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court approved such a sentence for Tuckfield based primarily on his extensive criminal record, which included two prior nonviolent felonies, and the serious injury to his victim. Further, the court stressed Tuckfield's refusal to admit guilt and the poor prognosis for his rehabilitation. 621 P.2d at 1353–54.

In two cases we have approved sentences in the twenty-year range for sexual abuse of children. *Seymore v. State*, 655 P.2d 786 (Alaska App.1982); and *Qualle v. State*, 652 P.2d 481 (Alaska App.1982). In *Seymore*, we approved a twenty-year sentence with restricted parole for one count of first-degree sexual assault on the defendant's stepdaughter. At that time the crime was a class A felony. Seymore was thirty-nine years old. The record reflected a continuous course of sexual abuse, including a prior conviction for sexual abuse of the same stepdaughter, for which Seymore had received a suspended imposition of sentence. His victim suffered substantial psychological damage. 655 P.2d at 786. In *Qualle*, we considered a forty-year composite of consecutive sentences for one count of statutory rape and one count of lewd and lascivious acts with a child involving, respectively, a seven-year-old girl and a six-year-old boy; we held the sentence excessive and directed that it be reduced on remand to no more than twenty-one years. 652 P.2d at 488. Qualle, a mature man fifty-one years old, had a long history of child sexual abuse with commercial overtones, and there was evidence that Qualle had previously engaged in sexual relations with his daughters. *Id.* at 484, 487.

The supreme court's treatment of *Tuckfield* and our treatment of *Seymore* and *Qualle* was consistent with the general rule that maximum sentences should only be imposed upon worst offenders. *See State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975). The "worst offender" designation may be based on the particular manner of committing the offense, the background of the offender or both. *Saganna v. State*, 594 P.2d 69 (Alaska 1979).

Generally, the supreme court has based a worst offender characterization on an extensive criminal record. *See, e.g., Tuckfield v. State*, 621 P.2d at 1353; *Saganna v. State*, 594 P.2d 69, 70 (Alaska 1979); *State v. Wortham*, 537 P.2d at 1119–20. In *Seymore*, the defendant had previously been convicted of sexual assault but his record was cleared. 655 P.2d at 787. In *Qualle*, charges were brought, but dismissed because of the victim's unavailability. 652 P.2d at 484. The supreme court

kidnapped eighteen-year-old hitchhiker and kept her prisoner for eight days during which she was repeatedly sexually assaulted; court affirmed a life sentence for the kidnapping and eight concurrent ten-year sentences for the rapes, to run consecutively to the kidnapping sentence); *Patterson v. State*, 689 P.2d 146, 150–52 (Alaska App.1984) (forty-one-year composite sentence for kidnapping, sexual assault, and violent assault on two separate victims reduced to thirty years; defendant had prior felony record and there was little likelihood of rehabilitation). We have also approved such sentences for those convicted of multiple violent assaults where, in addition, the defendant had a substantial felony record. *Nix v. State*, 653 P.2d 1093, 1100–02 (Alaska App.1982) (composite sentence of approximately fifty years reduced to forty years; defendant, who had an extensive criminal record, was convicted of several separate assaults, sexual assaults, and burglary charges involving different victims); *Tookak v. State*, 648 P.2d 1018, 1023–24 (Alaska App.1982) (forty-one-year total of consecutive sentences for sexual assault, kidnapping and joyriding reduced to thirty years; defendant, who had a prior felony record, took victim to remote area where he sexually assaulted and abandoned her).

While not involving sexual assault, consideration should also be given to *Wortham v. State*, 689 P.2d 1133, 1144–45 (Alaska App.1984) (composite fifty-three-year sentence affirmed where defendant, who had five prior felony convictions and had served substantial prison sentences, kidnapped, shot, and robbed his victim), and *Larson v. State*, 688 P.2d 592 (Alaska App. 1984) (defendant had two prior felony convictions for violent crimes, broke into an occupied dwelling at night and terrorized the two occupants; forty-eight-year composite sentence reduced to forty years).

Finally, consideration should be given to *Pears v. State*, 698 P.2d 1198 (Alaska 1985) (disapproving as excessive two concurrent twenty-year sentences for second-degree murder of two victims); and *Page v. State*, 657 P.2d 850, 855 (Alaska App.1983) (recognizing as a benchmark for sentences of second-degree murder based on intent to kill a sentence of twenty to thirty years).

has recognized, however, that in an unusual case a worst offender designation could be based on a single event or series of events without a prior record of convictions. *See Wilson v. State*, 582 P.2d 154, 156 (Alaska 1978); *Burleson v. State*, 543 P.2d 1195, 1201 (Alaska 1975); *Winslow v. State*, 685 P.2d 1273, 1275 (Alaska App. 1984); *Kimbrell v. State*, 647 P.2d 618, 620 n. 5 (Alaska App.1982); *Huckaby v. State*, 632 P.2d 975, 976 (Alaska App.1981). Such a designation usually involves a finding that the defendant's conduct actually constituted either (1) a higher degree of offense, *see Notaro v. State*, 608 P.2d 769, 770 (Alaska 1980) (fifteen-year sentence for manslaughter upheld where facts made the crime "an extreme one" within this class, closely equivalent to second-degree murder), *cf.* AS 12.55.155(c)(10) (discussed in *Braaten v. State*, 705 P.2d 1311 (Alaska App.1985) (Singleton, concurring)); or (2) a premeditated offense involving substantial injury to the victim or victims, where the defendant had a bad psychological prognosis and showed no remorse, *see Wilson v. State*, 582 P.2d at 156.

We recognize that many of the cases we have reviewed were decided under former law. Up until the new code became effective in 1980, a person nineteen years of age or over who engaged in consensual sexual penetration with a person under the age of sixteen was punishable by imprisonment for any term of years. Former AS 11.15.-130(a). A person who had sexual contact with a child for purposes of sexual gratification was punishable by imprisonment for one to ten years. Former AS 11.15.134. As originally enacted, the Revised Code reduced these penalties substantially. It punished sexual assault on a child under the age of thirteen as a class A felony punishable by up to twenty years' imprisonment. Former AS 11.41.410(a)(3); AS 12.55.125(c). Where sexual penetration occurred and the victim was between thirteen and sixteen years of age or sexual contact occurred with someone under thirteen the offense was a class C felony punishable by up to five years' imprisonment. Former AS 11.41.440; AS 12.55.125(e). Sexual contact with someone between the ages of thirteen and sixteen was a class A misdemeanor. Former AS 11.51.130(a)(4). The statutes were amended in 1980, 1982, and again in 1983. Under current law a person who engages in sexual penetration with a child under the age of thirteen is guilty of an unclassified felony punishable by up to thirty years' imprisonment. AS 11.41.-434(a)(1); AS 12.55.125(i). If someone sixteen or older engages in sexual penetration with someone between thirteen and sixteen, he or she is guilty of a class B felony punishable by up to ten years' imprisonment, unless he or she is less than three years older than the victim. AS 11.41.-436(a)(1); AS 12.55.125(d). The same penalty is reserved for someone sixteen or over who engages in sexual contact with someone under thirteen. AS 11.41.-436(a)(2). Where sexual contact occurs and the victim is between thirteen and sixteen years of age, and at least three years younger than the abuser, the offense is a class C felony with a five-year maximum penalty. AS 11.41.438; AS 12.55.125(e).

In summary, the drafters of the Revised Code substantially reduced the penalties for sexual abuse of minors. Since 1980, the legislature has increased the penalties, but has not restored them to former levels. Consequently, we do not find that legislative revision of the penalties establishes legislative dissatisfaction with the ranges of sentence we have been discussing.

[17] We are also satisfied that those ranges of sentence are consistent with the current presumptive sentencing provisions of the code. Adoption of presumptive sentencing was aimed at ensuring greater uniformity in sentencing, not at increasing the magnitude of sentences. *See* AS 12.55.005. Finally, while the eight-year presumptive term presently imposed on first offenders committing unmitigated sexual assaults on children slightly increases the minimum terms recognized in *State v. Brinkley*, 681 P.2d 351, we do not view this change in the statute as indicating dissatisfaction with the fifteen-year benchmark sentence for

aggravated offenses derived from cases decided under former law, at least first felony offenders. In the case of second and third felony offenders, the code does stipulate presumptive sentences of fifteen and twenty-five years, respectively, for those convicted of sexual assault in the first degree, or sexual abuse of a minor in the first degree. AS 12.55.125(i). In aggravated cases, slightly higher sentences would be appropriate. AS 12.55.155.

Koenig does not have a criminal record. Judge Hanson found that his conduct was among the most serious within the definition of the offense, AS 12.55.155(c)(10), but he did not find that Koenig committed a higher degree of offense. Koenig's offense involved multiple victims, and Judge Hanson may have concluded that Koenig's crimes were premeditated. There is nothing in the record, however, that would justify a finding that Koenig is a dangerous offender in the sense that we have used that term in the past. *See Viveros v. State*, 633 P.2d 289, 291 (Alaska App.1981) (using term "dangerous offender" as term of art in accordance with 1980 ABA *Standards For Criminal Justice*, which require conviction of two or more felonies within the past five years plus service of a year or more incarceration). It is not clear that Judge Hanson viewed diagnosis as a pedophile sufficient to support a finding that Koenig would continue to be a danger after serving eight years of continuous incarceration. *See Mutschler v. State*, 560 P.2d 377, 381 (Alaska 1977); *Brown v. State*, 693 P.2d 324, 330–31 (Alaska App.1984); *Lacquement v. State*, 644 P.2d 856, 862 (Alaska App.1982). *Cf. Maal v. State*, 670 P.2d 708, 711–12 (Alaska App.1983) (sentencing court should not give undue emphasis to predictions of future misconduct, which would violate just deserts sentencing model embodied in AS 12.55.005(1)).[14]

[18] On remand, Koenig's sentence, whether involving concurrent or consecutive increments, should not exceed twenty years with five years suspended.[15]

The sentence of the superior court in A–468 is AFFIRMED. The appeal in A–492 is DISMISSED.

The sentence in A–552 is VACATED, and that case REMANDED for resentencing.

14. The Alaska Criminal Code Revision Subcommission explained the "just deserts" theory as follows:

> In determining the appropriate sentence to be imposed, two basic principles guide the court: (1) the least severe measure should always be used which accomplishes the purposes of sentencing; and
> (2) primary consideration in imposing sentence should always be given to the seriousness of the offense and the prior criminal history of the convicted person.
>
> Under the "just deserts" theory of punishment, as a matter of justice or fairness, decisions with respect to a particular defendant ought to be made on the *basis of what the person has done, not on some speculative expectation of what he might do in the future.* Neither rehabilitation nor deterrence, as such, are primary considerations in determining the appropriate sentence, although both remain objectives of a "deserved" sentence. If a person's crime is serious, his punishment should be severe. If the offense is minor, the sanction should be mild.

T.D. at 19–20 (emphasis supplied). Where a person has been prosecuted as a child molester and nevertheless continues to abuse children, a diagnosis of pedophilia takes on added significance and may justify an extended term. *See, e.g., Seymore v. State*, 655 P.2d 786 (Alaska App.1982); *Qualle v. State*, 652 P.2d 481 (Alaska App.1982). Our concern is that first offenders, who have never been prosecuted or treated, should not be given this label and then, solely on the basis of the label, treated as, worst offenders and given maximum sentences. *See State v. Rastopsoff*, 659 P.2d 630, 640 (Alaska App.1983) (drafters of Revised Code clearly intended to punish more harshly those offenders who had been "alerted" by prior conviction, but who had failed to respond by conforming their conduct to the law).

15. Twenty years with five years suspended results in a fifteen-year period of incarceration equal to the presumptive term for a second unclassified felony offender, AS 12.55.125(i)(3), and the fifteen-year typical sentence for aggravated rape established under former law. It also allows five years of suspended time as a deterrent to Koenig, in order to protect the public as he makes the adjustment to normal life after his release from prison.

Third, the trial judge took steps to alleviate the possible prejudicial effect of the impeachment by not allowing the jury to hear that the prior offense was for the same crime currently charged against Johnson and by giving cautionary instructions on the limited use of the impeachment evidence. This was in accord with Evidence Rule 105, the commentary to Evidence Rule 403, this court's suggestion in *Alexander*, and the court of appeals' holding in *Frankson*.

Fourth, "[i]f judicial self restraint is ever desirable, it is when a probative versus prejudice analysis of a trial court is reviewed by an appellate tribunal." *U.S. v. Long*, 574 F.2d 761, 767 (3d Cir.1978), *cert. denied* 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978). As the *Long* court stated:

> [I]t is manifest that the draftsmen intended that the trial judge be given a very substantial discretion in "balancing" probative value on the one hand and "unfair prejudice" on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative value, or (b) the prejudice presented by the evidence.... The trial judge, not the appellate judge, is in the best position to assess the extent of the prejudice caused a party by a piece of evidence. The appellate judge works with a cold record, whereas the trial judge is there in the courtroom.

Id.

The trial judge in this case was in the court room and could directly observe the witnesses and closely assess the possible prejudicial effect the evidence would have on the jury. Accordingly, a great deal of discretion should be allowed the trial court in the probative versus prejudicial balancing analysis.

Given the evidence in the record and previous case law on the issue we cannot say the trial court's reasons for admitting the evidence were clearly untenable or unreasonable or that it abused its discretion in allowing Johnson to be impeached by reference to a prior conviction for a crime involving dishonesty.

[8] As noted, the rationale used by the court of appeals was that telling the jury that Johnson has a prior conviction for a crime involving dishonesty had the potential to create in the jurors' minds an incorrect belief that the prior crime was of a much more serious nature than that presently involved. No objection raising this point was made at the trial level. If such an objection had been made, the trial court could well have agreed and modified the instruction so that the jurors were told that the prior crime was not more serious. However, in the absence of an objection, the instruction as given is reviewable only under the plain error standard. The requirements of that standard, that the mistake be obvious and that it create a high likelihood of injustice, *Miller v. Sears*, 636 P.2d 1183 (Alaska 1981), have not, for the reasons previously stated, been met.

The judgment of the court of appeals is REVERSED and the trial court's ruling is AFFIRMED.

STATE of Alaska, Petitioner,

v.

Peter ANDREWS, Sr., and George R. Koenig, Respondents.

STATE of Alaska, Petitioner,

v.

Harry N. COFFEY, Respondent.

Nos. S–1172, S–1192.

Supreme Court of Alaska.

Aug. 8, 1986.

Petitions for Hearing from the Court of Appeals of the State of Alaska, on Appeal

from the Superior Court, Third Judicial District, Dillingham, Eben H. Lewis, Judge, *State v. Andrews;* on Appeal from the Superior Court, Third Judicial District, Palmer, James A. Hanson, Judge, *Koenig v. State,* and on Appeal from the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, *State v. Coffey.*

Cynthia M. Hora, Asst. Atty. Gen., Anchorage and Harold M. Brown, Atty. Gen., Juneau, for petitioner.

John M. Murtagh, Anchorage, for respondent Andrews.

Laurel J. Peterson, Laurel J. Peterson, P.C., Anchorage, for respondent Koenig.

A. Michael Zahare, Bradbury, Bliss, & Riordan, Inc., Anchorage, for respondent Coffey.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The issue in these consolidated cases is the proper interpretation of AS 12.55.025(e) and (g). The State contends that an offender convicted of separate counts of sexual assault must be sentenced to consecutive, rather than concurrent, terms. Having made a thorough examination of the matter, we have concluded that the opinion of the court of appeals in *State v. Andrews,* 707 P.2d 900 (Alaska App.1985), correctly treats and disposes of the issues involved, and we adopt such opinion as the opinion of this court.

RABINOWITZ, Chief Justice, with whom COMPTON, Justice, joins, concurring.

The majority adopts the court of appeals' decision in *State v. Andrews,* 707 P.2d 900 (Alaska App.1985) which holds that concurrent sentences may be given if any of the six subparagraphs of AS 12.55.025(g) are met. While the statute is drafted ambiguously, the interpretation the majority adopts is contrary to the legislative intent.

AS 12.55.025(e) provides in part:

> Except as provided in (g) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively.

AS 12.55.025(g) provides:

> If the defendant has been convicted of two or more crimes before the judgment on either has been entered, any sentences of imprisonment may run concurrently if
>
> (1) the crimes violate similar societal interests;
>
> (2) the crimes are part of a single, continuous criminal episode;
>
> (3) there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property rights offended, or the persons offended;
>
> (4) the crimes were not committed while the defendant attempted to escape or avoid detection or apprehension after the commission of another crime;
>
> (5) the sentence is not for a violation of AS 11.41.100–11.41.470; or
>
> (6) the sentence is not for a violation of AS 11.41.500–11.41.530 that results in physical injury or serious physical injury as those terms are defined in AS 11.81.-900.

The court of appeals summarized the difficulties in interpreting AS 12.55.025(g):

> The first three subparagraphs, (1)–(3), identify three situations in which concurrent sentences have been traditionally imposed. The problem arises because the last three subparagraphs, (4)–(6), are phrased in the negative and appear to describe situations in which the legislature may not have wished concurrent sentences, yet the drafter placed all six subparagraphs in the disjunctive. This grammatical structure suggests that each subparagraph should be considered an independent basis for permitting concurrent sentences. Read in this literal fashion, however, the statute would per-

> mit imposition of concurrent sentences in almost every case, since the conduct need only satisfy one of the six subparagraphs, and three of them are in the negative.

Andrews, 707 P.2d at 905–906 (citations omitted).

The court of appeals concluded that reading all six paragraphs disjunctively did not obviously violate legislative intent and was one of several "reasonable interpretations" of the statute. *Id.* at 908. The court of appeals therefore resolved the statute's ambiguity by adopting this interpretation as the one most favorable to the defendant. *Id.*

I agree that the statute is subject to several reasonable interpretations and that the rule of lenity should be applied by construing the statute strictly against the state. However, the construction adopted by the court of appeals and the majority is not a reasonable interpretation of the statute since it cannot be squared with legislative intent.

The one aspect of the legislative intent that can be confidently ascertained is that the statute was designed to require trial courts to give consecutive sentences as a general rule, subject to certain exceptions. AS 12.55.025(e) states that sentences "*shall* run consecutively," except as provided in paragraph (g) (emphasis added). AS 12.55.025(e) and (g) replaced legislation which had given trial courts discretion to impose concurrent sentences in all cases.[1] The legislative commentary to the new sections indicates that they are designed to limit the trial court's discretion to impose concurrent sentences:

> The intent of these sections are [sic] to specify circumstances when consecutive sentences are required by law and to specify the general rule that consecutive sentences are required unless the court has the discretion to impose concurrent sentences under subsection (g).

3 House Journal Supp. No. 64, at 19 (1982).

Paragraph (g) is drafted in a way such that it is difficult to determine exactly how the legislature wished the six subparagraphs to interact and to be applied. It is clear, however, that the legislature intended the subparagraphs to function as exceptions to a general rule. The majority's interpretation cannot be what the legislature intended, because to read the six subparagraphs entirely in the disjunctive causes the exceptions to completely eliminate the general rule.

Under the majority's interpretation the exception applies and concurrent sentences may be given so long as defendant's crimes were not committed while he was attempting to escape. AS 12.55.025(g)(4). Even more significant is that under the majority's interpretation subparagraphs (g)(5) and (g)(6) function to eliminate the possibility that consecutive sentences are ever required. Subparagraph (g)(5) provides that concurrent sentences may be given if the sentence is not for a violation of AS 11.41.-100–11.41.470, which encompass homicide, assault and reckless endangerment, kidnapping, and sexual offenses. Subparagraph (g)(6) provides that concurrent sentences may be given if the sentence is not for a violation of AS 11.41.500–11.41.530, which encompass robbery, coercion, or extortion, that results in physical injury or serious physical injury. The result of the majority's approach will be that concurrent sentences are always available, since homicide, assault and sexual offenses necessarily are not robbery, coercion, or extortion and thereby fall under (g)(6), and robbery, coercion, and extortion necessarily are not homicide, assault or sexual offenses and thereby fall under (g)(5).

