## *RECOMMENDATIONS*

### A. Introduction

The 11 recommendations that follow were distilled from the many shared with us by the hundreds of children, and law enforcement and human service professionals with whom we met in the course of our investigation. They reflect prevention as the first priority, harm reduction as the second. Attention to gender issues as factors that contribute to CSE and the need for systematic public and professional education on CSE are the third and fourth priorities. Earlier identification and more intensive supervision of sexually offending adults and juveniles also are priorities as is the need for more in-depth research into other societal factors that contribute to CSE and the identification of those subgroups of children who are at the greatest risk of exploitation.

Realization of these recommended priorities will require a higher level of public policy focus, commitment and coherence than currently exists. Their realization also requires new human, fiscal and other resources to support the activities of Federal, state and local governments, service providers, planners, child advocacy organizations, researchers and others that are seeking to protect children from sexual exploitation. Only a comprehensive approach to the elimination of CSE can succeed.

Although the recommendations have been framed and listed in discrete sequence, they are mutually reinforcing; considered together they form an integrated plan of attack on CSE. They reflect our view concerning what is needed to remedy the most pernicious and recalcitrant manifestation of CSE—pornography, prostitution and trafficking in children for sexual purposes.

### B. The Framework For An Integrated Plan of Action

Clearly, CSE is a complex and complicated phenomenon. Pathways into and out of CSE and CSEC are many and they are layered. Beyond the usual difficulties encountered when trying to unravel multiple, dense, causal relationships, CSE is, at its heart, a cluster of *commercial* activities, both in the formal—trafficking, smuggling, bogus contracts, financial payments—and wider meaning of that term—solicitations and exchanges. The commercial aspect of the CSEC creates a set of related sexually exploitative phenomena—prostitution, pornography, and trafficking—that promote an iron cage of control around the children enmeshed in them. The children possess commercial value, no matter how reprehensible the source of that value might be, and that strengthens the attachment of their purveyors to them. Add to the commercial mix the transnational aspect of trafficking—language and cultural barriers to extrication—and one confronts a potent phenomena that resists eradication. Superior counter force, comprising a combination of research- and law-enforcement-based knowledge of the CSEC's Achille's tendons, can nonetheless be mustered to roll back the tide of a still cresting set of CSEC phenomena.

We began our investigation into CSE with a commitment to help curb CSE. We have not veered from that initial commitment and, indeed, our resolve became even stronger as the investigation's findings began to emerge. Our research enterprise, then, has been in the service of this objective. Consequently, the way in which we depict what we have seen of the core structure of CSE is shaped by this fundamental commitment.

Exhibit N.1 (Appendix 1) frames the complex of relevant CSE relationships starting from the anchor point of reduction strategies. Following convention, reduction strategies (the boldfaced box)

can be broadly split into strategies of prevention (reduction activities launched before entry into the CSEC) and intervention (reduction activities launched after entry into the CSEC).

As we have wound our way through the CSEC thicket, we have found some fairly common ways of productively examining it from a reduction-based perspective. Pathways of entry into, continuation in, and exit from the CSEC involve a variety of micro- and macro-level *risks* and *causes* that are bracketed by individual attributes and cultural phenomena. In between these analytical bookends fall family relationships, peer interactions, school/educational processes, community connections, and social structure.

In view of the pivotal trafficking and transportation aspects of the CSEC—that is, the substantial human *mobility* that is at its center—across local, state, national, and regional borders and areas, from departure to arrival staging hubs, it is clear to us and others who have studied this problem that there must be a heavy concentration of *cooperation* among the main regulators of human mobility. These regulators comprise international, regional, national, and sub-national organizations. Standing together in cooperative efforts will be a key linchpin to denting the CSE trade. The possible forms of connection are many and varied, but the most critical ones include national and international statutory congruence, economic partnerships and incentives/disincentives, interagency cooperation (both GOs and NGOs), and technological sharing.

The capacity to set aside specific governmental and political interests on behalf of affected children and youth will be paramount to rolling back child sex-exploitation trafficking. However, many shocks and impediments to doing so continue to exist, many of which lurk at the national and international levels. These include social and economic upheavals (e.g., warfare, famine, economic impoverishment) and the entrenchment of the byproducts of such upheavals. Also, the brute fact that some governments may be complicit in the CSEC must be confronted, as difficult a challenge as that might be to overcome.

Governmental (e.g., criminal justice, human service) organizations are balanced by assorted nongovernmental organizations. These two organizational clusters will require some degree of *system integration* to substantially reduce the CSEC. System integration can consist of a range of formal and informal arrangements--including laws, regulations, partnerships, alliances, communication, technical assistance, and training, among others.

Cooperation and system integration cannot be fully realized absent a sufficient outlay of financial and human *resources*. Unless underwritten by adequate levels of financial and human capital, cooperation and system integration will remain inviting but empty visions.

In order to understand and harness information about the CSEC in the service of control and reduction strategies, systematic and sustained scientific *research* on the spectrum of risks and causes, cooperation, and system integration is urgently needed. Similarly, sustained research is needed on child prostitution and child pornography from the perspective of the CSEC, especially with respect to the intersection of its *commercial* and *international* aspects. This intersection raises some especially difficult social-control questions that require resolution. Equally vigorous research is needed on the extended relationships between the children caught in CSE and the succession of traffickers, customers, and pimps/procurers/promoters who use, abuse, and otherwise victimize these children. The products of our research will require, if they are to be of concrete value, mechanisms of dissemination and utilization. Put differently, in order to enhance the prospects for reducing the CSEC, there needs to be a seamless and forceful connection between the activities of knowledge creation, knowledge transmission, and knowledge application.

The diagrammatic depiction of CSE and the CSEC presented in Exhibit N 1 is shaped, then, by our unwavering inclination toward reduction strategies. Knowledge unfolds from both basic and applied purposes. In this instance, there is no more fundamental and defensible prism than that of research applied toward the end of curbing this shameful form of human misery.

C. Recommendations in Support of a National Strategy to Combat Child Sexual Exploitation (CSE) and the Commercial Sexual Exploitation of Children (CSEC)

**Recommendation #1.** ***Protect the Children***

Children are the victims of sexual exploitation and only rarely can protect themselves against sexual assaults inflicted by trusted family members and other adults, especially when children themselves fail to recognize or give credence to the coercion and deception that accompanies CSE. Thus, efforts at protecting children from sexual exploitation must emphasize prevention as the first priority.

The findings obtained from this investigation underscore the importance of the following elements in a national strategy to prevent CSE and to protect children from its devastating consequences:

- A lead Federal agency, or consortium of such agencies, must be designated and given primary responsibility for protecting children from SEC;
- Sexually offending adults and juveniles, including "opportunistic" sexual exploiters of children, must be given the unequivocal message that "it is not okay" to sexually molest children;
- Children must be empowered to report incidents of illicit sexual contact between themselves and others to law enforcement and human service authorities;
- Local and state human service and law enforcement agencies must have access to the resources needed to investigate fully all reported cases of child sexual abuse and child sexual assault;
- Local and state human service and law enforcement agencies must have access to the resources needed to adequately supervise all cases of *substantiated* or *indicated* child sexual abuse over the long term;
- Local human service and law enforcement agencies must have the resources needed to assist runaway, thrownaway and homeless youth from becoming victims of CSE;
- Local human service and law enforcement agencies must have access to resources needed to serve transient runaway and homeless youth who enter their communities; and,
- States and other jurisdictions must have access to the resources needed to cooperate fully with one another in monitoring the presence, location and activities of convicted child sexual offenders.

Parents, schools, child advocacy organizations, and youth groups need to work together in the development and dissemination of messages related to the protection of children from sexual exploitation. Public media, but especially television networks and the movie and recording industries, share a heavy responsibility for disseminating age-appropriate and accurate messages concerning the nature, extent and seriousness of CSE in contemporary American society.

**Recommendation #2.** ***Target Adult Sexual Exploiters of Children For Punishment, Not the Children***

Sexually exploited children often are re-victimized by the very agencies that have been designed to assist them. This re-victimization takes several forms: 1) the treatment of sexually exploited children as *criminals* rather than as *victims* of sexual exploitation; 2) to the extent they occur at all, arrests of juveniles involved in prostitution rather than the pimps, traffickers, customers and other adults that benefit from the sexual exploitation of children; and 3) "benign neglect" by many agencies of the complex service needs of tens of thousands of runaway and homeless street youth that enter local communities as "transients."

We strongly recommend that the focus of law enforcement and human service agencies shift in the following ways:

- that local and state law enforcement agencies shift their priorities away from the apprehension of sexually involved street youth to the arrest, prosecution and punishment of adult perpetrators of sex crimes against children—pimps, traffickers and customers;

- that Federal law enforcement agencies become more involved in the identification and prosecution of adults involved in national sex crime rings that include child sex among their "portfolio" of services; and

- that appropriate mechanisms be found for local and state human service agencies to work more cooperatively with law enforcement authorities in the identification and apprehension of adults who commit sexual crimes against children.

**Recommendation #3.** ***Enforce More Fully Existing National and State Laws Relating to Child Sexual Exploitation***

This investigation has confirmed a pattern of "benign neglect" on the part of many law enforcement and human service agencies vis-à-vis the needs of sexually exploited children and youth. This pattern is reflected both in the comparatively low number of CSE cases currently being served by public agencies (relative to the large number of CSE cases this investigation has confirmed to exist) and the absence of written policies and procedures for dealing with CSE cases in all but a few agencies. The pattern prevails despite the existence of strong Federal, and usually state, laws designed to protect children from sexual exploitation.

We strongly recommend that the Federal government assume a leadership position in encouraging both its own agencies and those of state and local governments to implement fully all national and state laws pertaining to the protection of children from sexual exploitation. At a minimum, such interventions should encourage:

- all Federal agencies to develop strategic plans for implementing Federal laws related to the sexual exploitation of children that affect their mission;

- the creation of financial incentives to states and local governments for implementing all laws related to the sexual exploitation of children within their jurisdictions (e.g., planning grants); and,

- the development of a system of disincentives for use with governmental agencies that fail to comply with relevant laws pertaining to the sexual exploitation of children (e.g., withdrawal funds, reassignment of responsibilities to other agencies, court supervision, etc.).

**Recommendation #4.** ***Increase the Penalties Associated With Sexual Crimes Against Children***

While no one can forecast exactly the net impact of greater or enhanced criminal penalties in reducing CSE, there is an important logic for doing so. Penalty enhancement broadcasts the unmistakable message that CSE is a crime, not a viable, defensible personal choice. That is an important cultural and educational statement that seems atrophied in many places in the U.S., as well as in many foreign communities in which CSE is a brute fact of life (and saddening forced option).

Some persons involved in child trafficking were quite explicit about the "cost/benefit" ledger sheets they mentally drafted; on balance, involvement in the CSEC was judged to be more profitable and less risky than involvement in felony-level crimes.[47] This imbalance is an incentive to make one's illicit money from CSE rather than drugs or other felony crimes. While not all decisions to engage in one illicit crime rather than another are made quite so rationally, the existing statutory imbalance sends a powerful message to those involved or considering involvement in CSE. The message is one of legal and cultural hypocrisy. Putting both messages back on point will do no harm and, one hopes, substantial good.

For these reasons, we recommend:

- taking action to tip the balance toward making the current net of CSE-relevant statutes more consistent in severity with other acts of commensurate seriousness, like drug and arms trafficking; and,

- convening a multidisciplinary group of legal a advocacy experts to draft a model penal code to inform and shape CSE-related legislation, perhaps doing so under the auspices of the American Bar Association, which has sanctioned such initiatives in the past.

**Recommendation #5.** ***Support Local Communities in Their Efforts to Strengthen Local and State Laws Pertaining to Child Sexual Exploitation***

At the same time that work is done by governmental and nongovernmental groups to change the penalty structure and hierarchy of statutes pertaining to CSE, work also needs to be done in strengthening those statutes that already exist. There are two avenues of redress. One is simply to apply the law when it is violated. Infrequent statutory application breeds blindness if not contempt for its content and message. The second is to impose a more even, or uniform, level of legal sanction when the sanction is in fact invoked, regardless of the frequency of use. Perhaps the most viable modality for ad-

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[47] Many CSE offenses, at least at the local level, trigger comparatively minor, misdemeanor (municipal) "jail" time in comparison to other related offenses, like drug trafficking or distribution, which can carry major, felony (state) "prison" time.

vancing this twin agenda is through advocacy and groups of victims acting on behalf of sexually exploited children.

Thus, we recommend the following:

- apply current statutes in a more consistent manner, doing so by taking steps to adopt sentencing guidelines, such as those used at the Federal level and in many states; and,

- develop sentencing guidelines for CSE by mounting a multi-state review of actual sentences meted out.

**Recommendation #6.** ***Establish a National Child Sexual Exploitation Intelligence Center (NCSEIC)***

This investigation has demonstrated the need for a full-time intelligence gathering and strategic planning apparatus for monitoring national trends related to CSE. To that end, we recommend that a *National Child Sexual Exploitation Intelligence Center* (NCSEIC) be established.

