LEGAL SERVICES

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MEMORANDUM February 26, 2008

SUBJECT: Constitutional issues (CSHB 305(RLS); Work Order No. 25-LS1226\L)

TO: Representative Kevin Meyer
Attn: Mike Pawlowski

FROM: Alpheus Bullard
Legislative Counsel

You have requested a legal opinion as to the constitutionality of provisions in CSHB 305(RLS) (25-LS1226\L) that prohibit a legislator or legislative employee from "solicit[ing] or accept[ing] a contribution or a promise or pledge to make a contribution" when either house of the legislature is in regular or special session for (1) another candidate in an election for municipal, state, or federal office, or (2) to influence a state ballot proposition or question.

It is my opinion that these provisions do not significantly burden a legislator's First Amendment rights and would most likely be interpreted by a court as constitutional. While restrictions on campaign contributions encounter constitutional problems associated with First Amendment protections of the rights of association and expression, the Supreme Court has recognized "the prevention of corruption and the appearance of corruption" as a sufficiently important interest to justify restrictions on campaign contributions. See Buckley v. Valeo, 424 U.S. 1, 26 (1976). Therefore, the relevant legal analysis is whether these prohibitions are consistent with the state's compelling interest in preventing corruption and the appearance of corruption and do not "burden substantially more speech then is necessary to further the government's legitimate interests." State v. Alaska Civil Liberties Union, 978 P.2d 597, 619 (Alaska 1999), quoting California Prolife Council v. Scully, 989 F. Supp. 1282, 1296 (E. D. Cal. 1998), quoting Ward v. Rock Against Racism, 491 U. S. 781, 799 (1989).

In State v. Alaska Civil Liberties Union, the Supreme Court of Alaska in applying the principles of Buckley v. Valeo held that "the [ ] test does not require exhaustive proof of corruption in this context, but merely, in the words of the Court, 'empirical support or at least sound reasoning' in favor of the measures defended." Id. at 607, quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666 (1994).

The analysis of the bill's prohibitions on the solicitation and acceptance of campaign contributions for other candidates and ballot propositions and questions is no different

than that of the bill's prohibition against a legislator accepting or soliciting a contribution for the legislator's own campaign. Corruption, and the appearance of corruption, is arguably possible no matter whether a legislator solicits or accepts a contribution for the legislator's own campaign, another candidate's campaign, or for the purpose of influencing a ballot proposition or question. A legislator who solicits or accepts a contribution for any of these purposes is equally likely to appear to be trading on the legislator's position and influence.

Because the bill's prohibitions are limited to the "acceptance and solicitation" of certain contributions during a legislative session, it is my opinion that a court would hold that such prohibitions are constitutionally acceptable, since the prohibitions only minimally restrict a legislator's expressive and associational First Amendment freedoms for the compelling governmental interest in preventing corruption and the appearance of corruption.[1]

If I may be of further assistance, please do not hesitate to contact me.

TLAB:ljw
08-117.ljw

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[1] Please note that the bill's prohibitions against "acceptance and solicitation" of contributions do not deny a legislator the right to make an individual contribution to another candidate or a contribution for the purpose of influencing a ballot proposition or question. Neither do the bill's prohibitions prevent a legislator from speaking on behalf of a candidate or issue.

HB 307

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Charlie Huggins
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

MEMORANDUM

April 3, 2008

TO: Leg. Legal

From: Cindy Smith

RE: CS for HB307

Please amend CSHB307\O with the language of Amendment #1, attached.

The committee also passed a motion for any necessary accompanying title change resolution to be done to travel with the bill.

AMENDMENT #1

OFFERED IN THE SENATE BY SENATOR MCGUIRE

TO: SCS CSHB 307(JUD) (25-LS1236\O)

Page 1, line 1:

Delete "**domestic violence**"

Page 2, line 18:

Delete: "involving domestic violence"

Page 3, line 2 – 12:

Delete all material

25-LS1236\O
Luckhaupt
4/2/08

SENATE CS FOR CS FOR HOUSE BILL NO. 307(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HOLMES, GARA, DAHLSTROM, FAIRCLOUGH, JOHNSON, BUCH, HARRIS AND DOLL, Lynn, Salmon, Ramras, Samuels, Edgmon, Crawford, Doogan, Gardner, Olson, Gatto, Kerttula, LeDoux, Kawasaki, Nelson, Wilson, Gruenberg, Guttenberg, Roses

A BILL

FOR AN ACT ENTITLED

"An Act relating to penalizing certain misdemeanor domestic violence assaults as felonies."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTENT. It is the intent of the legislature that the courts and the Department of Law should ensure that the enhanced penalty under AS 11.41.220(a)(5), added by sec. 2 of this Act, is applied to the perpetrators of domestic violence and not to innocent victims of domestic violence.

