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Furthermore, [496 US 132] the Ohio law forbids not only depictions of nudity *per se*, but also depictions of the buttocks, breast, or pubic area with less than a "full, opaque covering." Thus, pictures of fashion models wearing semi-transparent clothing might be illegal,[6] as might a photograph depicting a fully clad male that nevertheless captured his genitals "in a discernibly turgid state." The Ohio statute thus sweeps in many types of materials that are not "child pornography," as we used that term in Ferber, but rather that enjoy full First Amendment protection.

It might be objected that many of these depictions of nudity do not amount to "lewd exhibitions." But in the absence of *any* authoritative definition of that phrase by the Ohio Supreme Court, we cannot predict which ones. Many would characterize a photograph of a seductive fashion model or alluringly posed adolescent on a topless European beach as "lewd," although such pictures indisputably enjoy constitutional protection. Indeed, some might think that *any* nudity, especially that involving a minor, is by definition "lewd," yet this Court has clearly established that nudity is not excluded [496 US 133] automatically from the scope of the First Amendment. The Court today is unable even to hazard a guess as to what a "lewd exhibition" might mean; it is forced to rely entirely on an inapposite case—Ferber—that simply did not discuss, let alone decide, the central issue here.

The Ohio Supreme Court provided few clues as to the meaning of the phrase "lewd exhibition of nudity." The court distinguished "child pornography" from "obscenity," see 37 Ohio St 3d, at 257, 525 NE2d, at 1372, thereby implying that it did not believe that an exhibition was required to be "obscene" in order to qualify as "lewd."[7] But it supplied no authoritative definition—a disturbing omission in light of the absence of the phrase "lewd exhibition" from the statutory definition section of the Sex Offenses chapter of the Ohio Revised Code. See § 2907.01.[8] In fact, the word [496 US 134] "lewd" does *not* appear in the statutory definition of *any* crime involving obscenity or other sexually oriented materials in the Ohio Revised Code. See §§ 2907.31-2907.35. [496 US 135] Thus, when the Ohio Supreme Court grafted the "lewd exhibition" test onto the definition of nudity, it was venturing into uncharted territory.[9]

6. Cf. Steffens v State, 343 So 2d 90, 91 (Fla App 1977) (invalidating as impermissibly vague ordinance that prohibited "female waitresses, entertainers or other employees of a public business" from appearing with their breasts "thinly covered by mesh, transparent net or lawn skin tight materials which are flesh colored and worn skin tight, so as to appear uncovered," on the ground that "[i]n view of the scanty female apparel which is now socially acceptable in public particularly on beaches, the description of the type of clothing forbidden by this ordinance is extremely unclear").

7. Other courts have found it necessary to equate "lewd" with "obscene" in order to avoid overbreadth and vagueness problems. See, e.g., United States v 12 200—ft. Reels of Film, 413 US 123, 130, n 7, 37 L Ed 2d 500, 93 S Ct 2665 (1973); Donnenberg v State, 1 Md App 591, 597, 232 A2d 264, 267 (1967) ("lewd" and "indecent" equivalent to "obscene"; "[o]therwise the words would be too vague to constitute a permissible standard in a criminal statute"); State ex rel. Cahalan v Diversified Theatrical Corp. 59 Mich App 223, 232-233, 229 NW2d 389, 393 (1975); Seattle v Marshall, 83 Wash 2d 665, 672, 521 P2d 693, 697 (1974); State v Voshart, 39 Wis 2d 419, 429-431, 159 NW2d 1, 6-7 (1968). But the Ohio Supreme Court specifically rejected this path.

In my judgment, even equating "lewd" with "obscene" would not adequately clarify matters because "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." Paris Adult Theatre I v Slaton, 413 US, at 103, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting); see also Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989) (Brennan, J., concurring in part and dissenting in part); Pope v Illinois, 481 US 497, 507, 95 L Ed 2d 439, 107 S Ct 1918 (1987) (Brennan, J., dissenting); id., at 513-518, 95 L Ed 2d 439, 107 S Ct 1918 (Stevens, J., dissenting.)

tions of *nudity*" and in another to "lewd exhibitions of *the genitals*," would create a great deal of uncertainty regarding the scope of § 2907.323(A)(3) and likely would render that

8. Revised Code § 2905.26(B), which was repealed in 1974, defined "lewdness" somewhat unhelpfully as "any indecent or obscene act." As it now reads, the Sex Offenses chapter of the Ohio Revised Code is remarkably *devoid* of any use of the term "lewd." The crime of "importuning," for example, is defined as the solicitation to engage in "sexual activity" or "sexual conduct." Ohio Rev Code Ann § 2907.07 (1975). "Public indecency" comprises "expos[ing one's] private parts," "engag[ing] in masturbation," "engag[ing] in sexual conduct," or "engag[ing] in conduct which to an ordinary observer would appear to be sexual conduct or masturbation." § 2907.09. "Prostitution" is described as engaging in "sexual activity for hire." Ohio Rev Code Ann §§ 2907.21-2907.26 (1975 and Supp 1989).

Currently, several sections of the Ohio Revised Code outside the Sex Offenses chapter contain the term "lewd." See Ohio Rev Code Ann § 715.52 (1976) ("Any municipal corporation may . . . [p]rovide for the punishment of all lewd and lascivious behavior in the streets and other public places"); Ohio Rev Code Ann § 3767.01(C) (1988) (defining public "nuisance" as "that which is defined and declared by statutes to be such and . . . any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives [and so on, are exhibited]"); Ohio Rev Code Ann § 4715.30(A) (Supp 1989) (providing that "[t]he holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for . . . [e]ngaging in lewd or immoral conduct in connection with the provision of dental services"); Ohio Rev Code Ann § 4931.31 (1977) ("No person shall, while communicating with any other person over a telephone, . . . use or address to such other person any words or language of a lewd, lascivious, or indecent character, nature, or connotation for the sole purpose of annoying such other person").

The Ohio Supreme Court did not refer to any of these provisions in articulating its "lewd exhibition" standard, and they provide little guidance in deciphering the "lewd exhibition of nudity" test. Indeed, although the Ohio public nuisance statute, § 3767.01(C), contains the phrase "lewdness, assignation, or prostitution," it has been interpreted to refer only to conduct or behavior and not to photographs and other printed materials. See Ohio v Pizza, No. L-88-045, 18 (Ohio Ct App, Mar. 10, 1989), p 18. Thus, Ohio has followed those States that have determined that "the term 'lewdness' does *not* apply to persons who sell pornography." Chicago v Geraci, 30 Ill App 3d 699, 704, 332 NE2d 487, 492 (1975) (emphasis added); see also Chicago v Festival Theatre Corp. 91 Ill 2d 295, 302, 438 NE2d 159, 161-162 (1982) (noting that various courts have held that " 'lewdness, assignation, or prostitution' " abatement statutes are not applicable to obscene films or books).

9. Indeed, in other contexts the Ohio Supreme Court has recognized the difficulty of defining the term "lewd." See, e.g., Columbus v Rogers, 41 Ohio St 2d 161, 163-165, 324 NE2d 563, 565-566 (1975) (holding void for vagueness city ordinance providing that " '[n]o person shall appear on any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress' "); Columbus v Schwarzwalder, 39 Ohio St 2d 61, 62-63, 313 NE2d 798, 800 (1974) (per curiam) (reversing, on grounds of overbreadth, convictions under disorderly conduct ordinance that prohibited " 'disturb[ing] the good order and quiet of the city' " and " 'otherwise violat[ing] the public peace by indecent and disorderly conduct or by lewd or lascivious behavior' "); see also South Euclid v Richardson, Nos. 54247, 54248, (Ohio Ct App, Aug. 18, 1988), pp 1-2 (invalidating as vague and overbroad municipal ordinance stating that " 'no person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct,' " and that defined " 'lewdness' " as " 'sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals' ").

Moreover, there is no longstanding, commonly understood definition of "lewd" upon which the Ohio Supreme Court's construction might be said to draw that can save the "lewd exhibition" standard from impermissible vagueness.[10] At

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common law, the term "lewd" included "any gross indecency so notorious as to tend to corrupt community morals," Collins v State, 160 Ga App 680, 682, 288 SE2d 43, 45 (1981), an approach that was "subjective" and dependent entirely on a speaker's "social, moral, and cultural bias." Morgan v Detroit, 389 F Supp 922, 930 (ED Mich 1975).[11] Not surprisingly, States with long experience in applying indecency laws have learned that the word "lewd" is "too indefinite and uncertain to be enforceable." Courtemanche v State, 507 SW2d 545, 546 (Tex Cr App 1974). See also Attwood v Purcell, 402 F Supp 231, 235 (Ariz 1975); District of Columbia v Walters, 319 A2d 332, 335-336 (DC 1974). The term is often defined by reference to such pejorative synonyms as "'lustful, lascivious, unchaste, wanton, or loose in morals and conduct.'" People v Williams, 59 Cal App 3d 225, 229, 130 Cal Rptr 460, 462 (1976). But "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify." State v Kueny, 215 NW2d 215, 217 (Iowa 1974). "To instruct the jury that a 'lewd or dissolute' act is one which is morally 'loose,' or 'lawless,' or 'foul' piles additional uncertainty

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upon the already vague words of the statute. In short, vague statutory language is not rendered

10. Historically, prohibitions on "lewd" acts grew out of "the archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 248, 599 P2d 636, 641 (1979). We held such vagrancy laws unconstitutionally vague in Papachristou v City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct 839 (1972). Cf. Ohio Rev Code § 715.55 (1976) ("Any municipal corporation may provide for: (A) The punishment of persons disturbing the good order and quiet of the municipal corporation by clamors and noises in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by *lewd* or lascivious behavior. (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself") (emphasis added).

11. Virtually any act running afoul of "conventional" morality can be and has been sanctioned under "lewdness" laws. See, e.g., Jelly v Dabney, 581 P2d 622, 626 (Wyo 1978) (describing, as punishable under "lewdness" prohibition, crime of "illicit cohabitation," i.e., a "dwelling or living together by a man and woman, not legally married to each other, in the manner of husband and wife, and indulgence in acts of sexual intercourse") (quotation omitted); Egal v State, 469 So 2d 196, 198 (Fla App 1985) ("'[I]f forty years ago either a man or a woman had donned the apparel popular on our beaches today . . . such person would probably have been . . . branded as a lewd, lascivious, and indecent person'") (quoting State ex rel. Swanboro v Mayo, 155 Fla 330, 332, 19 So 2d 883, 884 (1944)).

more precise by defining it in terms of synonyms of equal or greater uncertainty." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 249, 599 P2d 636, 642 (1979).

The Ohio Supreme Court, moreover, did not specify the perspective from which "lewdness" is to be determined. A "reasonable" person's view of "lewdness"? A reasonable pedophile's? An "average" person applying contemporary local community standards? Statewide standards? Nationwide standards? Cf. Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989); Pope v Illinois, 481 US 497, 500-501, 95 L Ed 2d 439, 107 S Ct 1918 (1987); Pinkus v United States, 436 US 293, 302-303, 56 L Ed 2d 293, 98 S Ct 1808 (1978); Smith v United States, 431 US 291, 300, n 6, 52 L Ed 2d 324, 97 S Ct 1756 (1977); Miller v California, 413 US 15, 24, 37 L Ed 2d 419, 93 S Ct 2607 (1973); Mishkin v New York, 383 US 502, 508, 16 L Ed 2d 56, 86 S Ct 958 (1966). In sum, the addition of a "lewd exhibition" standard does not narrow adequately the statute's reach. If anything, it creates a new problem of vagueness, affording the public little notice of the statute's ambit and providing an avenue for "'policemen, prosecutors, and juries to pursue their personal predilections.'" Kolender v Lawson, 461 US 352, 358, 75 L Ed 2d 903, 103 S Ct 1855 (1983) (quoting Smith v Goguen, 415 US 566, 575, 39 L Ed 2d 605, 94 S Ct 1242 (1974)); see also Houston v Hill, 482 US 451, 465, and n 15, 96 L Ed 2d 398, 107 S Ct 2502 (1987).[12] Given the important First Amendment interests

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at issue, the vague, broad sweep of the "lewd exhibition" language means that it cannot cure § 2907.323(A)(3)'s overbreadth.

2

The Ohio Supreme Court also added a "graphic focus" element to the nudity definition. This phrase, a stranger to obscenity regulation, suffers from the same vagueness difficulty as "lewd exhibition." Although the Ohio Supreme Court failed to elaborate what a "graphic focus" might be, the test appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture or other representation. Not only is this factor dependent on the perspective and idiosyncrasies of the observer, it also is unconnected to whether the material at issue merits constitutional protection. Simple nu-

12. The danger of discriminatory enforcement assumes particular importance of the context of the instant case, which involves child pornography with male homosexual overtones. Sadly, evidence indicates that the overwhelming majority of arrests for violations of "lewdness" laws involve male homosexuals. See Pryor, supra, at 252, n 599 P2d, at 644, n 8. Cf. Houston v Hill, 482 US 451, 96 L Ed 2d 398, 107 S Ct 2502 (1987) (prosecution of male homosexual for interfering with a police officer in the performance of his duties); Developments in the Law—Sexual Orientation and the Law, 102 Harv L Rev 1509, 1537-1538, 1542 (1989). "Such uneven application of the law is the natural consequence of a statute which as judicially construed measure[s] the criminality of conduct by community or even individual notions of what is distasteful behavior." Pryor, supra, at 252, 599 P2d, at 644. The "lewd exhibition" standard "'furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."'" Kolender v Lawson, 461 US, at 360, 75 L Ed 2d 903, 103 S Ct 1855 (quoting Papachristou, 405 US, at 170, 31 L Ed 2d 110, 92 S Ct 839, in turn quoting Thornhill v Alabama, 310 US 88, 97-98, 84 L Ed 1093, 60 S Ct 736 (1940)).

dity, no matter how prominent or "graphic," is within the bounds of the First Amendment. Michelangelo's "David" might be said to have a "graphic focus" on the genitals, for it plainly portrays them in a manner unavoidable to even a casual observer. Similarly, a painting of a partially clad girl could be said to involve a "graphic focus," depending on the picture's lighting and emphasis,[13] as could the depictions of nude children on the friezes that adorn our courtroom. Even a photograph of a child running naked on the beach or playing in the bathtub might run afoul of the law, depending on the focus and camera angle.

In sum, the "lewd exhibition" and "graphic focus" tests are too vague to serve as any workable limit. Because the statute,

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even as construed authoritatively by the Ohio Supreme Court, is impermissibly overbroad, I would hold that appellant cannot be retried under it.[14]

II

Even if the statute was not overbroad, our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), forbids the criminalization of appellant's private possession in his home of the materials at issue. "If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Id., at 565, 22 L Ed 2d 542, 89 S Ct 1243. Appellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. Appellant testified that he had been given the pictures in his home by a friend. There was no evidence that the photographs had been produced commercially or distributed. All were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.

In these circumstances, the Court's focus on Ferber rather than Stanley is misplaced. Ferber held only that child pornography is "a category of material the *production* and *distribution* of which is not entitled to First Amendment protection," 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348 (emphasis added); our decision did not extend to private *possession*. The authority of a State to regulate the production and distribution of such materials is

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not dispositive of its power to penalize possession.[15] Indeed, in Stanley

13. Since § 2907.323(A)(3) makes it to crime to "view" as well as to possess depictions of nudity, visitors to an art gallery might find themselves in violation of the law.

14. The scope of § 2907.323(A)(3) is restricted to depictions of "a minor who is not the person's child or ward." This does not cure the overbreadth problem, because many constitutionally protected photographs outlawed by the statute, such as commercial advertisements and works of art, circulate outside of the subject's immediate family. See also ante, at 124, 109 L Ed 2d, at 118 ("'Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law. . . . So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute'") (quoting Tr 3-4).

15. The distinction drawn in Stanley is not an anomaly in the law; to the contrary, we have often protected expression valued by listeners, whether or not the *source* of the communication was fully entitled to the safeguards of the First Amendment. See, e.g., Pacific Gas & Electric Co. v Public Utilities Comm'n of California, 475 US 1, 8, 89 L Ed 2d 1, 106 S Ct 903 (1986) (plurality opinion); Consolidated Edison Co. of New York v Public Service Comm'n of New York, 447 US 530, 533-534, and n 1, 65 L Ed 2d 319, 100 S Ct 2326 (1980); First National Bank of Boston v Bellotti, 435 US 765, 777, and n 13, 55 L Ed 2d 707, 98 S Ct 1407 (1978); Lamont v Postmaster General, 381 US

we assumed that the films at issue were obscene and that their production, sale, and distribution thus could have been prohibited under our decisions. See 394 US, at 559, n 2, 22 L Ed 2d 542, 89 S Ct 1243. Nevertheless, we reasoned that although the States "retain broad power to regulate obscenity"—and child pornography as well—"that power simply does not extend to mere possession by the individual in the privacy of his own home." Id., at 568, 22 L Ed 2d 542, 89 S Ct 1243. Ferber did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed. The distinction established in Stanley between *what* materials may be regulated and *how* they may be regulated still stands. See United States v Miller, 776 F2d 978, 980, n 4 (CA11 1985) (per curiam); People v Keyes, 135 Misc 2d 993, 995, 517 NYS2d 696, 698 (1987). As Justice White remarked in a different context, "[t]he personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by

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the Constitution." United States v Reidel, 402 US 351, 356, 28 L Ed 2d 813, 91 S Ct 1410 (1971).

The Court today finds Stanley inapposite on the ground that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley." Ante, at 108, 109 L Ed 2d, at 108. The majority's analysis does not withstand scrutiny.[16]

301, 307-308, 14 L Ed 2d 398, 85 S Ct 1493 (1965) (Brennan, J., concurring). Just as the right of a listener to receive information does not rest on the right of the producer to disseminate it, so the power to ban the production and distribution of child pornography does not imply a concomitant authority to proscribe mere possession.

16. Although we held in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," id., at 568, 22 L Ed 2d 542, 89 S Ct 1243, we acknowledged that "compelling reasons may exist for overriding the right of the individual to possess" other types of "printed, filmed, or recorded materials." Id., at 568, n 11, 22 L Ed 2d 542, 89 S Ct 1243. The majority's reference to this language as support for its decision today, see ante, at 110, 109 L Ed 2d, at 109-110, ignores the fact that footnote 11 in Stanley cited only to 18 USC § 793(d) [18 USCS § 793(d)], which criminalizes possession of defense information harmful to US national security. To equate child pornography with state secrets is to read the narrow exception carved in footnote 11 of Stanley as swallowing the general rule that the case established. See State v Meadows, No. C-850091 (Ohio Ct App, Dec. 18, 1985) (Doan, J., concurring) ("The reservation [in footnote 11 of Stanley] applies to traitorous or seditious materials, and not to child pornography"), rev'd, 28 Ohio St 3d 43, 503 NE2d 697 (1986), cert denied, 480 US 936, 94 L Ed 2d 771, 107 S Ct 1581 (1987); see also Meadows, 28 Ohio St 3d, at 356-357, 503 NE2d, at 716 (Brown, J., concurring). Although our decisions even in the First Amendment area have taken special note of the paramount importance of national security interests, see, e.g., Near v Minnesota ex rel. Olson, 283 US 697, 716, 75 L Ed 1357, 51 S Ct 625 (1931), we nonetheless have required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed. See, e.g., New York Times Co. v United States, 403 US 713, 726-727, 29 L Ed 2d 822, 91 S Ct 2140 (1971) (Brennan, J., concurring).