While uniquely focused on issues related to CSE, the goals and structure of the NCSEIC would be comparable to those of the National Drug Intelligence Center (NDIC): 1) to support national policy makers and law enforcement decision makers with strategic domestic CSE intelligence; 2) to support national counter CSE efforts; and 3) to conduct and report on a timely basis national, regional and state CSE threat assessments.

Collaborating agencies with the NCSEIC would include at least the following Federal departments and units in addition to the National Center for Missing and Exploited Children: the Child Exploitation and Obscenity Section of the U.S. Department of Justice, the Federal Bureau of Investigation, the U.S. Customs Service, the Defense Intelligence Agency, the Family and Youth Services Bureau of the U.S. Department of Health and Human Services, the U.S. Immigration and Naturalization Service (INS), The U.S. National Central Bureau (INTERPOL), the U.S. Marshall's Service, the Office For Victims of Crime of the U.S. Department of Justice, the U.S. Postal Inspection Service, the Office of Children's Issues of the U.S. Department of State, the Forensic Services Division of the U.S. Treasury Department, the U.S. Department of Labor, the U.S Department of Transportation, the U.S. Department of Education, the U.S. Department of Commerce, the U.S. Department of Agriculture, and the Criminal Investigative Divisions (CID) of the U.S. Department of Defense.

In addition to other responsibilities, the recommended functions of the NCSEIC would include:

- the development of a library of pornographic images that have been accepted by Federal and state courts as evidence of sexual crimes against children (for accessing by Federal prosecutors and others working in cooperation with Federal justice agencies);

- the conduct and dissemination of timely threat assessments of changing national, regional and state trends in CSE;

- the conduct and dissemination of timely threat assessments concerning the involvement of organized crime and other criminals in the commercial sexual exploitation of children; and,

- the promotion of continuing professional education of analysts, forensics specialists and others needed to carry out on-going threat assessments and strategic planning on matters pertaining to CSE.

**Recommendation #7.** ***Expand Federally Funded Multi-jurisdictional* Task Forces on Child Sexual Exploitation *Into All Major Federal and State Jurisdictions***

Federally-initiated multi-jurisdictional task forces on CSE have demonstrated great promise in the communities in which they are located (Whitcomb, 1995; Whitcomb & Eastin, 1998).[48] They have, for example, succeeded in several critical respects:

- sensitizing local communities to the dangers of sex crimes against children;
- promoting multi-jurisdictional cooperation in identifying, apprehending and prosecuting perpetrators of sex crimes against children;
- promoting new public-private partnerships in combating child pornography, juvenile prostitution, and trafficking of children for sexual purposes;
- strengthening local laws designed to protect children from sexual abuse, sexual assault and sexual exploitation; and,
- serving as focal points for promoting increasingly higher levels of public and continuing professional education concerning CSE both locally and nationally.

On the basis of their apparent effectiveness in combating sexual crimes against children, we recommend that Federally-funded *Multijurisdictional Task Forces on Child Sexual Exploitation* be established and systematically evaluated in all major Federal and state jurisdictions.

**Recommendation #8.** ***Expand Federally-Funded* Internet Crimes Against Child (ICAC) *Units Into All Major Federal and State Jurisdictions***

Federally-initiated *Internet Crimes Against Children* units have demonstrated great promise in the 30 communities in which they have been implemented.[49] They have succeeded, for example, in:

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[48] The current number of these task forces is unknown and their names vary from one jurisdiction to another, i.e., *Sexual Assault and Exploitation Felony Enforcement Team* (SAFE), *Task Force on Child Sexual Exploitation*, etc. In all cases, these task forces are multi-jurisdictional and consist of a standing team of CSE experts who are representatives of federal, state and local law enforcement agencies. The task forces are dedicated to proactive and reactive investigation and prosecution of cases involving child sexual exploitation.

[49] In FY 2001, Congress appropriated $6.49 million for the Internet Crime Against Children (ICAC) Task Force Program for state and local law enforcement to continue specialized cyber units to investigate and prevent child sexual exploitation. The ICAC program encourages communities to develop regional, multi-jurisdictional, and multi-agency responses to Internet crimes. Since their inception in 1998, ICAC Task Forces have arrested 420 offenders, identified hundreds of investigative targets, seized 825 computers, provided training to 10,000 prose-

- sensitizing local communities to the dangers of internet sex crimes against children;
- promoting multi-jurisdictional cooperation in identifying, apprehending and prosecuting perpetrators of internet sex crimes against children;
- promoting new public-private partnerships in combating electronically promoted sex crimes against children, including partnerships with internet service providers (ISPs);
- strengthening local laws designed to protect children from involuntary exposure to electronic pornography, sexual solicitations and sexual harassment; and,
- serving as focal points in the promotion of increasingly higher levels of public and continuing professional education concerning CSE both locally and nationally.

On the basis of their apparent effectiveness in combating electronic sex crimes against children, we recommend that Federally-funded *Internet Crimes Against Children* units be established and systematically evaluated in all major Federal and state jurisdictions.

**Recommendation #9.** ***Enlarge the National Pool of Child Sexual Exploitation Experts and Specialists***

A serious shortage exists nationally in the number and types of specialists in CSE. These shortages are most apparent in the forensics area but also are manifest in judicial and prosecutorial agencies. An urgent need also exists for more social workers, psychologists, psychiatrists, educators, physicians, lawyers, police officers, coroners and others with special expertise in CSE.

We recommend that the Federal government:

- expand significantly its current programs of continuing education focused on increasing the national pool of legal, correctional and human service professionals with specialized expertise in the nature, extent, dynamics and impact of sexual exploitation on children and their families;[50]
- promote increased attention to CSE content and practices in the curricula and training programs of all professional disciplines that share responsibility for assisting sexually exploited children and their families; and,

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cutors and law enforcement officers, and reached thousands of children, parents, and educators with information about safe online practices for children and teenagers. With the addition of 20 new regional task forces in FY 2000, the ICAC program is now providing forensic, investigative, and prevention services in 31 States (OJJDP, 2001:47).

[50] Existing efforts include those sponsored by selected federal agencies for their own staff engaged in the investigation of CSE cases (e.g., U.S. Customs Service, U.S. Postal Inspection Service) and those provided by private organizations through contractual arrangements with the Office of Juvenile Justice and Delinquency Prevention to other federal and private agencies--the National Center for Missing and Exploited Children and the Fox Valley Technical College (Connelly & Laney, 2001).

- promote increasingly higher levels of interdisciplinary education and cooperation in the field of CSE.

**Recommendation #10.** ***Promote Effective Public/Private Partnerships For Combating Child Sexual Exploitation***

A successful national campaign to combat CSE will require active participation and coordination of efforts between and among all public and private stakeholders committed to the prevention of CSE and to the protection of its victims. Among others, these stakeholders include:

- governmental agencies and units charged with leadership responsibility in combating CSE at the local, state and Federal levels;
- nongovernmental organizations and agencies that provide direct services to sexually exploited children and their families;
- associations and networks of sexually exploited children and youth;
- associations and networks of parents and guardians of sexually exploited runaway, throwaway, homeless and otherwise missing children;
- nongovernmental organizations engaged in advocacy, research, and educational activities on behalf of sexually exploited children nationally and internationally;
- nongovernmental organizations engaged in advocacy, research, and educational activities on behalf of adult victims of domestic violence and CSE;
- primary and secondary school educators;
- businesses and other commercial organizations that profit from the commercial sexual exploitation of children (e.g., internet service providers, hotel/motel chains, transportation vendors, travel agencies);
- foundations and other public benefit fiduciary organizations that provide financial support to programs serving sexually exploited children and their families; and,
- representatives of the public media (including news print, television, radio, the film industry, etc.).

We recommend that the Federal government give programmatic and fiscal leadership to:

- the development of local, state and national councils (coalitions and task forces) of public and private stakeholders committed to the elimination of CSE;
- the development by these councils (coalitions and task forces) of multi-year strategic plans that include specific goals and timetables for measuring and reducing the prevalence of CSE within their communities; and,

- the development of nationally linked coordinating mechanisms whereby local and state strategic plans for the elimination of CSE can be integrated into a comprehensive national plan of action.

**Recommendation #11** ***The Need For More Specialized Studies of Perpetrators of Child Sexual Exploitation and Their Victims***

The present investigation represents a unique "first generation" inquiry into the nature, extent, dynamics and seriousness of CSE in the U.S.. This investigation has uncovered many surprising, and unsettling, facts about the near epidemic nature of CSE in contemporary American society. We have reported these findings in considerable detail. Even so, much more needs to be understood about the causes and extent of CSE, especially among those sexually vulnerable populations of children and youth that are hidden from public view.

We recommend that additional research be undertaken in the following areas:

- understanding more fully those aspects of American collective life that appear to contribute directly to the CSEC—including changing societal values and mores; weakening family structures; the persistence of male dominance over females; the apparent unclarity on the part of many adults concerning the right of children not to be physically, emotionally or sexually violated;

- the development of more detailed profiles of adults who we have identified as either "transients" (i.e., military personnel, long haul truck drivers, conventioneers, members of motorcycle gangs, sex tourists) or "opportunistic" sexual exploiters of children—a significant number of whom are married men with children of their own;

- the development of more detailed profiles of juvenile sexual offenders (i.e., older siblings, neighbors, children of family acquaintances) who exploit younger children already are known to them;

- the development of more detailed profiles and modes of operation of "pimps" and others (both older juveniles and adults) who systematically promote the commercial sexual exploitation of juveniles;

- the development of more detailed profiles and modes of operation of national and international "traffickers" of children for sexual purposes;

- the nature and extent of the CSEC among youth who self identify as sexual minorities--including gay, lesbian, bisexual, and transgender youth;

- the nature and extent of the CSEC among girls in gangs, especially those in male-controlled gangs, ethnically organized gangs, and Native American tribal gangs;

- the nature and extent the CSEC among American youth who cross international borders (especially into Mexico) in pursuit of cheaper drugs, alcohol and sex with child nationals of those countries;

- the nature and extent of commercial sex among middle income and other comparatively "well-off" youth living in their own homes who prostitute themselves for money in order to purchase more expensive clothing, jewelry and drugs;

- the nature and extent of the CSEC among youth living in poverty, particularly those living in public housing;

- the international dimensions of the CSEC with a U.S. nexus, including American youth who are trafficked outside the U.S. for sexual purposes and the foreign age-dependent children and youth who are trafficked into the U.S.;

- the near- and long-term impact of sexual exploitation on children and youth as they mature into adults; and,

- cost (and profit) estimates associated with the CSEC.

The road ahead to protect America's children and youth from CSE and the CSEC is long, and success is uncertain. After having concluded this *first generation research* effort, however, what is clear to us is the need for collateral *first generation policy development* and *strategic planning* in dealing with CSE and the CSEC at the local, state, national, and, because of the great human mobility involved, international levels. These developments must engage the talents and resources of all those persons and organizations working to protect children from CSE and these efforts must be adequately financed. Nothing short of a comprehensive and well-coordinated approach to enhancing the nation's capacity for preventing and protecting children from the horrors of CSE will succeed.

# TRAFFICKING VICTIMS PROTECTION ACT — MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS

**Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-386, § 108, as amended.**

**(A) Minimum standards**

For purposes of this chapter, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following:

(1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.

(2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

**(B) Criteria**

In determinations under subsection (a)(4) of this section, the following factors should be considered as indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons:

(1) Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons, and convicts and sentences persons responsible for such acts, that take place wholly or partly within the territory of the country. After reasonable requests from the Department of State for data regarding investigations, prosecutions, convictions, and sentences, a government which does not provide such data, consistent with the capacity of such government to obtain such data, shall be presumed not to have vigorously investigated, prosecuted, convicted or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(2) Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking

including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.

(3) Whether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.

(4) Whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons.

(5) Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to substantially the same extent as persons charged with other serious crimes (or, to the extent such extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).

(6) Whether the government of the country monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's own country.

(7) Whether the government of the country vigorously investigates, prosecutes, convicts, and sentences public officials who participate in or facilitate severe forms of trafficking in persons, and takes all appropriate measures against officials who condone such trafficking. After reasonable requests from the Department of State for data regarding such investigations, prosecutions, convictions, and sentences, a government which does not provide such data consistent with its resources shall be presumed not to have vigorously investigated, prosecuted, convicted, or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.

(8) Whether the percentage of victims of severe forms of trafficking in the country that are noncitizens of such countries is insignificant.

(9) Whether the government of the country, consistent with the capacity of such government, systematically monitors its efforts to satisfy the criteria described in paragraphs (1) through (8) and makes available publicly a periodic assessment of such efforts.

(10) Whether the government of the country achieves appreciable progress in eliminating severe forms of trafficking when compared to the assessment in the previous year.