*** Sec. 2.** AS 11.41.220(a) is amended to read:

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

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment; [OR]

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; **or**

(5) commits a crime involving domestic violence that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 3.** AS 11.41.220 is amended by adding new subsections to read:

(e) In (a)(5) of this section, when considering whether a conviction has occurred in the preceding 10 years, the date that sentence is imposed is the date that a

previous conviction has occurred.

(f) In (a)(5) of this section, when determining whether a person has committed a crime involving domestic violence, "household member" means

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

(2) adults or minors who live together;

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

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

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

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

(7) parents or children of a person in a relationship that is described in (1) - (6) of this subsection.

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

APPLICABILITY. AS 11.41.220(a)(5), added by sec. 2 of this Act, applies to offenses committed on or after the effective date of this Act. References to previous convictions apply to convictions for offenses committed on or after the effective date of this Act.

Blanket prohibition on DV offender returning to home while on bail is u/c

CWilliams v. State
Alaska App.,2006.

Court of Appeals of Alaska.
Thomas A. WILLIAMS, Petitioner,
v.
STATE of Alaska, Respondent.
Nos. A-9139.

Nov. 24, 2006.

Background: Defendant, who had been charged with fourth degree assault on basis that he had allegedly assaulted his wife and barred from returning to marital residence while on pre-trial release, pursuant to statute prohibiting persons charged with crime involving domestic violence from returning to residence of alleged victim while on pre-trial release, filed motion challenging constitutionality of statute. The District Court, Third Judicial District, Anchorage, Sigurd E. Murphy, J., ruled that statute was constitutional. Defendant appealed.

Holding: The Court of Appeals, Coats, C.J., held that statute violated Equal Protection Clause of State Constitution as applied to individuals on pre-trial release.

Reversed and remanded.

West Headnotes

[1] Bail 49 ⚿42.5

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k42.5 k. Imposition of Conditions in General. Most Cited Cases

Constitutional Law 92 ⚿3797

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3797 k. Bail. Most Cited Cases
(Formerly 92k250.1(2))
Statute prohibiting persons charged with crime involving domestic violence from returning to residence of alleged victim while on pre-trial release applied to all persons charged with or convicted of a crime involving domestic violence, including those released without conditions, for purposes of determining whether statute as applied to defendant, who was person charged with fourth degree assault on basis that he had allegedly assaulted his wife and was on pre-trial release, violated Equal Protection Clause of State Constitution. Const. Art. 1, § 1; AS 12.30.027(b).

[2] Constitutional Law 92 ⚿3043

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(1))
Initial inquiry in determining whether a statute violates Equal Protection Clause of State Constitution is to determine what weight should be afforded the constitutional interest impaired by the challenged enactment. Const. Art. 1, § 1.

[3] Constitutional Law 92 ⚿3050

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3050 k. In General. Most Cited Cases
(Formerly 92k213.1(1))
Depending upon the primacy of the interest involved in the challenged statute, the state will have a greater or lesser burden under Equal Protection Clause of State Constitution in justifying its legislation. Const. Art. 1, § 1.

[4] Constitutional Law 92 ⚿3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing Levels Set Forth or Compared. Most Cited Cases
(Formerly 92k213.1(1))

Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))
Second step in determining whether a statute violates the Equal Protection Clause of the State Constitution is an examination of purposes served by challenged the challenged statute; depending on level of review determined, state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the statute was motivated by a compelling state interest. Const. Art. 1, § 1.

[5] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))
Third step in determining whether a statute violates the Equal Protection Clause of State Constitution is to evaluate state's interest in the particular means employed to further its goals, with state's burden differing in accordance with determination of level of scrutiny afforded constitutional interest impaired; at low end of the sliding scale, a substantial relationship between means and ends is constitutionally adequate, while at higher end of scale, the fit between means and ends must be much closer, such that classification will be invalidated if purpose can be accomplished by a less restrictive alternative. Const. Art. 1, § 1.

[6] Constitutional Law 92 ⚿3797

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3797 k. Bail. Most Cited Cases
(Formerly 92k250.1(2))
Court of Appeals would apply heightened scrutiny in determining whether statute prohibiting persons charged with crime involving domestic violence from returning to residence of alleged victim while on pre-trial release violated Equal Protection Clause of State Constitution as applied to defendant, who had been charged with fourth degree assault on basis that he had allegedly assaulted his wife and was barred from returning to marital residence while on pre-trial release, as defendant had a liberty interest in choosing his family's living arrangements, which interest did not disappear because he had been charged with a crime, and defendant had an important, if not substantial, right to live in his home with his wife and family while on pre-trial release. Const. Art. 1, § 1; AS 12.30.027(b).