While normally phrases separated by "or" should be read disjunctively, courts will not give a statute that interpretation if

1. Former AS 12.55.025(e) provided in part:
> If the defendant is convicted of two or more crimes before judgment on either has been entered, any sentences of imprisonment may run concurrently or consecutively, as the court provides. If the court does not specify, the sentences of imprisonment shall run concurrently.

this will frustrate the legislative intent. *De Sylva v. Ballentine*, 351 U.S. 570, 573–580, 76 S.Ct. 974, 976–79, 100 L.Ed. 1415, 1423–1427 (1956); *United States v. Moore*, 613 F.2d 1029, 1038–1045 (D.C.Cir.1979), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2922, 64 L.Ed.2d 811 (1980); 1A C. Sands, *Sutherland Statutory Construction* § 21.14 (4th ed. 1985). Although the rule of lenity provides that criminal statutes should be strictly construed against the state, "the statute is not to be construed so strictly as to defeat the intention of the legislature." *Moore*, 613 F.2d at 1044. To read the six subparagraphs entirely in the disjunctive clearly would frustrate the legislative intent to require consecutive sentences in some instances.[2] Therefore such a reading should not be accepted.

The question remains how paragraph (g) should be construed. The state argues that concurrent sentences may be given if defendant's crimes fall within subparagraph (1)–(3) *unless* they fall within the situations described in subparagraphs (4)–(6). In other words the state maintains that subparagraphs (4)–(6) act as a limitation on and override subparagraphs (1)–(3), such that a defendant who commits crimes such as sexual offenses, assault, or homicide, or who commits crimes while escaping, must always receive consecutive sentences.[3]

The above interpretation is consistent with the general legislative intent that consecutive sentences be required subject to certain exceptions. I would not, however, adopt this interpretation. The statute can be interpreted in more than one way that is consistent with the general legislative intent. At the same time the wording of the statute does not make clear the specific legislative intent as to the interaction of the exceptions. In such a situation the rule of lenity should apply and the statute should be construed strictly against the state. *Dunn v. United States*, 442 U.S. 100, 112–113, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979); *Moore*, 613 F.2d at 1043.[4]

Therefore, I would construe the statute to mean that concurrent sentences may not be given if the crimes fall within subparagraphs (4)–(6), *unless* one of the criteria set out in subparagraphs (1)–(3) are met.[5] In other words subparagraphs (1)–(3) override subparagraphs (4)–(6). Such an interpretation satisfies the rule of lenity, while at the same time it is consistent with the general legislative intent. Under this interpretation there will be instances when consecutive sentences will be required—i.e. when defendant's conduct does not fall within subparagraphs (1)–(3).[6]

2. Additionally, a statute should be construed to give effect to all of its provisions, such that no part should be read as inoperative, superfluous, void or insignificant. *State v. Frazier*, 719 P.2d 261 (Alaska 1986); 2A C. Sands, *supra*, § 46.06, at 104. The majority's interpretation renders AS 12.55.025(e) superfluous.

3. This interpretation was applied pursuant to agreement of the parties by the court of appeals in *Griffith v. State*, 675 P.2d 662, 664 (Alaska App.1984).

4. It should also be noted that to construe the statute in the manner the state urges would result in mandatory consecutive sentences for such crimes as reckless endangerment (AS 11.41.250), indecent exposure (AS 11.41.460), and coercion (AS 11.41.530).

5. This interpretation was urged by the defendant in *State v. Moody*, (Lekanof), 726 P.2d 194, (Alaska 1986).

6. If this interpretation is not in fact what the legislature intended, the legislature should redraft the statute to clarify its intent.

I concur in the result the majority reaches because the defendants' crimes involved similar societal interests. Subparagraph (g)(1) therefore is satisfied and concurrent sentences may be given.

CSHB 244(2nd JUD)

MAKES CRIMINALS THINK TWICE
BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed (sec. 8)

   - The "felony-murder rule" says that if a person dies during commission of a serious felony, the offender is guilty of second-degree murder, even if he did not cause the death. However, there is an exception in Alaska law: if the person killed is one of the perpetrators, the other perpetrators cannot be charged with his death. The felony-murder rule is designed to discourage serious crimes, and it can be made more effective if it applies equally to the death of a participant in the crime as to the death of a bystander.

   - Example: A small gang commits an armed robbery. The robbery victim (for example, a homeowner or a security guard) shoots and kills one of the robbers. Under current law, if a bystander had been killed, the robbers would be guilty of second-degree murder, but because one of the gang members dies, his accomplices cannot be charged with murder.

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime (secs. 18, 19, 25, 26 and 28)

   - Gives direction to courts when sentencing for more than one offense. Current statutes were intended to require consecutive sentences, but were not interpreted that way because of bad drafting.

   - Under this bill, courts still retain significant sentencing discretion, and for most crimes may impose sentences that are concurrent. However, for homicide, kidnapping, and serious sex offenses, the bill specifies the minimum amount of consecutive time that must be imposed.

   - Example from *State v. Glaser*: Two counts of second degree murder and one count of first degree assault (three separate victims). Under the bill, after the court determines an appropriate sentence for the first count of murder, the court must impose at least the 10-year mandatory minimum term for the second count of murder, and the sentence is consecutive. For the count of assault, the court must impose some period of consecutive time, but the amount is left to the judge's discretion. Actual sentence imposed in *Glaser*: 13 years. Under this bill, the sentence would be a minimum of 20 years.

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs (sec. 13)

   - DOES NOT CHANGE THE BURDEN OF PROOF. THE STATE MUST STILL DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.

   - This bill merely identifies additional circumstances when self-defense is not justified, similar to the current law that says self-defense is not justified if you started the fight or provoked the other person.

   - One of the reasons there is so much serious street violence, especially in Anchorage, is that individuals or groups of criminals fight over territory or over drug deals gone bad or over any number of disputes. These groups are sometimes organized gangs, but often they are loosely-associated or simply "wannabes" who try to curry favor with an organized gang or gang leader because they "want to be" part of the group. These people often roam the city, looking for an opportunity to shoot a rival or perceived rival. It is common that gang members or innocent bystanders are shot or killed, and everyone involved claims they acted in self-defense. Because the prosecution often can't prove who started shooting, the state usually can't prosecute the person who did the killing. **This bill says that if you are trying to further your own criminal objectives or those of someone else, you can't use force and claim self-defense.**

   - In illegal drug deals, it's common for all parties to be armed, and for violence to break out. Everyone claims self-defense, and the prosecution often can't prove who started shooting. **This bill says that anyone engaged in an illegal drug transaction cannot claim self-defense. This is not only a deterrent to violence, but also a deterrent to drug dealing.**

4. Disallows self-defense if the only evidence of it is implausible (sec. 14)

   - Alaska law requires the trial judge to give an instruction that allows the jury to find self-defense, even if the evidence supporting it is "weak or implausible." *Folger v. State*, 648 P.2d 111 (Alaska App. 1982).

   - Federal law, by contrast, requires the defendant to produce enough evidence in support of self-defense that a rational jury could find that the defendant acted in self-defense. *United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984).

   - The bill will help avoid verdicts not supported by evidence, by changing the law to allow the judge to instruct the jury only if there is plausible evidence of self-defense.

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices, and friends of the defendants to refuse to testify by hiding behind state immunity laws (secs. 15-17 and 20)

   - If it is possible that a person would incriminate himself by giving testimony, Alaska law requires complete immunity from prosecution (called transactional immunity) before that witness can be compelled to testify. The witness must be given immunity for any crimes that he may be required to testify about.

   - Witnesses who are willing to testify will usually consult with the prosecutor to disclose their concerns and work out an immunity agreement, if necessary. However, fellow gang members, friends and relatives of defendants usually do not want to testify and often claim self-incrimination, but then refuse to disclose their concerns. Because the prosecutors have no information about what crimes they would be immunizing, they cannot responsibly grant immunity, and therefore critical testimony is not available.

   - This provision sets up a fair and uniform procedure for determining whether a person has a valid self-incrimination claim. For example, it gives the witness a public defender to represent them. It also gives prosecutors minimal information upon which to base a rational decision, i.e., whether the possible offense committed by the witness is a serious offense.

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions (sec. 12)

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system (secs. 3 and 4)

8. Increases penalty to a class C felony for furnishing alcohol to minors in local option areas (sec. 5), and for sending large amounts of alcohol to local option areas (secs. 1 and 2)

9. Strengthens the forfeiture law for bootlegging offenses (secs. 6 and 7)

   - Allows for forfeiture of money used in bootlegging offenses and provides for sharing of proceeds of forfeitures with local law enforcement

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers (secs. 10 and 11)

- Increases the protection for children from sexual abuse of older teenagers. Adjudication for an offense that would be a felony may be used as an aggravating factor if the offender commits another offense as an adult.

11. Allows greater disclosure of information about juvenile sex offenders (sec. 27)

- Help parents and other adults protect children by making information available to them about juvenile sex offenders. This information is not currently available to the public.

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies (secs. 21 and 23)

- Because prior drunk driving offenses must be within a ten-year period to subject the driver to felony penalties, sometimes, later drunk driving offenses are treated as misdemeanors even if the person was already convicted of felony drunk driving. These drivers present a big risk to the public; by making every subsequent drunk driving a felony, we can encourage repeat drunk drivers to stay off the road if they have been drinking.

13. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury (sec. 9)

- Persons who drive partly impaired (but not enough to be DUI), and cause serious physical injury, are only guilty of misdemeanor assault. Causing long-term and debilitating injuries by driving while impaired justifies felony penalties.

14. Prohibits the "big gulp" defense in drunk driving cases (secs. 22 and 24)

- Reverses a recent court decision, *Conrad v. State,* 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

FRANK H. MURKOWSKI, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste 717
Juneau, AK 99801
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February 10, 2004

Rep. Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Re: Proposal for CSHB 244 (2nd JUD)

Dear Representative McGuire:

The following describes the highlights of the proposed House Judiciary Committee Substitute for HB 244. I am also enclosing a chart comparing the original bill with CSHB 244 (JUD) and the proposed committee substitute. Also attached are a two-page sectional summary and a four-page description of the bill with examples showing how the proposed changes would improve criminal law in the state.

Highlights of Governor's 2004 Crime Bill (CSHB 244(2nd JUD))

MAKES CRIMINALS THINK TWICE
BEFORE COMMITTING DANGEROUS OFFENSES

1. Expands felony-murder law so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed

2. Adopts consecutive sentencing procedures so that some consecutive term is imposed for each victim or each conviction of a serious crime

3. Disallows self-defense if the state proves the defendant was furthering the criminal objectives of a gang or was buying or selling illegal drugs

4. Disallows self-defense if the only evidence of it is implausible

5. Adopts a uniform procedure for deciding whether to grant immunity to witnesses, thus making it harder for gang members, accomplices and friends of defendants to refuse to testify by hiding behind state immunity laws

6. Makes it a misdemeanor crime for a court-appointed custodian to fail to report that the defendant released to his custody has violated court imposed conditions

BOOTLEGGING: HELPS COMMUNITIES THAT CHOOSE TO REDUCE ALCOHOL

7. Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system; increases the penalty for bootleggers in urban areas who send booze to local option areas

8. Increase penalty to a class C felony for furnishing alcohol to minors in local option areas, and for sending large amounts of alcohol to local option areas

9. Strengthens the forfeiture law for bootlegging offenses

PROTECTS CHILDREN FROM JUVENILE SEX OFFENDERS

10. Increases penalty for sexual abuse of young children by teenagers

11. Allows greater disclosure of information about juvenile sex offenders

IMPROVES DRUNK DRIVING LAWS

12. Once a person has committed felony drunk driving, all further drunk driving offenses would be treated as felonies

13. Increase penalty to a class C felony for certain vehicular offenses that cause serious physical injury

14. Prohibits the "big gulp" defense in drunk driving cases

I hope this information is helpful to you.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: David Marquez
Assistant Attorney General

DWM:hb

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

March 9, 2004

The Honorable Lesil McGuire, Representative
State Capitol
Juneau, Ak 99801-1182

Re: HB 244, Governor's 2004 Crime Bill

Dear Representative McGuire:

I am writing to voice my support of the Governor's 2004 Crime Bill, which I understand, will be considered as a committee substitute for HB 244. Although I support all the provisions in the Governor's new bill, there are some that are of particular interest to me because they are important in protecting children from abuse.

For over 20 years I have been working in Alaska as a prosecutor of adult sex offenders, as a prosecutor of juvenile offenders, and as a line attorney and supervisor of prosecutors of child protection (CINA) cases, many of which involve sexual abuse of children, as well as other types of abuse and neglect. I have also served on two Governor's Child Protection Task Forces and the Balloon Project Steering Committee. I continue to serve on the Juvenile Justice Working Group, the CINA and Juvenile Delinquency Court Rules Committee, the CINA Court Improvement Project and the Management Team of Alaska CARES (Anchorage's Child Advocacy Center). And I currently serve as chair of the Federal Children's Justice Act Task Force. Finally, I received the 2003 Commissioner's Award from the U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, for my "outstanding leadership and service in the prevention of child abuse and neglect." This was followed by a citation in my honor issued by the Alaska Legislature and sponsored by the Honorable Fred Dyson.

Because of my lengthy and broad experience in several aspects of the fight against child abuse and neglect articulated above, I would like to add my support and comments to four particular provisions of the Governor's crime bill that deal directly with this effort.

First, the provisions giving direction to courts in imposing sentences for defendants convicted of more than one crime will help protect children from abusers. Current laws for sentencing offenders convicted of multiple offenses are confusing and unevenly applied. As I know you are aware, child abusers often victimize more than one child, and more than one time, and therefore these new sentencing provisions are of great interest to me.

Next, because I am well aware that sexual offenders are not always adults, I support the provisions that would increase the seriousness of abuse of young children by teenagers. A 14-year-old that sexually abuses a five- year- old by penetration should be adjudicated of a felony, not a misdemeanor. Even though the incarceration/treatment of these young offenders would not drastically change, increasing the class of the offense would send the correct message to these offenders about the seriousness of the offense. Currently, to a juvenile, it appears more serious to steal someone's laptop (a felony) than to engage in full sexual penetration with a kindergartner (a misdemeanor).

Thirdly, I support the provision that would allow greater information to be released about juvenile sex offenders. A parent should be able to find out if a potential babysitter for their children has been adjudicated in the juvenile justice system for a sex offense. As a mother of two young children, I know I would be horrified if I unwittingly hired a babysitter that perpetrated on one or both of my children. My children could be scarred for life.

Finally, the provisions giving local communities authority to adopt stronger controls over alcohol in local option areas, and related provisions to curb bootlegging, will contribute to a better environment for children in rural areas. Alcohol is almost always involved in incidents of child sexual abuse, physical abuse and neglect. If perpetrators who are prone to abusing children when they have consumed too much alcohol were not allowed access to it, I guarantee the rate of child abuse and neglect would plummet.

Thank you for hearing this legislation. I believe it will greatly assist our efforts to make Alaska a safer place to be a child.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Lisa B. Nelson
Assistant Attorney General

LBN:dal

Alaska Association of Chiefs of Police

Via: US Mail

February 24, 2004

Mr. Dean Guaneli
Chief Assistant Attorney General
PO Box 110300
Juneau, Alaska 99801

RE: Governor's 2004 Crime Bill

Dear Dean,

The Alaska Association of Chiefs of Police would like to offer our support for the Governors 2004 Crime Bill. I believe this bill offers many potential solutions to problems we as Law Enforcement Officers and you as Prosecutors face day on a daily basis.

As an Alaskan Law Enforcement Officer for over 30 years I have watch our criminal justice system come from areas that were weak to a much stronger practice today. However there is still much to do to assure the safety of the people we serve as well as reducing the occurrence of serious and dangerous offenses. This bill assist's those communities that choose to reduce the use of alcohol; it improves our drunken driving laws and helps in the protection of children from juvenile offenders. These are important areas that need to be address and I believe the Governor has made a major step in the right direction.

We support this bill and offer any assistance we can provide. Please contact me if you have any questions or concerns.

Sincerely,

Thomas Lee Clemons
Chief of Police

(907) 224-3338 P.O. Box 167 Seward, AK 99664

MADD
Activism | Victim Services | Education

Mothers Against Drunk Driving
JUNEAU CHAPTER
211 4th St., Suite 314
Juneau, AK 99801
Phone (907)463-2562
Fax (907)463-2540
madd@alaska.net
www.madd.org/ak/juneau

Mothers Against Drunk Driving (MADD) supports CSSB 170 for House Bill 244.

MADD supports consecutive jail time for each death in a drunk driving crash in order for restorative justice to take place within our communities.

As a victim in the State v. Glaser case, I cannot begin to explain the unnecessary bitterness and frustration our families struggle with because of the court decision which refused to consider the multiple deaths in the drunk driving tragedy. Currently in Alaska, a loved one's life is less valuable than a stolen automobile in a felony case; this sends a dangerous message out to all Alaskans. Each life torn from us by drunk driving is certainly worth taking into individual consideration; to do otherwise would create additional heartache and trauma for victims of this violent crime.

MADD also supports the right for communities to adopt lower limits of alcohol possession and importation in order to increase the health and safety of their people.

MADD supports stricter drunk driving sanctions for high risk drivers. Habitual drunk drivers who have repeatedly chosen to endanger themselves and everyone else who shares their road system must be held accountable for their crimes.

About one-third of all drivers arrested or convicted of driving under the influence are repeat offenders. These drivers are 40% more likely to be involved in a fatal crash than those without prior DUIs.

MADD supports increased penalties for those whose choice to drink and drive results in the serious injury of an innocent victim or victims.

People who drink and drive are unable to determine if they are sober before arriving at their destination. If a person chooses to drink and drive then that person has committed a crime and should be held accountable for his/her actions.

MADD supports the recommended changes in CSSB 170 for House Bill224 as a way of deterring further drunk driving tragedies and improving Alaska's restorative justice system.

Sincerely,

Cindy Cashen

Cindy Cashen
Executive Director

ALASKA NETWORK ON
DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, Rm 209
Juneau, Alaska 99801

(907) 586-3650 ph
(907) 463-4493 fx

SB170/HB244
March 2004

Please accept this memo as a letter of support for the Governor's crime bill.

The Network particularly appreciates the administration's stance on holding perpetrators accountable for each crime they've committed by requiring consecutive sentencing for multiple counts of particularly heinous crimes, including sexual assault. The longer sex offenders can be removed from the community the safer we all are. Consecutive sentences also provide some sense of approximate justice to each victim involved, that at least the perpetrator is being required to pay something, for the crime committed against her/him.

The Network supports increasing the penalty from a class A misdemeanor to a class C felony for the crime of sexual abuse when an older minor penetrates a very young minor. Recognizing that minors who commit sexual abuse crimes are sometimes victims themselves, it is still important that the crime carry a penalty severe enough that if the minor chooses to perpetrate a sexual assault as an adult, the previous conduct can be examined.

The Network also supports releasing documents concerning adjudication of a sexual offense to protect the safety of a child or vulnerable adult. Balancing the needs of families to protect children and vulnerable adults and the juvenile offender's right to confidentiality is something we believe can be achieved through the regulation process when the department begins to implement procedures to allow for the release of information.

8.3[illegible].140 Abuse of third party appointment.

A. It is unlawful for any person to:

1. Intentionally, knowingly, or recklessly make a false statement to the court while being examined regarding the duties of a third-party custodian;

2. Intentionally, knowingly, or recklessly fail to comply with the conditions set by the court on the third-party appointment; or

3. Intentionally, knowingly, or recklessly fail to immediately report that the defendant has violated any condition of the defendant's release.

B. Violation of this section shall, upon conviction, be punishable by a fine of not more than $2,000.00 or imprisonment of not more than six months, or both such fine and imprisonment.

(AO No. 2000-95, § 10, 10-16-00; AO No. 2003-73, § 3, 4-22-03)

LEXSEE 853 P.2D 526

STATE OF ALASKA, Petitioner, v. THE HONORABLE RENE J. GONZALEZ, JUDGE OF THE SUPERIOR COURT, JILL JAHNKE-LELAND, PETER H. LELAND, and JEFFREY S. DEGRASSE, Respondents.

No. 3962, Supreme Court No. S-5003

SUPREME COURT OF ALASKA

853 P.2d 526; 1993 Alas. LEXIS 53; 5 A.L.R. 2204; 29 A.L.R.5th 747

June 4, 1993, Decided

PRIOR HISTORY: [**1]

Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Court of Appeals No. A-4063. Superior Court Nos. 3AN-S91-693 Cr., 3AN-S91-694 Cr. Rene Gonzalez, Judge.

DISPOSITION:

AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: The State appealed the ruling of the Court of Appeals of the State of Alaska, which affirmed the trial court's judgment holding that *Alaska Stat. § 12.50.101* was unconstitutional under Alaska Const. art. I, § 9. The statute authorized an order compelling testimony based on a grant of use and derivative use immunity.