While the sexual exploitation of children is undoubtedly a serious problem, Ohio may employ other weapons to combat it. Indeed, the State already has enacted a panoply of laws prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. See n 1, supra. Ohio has not demonstrated why these laws are inadequate and why the State must forbid mere possession as well.

The Court today speculates that Ohio "will decrease the production of child pornography if it penalizes those who

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possess and view the product, thereby decreasing demand." Ante, at 109-110, 109 L Ed 2d, at 109. Criminalizing possession is thought necessary because "since the time of our decision in Ferber, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." Ante, at 110-111, 109 L Ed 2d, at 110. As support, the Court notes that 19 States have "found it necessary" to prohibit simple possession. Ibid. Even were I to accept the Court's empirical assumptions," I would find the Court's

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approach foreclosed by Stanley, which rejected precisely the same contention Ohio makes today:

"[W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 US, at 567-568, 22 L Ed 2d 542, 89 S Ct 1243.

17. That 19 States have prohibited possession of child pornography hardly proves that such an approach is integral to effective enforcement of production and distribution laws. A restriction on speech cannot be justified by such self-referential reasoning. In fact, the difficulty of enforcing possession laws—for example, the requirements of probable cause and a warrant before a search may be undertaken—means that penalties for possession are dubious complements to curbs on production, sale, and distribution. See Note, Private Possession of Child Pornography: The Tensions Between Stanley v Georgia and New York v Ferber, 29 Wm. & Mary L Rev 187, 212 (1987) ("Statutory prohibition of the private possession of child pornography is an inefficient and ineffective means of preventing the serious problem of child sexual abuse").

The federal experience illustrates that possession laws are not an essential element of a successful enforcement strategy. In the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L 95-225, 92 Stat 7, Congress prohibited the production, distribution, and sale of material depicting sexually explicit conduct by minors. See 18 USC §§ 2251-2253 (1982 ed) [18 USCS §§ 2251-2253]. Congress also criminalized the mailing, receipt, or trafficking in interstate or foreign commerce of such material for the purpose of sale or distribution for sale. See 18 USC § 2252(a) (1982 ed) [18 USCS § 2252(a)]. But Congress did *not* criminalize mere possession. In the Child Protection Act of 1984, Pub. L 98-292, 98 Stat 204, Congress enacted a broad revision of the 1977 law, removing the requirement that trafficking, receipt, and mailing be for the purposes of sale or distribution for sale. See 18 USC § 2252(a) [18 USCS § 2252(a)]. Further, the 1984 Act eliminated a requirement that material be "obscene" before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal, see § 2252(a); raised the age limit of protection from 16 to 18 years of age, see § 2256(1); and added stiffer penalties, see § 2252(b), criminal and civil forfeiture provisions, see §§ 2253, 2254, and a civil remedy for personal injuries. See § 2255. Even in the 1984 amendments, Congress did not find it necessary to ban simple possession. Nevertheless, the Attorney General's Commission on Pornography determined that "the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry." 1 US Dept of Justice, Attorney General's Commission on Pornography, Final Report 607 (1986).

At bottom, the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.[18]

18. The Court briefly identifies two other interests that it contends justify Ohio's law. First, the majority describes a state interest in destroying the "permanen[t] record" of the victim's abuse. Ante, at 111, 109 L Ed 2d, at 110. I do not believe that the law is narrowly tailored to this end, for there is no requirement that the State show that the child was abused in the production of the materials or even that the child knew that a photograph was taken. Even if the State could recover all copies of the offensive picture, which seems highly unlikely, I do not see how a candid shot taken without the minor's knowledge can "haun[t]" him or her in the years to come, ibid., when there is no indication that the child is even aware of its existence. And if the law's purpose is preventing sexual abuse of children, it is underinclusive to the extent that it does not prevent *parents* from photographing their children in a state of nudity, see, e.g., Massachusetts v Oakes, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633 (1989), or giving others written permission to do so. See, e.g., Faloona v Hustler Magazine, Inc. 607 F Supp 1341 (ND Tex 1985). The only restriction on parents is the nebulous "proper purposes" provision, which is really no restriction at all. See n 2, supra. More fundamentally, even if the State could presume that minors are legally incompetent to consent to sexually explicit photographs, and therefore that all such photographs could be outlawed, it does not follow that the State can prohibit *possession* of such pictures in addition to their *production*. In Ferber, the Court was careful to limit its discussion to the "distribution" and "circulation" of photographs taken without a minor's consent. See 458 US, at 759 and n 10, 73 L Ed 2d 1113, 102 S Ct 3348; cf. Butterworth v Smith, 494 US 624, 635-636, 108 L Ed 2d 572, 110 S Ct 1376 (1990); The Florida Star v B. J. F. 491 US 524, 532-533, 105 L Ed 2d 443, 109 S Ct 2603 (1989); Smith v Daily Mail Publishing Co. 443 US 97, 103, 61 L Ed 2d 399, 99 S Ct 2667 (1979); Cox Broadcasting Corp. v Cohn, 420 US 469, 491, 43 L Ed 2d 328, 95 S Ct 1029 (1975). By analogy, Stanley assuredly protects the private possession of obscene adult pornography, even though an argument could be made that "production of adult pornography can be as harmful to adult actors as the production of child pornography is to child actors." Note, 29 Wm. & Mary L Rev, supra, at 204, n 144; see also Attorney General's Report, supra n 17, at 839-900; Pollard, Regulating Violent Pornography, 43 Vand L Rev 125, 133-134 (1990).

Second, the Court maintains that possession of child pornography may be prohibited "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." Ante, at 111, 109 L Ed 2d, at 110 (citing, in a footnote, the Attorney General's Commission on Pornography). The Attorney General's Commission, however, determined that pedophiles are likely to use *adult* as well as *child* pornography to lower the inhibitions of a child victim. See Attorney General's Report, supra n 17, at 686; see also Brief for Covenant House et al. as Amici Curiae 8, n 9 (characterizing the Court's argument on this point as "factual speculation"). Finally, Ohio's solution—prohibiting private possession—ignores fundamental principles of our First Amendment jurisprudence. "Assuming obscene material could be proved to create a . . . danger of illegal behavior, it would not follow that the expression should be suppressed. Rather, the basic principles of a system of freedom of expression would require that society deal directly with the . . . action and leave the expression alone." T. Emerson, The System of Freedom of Expression 494 (1970). See also Paris Adult Theatre I v Slaton, 413 US, at 108-110, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting). Thus, while acts of sexual abuse themselves may be outlawed, the private possession of photographs, magazines, and other materials may not.

While I share the majority's

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concerns, I do not believe that it has struck the proper balance between the First Amendment and the State's interests, especially in light of the other means available to Ohio to

[495 US 145]

protect children from exploitation and the State's failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production.[19] "The existence of the State's power to prevent the distribution of obscene matter"—and of child pornography—"does not mean that there can be no constitutional barrier to any form of practical exercise of that power." Smith v California, 361 US 147, 155, 4 L Ed 2d 205, 80 S Ct 215 (1959).

III

Although I agree with the Court's conclusion that appellant's conviction must be reversed because of a violation of due process, I do not subscribe to the Court's reasoning regarding the adequacy of appellant's objections at trial. See ante, at 122-125, 109 L Ed 2d, at 117-119. The majority determines that appellant's due process rights were violated because the jury was not instructed according to the interpretation of § 2907.323(A)(3) adopted by the Ohio Supreme Court on appeal. That is to say, the jury was not told that "the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals." Ante, at 123, 109 L Ed 2d, at 118. The Court finds that appellant's challenge to the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements is properly before us, because appellant objected at trial to the overbreadth of § 2907.323(A)(3). See

[495 US 146]

ante, at 123-124, 109 L Ed 2d, at 118. I agree with the Court's conclusion that we may reach the merits of appellant's claim on this point.[20]

19. The notion that possession of pornography may be penalized in order to facilitate a prohibition on its production, whatever the rights of possessors, is not unlike a proposal that newspaper subscribers be held criminally liable for receiving the newspaper if they are aware of the publisher's violations of child labor laws. Cf. L Tribe, American Constitutional Law 915 (2d ed 1988). In both cases, sanctions against possession might increase the effectiveness of concededly permissible regulations on the production process. But although the need to protect children from exploitation may be acute, it cannot override the right to receive the newspaper or to possess sexually explicit materials in the privacy of the home, especially when less restrictive alternatives exist to further the state interests asserted.

20. The Court's opinion should not be taken to mean that appellant's due process claim with respect to the "lewd exhibition" and "graphic focus" elements would be procedurally barred now had he failed to object at trial. If appellant's due process contention were nothing more than a complaint concerning the statute's overbreadth, the suggestion that he would be barred from raising it now if he failed to object at trial might be plausible. But that is not appellant's argument. Rather, he maintains that his due process rights were violated because the Ohio Supreme Court affirmed his conviction after adding the elements of "lewd exhibition" and "graphic focus" on appeal, despite the fact that appellant had had no reason to design a defense strategy or introduce evidence with these tests in mind. The jury, moreover, might have convicted appellant purely on the basis of the "nudity" definition, without deciding whether the materials depicted a "lewd exhibition of nudity" or involved a "graphic focus" on the genitals. Thus, appellant's due process claim is separate from his overbreadth challenge, see Shuttlesworth v Birmingham, 382 US 87, 92, 15 L Ed 2d 176, 86 S Ct 211 (1965), as even the Court appears to recognize at some places in its opinion. See ante, at 121, 109 L Ed 2d, at 117 ("Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause"). The due process violation in this case was not complete until the Ohio Supreme Court affirmed appellant's conviction after reinterpreting the statute. Requiring defendants to object *at trial* to an error that does not appear until the appellate stage would advance no legitimate state interest regarding finality or compliance with state procedures.

But the Court does not rest there. Instead, in what is apparently dictum given its decision to reverse appellant's conviction on the basis of the first due process claim, the Court maintains that a separate due process challenge by appellant arising from the Ohio Supreme Court's addition of a scienter element is procedurally barred because appellant failed to object at trial to the absence of a scienter instruction. The Court maintains that § 2907.323(A)(3) must be interpreted in light of § 2901.21(B) of the Ohio Revised Code, which provides that recklessness is the appropriate mens rea where a statute "'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" Ante, at 113, n 9, and

[495 US 147]

122-123, 109 L Ed 2d, at 111, 117-118. I cannot agree with this gratuitous aspect of the Court's reasoning.

First, the overbreadth contention voiced by appellant must be read as fairly encompassing an objection both to the lack of an intent requirement and to the definition of "nudity." Appellant objected to, inter alia, the criminalization of the "mere possession or viewing of a photograph," without the need for the State to show additional elements. Tr 4. A natural inference from this language is that intent is one of the additional elements that the State should have been required to prove. There is no need to demand any greater precision from a criminal defendant, and in my judgment the overbreadth challenge was sufficient, as a matter of federal law, to preserve the due process claim arising from the addition of a scienter element. As the majority acknowledges, our decision in Ferber mandated that "prohibitions on child pornography include some element of scienter." Ante, at 115, 109 L Ed 2d, at 113 (citing Ferber, 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348). In Ferber we recognized that adding an intent requirement was part of the process of narrowing an otherwise overbroad statute, and appellant's contention that the statute was overbroad should be interpreted in that light. I find the Ohio Supreme Court's logic internally contradictory: In one breath it adopted a scienter requirement of recklessness to narrow the statute in response to appellant's overbreadth challenge, and then, in the next breath, it insisted that appellant had failed to object to the lack of a scienter element.

Second, even if appellant had failed to object at trial to the failure of the jury instructions to include a scienter element, I cannot agree with the reasoning of the Ohio Supreme Court, unquestioned by the majority today, that "the omission of the element of recklessness [did] not constitute plain error." 37 Ohio St 3d, at 254, 525 NE2d, at 1370. To the contrary, a judge's failure to instruct the jury on every element of an offense violates a "'bedrock, "axiomatic and elementary" [constitutional] principle,'" Francis v Franklin, 471 US

[495 US 148]

307, 313, 85 L Ed 2d 344, 105 S Ct 1965 (1985) (quoting In re

Winship, 397 US 358, 363, 25 L Ed 2d 368, 90 S Ct 1068 (1970)), and is cognizable on appeal as plain error. Cf. Carella v California, 491 US 263, 2[illegible]-269, 105 L Ed 2d 218, 109 S Ct 2419 (1989) (Scalia, J., concurring in judgment); Rose v Clark, 478 US 570, 580, n 8, 92 L Ed 2d 460, 106 S Ct 3101 (1986); Connecticut v Johnson, 460 US 73, 85-86, 74 L Ed 2d 823, 103 S Ct 969 (1983) (plurality opinion); Jackson v Virginia, 443 US 307, 320, n 14, 61 L Ed 2d 560, 99 S Ct 2781 (1979). "[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, . . . it is necessary to take note of it on our own motion." Screws v United States, 325 US 91, 107, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330 (1945) (plurality opinion).

Thus, I would find properly before us appellant's due process challenge arising from the addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests.

IV

When speech is eloquent and the ideas expressed lofty, it is easy to find retrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his rig[illegible] to possess them privately and his right to avoid punishment under an overbroad law. I respectfully dissent.

[495 US 149]

JONAS H. WHITMORE, individually and as next friend of RONALD GENE SIMMONS, Petitioner

v

ARKANSAS et al.

495 US 149, 109 L Ed 2d 135, 110 S Ct 1717

[No. 88-7146]

Argued January 10, 1990. Decided April 24, 1990.

Decision: Death row inmate held not to have standing, either individually or as "next friend," to challenge validity of death sentence imposed on another death row inmate, who had waived right of appeal.

SUMMARY

An individual who had allegedly murdered 14 members of his family, and later killed or wounded 5 other people, was tried separately in an Arkansas Circuit Court on each of the 2 sets of crimes, and in each case was convicted of capital murder and sentenced to death. After each sentence, (1) the individual stated under oath his desire that no action be taken to appeal or in any way change his sentence, and (2) the Circuit Court, after conducting a hearing as to the individual's competence to make such a waiver, concluded that his decision was knowing and intelligent. In denying a priest's petition to appeal one of the sentences on the individual's behalf, the Supreme Court of Arkansas held that (1) the priest did not have standing to proceed (a) as "next friend," because it had not been alleged that he was the individual's spiritual adviser or confidant or, indeed, that the two had ever met, (b) as an aggrieved taxpayer under the state constitution, or (c) as a concerned citizen seeking to prevent an important legal issue from going unresolved at the appellate level; (2) under Arkansas law, a mandatory appeal is not required in all death penalty cases, but capital defendants may forgo direct appeal only if they have been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive all rights to appeal; and (3) the Circuit Court, on the basis of the record, correctly upheld the individual's waiver (754 SW2d 839). The Arkansas Supreme Court, while noting that seven possible grounds for reversal had been discussed with the individual by his counsel, subsequently upheld the individual's waiver

Briefs of Counsel, p 810, infra.

NLC-D.C.

X

RESEARCH ON PORNOGRAPHY: THE EVIDENCE OF HARM

from the

NATIONAL COALITION
AGAINST PORNOGRAPHY

PORNOGRAPHY'S RELATIONSHIP TO CHILD SEXUAL EXPLOITATION AND ABUSE

STAND TOGETHER OPPOSING PORNOGRAPHY®

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National Coalition
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PORNOGRAPHY'S RELATIONSHIP TO CHILD SEXUAL EXPLOITATION AND ABUSE

THE PROBLEM

The National Coalition for Children's Justice (Ken Wooden)

Between 1981 and 1985, child sexual abuse rose by 175%. Child molestation cases in the home in 1986 were 216,216.

In Chattanooga, 60% of 539 children of elementary, junior and senior high school age interviewed had seen X-rated movies, knew names and scenes.

In Reading, PA 70% of 700 elementary students, 65% of junior high students, and nearly 100% of high school students interviewed had seen X-rated movies, and knew names and scenes.

The same pattern was true in Fort McClellan, Alabama; North Adams, Massachusetts; and Cincinnati, Ohio.

Abelson (1970)

1 in 5 boys and 1 in 10 girls had first exposure to pornography be age 12.

National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Heath and Human Services: Study of National Incidence and Prevalence of Child Abuse and Neglect (1988) (NIS-2)

"A study to assess the current (1986) national incidence of child abuse and neglect, and to determine how the severity, frequency, and character of child maltreatment changed since the last study in 1980."

The numbers reported reflect cases reported to the Child Protective Services (a state program) accepted for investigation, investigated, and substantiated, based upon consistent operational definitions of maltreatment.

- An estimated 1,678,600 children nationwide experienced abuse or neglect in 1986. These children had experienced demonstrable harm or were endangered and at risk of harm.
- There were 675,000 abused children in 1986.
- There has been a significant increase (74%) in the incidence of abuse between 1980 and 1986.
- Although more professionals (in major community institutions such as schools, hospitals, day care centers, social service agencies and mental health centers, etc.) are recognizing child maltreatment, they are not necessarily reporting it to Child Protective Services.
- A substantial majority (54%) of children who are recognized as abused or neglected by community professionals are not reported to Child Protective Services. Reporting rates are remarkably low. National estimates of the number of cases of abused or neglected children not reported (852,400) far exceeds estimates of the number of cases which are reported (732,300).
- Many suspected cases, reported to Child Protective Services, cannot be substantiated upc investigation.
- Child sexual abuse in 1986 increased progressively, but not significantly by successive age groups, beginning with children aged three. In other words, children of all ages from 3-17 are sexually abused in about equal numbers. When compared to 1980, however, the increased incidence of sexual abuse occured disproportionately among the older children—especially children aged 15-17.
- Child sexual abuse is 5 times more frequent for children from lower income families (i.e., <$15,000).

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- The increased child sexual abuse from 1980 to 1986 occured disproportionately in more urban counties.
- Among the abuse cases there were significant rises in the incidence of physical and sexual abuse:
  - physical abuse increased by 58% over 1980
  - child sexual abuse occurred in 1986 at more than triple the rate of 1980
- There were 138,000 children abused sexually in 1986, and another 17,900 in danger and at risk of being sexually abused.
- Female children were sexually abused almost four times as often as males.
- Male children were emotionally abused more than twice as often as they were sexually abused.
- Female children were equally likely to be sexually abused or emotionally abused.
- Female children experienced more abuse overall than did male children. This reflected primarily their greater susceptibility to being sexually abused.