[7] Bail 49 ⚿42.5

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k42.5 k. Imposition of Conditions in General. Most Cited Cases

Constitutional Law 92 ⚿3797

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3797 k. Bail. Most Cited Cases
(Formerly 92k250.1(2))
Statute prohibiting persons charged with crime involving domestic violence from returning to residence of alleged victim while on pre-trial release, regardless of circumstances of offense and without any opportunity for judicial review, violated Equal Protection Clause of State Constitution as applied to defendant, who was on pre-trial release after having

been charged with fourth degree assault for allegedly assaulting his wife; state had no legitimate interest in barring person who posed no appreciable risk of harming or intimidating alleged victim from returning to a shared residence, state failed to show that less restrictive alternatives would fail to accomplish its interests in preventing domestic violence and preventing person accused of domestic violence from tampering with victim's testimony, and statute swept too broadly, infringing liberty interests of persons who posed no threat of future violence. Const. Art. 1, § 1; AS 12.30.027(b).

[8] Bail 49 ⚿42

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k42 k. In General. Most Cited Cases

Constitutional Law 92 ⚿3924

92 Constitutional Law
92XXVII Due Process
92XXVII(C) Persons and Entities Protected
92k3924 k. Prisoners, Detainees, and Convicts. Most Cited Cases
(Formerly 92k254.1)
Individuals who have been convicted of a crime have no constitutional right to bail and a diminished liberty interest.

[9] Constitutional Law 92 ⚿994

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k994 k. Avoidance of Constitutional Questions. Most Cited Cases
(Formerly 92k48(1))
Court has a duty to construe a statute to avoid unconstitutionality if it can reasonably do so.

[10] Constitutional Law 92 ⚿2473

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2473 k. In General. Most Cited Cases
(Formerly 92k70.1(2))

Constitutional Law 92 ⚿2474

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2474 k. Judicial Rewriting or Revision. Most Cited Cases
(Formerly 92k70.1(2))
Separation of powers doctrine prohibits courts from enacting legislation or redrafting patently defective statutes.

West Codenotes
Unconstitutional as Applied AS 12.30.027(b).
*461 Brian T. Duffy, Law Office of Dan Allan, Anchorage, for the Appellant.
Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and David W. Márquez, Attorney General, Juneau, for the Appellee.
Cynthia M. Hora and Christine M. Pate, Alaska Network on Domestic Violence and Sexual Assault, Sitka, as amicus curiae aligned with the State.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

*462 *OPINION*

COATS, Chief Judge.
This petition raises constitutional challenges to a statute, AS 12.30.027(b), that prohibits all persons charged with domestic violence from returning to the residence of the alleged victim while on pre-trial release-regardless of the circumstances of the offense and without any opportunity for judicial review.

Thomas A. Williams was charged almost two and one-half years ago with assaulting his wife of twenty-

three years. He is apparently still awaiting trial. As required by AS 12.30.027(b), one of the conditions of his pre-trial release forbids him from returning to the residence he shared with his wife and daughter. Williams argues that this condition violates the equal protection clause of the federal and state constitutions because it burdens the liberty interests of individuals who pose no danger to the alleged victim. He also argues that his right to procedural due process was violated because he was deprived of a fundamental liberty interest-the right to live at home with his family-without the opportunity for a meaningful hearing. Because we agree that AS 12.30.027(b) violates Alaska's guarantee of equal protection of the laws, we reverse the decision of the district court.

Facts and proceedings

On April 21, 2004, the police responded to a report by a passerby that a man was strangling a woman in a house on Henderson Loop in Anchorage. When the police arrived at the house, they contacted Terese Williams. Williams said her husband, Thomas Williams, had grabbed her around the neck during an argument and pushed her to the ground. She said he kept a firm grip on her throat and squeezed for several minutes and that she was very scared. Then he let go and she got up. She was shaken and went to smoke a cigarette; her husband grabbed his bags and left. She said her husband worked in Point Mackenzie and stayed with a friend while he was there. She also told the police her husband had consumed some cough medicine and beers before the incident. The investigating officer noted that Terese Williams was "visibly shaken" and had a scratch on her chin, a finger impression under her right ear, and a small red mark on the left of her neck.

Based on these allegations, Thomas Williams was charged with fourth-degree assault.[FN1] The conditions of his pre-trial release barred him from contacting his wife or returning to the residence they had shared.

FN1. AS 11.41.230(a)(1).

Several weeks after his release, Williams asked the court to modify his release conditions so he could have contact with his wife. His attorney said Williams and his wife had been together for more than twenty years and that both parties wished to renew contact. The State did not oppose the request. The prosecutor told the court that "in looking at Mr. Williams's record and the facts in this case, the State [is] confident or at least hopeful that it was an isolated incident." The court modified the bail conditions to allow contact, but emphasized that, by statute, Williams was still barred from the residence.