OVERVIEW: In a murder trial, the State attempted to compel the testimony of a co-defendant under § 12.50.101, which allowed the State to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony. The trial court held that the statute was unconstitutional as it violated the self-incrimination right of the co-defendant. Finding no error in the lower courts' judgments, the court affirmed. The scope of the protection against self-incrimination under Alaska Const. art I, § 9 was that: (1) an individual could not be compelled to give testimony unless the State had taken measures to remove the hazard of incrimination; and (2) an individual faced a hazard of incrimination whenever the answers elicited could supported a conviction or could furnish a link in the chain of evidence leading to a conviction. Where the hazard of incrimination had been removed, the privilege against self-incrimination was no longer required. The court held that a grant of use and derivative use immunity did not remove the hazard of incrimination. The State could not meaningfully safeguard against nonevidentiary use of the compelled testimony.

OUTCOME: The court affirmed the judgment.

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege

[HN1] Alaska Const. art. I, § 9 states that no person shall be compelled in any criminal proceeding to be a witness against himself. This section does not prohibit compelling a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

Criminal Law & Procedure > Grand Juries > Self-Incrimination Privilege > ImmunityCriminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege

[HN2] Transactional immunity prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. Use and derivative use

immunity allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions.

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege
[HN3] *Alaska Stat. § 12.50.101* authorizes an order compelling testimony based on a grant of use and derivative use immunity.

Criminal Law & Procedure > Grand Juries > Self-Incrimination Privilege > Immunity
[HN4] Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. Additionally, if defendant is compelled to testify while her appeal is pending, transactional immunity will not invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction is reversed on appeal.

Criminal Law & Procedure > Evidence > Privileges > Self-Incrimination Privilege
[HN5] *Alaska Stat. § 12.50.101* states that: the State may compel testimony upon the condition that: no testimony or other information compelled, or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution. *Alaska Stat. § 12.50.101(a).*

Governments > Legislation > Interpretation
[HN6] Constitutional interpretation follows the rule that the intent underlying constitutional language should first be gathered from the plain meaning of the language itself. This inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the intention and spirit of our local constitutional language and whether the right invoked is necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Criminal Law & Procedure > Grand Juries > Investigatory Powers
[HN7] Nonevidentiary use of compelled testimony includes assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

COUNSEL:

Eric A. Johnson, Assistant Attorney General, Anchorage; Charles E. Cole, Attorney General, Juneau, for petitioner.

Margi Mock, Assistant Public Defender; Ray Brown, Assistant Public Defender; John B. Salemi, Public Defender, Anchorage, for respondent Jeffrey S. DeGrasse. Jeffrey S. Sauer, Juneau, for respondent Jill Jahnke-Leland.

JUDGES: Before: Moore, Chief Justice, Rabinowitz, Burke, Matthews, and Compton, Justices.

OPINIONBY: MATTHEWS

OPINION:

[*528] OPINION

MATTHEWS, Justice.

[HN1] Article I, section 9 of the Alaska Constitution states that "no person shall be compelled in any criminal proceeding to be a witness against himself." This section does not prohibit compelling a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. *Surina v. Buckalew, 629 P.2d 969 (Alaska 1981); State v. Serdahely, 635 P.2d 1182 (Alaska 1981)* [**2] (per curiam). However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

There are two types of immunity from prosecution in current usage. [HN2] Transactional immunity, the more protective type, prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. The narrower form, use and derivative use immunity, allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions. *Surina, 629 P.2d at 971, n.2.* In Surina and Serdahely, pursuant to our supervisory powers, we approved of transactional immunity as a matter of practice but expressed no view as to whether use and derivative use immunity might also be constitutionally permissible.

Alaska Statute 12.50.101, enacted after Surina and Serdahely were decided, [HN3] authorizes an order compelling testimony based on a grant of use and derivative use immunity. In the present case this statute has been challenged as unconstitutional under article I, section 9 of the Alaska Constitution. The superior court [**3] and the court of appeals have concluded that the

statute is unconstitutional. We granted the state's petition and now affirm the decision of the court of appeals.

FACTS AND PROCEEDINGS

On the evening of May 8, 1990, Jill Jahnke-Leland, Carl Jahnke-Leland, Peter Leland, and Jeffrey DeGrasse were arrested for the murder of Rick Zaug and the attempted murder of Tom Moore. Earlier that day Zaug and Moore had sailed from Ketchikan to Thorne Arm to go fishing. That evening the two men tied their boat to a public mooring buoy to which another boat was already tied. Soon thereafter a tragic dispute arose over use of the buoy. After angry words were exchanged, Moore and Zaug were fired upon from the shore; Zaug was killed and Moore was seriously injured.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland all gave taped statements to the police. Leland and DeGrasse admitted that each had shot at Zaug and Moore from the shore. Jill Jahnke-Leland stated that after she had words with Zaug and Moore, she headed toward shore and fired a gun shot in the air to scare Zaug and Moore. Jill Jahnke-Leland also stated that soon after she fired that shot into the air, DeGrasse and Leland began firing. **[**4]**

Leland, DeGrasse, and Carl and Jill Jahnke-Leland were each indicted for first-degree murder, attempted first-degree murder, and first-degree assault. Jill Jahnke-Leland was convicted of manslaughter and assault. She appealed to the court of appeals. Her appeal was pending during the proceedings hereinafter described **[*529]** and during the presentation and consideration of this case by this court. n1

n1 Shortly before the publication of this opinion the court of appeals affirmed her conviction and remanded her sentence. Jahnke-Leland v. State, Mem. Op. & J. No. 2675 (Alaska App., April 21, 1993). The progress of Jill Jahnke-Leland's appeal is relevant if her conviction becomes final before the state compels her to testify. In that event, Jill Jahnke-Leland would no longer be subject to conviction or punishment on account of her compelled testimony. [HN4] Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. *E.L.L. v. State, 572 P.2d 786, 788 (Alaska 1977)* ("a witness may not refuse to testify where there is no real or substantial hazard of incrimination."). Additionally, if Jill Jahnke-Leland was compelled to testify while her appeal was pending, transactional immunity would not invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction was reversed on appeal. See *State v. Runions, 100 Wash. 2d 52, 665 P.2d 1358, 1360 (Wash. 1983)* (citing *Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)*).

[5]**

In the subsequent trial against Leland and DeGrasse, the state moved to compel Jill Jahnke-Leland to testify under *AS 12.50.101*. n2 *Alaska Statute 12.50.101* allows the state to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony in a criminal prosecution. The trial court denied the state's motion, ruling that *AS 12.50.101* violates article I, section 9 of the Alaska Constitution, which protects individuals against compelled self-incrimination. n3 Leland and DeGrasse were then tried without Jill Jahnke-Leland's testimony. The trial ended with a hung jury. On retrial, the state renewed its motion to compel Jill Jahnke-Leland to testify. The trial court again denied the motion on constitutional grounds. The state sought review and the court of appeals affirmed the trial court's decision. *State v. Gonzalez, 825 P.2d 920 (Alaska App. 1992)*. We granted the state's petition for hearing from this decision.

n2 *AS 12.50.101* [HN5] states, in relevant part, that the state may compel testimony upon the condition that:

> no testimony or other information compelled . . ., or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

AS 12.50.101(a). **[**6]**

n3 Article I, section 9 of the Alaska Constitution reads as follows:

> **Section 9. Jeopardy and Self-Incrimination.** No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

IMMUNITY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

This case presents two issues: (1) What is the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination? and (2) Does *AS 12.50.101* provide immunity which adequately matches the protection of the constitutional privilege? We address each issue in turn.

Scope of the Privilege

The issue of the scope of article I, section 9 is a question of constitutional law which we decide de novo. [HN6] Constitutional interpretation follows the "rule that the intent underlying . . . constitutional language should first be gathered from the plain meaning of the language itself." *Baker v. City of Fairbanks, 471 P.2d 386, 397 (Alaska 1970).* As the court of appeals recognized, this inquiry is not controlled by any one source **[**7]** of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our local constitutional language and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Id. at 402* (emphasis added).

In the present case, our inquiry is controlled by Alaska precedent. The state and DeGrasse acknowledge that the scope of article I, section 9 is set forth in *E.L.L. v. State, 572 P.2d 786 (Alaska 1977):*

> The privilege against self-incrimination applies where the answers elicited could **[*530]** support a conviction or might furnish a link in the chain of evidence leading to a conviction. But, a witness may not refuse to testify where there is no real or substantial hazard of incrimination . . . .

Id. at 788 (citations omitted). Thus, in *Surina v. Buckalew, 629 P.2d 969, 977 (Alaska 1981),* we stated: **[**8]** "where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required." Surina, however, left open the question of what type of immunity would "remove" "the hazard of incrimination." From these authorities we can piece together the scope of the article I, section 9 protection against self-incrimination: (1) an individual may not be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination; and (2) an individual faces a hazard of incrimination whenever "the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction." n4

> n4 This scope largely parallels the scope the Supreme court has set for the Fifth Amendment. *Kastigar v. United States, 406 U.S. 441, 453, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).* None of the parties have suggested, nor do we consider, Justice William O. Douglas' position that the privilege "put[s] it beyond the power of [government] to compel anyone to confess his crimes." *Id. at 467* (emphasis added) (Douglas, J., dissenting); see *Ullmann v. United States, 350 U.S. 422, 446, 100 L. Ed. 511, 76 S. Ct. 497 (1956)* (Douglas, J., dissenting).
>
> At times, DeGrasse claims to broaden the scope of article I, section 9 by stating that a grant of immunity must "place[] [the witness] in the same position as if he remained silent." The Supreme Court has rejected this formulation of the self-incrimination guarantee, instead favoring an interpretation similar to the one stated above. See *United States v. Apfelbaum, 445 U.S. 115, 63 L. Ed. 2d 250, 100 S. Ct. 948 (1980).* This formulation also begs a very important question: put in the same position with respect to what interest? Clearly certain interests, such as keeping the compelled testimony from coming to public light, could not be achieved without implementing extraordinary means. The standard "the same position as if he remained silent" must have a specific reference point. In the present case, that reference point is incrimination. Thus, a meaningful reading of the "same position" argument is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination from his own words. Thus, DeGrasse's seemingly restrictive standard really reduces to this court's prior standard: remove the hazard of incrimination due to the compelled person's own words.

[9]**

AS 12.50.101 and the Scope of the Privilege

We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination. See

Kastigar v. United States, 406 U.S. 441, 468, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) (Marshall, J., dissenting). In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy article I, section 9. Because we doubt that workaday measures can, in practice, protect adequately against use and derivative use, we ultimately hold that *AS 12.50.101* impermissibly dilutes the protection of article I, section 9. Our conclusion rests on two bases.

First, we are persuaded that problems of proof and ordinary human frailties combine to pose a potent threat to **[**10]** an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used. Justice William Brennan expressed these twin concerns in his dissent in *Piccirillo v. New York, 400 U.S. 548, 552, 27 L. Ed. 2d 596, 91 S. Ct. 520 (1971)* (Brennan, J., dissenting). According to Justice Brennan:

> **[*531]** all the relevant evidence will obviously be in the hands of the government -- the government whose investigation included compelling the individual involved to incriminate himself. . . . This argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is **[**11]** often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568; see also *Kastigar, 406 U.S. at 469* (Marshall, J., dissenting).

For this important reason, we also reject the state's proffered analogy between compelled testimony and coerced confessions. In a case involving a coerced confession, the facts relevant to the "voluntariness" of the confession will be known and available to both the state and the accused. In the case of compelled testimony, however, the accused can only speculate as to how widely her compelled statement has been disseminated. Procedures and safeguards can be implemented, such as isolating the prosecution team or certifying the state's evidence before trial, but the accused often will not adequately be able to probe and test the state's adherence to such safeguards. This danger does not subside in the face of even the strictest burden of proof, for, as Justice Thurgood Marshall aptly noted, although the government may have the burden of proof, "the government will have no difficulty in **[**12]** meeting its burden by mere assertion if the witness produces no contrary evidence." *Kastigar, 406 U.S. at 469* (Marshall, J., dissenting).

One of the more notorious recent immunity cases, *United States v. North, 285 U.S. App. D.C. 343, 910 F.2d 843* (D.C. Cir.), modified, *287 U.S. App. D.C. 146, 920 F.2d 940 (D.C. Cir. 1990)* (en banc), cert. denied, *111 S. Ct. 2235 (1991)*, illustrates another proof problem posed by use and derivative use immunity. North involved the criminal conviction of Oliver North for his alleged participation in the Iran/Contra Affair. Prior to his criminal trial, North had been compelled to testify before congressional committees investigating the Iran/Contra Affair. This testimony received extensive coverage in the national media. As required by federal law, North received immunity from use or derivative use of any testimony given before the committees.

On appeal, the District of Columbia Circuit identified two witness-related problems with regard to North's compelled testimony. **[**13]** First, the prosecution could use the compelled testimony to refresh the recollection of a witness testifying at North's criminal trial. Id. at 860-61. This use could be policed by relying on the good faith assurances of the prosecution and its witnesses that no such use was made of the compelled testimony. The second problem, however, is more troublesome. In a case such as North, where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. Id. at 863. In such cases, a court would face the insurmountable task of determining the extent and degree to which "the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." Id. We have not been persuaded that procedures exist to probe the mind of a witness in order to discover such use of compelled testimony.

The second basis for our decision is that the state cannot meaningfully safeguard against nonevidentiary use of compelled testimony. n5 [HN7] Nonevidentiary use "include[s] **[*532]** assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting **[**14]** evidence, planning

cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).* Innumerable people could come into contact with the compelled testimony, either through official duties or, in a particularly notorious case, through the media. n6 Once persons come into contact with the compelled testimony they are incurably tainted for nonevidentiary purposes. See id. Safeguarding against such dangers will prove well nigh impossible,

> for the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469 (Marshall, J., dissenting).

n5 Although both courts and commentators divide on whether a constitutional protection against self-incrimination should prohibit nonevidentiary use of compelled testimony, see, e.g., *United States v. Byrd, 765 F.2d 1524, 1530-31 (11th Cir. 1985)* (allowing nonevidentiary use); *United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)* (prohibiting nonevidentiary use); Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, *66 Tex. L. Rev. 351, 371-83 (1987)* (urging that nonevidentiary use be allowed); Kristine Strachan, Self-Incrimination, Immunity, and Watergate, *56 Tex. L. Rev. 791, 806-10 (1978)* (urging that nonevidentiary use be prohibited), the state concedes that the Alaska constitution prohibits such use. Additionally, we believe that nonevidentiary use could "furnish a link in the chain of evidence leading to a conviction," *E.L.L., 572 P.2d at 788,* or at least forge and shape that chain, sufficiently to fall within the conduct prohibited by article I, section 9. **[**15]**

n6 This situation is further complicated if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.

Nonevidentiary use of compelled testimony can adversely affect an accused in many ways. When compelled testimony is incriminating, the prosecution can "focus its investigation on the witness to the exclusion of other suspects, thereby working an advantageous reallocation of the government's financial resources and personnel." Strachan, supra, at 807. The compelled testimony "may help explain information otherwise known," which could aid the prosecution in the presentation of its case. Id. With knowledge of how the crime occurred, the prosecution may refine its trial strategy to "probe certain topics more extensively and fruitfully than otherwise." Id. Indeed, a defendant may choose to relinquish her right to testify out of fear that the prosecution has honed its cross-examination with its knowledge of the compelled testimony. Id. Regardless of whether Jill Jahnke-Leland testified at her first trial, the prosecution's mere knowledge **[**16]** of her compelled testimony might significantly alter her decision whether to do so in a possible retrial. These are only some of the possible nonevidentiary advantages the prosecution could reap by virtue of its knowledge of compelled testimony.

Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be "nonevidentiary uses of which even the prosecutor might not be consciously aware." *State v. Soriano, 68 Ore. App. 642, 684 P.2d 1220, 1234 (Or. App. 1984)* (only transactional immunity can protect state constitutional guarantee against nonevidentiary use of compelled testimony). We sympathize with the Eighth Circuit's lament in McDaniel that "we cannot escape the conclusion that the [compelled] testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel, 482 F.2d at 312.* This incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.

We are not alone in construing a state constitutional guarantee **[**17]** to require transactional immunity in exchange for compelled incriminating testimony. Courts in Hawaii, Massachusetts, and Oregon have reached the same result. See *State v. Miyasaki, 62 Haw. 269, 614 P.2d 915, 922-23 (Hawaii 1980); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915, 921 (Mass. 1982); Soriano, 684 P.2d at 1232.* n7 In each case, the court relied, in part or in whole, on dangers presented by the inability to adequately enforce a ban on derivative use. See *Miyasaki,* **[*533]** *614 P.2d at 923-24; Colleton, 444 N.E.2d at 920-21; Soriano, 684 P.2d at 1233-34.*

n7 But see, e.g., *State v. Strong, 110 N.J. 583, 542 A.2d 866, 871-72 (N.J. 1988); People v. Johnson, 133 Misc. 2d 721, 507 N.Y.S.2d 791, 793 (Sup. 1986); Welsh v. Commonwealth, 14 Va. App. 300, 416 S.E.2d 451, 455 (Va. App. 1992).*

[**18]

Because of the manifold practical problems in enforcing use and derivative use immunity we cannot conclude that *AS 12.50.101* is constitutional. Mindful of Edward Coke's caution that "it is the worst oppression, that is done by colour of justice," n8 we conclude that use and derivative use immunity is constitutionally infirm.

n8 1 Lord Edward Coke, The Second Part of the Institutes of the Laws of England 48 (1797).

AFFIRMED.

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 4, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: May 9, 2003

The JUDICIARY Committee considered: **HB 244**

HOUSE BILL NO. 244 **CRIMINAL LAW/SENTENCING/PROBATION/PAROLE**

"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 244 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW	1			✓
COR	2	✓		
ADM		✓		

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Holm			✓	
	Coghill		✓		
	Ogg			✓	
	Gruenberg			–	
	SAMUELS	✓			
Chair:	McGuire			✓	
Chair:					

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: May 10, 2003

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1024\A, HB 244, incorporating the attached eight amendments (Amendments # 1, 2, 3, 4, 5, 6, 10 &14 passed while the other amendments failed). The bill was passed out of committee yesterday.

If you have any questions, please call me at 4990. Thank you and good luck with this one!

sects. 3-5

AMENDMENT #1 - Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page ~~1~~ 2, line ~~9~~ 10 - Page 3, line 6:
Delete all material.

Renumber the following bill sections accordingly.

Conceptual Amendment #2 - PASSED. BY REP. GARA

Removing §'s (sections) 1 & 2 of the Bill & renumber accordingly.

HB 244
(Sect. 6)

Anderson - 1

Amendment # 3 - Adopted

delete "a"
P. 3, L. 10 after (3) insert "an immediate"

Page 3, line 11, after "prisoner" insert "or any relative or friend of the prisoner"

This amendment deals with Section 6 of the bill, which seeks to restrict a prisoner's access to an attorney. Although an arrestee has been Mirandized and advised of their right to seek counsel, a prisoner's relative or friend should be able to retain counsel on their behalf. If the prisoner does not wish to meet with the attorney provided by their relative or friend, they retain the right to refuse counsel. I support this amendment because it has not been demonstrated that limiting a prisoner's right to counsel is in any way good public policy.

HB 244 Anderson .2

conceptual

Amendment #4 – Adopted

(sect. 7)

Page 3, line 15 – Page 4 line 1:
Delete all material. delete And all sections conforming to this deletion

Renumber sections accordingly.

This amendment removes Section 7 from the bill. Prior convictions should not be introduced in a criminal trial. It is highly prejudicial and has the potential of biasing a jury.

AMENDMENT #~~*~~5 - Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page 4, line 15 - Page 6, line 1: (sects. 9-12 & 17)
Delete all material.

Page 8, lines 11-16:
Delete all material.

Renumber the following bill sections accordingly.

conceptual **AMENDMENT #~~1~~ 6** -Adopted

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 244

Page 8, lines 7-10: (section 16)
Delete all material.

Renumber the following bill sections accordingly.