HB

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# SENATE COMMITTEE REPORT

DATE. 2/1/06

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 107(FIN)

HB 107 HUNTING/FISHING INTERFERENCE

"An Act relating to unlawful obstruction or hindrance of hunting, fishing, trapping, or viewing of fish or game; and amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

**CS Senate Bill:**
[ ] Same Title
[ ] New Title

**SCS House Bill:**
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

**NEW FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
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**PREVIOUS FISCAL NOTE(S):**

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[ ] **APPROPRIATION - no fiscal note**

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---|---|---|---|---|
| | | | X | |
| | | | X | |
| GOOD BILL! | X | | | |
| | X | | | |
| | | | | |
| | | | | |
| CHAIR: | ✓ | | | |

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** February 14, 2006

**SUBJECT:** SCS CSHB 107(RES): physical interference defined
(Work Order No. 24-LS0444\C)

**TO:** Representative Jay Ramras
Attn: Jim Pound

**FROM:** Brian J. Kane BJK
Legislative Counsel

You have asked me to define what "physically interfering" means in relation to commercial fishing, sport fishing, and viewing.

However, it appears to me that the real issue here is how the "physically interfering" phrase interacts with the rest of the clause in the proposed AS 16.05.790(a)(3). From my reading of HB 107, the physical interference involves "equipment," not just two people actually coming in contact with each other.

The intent of this clause, as it appears from past notes on the bill, initially was to prevent one from intentionally physically interfering with another's gear or equipment in fishing or viewing situations. The situations you describe of one fisherman stepping in front of another or one viewer stepping in front of another do not seem to fit into the parameters set in (a)(3). From my reading, (a)(3) is more aimed at a situation where one fisherman intentionally cuts the line of another, or something of that type of action. It does not appear that there is any cause of action created when one viewer steps in front of another viewer.

The problem, if this clause is being read in the wrong vein, may be that it reads: "physically interfering or tampering with equipment . . ." Perhaps this is being read as only the "tampering" relating to the equipment and not the physical interference. One solution to this problem may by to change the wording to: "physically interfering *with* or tampering with equipment . . ."

From my reading, and from the apparent intent of the initial bill request, the physical interference is aimed only at these acts being done toward someone's equipment, not an actual physical impediment as described in your examples.

If I may be of further assistance, please advise.

BJK:lmb:med
06-062.lmb

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329


**MEMORANDUM** January 31, 2006

**SUBJECT:** Interaction between hunter and photographer of wildlife (CSHB 107(FIN); Work Order No. 24-LS0444\X)

**TO:** Representative Jay Ramras
Attn: Jim Pound

**FROM:** Brian J. Kane BJK
Legislative Counsel

I have been asked to analyze the legal ramifications of a situation where a hunter shoots an animal while a photographer is trying to take a photo of said animal. Specifically, could the photographer make a pecuniary claim for this lost photo opportunity due to the actions of the hunter in shooting the animal?

It does not appear to me that a photographer would have any such claim against the hunter. The obstruction discussed in HB 107 must be intentional. AS 11.81.900(a)(1) defines "intentional":

> (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;

Hence, if the hunter is not shooting the animal for the purpose of preventing the photographer from taking the picture, then it does not appear as if the hunter is in violation. If the hunter is lawfully hunting and not intentionally hindering the photographer's viewing of the wildlife, then it does not appear that there are any pecuniary claims on either side of this situation.

BJK:lmb
06-031.lmb

**Representative Jay Ramras**
**Co-Chair, House Resources**
**V-Chair, Economic Develop.**
**Tourism & Trade**
**House State Affairs**
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 452-1146

# Alaska State Legislature

While in Session
**State Capitol, Room 104**
**Juneau, Alaska 99801-1182**
(907) 465-3004
Fax: 465-2070
Toll Free: (877) 465-3004

**House District 10**

## House of Representatives

## Sponsor Statement

## SCS CS for HB 107(RES)

Senate Committee Substitute for Committee Substitute House Bill 107 (RES) is a change to existing statute regarding persons who hunt, fish, trap, or view wildlife in Alaska. Presently, if any of these people are obstructed from participating in this most basic of Alaskan experiences, they can seek relief in our courts. The courts are permitted to grant damages for most of the expenses except reasonable actual attorney's fees and costs. SCSCSHB 107 will allow the judge to grant full costs and reasonable and actual attorney fees.

There is a growing sentiment across the country that disturbing wildlife in any manner is unacceptable. Hunting, fishing, trapping, and viewing wildlife are considered an important part of why we live in Alaska and why thousands of tourists visit our state each year. Those individuals or groups who would hinder a wildlife experience know that most people will not take them to court because of the attorney fees and costs involved with litigation.

Alaskans and visitors should not be subjected to having to pay because of interference, obstruction, or hindrance of their most basic rights. SCSCSHB 107 will allow an opportunity for the prevailing party to recoup the actual costs associated with hindering an Alaskan Wildlife Experience.

Representative_Jay_Ramras@legis.state.ak.us

**Representative Jay Ramras**
**Co-Chair, House Resources**
**V-Chair, Economic Develop.**
**Tourism & Trade**
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## House of Representatives

# Changes to AS 16.05.790 & .791

Change 1 (Page 2, Line 4&5)

Physically interfering or tampering language has been added to give law enforcement authority to charge an individual who has cut a trap line, destroyed nets or fish pots etc. to be actually charged with the crime. Currently the charges are filed under criminal mischief.

Change 2 (Page 2, Line 14 & 15)

This language exempts a law enforcement officer while performing their duties. The state was forced recently to settle a case involving a fish and wildlife protection helicopter that allegedly caused all of the fish to jump out of a net.

Change 3 (page 2, Line 20-22)

This language is the actual intent of the bill to allow people to recover reasonable actual attorney fees. There is an exemption for commercial fishing as limited openings often result in potential perceived violations.

Representative_Jay_Ramras@legis.state.ak.us

**SENATE CS FOR CS FOR HOUSE BILL NO. 107(RES)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

**BY THE SENATE RESOURCES COMMITTEE**

**Offered: 2/1/06**
**Referred: Judiciary**

**Sponsor(s): REPRESENTATIVES RAMRAS, Kelly, Neuman**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to unlawful obstruction or hindrance of hunting, fishing, trapping, or viewing of fish or game; and amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure."**

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

*** Section 1.** AS 16.05.790(a) is amended to read:

(a) Except as provided in (e) of this section, a person may not intentionally obstruct or hinder another person's lawful hunting, fishing, trapping, or viewing of fish or game by

(1) placing one's self in a location in which human presence may alter the

(A) behavior of the fish or game that another person is attempting to take or view; or

(B) feasibility of taking or viewing fish or game by another person; [OR]

(2) creating a visual, aural, olfactory, or physical stimulus in order to alter the behavior of the fish or game that another person is attempting to take or view; or

**(3) physically interfering with or tampering with equipment being used for lawful hunting, fishing, trapping, or viewing purposes.**

*** Sec. 2.** AS 16.05.790(d) is amended to read:

(d) In a prosecution under this section, it is an affirmative defense that the person was

**(1) a law enforcement officer engaged in performing the duties of the office; or**

(2) lawfully entitled to obstruct or hinder the hunting, fishing, trapping, or viewing of fish or game.

*** Sec. 3.** AS 16.05.791(b) is amended to read:

(b) A person aggrieved by a violation of AS 16.05.790 is entitled to recover general damages and special damages, including license and permit fees, travel costs, guide-outfitting fees, costs for special equipment and supplies, and other related expenses. **The prevailing party in an action described in this subsection is entitled to costs and reasonable actual attorney fees.**

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. The provisions of AS 16.05.791(b), amended by sec. 3 of this Act, have the effect of amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by providing for the award of reasonable actual attorney fees to the prevailing party in an action brought by a person aggrieved by a violation of AS 16.05.790.

# FISCAL NOTE

**STATE OF ALASKA**
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 4
Bill Version: SCS CSHB 107(RES)
(S) Publish Date: 2/01/06

Revision Date/Time (Note if correction):
Dept. Affected: Fish and Game
Title: Hunting/Fishing Interference
RDU
Component
Sponsor: Representative Jay Ramras
Requester: Senate Resources
Component No.

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 | FY 2012 |
|---|---|---|---|---|---|---|
| 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 (FY2006) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

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

Passage of this legislation would have no fiscal impact.

Prepared by: Sarah A. Gilbertson, Legislative Liaison — Phone 465-6137
Division: Commissioner's Office — Date/Time 1/20/06 1:51 PM
Approved by: Commissioner McKie Campbell — Date 1/20/2006
Agency: Alaska Department of Fish and Game

(Revised 9/7/2005 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 5
Bill Version: SCS CSHB 107(RES)
(S) Publish Date: 2/1/06

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to unlawful obstruction or hindrance of hunting, fishing, trapping, or viewing..."
RDU CIVIL
Component Torts and Workers' Compensation
Sponsor Representative Ramras
Requester Senate Resources
Component No.

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 | FY 2012 |
|---|---|---|---|---|---|---|
| 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 (FY2006) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

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

This bill amends AS 16.05.791(b) by allowing a person aggrieved by unlawful obstruction or hindrance of hunting, fishing, or the viewing of fish or game to recover full actual attorney fees and costs of an action to collect damages, fees, and costs. An actual award of fees and costs against the State would be requested in the judgments and claims section of the annual supplemental appropriations bill and are thus not included in this fiscal note. The bill makes an exception for a law enforcement officer while performing the duties of t he office.

Passage of this legislation is not anticipated to result in a fiscal impact for the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/23/06 8:51 AM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 1/23/2006
Agency Department of Law

(Revised 9/7/2005 OMB)

Sec. 16.05.790. Obstruction or hindrance of lawful hunting, fishing, trapping, or viewing of fish or game.

Statute text

(a) Except as provided in (e) of this section, a person may not intentionally obstruct or hinder another person's lawful hunting, fishing, trapping, or viewing of fish or game by

(1) placing one's self in a location in which human presence may alter the

(A) behavior of the fish or game that another person is attempting to take or view; or

(B) feasibility of taking or viewing fish or game by another person; or

(2) creating a visual, aural, olfactory, or physical stimulus in order to alter the behavior of the fish or game that another person is attempting to take or view.

(b) For purposes of (a) of this section, "lawful" means

(1) in compliance with

(A) this title, regulations adopted under this title, or applicable federal statutes and regulations;

(B) the Marine Mammal Protection Act (P.L. 92-522) or the Endangered Species Act (P.L. 93-205); or

(C) federal regulations adopted under 16 U.S.C. 3111 - 3126 relating to subsistence hunting, fishing, or trapping on federal land; and

(2) with the permission of the private landowner if the hunting, fishing, trapping, or viewing of fish or game occurs on private land.

(c) Notwithstanding AS 12.25, only a peace officer may arrest a person for violating this section. A peace officer who has probable cause to believe that a person has violated this section may arrest or cite the person or order the person to desist.

(d) In a prosecution under this section, it is an affirmative defense that the person was lawfully entitled to obstruct or hinder the hunting, fishing, trapping, or viewing of fish or game.

(e) This section does not apply to

(1) lawful competitive practices among persons engaged in lawful hunting, fishing, or trapping;

(2) actions taken on private property with the consent of the owner; or

(3) the obstruction or hindrance of the viewing of fish or game by a person actively engaged in lawful fishing, hunting, or trapping.

(f) A person who violates this section is guilty of a misdemeanor and is punishable by a fine of not more than $500 or imprisonment for not more than 30 days, or both.

History

(§ 1 ch 47 SLA 1991)

Rule 82. Attorney's Fees.

Text

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgement and, if awarded prejudgement interest

| | Contested with trial | Contested without trial | Non Contested |
|---|---|---|---|
| First $25,000 | 20% | 18% | 10% |
| Next $75,000 | 10% | *8% | *3% |
| Next $400,000 | 10% | *6% | *2% |
| Over $500,000 | 10% | *2% | *1% |

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

Rule 508. Costs.

Text

(a) Dismissal or Denial. If an appeal is dismissed or petition denied by the appellate court, costs shall not be allowed to the appellee or respondent, unless otherwise ordered by the court.

(b) Affirmance of Judgment. In all cases of affirmance of a judgment or any order or decision of the superior court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

(c) Reversal or Partial Reversal. In cases of reversal of any judgment, order or decision of the superior court, costs shall be allowed the appellant or petitioner unless otherwise ordered by the court. In cases of partial affirmance and partial reversal, the court will determine which party, if any, shall be allowed costs.

(d) Costs to be Awarded. When costs are awarded in the appellate court, they shall include, unless the court otherwise orders and subject to Rules 210(b)(6) and (c)(6), the filing fee, the costs of preparing the transcript, premiums for any bond under Rule 204(c) or 204(d), and the costs of duplicating and mailing briefs and excerpts of records. Duplicating costs will not be awarded in excess of the rate generally charged by printers in the city in which counsel is located.

(e) Attorney's Fees. Attorney's fees may be allowed in an amount to be determined by the court. If such an allowance is made, the clerk shall issue an appropriate order awarding fees at the same time that an opinion or an order under Rule 214 is filed. If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay, actual attorney's fees may be awarded to the appellee or cross-appellee.

(f) Procedure.

(1) Bill of Costs. At the time an opinion or an order under Rule 214 is filed, the clerk shall notify the party or parties entitled to recover costs under subsections (b) and (c) of this rule. That party or parties shall serve and file an itemized and verified bill of costs within 10 days after the date of notice of the opinion or order. Date of notice is defined in Civil Rule 58.1(c). The bill of costs shall be limited to the items specified in subsection (d) of this rule. Failure to file a timely bill of costs is a waiver of the right to recover costs. Objections to the bill of costs may be filed within 7 days after service of the bill. Promptly after expiration of the time for filing objections, the clerk shall issue an itemized award of costs. A hearing on the bill of costs shall not be held unless requested by the clerk. The clerk may not delegate to a deputy clerk the authority to award costs in cases in which objection is filed, except with the approval of the chief justice. Return of the record shall not be delayed pending the award of costs.