Several months later, Williams asked the court for permission to stay in the residence to care for the house and dog while his wife and daughter were in London. Williams's wife supported the request, and the State did not oppose. The court also granted that request.

On December 23, 2004-eight months after the incident-Williams, again with his wife's support, asked the court for permission to return to the residence for Christmas. He also filed a motion challenging the constitutionality of AS 12.30.027(b). Williams argued that the statute infringed his fundamental right to maintain his marital relationship and violated his rights to both due process and equal protection of the laws. He also argued that the statute violated the constitutional right of victims to be treated with dignity and fairness.

In support of Williams's request to return home for Christmas, Terese Williams told the court that she and Williams had been in contact for seven months, that they had seen *463 each other regularly, and that maintaining separate residences was a financial burden. She said she and her husband had taken vacations together outside Alaska while this case was pending and that she did not feel her husband was a threat. She said their older daughter was coming home for the holidays and that it would be costly to find a place outside the residence for the family to be together.

Relying on AS 12.30.027(b), District Court Judge Sigurd E. Murphy denied Williams's request to return to the residence. The court then scheduled a hearing on Williams's motion challenging the constitutionality of the statute.

That hearing was held in January 2005. At the hearing, Terese Williams reiterated that she had been in regular contact with her husband and that she did not feel he was a threat. She said Williams was in counseling and that it was her wish that he return to the residence. She also asserted that the police and

witnesses had exaggerated the seriousness of the incident. The State opposed the motion but did not present any evidence. The prosecutor simply observed that the domestic violence in the home had escalated, noting that Williams had threatened his wife with a fire poker in 2002 (he was convicted of disorderly conduct for that offense), and was now charged with assault for strangling his wife.

On February 2, 2005, Judge Murphy denied the motion. Judge Murphy interpreted the residence restriction in AS 12.30.027(b) as applying only in cases in which the court had already determined under AS 12.30.020 and AS 12.30.027(a) that release of the accused on his or her own recognizance or with an unsecured appearance bond would pose a danger to the alleged victim or other household member or not reasonably assure the accused's appearance in court. Having construed the statute in this manner, Judge Murphy found no deprivation of equal protection or due process. He also found that the bail condition barring Williams from returning home was appropriate given the facts of this case and Williams's previous conviction for disorderly conduct. Williams filed a motion for reconsideration, which the court denied.

Williams then filed this petition for review, which we granted.

Discussion

The residence restriction in AS 12.30.027(b) applies to all persons charged with or convicted of a crime involving domestic violence

As noted above, Judge Murphy held that the residence restriction in AS 12.30.027(b) does not apply to every person charged with a crime of domestic violence. He adopted a narrower reading of the statute, ruling that courts are only required to bar a person charged with domestic violence from the home of the alleged victim if the court first finds that the person is too dangerous, or too much of a flight risk, to be released on his or her own recognizance or with an unsecured appearance bond.

We disagree with this reading of the statute. By its plain language, AS 12.30.027 applies to the release of all persons charged with or convicted of crimes of domestic violence, including those released without conditions:

(a) Before ordering release before or after trial, or pending appeal, of a person charged with or convicted of a crime involving domestic violence, the court shall consider the safety of the alleged victim or other household member. To protect the alleged victim, household member, and the public and to reasonably assure the person's appearance, the court may impose bail and any of the conditions authorized under AS 12.30.020, any of the provisions of AS 18.66.100(c)(1)-(7) and (11),[FN2] and any other condition necessary to protect the alleged victim, household member, and the public, and to ensure the appearance of the person in court, including ordering the person to refrain from the consumption of alcohol.

FN2. AS 18.66.100(c) lists the conditions that may be imposed in a domestic violence protective order.

(b) A court may not order or permit a person released under (a) of this section to return to the residence of the alleged victim*464 or the residence of a petitioner who has a protective order directed to the person and issued or filed under AS 18.66.100-18.66.180.[FN3]

FN3. In *State v. Roberts*, 999 P.2d 151 (Alaska App.2000), we rejected the claim that AS 12.30.027(b) only restricted the court from releasing a defendant to the residence of a petitioner who had obtained a protective order against the defendant. *Id.* at 154-55.

[1] Under the first sentence of subsection (a), a court is required, in every domestic violence case, to consider the safety of the alleged victim or other household member before releasing the accused. Under the second sentence, the court *may* impose bail or any of the release conditions authorized under AS 12.30.020 or certain provisions of AS 18.66.100(c)-if those conditions are needed to protect the victim or others or to ensure the accused's appearance in court. Thus, both the first and second sentences of AS 12.30.027(a) encompass persons who are subjected to release conditions and persons who are released on their own recognizance or with an unsecured appearance bond. Because subsection (a) encompasses both groups, subsection (b), which

applies to "a person released under (a)," does as well. We therefore conclude that AS 12.30.027(b) applies to all persons charged with or convicted of a crime involving domestic violence. However, in this case we are only asked to consider the application of AS 12.30.027(b) to a person on pre-trial release.