Amendment #9 - FAILS HB 244

P. 10 L. 5

Delete ~~p. 9 line 8~~ - p. 11 line 28

(section ~~2~~ 23)

sect. 23 stays in

Amend. #10 - conceptual - PASSES

p. 11, L. 11 after ";" delete "and"

p. 11, L. 12 before . insert "; and (D) the prosecution has not designated the officer or investigator as an expert witness."

AMENDMENT 13 - FAILS
to HB 244

By Rep. Gruenberg

1 Delete page 12, lines 24-30
(section 26)

---

by Rep. McGuire

Concept. Amend. #14 → PASSED. (Clean up Amendment)
Renumber entire bill accordingly.
make any necess. conforming A's
Re-title accordingly.

HOUSE BILL 244
Sectional Analysis

Section 1. "Heat of passion" applies only to First Degree Murder and Second Degree Murder. If a person kills while in a passion that was the result of serious provocation by the intended victim, that reduces the killing from murder to manslaughter. In one case, a man broke into the home of a drug dealer to recover money, and shot the drug dealer. He claimed that the shooting was done in a "heat of passion" and the Alaska Supreme Court reversed his murder conviction because the trial judge did not believe he was entitled to raise this defense. "Heat of passion" is often a fall-back position for defendants who do not think they will completely escape responsibility under self-defense. In cases where the state is able to disprove self-defense, it may also be required to disprove "heat of passion." This section would change "heat of passion" from a defense, that the state must *disprove* beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence. The defendant is the person who knows the motivation for the killing, and should bear the burden of establishing this justification.

Sections 2 - 4. These change self-defense from a defense, that the state must disprove beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence, with two exceptions. First, self-defense would remain a defense for the state to disprove if the person was on his or her property and did not use force against a household member; Second, it would remain a defense as under current law for force used by a peace officer acting within the scope of his or her duties. In most homicides, the defendant is only person still alive who was present at the killing. As with the defense of duress, the defendant is the person who knows the motivation for the use of force, and should bear the burden of establishing this justification. Section 2 deals with use of non-deadly force in self-defense. Sections 3 and 4 deal with deadly force. Section 4 also provides that a defendant may not claim self-defense for a killing if he brought a deadly weapon to the encounter, and was aware of and disregarded the risk that the encounter would result in combat.

Section 5 makes use of force in defense of a third person an affirmative defense. As with self-defense, the state would still be required to disprove the defense if the incident occurred on the person's property or the force was used by a peace officer.

Section 6 provides that an adult who has volunteered to talk to the police must request to be visited by an attorney, relative or friend. Occasionally attorneys people will demand to visit a person under arrest, even if the person has not made a request for the visit. This interrupts the police investigation, but it is allowed under current law. All other provisions in section 6, regarding the right to immediately make phone calls, are unchanged from current law.

Section 7. When the law provides that an element of a crime depends on a prior conviction or convictions, such as felony drunk driving, the state must prove beyond a reasonable doubt that the past convictions occurred. But the Alaska courts have said that this must occur in two trials, and that the jury must not be told of the past convictions in the first trial. This section reverses that court decision. Section 7 also provides that the defendant may not again litigate the validity of the prior conviction, unless the defendant was not provided counsel or a jury trial. Prior convictions should not again be subject to attack where the defendant has had the opportunity to appeal, and to exercise post-conviction remedies.

Sections 8 -12 and 17. These sections adopt a procedure for making decisions about Fifth Amendment claims and the granting of immunity by the state. Alaska law requires complete, transactional immunity from prosecution for a person who has claimed a privilege; thus, the decision to grant immunity must be made carefully. Currently, the courts hold secret hearings with witnesses who refuse to testify, and then give the state no information that the state needs to decide whether to grant immunity to the witness. Under this bill, the state is allowed the information it needs to make a rational decision about granting immunity from prosecution. Section 8 merely conforms statutory law to a constitutional decision by the Alaska Supreme Cournt. Sections 9 and 10 are minor clarifying amendments. Section 11 defines a term that explains that the witness can communicate to the court through his or her attorney, rather than speaking directly. Section 12 adopts a procedure where the decision about the privilege is made after an attorney is appointed for the witness, and after input by both the witness and the state. Section 17 clarifies that a witness who claims a Fifth Amendment privilege not to testify is entitled to a public defender if the cannot afford one. This codifies current court practice.

Sections 13 and 14, 18 - 20. Sections 13, 18 - 20 are conforming amendments regarding consecutive sentencing. Section 14 gives direction to courts in sentencing for more than one offense. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter or kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Section 15 is similar to section 7, and provides that in imposing a presumptive sentence (which depends on prior convictions), the defendant may only challenge the validity of a prior conviction if he was denied the right to counsel or the right to a jury trial.

Section 16 would adopt a new mitigating factor for sentencing in a sexual felonies. Because these trials are so difficult for the victim, it would allow the court to consider whether to impose a lesser sentence if the defendant reduced the impact on the victim by entering a plea of guilty or no contest within 30 days of arraignment.

Section 21 changes Rule 16 (c)(5), Alaska Rules of Criminal Procedure, to require a defendant to give notice of certain defenses 30 days in advance of trial. Current law requires a shorter notice, and is routinely ignored by defense attorneys and courts.

Section 22 makes a conforming amendment to Rule 16(e)(1), Alaska Rules of Criminal Procedure, by cross-referencing consequences provided in other law for violation of the discovery rules or an order issued by a court under the discovery rules.

Section 23 addresses pretrial discovery of expert witnesses by both the prosecution and the defense. It requires that no later than 45 days before trial, both parties provide opposing counsel with the name and curriculum vitae of expert witnesses. The defense must disclose only those experts that it may call at trial. The prosecution must disclose experts that it may call at trial or that have worked on the case. Defense attorneys frequently instruct their experts not to write reports, because the report would have to be turned over to the prosecution. The prosecution has no such luxury, and is required to provide an expert's report. This section provides that if the defense expert has not written a report, the prosecution is entitled to depose the expert at the expense of the defense. It requires the court to disallow expert testimony if disclosure isn't complete seven days before trial or another time ordered by the court.

Section 24 amends the Alaska Rules of Evidence to provide that a voluntary statement obtained in violation of the technical *Miranda* requirements, may be used to impeach the person who made the statement, if that person testifies differently. Further, evidence that has been suppressed may also be used to impeach a witness. Current law only allows these statements and evidence to be used at a later perjury trial. This makes them available to impeach a witness at the first trial.

Section 25 extends the time for use of prior convictions for impeachment at trial from five years from conviction, to five years from the date of unconditional discharge.

Section 26 adopts a new exception to the rule against use of hearsay evidence, by allowing the use at trial of statements made within 24 hours of a crime involving domestic violence, if the statement reports or describes the crime.

Sections 27 - 31 include conforming repealers, a notice of a court rule change described above, procedural directions, and an effective date, July 1, 2003.

HB 244 Anderson, 3

Amendment # 7 - FAILS

Page 9, line 20, after "defense" delete the remainder of line 20 through "defense" on line 22.

This amendment addresses Section 21. Although I have no problem to require more advance notice of certain defenses, I do object to mandating the courts deny the defendant from asserting the designated defenses if notice is not provided at least seven days before trial.

Amendment 8 - FAILS HB 244

Delete p. 7 line 26 - p. 8 line 6.
(Section 15)

Amendment 11 - FAILS HB 244

~~Delete~~ Delete
P. 11 Line 29 - p. 12 line 13.
(section 24)

Amendment 12 - FAILS HB 244

Delete

p. 6 line 14 - p. 7 line 25
(Sect. 14)

p. 8 line 17 - p. 9 line 6.
(Sect. 18 & 19)

TO Vanessa FROM Jenn Rep McGuire

SENATE BILL 170 / HOUSE BILL 244

Questions

1) Generally, should a person be innocent until proven guilty or guilty until proven innocent?

2) Does changing the use of nondeadly force in defense of self (AS 11.81.330), the use of deadly force in defense of self (AS 11.81.335) and the use of force in defense of a third person (AS 11.81.340) from "defenses" to "affirmative defenses" now place the burden on the individual to prove his or her innocence?

3) Under existing law, aren't individuals already required to retreat if they can rather than use deadly force? Answer: Yes! (AS 11.81.335(b))

4) Won't SB 170/HB 244 chill the right to bear arms for self defense by placing on potential crime victims who would act in self defense, the burden of proving their innocence in addition to the existing burden of having to decide if retreat is reasonable?

5) Under proposed subsection (c) of AS 11.81.335 (page 2, line 18 of the bill), isn't a woman with a protective order who is carrying a firearm for self-defense because she anticipates an "encounter" with an abusive, estranged "household member" and further anticipates that the encounter could result in "combat," stripped of her right to use deadly force in self-defense?

6) What is the definition of "household member" (page 2, lines 6 and 25)? Answer: It is broad!

7) Is it possible that proposed subsection (c) of AS 11.81.335 will allow juries to engage in second guessing a defendant's legitimate use of force in defense of self, potentially chilling the right to bear arms for self-defense?

Comments

1) The apparent purpose of SB 170/HB 244 is to allow the state to convict people more easily.

2) Victims of violent crime are further restricted in their right to self-defense.

3) Another purpose of SB 170/HB 244 appears to be to make it more difficult for a defendant to successfully plead defense of self or others. -This is accomplished by saddling the defendant with the heavier burden of an "affirmative defense" rather than the present burden of a "defense."

4) Being armed for self-defense can be construed as reckless under SB 170/HB 244.

Suggestion

Delete sections 2,3,4 and 5 of the bill.

Subject: NRA Contact
Date: Mon, 14 Apr 2003 13:06:01 -0800
From: Jennifer Yuhas <Jennifer_Yuhas@Legis.state.ak.us>
Organization: Alaska State Legislature
To: vanessa_tondini@legis.state.ak.us

Brian Judy is the Regional Rep for the NRA for the 6 NW States.

His desk is 916.446.2455
His cell is 916.806.3854

He is operating out of the office on his cell phone today - but wil be back in the office tomorrow - his office is in Sacremento.

He says that Wayne Anthony Ross has several concerns with this legislation as well - and was supposed to call the chair today - but apparently hasn't done that....

I'm available too later - thanks - Brian says he "feels much better than he did 15 minutes ago" now that he also found out that Anderson and Holm have concerns and Gruenberg is "going ballistic" about this.

Lesil, Im assuming we don't plan to pass this out today... many concerns.

V- can you contact him on my behalf plz to assess his concerns.

Subject: SB-170/HB-244
Date: Tue, 29 Apr 2003 23:01:01 -0800
From: "Grant Hunter" <hunterpp@corecom.net>
To: <vanessa_tondini@legis.state.ak.us>

4-29-2003

Madame:

I live at 2700 Forest Park Drive in Anchorage.

I respectfully request that the Judiciary Chair oppose House Bill 170 and Senate Bill 244 because they will impede the right of self-defense in those most in need of the same. I incorporate by reference the article by Brant McGee and Barbara Brink at page B5 of the Anchorage Daily News on 4-26-2003. As you may know, I am from the opposite side of the political spectrum. I firmly believe that Yates vs. United States was incorrectly decided and that the United States would be a better place if Barry Goldwater had been elected in 1964. Despite my differences on economic and national security policy with Mr. McGee and Ms. Brink, I stand shoulder-to-shoulder with them on the need to protect the natural law right to protect one's life and the Second Amendment right to keep and bear arms.

Grant W. Hunter
645 G. Street Ste. 100 PMB 653
Anchorage, AK 99501

907-258-6735

hunterpp@corecom.net

Subject: SB 170
Date: Fri, 2 May 2003 20:32:09 EDT
From: Craylaw@aol.com
To: rep.lesil.mcguire@legis.state.ak.us
CC: rep.tom.mcguire@legis.state.ak.us, rep.jim.holm@legis.state.ak.us, rep.dan.ogg.@legis.state.ak.us, rep.ralph.samuels@legis.state.ak.us, rep.les.gara@legis.state.ak.us, rep.max.gruenberg@legis.state.ak.us

Reprsentative McGuire, and members of the House Judiciary Committee --

It has come to my attention that the legislature is considering amendment of statutes governing the standard of proof applicable to a criminal defendant's assertion of self-defense as a justification for use of a weapon. I understand that John Novak testified before the Senate Judiciary Committee in support of suggested amendments. Apparently Mr. Novak suggested that certain recent verdicts rendered after murder trials support his view that the present law is in need of amendment. Mr. Novak is reported to have testified that in particular, the jury verdict in *State v. Vasco Vea* indicates that the present law is insufficient to protect the community. Following Mr. Novak's testimony, Senator Ogan is reported to have observed that it was obvious to him that in *Vea*, there was a "flawed jury." Assuming the accuracy of what has been reported to me, I must respectfully disagree with Mr. Novak's testimony, and the remark by Senator Ogan. I do not fault Senator Ogan, for if the facts presented to the jury in *Vea* had been as reported to the committee, Senator Ogan's remark would probably have merit.

I sat on the *Vea* jury, and was its foreperson. There was not a single suggestion during the course of either the State's case, presented by Assistant District Attorney David Wallace, or Mr. Vea's case, presented by Carmen Gutierrez, that Mr. Vea or anyone else involved in the actual shooting at issue, or the events described as leading up to the shooting, was a gang member or that the shooting or preceding events were gang related. This includes the fellow who died in the incident, the fellow who was seriously wounded in the incident, Mr. Vea, and the people with whom he was spending his afternoon on the day of the shooting. Simply put, the jury had *no* evidence of gang activity as a component of the incident or any of the events leading up to it. Hence, any suggestion by Mr. Novak that Mr. Vea was carrying a gun because his gang and another were at odds over some issue related to gangs is either false, or for reasons known to Judge Souter was not presented to the jury.

There *was* violence before the shooting for which Mr. Vea was on trial. His best friend had been shot several times by the the people who later were shot by Mr. Vea. Another of Mr. Vea's friends was chased through a neighborhood by the same people who were thought to be carrying baseball bats and guns. Mr. Vea's home was the subject of a drive-by shooting, during which drywall dust settled on his and his wife's baby as bullets pierced the wall not far above the baby's crib. The shooters were not identified, but the inference was the fellows later shot by Mr. Vea were involved. I could go on, since there was a wealth of evidence that the people shot by Mr. Vea were a far cry from model citizens. I dare say that if Senator Ogan -- if he does not already -- would arm himself if he thought the likes of the people Mr. Vea shot were out to get him.

As to the shooting itself, Mr. Vea was not in a car when it occurred. Rather, the evidence at trial was that Mr. Vea was playing with some dogs in a yard adjacent to where several friends of his were having a enighborhood barbecue, at which barbecue Mr. Vea himself was an invited guest, when the two fellows he shot "rolled up" on Mr. Vea and his friends. The evidence of events as the car rolled up supported the jury's conclusion that Mr. Vea had every reason to be in fear of his life. He was backed up against a fence, the car turned directly toward him, and he could clearly see who was in the car. Bullet wounds in the fellow that died further supported that he was reaching for a semi-automatic pistol found in that vehicle when he was shot by Mr. Vea.

I would add some of the jurors' thoughts during the course of deliberations. First, there were at least 2 jurors who thought, based on the evidence at trial, that Mr. Vea deserved a medal, not prosecution, for shooting the two men. Second, there was no doubt in any of the jurors' minds that Mr. Vea feared for his life when the car with the two guys drove up to Mr. Vea and his friends and turned directly toward Mr. Vea. There was no doubt in any of the jurors' minds that such fear was reasonable. There was no doubt that Mr. Vea was justified in defending himself by shooting those men.

The *Vea* jurors very carefully considered all of the evidence presented during the course of a nearly 3 week trial. Only after very studied deliberation was Mr. Vea acquitted. That this was the correct result was essentially corroborated by Mr. Wallace after the trial. When I told Mr. Wallace that he had put on a good case, given what he had to work with, I clearly remember his response, "If I'm going to lose one, this is the one to lose." This was not a "flawed jury," but a panel of responsible, thoughtful individuals with whom I was proud to serve as a juror.

Mr. Novak does a terrible disservice to the public, jurors, Mr. Vea's jury, and your committee, by painting an erroneous picture of the evidence at Mr. Vea's trial. Please do not compound Mr. Novak's error by tinkering with statutes that do not warrant tinkering. In the experience of this juror, the system, under the law as written, worked precisely as it should -- a defendant who was in fear of his life took the life of another under circumstances which fully justified the killing.

Thank you for considering my input into your deliberations on SB 170.

Respectfully,

Charles W. Ray, Jr.
711 H Street, Suite 310
Anchorage, AK 99501
phone (907) 274-4839
crraylaw@aol.com

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 244
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to the Code of Criminal Procedure; . . ."
BRU Criminal Division
Component All
Sponsor Rules Committee
Requester Governor
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The bill proposes a number of changes in the law regarding criminal defenses and criminal procedures. It addresses self-defense, and other defenses such as acting in the heat of passion and using deadly force in defense of others. It also would put some limits on collateral attacks on prior convictions. Additionally, the bill adopts a rational procedure for courts to follow in deciding claims of privilege and the granting of immunity, and it makes changes in sentencing procedures.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/20/03 8:30 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/20/2003
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 244
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Title: Criminal Procedures, Sentencing & Related Issues
Sponsor
Requester

Dept. Affected: Department of Corrections
BRU: Administration & Operations
Component: Institution Director's Office
Component No.: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.4	54.4	98.6	173.6	194.3	224.9
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	3.4	54.4	98.6	173.6	194.3	224.9
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**3.4**	**54.4**	**98.6**	**173.6**	**194.3**	**224.9**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Time served is estimated based on the time that would have been served under this bill for defendants sentenced during the time period 1/1/2001 through 12/31/2001. Time served under current law is not included on Fiscal Note estimates. Months are based on an average of 30 days per month and the FY03 cost of care of $113.31. Sentences timeframe is estimated as beginning 7/1/2003.

See attached:

Prepared by: Jerry D. Burnett, Director — Phone (907) 465-3339
Division: Administrative Services — Date/Time 3/21/03 8:31 AM
Approved by: Portia C.K. Parker, Deputy Commissioner — Date 3/21/2003
Agency: Department of Corrections

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 244

ANALYSIS CONTINUATION

For years past FY 2009, there could be a cumulative effect of long-term and short-term sentence increases that would result in higher costs on an annual basis. We have not attempted to estimate these future year costs past FY 2009. Given the recidivism rates for many offenders, it is not clear that these longer sentences will actually have the effect of increasing costs to the Department of Corrections. Our costs are the same on a daily basis whether offenders are serving an extra period of incarceration or are reincarcerated for a new offense. To the extent that increased sentences may reduce recidivism for this group of offenders, the legislation may result in lower costs in future years.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB244
(S) Publish Date: 4/4/2003

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title "An Act relating to the Code of Criminal Procedure;..."
BRU Legal and Advocacy Services
Component Public Defender Agency
Sponsor Rules Committee
Requester House Judiciary
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	106.4	106.4	106.4	106.4	106.4	106.4
Travel	4.2	4.2	4.2	4.2	4.2	4.2
Contractual	13.0	13.0	13.0	13.0	13.0	13.0
Supplies	2.0	2.0	2.0	2.0	2.0	2.0
Equipment	13.4	1.3	1.3	1.3	1.3	1.3
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**139.0**	**126.9**	**126.9**	**126.9**	**126.9**	**126.9**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	139.0	126.9	126.9	126.9	126.9	126.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**139.0**	**126.9**	**126.9**	**126.9**	**126.9**	**126.9**

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill proposes numerous changes in criminal law and procedure. These changes will result in a financial impact on the Public Defender Agency. The impact will be felt in increased preparation for trials in felony and misdemeanor cases as described below. The Agency will need two additional Investigators, one in Anchorage and one in Fairbanks, the offices with the highest caseloads, to meet this need. Currently the Agency only has 13.5 investigators handling over 20,000 cases a year.

See attached page for continuing analysis.

Prepared by: Linda K. Wilson, Deputy Director + Kevin Jardell Dept of Admin. Phone (907)-334-4416
Division Public Defender Agency Date/Time 5/7/03 1:27 PM
Approved by: Mike Miller, Commissioner Date 5/7/2003
Agency Department of Administration

ANALYSIS CONTINUATION

Sections 1-5 change long-standing Alaska laws on self-defense, defense of others, and heat of passion and require the defense to carry the entire burden of proving to the jury that the defendant acted in self-defense, defense of others, or in the heat of passion. Under current law the defendant must produce some credible evidence of self-defense, defense of others or heat of passion before a judge will allow a jury to consider the defense, but once sufficiently produced, the state then has the burden of proving that the defendant's actions were not justified. The Agency will have increased investigative costs as a result of this change.