American Association for Protecting Children (American Humane Association)

They noted a 10-fold increase in the number of children reported to be sexual abuse victims from 1976 to 1983. They summarized numbers of child sexual abuse reported to and investigated by the Child Protective Services. AHA reported that 1,928,000 children had been reported to Child Protective Services in 1985.

National Obscenity Enforcement Unit

"Review of recent law enforcement statistics and studies, as well as scientific research, reveals the devastating effect obscenity and child pornography are having on our nation. Between 1981-1985 reported child sexual abuse rose by 175%. The rape rate has climbed 43% in the last decade alone and, tragically, the highest incidence of rape victims are teenagers between 16-19."

Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia (1986)

"A 1985 report by the New York-based Child Welfare League of America said child sexual abuse reports rose 59 percent from 1983 to 1984. In Delaware and Idaho reports nearly doubled from 1983 to 1984; in Oregon they rose 129 percent; and in Wisconsin, they went up by 132 percent. In Houston, police received 1,600 reports of child sexual assaults in 1985, more than double the total in 1983. There is wide agreement that even these are conservative figures."

Check (1985)

Adolescents aged 12-17 (as a group) report most frequent exposure to pornography (compared to other groups). This was found to be true by the 1970 Commission as well.

Gene Abel (1987)

"It is surprising to note the very high percentage of total child molestations committed by those who target children outside the home." Many sex crimes are not reported, so arrest records are an incomplete picture.

U.S. Department of Justice, Network News, Fall Edition (1985)

"One in three females and one in ten males will be sexually molested before the age of 18. Four million child molesters reside in this country."

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Tony Samstag, "Throwaway Children," THE SPECTATOR (June 25, 1988)

"In some cases, the authorities of several countries have tried to sum up the extent of sexual abuse of children. These numbers have one thing in common. They are very much lower than those which some private organizations have found out on their own. Defence for Children International believes that official estimates as to the number of child prostitutes in any given city seem to bear no relationship to the actual numbers of children involved but rather to the seriousness with which the politicians view the problem. The global traffic in child pornography and prostitution does appear to be vast, probably worth billions in any unit of currency.

"There appears to be a strong connection between commercial child abuse and incest. Sexual abuse at home seems to be one of the most common reasons for very young children to run away—or to be thrown out. Once on the streets, they will seek affection (or cash) in the ways to which they have become habituated, or they will simply become easy meat because they are so helpless."

Silbert & Pines (1984)

They interviewed 200 juvenile and adult street prostitutes. In 193 cases of rape: about 25% reported, without being asked, the assailants' reference (allusion) to pornographic materials. 12% told the rapists that they were prostitutes, only to be assaulted after forced vaginal penetration, in ways the rapists "claimed they had seen prostitutes enjoy in the pornographic literature they cited." In 178 cases of rape: 22% reported, without being asked, "the use of pornographic materials by the adult prior to the sexual act."

THE NATURE AND EXTENT OF THE PROBLEM

Abel (1985)

A study of 411 non-incarcerated sex offenders (sexual deviants or paraphiliacs) showed that sex offenders attempted an average of 581 sex offenses each, completed an average of 533 offenses, and victimized 336 people each over a 12 year period. This includes pedophiles (child molesters).

Abel, et al (1987)

"The frequency of self-reported crimes" (for the non-incarcerated sex offenders they studied) "was vastly greater than the number of crimes for which they had been arrested. The ratio of arrest to commission of the more violent crimes such as rape and child molestation was approximately 1:30.

Faller, 1988 (Presented at the National Association of Social Workers Annual Conference, 11/11/88)

"The number of women who sexually abuse children may be two to three times higher than previously thought. In a clinical study of 308 abuse cases studied over a period of ten years, Faller found that women were the abusers in almost fourteen percent of the cases. 'Our findings also suggest that women are not the initiators (of the abuse), but that they are persuaded, coerced, or otherwise drawn into sexual abuse by men.' About 60 percent of the women in the study had sexually abused more than one child. Almost three out of four women in the study engaged in incestuous family situations, which involved two abusers and at least two victims."

Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia (1986)

"No single characteristic of pedophilia is more pervasive than the obsession with child pornography. The fascination of pedophiles with child pornography and child abuse has been documented in many studies and has been established by hundreds of sexually explicit materials involving children.

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Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986 (continued)

"Detective William Dworin of the Los Angeles Police Department estimates that of the 700 child molesters in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About 80 percent owned either child or adult pornography.

"Each convicted child molester interviewed by the Subcommittee either collected or produced child pornography, or both. Most said they had used the material to lower the inhibitions of children or to coach them into posing for photographs.

"It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities.

" 'The maintenance and growth of [the pedophile's] collections [of items related to children] becomes one of the most important things in their life.' (Special Agent Kenneth Lanning, FBI)"

"Messages have appeared on computer bulletin boards offering to buy, sell or trade child pornography, establish correspondence about sexual interests, trade names of 'available' children and even propose sexual liaisons. The bulletin boards actually are an electronic form of the classified ads that appear in sexually-oriented magazines throughout the country. The bulletin board users, who normally use aliases, now have virtually complete anonymity because police are not authorized under current federal law to intercept computer conversations without a warrant based on probable cause. 'We've seen that the (bulletin board) ads tend to be a bit more explicit, because they (the senders) have a sense of anonymity or security. There's a likelihood they'll never be caught' (Sergeant William Brown, Houston Police Department).

"The largest bulletin board accessed by Sergeant Brown was called 'Lambda' and was based in San Francisco. Many of the systems indicate how many calls have come into the network, and Brown reported that he never saw one with fewer than 20,000 calls."

Fortunately, the obscenity provisions of the 1988 drug law have closed many of the loopholes in past legislation that have allowed this type of networking to continue.

"Based on the information obtained during its investigation, the Subcommittee has reached the following general conclusions:

- Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure.
- The vast majority of child pornography in the United States constitutes a small portion of the overall pornography market and is deeply underground. Unlike the adult pornography industry, it is not significantly influenced by organized crime.
- It is extremely difficult, if not impossible in some cities, to purchase true child pornography at adult bookstores. The overwhelming majority of child pornography seized in arrests made in the United States has not been produced or distributed for profit.
- The seizure by the U.S. Customs Service of imported child pornography, especially from Denmark and the Netherlands, has declined dramatically since late 1984 due to increased diplomatic and law enforcement pressure, American news media reports and increased caution shown by American child pornography customers.

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Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986 (continued)

- The membership of known pedophile-support groups in the United States is probably less than 2,000. While many of the groups' members have been convicted for child sex crimes, the groups themselves are not involved actively in large-scale criminal conspiracies, such as commercial child pornography rings.
- So-called 'child sex rings' do exist, however, and it is these un-organized groups, and the individuals who participate in them, which pose the most serious threat to children.
- The Child Protection Act of 1984, which made illegal all distribution of sexually explicit material involving children, has been highly successful, leading to a substantial increase in federal prosecutions and the placing of higher priorities on such investigations. Since passage of the law, the Department of Justice has won 164 convictions on child pornography violations; in the previous six and one-half years, there were only 64.
- While the awareness of many police agencies about child sexual exploitation has improved greatly, many still do not have the training, staff or inclination to recognize promptly and investigate potential leads to crimes involving child pornography or child sexual abuse.
- Computers are providing pedophiles with a virtually untraceable means of exchanging information, including the names of potential victims. While the Subcommittee is mindful of the Constitutional safeguards against interference with free speech, a need clearly exists for additional legislation in this area." (The obscenity provisions of the 1988 drug law have closed many of the loopholes in past legislation that have allowed this type of networking to continue.)

Eli Coleman, Psychologist at Golden Valley Health Center; University of Minnesota Medical School

There is no question that sexual addiction exists. While not addictive in the chemical or physiological sense, "these behavior patterns are pathological (i.e., caused) and self-defeating. These individuals display hypersexuality in response to feelings of anxiety, depression, or loneliness. Many describe a sexual act as a "fix" to some very negative feeling. But this relief is short-lived and negative feelings recur. Some (therapists) view this as a psychiatric condition and treat it with medications. Others treat it with psychoanalytic or behavioral therapy. Others adopted the methods of treating alcohol addiction."

Abel (1986)

He studied 240 child molesters (pedophiles). They averaged 30 (homosexual or same-sex) to 60 (heterosexual) victims before being caught. The typical child molester will sexually abuse 380 children in a lifetime.

Abel et al (1987)

"Pedophiles (child molesters) involved with children outside the home will occasionally return to the same victim, especially men who molest young boys. As expected, incestuous pedophiles (child molesters who molest their relatives) repeatedly molest the same child, from an average of 36.7 molestations per boy victim to 45.2 molestations per girl victim."

"The number of acts reported by child molesters was from 23 to 282 acts per offender." This is a marked contrast to an earlier study by Gebhard et al (1965) which "reported that, on the average, pedophiles had been found guilty of fewer than 3 paraphilic acts per offender."

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Diagnostic and Statistical Manual of Mental Disorders, III (Revised 1987)

"Because of the highly repetitive nature of paraphilic (sexually deviant) behavior, a large percentage of the population has been victimized by people with paraphilias (sexual deviations)."

"The more deviant the sexual pattern is from the norm, the fewer instances there need to be of the behavior to indicate psychopathology. Being turned on by ladies' underwear (Fetishism) a few times may not mean much, but once with a corpse (Necrophilia) is too much."

David Duncan (1988) Southern Illinois University

He did a content analysis of twenty-five years of homosexual pornographic magazines sold in adult bookstores of two major US cities. Dr. Duncan found "the frequency with which clearly underage models appeared in such legally available magazines has declined to zero, due to the recent legislation prohibiting child pornography. Suggestions of child pornography remained, however, in the frequent use in porno magazine titles of such words as 'boy,' 'young' and 'teen' although the models were no longer adolescents. Youthful appearing models achieved star billing in what the Attorney General's Commission on Pornography has named 'pseudo-child pornography.'"

"Most of the child models appearing in such pornography are likely to be incest victims being exploited by their parents or other adults."

The earlier decline may have been simply market adjustment with the marketers of gay pornography shifting the emphasis in their product as they became more aware of what sold best to their consumers.

"The demand for homosexual child pornography probably proved to be much smaller than marketers expected during the 'porno boom' of the 1960's. But the fact that there is a demand for such material is clearly indicated by the continued presence of the new pseudo-child pornography."

Carter et al (1984)

The Los Angeles Police Department reported that most child molesters were themselves molested as children. They tend to seek out victims of the age they were when first molested. One study reported that 57% of molesters studied had been victims of child molestation themselves.

Diagnos ic and Statistical Manual of Mental Disorders III (Revised)

Pedophiles target pre-pubescent children; the age of the females preferred by child molesters is 8-10; boys slightly older.

"The recidivism rate (the likelihood of the crime or offense being repeated) for those sexual deviants (paraphiliacs) who are attracted to the same sex is TWICE that of those attracted to children of the opposite sex."

Pierce (1984)

Sexually exploited children involved in the pornography industry are usually recruited among runaways, although some may use neighborhood children or their own children.

Burgess (1984) (A study in Jefferson County, Kentucky)

"The study was an outgrowth of community interest and was an attempt to examine systematically a group of self-identified juvenile prostitutes compared with a group of other juveniles who were non prostitutes.

"Of the prostitute group, up to 90% had been the victims of child physical abuse by parents, and up to 50% had been the victims of child sexual abuse by parents.

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Burgess (continued)

"Concerning the incidences of intrafamily sex, 23% of the prostitute group related that they had sex with family members, while the non prostitute group answered in a like manner only 3 percent of the time. Intrafamily sex abuse victims often become extrafamily sexual exploitation victims.

"37% of the prostitute group admitted to having been involved in pornography; only 18% of the non prostitute group reported involvement in pornography. 38% of the runaways were involved in prostitution, and 15% of the runaways were involved in pornography.

"The age of first sexual intercourse for these children was 12, with the greatest frequency occurring between 10 and 13 years of age, the lowest age being 3.

"Major overlaps between exploited children and criminal activity have been discovered; therefore there are dramatic intelligence benefits to law enforcement and prosecutorial agencies from working with and for exploited children.

"Research suggests that the vast majority of violent sex offenders (rapists, sex murderers) and child molesters have themselves been the victims, as children, of physical or sexual abuse. Certainly the combined efforts of local task forces can, by focusing on victimized children, help break this pattern.

"Identifying and tracking missing children is vital to curbing the victimization of children. Over 86% of Jefferson County children involved in child prostitution and pornography were, at the time of those activities, runaways or missing.

"Data developed on the first 200 children of the missing child program of Jefferson County, Kentucky indicate that approximately 10% of the missing youth are exploited while missing, with 90% of those exploited falling into the 'unusual circumstances' categories developed.

"The ability of child molesters to avoid exposure and prosecution by maintaining mobility across the county is well documented."

Report for Catholic Bishops (1985) [The Plain Dealer, 11/15/86]

"Effects of child molesting by adults are long-lasting, it said, and if the abuse is by a priest, 'This will no doubt have a profound effect on the faith life of the victims, their families and others in the community.'"

The victim's capacity to develop trusting relationships with adult clergy will be impaired, the report said. "Sexual abuse of a child by a cleric, especially a priest, can have a devastating effect on the child's short and long-term perception of the church and its clergy."

DOES PORNOGRAPHY PROMOTE ABUSE?

June 24, 1986 Surgeon General's Workshop on Pornography

19 nationally and internationally recognized clinicians and researchers achieved consensus on the statement that "children and adolescents who participate in the production of pornography experience adverse enduring effects."

Dr. William Marshall (1983)

87% of girl child molesters and 77% of boy child molesters studied admitted to regular use of hard core adult pornography. The obscene material was used by these sex offenders for three reasons: (1) to stimulate themselves; (2) to destroy the consciences and lower the inhibitions and resistance to sexual activity in their intended child victims; and (3) as teaching tools for the child to imitate or model in their real life sexual encounter with the adult.

John Rabun, Exploited and Missing Children Unit of Louisville, KY

"The Police/Social work team of the Exploited and Missing Child Unit (EMCU) of Louisville, KY investigated 1,400 cases of children suspected of being victims of sexual exploitation. Over 40 major cases involved the successful prosecution of adults involved with over 12 children each. One case involved 320 children. At the time of the arrest of and/or service of search warrants, all 40 of these adult predators were found with various forms of adult pornography, and in most cases child nudes and/or child pornography were also found.

"Over four years, the EMCU team learned to expect to always find adult pornography since it was used for: 1) the offender's own arousal; 2) self-validation of their own sex deviations; 3) extortion of child victims or other adults; and 4) deliberate and planned lowering of inhibitions of child victims."

The National Obscenity Enforcement Unit

They now teach their investigators at all of their seminars "to look for pornography at the scene of sexual crimes involving children. It is beyond debate that molestation of children is, in part, caused by consumption of pornography."

"The National Obscenity Enforcement Unit has been most successful in its efforts. Prosecutions for child pornography are up by 80% in the last fiscal year (1987) and obscenity prosecutions are up by 800%."

Ann Burgess, Professor at the University of Pennsylvania (Federal grant to study child pornography).

Pornography depicting children is used by child molesters to convince children that deviant sex acts (which all child sex abuse is) are normal—thereby breaking down their resistance. Her later study (1987) found that victims of child sexual abuse have symptoms of chronic or delayed posttraumatic stress. It causes multiple psychological problems.

As an example of the cost of treatment, one Southwest Ohio mental health center reported that the cost of treatment for children who are molested (especially if the home is a negative environment) is very high, because problems are more entrenched: Private sessions average $85.00/hour and public sessions are 65.00/hour. Most children need between 40 and 50 hours of treatment to alleviate debilitating symptoms. The more dysfunctional the family, the more treatment is needed. Parent groups are also recommended for families of molested children, and these add to the social cost.

This sample County Mental Health Center treats approximately 70 cases of child molestation per year. There are 4-6 new cases per month.

David A. Scott (In Pornography: A Human Tragedy, 1987)

"*Judith Reisman (1985)* found that from the first issue of *Playboy* in 1954, children in cartoons (or photographs of adults dressed to suggest children) have appeared in sexual contact with adults, and the frequency and intensity of these contacts has increased through the years. The dominant impression was that child/adult sex is glamorous, thereby enhancing the impression that these activities are harmless. Magazines can escape the letter of child pornography laws while still implying that sex with children is desirable and readily available. And these magazines, of course, are sold in the open."

Don Feder, Boston Herald (1988)

"Pornographers protest their innocence while facilitating the victimization of our children."

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The Badgley Report (1984)

The report found that almost 60% of both male and female juvenile prostitutes had been asked to be the subject of sexually explicit films or photographs; 12% of the girls and 20% of the boys had actually been used in making pornography: juvenile prostitutes are a high-risk group in regard to being exploited by pornographers.

Two smaller American studies (Burgess: 755 of youth hustlers had participated in pornography; John Rabun: 37% had participated) emphatically confirm this finding.

The 1982 URSA Study: 27% of the young male prostitutes had been photographed by a "john"; of the 54 young male hustlers for whom information was available, 9 had been photographed for commercial pornographic magazines. In the face of that evidence it seems impossible to deny the existence of a significant link between the exploitation of minors in prostitution and in pornography.

Extant studies of juvenile prostitutes showed less incidence of participation in pornography than is the real case because by its very nature one item of pornography can be viewed contemporaneously by many patrons and for repeated sittings. The demand for pornographic performers will always be a tiny fraction of the demand for prostitutes.

Silbert and Pines (1984)

A detailed content analysis of 193 cases of rape and of 178 cases of juvenile sexual abuse revealed a clear relationship between violent pornography and sexual abuse.

Diagnostic and Statistical Manual of Mental Disorders III–R

Pedophiles who act on their urges with children commonly develop excuses or rationalizations about their illegal sexual activities toward the children:

1) that they have "educational value" for the child
2) that the child derives "sexual pleasure" from them
3) that the child was "sexually provocative" toward them—led them on

These three rationalizations are "themes that are also common in pedophilic pornography." p.284.

In other words, pornography teaches three myths that pedophiles believe, and act on, when they molest children.

Southern California Child Exploitation Task Force (1988)

It is the longest existing task force in the U.S. and has prosecuted all the child pornography and Federal child abuse cases in the Central District of California during the past 10 years.

- "According to the U.S. Customs Service, a conservative estimate of the number of pedophiles in the U.S. is 15,000. It is impossible to determine accurately the number, because pedophiles do everything possible to avoid detection."
- "We have frequently gone into homes with search warrants for child pornography and discovered children living in the home who have been molested by the person who is the target of our child-pornography investigation."
- "We have discovered photographs of the pedophiles molesting children."
- "We have found convicted child molesters as well as individuals who were providing children to molesters."