Why AS 12.30.027(b) violates Alaska's guarantee of equal protection to the extent that it categorically forbids a person on pre-trial release for domestic violence from returning to the home of the alleged victim

Williams argues that AS 12.30.027(b) violates the equal protection clause of the federal and state constitutions because it sweeps too broadly, infringing the liberty interests of persons who pose no threat of future violence.[FN4]

FN4. U.S. Const. amend. XIV, § 1; Alaska Const. art. I, § 1.

The State and Amicus Curiae counter that the residence restriction treats all members of Williams's class-persons on release on a charge of domestic violence-identically. While this is true, it misses the point: Williams's claim is that the statute is impermissibly overinclusive, in that it burdens individuals who are not similarly situated with respect to the purposes of the statute.[FN5]

FN5. *See generally* Laurence H. Tribe, *American Constitutional Law* § 16-4, at 1450 (2d ed.1988).

[2][3][4][5]Article I, section 1 of the Alaska Constitution provides that all persons are "entitled to equal rights, opportunities, and protection under the law." In evaluating whether legislation violates this guarantee, we apply a flexible three-part test that is dependent on the importance of the rights involved:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment.... Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by [the] challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[FN6]

FN6. *Alaska Pacific Assur. Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984); *see also State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).

*465[6] As noted earlier, Williams asserts that he has a fundamental right to live at home with his wife and family while on pre-trial release and that any government infringement of that right must be strictly scrutinized.

We have previously subjected restrictions on marital association to heightened scrutiny. In *Dawson v. State*,[FN7] we observed that "[a] condition of probation restricting marital association plainly implicates the constitutional rights of privacy, liberty, and freedom of association and ... must be subjected to special scrutiny."[FN8]

FN7. 894 P.2d 672 (Alaska App.1995).

FN8. *Id.* at 680 (citing *Thomas v. State*, 710 P.2d 1017, 1019 (Alaska App.1985)).

The State nevertheless argues that no fundamental right is at stake in this case because Williams's conditions of release permit him to see his wife-just not in their home. Hence, the State argues, the residence restriction has "at most a modest, incidental, and temporary effect" on the marital relationship. This argument understates the integral relationship between cohabitation and marriage.

Moreover, apart from any burden imposed on Williams's relationship with his wife and family, Williams has a liberty interest in choosing his family living arrangements.

In *Moore v. City of East Cleveland*,[FN9] the United States Supreme Court addressed a city ordinance that limited the occupancy of a dwelling to members of a single family.[FN10] While that limitation in itself is unremarkable, this ordinance defined "family" so narrowly that it forbade Inez Moore from living in her home with her son and two young grandsons because the grandsons were cousins, not brothers.[FN11] When Moore refused to remove the offending grandson from her home, she was convicted of a crime.[FN12] The Supreme Court rejected the city's claim that it was required to uphold the ordinance if it bore a rational relationship to permissible government objectives:

> When a city undertakes such intrusive regulation of the family ... the usual deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." ....Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.[[FN13]

This liberty interest does not disappear because a person has been charged with a crime.[FN14] We hold based on this authority that Williams has an important, if not fundamental, right to live in his home with his wife and family while on pre-trial release,[FN15] and that any state infringement of that right must be carefully scrutinized.[FN16]

[7] There is no legislative history to illuminate the legislature's purpose in enacting the residence restriction in AS 12.30.027(b). But the State undoubtedly has a legitimate and compelling interest in preventing domestic violence-and in preventing a person accused of domestic violence from tampering *466 with the alleged victim's testimony.[FN17] On the other hand, the government has no legitimate interest in barring a person who poses no appreciable risk of harming or intimidating the victim from returning to a shared residence.[FN18] Given the importance of the right to live with a member of one's family, we will invalidate the classification if we find an insufficiently tight fit between the purposes of the statute and the means used to accomplish those purposes and if less restrictive alternatives are available.[FN19]

FN9.431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

FN10.*Id.* at 495-96, 97 S.Ct. at 1934.

FN11.*Id.* at 496-97, 97 S.Ct. at 1934.

FN12.*Id.* at 497, 97 S.Ct. at 1934.

FN13.*Id.* at 499, 97 S.Ct. at 1935-36 (quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974)).

FN14.*Cf. Martin v. State*, 517 P.2d 1389, 1396-97 (Alaska 1974) (recognizing that the legislature may not infringe on an accused's constitutional right of bail); *Dawson v. State*, 894 P.2d 672, 680 (Alaska App.1995) (recognizing that probationers retain a constitutional right to a marital association).

