). This is indicated by the robust appearance of the other three children who had no apparent marks when observed by the emergency room staff. The explanations offered by the parents do not explain the lesions. Their lack of concern and their delay in seeking medical attention are also indicative of child abuse.

PLAN: Evaluation for bleeding diathesis. Repeat documentation of changes of bruises in a protective environment. Protective incarceration. May not be discharged until a safe environment can be determined by DFYS.

CLINTON LILLIBRIDGE, M.D.
CL:kkt
RECORD# 8307
D: 06/12/91
T: 06/13/91
cc: Dr. Lillibridge
Jessie Allen, DFYS
Tom Johnson, Case Officer, Anchorage Police Department
Dr. Diana Johnson
Betsy Kaufmann, Humana Hospital Emergency Department

Submitted by Sgt. Joe Austin
Anchorage Police Department
on HB396

Michael A. O'Connell and Associates

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8625 Evergreen Way, Suite 203
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Michael A. O'Connell, M.S.W.
Darlene Flowers, M.S.W.

January 6, 1992

CPS
840 N. Broadway, Building A
Everett, WA 98201

Re: Report of Child Abuse

The following information comes from my client, [redacted]

He was recently informed by his 32-year-old daughter, [redacted] that she had been sexually and physically abused by her step-father, [redacted] from her ages 8 to 14. (A listing of names, addresses and other information will follow at the end of this report.) [redacted] has just recently begun to retrieve some of the memories of this abuse and is scheduled to begin therapy with Dale Roberts of Olympic Mental Health Services in Everett. The abuse included vaginal intercourse from the age of 8, accompanied by enough pain that she was afraid she would die. She has recently learned that when she resisted sufficiently to stop the abuse at her age 14, that her stepfather then began to sexually abuse her younger sister, [redacted] reported that when she attempted, as a teenager, to report the abuse to authorities, she was not believed. She ended up on the streets at age 15. A third sister, [redacted] was also approached for sexual favors by the stepfather but resisted successfully.

Additional concern exists because the third sister [redacted] has an 11-year-old daughter [redacted] who frequently spends time with her grandparents, including the perpetrator. Her mother has believed that since she was able to successfully fend off the abuse, that her daughter is not in danger. The step-father, [redacted] is now semi-retired, but continues to work part-time as a fill-in school bus driver. He had worked for years as a full-time bus driver.

[redacted] (32) Victim
[redacted]
Everett, WA 98201 [redacted]

[redacted] (31) Victim
[redacted]
Sitka, AK 99835
[redacted]

[redacted](30)
[redacted]
Anchorage, AK 99508-1905
Mother of [redacted](11)

[redacted](Stepfather)
[redacted]
Eagle River, AK 99577

Sincerely,

Michael A. O'Connell, MSW

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

December 4, 1991

MEMORANDUM

TO: Representative Mark Boyer

FROM: Ceceile Kay Richter
Legislative Analyst

RE: **Statutes Of Limitation For The Prosecution Of Child Abuse**
Research Request 92.041

You requested information about what other states have done with respect to statutes of limitation for child abuse offenses, as well as a discussion of the pros and cons of these approaches. You also asked us to identify issues that need to be faced in drafting a new statute for Alaska.

We begin by establishing some common terminology. We then discuss the purposes and logic of statutes of limitation. Next, we describe the present statute of limitation in Alaska for offenses against children and follow this with an outline of what is done in the 50 states. We then provide information on the frequency of kinds of child abuse and evidence of and reasons for the under-reporting of offenses against children. This information may assist to justify enlarging the time period in which to prosecute offenses against children in Alaska. It is, after all, the adult survivors who were not served by the criminal justice system as children who will be served by legislation which enables individuals over the age of 18 to seek prosecution of those who abused them as children.

The next section of our memorandum examines several constitutional issues that are involved in enlarging the statutory time period in which to prosecute offenses against children. These include due process and rights of the accused, excessive punishment and the principles of penal administration, and *ex post facto* laws versus retroactive laws. We follow this with a note about discovery.

We then proceed to offer pros and cons of eleven approaches which we feel the State of Alaska could take with respect to enlarging the statutory time period in which to prosecute offenses against children. In selecting these approaches, we omitted any formula which places responsibility upon child victims under the age of 18 for the prosecution of their abusers. After this, we take up another side issue, the admission of hearsay evidence. We conclude by pointing to certain advantages of litigating in civil court claims that would be stale under the current Alaska statute of limitation for offenses against children.