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Southern California Child Exploitation Task Force (continued)

- "One of the men we prosecuted had 50,000 photographs of noncommercial child pornography in a storage locker. He admitted molesting several hundred children following his release from a state hospital for a child molestation conviction. He even maintained a ledger listing those molestations. He taught swimming and tennis to youngsters, some of whom became his victims."
- "A convicted child molester who was the subject of one of our investigations was found, after he had ordered materials, to have homemade child pornography in his house—including a video tape depicting him molesting a child who was clearly under the influence of drugs or alcohol."
- Some articles written in pornographic magazines call attention to a few cases in which individuals (who claimed neither to be sexually active with children nor to possess child pornography) were the subjects of search warrants after they ordered child pornography from undercover Government agents. While Government operations occasionally identify individuals who are not suitable for prosecution, those cases are the exception, not the rule.

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[INTRO]

Child pornography is vivid, heart-breaking proof of one or more children being sexually violated and exploited and, as evidence, is beyond challenge.

Equally unchallengable is the certainty that an adult who sexually violates a child is, by definition, a child molester. Professional study of this activity establishes collection of child porn as a "given" in the life of virtually every identified child molester.

Studies summarized in the final report of the Attorney General's Commission on Pornography indicate those who sexually exploit children do so for a wide range of reasons, and come from a wide array of backgrounds, and occupations, but it seems helpful to group them into two categories: "situational" and "preferential" molesters. The former are people who act out of some serious sexual or psychological need but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that "preferential" child molesters over the long term victimize far more children than do "situational" abusers. (pg 134-35)

Also shown in one of the studies summarized is the 6 step "life cycle" of child pornography. Typically, step one is the display of existing child pornorgraphy to a potential victim, obstensibly for "sex education". Step 2 attempt to convince child explicit sex is acceptable, even desirable. Step 3 Child porn used to convince children are sexually active-it's ok. Step 4 Child pornography desensitizes-lowers child's inhibitions. Step 5 Some of these sessions progress to sexual activity. Step 6 Photographs or movies are taken of the sexual activity (subsequently used as Step 1 with the next victim, thus perpetuating the cycle).

The pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvment include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety. Victims in the longer term may successfully "integrate" the event, particularly with psychiatric help, but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of self, and possible entry into delinquency or prostitution. All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control. That may well be their most unhealable wound. (pg. 136)

BACK UP TESTIMONY

Bob Lloyd

The commission also notes some states have made possession (of kiddie porn) illegal, and considers this action an "extremely effective" weapon against child molesters. (pg 134)

Considering the life-shattering effect on our youth, I would ask in the strongest of terms, that you enact this legislation prohibiting the possession of child pornography in the state of Alaska. I would also ask that you put some REAL TEETH in it!

May I suggest the first conviction to require registration on an inter-state law enforcement network, and link that registration requirement to life-time probation.

NOTE: Would also like to bring two minute "Sound Bite" from one of the members of the A.G.'s Commission on Porn ——

Bob H

[illegible] DRAFT [illegible]

The second sentence has no direct counterpart in the U.S. Constitution, but the principle is embodied in the federal provision that the president is the commander and chief of the army and navy (Article II, Section 2). Virtually all state constitutions contain a similar statement, which expresses a basic tenet of democratic government.

Section 21. Construction

> **The enumeration of rights in this constitution shall not impair or deny others retained by the people.**

That Article I may omit mention of other rights does not mean that these rights are surrendered by the people. This provision is common in state constitutions, and it is a principle recognized by the ninth article of the Bill of Rights: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In fact, this provision has been used very seldom by state or federal courts. So far it has been recognized as protecting only one minor right in Alaska: the supreme court declared that this section protects the right of a prisoner to act as his or her own attorney in post-conviction proceedings. "At the time that the Alaska Constitution was enacted and became effective, the right of self-representation was so well established that it must be regarded as a right 'retained by the people'" (*McCracken v. State*, 518 P.2d 85, 1974).

Section 22. Right of Privacy

> **The right of privacy is recognized and shall not be infringed. The legislature shall implement this section.**

This section was added to the constitution by amendment in 1972. It was prompted by the fear of the potential for misuse of computerized information systems, which were then in their infancy. Delegates to the constitutional convention 16 years earlier had also been concerned about the potential for technological intrusion in the lives of ordinary citizens, but then the fear was electronic surveillance and wiretapping. They considered, but ultimately rejected, inclusion of the following language in the section dealing with unreasonable searches and seizures: "The right of privacy of the individual shall not be

invaded by use of any electronic or other scientific transmitting, listening or sound recording device for the purpose of gathering incriminating evidence. Evidence so obtained shall not be admissible in judicial or legislative hearings."

In the early 1970s, the Alaska Department of Public Safety was developing the Alaska Justice Information System, a computerized database of information on the criminal history of individuals. Fearful that such a system was the precursor of a "Big Brother" government information bureaucracy, legislators responded with this constitutional amendment, which was handily ratified by the voters.

Alaska is one of a small group of states with a constitutional right of privacy: similar provisions can be found in the constitutions of Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington (some were added by amendment at approximately the same time as Alaska's). The U.S. Constitution does not contain an explicit right of privacy. However, in recent years the U.S. Supreme Court has ruled that basic privacy rights are inferred from the First, Third, Fourth, Fifth and Ninth Amendments.

Like other basic constitutional rights, the right of privacy is not absolute. Reasonable interferences with privacy are tolerated, as are, for example, reasonable restraints on the right of free speech. To judge the acceptability of government interference with citizens' privacy, the courts use the same balancing test applied in other cases where it is alleged that the state has trampled a person's rights: the more significant the right involved, the more important the state's interest must be in adopting the restrictive law or regulation.

The first major judicial interpretation of the new constitutional right of privacy in Alaska arose from a case not involving electronic intrusion, but the use of marijuana in the home. In this landmark case that overturned a state law making it illegal to possess marijuana under any circumstances, the Alaska Supreme Court regarded privacy in the home to be the highest importance and the most deserving of constitutional protection, and found the state's case for regulating the personal use of small amounts of marijuana to be less than compelling (*Ravin v. State*, 537 P.2d 494, 1975). In subsequent cases, however, the court upheld the state laws against the possession of small amounts of marijuana in public (saying the right of personal privacy in public places is of lesser constitutional significance; *Belgarde v. State*, 543 P.2d 206, 1975) and against the possession of small amounts of cocaine in the home (saying the harmful societal effects of cocaine are serious

enough to justify the state's regulation of the substance, even in the home; *State v. Erickson*, 574 P.2d 1, 1978).

Many privacy cases in Alaska have arisen in the context of searches and seizures. Of these, the leading case is *State v. Glass* (583 P.2d 872, 1978), in which the Alaska Supreme Court ruled the state could not use as evidence a recording, made without a warrant, of a conversation between the defendant and an informant who possessed a wireless transmitter. Although the U.S. Supreme Court had ruled that recordings of this type were admissible evidence, the Alaska Supreme Court found Alaska's constitutional guarantee protection broader than the inferred right of privacy from the federal constitution: "Were that not the case, there would have been no need to amend the constitution."

According to other decisions of the court, however, not all warrantless recordings of conversation are illegal. Recordings made by a police officer in the normal course of duty may be used as evidence at trial (see, for example, *City of Juneau v. Quinto*, 684 P.2d 127, 1984). Students do not have constitutional protection from searches by school authorities (*D.R.C. v. State*, 646 P.2d 252, Court of Appeals, 1982), nor do fishermen have a reasonable expectation that catches stored in the holds of their vessels will be protected from warrantless searches (*Dye v. State*, 650 P.2d 418, Ct. of Appeals, 1982).

The legislature has not provided the statutory implementation that is expected from the second sentence of this section.

Section 23. Resident Preference

> **This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.**

This section of Article I was passed by the legislature and ratified by the voters in 1988. It was intended to prevent the equal protection clause of Article I, Section 1 from becoming a snag in state courts for local hire (also referred to as "Alaska hire") legislation -- that is, legislation that would give preference to job applicants who are

any of the six paragraphs of subsection (g) are met. State v. Andrews, 723 P.2d 85 (Alaska 1986).

Where defendant's various check forgery cases violated similar societal interests, he could therefore receive concurrent sentences. Winfree v. State, 683 P.2d 284 (Alaska Ct. App. 1984).

Correction of judgment unlawfully imposing concurrent sentences. — See Joseph v. State, 712 P.2d 904 (Alaska Ct. App. 1986).

Sentence was remanded for consideration of alternatives to correct the illegality of concurrent sentences without increasing the total time to serve, where the trial court had erred in imposing a one-year sentence on a probation revocation concurrently to the other sentences. Napayonak v. State, Ct. App. Op. No. 1041 (File No. A-2672), P.2d (1990).

Sec. 12.55.030. Discharge of indigents imprisoned for nonpayment of fine. [Repealed, § 16 ch 53 SLA 1973.]

Sec. 12.55.035. Fines. (a) Upon conviction of an offense, a defendant may be sentenced to pay a fine as authorized in this section or as otherwise authorized by law. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose. No defendant may be imprisoned solely because of inability to pay a fine.

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

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

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

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

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

(5) $300 for a violation.

(c) Upon conviction of an offense, a defendant that is an organization may be sentenced to pay a fine not exceeding the greater of

(1) an amount that is

(A) $500,000 for a felony offense or for a misdemeanor offense that results in death;

(B) $200,000 for a class A misdemeanor offense that does not result in death;

(C) $25,000 for a class B misdemeanor offense that does not result in death;

(D) $10,000 for a violation;

(2) two times the pecuniary gain realized by the defendant as a result of the offense; or

(3) two times the pecuniary damage or loss caused by the defendant to another, or to the property of another, as a result of the offense.

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Sentence too lenient. — See State v. Chaney, 477 P.2d 441 (Alaska 1970); State v. Wortham, 537 P.2d 1117 (Alaska 1975); State v. Lancaster, 550 P.2d 1257 (Alaska 1976); State v. Abraham, 566 P.2d 267 (Alaska 1977); State v. Wassilie, 578 P.2d 971 (Alaska 1978); Putnam v. State, 629 P.2d 35 (Alaska 1980); State v. Brinkley, 681 P.2d 351 (Alaska Ct. App. 1984); Cleary v. State, 548 P.2d 952 (Alaska 1976); Salazar v. State, 562 P.2d 694 (Alaska 1977); Cleary v. State, 564 P.2d 374 (Alaska 1977); Amidon v. State, 565 P.2d 1248 (Alaska 1977); Black v. State, 569 P.2d 804 (Alaska 1977); Sumabat v. State, 580 P.2d 323 (Alaska 1978); Hansen v. State, 582 P.2d 1041 (Alaska 1978); Kanipe v. State, 620 P.2d 678 (Alaska 1980); Hintz v. State, 627 P.2d 207 (Alaska 1981); State v. Hooper, 750 P.2d 840 (Alaska Ct. App. 1988).

Inclusion of improper reference to unverified police contacts did not require remand for resentencing before different judge. — See Parks v. State, 571 P.2d 1003 (Alaska 1977).

Reference to unverified police contacts in a presentence report does not require a remand for resentencing where the record indicates that the sentencing judge was not unduly or improperly influenced by reference to the unverified police contacts. Pascoe v. State, 628 P.2d 547 (Alaska 1980).

Case remanded for resentencing. — See Neal v. State, 628 P.2d 19 (Alaska 1981).

Case remanded for sentence review. — Although a sentence of 15 years' imprisonment with eligibility for parole at the discretion of the parole board upon conviction of manslaughter was not excessive, since the trial court had sentenced defendant as if his conviction had been obtained within one year of the crime and therefore substantially ignored his subsequent history of steady employment, his meritorious service in the army, and his lack of involvement in any criminal activity other than a few traffic offenses in the 12 years since the commission of the crime, the case was remanded for the purpose of permitting the trial court to review the sentence it imposed, in light of all available information concerning defendant without excluding the time period commencing one year from the time of the killing until the present. Padie v. State, 594 P.2d 50 (Alaska 1979).

Sec. 12.55.125. Sentences of imprisonment for felonies. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree, attempted murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be

sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

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

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year;

(4) if the offense is a first felony conviction, and the defendant violated AS 08.54.520(a)(7) — (10), one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

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would be entitled to bring a sentence appeal upon the imposition of the suspended portion of the sentence. Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982).

In evaluating whether a partially suspended sentence for a first felony offender is in excess of the presumptive sentence which a second felony offender would receive, the reviewing court should consider only that portion of the sentence which imposes a period of incarceration. Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982).

Where defendant was a first-felony offender convicted of a class B felony, sexual abuse of a minor, and, had the defendant been subject to presumptive sentencing, the circumstances would have been sufficiently extraordinary to warrant a substantial increase in the applicable presumptive term, the case qualified as an exceptional one under Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981); and the imposition of a sentence in excess of the four-year presumptive term for second offenders did not violate the Austin rule. Skrepich v. State, 740 P.2d 950 (Alaska Ct. App. 1987).

Although the judge indicates that a lengthy sentence will serve the sentencing goals of general deterrence and community condemnation, these goals cannot, in themselves, support the imposition of a maximum 10-year term for a first offender convicted of a class B felony, such as sexual assault of a minor. Skrepich v. State, 740 P.2d 950 (Alaska Ct. App. 1987).

Where defendant with no prior felony convictions was convicted of three counts of sexual assault in the first degree, an unclassified felony, and one count of attempted sexual assault in the first degree, a class A felony, the many separate incidents of sexual assault, defendant's multiple victims, his use of a dangerous instrument, and his willingness to injure his victims with that instrument, established that he was a particularly dangerous offender who had to be isolated for a substantial period of time to protect the public, and the composite sentence imposed of 37 years with 12 years suspended was not clearly mistaken. Goolsby v. State, 739 P.2d 788 (Alaska Ct. App. 1987).

A first felony offender's prior record of misdemeanor convictions, even if extensive, does not qualify as an extraordinary circumstance warranting imposition of a term exceeding the second offender presumptive. Reynolds v. State, 736 P.2d 1154 (Alaska Ct. App. 1987).

Where the defendant, a first felony offender, was convicted of one count of theft in the second degree and three counts of forgery in the second degree, she should not have received a total sentence, including consecutive increments, more severe than the presumptive term established for a third felony offender, where there was nothing in the record to suggest that a composite sentence of imprisonment, including all consecutive increments, greater than this presumptive term was needed to deter the defendant. Young v. State, 762 P.2d 497 (Alaska Ct. App. 1988).

Sentence in accord with Austin rule. — First felony offender's sentence of four years imprisonment, with three years suspended, was substantially more lenient than the two-year presumptive term that would have been applicable to a second felony offender, and therefore did not violate the Austin rule. Long v. State, 772 P.2d 1099 (Alaska Ct. App. 1989).

Sec. 12.55.135. Sentences of imprisonment for misdemeanors. (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

(c) A defendant convicted of assault in the fourth degree committed in violation of the provisions of an order issued under AS 25.35.010 or 25.35.020 shall be sentenced to a minimum term of imprisonment of 20 days.

(d) A defendant convicted of assault in the fourth degree upon a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambu-

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(e) The execution of a sentence under (c) or (d) of this section may not be suspended and probation or parole may not be granted until the minimum term of imprisonment has been served. Imposition of a sentence under (c) or (d) of this section may not be suspended, except upon condition that the defendant be imprisoned for no less than the minimum term of imprisonment provided in (c) or (d) of this section, and the minimum sentence provided for in (c) or (d) of this section may not be otherwise reduced. (§ 12 ch 166 SLA 1978; am § 2 ch 139 SLA 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 31 ch 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983)

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Maximum sentence for joyriding justified. — The district court judge was not clearly mistaken in characterizing a defendant as a worst offender, and in imposing the maximum sentence of one year for third-degree criminal mischief (joyriding). Despite the limited period of time in which the defendant committed the offenses, the defendant's record, coupled with the especially serious nature of the particular joyriding offenses, i.e., that it was committed in order to perpetrate a felony, justifies the sentence imposed. Plant v. State, 724 P.2d 536 (Alaska Ct. App. 1986).

Sentence upheld. — Composite sentence of 24 months with six months suspended for refusal to submit to a chemical breath test and for driving with a suspended operator's license was affirmed where the defendant had five prior driving while intoxicated convictions and at least four prior driving with suspended license convictions and was on probation for a prior driving while intoxicated and driving with suspended license conviction. Witt v. State, 692 P.2d 976 (Alaska Ct. App. 1984).

Consecutive sentencing by district court permissible under former law. — See State v. Pete, 420 P.2d 338 (Alaska 1966), decided under former AS 11.05.010.

Applied in Ostrosky v. State, 725 P.2d 1087 (Alaska Ct. App. 1986); Purcella v. State, 765 P.2d 114 (Alaska Ct. App. 1988).

Cited in Law v. State, 624 P.2d 284 (Alaska 1981); Kelly v. State, 663 P.2d 967 (Alaska Ct. App. 1983); State v. Waalkes, 749 P.2d 1360 (Alaska Ct. App. 1988); Smi[illegible] v. State, 756 P.2d 913 ([illegible]ka C[illegible] 1988); Stewart v. State, [illegible] (Alaska Ct. App. 1988).

Sec. 12.55.140. Sentences for violations. [Repealed, § 23 ch 59 SLA 1982.]