FN15.*See also Treacy v. Anchorage*, 91 P.3d 252, 264-66 (Alaska 2004) (ruling that juvenile curfew ordinance implicated fundamental rights to move about and to privacy).

FN16.*See Erickson*, 574 P.2d at 12.

FN17.*See United States v. Salerno*, 481 U.S. 739, 749, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987) ("The government's interest in preventing crime by arrestees is both legitimate and compelling.").

FN18.*Cf. In the Matter of K.L.J.*, 813 P.2d 276, 280 (Alaska 1991) (quoting *In re Jay R.J.*, 150 Cal.App.3d 251, 197 Cal.Rptr. 672, 681 (1983)) ("The state has no legitimate interest in terminating a parent's

relationship with his child if he has not willfully neglected or abandoned that child.").

FN19. *See Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396-97 (Alaska 1997); *Alaska Pacific Assur. Co.*, 687 P.2d at 269-70.

The State argues that a blanket prohibition on returning to the alleged victim's residence is necessary because of the peculiar dynamics of domestic violence-in particular, the well-documented tendency of victims to remain with their abusers. The State argues that the victims of domestic violence are influenced by psychological and emotional forces that "too often make impossible an accurate assessment of whether the victim's safety can be assured if the defendant is allowed to return to [the] residence." The State concludes that a court's evaluation of whether a defendant poses a risk to the alleged victim is therefore likely to be "little more than an educated guess."

We agree that it can be difficult for judges to accurately predict whether a particular defendant will be dangerous in the future.[FN20] But judges confront this task "countless times each day throughout the American system of criminal justice" [FN21]:

FN20. *See Covington v. State*, 747 P.2d 550, 553 n. 5 (Alaska App.1987); *Wood v. State*, 712 P.2d 420, 428 n. 7 (Alaska App.1986).

FN21. *Jurek v. Texas*, 428 U.S. 262, 275-76, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976).

> The trial court is not only the traditional but also the superior tribunal for the kind of information-gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial. It is there, too, that the judge has at his disposal "the judicial machinery necessary to marshal the facts typically relevant to the release inquiry." [[[FN22]]

FN22. *State v. Wassillie*, 606 P.2d 1279, 1289 (Alaska 1980) (Rabinowitz, J., dissenting) (quoting *United States v. Stanley*, 469 F.2d 576, 581 (D.C.Cir.1972)) (footnotes omitted)).

As the State points out, courts are not obliged to credit a victim's assertion that her abuser is no threat-even if that testimony is undisputed. And in this case, in urging us to affirm the district court, the State lists ample circumstantial evidence Judge Murphy could have relied on to discredit Terese Williams's statements: the couple's lengthy marriage; Terese Williams's testimony about the financial strain of maintaining separate residences; Williams's prior conviction for threatening his wife with a fire poker; the fact that Terese Williams had resumed living with Williams after that prior incident; the eyewitness reports that Williams had strangled his wife; and the investigating officer's observations of Terese Williams's injuries.

Under the Alaska Statutes, once a court determines that a person charged with domestic violence poses a risk to the alleged victim, the court is authorized to impose numerous conditions of release (including removing the person from the victim's residence [FN23]). The court may appoint a third party custodian to supervise the accused person [FN24]; restrict the person's travel, association, or living arrangements [FN25]; require the person to return to custody after daylight *467 hours [FN26]; prohibit the person from committing, or threatening to commit, domestic violence, stalking, or harassment [FN27]; prohibit the person from contacting the victim [FN28]; direct the person to stay away from the victim's residence, school, car, or place of employment [FN29]; prohibit the person from possessing a firearm or consuming alcohol [FN30]; or impose any other condition reasonably necessary to assure the alleged victim's safety.[FN31] Before imposing any of these conditions, the court must assess the risk the accused person poses to the alleged victim, taking into account the possibility-perhaps the likelihood-that the victim has understated the risk of more violence. The State has advanced no evidence, and no convincing argument, that Alaska courts have failed, or must necessarily fail, at this task. Nor did the legislature make any findings on this issue. The legislative history reveals no discussion of the residence restriction in AS 12.30.027(b).

FN23. AS 12.30.027(a); AS 18.66.100(c)(3).

FN24.AS 12.30.020(b)(1).

FN25.AS 12.30.020(b)(2).

FN26.AS 12.30.020(b)(3).

FN27.AS 12.30.027(a); AS 18.66.100(c)(1).

FN28.AS 12.30.027(a); AS 18.66.100(c)(2).

FN29.AS 12.30.027(a); AS 18.66.100(c)(4), (5).

FN30.AS 12.30.027(a); AS 18.66.100(c)(7).