SUMMARY

The term "statute of limitation" applies to any law which fixes the time within which parties may take judicial action to enforce existing claims or rights. A criminal statute of limitation is an act of legislative grace whereby the state surrenders its right to prosecute after the period of time specified has lapsed. Nationally, there is no consensus of an ideal limitation period for criminal prosecution or applicable exceptions to this period in order to prosecute offenses against children, nor is there agreement on what the offenses included in an exception should be. Despite variances in state laws, however, in the last ten years there has been a definite trend in the states to allow prosecutions for offenses against children to be commenced beyond the normal limitation of actions and after the victim reaches the age of 18.

Even though in 1983 and 1985 the legislature extended the time period in which to prosecute certain sexual offenses against children, Alaska has one of the most restrictive statutes with respect to the time period in which to prosecute abusers of children. A child turning 16 years old in Alaska has one year in which to deal with sexually related offenses which may have happened to her or him in this state between the ages of 6 and 12. However, as of February 1990, an individual who was sexually abused in this state before the age of 16 has the ability to file a civil claim against the perpetrator at any time. This makes Alaska one of the more progressive states in the civil arena.

Despite what seem to be higher than national rates of known child abuse in Alaska, using inferences from both national and in-state surveys, there are indications that child abuse in this state is underreported. Underreporting is significant because when child abuse is not disclosed to law enforcement agencies, offenders cannot be prosecuted within the normal statute of limitation. Because a law enlarging a statute of limitation can reach back to encompass only unexpired periods of limitation for offenses already committed, it is the children who are not now being served by the criminal justice system who will be served by legislation which enables adult survivors of child abuse to seek prosecution of those who abused them as children.

The prospect of legislative action to increase the statutory time period in which to prosecute offenses against children raises a number of constitutional issues which must be addressed. These include due process and rights of the accused, excessive punishment and the principles of penal administration, and *ex post facto* laws versus retroactive laws. If, with the passage of time, a person has refrained from further criminal activity, it is a likely presumption that the person has reformed and the necessity for imposition of the criminal sanction has diminished. If, instead, years have passed since the commission of an offense against a particular victim but the offender has repeated the criminal behavior, the offender can be prosecuted for recent offenses which are within the period of limitation. Penal administration which is based on the principles of reformation and upon the need for protecting the public may be at odds with private goals of retribution and punishment which are better served in a civil forum.

According to one expert, the principal determinant of the appropriate duration of a statute of limitation should be the seriousness of the crime. What offenses are serious enough to prosecute beyond the normal statutory limitation period is a legislative determination, albeit one which is influenced by a perception of the public's wishes. Should the legislature determine to enlarge the statute of limitation for certain offenses against children, it can do anything it wants with respect to the statute of limitation for crimes committed on or after the effective date of an act. If the legislature wants to retroactively extend any limitation period, it can do so provided it does not reach back to encompass crimes for which the statute of limitation has already run out.

Eleven approaches for enlarging the time period in which to prosecute offenses against children in Alaska, together with pros and cons of each approach, are identified and discussed. We omitted approaches which place responsibility upon child victims under the age of 18 for reporting the abuse. In establishing its choice, the legislature may wish to identify an approach which not only recognizes that children under a certain age need additional time to disclose the abuse but also recognizes that adults, too, need additional time to report the abuse they suffered as minors. In concert with considering measures to enlarge the period of time in which to prosecute offenses against children, the legislature might also wish to consider ways to ease the introduction of hearsay evidence by these victims.

With no change in Alaska law, an adult survivor of child abuse already has the capacity to initiate a civil cause of action against the perpetrator. A civil proceeding may offer several advantages over a criminal proceeding for the state, the victim, and society, regardless of what is done to enlarge the criminal statute of limitation for offenses against children.

ACHIEVING SOME COMMON TERMINOLOGY

The National Center on Child Abuse and Neglect, an office of the U.S. Department of Health and Human Services established by legislation in 1974 to conduct and disseminate information and research into the causes, identification, prevention, and treatment of child abuse and neglect, currently defines "child abuse and neglect" as:

> the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby. [Title 42 U.S. Code, Section 5106g(4)]