Sec. 12.55.145. Prior convictions. (a) For purposes of considering prior convictions in imposing sentence under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)

(1) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

THE FOLLOWING DOCUMENTS ARE POOR ORIGINAL COPIES

Definitions. Article 6,

imminent serious physical injury by means of a dangerous instrument;

(13) "deadly weapon" means any firearm, or anything designed for and capable of causing death or serious physical injury, including a knife, an axe, a club, metal knuckles, or an explosive;

(14) "deception" means to knowingly

(A) create or confirm another's false impression that the defendant does not believe to be true, including false impressions as to law or value and false impressions as to intention or other state of mind;

(B) fail to correct another's false impression that the defendant previously has created or confirmed;

(C) prevent another from acquiring information pertinent to the disposition of the property or service involved;

(D) sell or otherwise transfer or encumber property and fail to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether or not that impediment is a matter of official record; or

(E) promise performance that the defendant does not intend to perform or knows will not be performed;

(15) "defense", other than an affirmative defense, means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt;

(16) "defensive weapon" means an electric stun gun, or a device to dispense mace or a similar chemical agent, that is not designed to cause death or serious physical injury;

(17) "drug" has the meaning ascribed to it in AS 11.71.900(9);

(18) "dwelling" means a building that is designed for use or is used as a person's permanent or temporary home or place of lodging;

(19) "explosive" means a chemical compound, mixture, or device that is commonly used or intended for the purpose of producing a chemical reaction resulting in a substantially instantaneous release of gas and heat, including dynamite, blasting powder, nitroglycerin, blasting caps, and nitrojelly, but excluding salable fireworks as defined in AS 18.72.050, black powder, smokeless powder, small arms ammunition, and small arms ammunition primers;

(20) "felony" means a crime for which a sentence of imprisonment for a term of more than one year is authorized;

(21) "fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person carrying on functions of trust on behalf of another person or organization;

(22) "firearm" means a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury;

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(23) "force" means any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement. "force" includes deadly and nondeadly force;

(24) "government" means the United States, any state or any municipality or other political subdivision within the United States or its territories; any department, agency, or subdivision of any of the foregoing; an agency carrying out the functions of government; or any corporation or agency formed under interstate compact or international treaty;

(25) "highway" means a public road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path, or similar or related facility, as well as ferries and similar or related facilities;

(26) "includes" means "includes but is not limited to";

(27) "incompetent person" means a person who is impaired by reason of mental illness or mental deficiency to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that person;

(28) "intoxicated" means intoxicated from the use of a drug or alcohol;

(29) "law" includes statutes and regulations;

(30) "leased" includes "rented";

(31) "metal knuckles" means a device that consists of finger rings or guards made of a hard substance and designed, made, or adapted for inflicting serious physical injury or death by striking a person;

(32) "misdemeanor" means a crime for which a sentence of imprisonment for a term of more than one year may not be imposed;

(33) "nondeadly force" means force other than deadly force;

(34) "offense" means conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation;

(35) "official detention" means custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release;

(36) "official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath;

(37) "omission" means a failure to perform an act for which a duty of performance is imposed by law;

(38) "organization" means a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose;

(39) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders;

Anchorage DN
3/1/94

High court to review child porn law

The Associated Press

WASHINGTON—Setting the stage for an important ruling on child pornography, the Supreme Court said Monday it will judge the validity of a key federal law used to prosecute people who buy and sell such material.

The justices voted to consider reinstating the conviction of a California man who distributed sexually explicit videotapes featuring a 15-year-old girl.

A federal appeals court overturned Los Angeles porn shop owner Rubin Gottesman's conviction and one-year prison sentence because the law didn't require the government to prove he knew the girl was under 18.

In other matters, the court:

- Declined to use the case of an Illinois woman to decide how far states may go to protect fetal life. On religious grounds the woman had refused a Caesarian section despite doctors' warnings her baby probably would be brain-damaged; she gave birth to an apparently health boy.
- Let stand rulings that require New York to comply with federal labor law and pay its state police investigators for overtime work. Fifteen states had urged the court to reverse its landmark 1985 decision.
- Turned down an appeal by Jimmy Hoffa's daughter, who is trying to get FBI files about the 1975 disappearance of the former Teamsters union president.
- Ruled that Tennessee lawmakers must redraw election districts for the 99-member state House of Representatives because district lines created in 1992 violate voters' equal-protection rights.

In the child-pornography case, Clinton administration lawyers contend the lower court's ruling thwarts efforts to crack down on child pornographers in nine Western states.

FBKs Newsminer 3/1/94

Inmate's sentence is halved

Sex offender's time too high, judge says

By LIZ RUSKIN
Daily News reporter

Convicted sexual predator Carlos "Chico" Rodriquez saw his sentence for raping and exploiting teen-age boys reduced Monday from 48 years to 24 years.

Superior Court Judge Rene Gonzalez said he had to reduce Rodriquez's sentence because it was too high when compared with those of other serious child molesters.

Rodriquez was convicted in 1983 of luring teen-age boys to his house in Spenard, where he sexually abused them. According to testimony at his trial, Rodriquez, a bartender, preyed on runaway youths, promising them money, drugs and careers as pornographic movie stars in return for sex for himself and his friends. One victim said he was abused while handcuffed to a pole in Rodriquez's basement.

Rodriquez was convicted of 25 counts against 11 boys, ages 13 to 16. The charges date from 1978 to 1980.

Superior Court Judge Ralph Moody originally sentenced Rodriquez to 83 years. But Rodriquez appealed. In 1987, the Court of Appeals overturned two of the convictions, saying they were redundant, and sent the case back, ordering the judge to compare Rodriquez's sentence with those of other

Please see Page B-2, SENTENCE

SENTENCE: Judge ordered to reduce jail time for s

Daily News file photo
Rodriquez in '83

Continued from Page B-1

similar offenders.

At a second sentencing in 1988, Moody reduced the sentence to 48 years. But the Court of Appeals said he hadn't done the comparison it ordered, so it ordered a third sentencing hearing, which Moody conducted in 1992. At that hearing Moody confirmed his previous finding that 48 years was appropriate.

The Court of Appeals was still not satisfied. In a tersely worded order last year, the court ordered yet another sentencing hearing. This time, it noted that it is illegal for a lower court judge to ignore the orders of a higher court.

The fourth and latest hearing was handled by Gonzalez, who, like Moody, found Rodriquez to be the worst kind of sexual abuser.

"The record in this case clearly reveals that Rodriquez had an ongoing lifestyle of enticing minors into the use of drugs, to provide stolen goods to be fenced by Mr. Rodriquez and to entice minors to engage in sexual activities with himself or others," Gonzalez said.

Nonetheless, he said, the benchmarks created by sentences in other serious sexual abuse cases show that Rodriquez was sentenced too harshly.

The 24-year sentence means the parole board could release Rodriquez now, if it were so inclined. In any event, Rodriquez would have to be released in about four years, assumin

Alaska State Legislature

SENATOR
MIKE MILLER
P.O. Box 55094
North Pole, Alaska 99705
(907) 488-0862

Senate District Q

State [illegible]
Juneau, [illegible]
[illegible]
(907) [illegible]

Senate

SPONSOR STATEMENT
SENATE BILL 252
POSSESSION OF CHILD PORNOGRAPHY

AS 11.41.455 and AS 11.61.125, prohibits the production and distribution of child pornography; current law however does not address the issue of possession.

SB 252 addresses a compelling need to "close the loop" by prohibiting possession of child pornography as well as production and distribution. It is crucial that state statutes address this vital issue. For as long as the supply and demand exist, producers will continue to victimize the children involved.

In Osborne v.Ohio, 495 U.S.103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a Ohio statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

The physical and psychological trauma inflicted on victims of this sexual exploitation is so devastating some children never heal.

If we regulate when people are old enough to drink, drive and vote in order to protect them, then why would we not also regulate and ban the possession of child pornography to stop this cycle of abuse in which the child is always the victim.

This would be a class B misdemeanor and subject to a term of imprisonment of not more than 90 days,AS 12.55.135 (b), and to a fine of not more than $1,000.,AS 12.55.035(b).

I urge your support of SB 252.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 25, 1994

SUBJECT: Sectional Summary of SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.61 by providing a new section, AS 11.61.127, that makes it a class B misdemeanor[1/] to possess any material that visually or aurally depicts conduct that is described in AS 11.41.455(a), unlawful exploitation of a minor,[2/] knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

GPL:lmb
94-024.lmb

[1/] Class B misdemeanors are subject to a term of imprisonment of not more than 90 days, AS 12.55.135(b), and to a fine of not more than $1,000., AS 12.55.035(b).

[2/] AS 11.41.455(a) provides:

> A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:
> (1) sexual penetration;
> (2) the lewd touching of another person's genitals, anus, or breast;
> (3) the lewd touching by another person of the child's genitals, anus, or breast;
> (4) masturbation;
> (5) bestiality;
> (6) the lewd exhibition of the child's genitals; or
> (7) sexual masochism or sadism.

Sec. 11.41.455. **Unlawful exploitation of a minor.** (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality; or

(6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is

intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983) ($50,000 fine)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

NOTES TO DECISIONS

Conviction and sentence upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Applied in Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.61.125. Distribution of child pornography. (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for distribution, or in the state distributes, or in the state possesses, prepares, publishes, or prints with intent to distribute, any material that visually depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony. $50,000 fine

(d) In this section, "distribution" includes delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, and exchanging, whether or not for monetary or other consideration. (§ 2 ch 57 SLA 1983; am §§ 1, 2 ch 39 SLA 1985)

Cross references. — For crime of unlawful exploitation of a minor, see AS 11.41.455.

Effect of amendments. — The 1985 amendment in subsection (a) deleted "sale or" preceding "distribution" and "sell, or exhibit to others for commercial consideration" preceding "any material," inserted "in the state distributes, or," and substituted "in" for "under" following "conduct described", and added subsection (d).

Collateral references. — Validity and construction of statutes and ordinances regulating sexual performance by child. 21 ALR4th 239.

DIVISION OF LEGAL SERVICES

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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M February 1, 1994

SUBJECT: Possession of Child Pornography - SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have asked various questions about child pornography.

1. What is the definition of child pornography? Child pornography is defined in SB 252 to be "any material that visually or aurally depicts conduct described in AS 11.41.455(a)" and "the production of that material involved the use of a child under 18 years of age who engaged in the conduct."

2. What is the history of attempts to criminalize the possession of child pornography? In Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) the United States Supreme Court struck down a Georgia law that outlawed the private possession of obscene material, finding that the law impinged on Stanley's right to receive information in his own home. Whether this decision protected the personal possession of child pornography was not considered in that case and was the subject of much discussion. In Ferber v. New York, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982) hints were provided that possession of child pornography would not be permitted under Stanley. In Ferber, the Court upheld a New York law that outlawed the distribution of child pornography and stated that "the value of permitting child pornography has been characterized as 'exceedingly modest, if not de minimis.'" Finally, in Osborne v. Ohio, 495 U.S. 103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a New York statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

3. What federal laws are there on this subject? 18 U.S.C. § 2251 et. seq. (copy attached) prohibits the inducement or employment of a minor for the purpose of producing any visual depiction of sexually explicit conduct (similar to AS 11.41.455).

the buying or selling of minors, and the distribution, mailing, and receipt of sexually explicit material that depicts minors engaged in that conduct. I have also attached copies of some other states' laws on possession of child pornography.

4. Is there anything in our state constitution that could conflict with SB 252? The right to privacy clause, Article I, § 19, of the Alaska Constitution could conceivably be found to protect personal possession of child pornography, although I do not believe that such a finding is likely. The personal possession of child pornography could be analogized to the possession of controlled substances. In this regard, although the Alaska Supreme Court held that the personal possession of small amounts of marijuana in the home is protected under our right to privacy provision (the court found that state's needs to ban its possession, e.g., its dangerousness, did not outweigh the privacy interests) the court did not extend this protection to other drugs, e.g., cocaine, whose dangerousness is proven and not subject to debate to the extent marijuana's was. In this regard I believe the Alaska Supreme Court would find that child pornography is akin to cocaine in that its dangerousness and the harm that it can cause seems to be fairly well accepted and would hold that its possession is not protected under the Alaska Constitution.

5. What difficulties are there with SB 252? Successful prosecutions could be difficult as the bill requires that a person possess the visual or aural matter knowing that the production of the matter involved the use of a child under the age of 18 and that the child engaged in the conduct that is depicted. The knowing requirement could be difficult to prove in certain situations. You may want to discuss this with the Department of Law to determine their feelings on the provision and the need for, and what type of mental state, should be employed. I am also concerned with how this knowing requirement could be applied to aural depictions and am wondering if it could ever be met if the defendant did not witness the recording being made.

GPL:gc:pl
94-075.glc

Enclosure

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☒ CRIMINAL DIVISION CENTRAL OFFICE
P O BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3428
FAX: (907) 465-4043

☐ OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
310 K STREET SUITE 308
ANCHORAGE, ALASKA 99501-2064
PHONE: (907) 269-6250
FAX: (907) 272-1249

DEPARTMENT OF LAW

CRIMINAL DIVISION

January 24, 1994

RECEIVED JAN 26 1994

The Honorable Mike Miller
Alaska State Senate
State Capitol
Juneau, Alaska 998001-1182

Re: SB 252 ("An Act prohibiting the possession of child pornography")

Dear Senator Miller:

You have asked for our opinion as to the constitutionality of SB 252, "An Act prohibiting the possession of child pornography." In *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), the United States Supreme Court held that a similar provision did not violate the United States Constitution.

It is possible, but unlikely, that the Alaska Supreme Court would conclude that this type of provision violates the right of privacy protected by the article I, section 22, of the state constitution. *See Ravin v. State*, 537 P.2d 494 (Alaska 1975). Other states that have considered the matter have concluded that the state has a compelling interest in protecting children from exploitation and that destroying the market for child pornography is reasonably related to that purpose. *See, e.g.*, *Washington v. Davis*, 768 P.2d 499 (Wash. App. 1988). We have a partial listing of other jurisdictions that have criminalized the possession of child pornography and would be glad to share that list with you at your request.

I note for your general information that we anticipate prosecutions for this offense arising from the discovery of child pornography by law enforcement officers who are lawfully searching a residence in the course of investigating other crimes, such as drug or sexual abuse offenses.

CONSTITUTIONALITY - DEPT. OF LAW

If you have any other questions or comments, please do not hesitate to contact us.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

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

MOK\jf

cc: Deborah Behr
Assistant Attorney General

Raga Elim
Legislative Liaison

BILL NO: SB 252

DATE: January 25, 1994

TITLE: "An Act prohibiting possession of child pornography"

CONTACT: C.E. Swackhammer
Deputy Commissioner
465-4322

POSITION PAPER - Department of Public Safety

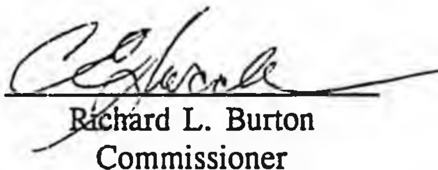
SB 252 addresses the societal problem of possession of child pornography. Alaska does not have a statute currently that prohibits the possession of child pornography. Alaska does have child exploitation laws that include the sales and/or production of child pornography. Production, sales, or delivery of child pornography are felony offenses. The statute would allow the charging of individuals found in possession of child pornography with a B misdemeanor.

Section one of the bill creates the crime of possession of child pornography making it a B misdemeanor. This is the type of crime that is typically secondary to an ongoing and existing investigation for a more serious crime of child exploitation. This would allow items that are normally found usually during the service of a search warrant in a different case. This would allow investigators to charge individual with possession of this material.

It is widely believed that persons involved in the viewing of child pornography will continue to do so unless sanctions, sometimes severe, are imposed. At the very least this creates a market for the exploitation of children.

This statute should have little or no impact on enforcement activities as this is the type of violation that is typically encountered during the investigation of numerous other crimes.

The Department of Public Safety supports this legislation.



Richard L. Burton
Commissioner

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

WALTER J. HICKEL, GOVERNOR

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PERS : (907) 278-2028
TRAINING: (90 276-6006

January 24, 1994

Dear Senator Miller,

I appreciate your introduction of Senate Bill 252, prohibiting the possession of child pornography. Our department staff who work directly with convicted sex offenders are aware of the strong link between such pornography and the commission of crimes against children.

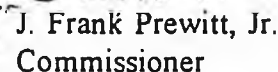
I would like to request your consideration of an amendment to the bill. Professionals providing sex offender treatment, under the direction of a psychologist, may use some pictures or auditory tapes involving children during plethysmograph assessments of sex offenders. A plethysmograph assessment measures the offender's physiological reaction to various types of stimuli related to sexual offenses. Although this procedure may seem offensive, it is a better alternative than relying upon the self-report of the sex offender. Numerous studies, as well as the experience of our own treatment providers, show that sex offenders cannot be relied upon to report truthfully their reactions to various types of sexual stimuli.

Our requested amendment would add a subsection to the bill:

> (c) The provisions of this section do not apply to persons providing plethysmograph assessments in the course of a sex offender treatment program which meets minimum standards under AS 33.30.011(6).

I appreciate your consideration of this request. The department supports SB 252; if we can provide any assistance or further information concerning pornography and its role in sexual offense behaviors, please do not hesitate to contact me.

Sincerely,



J. Frank Prewitt, Jr.
Commissioner

—AMENDMENT REQUEST DEPT. OF CORRECTIONS—

20-04LH

SB
286

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 286

Revision Date:
Title: An Act extending the Parole Board
Sponsor: Sen. Kelly
Requestor: Sen. L&C

Dept. Affected: Corrections
BRU: Admin/Support
Component: Parole Board
COMPONENT SERIAL NO. 695

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The Parole Board is contained in the department's proposed FY95 budget.

Prepared by: Diane Schenker, Special Assistant [signature] Phone: 465-4643/786-2147
Division: Office of the Commissioner Date: 2/14/94

Approved by Commissioner: J. Frank Prewitt, Jr. [signature] Date: 2/14/94
Agency: Department of Corrections

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— FISCAL NOTE —

Alaska State Legislature

Senator Tim Kelly, Chair
Senator Steve Rieger, Vice Chair
Senator Bert Sharp
Senator Judy Salo
Senator Georgianna Lincoln

STATE CAPITOL, SUITE 101
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-3822
FAX: (907) 465-3756

SENATE LABOR AND COMMERCE
COMMITTEE

716 W. 4TH, SUITE 400
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8180
FAX: (907) 258-4524

SPONSOR STATEMENT:
SB 286 - EXTEND THE BOARD OF PAROLE

SB 286 and its House companion HB 418, introduced by Representative Bettye Davis, would extend the Board of Parole for the customary four-year period under AS 44.66.010(c). Under current law, and without passage of this legislation, the Board will shut down on June 30, 1994. The Board sunsetted on June 30th, 1993, and is in its "close-down" year.

The State Board of Parole was created in 1960 and has been an essential component of Alaska's criminal justice system. There are currently 70 felons on parole supervision. Each year, about 400 prisoners are eligible to be released to discretionary parole supervision for a portion of their sentence. In addition, 500 prisoners are released to mandatory parole supervision for a period equal to one-third of the sentence.

Expiration of the Parole Board will not alter the state's responsibility under Title 33, Chapter 16, which provides for prisoners to be eligible for and supervised on discretionary and mandatory parole. The state will almost certainly be a party to costly litigation to determine the legal status of prisoners, parolees and victims.

The Board of Parole has been an effective vehicle in administering the parole process.

MEMORANDUM

Alaska Board of Parole
(907) 465-3384 Fax (907) 465-2006
P.O. Box 112000, Juneau, Alaska 99811

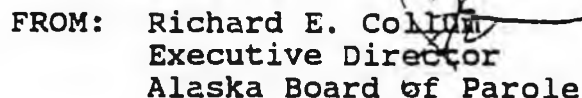
TO: J. Frank Prewitt, Jr.
Commissioner
Department of Corrections

DATE: December 16, 1993

TELEPHONE NO: (907) 465-3384

THRU: Diane Schenker
Special Assistant to the Commissioner

SUBJECT: Legislative Proposal



FROM: Richard E. Collum
Executive Director
Alaska Board of Parole

Please find attached a 1994 Legislative Proposal Form. This request form is submitted by the Parole Board Members at the suggestion of Michael J. Stark and Deborah E. Behr, Assistant Attorneys General, Department of Law, and is proposed to provide a clarification of Alaska Statute 33.16.050(c).