Shifting the burden to the defense to prove self-defense, defense of others, and heat of passion by a preponderance of the evidence in many instances will require more defense investigative efforts to find, arrange and then have the attorney present the relevant evidence. Relevant evidence to the defense is not always in the exclusive possession of the individual defendant.

Sections 7 and 15 of the bill propose to change the burden of proof, currently belonging to the prosecution, to make it the defense's burden of proof to challenge the validity of a prior conviction in both a prosecution where the prior conviction is an element of the crime being prosecuted and at sentencing where a prior conviction may result in a longer sentence. The defense must prove by a preponderance of the evidence that a prior conviction, sometimes from another state, that is either an element of the crime being prosecuted or is being used to seek a longer sentence, is invalid because of the denial of the right to counsel or jury trial. Shifting this burden of proof onto the defense will require more investigation efforts from the defense to find out the underlying facts in the old case, perhaps from out of state, and then retrieve evidence from that old case to be presented in the current case to meet the burden of proof. This is not an easy task to accomplish by an agency that is outside of law enforcement, and does not have the numerous resources to draw on to assist them across the country.

Sections 21 - 23 concern notice of defenses and experts and require the defense to give notice sooner than required under current law. It also adopts serious sanctions for failures to timely notify the prosecution. These changes in the rules will require the defense to put forth additional investigative efforts related to experts and defenses to meet these earlier deadlines in order to avoid the significant sanctions proposed.

Sections 13, 14, and 20 seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate the court's ability to determine the amount of consecutive time to be imposed for certain crimes. It will likely result in the inability to resolve cases short of trial because of the exposure to mandatory consecutive sentences. This fiscal impact is not easily determined, but inevitable.

Anchorage, AK 99501
(907)334-4400 FAX: (907)269-5476

ALASKA PUBLIC DEFENDER AGENCY
- Anchorage Office -

Fax

CONFIDENTIAL !!!
IF RECEIVED IN ERROR PLEASE SEND BACK IMMEDIATELY TO FAX # ABOVE.
THANK YOU!

DATE: 5-6-03
TO: Vanessa - House Judiciary
AGENCY: [redacted]
TELEPHONE #: _____ **FAX #:** 465-6592

Number of Pages (including cover sheet): 10

FROM: Linda Wilson
AGENCY: Public Defenders
TELEPHONE #: 334-4416 **FAX #:** 269-5476
(CASE NAME/#: HB 244)

COMMENTS:

Vanessa, Here are some handouts that I think would be very helpful for the Judiciary committee members to have for the hearing tomorrow. Would you distribute these to them if you agree?

Thanks, Linda Wilson

ing it. A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a class A misdemeanor. (§ 10 ch 166 SLA 1978; am §§ 9, 10 ch 143 SLA 1982; am §§ 17, 18 ch 37 SLA 1986; am §§ 2, 3 ch 59 SLA 1988; am §§ 7, 8 ch 54 SLA 1999)

COMMENTARY

From Senate Journal Supp. No. 47, at 124 (June 12, 1978):

This section lists the six classes of offenses in title 11: Class A, B and C felonies, class A and B misdemeanors and violations. Only three offenses are not classified: murder in the first and second degree and kidnapping.

The terms "offense", "crime", "felony", "misdemeanor", and "violation" are defined in AS 11.81.900. All forms of prohibited conduct described in the Code are offenses. An offense is either a crime or a violation. A crime is an offense for which a sentence of imprisonment is authorized. Crimes are either felonies or misdemeanors. A felony is a crime for which a sentence of imprisonment of more than one year is authorized. A misdemeanor is a crime for which a sentence for a term of more than one year may not be imposed. A violation is a noncriminal offense punishable only by fine.

Offenses are classified based on the type of injury "characteristically caused or risked by commission of the offense and the culpability of the defendant." The injury risked or caused may be to a person, property, the family, public administration, public order, or public health and decency. The "culpability of the defendant" refers to which culpable mental state — intentionally, knowingly, recklessly, or criminal negligence — the defendant committed the acts constituting the offense.

From House Journal Supp. No. 64, at 3 (May 29, 1980):

These sections make only technical changes to reflect the fact that the classification of Sexual Assault in the First Degree has been changed from a class A to an unclassified felony.

CROSS REFERENCES

Definition of "offense," "crime," "conduct," "felony," "serious physical injury," "misdemeanor," "physical injury," "violation" — AS 11.81.900(b)

Original Code Provision — None.

Article 4.

General Principles of Justification.

Section
300. Justification: Defense
320. Justification: Necessity
330. Justification: Use of nondeadly force in defense of self
335. Justification: Use of deadly force in defense of self
340. Justification: Use of force in defense of a third person
350. Justification: Use of force in defense of property and premises
370. Justification: Use of force by a peace officer in making an arrest or terminating an escape
380. Justification: Use of force by private person assisting an arrest or terminating an escape
390. Use of force by a private person in making arrest or terminating an escape
400. Justification: Use of force in resisting or interfering with arrest
410. Justification: Use of force by guards
420. Justification: Performance of public duty
430. Justification: Use of force, special relationships
440. Duress
450. Entrapment

Sec. 11.81.300. Justification: Defense. Except as otherwise specified in this title, justification as provided in AS 11.81.320 — 11.81.430 is a defense. (§ 10 ch 166 SLA 1978; am § 25 ch 102 SLA 1980)

COMMENTARY

From Senate Journal Supp. No. 47, at 126 (June 12, 1978):

This section classifies the various forms of justification described in AS 11.81.320 — 11.81.430 as defenses. If some evidence of justification is admitted at trial the state will have the burden of disproving the defense beyond a reasonable doubt. See definition of "defense" in AS 11.81.900(b).

From Senate Journal Supp. No. 44, at 17 (May 29, 1980):

Because of the specification of AS 11.81/.400(a)(2) as an affirmative defense, this conforming amendment is required.

CROSS REFERENCES

Definition of "defense" — AS 11.81.900(b)

Original Code Provision — None.

TD: II, 68.

Sec. 11.81.320. Justification: Necessity. (a) Conduct which would otherwise be an offense is justified by reason of necessity to the extent permitted by common law when

(1) neither this title nor any other statute defining the offense provides exemptions or defenses dealing with the justification of necessity in the specific situation involved; and

(2) a legislative intent to exclude [illegible] of necessity

fax: 465-6592

Vanessa

is incorporated into the Code "to the extent permitted by common law." Under subsection (1) the defense will be inapplicable if another statute covers the defense in the particular situation involved. *See, e.g.*, AS 11.46.340. Subsection (2) provides that the defense does not apply if a legislative intent to exclude the defense plainly appears.

From House Journal Supp. No. 64, at 3 (May 29, 1980):

This amendment provides that the defense of necessity is an affirmative defense which the defendant is required to establish by a preponderance of the evidence. *See* AS 11.81.900(b)(1).

CROSS REFERENCES

Justification: defense — AS 11.81.300
Defense: emergency use of premises — AS 11.46.340
Definition of "affirmative defense" — AS 11.81.900(b)

Original Code Provision — None.

TD: II, 48-49.

Sec. 11.81.330. Justification: Use of nondeadly force in defense of self. (a) A person may use nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other, unless

(1) the force involved was the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other's conduct with intent to cause physical injury to the other; or

(3) the person claiming the defense of justification was the initial aggressor.

(b) In circumstances described in (a)(1) — (a)(3) of this section, the person claiming the defense of justification may use nondeadly force if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force. (§ 10 ch 166 SLA 1978)

Sec. 11.81.335. Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent

(1) the use of nondeadly force is justified under AS 11.81.330; and

(2) the person reasonably believes the use of deadly force is necessary for self defense against death, serious physical injury, kidnapping, sexual assault in the first degree, sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating, except there is no duty to retreat if the person is

(1) on premises which the person owns or leases and the person is not the initial aggressor; or

(2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380. (§ 10 ch 166 SLA 1978; am § 10 ch 4 SLA 1990)

COMMENTARY

From Senate Journal Supp. No. 47, at 126-28 (6/12/78):

Section 11.81.330 - NONDEADLY FORCE. Subsection (a) allows a person to use nondeadly force to defend himself from what he reasonably believes to be the use of unlawful force. Since force is defined to include the threat of imminent bodily impact, a person may defend himself from threats of imminent impact as well as actual impact.

Paragraphs (1)-(3) qualify the right of a person to use nondeadly force in self-defense. Under paragraph (1), neither party to mutual combat which is not authorized by law can claim self-defense. Paragraph (2) prohibits a person from provoking another person into using force and later claiming that his use of force in self-defense was justified. Finally, paragraph (3) prevents an initial aggressor from claiming self-defense.

Subsection (b) provides that even in the three circumstances described in paragraphs (1)-(3) a person can nevertheless use nondeadly force if he withdraws from the encounter and effectively communicates his withdrawal to the other person. If the other person continues the incident by the use of unlawful force, nondeadly force may then be used in self-defense.

Section 11.81.335 - DEADLY FORCE. As a prerequisite to the use of deadly force in self-defense, subsection (a)(1) requires that the use of nondeadly force would have been justified. If the use of nondeadly force would have been justified, subsection (a)(2) allows a person to use deadly force when and to the extent he reasonably believes it necessary to defend himself from death, serious physical injury, kidnapping, forcible sexual assault or robbery.

Subsection (b) requires a person to retreat prior to using deadly force. Retreat is not required when the defender is (1) on premises, including a dwelling, which he owns or leases and when he is not the original aggressor, (2) a peace officer acting within the scope and authority of his employment, or (3) a person assisting a peace officer in making an arrest. Note that there is no duty to retreat prior to using nondeadly force. Further, the defendant must know that he has a safe retreat; it is not enough that a reasonable person would have believed he could have retreated safely.

CROSS REFERENCES

Definition of "intentionally," "nondeadly force," "force," "physical injury," "serious physical injury," "premises," "peace officer," "leased" — AS 11.81.900
Kidnapping — AS 11.41.300
Robbery — AS 11.41.500, 11.41.510
Use of force in defense of a third person — AS 11.81.340

COMMENTARY

The commentary to this section was inadvertently omitted from the Senate Journal. This section was intended to limit the applicability of the revised criminal code's general rules on culpability to title 11.

CROSS REFERENCES

Original Code Provision — None.

Article 6.

Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "access device" means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document, to obtain property or services, or that can be used to initiate a transfer of property;

(2) "affirmative defense" means that

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

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(3) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary;

(4) "building", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building;

(5) "cannabis" has the meaning ascribed to it in AS 11.71.900(10), (11), and (14);

(6) "conduct" means an act or omission and its accompanying mental state;

(7) "controlled substance" has the meaning ascribed to it in AS 11.71.900(4);

(8) "correctional facility" means premises, or a portion of premises, used for the confinement of persons under official detention;

(9) "credit card" means any instrument or device, whether known as a credit card, credit plate, courtesy card, or identification card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining property or services on credit;

(10) "crime" means an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor;

(11) "crime involving domestic violence" has the meaning given in AS 18.66.990;

(12) "criminal street gang" means a group of three or more persons

(A) who have in common a name or identifying sign, symbol, tattoo or other physical marking, style of dress, or use of hand signs; and

(B) who, individually, jointly, or in combination, have committed or attempted to commit, within the preceding three years, for the benefit of, at the direction of, or in association with the group, two or more offenses under any of, or any combination of, the following:

(i) AS 11.41;

(ii) AS 11.46; or

(iii) a felony offense.

(13) "culpable mental state" means "intentionally", "knowingly", "recklessly", or with "criminal negligence", as those terms are defined in (a) of this section:

(14) "dangerous instrument" means any deadly weapon or anything that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury;

(15) "deadly force" means force that the person uses with the intent of causing, or uses under circumstances that the person knows create a substantial risk of causing, death or serious physical injury; "deadly force" includes intentionally discharging or pointing a firearm in the direction of another person or in the direction in which another person is believed to be and intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument;

(16) "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;

(17) "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;

(18) "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;

(19) "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;

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

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

(22) "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;

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

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

(25) "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;

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

(27) "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;

(28) "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;

(29) "identification document" means a paper, instrument, or other article used to establish the identity of a person; "identification document" includes a social security card, driver's license, nondriver's identification, birth certificate, passport, employee identification, or hunting or fishing license;

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

(31) "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;

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

(33) "law" includes statutes and regulations;

(34) "leased" includes "rented";

(35) "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;

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

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

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

Sec. 18.66.990. Definitions. In this chapter,

(1) "council" means the Council on Domestic Violence and Sexual Assault;

(2) "crisis intervention and prevention program" means a community program that provides information, education, counseling, and referral services to individuals experiencing personal crisis related to domestic violence or sexual assault and to individuals in personal or professional transition, excluding correctional half-way houses, outpatient mental health programs, and drug or alcohol rehabilitation programs;

(3) "domestic violence" and "crime involving domestic violence" mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:

(A) a crime against the person under AS 11.41;

(B) burglary under AS 11.46.300 — 11.46.310;

(C) criminal trespass under AS 11.46.320 — 11.46.330;

(D) arson or criminally negligent burning under AS 11.46.400 — 11.46.430;

(E) criminal mischief under AS 11.46.475 — 11.46.486;

(F) terrorist threatening under AS 11.56.807 or 11.56.810;

(G) violating a domestic violence order under AS 11.56.740; or

(H) harassment under AS 11.61.120(a)(2) — (4);

(4) "domestic violence program" means a program that provides services to the victims of domestic violence, their families, or perpetrators of domestic violence;

(5) "household member" includes

(A) adults or minors who are current or former spouses;

(B) adults or minors who live together or who have lived together;

(C) adults or minors who are dating or who have dated;

(D) adults or minors who are engaged in or who have engaged in a sexual relationship;

(E) adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law;

(F) adults or minors who are related or formerly related by marriage;

(G) persons who have a child of the relationship; and

(H) minor children of a person in a relationship that is described in (A) — (G) of this paragraph;

(6) "judicial day" means any Monday through Friday that is not a state holiday and on which the court clerk's offices are officially opened to receive legal documents for filing;

(7) "local community entity" means a city or borough or other political subdivision of the state, a nonprofit organization, or a combination of these;

(8) "petitioner" includes a person on whose behalf an emergency protective order has been requested under AS 18.66.110(b);

(9) "sexual assault" means a crime specified in AS 11.41.410 — 11.41.450;

(10) "sexual assault program" means a program that provides services to the victims of sexual assault, their families, or perpetrators of sexual assault. (§ 33 ch 64 SLA 1996; am § 75 ch 21 SLA 2000; am § 20 ch 92 SLA 2002)

Chapter 67.

Violent Crimes Compensation Board.

Section
10. Purpose
20. Violent Crimes Compensation Board
30. Application for compensation
40. Action on application; hearings
50. Attorney fees
60. Regulations
70. Standards for compensation
80. Awarding compensation
90. Recovery from collateral source
101. Incidents and offenses to which this chapter applies
110. Nature of the compensation
120. Emergency compensation
130. Limitations on awarding compensation
140. Recovery from offender
150. False claim
160. Survival and abatement
162. Crime victim compensation fund
170. Reports
175. Duty to display information
180. Definitions

Sec. 18.67.010. Purpose. It is the purpose of this chapter to facilitate and permit the payment of compensation to innocent persons injured, to dependents of persons killed, and to certain other persons who by virtue of their relationship to the victim of a crime incur actual and reasonable expense as a result of certain serious crimes or in attempts to prevent the commission of crime or to apprehend suspected criminals. (§ 1 ch 203 SLA 1972; am § 1 ch 132 SLA 1975)

Sec. 18.67.020. Violent Crimes Compensation Board. (a) There is the Violent Crimes Compensation Board in the Department of Public Safety composed of three members to be appointed by the governor. One of the members shall be designated as chairman by the governor. At least one member must be a medical or osteopathic physician licensed to practice in this state and one member must be an attorney licensed to practice in this state.

(b) Members of the board serve staggered terms of three years. All vacancies, except through the expiration of term, shall be filled for the unexpired term only.

(c) Each member of the board is eligible for reappointment and serves at the pleasure of the governor.

tion" and would therefore be subject to the rules and conditions he seeks to have reviewed. [At. 34-35]

[11] The problem with this argument is that Kleven was not asserting a claim for constructive discharge in his second lawsuit. The trial court noted this in making its ruling. The issue then is whether an employee who starts a grievance process and subsequently resigns has standing to force the employer to continue with the process and remedy problems presumably for the benefit of those employees who remain. Even under our liberal standing rules, we do not believe Kleven has established a sufficient personal stake in the case to gain standing under an interest-injury analysis. As the trial court noted, because Kleven is no longer employed by YKSD, he is no longer subject to the contested grievance procedures, nor is he threatened by the alleged safety violations.[14] *Compare Rutter v. State*, 668 P.2d 1343, 1345 (Alaska 1983) (holding that commercial fisherman had standing to challenge state's fishing permit policy because his ability to fish would be directly impacted by the number of permits granted); *with Bowers Office Prod. v. University of Alaska*, 755 P.2d 1095, 1098 (Alaska 1988) (holding that bidder did not have standing to challenge university bid review practices where bidder had abandoned claim for damages arising out of these practices and was currently only seeking declaratory relief).

[12, 13] Taxpayer-citizen status is a sufficient basis to challenge allegedly illegal governmental conduct when the issues raised are of significant public concern and when the taxpayer-plaintiff is a suitable advocate of the issues involved in the lawsuit. *See Trustees for Alaska*, 736 P.2d at 329; *State v. Lewis*, 559 P.2d 630, 635 (Alaska 1977), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2949, 53 L.Ed.2d 1073 (1977). In *Trustees for Alaska*, we noted that standing may properly be denied to a taxpayer-plaintiff where "there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." *Trustees for Alaska*, 736 P.2d at 329. Because YKSD's remaining employees are certainly in better position to raise the grievances Kleven cites and because we have no reason to believe that current YKSD employees would be indisposed to press legitimate grievances, we agree with the trial court that Kleven has failed to establish citizen-taxpayer standing. Accordingly, we hold that Kleven's second lawsuit was properly dismissed for lack of standing.

[14] We also uphold the trial court's partial attorneys' fee award. *See* Alaska Civil Rule 82. The court awarded YKSD $2,700.00 in cost and fees which represented only about fifty percent of YKSD's total fees for the second lawsuit. We have previously upheld awards representing well over fifty percent of a prevailing party's actual fees and therefore find no abuse of discretion in this case. *See, e.g., Steenmeyer Corp. v. Mortenson-Neal*, 781 P.2d 1221, 1226-27 (Alaska 1987) (holding that a Civil Rule 82 award of 75 percent of actual fees was not "manifestly unreasonable").

The judgment in the first lawsuit is REVERSED and the case is REMANDED for further proceedings consistent with this opinion. The judgment in the second lawsuit is AFFIRMED.

14. If Kleven had articulated a claim for constructive discharge in his second lawsuit he would have had a sufficient interest in these issues. *See Beard*, 796 P.2d at 1349.

STATE of Alaska, Petitioner,

v.

The Honorable Rene J. GONZALEZ, Judge of the Superior Court, Jill Jahnke-Leland, Peter H. Leland, and Jeffrey S. DeGraaf, Respondents.

No. S-5903.

Supreme Court of Alaska.

June 4, 1993.

Following retrial in criminal case, state issued subpoena for witness to appear as prosecution witness. Witness moved to quash subpoena by asserting constitutional privilege against compulsory self-incrimination. The Superior Court, Third Judicial District, Anchorage, Rene Gonzalez, J., found that Alaska's witness immunity statute violated Alaska Constitution and quashed the subpoena. State appealed. The Court of Appeals, 825 P.2d 926, affirmed. Petition for hearing was granted. The Supreme Court, Matthews, J., held that statute granting use and derivative use immunity violated the constitutional provision that no person could be compelled to give testimony against himself.

Affirmed.