(2) Reconsideration. A party aggrieved by an order awarding costs under subsection (f)(1) of this rule or an order awarding attorney's fees under subsection (e) of this rule may file a motion for reconsideration within ten days after the date of notice of the order. The non-moving party may file a response within seven days after service of the motion. Reconsideration of an award of costs or attorney's fees under (f)(1) or (e) will be determined by an individual justice or judge. Full court reconsideration of such individual justice's or judge's decision may be sought pursuant to Appellate Rule 503(h)(2)(B).

(3) Rehearing. If a timely petition for rehearing is filed, the clerk shall not award costs until the court has disposed of the case on rehearing. Supplemental or amended bills of costs may not be filed after disposition of a petition for rehearing unless requested by the court.

(g) Exemptions.

(1) Workers' Compensation Appeals. In an administrative appeal from the Alaska Workers' Compensation Board or in an appeal from a denial of a claim of benefits under the Employment Security Act, an award of costs or attorney's fees shall not be made against the claimant in either the supreme court or the superior court unless the court finds that the claimant's position was frivolous, unreasonable, or taken in bad faith.

(2) In an administrative appeal from the Alaska Workers' Compensation Board, full reasonable attorney's fees will be awarded to a successful claimant. Counsel for the claimant shall serve and file an affidavit of services rendered on appeal within 10 days from the date of notice of an opinion or an order under Rule 214. Objections to the affidavit of services may be filed within 7 days of service of the affidavit. An individual justice shall determine the amount of fees to be awarded.

(h) Execution. Upon proper application, the clerk of the trial court may issue writs of execution upon the award of costs and attorney's fees made pursuant to this rule, without the approval of a judge of the trial court.

(SCO 439 effective November 15, 1980; amended by SCO 507 effective July 1, 1982; by SCO 508 effective July 1, 1982; by SCO 512 effective October 1, 1982; by SCO 552 effective February 1, 1983; by SCO 554 effective April 4, 1983; by SCO 562, effective May 2, 1983; by SCO 583 effective February 1, 1984; by SCO 619 effective June 15, 1985; by SCO 847 effective January 15, 1988; by SCO 1024 effective July 15, 1990; by SCO 1155 effective July 15, 1994; by SCO 1279 effective July 31, 1997; by SCO 1440 effective October 15, 2001; and by SCO 1482 effective October 15, 2002)

Note: In 1997 the legislature enacted AS 18.16.030(m), which provides that a filing fee may not be required of, and court costs may not be assessed against, a minor in a proceeding to bypass parental consent to an abortion. According to ch. 14, § 10 SLA 1997, AS 18.16.030(m) has the effect of amending Administrative Rule 9, Civil Rule 79, and Appellate Rule 508 by prohibiting filing fees and assessment of court costs in certain actions. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass proceedings in the superior court and a separate rule on judicial bypass appeals. See Probate Rule 20 & Appellate Rule 220.

NATIONAL RIFLE ASSOCIATION OF AMERICA
DIVISION OF CIVIL 1871
11250 WAPLES MILL ROAD
FAIRFAX, VA 22030

February 17, 2005

The Honorable Jay Ramras
Alaska State House of Representatives
Alaska State Capitol
Juneau, AK 99801

Dear Representative Ramras:

I would like to commend you on having the foresight and courage to introduce legislation designed to preserve the rights of Alaska's outdoorsmen and women. HB 107, "An Act relating to the unlawful obstruction or hindrance of hunting, fishing, trapping or viewing of fish or game is a significant step in the right direction to protect law abiding citizens.

As you may be aware, I have been intricately involved in the rights of Alaska's outdoor community for well over 25 years. Over that time period I have found the environmental/animal rights activists are the most relentless crusaders against our traditional values and way of life. They are in fact "true believers" who care little or nothing for the rights of others, and are especially disdainful of others personal values and viewpoints.

Since the days when Alaskans battled unsuccessfully with "outside interests" over D-2, the environmental community has not wavered from its consistent effort to erode or eliminate such traditional Alaskan activities like hunting and trapping. Although millions of acres were set aside in ANILCA for their sole benefit, it was not enough. To this day they continue in their crusade to shut down more areas, and are becoming bolder in their rhetoric and actions against those of us who choose to live a more natural lifestyle.

HB 107 will go a long way toward preventing the kind of unlawful activities groups like PETA and HSUS encourage their members to take against hunters and other outdoor users. Although hunters have never attempted to pass rules or regulations coercing non-hunters to participate in their activities, or keep them from pursuing activities of their choice, the anti-hunting community has continually supported actions to eliminate hunting and trapping. Tools like those provided in HB 107 are an unfortunate, but necessary remedy to protect the rights of Alaskans who continue to live with a strong connection to the land.

Once again, thank you for introducing such an important piece of legislation. If there is anything I can do to assist you in this endeavor, please don't hesitate to let me know.

Sincerely,

Eddie Grasser
NRA Field Rep.

Alaska Outdoor Council Testimony today:

Thank you Mr. Chairman and members of the committee,

My name is Jennifer Yuhas. I am the Executive Director of the Alaska Outdoor Council.

On behalf of the AOC Board of Directors representing over 54 Member Clubs and a collective membership of over 12,000 I would like to express support for HB 107 and thank Representative Ramras for sponsoring this legislation.

Current statute does not guarantee a citizen to be awarded attorney fees when litigating an incidence of obstruction from hunting, fishing, trapping, or wildlife viewing. Since the use of fish and game resources by Alaskan citizens and access to those resources are guaranteed by the Alaska Constitution, we believe the changes the proposed legislation will bring are a necessary correction to an oversight in existing statute.

With regard to Representative LeDoux's question regarding rate of incidence:
While there is a minor frequency of occurrence, this change would serve as a deterrent to those wishing to obstruct the lawful use of fish and game resources and provide peace of mind to our license holders.

By passing this legislation today the committee will join us in validating the constitutional right of Alaska's private citizens to lawfully use fish and game resources.

We express our gratitude to the sponsor and the committee for hearing this legislation today and ask for a speedy passage from this committee.

Jennifer Yuhas, Executive Director
Alaska Outdoor Council, and
Alaska Fish & Wildlife Conservation Fund
P.O Box 73902 Fairbanks, AK 99707
Ph: (907) 455-4262 Fax: (907) 455-6447
aoc@alaska.net
www.alaskaoutdoorcouncil.org

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** January 24, 2006

**SUBJECT:** Cruise ship hindering possibility under AS 16.05.790(a)
(Work Order No. 24-LS0444\X)

**TO:** Representative Jay Ramras
Attn: Jim Pound

**FROM:** Brian J. Kane BK
Legislative Counsel

You have posed the following question: Under AS 16.05.790(a), would a cruise ship or other large, non-fishing vessel be guilty of obstructing or hindering lawful fishing if it crossed over a commercial fishing net? The short answer is that it would not be guilty.

The key word in AS 16.05.790(a) applicable here is "intentionally." If this obstruction or hindrance is not done intentionally, then it does not fit the parameters for this misdemeanor. Putting the phrase "intentionally" into context is also helpful.

There are basically four mental states that are statutorily defined for crimes in Alaska. These are listed in AS 11.81.900(a):

> (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.

"Intentionally" is the most stringent of the four standards.

Because "intentionally" is an element of the crime, the state would have to prove beyond a reasonable doubt that the person acted intentionally. Further, a key phrase in the definition of intentionally is the "conscious objective is to cause that result." Hence, the large, non-fishing vessel would have to know the commercial net was there and then intend to obstruct or hinder its use. It appears that the owner or operator of a vessel simply moving in the water that crosses over a net in its normal flow of travel will not be guilty.

If I may be of further assistance, please advise.

BJK:med
06-060.med

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** January 31, 2006

**SUBJECT:** Interaction between hunter and photographer of wildlife (CSHB 107(FIN); Work Order No. 24-LS0444\X)

**TO:** Representative Jay Ramras
Attn: Jim Pound

**FROM:** Brian J. Kane BJK
Legislative Counsel

I have been asked to analyze the legal ramifications of a situation where a hunter shoots an animal while a photographer is trying to take a photo of said animal. Specifically, could the photographer make a pecuniary claim for this lost photo opportunity due to the actions of the hunter in shooting the animal?

It does not appear to me that a photographer would have any such claim against the hunter. The obstruction discussed in HB 107 must be intentional. AS 11.81.900(a)(1) defines "intentional":

> (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;

Hence, if the hunter is not shooting the animal for the purpose of preventing the photographer from taking the picture, then it does not appear as if the hunter is in violation. If the hunter is lawfully hunting and not intentionally hindering the photographer's viewing of the wildlife, then it does not appear that there are any pecuniary claims on either side of this situation.

BJK:lmb
06-031.lmb

# HB

# 116

# SENATE COMMITTEE REPORT

DATE: 4/15/05

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 116(JUD)

HB 116 LIABILITY FOR ALCOHOL LAW VIOLATIONS

"An Act relating to the liability of certain persons for certain violations of alcoholic beverages laws."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

**CS Senate Bill:**
[ ] Same Title
[ ] New Title

**SCS House Bill:**
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

**NEW FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
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**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|---|---|---|---|---|---|
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[ ] **APPROPRIATION - no fiscal note**

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---|---|---|---|---|
| | | | X | |
| | ✓ | | | |
| | ✓ | | | |
| | ✓ | | | |
| | | | | |
| | | | | |
| CHAIR: Ralph Seekins | ✓ | | | |

# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30


**Sponsor Statement**

**House Bill 116**

**"An Act relating to the liability of certain persons for entry and remaining on licensed premises."**

Volunteers under the age of 21 cooperate with law enforcement officials in investigating and enforcing compliance with the state's alcoholic beverage laws. Under current statutes, persons under 21 years of age can be sued by license holders for up to $1000 for being on the premises. No exemption exists in the law for young people working with law enforcement officials. Recently a liquor license holder sued a volunteer, who was cooperating in an active investigation.

House Bill 116 creates an exception to AS 04.16.049 and .060 to protect young volunteers cooperating with law enforcement from retributive action and liability. Keeping alcoholic beverages out of the hands of people under 21 years of age is a cooperative effort. Young people working with law enforcement should not be subjected to lawsuits for participating in an investigation.


Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

# LEGAL SERVICES

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

**MEMORANDUM** April 26, 2005

**SUBJECT:** Retroactivity and SCS CSHB 116( )
(Work Order No. 24-LS0379\I)

**TO:** Representative Kevin Meyer
Attn: Mike

**FROM:** Gerald P. Luckhaupt
Legislative Counsel

Enclosed is the SCS( ) you requested. I have one comment. I am more than a little skeptical that the courts will accept the retroactive application of this bill to invalidate valid, existing rights as of the effective date of the Act.

> A 'retrospective' or 'retroactive' law is generally defined as a law which 'takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.'

*Underwood v. State*, 881 P.2d 322 (Alaska 1994).[1] Whether a particular provision may be applied retroactively in other than a purely procedural context without violating the Constitution is a complex issue. It seems clear that this bill has more than a purely procedural reach.

GPL:med
05-310.med

Enclosure

---

[1] In *Underwood* the court further explained that "a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law" and cited *Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n.12 (Alaska 1989) for that proposition.

24-LS0379\I
Luckhaupt
4/26/05

**SENATE CS FOR CS FOR HOUSE BILL NO. 116( )**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

**BY**

**Offered:**
**Referred:**

**Sponsor(s): REPRESENTATIVES MEYER, Gara**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to the liability of certain persons for certain violations of alcoholic beverages laws; and providing for an effective date."**

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

*** Section 1.** AS 04.16.049 is amended by adding a new subsection to read:

(f) A person under 21 years of age does not violate this section if the person enters or remains on premises licensed under this title at the request of a peace officer, if the peace officer accompanies, supervises, or otherwise observes the person's entry or remaining on premises, and the purpose for the entry or remaining on premises is to assist in the enforcement of this section.

*** Sec. 2.** AS 04.16.060 is amended by adding a new subsection to read:

(f) A person does not violate this section if the person performs an act proscribed under this section, the person performs that act at the request of a peace officer, the peace officer accompanies, supervises, or otherwise observes the person's act, and the purpose of the act is to assist in the enforcement of this section.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

RETROACTIVITY. (a) Section 1 of this Act is retroactive to October 1, 2001.

(b) Section 2 of this Act is retroactive to September 27, 2004.

*** Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

# FISCAL NOTE

**STATE OF ALASKA**
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1
Bill Version: CSHB 116(STA)
(H) Publish Date: 3/2/05

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety

Title: Minors On Licensed Premises
RDU: Statewide Support
Component: Alcoholic Beverage Control Board
ABC Board

Sponsor: Representative Meyer
Requester: House State Affairs
Component No.: 2690

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|---|---|---|
| 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 (FY2005) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

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

This bill will aid the Alcoholic Beverage Control Board and law enforcement agencies that conduct compliance checks and other investigations to reduce underage access to alcohol.