I can not overemphasize the urgency of this request. The subject matter of this clarification is the basis for at least two current law suits pending against the Board. If we lose one of these suits you can anticipate a copycat effect of similar suits multiplying exponentially. Consequently, this statutory change, at a minimum, will result in a reduction in litigation. In addition, if the Court rules against the Board in one of the current suits this statutory clarification would avert a substantial increase in our workload and a resulting increase in cost of operation.

This clarification should be non-controversial and is meant only to assure the Board's continued efficiency. Please approve and forward this request to the Governor's office as soon as possible.

If I can provide any additional information in this regard please do not hesitate to contact me.

cc: Michael J. Stark, Assistant Attorney General
Department of Law, Juneau

1994 LEGISLATIVE PROPOSAL FORM

Return this form to the Governor's Legislative
Office no later than August 13, 1993

DEPARTMENT: Department of Corrections
Alaska Board of Parole

SUBJECT OF PROPOSED BILL: Amend AS 33.16.050(c) to clarify that the requirement for a majority of the Board to issue orders or decisions was never intended to apply to the setting of special or supplemental conditions of parole which has traditionally been done by a single member, subject to the parolee's right of appeal to the full Board.

DEPARTMENT PRIORITY NO. _____

SPECIFY: Governor's Legislation___/Friendly Legislation ✓

SUMMARY OF INTENT: Include what the problem is, how this proposal solves it, how many incidents have occurred which necessitates this change, and include a short synopsis of how your proposal fits with the Governor's objectives(attach sheet, if necessary)

The Alaska Board of Parole has the statutory responsibility to grant discretionary parole, to set conditions of discretionary parole or mandatory parole and to revoke parole for good cause. With the exception of setting special or supplemental conditions of mandatory parole the Board's decisions are based on a majority of the members present as required by AS 33.16.050(c). However, in the case of special or supplemental conditions of parole the Board has a long standing policy of having one Board member review the file and set the conditions.

By delegating this responsibility to one member the remaining four members are relieved of the task of reviewing approximately 500 case files each year. As a safeguard, this system of setting conditions provides the parolee with an immediate appeal to a majority of the members if the parolee objects to any of the conditions set by one member.

The State is currently litigating this issue in a couple of cases before the Superior Court. No matter what the outcome in the lower court the Department of Law believes each side is prepared to pursue the issue to the Appeals Court. A timely clarification of the statute through legislation this session would reduce the future costs of litigation as well as avert a substantial increase in the Board's work load.

ESTIMATED FISCAL IMPACT(briefly describe): There should be no fiscal impact with this legislation. There is a potential for a substantial fiscal impact if the legislation is not passed.

Operating:

Capital:

Revenue:

WHAT OTHER DEPARTMENTS WILL BE AFFECTED BY THIS PROPOSAL:
The Department of Law is currently litigating this matter in two cases at the Superior Court level. If this legislation is not passed it is assumed the Department of Law will be defending the Board in some future cases.

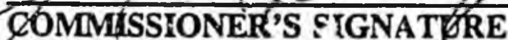
WHO WILL SUPPORT THIS BILL: The Department of Corrections, the Department of Law and the Alaska Board of Parole.

WHO WILL OPPOSE THIS BILL: The only possible opposition could come from prisoners/parolees and the Public Defender Agency. However, we do not anticipate a great deal of opposition.

BRIEFLY OUTLINE ANY PRECEDENTS FOR THIS PROPOSAL IN ALASKA OR OTHER STATES (attach sheet):

IF A SUBSTANTIALLY SIMILAR BILL HAS BEEN DRAFTED AND NOT INTRODUCED, OR INTRODUCED AND NOT PASSED, PLEASE GIVE LAWLOG OR BILL NUMBER (CITE YEAR):

12/21/93



COMMISSIONER'S SIGNATURE **DATE**

Governor's Office Notes:

STATE OF ALASKA

BOARD OF PAROLE

1993 ANNUAL REPORT TO THE GOVERNOR

AND THE ALASKA LEGISLATURE

JANUARY 1994

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

BOARD OF PAROLE

WALTER J. HICKEL, GOVERNOR

ALASKA BOARD OF PAROLE
P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE: (907) 465-3384
FAX: (907) 465-2006

Alonzo B. Patterson, Jr., Chairman
Dolores G. Weiler, Vice Chairperson
David F. Cooper, Member
Elsabeth Demeksa, Member
James E. McLain, Member

December 30, 1993

To the Honorable Walter J. Hickel, Governor
and the Honorable Members of the Alaska
State Legislature and the Citizens of the
State of Alaska:

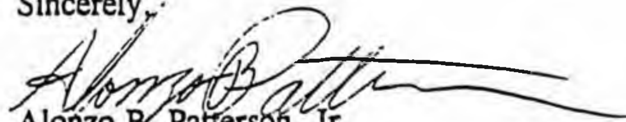
Ladies and Gentlemen:

It is my pleasure to offer the Annual Report of the Alaska Board of Parole for the calendar year 1993. I believe you will find the information contained in this report to be both interesting and informative.

The Board and the Department of Corrections are faced with many challenges. At the forefront is the growing prisoner population and the limits of our resources. The Board takes a great deal of pride in the dedication and commitment to excellence exemplified by our administrative staff and by the Department's employees during the last year. Often employees go beyond the call of duty to bring about positive change in many who have known only failure.

We as a Board are first and foremost accountable to the citizens of Alaska and we will endeavor to uphold their trust through informed decision-making and successful reintegration of the offender back to the community.

Sincerely,



Alonzo B. Patterson, Jr.
Chairman

'H

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MISSION STATEMENT

Alaska Board of Parole

OUR MISSION IS

To protect the public by focusing on risk and by making careful, just and equitable parole decisions.

To have a clear, articulate policy and numerical guidelines so the public, offenders and criminal justice components can easily understand discretionary parole release decisions.

To have professionally trained Board Members, with close ties to the community, who are representative of the ethnic, racial, sexual, and cultural populations of the state.

To use Department and community resources as a bridge to help parolees become contributing members of society.

To set realistic parole conditions and to return to prison those who show they will not be law-abiding.

OUR STATUTORY OBLIGATIONS

AS 33.16.100(a) The Board may authorize the release of a prisoner on discretionary parole if it determines that a reasonable probability exists that:

(1) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the Board;

(2) the prisoner's rehabilitation and reintegration into society will be furthered by release on parole;

(3) the prisoner will not pose a threat of harm to the public if released on parole; and

(4) release of the prisoner on parole would not diminish the seriousness of the crime.

AS 33.16.010(d) A prisoner released on discretionary or mandatory parole is subject to the conditions of parole imposed under AS 33.16.150.

AS 33.16.220 The Board may revoke parole for conduct in violation of AS 33.16.150(a) or (b).

OUR RESPONSIBILITIES

To Alaska Citizens

To keep refining our ability to select persons for parole who will succeed as law-abiding citizens; to help parolees become productive citizens for the benefit of society, themselves and their families; and to use our revocation authority wisely and to promptly return to prison those parolees who present a danger to the community.

To Victims

To welcome and consider views and information from crime victims and their families and to respond positively to their requests for information and notification.

To Corrections Employees

To provide leadership, training and resources so they can perform their job effectively and efficiently.

To Offenders

To consider each offender as an individual by one set of standards and to provide a fair and unbiased hearing; to provide realistic parole conditions and helpful positive supervision.

To Justice

To uphold appropriate punishment, to advance equal treatment of offenders serving for similar offenses with similar histories and needs, and to work with other justice components to reduce criminality.

THE BOARD MEMBERS

Chairman Alonzo B. Patterson, Jr. was appointed to the Board in February 1984 by Governor Sheffield. He was reappointed by Governor Sheffield in 1986 and by Governor Hickel in 1991. Reverend Patterson is the pastor of Shiloh Missionary Baptist Church in Anchorage. He has a Bachelor of Arts Degree in Psychology from the University of Alaska/Anchorage, and a Doctor of Divinity Degree from the American Bible Institute. Reverend Patterson is a resident of Anchorage.

Member David Cooper was appointed by Governor Sheffield in February 1984. He was reappointed by Governor Sheffield in 1986 and again by Governor Cowper in 1990. He has an Associate Arts Degree in Behavioral Science from the University of Alaska/ Anchorage. Mr. Cooper is retired from the position of Assistant Superintendent at the Palmer Correctional Center after 19 years of exemplary service. He was born and raised near Ninilchik. He and his family operate a commercial fishing business in Cook Inlet. Mr. Cooper is a resident of Palmer.

Member Elsabeth Demeksa was appointed by Governor Hickel in 1992. She has a Bachelor of Arts Degree in English Literature from New York State University. Ms. Demeksa is the owner, manager of a women's apparel store. From 1980 to 1991 she was an Aide to the Alaska Legislature, the last two years as Chief of Staff to the House Minority Leader. She is active in numerous women's and family organizations, and in 1984 was honored as one of the Outstanding Young Women of America. Ms. Demeksa is a resident of Juneau.

Member James McLain was appointed by Governor Hickel in 1993. He has a Bachelor of Arts Degree in Criminal Justice from the University of Alaska/Fairbanks and was the Justice Student of the Year in 1988. He is currently employed as a paralegal. Mr. McLain is a resident of Fairbanks.

Member Mary Vollendorf was appointed by Governor Hickel in 1994. She has a Bachelor of Arts Degree in Political Science/Pre Law from the University of Northern Arizona University. Since graduation from college she has worked for several legislators. Ms. Vollendorf is a resident of Anchorage.

THE EMPLOYEES OF THE PAROLE BOARD

During 1993 the administrative office of the Board was located at the corner of 4th & Harris, Juneau, Alaska. As of January 21, 1994 the office will be located at 802 Third St., Douglas, Alaska. Our mailing address is:

Alaska Board of Parole
P.O. Box 112000
Juneau, Alaska 99811-2000
Phone: (907) 465-3384
Fax: (907) 465-2006

EXECUTIVE DIRECTOR

Richard E. Collum

The Executive Director is appointed by the Board and is responsible for day to day operations of the agency. The Executive Director attends parole release hearings and parole revocation hearings and provides technical assistance to the Board.

Secretary I

Georgina Weitzel

Clerk Typist III

Mary Engdahl

PAROLE ADMINISTRATOR

Donna E. White

The Parole Administrator assists the Executive Director in agency administration and supervision of the staff. The Parole Administrator is a resource for parole officers to use in the daily management of cases, scheduling hearings and compiling statistics.

PAROLE BOARD OFFICER

Daniel L. Stroeing

The Parole Board Officer assists the Parole Administrator and handles conditions of supervision and Executive Clemency applications and investigation.

THE PAROLE BOARD

Society through legislation has determined that some people who commit crimes must be incarcerated in correctional institutions as a deterrent to others and for punishment for their crime, as well as for protection of the public and for reformation. The optimum period of time that will meet this criteria, for any given crime, is unknown and consequently sentence length varies considerably across the United States. We know from experience that a number of offenders can be released to community supervision prior to the expiration of their sentences without jeopardizing the public and at a tremendous cost savings to the public.

The Alaska Board of Parole was created by the legislature at the time of statehood to fulfill the State's constitutional requirement for a parole system. The Board was originally comprised of three volunteer members appointed by the Governor, the staff was provided by the Division of Corrections. In the mid 1960's the Board was increased to five members. In 1972, a separate parole office was created within the Department of Health and Social Services to make the Board independent of the Division of Corrections and provide the Board Members with their own administrative staff. When the Division of Corrections became the Department of Corrections in 1984 the Board's Budget Request Unit was moved from Health and Social Services to this newly formed Department.

Prior to 1986, Board Members were appointed to four year terms. Beginning January 1, 1986 the five members are appointed to staggered five year terms. One term expires every year on December 31. The Staff presently consists of an Executive Director, Parole Administrator, Parole Board Officer, a Secretary and a Clerk Typist.

In addition to holding discretionary parole release hearings, the Board holds parole revocation hearings on both mandatory parolees and discretionary parolees. The Board sets conditions of parole, conducts preliminary revocation hearings and preliminary recision hearings, and issues arrest warrants and subpoenas. During the years from 1984 to 1986, the Board reviewed cases in accordance with the Prisoner Overcrowding Emergency Conditional Commutation Plan. The staff conducts all of the Executive Clemency investigations for the Executive Clemency Advisory Committee and the Governor.

The Board meets quarterly in Fairbanks, Anchorage and Juneau. The Board meets quarterly as necessary in other areas which have a State Correctional Facility, such as Seward, Nome, Bethel, Kenai,

and Ketchikan. Occasionally it is necessary for the Board to travel outside Alaska to the Federal Bureau of Prisons Facilities and other contract institutions to hold parole hearings. The Board members are not state employees but are paid perdiem and travel expenses plus $150 compensation for each full day they are in session.

In 1981, following three years of research and analysis the Board adopted a parole guidelines model which rates a prisoner's social and criminal history to determine risk. This risk score is compared to the severity of the crime to determine a range of time the prisoner should serve prior to discretionary parole. These guidelines were revised in 1983 based on criminal code revisions and again in 1989 following additional research into the validity of the risk factors.

THE HISTORY OF PAROLE ELIGIBILITY

Eligibility for discretionary parole and for mandatory parole has changed considerably over the last three decades since Statehood and has become extremely complicated. The following information is presented as a historical review of what has occurred and may provide some perspective on the limited numbers of prisoners who are currently eligible for release.

The Alaska legislature determined, with passage of the criminal code in 1960, that a prisoner sentenced to a term of at least 181 days would be eligible for discretionary parole. Former AS 33.15.180. Although there was no statutory minimum term a prisoner had to serve before release on parole, the court had the discretion to set a minimum term, not to exceed one-third of the total sentence. Former AS 33.15.230(a)(1). No other restrictions or guidelines applied.

Effective May 16, 1974, the Alaska Legislature amended former AS 33.15.080 to require a prisoner to serve one-third of the period of confinement prior to being eligible for release on discretionary parole. In the case of a prisoner serving a life sentence, the mandatory minimum was set at fifteen years. In addition, former AS 33.15.230(a)(1) was amended so the court could further restrict eligibility up to the maximum term.

In 1980, as part of the revised criminal code and with the inception of presumptive sentencing, parole eligibility was altered significantly. Crimes were grouped according to severity of the offense. Murder I, Murder II and Kidnapping were unclassified felonies. Murder I and II and Kidnapping were changed from a maximum term of life to a maximum term of 99 years. The mandatory

minimum for discretionary parole eligibility for Murder I was increased to 20 years [AS 12.55.125(a)] or one-third of the period of confinement (<u>former</u> AS 33.15.080), whichever was greater. The mandatory minimum term for Murder II and Kidnapping was set at five years [AS 12.55.125(b)] or one-third of the period of confinement, whichever was greater.

All other felony offenses were classified as A, B, or C felonies. First time felony offenders and all misdemeanor offenders with a sentence of 181 days or longer were eligible for parole after serving one-third of the period of confinement. The remaining felony offenders (those with one or more prior felony convictions) were to be given a non-parole eligible presumptive term. AS 12.55.125. As in the past, the court could further restrict parole eligibility beyond the statutory minimums. AS 12.55.115.

The 1980 revised criminal code also provided for a Three-Judge Sentencing Panel (AS 12.55.175) to review cases with extraordinary circumstances. AS 12.55.165. The Three-Judge Panel may sentence a defendant to any sentence authorized under AS 12.55.015, including making an otherwise ineligible defendant eligible for parole.

Effective October 1, 1982, Sexual Assault I and Sexual Abuse of a Minor I, previously class A felonies, were moved to a new category of unclassified presumptive's [AS 12.55.125(i)] and first time offenders were no longer eligible for parole. In addition, Class A first time offenders were now subject to presumptive terms and were not eligible for parole. AS 12.55.125(c).

Effective January 1, 1983, drug offenses were included in the revised criminal code and Misconduct Involving a Controlled Substance in the First Degree became an unclassified felony with a five year mandatory minimum. AS 12.55.125(b).

Effective January 1, 1986, class A, B and C felony offenders eligible for parole, had their parole eligibility reduced from one-third of the period of confinement to one-quarter. [AS 33.16.100 (c)] In addition, enhanced or aggravated presumptive's were declared eligible for discretionary parole after completing the initial presumptive term plus the minimum (one-third or one-quarter) applicable to the enhanced portion of the term. [AS 33.16.090(c)].

In order to correct what they believed to be a previous oversight the legislature made Class A offenders eligible for parole after serving one-third of the period of confinement, effective September 12, 1987. Eligibility on these offenders had been mistakenly reduced the previous year to one-quarter along with class B and C offenders. [AS 33.16.100(d)].

In 1988, it was determined an offender sentenced prior to 1986 to an enhanced (aggravated) presumptive sentence [AS 12.55.155(c)] was eligible for parole after serving the presumptive term, less good time, and at least one-third of the composite term. Merry v. State, 752 P.2d 475 (Alaska App. 1988). In 1990, it was determined an offender sentenced to a consecutive presumptive sentence prior to 1986 was eligible for parole after completion of the initial presumptive sentence, less good time, and after serving the applicable minimum (one-third or one-quarter) of the consecutive presumptive term.

It has been long established that good time does not reduce the minimum term for parole eligibility. Attorney General Opinion, 01/30/74, Mills v. State, 592 P.2d 1247 (Alaska 1979). However good time does reduce the term of a presumptively sentenced prisoner and thus affects parole eligibility on enhanced presumptive sentences and consecutive presumptive sentences. AS 33.16.090(c).

Effective September 14, 1992, Three Judge Panel sentencing based on a finding of an exceptional potential for rehabilitation became more restrictive. After that date the panel is required to sentence the defendant to the presumptive term, shall order the defendant to participate in appropriate programs of rehabilitation, and may provide that the defendant is eligible for discretionary parole during the second half of the sentence imposed if the defendant successfully completes all rehabilitation programs ordered. AS 12.55.175(e), AS 33.16.090(e).

WHO IS ELIGIBLE FOR DISCRETIONARY PAROLE NOW?

As indicated in the previous history of parole, the parole eligibility laws have become extremely complicated. A quick overview follows:

In order for a prisoner to be eligible for discretionary parole, the prisoner must be sentenced to a term of 181 days or more. In the case of classified felonies, first time class B and C offenders are eligible after serving one-quarter of their term. All other classified felonies and unclassified sex offenses fall under presumptive sentencing and are eligible for parole after serving the initial presumptive terms. Prisoners convicted of Unclassified felonies must serve mandatory minimums (20 yrs. for Murder in the first Degree, five years for all others) or one-third of the total term, whichever is greater.