FN31.AS 12.30.020(b)(7); AS 12.30.027(a).

Furthermore, because of the broad definition of "a crime involving domestic violence," there is a substantial risk that the statute will burden the liberty interests of persons who pose no appreciable risk of future violence. Although "domestic violence" is normally understood to mean an assault committed by one domestic partner against the other, the offense actually encompasses a much broader range of persons and conduct.[FN32] In Alaska, a wide variety of crimes-extortion, reckless endangerment, tr spass, and criminal mischief, to name a few [FN33]-are domestic violence crimes if they are committed by one household member against another.[FN34] And "household member" does not only mean people who are, or have been, involved in a sexual relationship; it also includes individuals who once lived together in any context or who dated in the past, or who are related by marriage or within the fourth degree of consanguinity.[FN35]

FN32.*Bingaman v. State*, 76 P.3d 398, 407-08 (Alaska App.2003); *Carpentino v. State*, 42 P.3d 1137, 1141 (Alaska App.2002) (opinion on rehearing).

FN33.AS 11.41.520; AS 18.66.990(3).

FN34.AS 18.66.990(3).

FN35.AS 18.66.990(5)(B)-(F).

Of course, the residence restriction in AS 12.30.027(b) generally will only burden the liberty interest of a person who was living with the alleged victim at the time of the offense. But even within this narrower context, it is easy to imagine situations in which the condition would serve no legitimate governmental purpose. For instance, if a mother had an accident while driving with her infant daughter and was charged with reckless endangerment or assault for that offense, the court would be obliged to prohibit the mother from returning to the residence she had shared with her daughter.[FN36] Or, if Williams's nineteen-year-old daughter, who was living at home and attending college during this time, had recklessly burned her parents' front porch and been charged with criminally negligent burning for that offense, the court would be obliged to bar her from returning home for the duration of her pre-trial release.[FN37]

FN36.*See* AS 11.41.250 (reckless endangerment); AS 18.66.990(3)(A) (defining domestic violence to include a crime against the person under AS 11.41); AS 18.66.990(5)(E) (defining household member to include adults or minors who are related to each other up to the fourth degree of consanguinity).

FN37.*See* AS 11.46.430 (criminally negligent burning); AS 18.66.990(3)(D) (defining domestic violence to include criminally negligent burning); AS 18.66.990(5)(E) (defining household member to include adults or minors who are related to each other up to the fourth degree of consanguinity).

Judge Murphy provided another example of how the residence restriction might create a significant hardship without advancing the State's interest in reducing domestic violence:

Court: Let's say you have a case where a couple have been married for a long *468 period of time. There's no criminal activity. They get along pretty well. As married couples often do, they have little fights and disagreements. Well, one night they both have been drinking and the husband calls the wife a fat pig or some other obnoxious statement, and the wife slaps him. He then goes ahead and calls the police. The police arrive.

> Now ... I assume the prosecutor acknowledges that the [Anchorage Police Department] has a policy in domestic violence cases that if they go there on a call, they're going to arrest somebody, right?
>
> *Prosecutor:* Yes, Your Honor.
>
> *Court:* So let's say they arrest a woman for slapping her husband. They take her to jail and she's prohibited from returning to the home that she lived in for maybe a quarter of a century, and she has school-aged children to raise, and she is a home provider, and she prepares all the meals for the kids .... And the husband, who works full-time on the North Slope, or maybe [like Williams] he works in the valley in the Department of Corrections, isn't there to do that. There's been a total disruption to the home.

As the above examples illustrate, under Alaska's far-reaching definition of domestic violence, probable cause to believe a person has committed a domestic violence offense cannot necessarily be equated with probable cause to believe that the person poses an ongoing risk to the alleged victim's safety.

Even in Williams's case, which involves the more typical assault of a husband against a wife, it is possible to see how AS 12.30.027(b) might infringe an important liberty interest without advancing any significant governmental interest. Several weeks after the incident in this case, Williams asked the court to modify his release conditions to allow him to have contact with his wife so they could discuss their daughter and other household matters. Williams's wife supported that request, and the State did not oppose it. The State told the court that "in looking at Mr. Williams's record and the facts in this case, the State [is] confident or at least hopeful that it was an isolated incident." Several months later-again with his wife's support, and with no opposition from the State-Williams received permission to stay in the family home while his wife was overseas. Shortly before Christmas, some eight months after the incident, Williams asked for permission to stay at home with the family for the holidays. Williams's wife told the court that she and Williams had been in regular contact for months, that they had traveled together on family vacations, that they wished to spend the holiday at home as a family, and that it would be a financial hardship to travel elsewhere. Judge Murphy denied the request, noting that the statute gave him no choice:

> ... I realize it works a hardship and, in some situations, I suspect that not having a family mend itself may cause more problems and exacerbate the whole issue that caused the domestic violence in the first place. I understand all that. I've been dealing with domestic violence in this state for almost a third of a century now.... I can't change the law though ... at this date. So he cannot go back to the residence.