Prepared by: Douglas B. Griffin, Director
Phone 269-0350
Division: Alcoholic Beverage Control Board
Date/Time 2/28/05 10:12 AM

Approved by: Commissioner William Tandeske
Date 2/28/2005
Agency: Department of Public Safety

# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30


## MEMORANDUM

**DATE:** **February 25, 2005**

**TO:** **Representative Paul Seaton**

**FROM:** **Mike Pawlowski**

**RE:** **Sectional Analysis for CSHB 116**
(Version No. 24 – LS0379\G)

---

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

**Section 1.** Creates an exemption from the liability specified in AS 04.16.049(e) for persons under 21 years of age assisting a peace officer in the enforcement of AS 04.16.049.

**Section 2.** Clarifies that a person cooperating with law enforcement does not violate AS 04.16.060.


Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
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# Changes to HB 116 in CS HB 116 version 24-LS 0379\Y

## HB 116

## CSHB 116

- **Section 1 & 2**: Added "supervises" and deleted "the person" to line 7 in section 1 and line 13 in section 2: "if the peace officer accompanies, supervises, or otherwise observes the person's entry."

Prepared by Representative Meyer's Office

# Changes to HB 116 in CS HB 116 version 24-LS 0379\G

## HB 116

## CSHB 116

- Page 1, line 10-14:
  Adds a new section clarifying that a person does not violate the provisions of 04.16.060 if they perform the act at the request of a peace officer with certain provisions.

**Rationale**:
Persons are subject to civil liability for violations of both AS 04.16.049, and AS 04.16.060. The addition to HB 116 protects volunteers from civil liability under both provisions.

Prepared by Representative Meyer's Office

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

February 8, 2005

Re: HB 116

Dear Representative Meyer,

Thank you for sponsoring HB 116. Mothers Against Drunk Driving and its Youth In Action program support HB 116 because we believe it will help in the prevention of underage drinking in Alaska. This bill will protect law enforcement's youth and adult agents who are essential to making sure that people under 21 are unable to obtain alcohol from licensees or other adults.

In order to check for compliance with Alaska's underage drinking laws, law enforcement officers sometimes use agents who attempt to obtain alcohol for people under 21. MADD has assisted in these checks, particularly in recruiting youth to serve as agents. Under current law, these agents are vulnerable to law suits by liquor licensees who wish to obstruct enforcement of the title four laws that govern the dispensing of alcohol. We believe youth and adults agents who courageously volunteer to help with enforcement of Alaska's liquor laws deserve our gratitude instead of having to fear being sued $1000.

We believe the intent of statutes 04.16.049 and 04.16.065 is to allow liquor licensees to sue people $1000 when their aim is to provide alcohol to teens, not to allow licensees to sue agents working with law enforcement. Most liquor licensees have not tried to abuse the law in this manner; however, at this moment at least one 18-year-old agent is being sued by a licensee. It is difficult to attract and retain youth agents for a number of reasons. The threat of a lawsuit will make it more difficult to attract agents in the future.

Studies have shown that ongoing compliance checks are important for ensuring that liquor laws are upheld. The more frequently and consistently compliance checks occur, the better licensees are about complying. In Juneau, for example, once compliance checks were instituted, we saw refusal to sell to minors go from a 67% compliance rate in 2000 to a 100% compliance rate in 2004. However, compliance rates typically slip when checks are discontinued.

We all know underage drinking is a big problem in Alaska. Thank you for helping to keep alcohol out of the hands of our youth.

Sincerely,

Jessica Paris

Jessica Paris
MADD Youth In Action Coordinator

Cindy Cashen

Cindy Cashen
MADD Executive Director

# State of Alaska
**Department of Public Safety**
# Alcoholic Beverage Control Board

**Frank H. Murkowski, Governor**
**William Tandeske, Commissioner**

February 15, 2005

Representative Kevin Meyer
Alaska House of Representative
State Capitol
Juneau, Alaska 99801-1182

RE: HB 116—"An Act relating to the liability of certain persons for entry and remaining on licensed premises."

Dear Representative Meyer:

Your staff has requested a statement from the Alcoholic Beverage Control (ABC) Board regarding HB 116.

The ABC Board has conducted compliance checks for the last four years to address the public safety and welfare problem of selling alcoholic beverages to persons younger than 21 years of age. The compliance checks involve having young people between the ages of 16 and 20 attempt to purchase alcohol under the supervision of ABC Board investigators, municipal police, or Alaska State Troopers. The youth are instructed to be truthful in response to questions regarding their age and identification. The program has been very successful if judged by the metric of reducing sales to these underage customers. When the program began, alcohol was sold nearly 50% of the time and now the sell rate is less than 10%.

One tactic that has been raised by liquor licensees that do not like this increased oversight and enforcement is the claim that law enforcement agents are breaking the law to enforce the law by sending underage persons on to licensed premises in violation of AS 04.16.049. The ABC Board has been advised informally by its legal counsel that the compliance check protocol could be successfully defended under AS 11.81.420(b)(2). This statute says that conduct which would otherwise constitute an offense is justified if the person (in this case our underage customer) "believes the conduct to be required or authorized to assist a peace officer in the performance of the officer's duties." HB 116 applies this broad grant of immunity found in Title 11 to a very specific situation regarding alcohol law enforcement in AS 04.16.049. As long as there is no conflict between the statutes, the change makes very clear that properly administered compliance checks do not constitute a violation of Title 4. The ABC Board supports HB 116 since it does not appear to conflict with existing law.

Please contact me if you have any further questions.

Sincerely,

Douglas B. Griffin
Director

cc: ABC Board Members
Commissioner William Tandeske
Deputy Commissioner Ted Bachman
Cliff Stone, Special Assistant, Department of Public Safety
Anne Carpeneti, Asst. Attorney General, Department of Law

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Web posted Thursday, July 26, 2001

# Stings show drop in alcohol sales to kids

*Purchasing rate of undercover agent fell from 40 to 26 percent*

**By KATHY DYE**
*THE JUNEAU EMPIRE*

Liquor vendors in Juneau were less willing to sell alcohol to minors in 2001 during a second year of sting operations to crack down on underage drinking.

Although an 18-year-old working undercover was able to buy liquor 40 percent of the time last year, the agent's purchase rate dropped to 26 percent this year, according to data from the state Alcoholic Beverage Control Board, which led the effort with the Juneau Police Department.

The data show liquor vendors are getting the message, said Ed Kalwara, Juneau investigator for the alcohol board.

"That tells me the licensees in Juneau have become more conscientious," Kalwara said. "They're certainly trying harder, and they're a good bunch of people. They want to do the right thing."

Liquor vendors sold alcohol to the underage agent in 14 of 35 attempts in 2000, compared to four of 15 attempts in 2001, Kalwara said. The sting operation was one of three strategies used this year to bust people for liquor offenses. Investigators also did storefront surveillance to catch adults buying alcohol for minors, and they crashed some parties where kids were drinking.

Authorities this year issued a total of 54 warnings to adults and minors and cited 18 people: 11 minors for underage drinking, three adults for buying liquor for kids and four employees for selling it to them at the Breakwater Inn, Goldbelt Hotel, The Liquor Barrel and DeHarts. The maximum penalty for the employees is one year in jail and a $5,000 fine, said Kalwara, who added liquor vendors could lose their licenses for multiple offenses.

An employee of DeHarts also was cited last year. However, the store was purchased after the incident, and new owner Lillian Harris said a clerk mistakenly sold alcohol to the agent because he entered the store during its busiest hours.

"You're behind the counter, people are shoving stuff at you from both sides, and he just slipped through," Harris said. "You try to look at everybody and make sure you ask them for the IDs, but it happens."

Eleven Juneau stor refused to sell alcohol to the agent, including Kmart, Kenny's Liquor, Liquor Cache, Percy's, Imperial Bar, Douglas Breeze In, Valley Breeze In, Fred Meyer, Fisherman's Bend, Carrs and Duck Creek Market.

State and local investigators launched the effort in 2000 with funding from a federal grant - about $100,000 doled out statewide each fiscal year. Juneau's share the past two years was $11,000 and $14,000, said Kalwara, noting police officers volunteer for overtime to help in the effort.

Juneau investigators are renewing the grant for the fiscal year that began July 1 and tentatively plan to start a new rash of undercover operations in August. Kalwara said the next round could include a follow-the-keg program, meaning undercover officers posted outside stores would follow people who buy kegs to see if minors consume the beer.

They also might do more storefront stakeouts in which the underage agent, usually an 18-year-old, would ask adults to buy alcohol for him. Officers would cite adults who agree to the illegal transaction.

In addition, officers might pose as store clerks to catch minors who try to buy alcohol and adults who buy it for them, said Kalwara, who added they would first get permission from store owners.

*Kathy Dye can be reached at kdye@juneauempire.com.*

Juneau Empire

Click here to return to the original story

# YIA survey shows adults willing to buy alcohol for minors

## Actual violations could result in $10,000 fine, 1 year in jail

**January 14, 2005**

***Mothers Against Drunk Driving***

Last weekend, teens working with Mothers Against Drunk Driving's Youth In Action and state Alcohol Beverage Control officers discovered that it is not difficult to find adult strangers who will buy alcohol for teens.

Ranging in age from 14 to 19, the teens stood downtown near liquor stores and asked passing strangers to buy alcohol for them while admitting to be underage. Whether the adult answered yes or no, the teens then presented him with a card that explained this was only a survey, and the legal consequences of actually buying for someone underage. An ABC officer stood nearby to ensure the teens' safety and to assure people of the legality of the survey.

One pair of teens, which included a 14-year-old with braces on his teeth, had to wait only eight minutes before a young man said he would buy for them. Another pair of teens had to wait only about a minute before a middle-aged woman agreed. Overall, the teens spent one hour in two different locations downtown and found that four out of the 24 parties they asked were willing to buy.

"We were surprised and disappointed at how easy it was to find someone willing to buy," YIA coordinator Jessica Paris said. "However, we also had some adults who responded very admirably. One woman, not realizing it was a survey, went into the nearest liquor store and asked them to call the police. And at Kenny's Liquor Market, the clerk came out to investigate what the teens were doing."

One adult the teens asked happened to be state Rep. Kevin Meyer, who sponsored legislation last year allowing liquor stores to sue adults for buying alcohol for minors as well as the teens who solicit the alcohol. Rep. Meyer refused to buy for them, warning them he could get in big trouble.

"This survey shows us that we have to work harder to convince people they shouldn't provide alcohol to teens," Paris said. "Adults need to know about the tragedies that accompany underage drinking, as well as the serious legal consequences for providing to a minor."

ABC also conducted compliance checks over the weekend in which teen agents, aged 18 to 19, attempted to buy alcohol directly from liquor stores. Although Juneau had 100 percent compliance in last summer's checks, in 27 checks held last weekend, clerks sold to underage teens twice. Clerks, bartenders and wait staff face the same penalties for providing to an underage person that regular adults do - fines of up to $10,000 and up to one year in jail, though a typical sentence is $1,000 and five days in jail.

OJJDP U.S. Department of Justice
Office of Justice Programs
Office of Juvenile Justice and Delinquency Prevention

# Guide to Conducting Alcohol Purchase Surveys

Prepared by

Pacific Institute
FOR RESEARCH AND EVALUATION

In support of the
***OJJDP Enforcing the Underage Drinking Laws Program***

# Introduction

People who care about youth are aware of the serious problems caused by underage drinking. They realize that:

- Alcohol is the drug most commonly used by youth—more than tobacco and far more than marijuana or any other illicit drug.
- Alcohol is one of the most common contributors to injury, death, and criminal behavior among youth.
- Underage alcohol use can have immediate and potentially tragic consequences, as well as long-range harmful consequences, such as increased risk for chronic alcohol addiction.

There is no doubt that underage alcohol use is an extremely serious problem. But there are many effective strategies for reducing the problem. Strategies that *limit access* to alcohol by youth are some of the most powerful and well-documented approaches to reducing underage drinking and related problems.

The purpose of this guide is to promote the use of an important tool for monitoring underage access to alcohol—the purchase survey. These surveys involve sending young adults who appear underage (or minors under appropriate adult and police supervision) into stores to purchase alcohol. Communities and local groups can carry out purchase surveys of retail alcohol sales outlets to find out how easily available alcohol is to young people and to identify who is selling alcohol to youth. Such surveys provide extremely valuable information that can be used in addressing the problems of underage alcohol purchase and underage drinking.

This guide gives some of the background and rationale for these surveys as well as practical, step-by-step instructions for carrying out alcohol purchase surveys. The guide also shows how the information from the survey can be used to strengthen community awareness, promote better policies, and improve merchant compliance with the law.

Safe, efficient, and valid alcohol purchase surveys can be carried out in almost any community. This guide will show how.

**Alcohol:**
**The drug of choice for youth**

National surveys of young people consistently sh. ' that alcohol is the drug of choice among young people. By the 12th grade, more than 80 percent of adolescents have experimented with alcohol, more than 50 percent report drinking within the previous month, and more than 30 percent report consuming five or more drinks in a row at least once in the previous 2 weeks (Johnston, O'Malley, & Bachman, 1998).