WHO IS ON MANDATORY PAROLE?

A prisoner who is not eligible for discretionary parole or has not been granted discretionary parole will be supervised on mandatory parole if the composite term the prisoner is serving is two (2) years or more. The term of mandatory parole is equal to the period of time the prisoner's sentence was reduced for good behavior, in most cases this is one-third of the total sentence.

Mandatory parole can be revoked prior to a prisoner's release to supervision if the prisoner does not comply with court ordered treatment while incarcerated. Once released from the institution, mandatory parole can be revoked by the Board if the prisoner violates a condition of the mandatory parole. A prisoner cannot refuse to be released to mandatory parole supervision.

The Board's Workload

The workload for the Alaska Board of Parole increased significantly during the 1980's at a time when the prison population mushroomed. As an example, the 1980 criminal code revision did not begin to show an impact until about 1983 (**Figure #1**). In 1982, the Board's total workload including parole hearings, parole revocation hearings, warrants and preliminary hearings was under 400 cases. From 1982 to the current peak, the Board's workload increased fourfold. The increase was substantially related to the 1980 presumptive sentence law and mandatory parole law. Discretionary parole hearings and discretionary parole releases did not increase during that period in spite of the growing prison population. Each year, as a higher percentage of prisoners entering the system were sentenced after 1979 under the presumptive sentence law, the number of prisoners eligible for discretionary parole and the number of prisoners released on discretionary parole decreased.

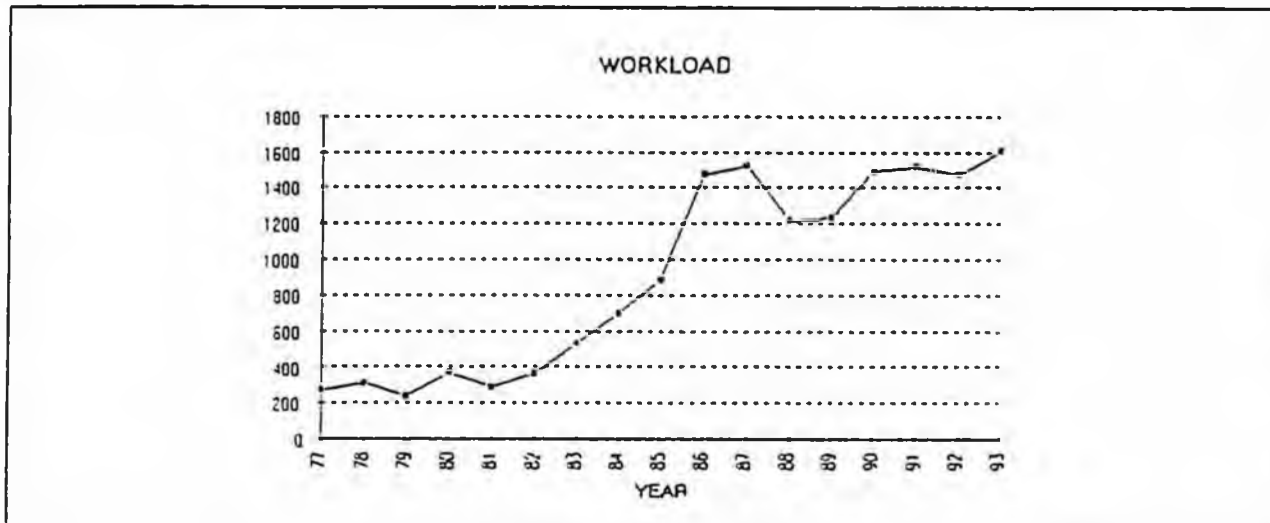

Figure #1

The Board's sharp increase in workload in 1986 and 1987 as indicated in **Figure #1** is attributed to the added responsibility during those two years of reviewing prisoners eligible for release under the Governor's Emergency Conditional Commutation Release Plan.

During calendar year 1993, the Board held a total of 1608 hearings, 697 of which were in-person hearings. The remaining 911 case decisions included issuing warrants, setting or changing conditions, and reviewing appeals.

Discretionary Parole

During the calendar years 1991, 1992 and 1993 the Board held a total of 461 discretionary parole release hearings. Of that total, 178 prisoners were granted discretionary parole for a parole rate of 39%. **(Figure 2)**. In addition, during that three year period, the Board released another 225 prisoners following revocation of their mandatory parole.

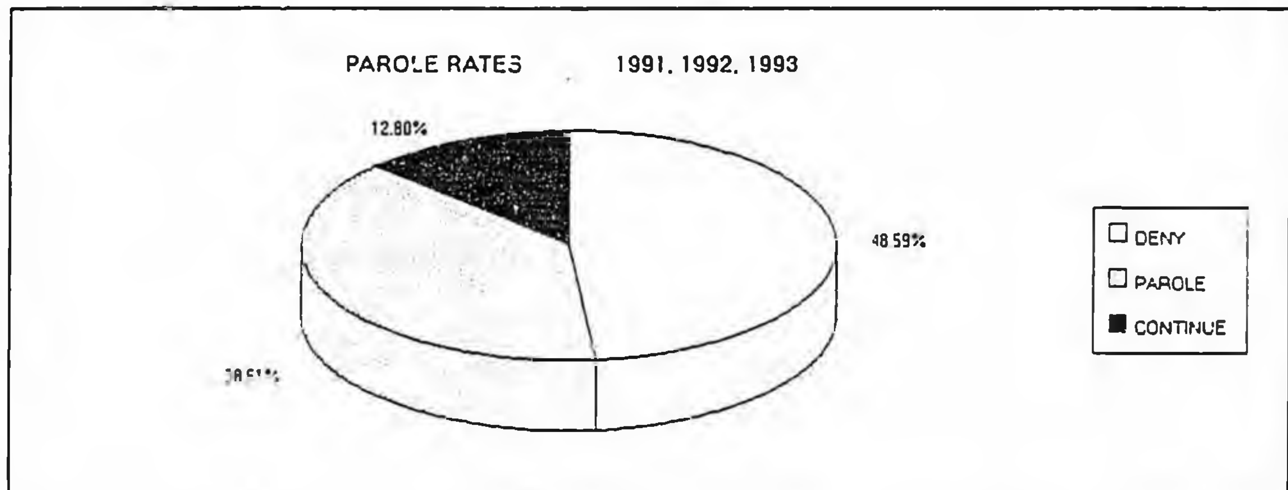

Figure #2

The Board has completed a recidivism study every year since at least the mid 1970's. This was traditionally a one year follow up of prisoners released to discretionary parole. In 1988, the study was expanded to follow the parolee for more then one year. Success is measured by the parolee's ability to complete the followup period on supervision without having been revoked by the Board.

Failure is also divided into four categories based on the nature of the violation. If the violation was for a condition of parole that was not a violation of a law or local ordinance, such as consuming alcohol or failing to report a change of residence, the violation is considered to be a **technical** or conditions violation. If parole is revoked as a result of a conviction for a **misdemeanor** or **felony** while on supervision, the violation is noted accordingly. A parolee who does not report to the parole office as instructed and is unable to be located by the parole officer is coded as an **absconder.** If multiple violations occur, the most serious one is the one coded.

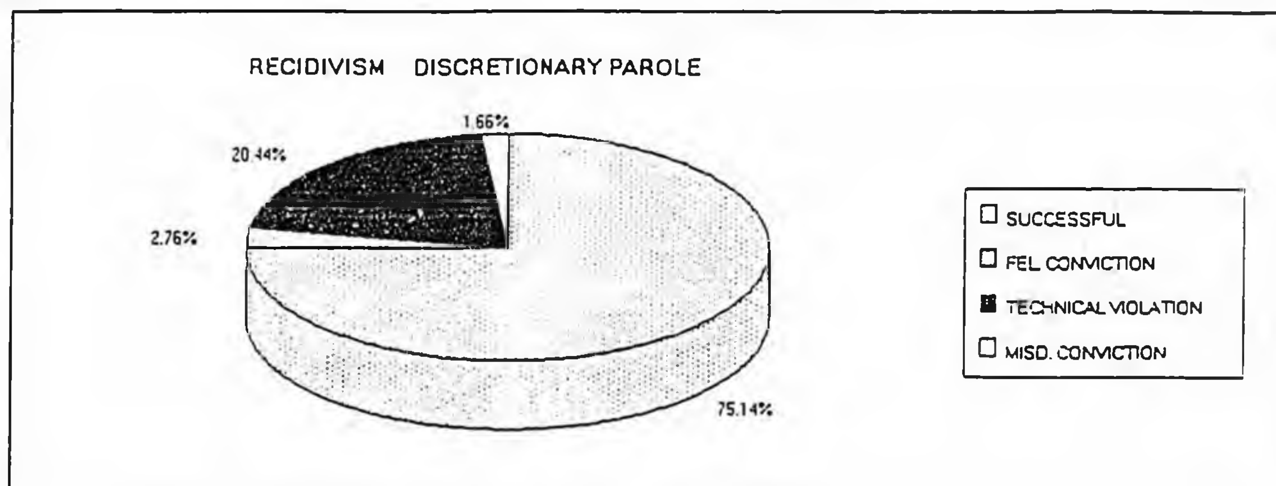

Figure #3

The Board is very proud of its consistently low felony revocation rate. A felony revocation rate of 10% is acceptable and expected in many jurisdictions across the United States. The Alaska Board of Parole has consistently had a felony violation rate of 5% or less. *A follow-up of the prisoners released to discretionary parole during the years 1989, 1990, 1991 and 1992 indicates a felony violation rate of 5 out of 182, or 3%.* (Figure #3).

The combined violation rate for discretionary parolees during that period of time is 25%. However, many of those prisoners were ordered back to prison for only a short period of time and then released to supervision again at a later date. This low felony and misdemeanor revocation rate is an indication the field parole officer is doing a good job of monitoring cases to assure the parolee is removed from the community at the first sign of serious supervision violations and before a new crime is committed.

Mandatory Parole

The Department of Corrections currently releases over 500 prisoners each year who are to be supervised on mandatory parole for the period of time their sentence was reduced for good behavior in the institution. This number has increased considerably as the prison population has increased. In 1986, less then 300 prisoners were released to mandatory parole supervision. At the present time, the Department is supervising about 700 mandatory parolees.

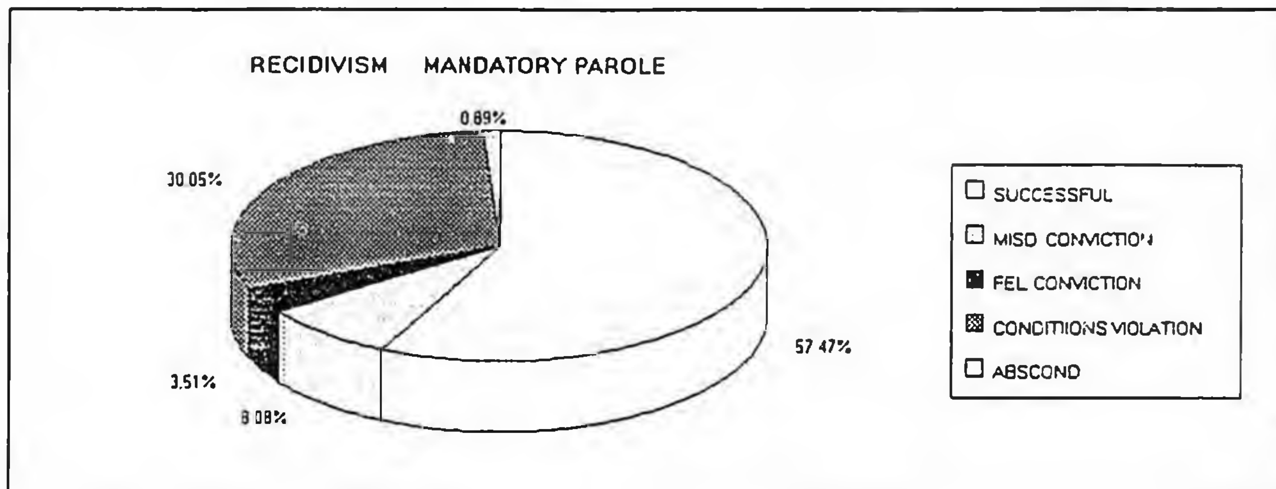

Figure #4

During the years 1989, 1990,1991 and 1992, it is estimated 1907 prisoners were released to mandatory parole supervision. This estimate is based on the number of cases submitted to the Board so they could set conditions prior to release. As **Figure #4** indicates, 811 of them were returned to prison. This is a violation rate of 43%. *This violation rate is nearly eighteen (18%) percentage points higher than prisoners released to discretionary parole.* In addition, on the average these prisoners were not as closely supervised as discretionary parolees who are often required to participate in residential programs, halfway houses or the Intensive Supervision Program. This revocation rate for mandatory parolees could increase considerably if they were supervised as closely as discretionary parolees.

Risk Factors

The parole guidelines model developed in 1981 and the subsequent revisions to that model have always included a risk score sheet. The current risk factors were adopted in 1989 and provide for a scoring range of 0 to 49. The lower the score, the lower the risk to reoffend. Risk scores are divided into four categories as follows:

A = 0-6 B = 7-14 C = 15-29 D = 30-49

During the years 1990, 1991, 1992, and 1993, the parole rate for prisoners in category A was 52%; the parole rate for category B was

48%; the parole rate for category C was 33%; and the parole rate for category D was 23%. (**Figure #5**). This is a good indication the Board is paying a great deal of attention to an applicant's risk to the community at the time parole is granted.

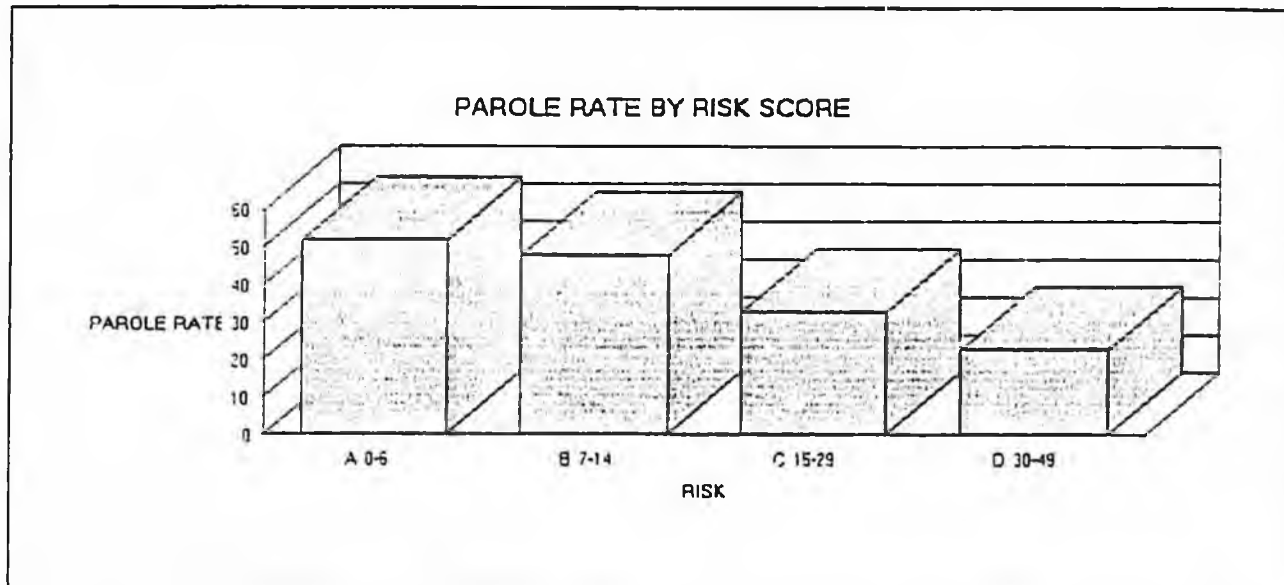

Figure #5

Information obtained from risk scores for prisoners appearing in revocation hearings during the years from 1988 to 1993 further support the validity of the scores and the Board's reliance on these scores. Of the 1350 prisoners revoked during that six year period, only 7% were in the two best risk categories (A & B). (**Figure #6**). Nearly all of the parolees violated during those years (93%) had a risk score of 15 or higher.

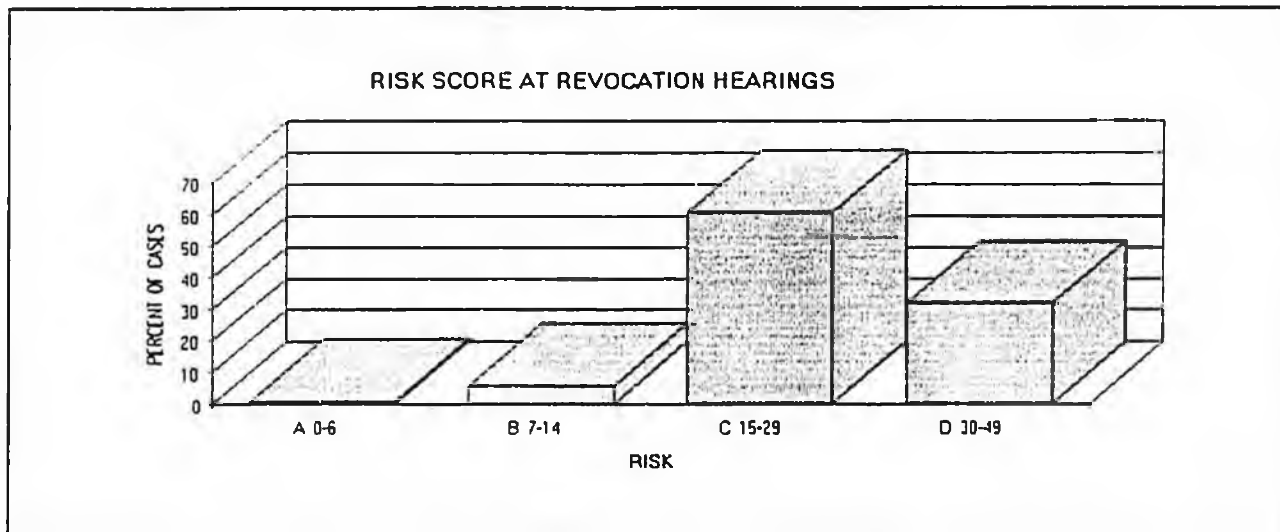

Figure #6

Parole Guidelines

The Board has utilized numerical guidelines for releasing prisoners since 1981. See 22 AAC 20.142. The guidelines are designed for non-presumptively sentenced offenders eligible for discretionary parole. Many other states have guidelines models, including the U.S. Parole Commission. One of the goals in utilizing a guidelines system is to limit the number of cases where a decision is made outside of the suggested guidelines range. In some cases the Board will release a prisoner below the minimum range by making a formal finding of mitigating factors; or the Board will deny parole and thus require a prisoner to serve a term above the guidelines by making a formal finding of aggravating factors. As **Figure #7** indicates, the Alaska Board of Parole is finding mitigation in about 7% of the cases appearing before them and is making a finding of aggravation in about 10% of the cases appearing before them.