1. Witnesses ⇐297(4.1)

State constitutional prohibition against compelling person to witness against himself does not prohibit forcing person to testify in criminal case against another person, even though testimony may show witness was guilty of crime. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

2. Witnesses ⇐304(4)

Witness compelled to give testimony that might show he or she was guilty of crime must be granted some type of immunity from prosecution. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

3. Criminal Law ⇐42

"Transactional immunity" from prosecution, of witnesses whose compelled testimony might show their guilt of crime, prohibits prosecution for crime concerning which witness is compelled to testify. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐42

"Use and derivative use immunity," in connection with compelled testimony that might show witness was guilty of crime, allows prosecution of witnesses for crimes referred to in compelled testimony, but prohibits use of compelled testimony and its fruits in such prosecutions. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

5. Criminal Law ⇐1139

Scope of state constitutional provision, that no person would be compelled to be witness against himself in criminal proceeding, is question of constitutional law to be decided by Supreme Court de novo. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

6. Constitutional Law ⇐12, 13, 16

In applying state constitutional provision barring person from being compelled to testify against himself in criminal case, Supreme Court's inquiry is not controlled by any one source of authority, such as United States Supreme Court or appeal to intent of framers of State Constitution; such authority is considered when helpful in discerning intent and spirit of local constitutional language and whether right invoked is necessary for kind of civilized life and ordered liberty which is at core of constitutional heritage. Const. Art. 1, § 9; AS 12.50.101, 12.50.101(a).

7. Criminal Law ⇐393(1)

Under state constitutional provision prohibiting self-incrimination individual may not be compelled to give testimony unless state has taken measures to remove hazards of incrimination, and individual faces hazard of incrimination whenever answers elicited could support conviction or might furnish link in chain of evidence leading to conviction. Const. Art. 1, § 9; AS 12.50.101.

8. Criminal Law ⇐42, 393(1)

Statute granting use and derivative use immunity to witnesses compelled to give testimony that might incriminate them violated state constitutional prohibition against forcing a person to be witness against himself in criminal proceeding; due to human frailties it could be impossible to ensure that testimony would not be used in some manner against defendant in subsequent trial and even if evidence was not used directly, nonevidentiary use could be made of testimony in terms of focusing investigation, deciding to initiate prosecution against witness, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally do-

veloping trial strategy. Const. Art. I, § 9; AS 12.50.101, 12.50.101(a).

Eric A. Johnson, Asst. Atty. Gen., Anchorage, Charles E. Cole, Atty. Gen., Juneau, for petitioner.

Margi Mock, Ray Brown, Asst. Public Defenders, John B. Salemi, Public Defender, Anchorage, for respondent Jeffrey S. DeGrasse.

Jeffrey F. Sauer, Juneau, for respondent Jill Jahnke-Leland.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

[1, 2] Article I, section 9 of the Alaska Constitution states that "[n]o person shall be compelled in any criminal proceeding to be a witness against himself." This section does not prohibit *compelling* a person to testify in a criminal case against another person, even though the testimony may show that the witness was guilty of a crime. *Surina v. Buckalew*, 629 P.2d 968 (Alaska 1981); *State v. Serdahely*, 635 P.2d 1182 (Alaska 1981) (per curiam). However, a witness who is compelled to testify must be granted some type of immunity from prosecution.

[3, 4] There are two types of immunity from prosecution in current usage. Transactional immunity, the more protective type, prohibits prosecution of a compelled witness for a crime concerning which the witness is compelled to testify. The narrower form, use and derivative use immunity, allows prosecution of the witness for the crimes referred to in the compelled testimony, but prohibits the use of the compelled testimony and its fruits in such prosecutions. *Surina*, 629 P.2d at 971, n. 2. In *Surina* and *Serdahely*, pursuant to our supervisory powers, we approved of transactional immunity as a matter of practice but expressed no view as to whether use and derivative use immunity might also be constitutionally permissible.

Alaska Statute 12.50.101, enacted after *Surina* and *Serdahely* were decided, authorizes an order compelling testimony based on a grant of use and derivative use immunity. In the present case this statute has been challenged as unconstitutional under article I, section 9 of the Alaska Constitution. The superior court and the court of appeals have concluded that the statute is unconstitutional. We granted the state's petition and now affirm the decision of the court of appeals.

FACTS AND PROCEEDINGS

On the evening of May 8, 1990, Jill Jahnke-Leland, Carl Jahnke-Leland, Peter Leland, and Jeffrey DeGrasse were arrested for the murder of Rick Zaug and the attempted murder of Tom Moore. Earlier that day Zaug and Moore had sailed from Ketchikan to Therne Arm to go fishing. That evening the two men tied their boat to a public mooring buoy to which another boat was already tied. Soon thereafter a tragic dispute arose over use of the buoy. After angry words were exchanged, Moore and Zaug were fired upon from the shore; Zaug was killed and Moore was seriously injured.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland all gave taped statements to the police. Leland and DeGrasse admitted that each had shot at Zaug and Moore from the shore. Jill Jahnke-Leland stated that after she had words with Zaug and Moore, she headed toward shore and fired a gun shot in the air to scare Zaug and Moore. Jill Jahnke-Leland also stated that soon after she fired that shot into the air, DeGrasse and Leland began firing.

Leland, DeGrasse, and Carl and Jill Jahnke-Leland were each indicted for first-degree murder, attempted first-degree murder, and first-degree assault. Jill Jahnke-Leland was convicted of manslaughter and assault. She appealed to the court of appeals. Her appeal was pending during the proceedings hereinafter described and during the presentation and consideration of this case by this court.[1]

In the subsequent trial against Leland and DeGrasse, the state moved to compel Jill Jahnke-Leland to testify under AS 12.50.101.[2] Alaska Statute 12.50.101 allows the state to compel a witness to testify in exchange for immunity from use or derivative use of the compelled testimony in a criminal prosecution. The trial court denied the state's motion, ruling that AS 12.50.101 violates article I, section 9 of the Alaska Constitution, which protects individuals against compelled self-incrimination.[3] Leland and DeGrasse were then tried without Jill Jahnke-Leland's testimony. The trial ended with a hung jury. On retrial, the state renewed its motion to compel Jill Jahnke-Leland to testify. The trial court again denied the motion on constitutional grounds. The state sought review and the court of appeals affirmed the trial court's decision. *State v. Gonzalez*, 825 P.2d 929 (Alaska App.1992). We granted the state's petition for hearing from this decision.

IMMUNITY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

This case presents two issues: (1) What is the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination? and (2) Does AS 12.50.101 provide immunity which adequately matches the protection of the constitutional privilege? We address each issue in turn.

Scope of the Privilege

[5, 6] The issue of the scope of article I, section 9 is a question of constitutional law which we decide *de novo*. Constitutional interpretation follows the "rule that the intent underlying ... constitutional language should first be gathered from the plain meaning of the language itself." *Baker v. City of Fairbanks*, 471 P.2d 386, 397 (Alaska 1970). As the court of appeals recognized, this inquiry is not controlled by any one source of authority, such as United States Supreme Court precedent or an appeal to the intent of the framers of the Alaska Constitution. Rather, such authority is considered and, when appropriate, followed when helpful in discerning the "intention and spirit of our *local constitutional language* and [whether the right invoked is] necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Id.* at 402 (emphasis added).

[7] In the present case, our inquiry is controlled by Alaska precedent. The state and DeGrasse acknowledge that the scope of article I, section 9 is set forth in *E.L.L. v. State*, 572 P.2d 786 (Alaska 1977):

> The privilege against self-incrimination applies where the answers elicited could

1. Shortly before the publication of this opinion the court of appeals affirmed her conviction and remanded her sentence. *Jahnke-Leland v. State*, Mem.Op. & J. No. 2675 (Alaska App., April 21, 1993). The progress of Jill Jahnke-Leland's appeal is relevant if her conviction becomes final before the state compels her to testify. In that event, Jill Jahnke-Leland would no longer be subject to conviction or punishment on account of her compelled testimony. Without the threat of conviction or punishment, an individual may no longer invoke the protection of the privilege against self-incrimination. *E.L.L. v. State*, 572 P.2d 786, 788 (Alaska 1977) ("a witness may not refuse to testify where there is no real or substantial hazard of incrimination."). Additionally, if Jill Jahnke-Leland was compelled to testify while her appeal was pending, transactional immunity would *not* invalidate her prior conviction; instead, transactional immunity would only bar retrial if her conviction was reversed on appeal. *See State v. Runions*, 100 Wash.2d 52, 665 P.2d 1358, 1360 (1983) (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

2. AS 12.50.101 states, in relevant part, that the state may compel testimony upon the condition that:

> no testimony or other information compelled ..., or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

AS 12.50.101(a).

3. Article I, section 9 of the Alaska Constitution reads as follows:

> Section 9. Jeopardy and Self-Incrimination. No person shall be put to jeopardy twice for the same offense. No person shall be compelled to any criminal proceeding to be a witness against himself.

support a conviction or might furnish a link in the chain of evidence leading to a conviction. But, a witness may not refuse to testify where there is no real or substantial hazard of incrimination.....

Id. at 788 (citations omitted). Thus, in *Sarina v. Buskalon*, 629 P.2d 969, 977 (Alaska 1981), we stated: "where the hazard of incrimination has been removed, the privilege against self-incrimination is no longer required." *Sarina*, however, left open the question of what type of immunity would "remove" "the hazard of incrimination." From these authorities we can piece together the scope of the article I, section 9 protection against self-incrimination: (1) an individual may not be compelled to give testimony unless the state has taken measures to remove the hazard of incrimination; and (2) an individual faces a hazard of incrimination whenever "the answers elicited could support a conviction or might furnish a link in the chain of evidence leading to a conviction."[4]

AS 12.50.101 and the Scope of the Privilege

[6] We now reach the question at the center of this case: does a grant of use and derivative use immunity remove the hazard of incrimination? We do not doubt that, in theory, strict application of use and derivative use immunity would remove the hazard of incrimination. *See Kastigar v. United States*, 406 U.S. 441, 468, 92 S.Ct. 1653, 1668, 32 L.Ed.2d 212 (1972) (Marshall, J., dissenting). In a perfect world, one could theoretically trace every piece of evidence to its source and accurately police the derivative use of compelled testimony. In our imperfect world, however, the question arises whether the judicial process can develop safeguards to prevent derivative use of compelled testimony that satisfy article I, section 9. Because we doubt that workaday measures can, *in practice*, protect adequately against use and derivative use, we ultimately hold that AS 12.50.101 impermissibly dilutes the protection of article I, section 9. Our conclusion rests on two bases.

First, we are persuaded that problems of proof and ordinary human frailties combine to pose a potent threat to an individual compelled to testify. The accused faces proof problems because all evidence regarding use of compelled testimony necessarily rests in the hands of the state. Human frailty presents a further obstacle because the accused is reduced to probing the faded memories and incomplete recollections of the state's agents in tracing the path of the compelled testimony from the point where it is given to the point where it is used. Justice William Brennan expressed these twin concerns in his dissent in *Piccirillo v. New York*, 400 U.S. 548, 562, 91 S.Ct. 520, 522, 27 L.Ed.2d 595 (1971) (Brennan, J., dissenting). According to Justice Brennan:

> all the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself.... [T]his argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. [People] working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained.

Id. at 568, 91 S.Ct. at 530–531; *see also Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

For this important reason, we also reject the state's proffered analogy between compelled testimony and coerced confessions. In a case involving a coerced confession, the facts relevant to the "voluntariness" of the confession will be known and available to *both* the state and the accused. In the case of compelled testimony, however, the accused can only speculate as to how widely her compelled statement has been disseminated. Procedures and safeguards can be implemented, such as isolating the prosecution team or certifying the state's evidence before trial, but the accused often will not adequately be able to probe and test the state's adherence to such safeguards. This danger does not subside in the face of even the strictest burden of proof, for, as Justice Thurgood Marshall aptly noted, although the government may have the burden of proof, "the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence." *Kastigar*, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

One of the more notorious recent immunity cases, *United States v. North*, 910 F.2d 843 (D.C.Cir.), *modified*, 920 F.2d 940 (D.C.Cir.1990) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991), illustrates another proof problem posed by use and derivative use immunity. *North* involved the criminal conviction of Oliver North for his alleged participation in the Iran/Contra Affair. Prior to his criminal trial, North had been compelled to testify before congressional committees investigating the Iran/Contra Affair. This testimony received extensive coverage in the national media. As required by federal law, North received immunity from use or derivative use of any testimony given before the committees.

On appeal, the District of Columbia Circuit identified two witness-related problems with regard to North's compelled testimony. First, the prosecution could use the compelled testimony to refresh the recollection of a witness testifying at North's criminal trial. *Id.* at 860–61. This use could be policed by relying on the good faith assurances of the prosecution and its witnesses that no such use was made of the compelled testimony. The second problem, however, is more troublesome. In a case such as *North*, where the compelled testimony receives significant publicity, witnesses receive casual exposure to the substance of the compelled testimony through the media or otherwise. *Id.* at 863. In such cases, a court would face the insurmountable task of determining the extent and degree to which "the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." *Id.* We have not been persuaded that procedures exist to probe the mind of a witness in order to discover such use of compelled testimony.

The second basis for our decision is that the state cannot meaningfully safeguard against nonevidentiary use of compelled testimony.[5] Nonevidentiary use "in-

4. This scope largely parallels the scope the Supreme Court has set for the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). None of the parties here suggested, nor do we consider, Justice William O. Douglas' position that the privilege "put[s] it beyond the power of [government] to compel anyone to confess his crimes." *Id.* at 467, 92 S.Ct. at 1668 (emphasis added) (Douglas, J., dissenting); *see Ullmann v. United States*, 350 U.S. 422, 446, 76 S.Ct. 497, 511, 100 L.Ed. 511 (1956) (Douglas, J., dissenting).

At times, DeGraff claims to broaden the scope of article I, section 9 by stating that a grant of immunity must "place[ ] [the witness] in the same position as if he remained silent." The Supreme Court has rejected this formulation of the self-incrimination guarantee, instead favoring an interpretation similar to the one stated above. *See United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). This formulation also begs a very important question: put in the same position with respect to *what interest*? Clearly certain interests, such as keeping the compelled testimony from coming to public light, could not be achieved without implementing extraordinary means. The standard "the same position as if he remained silent" must have a specific reference point. In the present case, that reference point is incrimination. Thus, a meaningful reading of the "same position" argument is that the person compelled to testify must be put in the same position with regard to the possibility of incrimination as if he had remained silent. If the person had remained silent, he would have faced no hazard of incrimination *from his own words*. Thus, DeGraff's seemingly restrictive standard really reduces to this court's prior standard: remove the hazard of incrimination due to the compelled person's own words.

5. Although both courts and commentators divide on whether a constitutional protection against self-incrimination should prohibit nonevidentiary use of compelled testimony, *see, e.g., United States v. Byrd*, 765 F.2d 1524, 1530–31 (11th Cir.1985) (allowing nonevidentiary use); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973) (prohibiting nonevidentiary use); Gary S. Hunble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 Tex.L.Rev. 351, 371–83 (1987) (urging that nonevidentiary use be allowed); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 Tex.L.Rev. 791, 804–10 (1978) (urging

clude[s] assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir.1973). Innumerable people could come into contact with the compelled testimony, either through official duties or, in a particularly notorious case, through the media.[6] Once persons come into contact with the compelled testimony they are incurably tainted for nonevidentiary purposes. *See id.* Safeguarding against such dangers will prove well nigh impossible,

> [f]or the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar, 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, J., dissenting).

Nonevidentiary use of compelled testimony can adversely affect an accused in many ways. When compelled testimony is incriminating, the prosecution can "focus its investigation on the witness to the exclusion of other suspects, thereby working an advantageous reallocation of the government's financial resources and personnel." Strachan, *supra*, at 807. The compelled testimony "may help explain information otherwise known," which could aid the prosecution in the presentation of its case. *Id.* With knowledge of how the crime occurred, the prosecution may refine its trial strategy to "probe certain topics more extensively and fruitfully than otherwise." *Id.* Indeed, a defendant may choose to relinquish her right to testify out of fear that the prosecution has honed its cross-examination with its knowledge of the compelled testimony. *Id.* Regardless of whether Jill Jahnke-Leland testified at her first trial, the prosecution's mere knowledge of her compelled testimony might significantly alter her decision whether to do so in a possible retrial. These are only some of the possible nonevidentiary advantages the prosecution could reap by virtue of its knowledge of compelled testimony.

Even the state's utmost good faith is not an adequate assurance against nonevidentiary uses because there may be "non-evidentiary uses of which even the prosecutor might not be consciously aware." *State v. Soriano*, 68 Or.App. 642, 684 P.2d 1229, 1236 (1984) (only transactional immunity can protect state constitutional guarantee against nonevidentiary use of compelled testimony). We sympathize with the Eighth Circuit's lament in *McDaniel* that "we cannot escape the conclusion that the [compelled] testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel*, 482 F.2d at 312. This incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.

We are not alone in construing a state constitutional guarantee to require transactional immunity in exchange for compelled incriminating testimony. Courts in Hawaii, Massachusetts, and Oregon have reached the same result. *See State v. Miyazaki*, 62 Haw. 269, 614 P.2d 915, 922–23 (1980); *Attorney General v. Colleton*, 387 Mass. 790, 444 N.E.2d 915, 921 (1982); *Soriano*, 684 P.2d at 1232.[7] In each case, the court relied, in part or in whole, on dangers presented by the inability to adequately enforce a ban on derivative use. *See Miya-*

(that nonevidentiary use be prohibited), the state concedes that the Alaska Constitution prohibits such use. Additionally, we believe that nonevidentiary use could 'furnish a link in the chain of evidence leading to a conviction,' *R.L.*, 572 P.2d at 786, or at least forge and shape that chain, sufficiently to fall within the conduct prohibited by article I, section 9.

6. This situation is further complicated if potential jurors are exposed to the witness' compelled testimony through wide dissemination in the media.

7. *But see, e.g., State v. Strong*, 110 N.J. 513, 542 A.2d 866, 871–72 (1988); *People v. Johnson*, 133 Misc.2d 721, 507 N.Y.S.2d 791, 793 (Sup.1986); *Welsh v. Commonwealth*, 14 Va.App. 300, 416 S.E.2d 451, 453 (1992).

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saki, 614 P.2d at 922–24; *Colleton*, 444 N.E.2d at 920–21; *Soriano*, 684 P.2d at 1233–34.

Because of the manifold practical problems in enforcing use and derivative use immunity we cannot conclude that AS 12.50.101 is constitutional. Mindful of Edward Coke's caution that "it is the worst oppression, that is done by colour of justice,"[8] we conclude that use and derivative use immunity is constitutionally infirm.

AFFIRMED.

John WILLIS, Appellant,

v.

WETCO, INCORPORATED, Appellee.

No. S-4905.

Supreme Court of Alaska.

June 4, 1993.

Employer brought action against employee for violation of noncompetition and confidentiality agreements. After preliminary injunction was granted against employee, employee filed counterclaim. The Superior Court, Third Judicial District, Anchorage, Dana Fabe and Peter Michalski, JJ., dismissed case for failure to prosecute. Employee filed motion to reconsider dismissal, which was denied, and employee appealed. The Supreme Court, Rabinowitz, J., held that employee failed to demonstrate good cause for delay in prosecution.

Affirmed.

1. Appeal and Error ⇐962

Supreme Court will review lower court's dismissal of action for delay of prosecution under the abuse of discretion standard. Rules Civ.Proc., Rule 41(e).

8. 3 Lord Edward Coke, *The Second Part of the*

2. Pretrial Procedure ⇐534.1

A showing of "good cause" for delay in prosecution is the production of a reasonable excuse for lack of prosecution.

See publication Words and Phrases for other judicial constructions and definitions.

3. Pretrial Procedure ⇐534.1

Trial court did not abuse its discretion in finding that employee failed to demonstrate good cause for delay in prosecuting his counterclaim where employee did not explain what aspect of his damages were continuing to accumulate, or why time was any more ripe for trial now than earlier if alleged damages were still accumulating, and where a review of his counterclaim indicated that there was no support for his excuse.

4. Pretrial Procedure ⇐681

Prior to court's dismissal of case for lack of prosecution, there must be record evidence of court's consideration of lesser sanctions. Rules Civ.Proc., Rule 41(e).

5. Pretrial Procedure ⇐587

Trial court did not abuse its discretion in dismissing employee's counterclaim for failure to prosecute where employee failed to demonstrate good cause for his nearly two-year delay in prosecution. Rules Civ. Proc., Rule 41(e).

6. Pretrial Procedure ⇐681

Trial court is not under duty to explore meaningful alternatives before entering dismissal without prejudice for failure to prosecute where function of rule is to clear court's calendar and to protect parties against undue delay; however, relevant inquiry for court is to determine whether any proceedings have been taken within one-year period, and if no proceedings have been taken for more than one year, to determine whether or not good cause has been shown why action should not be dismissed. Rules Civ.Proc., Rule 41(e); AS 09.10.240.