A recent study indicates that alcohol is responsible for 69 percent of all drug-related hospital stays among 10- to 19-year-olds. In contrast, tobacco accounts for 22 percent and other drugs for 9 percent of these hospital stays. Overall, 87 percent of years of life lost between the ages of 10 and 19 are alcohol related (Xie, Rehm, Single, & Robson, 1996).

In 1996, more than 6,300 young people between 15 and 20 years old died in traffic crashes. Of these fatalities, 2,315 (37 percent) were alcohol related. More than 21 percent of drivers aged 15–20 years old who were killed in traffic crashes in 1996 had been drinking (National Highway Traffic Safety Administration [NHTSA], 1998).

## How Do Kids Get Alcohol?

Underage drinkers can obtain alcohol in many different ways—they can steal it or get it from their friends or their parents. In fact, kids are frequently quite creative in their schemes to get access to alcohol. All too often, however, they simply walk into a store and buy it—no questions asked, no identification requested, no problems encountered. Cutting off this type of easy access is the most important step toward preventing underage drinking in most communities.

Surveys carried out in various areas around the country have found that youth were able to buy alcohol in between 50 percent and 97 percent of stores, bars, and restaurants where attempts were made.

Studies indicate that enforcement of underage sales laws is lax in many communities. Police cite a number of reasons for not enforcing underage sales laws; most importantly, they perceive a lack of public support for such activities. This is unfortunate because research shows that enforcement can significantly reduce alcohol sales to minors.

## Why Conduct Alcohol Purchase Surveys?

Illegal sales to minors can be prevented. A variety of strategies have been shown to be very effective, but most communities need valid information in order to make the best use of these strategies and to monitor their impact. Alcohol purchase surveys can help provide this information. In addition, the data obtained from purchase surveys can be used to increase support from the public and from public officials for policy changes and for more generous allocation of resources. This process is depicted in figure 1 as circular and involves a variety of segments of the community.

## How Do You Conduct Purchase Surveys?

In order to carry out a purchase survey, a representative sample of alcohol outlets is selected. At each outlet in the sample, a buyer who appears to be underage attempts to purchase alcohol without presenting age identification (ID). If the outlet sells alcohol to the buyer, it is considered noncompliant. If the outlet refuses to sell to the buyer, it is considered in compliance. Details of this procedure vary, but the basic process is similar in all alcohol purchase

surveys. A flowchart of the tasks involved in conducting an alcohol outlet purchase survey is presented in appendix 1.

Purchase surveys are extremely useful, and they can be conducted practically, efficiently, and flexibly. This guide explains how to plan and carry out surveys under a variety of circumstances. It also provides sample protocols and materials that can be adapted for use in communities across the country.

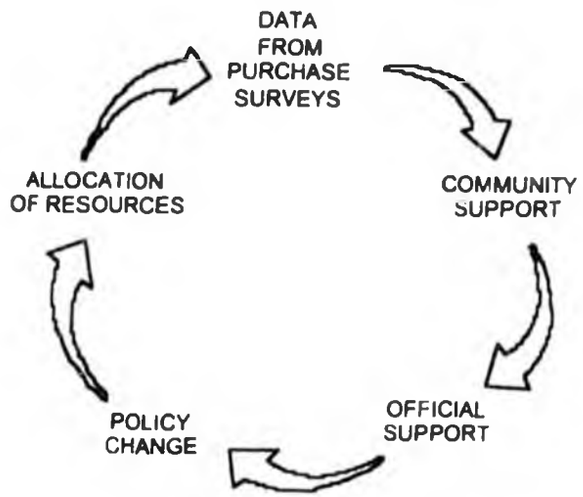



**Figure 1. Survey Data and Community Process**

### Underage Purchase of Alcohol

Purchase surveys conducted in medium and small cities in Minnesota and Wisconsin have found youth able to purchase alcohol in about half of the attempts in both on- and off-premises outlets (Forster et al., 1994; Forster, Murray, Wolfson, & Wagenaar, 1995).

Another study surveyed communities in New York State and Washington, DC. Fully 97 percent of the Washington, DC, outlets sold to youth. Sales rates in New York varied from 44 percent to 80 percent (Preusser & Williams, 1992).

# Five Reasons for Conducting Alcohol Purchase Surveys

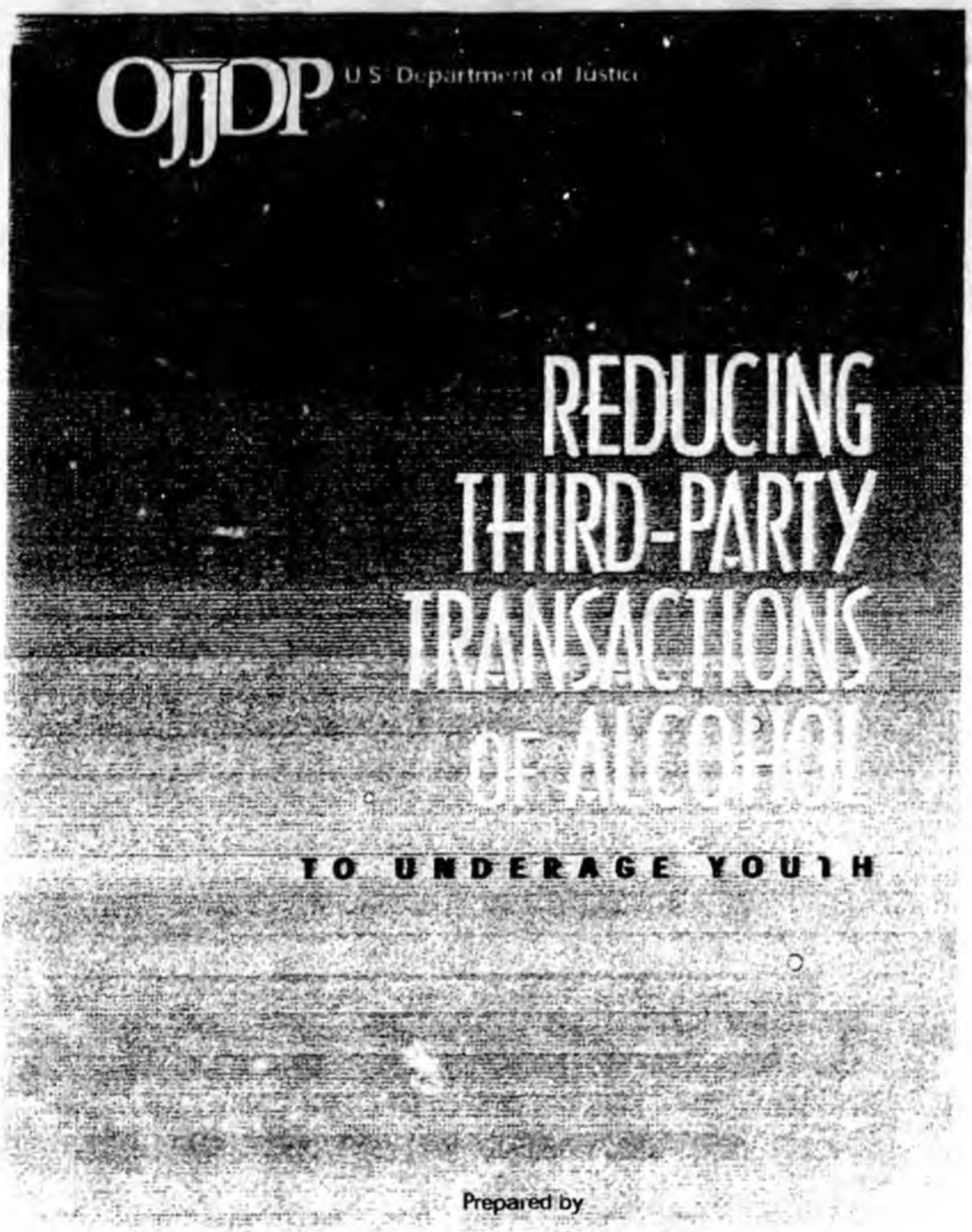
1. Purchase surveys indicate who is selling alcohol to minors and how often. This lets a community know how large the problem of underage sales is and among which outlets. This information can be very useful in allocating scarce enforcement and prevention resources.

2. The results of surveys can be used to help raise community awareness and build support for efforts to reduce sales to minors. For example, some communities have called press conferences in which the buyers pose with all the beer they have managed to purchase from local stores. Such events can bring attention to the problem of alcohol sales to minors and make it easier for policymakers, merchants, and concerned citizens to act.

3. Purchase surveys can be an intervention. Informing merchants that they are being monitored by the community and providing them with feedback can motivate those with good policies and sales practices to continue them and motivate those with poor policies and practices to change them.

4. Purchase surveys can be an important part of enforcement. Some communities choose to issue citations to outlets who sell to minors during the surveys. Other communities use the information from the surveys to help target later enforcement efforts. *In either case, local police or Alcohol Beverage Control (ABC) authorities must always be involved when enforcement efforts are planned as part of a purchase survey.*

5. Purchase surveys can be used to measure the impact of prevention strategies. A series of surveys carried out over time can indicate whether prevention efforts are having an effect on sales to minors. This information can help communities decide whether to continue or discontinue particular policies or programs and can indicate how to modify prevention strategies to make them more effective.




Prepared by

Pacific Institute
FOR RESEARCH AND EVALUATION

In support of the
**OJJDP *Enforcing the Underage Drinking Laws* Program**

community who is aware of alcohol sales to people under the age of 21 (third-party or otherwise) to pass this information along to enforcement agencies. These "tip lines" may be through the police department, liquor control agency, or a community agency/ organization working closely with enforcement efforts in the area.

### Surveillance

Surveillance is another strategy for assessing where and when third-party transactions happen in your area. This observation within your jurisdiction can take a variety of forms and levels of intensity. If your department and community are still trying to determine where third-party sales occur, surveillance activity may involve asking officers on their routine patrol to be on the lookout for these transactions. While many third-party sales occur in open areas such as store parking lots or street corners, other exchanges happen in remote, hidden areas of the community, such as dead end streets, woods, and vacant lots. Therefore, it is important for patrol officers to include these areas in their rounds.

If you already have a sense of the "hot spots" in your area, you can conduct more specific surveillance in order to interrupt third-party transactions as they occur. Officers placed at or near locations popular for "shoulder taps" can watch for an exchange to start and address both parties as the transaction occurs. Some enforcement agencies use officers in "plain clothes" during surveillance in order to blend into the scene and not raise the suspicions of the adult purchaser or the youth.

### "Shoulder tap" Enforcement Programs

"Shoulder tap" enforcement programs are similar to compliance check programs except that they target the underage drinkers and/or the non-commercial supplier of alcohol to youth instead of the vendor. Police departments or liquor control agencies carry out these programs, working closely with the community, youth, and local media to ensure their effectiveness. An example of a "shoulder tap" enforcement effort that focuses on stopping the underage purchasers is run by the Montgomery (MD) County Police

## Conducting "shoulder tap" enforcement programs using underage decoys

Some enforcement agencies have established procedures for "shoulder tap" enforcement programs using underage decoys. While each department's guidelines must conform to local and state laws, a summary of the California ABC Department's procedures is offered as an example.

### Implementation

The California ABC Department finds that its Decoy Shoulder Tap Program is most effective in areas where compliance checks have already been conducted and where most licensed premises were found in compliance. Additionally, the department uses this program when it has specific information or complaints that underage youth have changed their method of gaining alcohol from attempting to purchase directly from retailers to requesting that adults purchase and furnish them with alcohol. The department obtains this information from a variety of sources, including parents, youth officers, patrol officers, and members of community groups.

### Preparation

The department contacts the local District Attorney's Office to ensure that they are willing to prosecute any misdemeanor violations found during the "shoulder tap" enforcement program. It is also recommended that the Municipal Court Judge most likely to preside over criminal charges be contacted and given an overview of the program and its purpose. To educate the public and gain support of these efforts, the department sends a formal press release to all local news media announcing the "shoulder tap" enforcement program. The department uses this media contact to emphasize that the goal of the program is not necessarily to make arrests, but to inform the public about the problems related to furnishing alcohol to underage youth and the legal consequences for doing so.

The selection of the underage decoys is clearly a critical part of the department's preparation. Requirements for the underage operatives include:

- the decoy should be under the age of 20 at the time of the operation, preferably under 19 years old
- the decoy should have the appearance of a person his or her age

Department. Montgomery County police officers dress in "plain clothes" and stand in parking lots of retail establishments. The officers then wait to see if youth ask them to purchase alcohol. Often, the officers will wear clothes that allow them to blend in with a

- the decoy should be willing to wear a radio transmitter and to have his or her conversations recorded
- the decoy must be willing to testify in any criminal and administrative proceedings resulting from the operation.

As an additional preparatory step with the underage operatives, the Minneapolis Police Department photographs the decoys immediately before conducting the operations; this procedure offers proof that no attempts were made to make youth look older than their actual ages.

The California ABC Department instructs the underage volunteers to always tell the truth about their age and the fact that they cannot purchase alcohol for themselves.