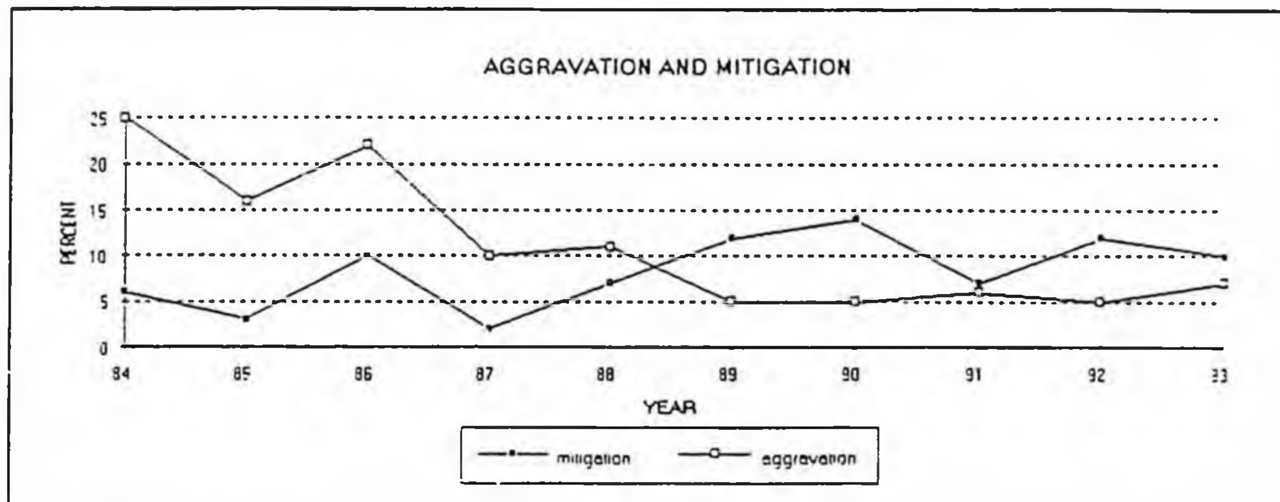

Figure #7

The remaining 83% of decisions are made within the guidelines range and this high percentage of conformity to the guidelines is an indication the Board is making a conscious effort to apply the discretion they have in a fair and equitable manner.

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment exceed 180 days.

(d) A prisoner released on discretionary or mandatory parole is subject to the conditions of parole imposed under AS 33.16.150. Parole may be revoked under AS 33.16.220. (§ 2 ch 88 SLA 1985)

Legislative history reports. — For House letter of intent related to this section, see 1985 House Journal, p. 821.

Sec. 33.16.020. Board of parole. (a) There is in the Department of Corrections a board of parole consisting of five members appointed by the governor, subject to confirmation by a majority of members of the legislature in joint session.

(b) Members of the board serve for staggered terms of five years and until their successors are appointed.

(c) The governor shall choose the presiding officer of the board from among the membership.

(d) The governor shall make appointments to the board with due regard for representation on the board of the ethnic, racial, sexual, and cultural populations of the state.

(e) The governor shall appoint at least one member who resides in the First Judicial District, one member who resides in the Third Judicial District, and one member who resides in either the Second or Fourth Judicial District. (§ 2 ch 88 SLA 1985)

Cross references. — For transitional provisions relating to board members, see § 8, ch 88, SLA 1985 in the Temporary and Special Acts.

NOTES TO DECISIONS

There is no authority which would sanction the expansion of the superior court's jurisdiction to pass sentence into a realm of review and modification which is statutorily vested in either the supreme court or the executive branch of government. Davenport v. State, Sup. Ct. Op. No. 1218 (File No. 2202), 543 P.2d 1204 (1975); Szeratics v. State, Sup. Ct. Op. No. 1525 (File No. 3390), 572 P.2d 63 (1977), decided under former AS 33.15.-010.

Collateral references. — Statute conferring power upon administrative body in respect to parole of prisoners or discharge of parolees, as unconstitutional infringement of power of executive. 143 ALR 1488.

DRAFT

"Clarifying meeting requirements for activities of the board of parole; and providing for an effective date."

*** Section 1.** PURPOSE. The purpose of this Act is to validate and affirm the longstanding practice of the board of parole to delegate the setting of special conditions for mandatory parole under AS 33.16.150 to a single board member, subject to a right of review by a quorum of the board of parole. It is the intent of the legislature to expressly ratify this practice and to clarify existing statutes to reflect it.

*** Sec. 2.** AS 33.16.050(c) is amended to read:

(c) **Except as provided in (e) of this section, decisions** [DECISIONS] and orders of the board require the affirmative vote of a majority of the members present.

*** Sec. 3.** AS 33.16.050 is amended by adding a new subsection to read:

(e) A meeting of the board is not required for a decision or order setting special conditions of mandatory parole by a single member of the board under AS 33.16.150(b) and (e), unless a prisoner or parolee aggrieved by the decision or order requests a change in parole conditions to the full board under AS 33.16.150(e) and AS 33.16.160.

*** Sec. 4.** AS 33.16.150 is amended by adding a new subsection to read:

(e) The board may delegate its authority under this section to a single member of the board to issue a decision or order on behalf of the board setting special conditions of mandatory parole. A prisoner or parolee aggrieved by a

— AMENDMENT PROPOSED BY THE BOARD —

DRAFT

decision or order of a single board member may request a change in mandatory parole conditions by applying to the full board under AS 33.16.160.

* **Sec. 5.** Sections 1 - 4 of this Act are retroactive to January 1, 1986.

* **Sec. 6.** Section 1 - 4 and 5 of this Act take effect immediately under AS 01.10.070(c).

SB
292

(From Senator Frank)

Alaska State Senate

Senate Finance Committee

Official Business

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

Senate Bill 292: Sponsor Statement

If suitable State correctional facilities are not available, the commissioner of the Department of Corrections has statutory authority to enter into an agreement with an out-of-State correctional facility for the detention and confinement of persons held under authority of State law. In the past the department has considered transferring inmates outside Alaska due to severe overcrowding pressures in its institutions. Alaska Statutes, however, currently provide two contrary standards for determining whether or not a resident inmate may be transferred outside of the State. SB 292 would amend the relevant statute to bring these two standards into conformity.

The first standard in AS 33.30.061(b) allows the State to transfer inmates outside so long as their treatment will not be negatively impacted; "[the] commissioner may designate an out-of-state facility under this section only if the commissioner determines that rehabilitation or treatment of the prisoner will not be substantially impaired." The second standard in AS 33.36.010, however, provides that the State may not transfer inmates outside if their treatment will be more effective within Alaska; "[it] is the policy of the State of Alaska not to transfer a resident inmate outside of the state under [the Interstate Corrections Compact] if that inmate's continued confinement in Alaska will better facilitate rehabilitation or treatment." This Bill amends AS 33.36.010, deleting the latter standard and establishing the former standard from AS 33.30.061(b) as the sole test that must be met.

These two conflicting standards have constituted an effective legal hurdle to attempts by the Department of Corrections to transfer inmates outside of Alaska. Given the fact that current population levels in Alaska's correctional institutions exceed court-established maximums, this policy tool should be available for consideration by the commissioner of corrections.

GENERAL INFORMATION REGARDING INTERSTATE TRANSFER OF PRISONERS from Senator Frank's Office

1.) Even without Senate Bill 292, the Department of Corrections currently has the statutory authority to send prisoners out of State. AS 33.30.031 requires that any facility to which prisoners are sent must provide a degree of custody, care, and discipline that is similar to that required inside Alaska. Prisoners outside Alaska must have access to Alaskan law library materials.

This legislation is only aimed at making the Interstate Corrections Compact consistent with existing statute (AS 33.30.061) which gives DOC authority to place prisoners in a facility regardless of location inside or outside Alaska, so long as an out-of-State placement does not substantially impair the rehabilitation of the prisoner. This statute has been in effect since 1986.

The department currently houses about 56 prisoners outside Alaska. Only those inmates who volunteer are currently housed outside the State; however, DOC is not legally restricted to such a voluntary policy.

2.) If a prisoner is being considered for an out-of-State transfer, he/she would be entitled to receive sufficient notice, a tape-recorded classification hearing, and a multi-level appeals process before being transferred.

3.) PFD regulations exempt persons who are outside the State--but who are in State custody--from losing eligibility for the dividend; incarcerated felons are ineligible for the PFD regardless, but there is no disadvantage in this regard to being incarcerated outside of Alaska.

4.) Although the department could send prisoners outside under current law, this is generally not done because of concerns about in-state jobs, proximity to families for inmates with strong ties in Alaskan communities, transportation costs, and lack of appropriate bedspace availability outside. Out-of-State transfers are one of many tools which must be available to the department, but this process is not viewed as a "wholesale solution" to the department's overcrowding and budgetary problems.

Sec. 33.30.055. Contraband articles into or out of prisons prohibited. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.56.375 and 11.56.380.]

Sec. 33.30.060. [Repealed, § 12 ch 88 SLA 1986.]

Sec. 33.30.061. Commissioner to designate facility. (a) The commissioner shall designate the correctional facility to which a prisoner is to be committed to serve a term of imprisonment or period of temporary commitment. The commissioner may designate a facility without regard to whether it is maintained by the state, is located within the judicial district in which the prisoner was convicted, or is located in the state.

(b) The commissioner may designate an out-of-state facility under this section only if the commissioner determines that rehabilitation or treatment of the prisoner will not be substantially impaired. (§ 6 ch 88 SLA 1986)

NOTES TO DECISIONS

Editor's notes. — The Department of Corrections was created from the Division of Corrections of the Department of Health and Social Services by E.O. No. 55 (1984). Earlier cases refer to the executive administration then in effect.

Authority for administration placed with commissioner. — Alaska's statutory provisions leave little doubt that the legislature intended to place authority for administering matters affecting prisoners with the Commissioner of Health and Social Services. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134, on rehearing modified on other grounds, Sup. Ct. Op. No. 1668 (File No. 3172), 584 P.2d 38 (1978), decided under former AS 33.30.100.

Inmate's due process rights relating to classification of prisoners. — Decisions of prison authorities relating to classification of prisoners are completely administrative matters regarding which an inmate has no due process rights beyond the expectation of fair and impartial allocation of the resources of the prison system to its charges. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134, on rehearing modified on other grounds, Sup. Ct. Op. No. 1668 (File No. 3172), 584 P.2d 38 (1978), decided under former AS 33.30.100.

Administration must be neither arbitrary nor vindictive. — As an extension of the state, the Division of Corrections must administer Alaska's prisons in a manner which is neither arbitrary nor vindictive. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134, on rehearing modified on other grounds, Sup. Ct. Op. No. 1668 (File No. 3172), 584 P.2d 38 (1978), decided under former AS 33.30.100.

Authority to designate specific facility for incarceration. — The authority to designate a specific prison facility is "plainly vested" in the Commissioner of Health and Social Services. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134, on rehearing modified on other grounds, Sup. Ct. Op. No. 1668 (File No. 3172), 584 P.2d 38 (1978). See also Nell v. State, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982), decided under former AS 33.30.100.

The matter of a prisoner's classification, which encompasses designation of the prison facility to which the prisoner is to be confined, is committed to the administrative discretion of the Division of Corrections, and not to the sentencing courts of Alaska, although it is appropriate that the Division of Corrections give weight to the sentencing court's recommendations, and thus, the sentencing court does not have the authority to designate a particular prison facility in which a prisoner is to be confined. Rust v. State, Sup. Ct. Op.

NOTES TO DECISIONS

Primary function of agreement. — A defendant was not denied due process of law under the fourteenth amendment to the United States Constitution and Article 1, § 7 of the Alaska Constitution because the state did not supplement its extradition proceedings with a specific request for return of the defendant under the Interstate Agreement on Detainers, for the primary function of the Interstate Agreement on Detainers is to give the defendant a means, if he wishes to exercise it, of compelling the state to return him for retrial. Conway v. State, Ct. App. Op. No. 537 (File No. A-326), 707 P.2d 930 (1985).

Sec. 33.35.020. "Appropriate court" defined. The phrase "appropriate court" in AS 33.35.010, with reference to the courts of this state, means the superior court. (§ 1 ch 39 SLA 1981)

Sec. 33.35.030. Enforcement. All courts, departments, agencies, officers, and employees of the state and its political subdivisions shall enforce the Agreement on Detainers under AS 33.35.010 and cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. (§ 1 ch 39 SLA 1981)

Sec. 33.35.040. Central administrator and information agent. The commissioner of corrections or the designee of the commissioner of corrections is the central administrator of and information agent for the Agreement on Detainers under AS 33.35.010. (§ 1 ch 39 SLA 1981; am E.O. No. 55, § 33 (1984))

Effect of amendments. — The 1984 amendment substituted "corrections" for "health and social services" in two places.

Chapter 36. Interstate Corrections Compacts.

Article

1. Interstate Corrections Compact (§§ 33.36.010 — 33.36.040)
2. Western Interstate Corrections Compact (§§ 33.36.060 — 33.36.100)
3. Interstate Compact on Probation and Parole (§§ 33.36.110 — 33.36.120)

Article 1. Interstate Corrections Compact.

Section

10. Compact enacted.
20. Commitment or transfer of inmates under compact
30. Enforcement of compact
40. Implementation

Sec. 33.36.010. Compact enacted. The Interstate Corrections Compact as contained in this section is enacted into law and entered into on behalf of the State of Alaska with any other states legally joining in it in a form substantially as follows. It is the policy of the State of Alaska not to transfer a resident inmate outside of the state

under this compact if that inmate's continued confinement in Alaska will better facilitate rehabilitation or treatment:

INTERSTATE CORRECTIONS COMPACT

ARTICLE I

PURPOSE AND POLICY

The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders. declare that it is the policy of each of the party states to provide those facilities and programs on a basis of cooperation with one another, thereby serving the best interests of the offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

ARTICLE II

DEFINITIONS

As used in this compact, unless the context clearly requires otherwise:

(a) "state" means a state of the United States, the United States of America, a territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico;

(b) "sending state" means a state party to this compact in which conviction or court commitment was had:

(c) "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had;

(d) "inmate" means a male or female offender who is committed, under sentence to, or confined in a penal or correctional institution;

(e) "institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates, as defined in (d) of this article, may lawfully be confined.

ARTICLE III

CONTRACTS

(a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Such a contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and the participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance;

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account of their employment; and the crediting of proceeds from or disposal of any products resulting from their employment;

(4) delivery and retaking of inmates;

(5) other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) The terms and provisions of this compact shall be a part of a contract entered into under this compact, and nothing in such a contract may be inconsistent with this compact.

ARTICLE IV

PROCEDURES AND RIGHTS

(a) Whenever the duly constituted authorities in a state party to this compact, which state has entered into a contract under Article III, decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, those authorities may direct that the confinement be in an institution within the territory of the other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of a state party to this compact shall have access, at all reasonable times, to an institution in which it has a contractual right to confine inmates, for the purpose of inspecting the facilities of the institution and visiting those of its inmates who may be confined in the institution.

(c) Inmates confined in an institution under this compact are at all times subject to the jurisdiction of the sending state and may at any time be removed from the institution for transfer to a prison or other institution in the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; however, the sending state continues to be obligated to make any payments that may be required under a contract entered into the terms of Article III of this compact.

(d) A receiving state shall provide regular reports to a sending state on the inmates of that sending state in institutions under this compact, including a conduct record of each inmate, and certify that record to the official designated by the sending state, in order that each inmate may have official review of the inmate's record in determining and altering the disposition of that inmate in accordance with the law in the sending state and in order that the record may be a source of information for the sending state.

(e) All inmates who may be confined in an institution under the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with similar inmates of the receiving state as may be confined in the same institution.

(f) Any hearing to which an inmate, confined under this compact, may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for those hearings which may be conducted by the appropriate officials of a sending state. If a hearing is had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing as prescribed by the sending state shall be made. That record together with any recommendations of the hearing officials shall be transmitted immediately to the officials before whom the hearing would have been had if it had taken place in the sending state. In a proceeding had under the provisions of this subsection, the officials of the receiving state shall act solely as agents of the sending state and no final determination may be made in any matter except by the appropriate officials of the sending state.

(g) An inmate confined under this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, agree upon release in some other place. The sending state shall bear the cost of the return of an inmate to its territory.

(h) An inmate confined under the terms of this compact has all rights to participate in and derive any benefits or incur or be relieved of any obligations or have those obligations modified or the inmate's status changed on account of an action or proceeding in which the inmate could have participated if confined in an appropriate institution of the sending state located in that state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for or otherwise function with respect to an inmate may not be deprived of or restricted in the exercise of any power in respect to an inmate confined under the terms of this compact.

ARTICLE V

ACTS NOT REVIEWABLE IN RECEIVING STATE: EXTRADITION

(a) A decision of the sending state in respect to a matter over which it retains jurisdiction under this compact is conclusive upon and not reviewable in the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate in that state any criminal charge or if the inmate is formally accused of having committed in that state a criminal offense, the inmate may not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for the offense. The duly accredited officers of the sending state shall be permitted to transport inmates under this compact through any state party to this compact without interference.

(b) An inmate who escapes from an institution in which the inmate is confined under this compact is considered a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings is that of the sending state, but nothing contained in this compact may be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

ARTICLE VI

FEDERAL AID

A state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or a contract under it and an inmate in a receiving state under this compact may participate in a federally aided program or activity for which the sending and receiving states have made contractual provision; however, if the program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required.

ARTICLE VII

BECOMING EFFECTIVE

When this compact has been enacted into law by any two states, it becomes effective and binding upon them. Thereafter, this compact becomes effective and binding as to any other state upon similar action by that state.

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Revisor's notes
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ARTICLE VIII

WITHDRAWAL AND TERMINATION

This compact continues in force and remains binding upon a party state until the state enacts a statute repealing the compact and providing for sending formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal does not take effect until one year after the notices provided in the statute have been sent. A withdrawal does not relieve the withdrawing state from its obligations assumed under this compact before the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, those inmates it may have confined under the provisions of this compact.

ARTICLE IX

OTHER ARRANGEMENTS UNAFFECTED

Nothing contained in this compact may be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

ARTICLE X

CONSTRUCTION AND SEVERABILITY

The provisions of this compact shall be liberally construed and are severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of a participating state or of the United States, or the applicability of it to a government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability of it to a government, agency, person or circumstance is not affected by that holding. If this compact is held contrary to the constitution of a state participating in it, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (§ 1 ch 127 SLA 1982)

Revisor's notes. — Enacted as AS 33.24.010. Renumbered in 1982.