Institutes of the Laws of England 43 (1797).

MEMORANDUM

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TO:	House Judiciary
FROM:	Linda K. Wilson, Deputy Public Defender
RE:	HB 244
DATE:	5/07/03

Introduction

Chairwoman McGuire, Vice-Chairman Anderson, and members of the Committee, Representatives Gara, Gruenberg, Holm, Ogg, and Samuels.

The Public Defender Agency has serious concerns regarding numerous portions of this bill.

This bill proposes some radical changes to the criminal laws, many of which are unwarranted, unfair, and in some instances unconstitutional. This bill covers many different areas within the topic of criminal law and procedure, including defenses, affirmative defenses, rights of prisoners after arrest, discovery, immunity, notice of defenses, admissibility of certain evidence, consecutive sentencing and mitigation in sentencing. I would like to address each area individually.

Specifics

1. Self Defense and Heat of Passion

Sections 1-5 change long-standing Alaska laws on self-defense, defense of others, and heat of passion and require the defense to carry the entire burden of proving to the jury that the defendant acted in self-defense, defense of others, or in the heat of passion. Under current law, if you defend yourself and are later prosecuted, you must produce some evidence of self-defense before a judge will allow a jury to consider the defense, but once produced, the state must prove beyond a reasonable doubt that your use of force was unjustified to gain a conviction. The same holds true for those acting in defense of others, or in the heat of passion.

Defenses can be divided into two basic categories: Justification and Excuse. Although there is some overlap between the categories, looking at defenses in this way helps

explain differences between true "affirmative defenses" which the defense must prove, and other defenses, like self-defense, on which the prosecution has the burden.

An example of an Excuse in the affirmative defense is the defense of necessity. If a person is in danger of freezing to death and breaks into a cabin, he has committed the crime of burglary. But the criminal conduct is excused by necessity. Under current law, the defense has the burden of convincing the judge or jury of the "affirmative defense." This is the way it should be. If a defendant essentially admits to criminal conduct but asks the judge or jury to excuse the transgression, he or she should bear the burden of proving the excuse.

Justifications are given a higher status in criminal law, and the prosecution has traditionally had the burden of proving that a crime took place despite a justification. (Although the prosecution has the ultimate burden, the judge will not allow the jury to consider the justification unless the defense has come forward with some credible evidence to support it.) An example of justification is a police officer using force to arrest someone for a crime. Technically, the police officer's actions are a criminal assault. However, under AS 11.81.370, the police officer is justified in using force to make an arrest or terminate an escape.

Therefore, with justifications, criminal conduct is not merely excused. When a defendant's actions are **justified**, society has made the judgement that conduct that would otherwise be criminal is not a crime. The law placing the ultimate burden of proof on the prosecution when justifications are legitimately raised is longstanding in Alaska (see Toomey v. State, 581 P.2d 1124 (Alaska Supreme Court 1978) and elsewhere (see Paul H. Robinson, Criminal Law Defenses, Sec. 132 at pg. 99-100 (West Publishing Co. 1984)). This law should not be changed.

Many states, and the federal government require that the prosecution has the burden of proving beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. From a 2002 pocket supplement to an American Law Reports article on the subject entitled *Homicide: Modern Status of Rules As to Burden and Quantum of Proof to Show Self-Defense*, 43 ALR 3d 221, June 2002 Supp. at pp. 13-24, more than 30 states require the government to prove beyond a reasonable doubt that the defendant in a homicide prosecution did not act in self-defense. Those states include Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Washington, and West Virginia. Some state may label the defense of self-defense an "affirmative defense," but that can mean, like in Alaska now, that the defendant has the affirmative duty to produce some evidence of self-defense to raise the issue, and then the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you look at AS 11.81.900(b)(2) and (18) it explains how the two work in Alaska. "Affirmative defense" is an ambiguous phrase and means different things in different states.

One part of this bill seeks to deny to a victim of domestic violence a right to armed self-defense against the very perpetrator of prior violence. That proposed change in section 4 states that "A person may not use deadly force... if the person brought a deadly weapon to an encounter with reckless disregard that the encounter would result in combat." In other words, the proposed law denies the right of self–defense to the very people who are most likely to have to exercise it. It may be proposed with gangs in mind, but its reach is far more expansive. For example, a woman who carries concealed because she is afraid her abusive ex-boyfriend might seriously hurt or kill her, now would have absolutely no right to self-defense if she regularly carries a weapon and encounters him picking up her child at day care and he lunges at her and she shoots him. She is completely denied her right to self defense under this new provision, because she brought a gun to an encounter with reckless disregard that the encounter with him would result in combat. This is so even if she was not the initial aggressor or did not provoke the incident.

Sections 2 and 4 of the proposed legislation provide exceptions to the burden shifting to the defense for citizens that defend themselves in their own home, but the exeption is meaningless. The transmittal letter states that citizens who defends themselves in their own homes and must use force to protect their families would not be affected by this change, as long as they are in their own home, are not the initial aggressor, and not assaulting a "household member." This exception is meaningless for most people defending themselves in their own home, because the definition of "household member" in AS 18.66.990(5) is so broad, it includes a multitude of people that one can't defend against, even in one's own home. For instance, if a woman is in her home with her children, and a person she dated twice many years before comes to her home and while there physically threatens her, and she grabs a handgun and forcefully defends herself, if she is prosecuted for killing or assaulting him, she has the full burden (preponderance of the evidence) to prove her innocence, because this person is considered a "household member" under the definition. This should not be the case.

Changes in the law on self defense, defense of others and heat of passions are not warranted. In the Governor's transmittal letter it describes how difficult it is for prosecutors to obtain convictions while self defense and 'heat of passion' remain elements that the State of Alaska must disprove. This claim is hard to support. Distress over the results in 16 cases over the last twenty years, as mentioned by prosecutor Novak is not such a compelling figure that it warrants the radical changes proposed. The expressed distress over these sixteen cases out of hundreds does not warrant the drastic erosion of the right to protect oneself.

Further, the argument that this change is needed to combat a rise in drug violence is also misstated. An examination of Alaska's current criminal law shows that possessing a firearm while violating Alaska's controlled substances act is in and of itself a crime. AS 11.61.195 defines this as Misconduct Involving Weapons in the Second Degree, a class B felony. If a person actually uses or attempts to use a firearm while conducting a controlled substances transaction or other violation of the law, AS 11.61.190 defines that conduct as Misconduct Involving Weapons in the First Degree, a class A felony.

That crime is punishable by up to twenty (20) years in prison. As such, when the argument is made that too many drug dealers are carrying weapons and innocent people are dying, the proper response should not be to pass more legislation. The proper response should be to wonder why current laws are not being enforced. It is not that charges can't be prosecuted, but that they are choosing not to charge.

All of this analysis, however, begs the question of how many people are in fact being shot in drive-by shootings or other drug-related violence. The answer, at least according to news reports, is very few. The vast majority of homicides that occur within this state arise over relationships. As such, changing this law will not help put drug dealers who shoot innocent people in jail. Rather, it erodes basic, constitutional and common-law rights of individuals.

This is the second reason why this law should be rejected. From its roots in the Anglo jurisprudence system, individuals have been held to hold basic, inalienable rights. As recognized by the drafters of the United States Constitution, these rights included the right to life, liberty, and the pursuit of happiness. Because the loss of liberty involves such a significant right, courts have held that the Government, in seeking to imprison a defendant, must bear a great burden of proof. As such, for the past several centuries, the government has had to prove that a case did not involve self-defense or heat of passion. Yes, this did make it more difficult for the government to prove, but this was accepted because the rights involved were so great.

The policies behind self-defense and heat of passion are a little different. For heat of passion, a defense only to murder, that if successful, reduces the conduct to manslaughter, the common law recognized that sometimes people were so provoked that they in fact killed the person who did the provoking. The law school textbook example is of the man who comes home to catch his wife in the act of adultery. If the homicide occurred very soon after such a discovery, the law recognizes that the intent of the individual who committed the crime was less than the intent of the individual who deliberately planned a murder, stalked his victim, and then, when an opportunity arose, killed the victim. Thus, the *mens rea* of someone who commits first degree murder is more culpable than one who commits manslaughter, the appropriate crime when someone kills in the heat of passion.

The reasons against making heat of passion an affirmative defense are then two-fold. First, the common law sought to discourage behavior that would provoke ordinary persons into homicidal rage. Adultery and fighting were discouraged in an effort to promote a just and orderly society. Second, because the *mens rea* of murder is more culpable than manslaughter, it is appropriate that the State should have to prove the more culpable *mens rea* in order to gain the greater punishment. By making the defendant prove that this was heat of passion, this bill would erode the protections envisioned by the common law of England and the United States, and the current law in Alaska. It would ignore the wisdom behind that policy, and while it increases the power of the State it does so at the expense of the rights of an individual.

The policy behind the law of self-defense was a little bit different than that of heat of passion. Under common law, individuals were understood to own their own body. Thus, they had the right to do whatever they wished to do as long as they did not unreasonably interfere with the rights of others. This meant, though, that they had the capacity to protect what was theirs, namely, their own persons. Common law recognized this right as being embodied in every major legal system since Old Testament times. Based upon the desire to promote a stable and just society, the right of self defense was extended to encompass third persons, if the third persons would be unable to defend themselves. The common law courts recognized, as courts recognize today, that the sovereign owed no duty to individuals for police protection. Even today, if a person calls 9-1-1 to report a burglar, there is no guarantee that police will respond. By granting individuals the right to self-defense, the common law provided an efficient means of promoting social order. This policy certainly holds true in Alaska where bush communities are the norm, and police protection is not always available. Individuals would be less likely to use violence against others if that violence would be returned upon them.

The policy behind the law then favors individuals having the right to defend themselves. By making individuals prove that any homicide or assault was in fact self defense, this bill would erode that public policy and support a less orderly and just society. It is true, however, that defendants do have to affirmatively raise some evidence of self defense before the jury will be instructed on the matter. Under *Toomey v. State*, 581 p.2d 1124 (Alaska 1978), the Court recognized that the defendant will have to demonstrate some evidence before being entitled to an instruction on self-defense. So not every homicide or assault will be granted jury instructions on self-defense. There does have to be some evidence to support the jury instructions.

The trial courts, then, have not been "too loose in enforcing the Alaska Supreme Court's admonition". Rather, they have been following the instructions of *Toomey*, *supra*, *Folger v. State*, 648 P.2d 111 (Alaska App. 1982), and other decisions holding that once the defendant puts forward some evidence to support the defense of self defense, the trial court is duty bound to give the instruction. This, however, has not resulted in a flood of vicious murderers being acquitted. Rather, it has apparently resulted in some acquittals in cases in which the State of Alaska believes there should have been convictions. This is not a reason to vitiate the sound public policy of the common law in an effort to encourage reasonable people to act reasonably and thus promote a just and orderly society.

This policy, however, went farther and did allow individuals, in certain circumstances, to arm themselves in anticipation of a potential conflict. This right, however, was limited to certain instances. As described in *Brown v. State*, 698 P.2d 671 (Alaska App. 1985), individuals could seek out an adversary in an effort to peacefully settle their differences. A person doing such could, under common law, arm himself in an effort to prevent future attacks. The court in *Brown* noted that neither the defendant's arming himself nor the return to confront his adversary deprived him of the right to self-defense per se. Rather, the test was what did the evidence show the defendant and the adversary did.

This is exactly the purpose of our jury system. As discussed below, these factual nuances are for juries to decide.

Juries decide these questions, though, within well-specified boundaries. It is well-settled law that an aggressor forfeits his right to self-defense. This concept has long roots in common law, and it makes sense when considering the policy previously described. If the law is to promote a just and orderly society, a person who violates the rights of others should not be allowed to avail himself of rights and defenses seeking to promote those rights. There certainly are numerous cases in Alaska where it was decided that a self-defense instruction was not warranted. *See Bangs*, 608 P.2d 1 (1980); *McMahon v. State*, 617 P.2d 909 (Alaska 1980), *cert. de*nied, 454 U.S. 839 (1981); *Stapleton v. State*, 696 P.2d 180 (Alaska App. 1985), *Hilbish v. State*, 891 P.2d 841 (Alaska App. 1995), and *Ha v. State*, 892 P.2d 184 (Alaska App. 1995). There are probably many more unreported or unpublished decisions. The system as it is, then, does work. Making a blanket rule that anyone who arms himself forfeits the right of self-defense destroys common law rights and takes away the decision-making power of the jury. It is an attempt to impose a one-size-fits-all solution to a problem that really is not a problem.

The proponents of this bill argue that these laws are becoming too lax and need to be fixed because too many people are being acquitted on self-defense grounds. The above analysis shows that the law is quite clear regarding self defense and that once a defendant shows some evidence supporting his claim of self defense, the trial court must instruct the jury and let the jury decide. The arguments, then, are not so much against the laws because they even acknowledge the *Bangs* decision. Rather, the difficulty appears to be with jury decisions.

This attitude is extremely problematic. Our system is one in which the power of the sovereign is ostensibly derived from the consent of the governed. This is one of the primary reasons for the right to a jury trial. From *Blackstone's Commentaries on the Law* to present day, opinion is unanimous that juries serve as a vital part of the justice system. Juries serve as a voice of the community. The people give the government its power, and through their representatives they describe the society in which they wish to live. The legislatures seek to create this society through general laws. The community, though, is asked to judge on particular instances when they serve on juries. Thus, the community wants murder against the law, and so the law is passed generally prohibiting murder. But the community, when representatives are seated as a jury, is asked specifically whether under these facts they believe that a murder has been committed. The State of Alaska is arguing that the juries really do not know what they are doing because they are finding too many people not guilty.

Reduced to its simplest terms, the proponents of this bill are saying that the source of its authority, the people, is wrong and that the prosecutors need more power because the people are not smart enough to get it right for themselves. This argument goes against the foundations of our representational legal system and against our commitment to juries as determiners of the facts. While no system is perfect, Alaska juries by and large

understand what happens and they reach correct results. Putting twelve citizens in a box and having them listen to testimony, filtering it through their common sense and experience, and judging it by the law has proven to be remarkably effective at determining what actually happened in a case. Further, it is an important way for communities to voice their approval or disapproval upon certain behavior. Granted, no system is perfect. But we should not be rejecting hundreds of years of experience simply because there are a couple of cases where juries reach decisions that the prosecutors do not like.

The last reason that the legislature should reject these amendments is because they are inefficient. As noted above, part of the public policy supporting the right to self-defense is the idea that the police cannot be everywhere. Further, allowing individuals to defend themselves will have the effect of reducing crime and creating a more just and orderly society without the need for the money or person power a police force needs. These policy arguments have been verified in the work of criminologists John Lott and Gary Kleck, both of whom have found that individuals possessing firearms and exercising their right to self-defense have prevented literally millions of crimes per year. All of this was done at literally no cost to the respective states.

In a time when Alaska is facing huge budget deficits, it makes little sense to diminish the rights of individuals to use self-defense. Already in rural Alaska, it can take literally days and sometimes weeks for appropriate law enforcement to arrive on a scene to determine what happened. Many rural villages are without any law enforcement whatsoever. Even on the road system, there are numerous communities long distances from police protection. By making these defenses affirmative defenses and thus making people prove their innocence, this bill will chill the exercise of self-defense by citizens. This will diminish the just and orderly society we all wish to promote.

I would urge the legislature to trust the juries and the people of this State. By and large, they get it right and there really is no need to enact the changes urged in this section of the bill. The changes are not necessary, they reduce individual liberties and increase the power of the government, and they are an assault on the integrity and intelligence of our juries. For all of the stated reasons, I urge you to reject these proposed changes and leave the law of self-defense, heat of passion, and armed individuals as it is. These laws have worked well for several centuries. They will work well for a few more.

2. Prisoner Rights after Arrest

Section 6 of the bill seeks to amend AS 12.25.150(b). This amendment will limit the right of an accused to consult with an attorney. There is no explanation for why this amendment is being offered. Yet the proponents seek to keep the prisoner without counsel as long as possible, and by this legislation make it harder for the prisoner to obtain the benefit of counsel, when one is ready and willing, and already retained to represent the prisoner. The amendment will allow the police or department of corrections to prohibit an attorney who was retained by the friends and family of an accused to speak to that person, unless the accused specifically asks to see that

attorney. The practical effect is that when someone is arrested they are allowed to call an attorney or friends and family, but only if they think to ask to call. It is much easier for a family member or friend to arrange an attorney and get them to the jail than it is for a prisoner. If an accused calls friends or family, they in turn, hire an attorney who tries to see the accused. That attorney will be turned away under this legislation, unless the accused specifically asks to see that attorney.

There is no problem to fix by this legislation. Attorneys are not hanging out at jails seeking to counsel prisoners with no prior arrangement to represent them. Many accused people have mental disabilities or are young, and not very smart. The police can lie to them while they are being questioned. Don't forget that suspects do make false confessions. There has been mention of these recently in the press, like in NYC with the Central Park jogger case. An arrested person should get the benefit of a lawyer that his or her loved ones have secured.

The problem is that the accused is detained and restricted from communicating with the family or friends. It is impossible for that person to know whether his or her friends and family have contacted and retained an attorney, or whether that attorney has arrived, therefore it is impossible to expect the accused to specifically ask to see that attorney. The right to counsel is constitutionally protected by the 5th Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution. We should not make it more difficult for a person incarcerated to get the benefit of a lawyer arranged for him or her by family or close friends.

3. The Use and Admissibility of Prior Convictions

Section 7 of the bill seeks to make evidence of a prior conviction admissible in a case where it is an element of the offense, but not contested. Currently in Alaska under *Ostlund v. State*, 51 P3d 938 (Alaska App. 2002) a defendant is entitled to a bifurcated trial so that the jury is not prejudiced by the prior conviction (ie: a prior DUI in a felony DUI case, or a prior shoplifting in a felony shoplifting case) by being informed about it before they deliberate on the current allegation (ie: the current DUI or shoplifting allegation). A bifurcated trial is not two separate trials, but two parts of a single trial done with one jury. This is not necessarily a long or time cunsuming process, and can take less than an hour. This procedure is important though because it preserves both parties' right to a determination of all of the issues, but avoids the potential for unfair prejudice. A majority of other states follow a similar procedure. They have also found that this procedure is the proper way to try these types of cases to protect the defendant from being unfairly prejudiced by evidence of a prior conviction of a similar offense that destroys the presumption of innocence. As Judge Mannheimer stated in *Ostlund*: "When a defendant is tried for felony DWI, and when the defendant's previous offenses have no relevance other than to prove the "prior convictions" element of the offense, a trial judge should bifurcate the trial so that the jury's deliberations on the current DWI are not unfairly prejudiced by evidence of the defendant's prior similar crimes –

evidence that, in other circumstances, would be barred by Evidence Rule 404(b)(1)", the rule against unfair propensity evidence.

This well reasoned, fair procedure that is followed in a majority of states should not be changed. The claimed reason of wanting to explain to a jury why there are 12 of them instead of 6, is not persuasive. It is doubtful whether jurors even notice this distinction and it certainly does not outweigh an accused's right to a fair trial.

Sections 7 and 15 of the bill also propose to change the burden of proof making it the defense's burden of proof to challenge the validity of a prior conviction both in a prosecution where the prior conviction is an element of the crime being prosecuted and also at sentencing where a prior conviction may result in a longer sentence. This change is also not warranted. Currently the state must prove the validity of a prior conviction before it can be considered. The bill proposes that the defense must prove by a preponderance of the evidence that a prior conviction is invalid. Sometimes the prior conviction is from another state. The defendant can only claim that the prior conviction is invalid because of the denial of the right to counsel or jury trial. Not only is this unfair and a violation of due process, the shifting of this burden of proof onto the defense will require more investigation efforts from the defense to find out the underlying facts in the prior case, perhaps from out of state, and then retrieve evidence from that old case to be presented in the current case to meet the burden of proof. This is not an easy task to accomplish by an agency that is outside of law enforcement, and does not have the numerous resources to draw on to assist them across the country.

4. Witness Immunity

Alaska is a state that requires the government to grant transactional immunity, meaning complete immunity from prosecution, to force a witness with a legitimate claim of privilege against self-incrimination to testify. We do so because our state constitution protecting the right against self-incrimination requires it.