Investigation and operation:

The underage decoys are equipped with a radio transmitter and placed under the *direct* supervision of a law enforcement officer. If the approached adult does furnish alcohol to the decoy, the youth walks to a pre-designated location. To provide added security to the youth, the adult is allowed to move away from the decoy before being detained by the enforcement officers. The detained adult is then Mirandized and asked to give a verbal statement. Enforcement officers ask the adult why he or she provided alcohol to the young person and how old he or she thinks the decoy is. The suspect is then booked into the jail whenever justified; the California ABC Department, working with local law enforcement, uses the state's "misdemeanor non-release" provisions whenever possible.

This abbreviated account of the California ABC Department's procedures may offer your department a blueprint if you plan to operate a "shoulder tap" enforcement program. **However, it is important that you check your state and local statutes to ensure that the use of underage operatives is permitted and that other laws governing the distribution of alcohol to those under the age of 21 will support this strategy.**

(California ABC Department, n.d.)

neighborhood's street alcoholics, who are frequently "shoulder tapped" by underage drinkers.

Other "shoulder tap" enforcement programs use underage "decoys" to approach adults outside an alcohol outlet and request that the

adult purchase alcohol on the decoy's behalf. *Not all states permit the use of underage operatives in the enforcement of alcohol statutes; check with prosecutors in your area if you are considering this type of "shoulder tap" enforcement program.* The California Alcohol Beverage Control Department, Montgomery County (MD) Police Department, and the Minneapolis (MN) Police Department are examples of enforcement entities that use this strategy to address third-party transactions. These departments have established procedures for "shoulder tap" enforcement programs (see box on pages 12–13), including guidelines for the decoy's actions that are similar to those used in compliance checks (e.g., no deception, false identification, or attempts to look older). The departments also take precautions to safeguard the underage decoys by training them prior to the operations, equipping them with radio transmitters during the attempts, and placing them under the direct supervision of a law enforcement officer. Attempts to complete these enforcement activities are broken off immediately if there is any sign of danger (e.g., the adult asking the decoy to get into a car, the transaction moves out the direct view of the back-up teams). In conducting these enforcement activities, the California ABC Department discovered an added benefit to these operations. During one year of the "shoulder tap" enforcement program, 37 percent of the adults cited for purchasing alcohol for youth were either on parole, probation, or had outstanding arrest warrants. Therefore, their efforts to reduce underage drinking also resulted in other enforcement benefits in the state.

## *Strategies To Reduce Familiar Third-party Transactions*

While strangers providing alcohol to youth contribute to underage access, parents, older siblings, other relatives, and friends are also a significant source of alcohol for underage drinkers. Because most of

1. The statute allowing a premises owner to bring a civil action against a minor for

this act applies retrospectively ... 04.16.049 that are ~~[illegible]~~ that are not determined by final judgment on or before the effective date of this act.

this act applies retrospectively to all actions and proceedings under AS 04.16.049 - 04.16.060 ~~[illegible]~~ that are not determined by final judgment before the effective date of this act.

Admin hearings ...? vs. district court.

Insurance costs - workers comp

HB

124

# SENATE COMMITTEE REPORT

DATE: 3/8/05

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered HOUSE BILL NO. 124 am

HB 124 COLLECTION OF DNA/USE OF FORCE

"An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample from persons convicted of or adjudicated delinquent for certain crimes."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

**Senate Bill:**
[ ] Same Title
[ ] New Title

**House Bill:**
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

**NEW FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|---|---|---|---|---|---|
| | | | | | |
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| | | | | | |
| | | | | | |
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**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|---|---|---|---|---|---|
| | | | | | |
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| | | | | | |
| | | | | | |

[ ] **APPROPRIATION - no fiscal note**

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---|---|---|---|---|
| | X | | | |
| | ✓ | | | |
| GT = | ✓ | | | |
| | ✓ | | | |
| | | | | |
| | | | | |
| CHAIR: | ✓ | | | |

# Alaska State Legislature

**Interim:**
716 W. 4th Ave.
Anchorage, AK 99501-2133

Phone: (907) 269-0265
Fax: (907) 269-0264

**Session:**
Alaska State Capitol, Rm 408
Juneau, AK 99801-1182

Phone: (907) 465-4939
F (907) 465-2418
Toll Free: (800) 465-4939
Rep.Tom_Anderson@legis.state.ak.us

**Representative Tom Anderson**
District 19 - Anchorage

## Sponsor Statement
## HB 124

HB 124 allows a correction, probation or parole officer to use reasonable force in the collection of DNA samples required by law and absolves them from civil or criminal liability for the use of that force. Officers shouldn't run the risk of being punished for carrying out their duties.

Currently, there is no way for a corrections, parole or patrol officer to collect the DNA samples required by law if the individual the DNA is to be collected from is uncooperative. If an officer were to try and use reasonable force to collect the sample, under current law they could be held liable for civil or criminal penalties.

For some convicted felons there is no incentive to provide this type of evidence because anything added to their sentence would make little difference. People serving extended sentences are one example. There is no punishment under the current statutes to efficiently encourage cooperation.

I urge your support of this bill.

# Alaska State Legislature
## House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

## Sectional Analysis for HB 124
## BY: Representative Tom Anderson

**Section 1.** Amends AS 44.41.035(b)

This section of the bill adds municipal violations similar to felonies to the list of violations for which the state can collect DNA evidence.

**Section 2.** Adds a new subsection to AS 44.41.035

Gives a juvenile or adult correctional, probation or patrol officer the authority to use reasonable force in the procurement of DNA samples when such samples are required by law. Also provides immunity from civil and criminal liability stemming from the use of that force.

# FISCAL NOTE

**STATE OF ALASKA**
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to collection of DNA by force...
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Rep. Anderson
Requester: House Judiciary
Component No.: 1631

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|---|---|---|
| Personal Services | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 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 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 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 (FY2005) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

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

This bill allows public safety employees, including juvenile and adult probation and parole officers to use reasonable force to collect authorized DNA samples, and grants them immunity from any civil or criminal liability. This bill, if enacted, is not expected to have a significant fiscal impact on the operations of the Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone: (907)334-4416
Division: Public Defender Agency
Date/Time: 2/22/05 9:52 AM
Approved by: Michael Tibbles, Deputy Commissioner
Date: 2/22/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 2
Bill Version: HB 124
(H) Publish Date: 2/?4/05

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title "An act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample"
RDU Institutional Facilities
Component Institution Director's Office
Sponsor Senator Bunde
Requester Judiciary, Finance
Component No. 524

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|---|---|---|
| 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 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 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** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |
| **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 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 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** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** | **0.0** |

**Estimate of any current year (FY2005) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2006 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)*

Passage of this legislation will not have a measurable fiscal impact on the Department of Corrections.

Prepared by: Sharleen Griffin, Acting Director
Phone 465-4641
Division Administrative Services
Date/Time 2/18/05 9:44 AM
Approved by: Portia Parker, Deputy Commissioner
Date 2/18/2005
Agency Department of Corrections

(Revised 9/23/2004 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 3
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid..."
RDU CRIMINAL
Component CDCO
Sponsor Representative Anderson
Requester House Judiciary
Component No.

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|---|---|---|
| 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 (FY2005) cost:** 0.0
**Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

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

This bill amends AS 44.41.035(b) (DNA identification system) by both narrowing the statute to apply to convictions that occur in Alaska, and widening to apply to violations of law or ordinances with elements similar to AS 11 (Criminal Law) or AS 28.35 (Motor Vehicle Offenses and Accidents). A new subsection to AS 44.41.035 is added that allows certain officials to use reasonable force in collection of DNA.

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

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 2/22/05 10:34 AM
Approved by: K. Daughhetee for Scott Nordstrand, Acting Attorney General
Date 2/22/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

# FISCAL NOTE

**STATE OF ALASKA**
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 4
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Use of Force for DNA Collection
RDU: Statewide Support
Component: Criminal Records & ID
Sponsor: Representative Anderson
Requester: House Judiciary
Component No.: 1190

**Expenditures/Revenues** (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|---|---|---|
| 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 (FY2005) cost:** 0.0
**Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:**

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

**ANALYSIS:**

Section 1 amends AS 44.41.035(b) by expanding the types of convictions that require deoxyribonucleic acid (DNA) registration. Under this bill, upon conviction in this state of crimes similar to crimes against persons, or felonies under AS 11 or AS 28.35, DNA must be collected. "Similar crimes" will include municipal misdemeanors, and preliminary estimates, based on the Uniform Offense Citation Table, are that this would include convictions under approximately 35 municipal misdemeanors from six municipalities – Anchorage, Juneau, Fairbanks, Ketchikan, Sitka, and Petersburg. In FY 2004 there were 680 persons with convictions under those municipal offenses. This number excludes duplicates (persons who were convicted of more than one qualifying municipal offense) and persons for whom DNA has already been collected for prior convictions (for whom subsequent collections will not be necessary).

continued on page 2

Prepared by: Director David Schade
Phone: 269-0202
Division: Statewide Services
Date/Time: 2/22/05 3:54 PM
Approved by: Commissioner William Tandeske
Date: 2/22/2005
Agency: Department of Public Safety

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. HB 124

**ANALYSIS CONTINUATION**

Collecting DNA for municipal misdemeanors will mean that when some defendants are subsequently convicted of other qualifying offenses, their DNA will already be on file, so this does not mean the numbers are absolute additions to the DNA database overall. Basically, this bill will shift the collection of DNA to earlier in a defendant's criminal career. "Similar crimes" will also include federal or military convictions, for which no preliminary numbers are available. Adding "similar crimes" will have an impact on Statewide Services Records & Identification and Information Services due to the increase in clerical and technical tasks, such as confirming fingerprints and modifying tables in the Alaska Public Safety Information Network (APSIN). This increase in the workload can be absorbed at present, although there is a cumulative impact on the APSIN staff workload. Similarly, the crime lab can absorb the increase in DNA submissions, although there is a cumulative impact on the crime lab workload as well.

Section 2 provides that reasonable force may be used in the collection of oral DNA samples. This section will have no impact on the workload of Statewide Services.

# LEGISLATIVE RESEARCH REPORT

FEBRUARY 23, 2005

REPORT NUMBER 05.169

## THE USE OF REASONABLE FORCE AND IMMUNITY FROM LIABILITY IN COLLECTING DNA SAMPLES FROM OFFENDERS

PREPARED FOR REPRESENTATIVE TOM ANDERSON

BY PATRICIA YOUNG, MANAGER

You wished to know if any states' laws provide for law enforcement or corrections personnel to use reasonable force in collecting DNA samples from persons who, although required by law to submit to DNA sampling, refuse to do so. You also wished to know if any such laws offer immunity from civil or criminal liability for the use of reasonable force in such situations.

We detail various state laws on this subject in Table 1. As you will see, we identified ten states with statutory provisions specifically authorizing the use of reasonable force under the described situations; in one additional state, an opinion by the attorney general notes that the use of reasonable force is permissible in such situations.[1] Among these eleven states, nine specifically grant immunity from civil or criminal liability to authorized personnel for the use of reasonable force in collecting DNA samples from individuals who refuse to comply with lawful requirements to do so.[2]

You will note that only the law in Vermont requires a court order prior to the forcible collection of a DNA sample. Wyoming law notes that the criminal justice agency *may apply* to the court for an order requiring a recalcitrant individual to comply.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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[1] Other states may have laws of similar practical application but worded such that our LEXIS queries did not identify them.

[2] Laws in Louisiana and Virginia authorize the collection of DNA samples from individuals arrested for certain offenses. As of January of 2003, only those states and Texas authorized such sampling at the time of arrest.