Sections 8 - 12 of this bill claim to seek to conform Alaska's immunity statute to the Alaska Constitution for witnesses who testify in a criminal proceeding after establishing a valid claim of privilege against self-incrimination. Amending AS 12.50.101 to enact transactional immunity as required by article I, section 9 of the Alaska Constitution and the Alaska Supreme Court holding in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) is commendable. Unfortunately, this intent is not carried out in the proposed legislation because of the additional provisions included in Sections 11 and 12 that allow the prosecutor to participate in the proceeding where the court determines whether the witness has a valid claim of privilege against self-incrimination. Allowing the prosecutor to hear the proffered testimony with only a requirement that it is inadmissible for any other purpose, only provides use and derivative use immunity, not transactional immunity. Use and derivative use immunity is not adequate under the Alaska Constitution and therefore this section of the proposed legislation is unconstitutional.

While the Public Defender Agency supports proposed legislation to conform Alaska's

immunity statute to the requirements of the Alaska Constitution, this proposed legislation fails to do so, and therefore the Agency cannot recommend this portion of the legislation in its entirety. AS 12.50.101 is unconstitutional as currently written because it does not adequately protect the privilege against self-incrimination afforded by article I, section 9 of the Alaska Constitution. The Alaska Supreme Court in *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993) unanimously found the statute unconstitutional and required the state to confer "transactional immunity," not just "use and derivative use immunity" in order for the statute to comply with Alaska's constitution. Simply amending the language in AS 12.50.101(a) as proposed in Section 8 of the new legislation, with a small but important change of the word "an" on line 8, page 4 with the word "any", would bring the statute into compliance. The Public Defender Agency has no objection to making the statute constitutional. The Agency takes no position on Sections 9 and 10 of the proposed legislation changing all references to "attorney general or attorney general designee" with "prosecutor."

The Public Defender Agency, however, strongly opposes the language provided in Section 12. Article I, section 9 of the Alaska Constitution provides that "no person shall be compelled in any criminal proceeding to be a witness against himself." The original drafters of Article I, section 9 intended to confer transactional immunity, which is complete immunity from prosecution for **any** crime about which the witness testifies. The Alaska constitutional right against self-incrimination is closely guarded and construed stringently against the abuse of governmental power. The incurable inability to prevent or even detect the non-evidentiary use of compelled testimony is a fatal constitutional flaw of use and derivative use immunity that would result from enactment of Section 12 of this bill.

The judge alone has to hear the proffer to decide if the privilege exists. If the prosecutor hears it, the privilege is vitiated. If the state is concerned about the judge making a fair ruling on whether or not the witness has a valid claim of privilege, the state always has the ability to petition the court of appeals to review the decision made by the trial court under seal, and the appellate court would review the same information under seal, without the state looking at it. To open the *in camera* proceeding to the prosecutor violates the witness' privilege against self-incrimination, the right not to be compelled to be a witness against oneself.

Allowing the prosecutors to be present during the *in camera* hearing on whether the witness has a valid claim of privilege against self-incrimination, and only providing that any testimonial proffer made under this section is "privileged and inadmissible for any other purpose" only confers use and derivative use immunity to the potential witness. Only providing use and derivative use immunity to the witness after he is compelled to proffer testimony against himself in front of the prosecutor at the *in camera* hearing is inadequate to protect against the privilege against self-incrimination. The inability to adequately enforce a ban on use and derivative use immunity makes this section unconstitutional. The only way this legislation would not violate Article I, section 9 of the Alaska Constitution and the holding in *Gonzalez* would be if the state could not prosecute the witness for anything arising out of his or her proffered testimony, that is

transactional immunity.

5. Consecutive Sentences

Sections 13, 14, and 18 - 20 seek to amend the sentencing statutes to expand the situations in which consecutive sentencing is mandated and to eliminate the court's ability to determine the appropriate amount of consecutive time to be imposed for certain crimes. This change in the sentencing statutes will have a fiscal impact on the criminal justice system, including an increase in prison populations. It will likely result in the inability to resolve cases short of trial, when the case is one in which conviction of more than one count would otherwise have been an appropriate resolution, now would be forced to go to trial because of the exposure to mandatory consecutive sentences.

The proposed legislation is, in the first place, not needed. The concerns that purport to be addressed in the proposed legislation are already being addressed by the current sentencing scheme. Trial courts are aware of the legislative preference for consecutive sentences and give that preference great weight when they impose sentences. For example, in the case of *Jones v. State*, 744 P.2d 410, 411 (Alaska App. 1987) the sentencing judge concluded that consecutive sentences were necessary to reflect the seriousness of the crime. Specifically, the judge emphasized that two people had died and that a third person had been seriously injured. The Court of Appeals agreed with this reasoning. In *State v. Dunlop*, 721 P.2d 604 (Alaska 1986), the Supreme Court specifically held that where an act of violence injures multiple victims, there are as many punishable offenses as there are victims.

In addition to being unnecessary, the proposed legislation would have serious fiscal impacts. The prison population would increase significantly. In addition to the fiscal impact on the Department of Corrections, other parts of the criminal justice system would see increased costs. For example, because the proposed legislation would discourage settlement in cases in which conviction of more than one count would otherwise be an appropriate resolution, many more cases would go to trial. As a result, the resources of the court system, the Department of Law, and the Public Defender Agency would be fiscally impacted beyond what they are under the current sentencing scheme.

Finally, this section of the proposed legislation is not in conformity with the legislature's stated declaration regarding the purpose of existing sentencing laws, which is codified in AS 12.55.005. Requiring a sentencing judge to impose large amounts of consecutive jail time when imposing sentences for certain crimes would eliminate the judge's ability to take into account the seriousness of the defendant's present offense in relation to other offenses, the prior criminal history of the defendant and the likelihood of rehabilitation, the need to confine the defendant to prevent further harm to the public, the circumstances of the offense, and the effect of the sentence on deterring the defendant and others. Currently, in situations in which a defendant has established that he cannot be deterred or rehabilitated within the confines of a given sentence, longer

sentences are justified. However, in situations in which additional jail time would not provide additional deterrence or rehabilitative effect, less consecutive time may be imposed. When sentencing a defendant for a number of individual crimes at the same time, the judge is permitted to determine the appropriate overall sentence taking into account each crime, the surrounding circumstances, the defendant's age and background, and any aggravating or mitigating factors. The proposed legislation would force judges into a sentencing scheme that overcrowds the prison system and overburdens the courts, prosecutors, and public defenders, while simultaneously eliminating the trial court's ability to consider a variety of sentencing factors that the legislature has expressly recognized in AS 12.55.005 as fundamental. The effect of previously legislated mandatory sentencing laws can be seen across the country as Los Angeles County, the state of Texas, and New York have been forced into wholesale releases of prisoners without much thought as to appropriateness due to budget constraints. Surely, Alaska should promote reasoned and considered sentences on an individual basis.

Section 14 creates AS 12.55.127(a) effectively replacing AS 12.55.025(e),(g),and (h), which are repealed by Section 20. Proposed AS 12.55.127(a) provides that "If a defendant is required to serve a term of imprisonment under a separate judgment, any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive." This proposed provision is consistent with existing law insofar as it relates to sentences/dispositions imposed for criminal conduct **committed** after a person "is imprisoned upon a previous judgment..." AS 12.55.025(e); *Jennings v. State*, 713 P.2d 1222 (Alaska App. 1986). Subsection (a)'s language may, however, have an impact upon persons who committed separate criminal acts, charged in separate criminal cases, but **prior** to the imposition of any judgments in the resulting cases. Existing law permits courts to impose concurrent or partially concurrent sentences under those circumstances. *See Wells v. State,* 706 P.2d 711 (Alaska App. 1985)(construing AS 12.55.125(e) to permit concurrent sentencing where judgments are entered in separate cases after the conduct underlying each has ocurred).

Under proposed subsection (a), the mere existence of a "separate judgment" would eliminate this prospect for concurrent sentencing. This would lead to irrational results where clearly similarly situated offenders would not be treated similarly, which defies the stated desire for uniformity and the elimination of unjustified disparity in sentences. For example, a defendant charged with two or more crimes in a single indictment could receive concurrent sentences, while a defendant charged with several related or similar crimes, but in separate indictments or cases could not, unless the defendant made arrangements for sentencing proceedings in the two cases to be consolidated. Yet, for the defendant who did not know or have the foresight to arrange consolidated sentencing proceedings or for whom consolidated proceedings were not possible due to scheduling problems or other procedural difficulties, imposition of consecutive sentences would be mandatory. Mandatory application of consecutive sentences should not turn on such fortuitous or haphazard considerations.

6. Mitigator for Pleading Quickly to Sex Offense

This section of the bill, section 16, adds a mitigator for consideration at sentencing. Normally the Agency would support the addition of a mitigator, but this one is unworkable. It states that the mitigator applies when a defendant is sentenced for a sexual offense and he or she has pled out to the offense within 30 days of being arraigned on the charge. This makes the availability of the mitigator dependant on the prosecution to get full discovery to the defense in a timely manner to enable the defendant to adequately assess the charge and options on how to plead. Therefore it puts the defendant in the difficult and unacceptable position of pleading to a crime without the necessary information to do so, in order to get the benefit of the mitigator.

Perhaps an amendment making the mitigator available based upon an event, or a later time frame, but certainly before trial would be more workable.

7. Notice of Defenses and Experts

Sections 21 - 23 concern notice of defenses and experts and require the defense to give notice sooner than required under current law. It also adopts serious sanctions for failures to timely notify the prosecution. These changes in the rules will require the defense to put forth additional investigative efforts related to experts and defenses to meet these earlier deadlines in order to avoid the significant sanctions proposed.

The proposed amendment to Criminal Rule 16(c)(5) should be amended to allow for a continuance if the prosecutor claims it is prejudiced by the late notice, instead of simply entitling the prosecutor to one with no showing of prejudice required. . Precluding a defendant from raising a defense because his/her attorney failed to file a timely notice has broad reaching repercussions. First, such a ruling most certainly opens the case up for an ineffective assistance of counsel claim that will be filed after any trial where a defendant has been precluded from running an appropriate defense because his/her attorney dropped the ball.

The troubling part of the bill is the language that **requires** the judge to preclude an affirmative defense for lack of notice. No other provision in Criminal Rule 16 **requires** the court to exclude evidence for a violation of the rule. Exclusion is an option in the case of late notice of an expert witness, and one option the court can exercise under Rule 16(b)(1)(B). The Governor's amendments to expert disclosure, under this same rule, include specific language that a continuance is a remedy to late notice. See Section 23, page 11, line 20, but it also requires preclusion of the expert witness in the proposed Rule 16(g)(5)(C) if disclosure is not complete within 7 days of trial or at a time ordered by the court.

8. Expanding Impeachment Testimony

This portion of the bill, found in Sections 24 and 25 amend several of Alaska's Rules of

Evidence.

The first concerns Evidence Rule 412 related to the admissibility of evidence illegally obtained by the state. It seeks to make admissible illegally obtained statements and evidence when used to impeach a witness, not just in a perjury prosecution.

This proposed change is not warranted. Evidence Rule 412 as currently written protects constitutional guarantees and removes incentives for governmental intrusion into those protected areas, by precluding use of evidence obtained **illegally**. It does not create a great incentive for the defendant to commit perjury, because the state can still cross-examine the defendant on his claims and the defendant can be prosecuted for perjury with use of the statements in that prosecution. The current rule is a good deterrent and there has been no demonstrated history of misuse.

The second section, section 25, seeks to amend Evidence Rule 609(b) to increase the opportunity to use prior convictions of dishonesty from five years fro the date of conviction to within 5 years from unconditional discharge from the conviction when the prosecutor wants to use evidence of the prior conviction to impeach the accused defendant. This will certainly expand the use of prior convictions in cases. If a young adult is convicted of a misdemeanor or low level felony and receives a sentence short of a year, but is put on probation for a significant period of time, he would not be unconditionally discharged from that conviction until he was off probation completely, which could be more than ten years later. Young people may commit crimes of dishonesty and then become upstanding citizens. Using that stale conviction of dishonesty to impeach him when he is much older seems more prejudicial and probative.

9. Unreliable Hearsay Evidence Made Admissible in Domestic Violence Cases

While we recognize that domestic violence cases are tought cases, this section of the bill is unconstitutional and against longstanding rules of evidence. Section 26 of the proposed legislation found on pages 12-13 of the bill seeks to amend Alaska's Rules of Evidence to provide an exception to the hearsay rule, to make statements about an alleged crime of domestic violence made **within 24 hours** of the alleged offense, either by the alleged victim or by another person who allegedly saw or heard the alleged offense, admissible even though the declarant is available as a witness. The underlying state and federal constitutional rights of a defendant to confront witnesses is enforced by the exclusion of hearsay evidence. The constitutional right to confrontation, which entails the right of cross-examination, is a fundamental right essential to a fair trial in a criminal prosecution. Hearsay evidence is second hand evidence that is not capable of cross-examination. Unless the evidence fits one of the constitutionally acceptable exceptions to the hearsay rule, the admissibility and use of out-of-court statements violates the constitutional right to confrontation. Hearsay evidence is generally unreliable second-hand evidence unless it fits one of the closely guarded exceptions. It would be a mistake to broaden the hearsay exceptions to include these out of court statements. Statements made within 24 hours of an alleged crime of domestic violence

are not any more reliable simply because it is an alleged crime of domestic violence. Many domestic violation cases are frought with passion, emotion, and bias, where it is even more essential to provide the accused with the right to test the declarant of the statement's sincerity, memory, ability to perceive and relate, and the factual basis of their statement. It is aiso essential to a reliable verdict that the jury have the ability to assess the witness' demeanor on the stand so that the witness' veracity is displayed for the jury to judge. Section 26 of this bill should be deleted

Closing

Numerous portions of this bill are problematic. It proposes radical changes in the criminal laws and in particular attempts to make it far easier to convict a person exercising their right to self-defense. It treats the victim of an unlawful assault like a criminal and makes them prove their innocence. The proposed legislation is poorly conceived and runs counter to nearly everyone's conception of the right to self-defense. With the exception of a few sections, most of the sections of this bill are unwarranted, unfair, and in some instances unconstitutional.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

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April 3, 2003

Representative Lesil McGuire
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: "An act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date"

Dear Representative McGuire:

I am writing this letter to request that you schedule the above act, pending referral, for a hearing at your earliest convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
Attorney General

By: David W. Marquez
David W. Marquez
Assistant Attorney General

DWM:lb
Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

HOUSE BILL 244
Sectional Analysis

Section 1. "Heat of passion" applies only to First Degree Murder and Second Degree Murder. If a person kills while in a passion that was the result of serious provocation by the intended victim, that reduces the killing from murder to manslaughter. In one case, a man broke into the home of a drug dealer to recover money, and shot the drug dealer. He claimed that the shooting was done in a "heat of passion" and the Alaska Supreme Court reversed his murder conviction because the trial judge did not believe he was entitled to raise this defense. "Heat of passion" is often a fall-back position for defendants who do not think they will completely escape responsibility under self-defense. In cases where the state is able to disprove self-defense, it may also be required to disprove "heat of passion." This section would change "heat of passion" from a defense, that the state must *disprove* beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence. The defendant is the person who knows the motivation for the killing, and should bear the burden of establishing this justification.

Sections 2 - 4. These change self-defense from a defense, that the state must disprove beyond a reasonable doubt, to an affirmative defense, that the defendant must prove by a preponderance of evidence, with two exceptions. First, self-defense would remain a defense for the state to disprove if the person was on his or her property and did not use force against a household member; Second, it would remain a defense as under current law for force used by a peace officer acting within the scope of his or her duties. In most homicides, the defendant is only person still alive who was present at the killing. As with the defense of duress, the defendant is the person who knows the motivation for the use of force, and should bear the burden of establishing this justification. Section 2 deals with use of non-deadly force in self-defense. Sections 3 and 4 deal with deadly force. Section 4 also provides that a defendant may not claim self-defense for a killing if he brought a deadly weapon to the encounter, and was aware of and disregarded the risk that the encounter would result in combat.

Section 5 makes use of force in defense of a third person an affirmative defense. As with self-defense, the state would still be required to disprove the defense if the incident occurred on the person's property or the force was used by a peace officer.

Section 6 provides that an adult who has volunteered to talk to the police must request to be visited by an attorney, relative or friend. Occasionally attorneys people will demand to visit a person under arrest, even if the person has not made a request for the visit. This interrupts the police investigation, but it is allowed under current law. All other provisions in section 6, regarding the right to immediately make phone calls, are unchanged from current law.

Section 7. When the law provides that an element of a crime depends on a prior conviction or convictions, such as felony drunk driving, the state must prove beyond a reasonable doubt that the past convictions occurred. But the Alaska courts have said that this must occur in two trials, and that the jury must not be told of the past convictions in the first trial. This section reverses that court decision. Section 7 also provides that the defendant may not again litigate the validity of the prior conviction, unless the defendant was not provided counsel or a jury trial. Prior convictions should not again be subject to attack where the defendant has had the opportunity to appeal, and to exercise post-conviction remedies.

Sections 8 -12 and 17. These sections adopt a procedure for making decisions about Fifth Amendment claims and the granting of immunity by the state. Alaska law requires complete, transactional immunity from prosecution for a person who has claimed a privilege; thus, the decision to grant immunity must be made carefully. Currently, the courts hold secret hearings with witnesses who refuse to testify, and then give the state no information that the state needs to decide whether to grant immunity to the witness. Under this bill, the state is allowed the information it needs to make a rational decision about granting immunity from prosecution. Section 8 merely conforms statutory law to a constitutional decision by the Alaska Supreme Court. Sections 9 and 10 are minor clarifying amendments. Section 11 defines a term that explains that the witness can communicate to the court through his or her attorney, rather than speaking directly. Section 12 adopts a procedure where the decision about the privilege is made after an attorney is appointed for the witness, and after input by both the witness and the state. Section 17 clarifies that a witness who claims a Fifth Amendment privilege not to testify is entitled to a public defender if the cannot afford one. This codifies current court practice.

Sections 13 and 14, 18 - 20. Sections 13, 18 - 20 are conforming amendments regarding consecutive sentencing. Section 14 gives direction to courts in sentencing for more than one offense. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter or kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

Section 15 is similar to section 7, and provides that in imposing a presumptive sentence (which depends on prior convictions), the defendant may only challenge the validity of a prior conviction if he was denied the right to counsel or the right to a jury trial.

Section 16 would adopt a new mitigating factor for sentencing in a sexual felonies. Because these trials are so difficult for the victim, it would allow the court to consider whether to impose a lesser sentence if the defendant reduced the impact on the victim by entering a plea of guilty or no contest within 30 days of arraignment.

Section 21 changes Rule 16 (c)(5), Alaska Rules of Criminal Procedure, to require a defendant to give notice of certain defenses 30 days in advance of trial. Current law requires a shorter notice, and is routinely ignored by defense attorneys and courts.

Section 22 makes a conforming amendment to Rule 16(e)(1), Alaska Rules of Criminal Procedure, by cross-referencing consequences provided in other law for violation of the discovery rules or an order issued by a court under the discovery rules.

Section 23 addresses pretrial discovery of expert witnesses by both the prosecution and the defense. It requires that no later than 45 days before trial, both parties provide opposing counsel with the name and curriculum vitae of expert witnesses. The defense must disclose only those experts that it may call at trial. The prosecution must disclose experts that it may call at trial or that have worked on the case. Defense attorneys frequently instruct their experts not to write reports, because the report would have to be turned over to the prosecution. The prosecution has no such luxury, and is required to provide an expert's report. This section provides that if the defense expert has not written a report, the prosecution is entitled to depose the expert at the expense of the defense. It requires the court to disallow expert testimony if disclosure isn't complete seven days before trial or another time ordered by the court.

Section 24 amends the Alaska Rules of Evidence to provide that a voluntary statement obtained in violation of the technical *Miranda* requirements, may be used to impeach the person who made the statement, if that person testifies differently. Further, evidence that has been suppressed may also be used to impeach a witness. Current law only allows these statements and evidence to be used at a later perjury trial. This makes them available to impeach a witness at the first trial.

Section 25 extends the time for use of prior convictions for impeachment at trial from five years from conviction, to five years from the date of unconditional discharge.

Section 26 adopts a new exception to the rule against use of hearsay evidence, by allowing the use at trial of statements made within 24 hours of a crime involving domestic violence, if the statement reports or describes the crime.

Sections 27 - 31 include conforming repealers, a notice of a court rule change described above, procedural directions, and an effective date, July 1, 2003.