907-465-3991
907-465-3908 (fax)

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| Arkansas | A.C.A. § 12-12-1110 | Only those individuals qualified to draw ... DNA ... samples in a medically approved manner. | Authorized law enforcement and corrections personnel may employ reasonable force in cases where an individual refuses to submit to DNA testing. No such employee shall be criminally or civilly liable for the use of reasonable force. |
| Idaho | Idaho Code § 19-5511 | | Duly authorized law enforcement and correction personnel shall employ reasonable force in cases where an individual refuses or resists submission to procedures for collecting a DNA sample authorized by this chapter, and no employee shall be subject to criminal or civil liability for the reasonable use of force absent a showing of malice. |
| Illinois | 730 ILCS 5/5-4-3 | Only a physician authorized to practice medicine, a registered nurse or other qualified person trained in venipuncture may withdraw blood; only a person trained in the instructions promulgated by the state police on collecting saliva or tissue may collect saliva or tissue (respectively). | Duly authorized law enforcement and corrections personnel may employ reasonable force in cases in which an individual refuses to provide a DNA sample required under this Act. |
| Louisiana | La. R.S. 15:609 | | Duly authorized law enforcement and corrections personnel may employ reasonable force in cases in which an individual refuses to provide a DNA sample required under this Section and no such employee shall be civilly or criminally liable for the use of such reasonable force. |
| Massachusetts | ALM GL ch. 22E, § 4 | Only a physician, registered professional nurse, licensed practical nurse, phlebotomist, health care worker with phlebotomist training or a person licensed and trained by the director | Duly authorized law enforcement and correction personnel may employ reasonable force to assist [authorized persons] in collecting DNA samples in cases where an individual refuses to submit to such collection as required by this chapter; such personnel shall not be subject to criminal prosecution or civil liability for the use of such reasonable force. |
| Pennsylvania | 42 Pa.C.S. § 4717 | Only those individuals qualified to draw DNA samples in a medically approved manner. | Duly authorized law enforcement and corrections personnel may employ reasonable force in cases where an individual refuses to submit to DNA testing authorized under this chapter, and no such employee shall be criminally or civilly liable for the use of reasonable force. |
| South Dakota | S.D. Codified Laws § 23-5A-13 | | Duly authorized law enforcement and corrections personnel may employ reasonable force in cases if an individual refuses to provide a DNA sample required under this chapter. No such employee may be held civilly or criminally liable for the use of such reasonable force. |
| Utah | Utah Code Ann. § 53-10-404 | *See Note Below* | Responsible agencies may use reasonable force, as established by their individual guidelines and procedures, to collect a DNA sample if the person refuses to cooperate with the collection. |
| Vermont | 20 V.S.A. § 1935 | Blood samples may only be drawn by a physician, physician's assistant, registered nurse, licensed practical nurse, medical technologist, laboratory assistant, or phlebotomist. | If a person required to provide a DNA sample refuses, the agency shall file a motion for an order requiring the person to provide the sample. If the court finds that the person is required to provide a DNA sample, the court shall issue a written order requiring the person to provide the sample and specifying the manner by which it shall be obtained. The court's order may authorize law enforcement and correctional personnel to employ reasonable force to obtain the DNA sample. No such employee or health care professional shall be criminally or civilly liable for the use of reasonable force. |

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| Virginia | Va. Code Ann. § 19.2-310.2:1<br>Va. Atty. Gen. Op. 02-138<br>Va. Code Ann. § 19.2-310.3:1 | | After a determination by a magistrate or grand jury that probable cause exists for an arrest for the commission or attempted commission of certain violent felonies or violations, a DNA saliva or tissue sample shall be taken prior to the person's release from custody. According to Virginia AG Opinion 02-138, issued May 13, 2003, reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the sample collection. No civil liability shall attach to any person authorized to take saliva or tissue [in accordance with procedures adopted by the Division of Forensic Science] as a result of the act of taking saliva or tissue from any person submitting thereto, provided the sample was taken according to recognized medical procedures. |
| Wyoming | Wyo. Stat. § 7-19-406 | DNA samples shall be collected in a medically approved manner by a physician, registered nurse, qualified clinical or laboratory technician or other person qualified by training and experience. | If a person required to provide a DNA sample under this act refuses to do so, the criminal justice agency having custody of the person may apply to the district court for an order requiring the person to provide the sample in conformity with the provisions of this act. Refusal to provide the sample shall be punishable as contempt of the court. Duly authorized law enforcement and corrections personnel may employ reasonable force in cases where a person refuses to submit to DNA testing as required under this act, and no such employee shall be criminally or civilly liable for the use of such reasonable force. |

**NOTES:**
Utah–Unless substantial reasons exist for using a different method of collection *or the person refuses to cooperate with the collection*, the preferred method of collection shall be obtaining a saliva sample. If the person refuses, then a blood sample is taken. A blood sample must be taken by a licensed professional nurse, practical nurse, paramedic, qualified medical technician, licensed physician, or other person licensed by the state for this purpose. Reasonable force is acceptable (as noted above), and a person authorized [in this section] to draw a blood sample may not be held civilly liable for drawing a sample in a medically acceptable way.
**SOURCE:** State Statutes on LEXIS.

# Arresting Developments In DNA Typing

**Phillip B.C. Jones, Ph.D., J.D.**

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### *I. Introduction: Identity testing in criminal investigation*

During the mid-to late nineteenth century, European intellectuals and government leaders worried about the rising crime rate that accompanied industrial progress and colonial expansion (Sankar, 2001). Analysts proposed a biological degeneration as the cause of rising crime in general, and in particular, the creation of a criminal class. To reverse this degeneration in England, Francis Galton proposed compulsory marriages between people of good stock. This presented the challenge of finding an outward sign of inward character, so that it would be possible to identify those who should be breeding. In the 1880s, Galton thought that he had found this marker in fingerprints. However, his studies showed that variations in papillary ridges would not provide an external marker of internal character, and hypothesized that this was due to a millennia of indiscriminate mixing of character types. Nevertheless, he decided that fingerprints could aid social improvement by providing a unique identifier, which would be especially useful to identify habitual criminals who took advantage of the anonymity offered by the new, large cities (Cole, 2001 ).

One hundred years later, Alec Jeffreys, a geneticist working in England on blood anomalies, developed DNA typing. As the analytic techniques evolved, "DNA fingerprinting" became more popular. In 1995, Britain began to take DNA samples from anyone arrested for a felony or misdemeanor (Cole, 2001). The United Kingdom's National DNA Database currently holds DNA profiles of more than 1.5 million suspects (Forensic Science Service, 2002). The United States is beginning to get as aggressive as the UK in collection of DNA samples for criminal identification.

### *II. DNA Testing in the United States*

All states have laws authorizing the collection of biological samples for DNA analysis from convicted sex offenders (Gugliotta, 1999; Willing, 2002a). Although requirements vary from state to state, most also take samples from murderers, kidnappers, robbers, and child molesters. Virginia, which has the oldest DNA database in the U.S., has been at the forefront: taking samples from convicted felons, as well as from juvenile offenders whose crimes would have been felonies had they been of age (Siegel, 2002).
More states are moving to collect DNA samples from thousands of non-violent criminals, such as burglars and check forgers (Willing, 2002b,. The number of states collecting DNA from all convicted felons rose from seven in 2000 to 19 in 2002, a trend that may be driven by the observation that state DNA databases now routinely solve murders,

rapes, and other violent crimes by linking them to criminals convicted of non-violent offenses (Willing, 2002b). In Virginia, for example, nearly two-thirds of the 60 crimes linked to people convicted of drug possession were rapes or murders, and ten out of 22 forgers who were linked to other crimes were linked to murders or sexual assaults. The success of DNA databases has also spurred the authorization of the use of "reasonable force" with inmates reluctant to donate samples. To date, 11 states have authorized the use of such force (Willing, 2002a).

In addition to an expansion of the types of crimes that trigger biological sample collection, states are changing the point at which samples can be taken. In February, a Texas law took effect that requires testing of those indicted in sex crimes (Rein, 2002). That same month, Virginia took a more radical step. The legislature passed a bill that allows authorities to take biological samples for DNA analysis of everyone arrested in a felony case.

Virginia's SB535, which has an effective date of January 1, 2003, requires a saliva or tissue sample from every person arrested for a violent felony. A "violent felony" includes: first and second degree murder, voluntary manslaughter, mob-related felonies, a kidnapping or abduction felony, any malicious felonious assault or malicious bodily wounding, robbery, carjacking, a criminal sexual assault punishable as a felony, and certain forms of arson. After the law is in effect, a magistrate will determine that probable cause exists for the arrest, and then a biological sample will be taken prior to the person's release from custody. If the charge is dismissed or the person is acquitted at trial, the DNA sample will be destroyed by the Division of Forensic Science.

Dr. Paul Ferrara, the Director of the Virginia Division of Forensic Science, sees that the primary benefit of the new law is that, by taking a sample at the time of arrest instead of waiting for a conviction, DNA information is available earlier for comparing against DNA samples from unsolved crimes (Sigel, 2002). However, the notion of taking DNA samples from arrestees has stirred protests that it is unconstitutional and should not be done.

### *III. DNA Collection at the Time of Arrest*

#### 1. Is it permissible under the law?

Those who find DNA collection unconstitutional point to the Fifth or Fourth Amendments. Some commentators have argued that a suspect's Fifth Amendment right not to act as a witness against themselves provides a basis for refusing to give a genetic sample (Morin, 2002). However, courts have limited the right against self-incrimination to a suspect's oral testimony, and physical or behavioral characteristics are not testimonial. In Boling v. Romer, for example, a federal appellate court found that requiring DNA samples from inmates was not compulsory self-incrimination because DNA samples are not testimonial in nature. The Fourth Amendment provides a more substantial challenge to DNA testing.

Under the Fourth Amendment, suspects have a due process right against unreasonable searches and seizures. As a result, a warrant must be issued to conduct a search and probable cause must exist before the warrant is issued. One proponent of DNA testing detects support for the procedure in the U.S. Supreme Court decision, *Schmerber v. California*, in which the Court found that an involuntary blood draw to assess blood alcohol concentration was allowable without a warrant, because the evidence would have been metabolized by the time a warrant was issued (Scott, 2001). Of course, a suspect's DNA should be more stable than blood alcohol; if not, than the suspect has bigger problems than the law.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A governmental action is a search or seizure within the scope of the Fourth Amendment if the person invoking its protection can claim a legitimate expectation of privacy in the place search or the item seized. Courts have found that obtaining a biological sample, such as saliva, for DNA analysis can be considered a search under the Fourth Amendment (see, for example, *In re Shaddie Clark Shabazz*). However, the Fourth Amendment does not proscribe all searches and seizures, but only those deemed "unreasonable." The general rule is that the question of whether a particular action is unreasonable is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests (see, for example, *The People v. James Edward King*). When the governmental action is the taking of a sample for DNA analysis, courts have analogized to fingerprinting.

In *Rise v. State of Oregon*, the court noted that the gathering of fingerprint evidence from "free persons" constitutes a sufficiently significant interference with an individual's expectation of privacy that authorities are required to demonstrate that they have probable cause, or at least an articulable suspicion, to believe that the person committed a criminal offense and that the fingerprinting will establish or negate the person's connection with the offense. In contrast:

> [E]veryday "booking" procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence. . . . Thus, in the fingerprinting context, there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state. (p. 1560; citations omitted)

The same argument can be made for the routine collection of a biological sample, such as saliva or a buccal swab, for DNA analysis.

**2. Should it be allowed?**

In 1998, New York City Police Commissioner Howard Safir went public with his plan for city police to take a DNA sample along with fingerprints of everyone arrested ("DNA," 1998; "Proposal," 1998). Norman Siegel, the Director of the New York Civil

Liberties Union, objected that the major fallacy in Safir's plan was that he equated a fingerprint with DNA when taking a DNA sample, unlike recording a fingerprint, reveals a person's complete genetic makeup and is too intrusive ("DNA," 1998). The Director of the Connecticut Civil Liberties Union has gone further. According to Joseph Grabarz, when you give up DNA information, you are not just giving up information about yourself, but about your family, past, present, and future (Halloran, 1999). This concern, in turn, fuels the fear that genetic information will be used for genetic discrimination, or that law enforcement agencies might use the information for commercial purposes (Halloran, 1999; Kertscher, 2001). These fears are based upon a misunderstanding about the information derived from DNA analyses by crime laboratories.

There is a difference between the genetic information required for identification and the genetic information that informs about disease or phenotype. Fisher and Jones (2001) explain the differences this way. A genetic marker used for identification should be highly variable, and the more variable the markers, the fewer are needed for positive identification. In contrast, a gene examined in a genetic test is unlikely to be highly variable, because the test is geared to detect an abnormality, which most will not have. Furthermore, a nucleotide sequence is usually of interest in genetic testing because it codes for a protein. In identification, however, a noncoding nucleotide sequence is of most interest. This is because the mathematical modeling used in identification works best with noncoding sequences that are considered unaffected by natural selection.

**3. Can it be done?**

Even if the sampling of all arrestees' DNA may be performed, the question remains about whether it can be done. Arizona now tests only those convicted of certain crimes, including homicide, sexual offenses, and home burglary. However, the state legislature may soon pass a bill that would phase in testing of all convicted felons. Yet this increase in scope, which does not include arrestees, presents the unresolved issue of how to pay the estimated $2 million annual cost of expanded testing (Davenport, 2002). Since 1999, Louisiana has a law mandating arrestee testing, but staffing and funding problems have delayed the program (Rein, 2002).

On the federal level, experts have concluded that the collection of DNA samples at the time of arrest is cost prohibitive. According to the National Commission on the Future of DNA Evidence, the majority of crime laboratories face difficult prioritization decisions due to limited financial and personnel resources (National Institute of Justice, 2000). Laboratories find their first priority in cases necessary for upcoming trials, as they struggle to keep pace with prosecutors' demands for DNA evidence in court. The next priority lies in DNA analysis for investigative purposes, where a suspect exists but DNA evidence is necessary to effectuate an arrest. It is only after prioritizing court cases and suspect cases that laboratories can allocate resources to analysis of non-suspect crime scene samples. This is the class for which the FBI's Combined DNA Index System (CODIS) was designed and the class of cases where offenders are at liberty to re-offend. Due to current prioritization and funding constraints, most police departments maintain policies that prevent the submission of non-suspect cases to laboratories, creating a backlog of DNA cases maintained in police evidence lockers. To place the extent of the backlog into perspective, Congress is considering the DNA Database Completion Act of 2001 (H.R. 2680), which authorizes grants to eligible States for DNA analyses of samples taken from individuals convicted of a qualifying State offense, and of samples from crime