Ultimately, Judge Murphy found that the release condition barring Williams from returning to the residence was appropriate in this case. But given the unrestricted contact Williams and his wife had outside the home, it is at least arguable that the prohibition on Williams returning to the residence was no longer serving its intended purpose.

Moreover, it appears that other jurisdictions have found less restrictive alternatives adequate to protect the victims of domestic violence. The Model Code on Domestic and Family Violence, which served as a blueprint for Alaska's 1996 Domestic Violence Prevention and Victim Protection Act (the law that authorized the residence restriction at issue in this case),[FN38] contains no blanket prohibition on a person charged with domestic violence *469 returning to the residence of the alleged victim.[FN39] Rather, the Model Code gives courts discretion to remove the accused from the home if the court finds that doing so is necessary to protect the alleged victim.[FN40] Apparently no other state follows Alaska's rule. At least two states restrict a person charged with domestic violence from returning to the alleged victim's residence for one to three days after the incident-but the victim can waive that requirement.[FN41]

FN38. *See* Sponsor Statement and Summary of H.B. 314, introduced by Rep. Sean R. Parnell (House Judiciary Committee file).

FN39. Model Code on Domestic and Family Violence, published by the National Council of Juvenile and Family Court Judges (1994).

FN40. *Id.* § 208(2)(c).

FN41. *See* Utah Code Ann. § 77-36-2.5 (providing that a person arrested for domestic violence may not be released on bail prior to the close of the next court day following the arrest unless he is ordered not to contact the victim or enter the victim's residence until the expiration of that time, but permitting the victim to waive that requirement); Wis. Stat. § 968.075(5)(a)(1) (requiring a person arrested for domestic violence to avoid the residence of the alleged victim during the 72 hours after arrest, but permitting the victim to waive that requirement).

In its amicus brief, the Alaska Network on Domestic Violence and Sexual Assault points out that Alaska's domestic violence law removes discretion in a number of other ways. For instance, the police now must arrest an alleged perpetrator if they have probable cause to believe domestic violence occurred within the preceding twelve hours.[FN42] The arrestee must be held in custody until arraignment.[FN43] And although the arrestee has the right to a telephone call after arrest, he or she cannot call the victim.[FN44]

FN42. AS 12.25.030(b); AS 18.65.530.

FN43. AS 12.30.027(e).

FN44. AS 11.56.755; AS 12.25.150(b).

But these measures are aimed at defusing a potentially violent situation until a judicial officer can assess the danger to the alleged victim and, if necessary, impose appropriate conditions of release. The non-discretionary residence restriction potentially burdens an accused's liberty interest for a much longer period (Williams has apparently been barred from the family residence since April 2005), with no possibility for judicial review. As Williams observes, a ban on returning to the residence while on pre-trial release may be more burdensome than the sentence the person will receive if he ultimately is convicted of domestic violence-a situation that might encourage a defendant to give up the right to trial and enter a plea.

In *Dawson*, we recognized that restrictions on marital association might be justified in domestic violence cases.[FN45] But we also recognized that those restrictions should be carefully considered:

FN45. *Dawson*, 894 P.2d at 680.

> In certain types of cases, such as cases involving domestic violence, limiting marital association would plainly be defensible. In any type of case, it is conceivable that such a limitation might be justified by case-specific circumstances demonstrating actual necessity and the lack of less restrictive alternatives. In such a case, however, to avoid unnecessary intrusion on marital privacy, it would seem appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand.[FN46]

FN46. *Id.* at 680-81.

We struck down the probation condition in *Dawson*-which forbade the defendant from any contact with his wife unless the contact was approved by his probation officer-after concluding that the court had made no apparent effort to tailor the scope of the condition to the specific circumstances of Dawson's case.[FN47] Similarly here, the State has failed to show that the less restrictive alternatives adopted by the Model Code and other jurisdictions-for instance, conditioning the residence restriction on a judicial finding, following a hearing, that the person charged with domestic violence poses an ongoing risk to the alleged victim-would fail to accomplish the government's interests. The legislation is thus impermissibly overinclusive: it prohibits all persons charged with crimes that meet the broad definition of domestic violence*470 from returning to the victim's residence, even persons who pose no appreciable risk of assaulting the victim or tampering with the victim's testimony.[FN48]

FN47. *Id.* at 681.

FN48. *Cf. Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

In urging a contrary conclusion, the Amicus Curiae points to our decision in *Stiegele v. State*.[FN49] In *Stiegele*, we rejected an equal protection challenge to

a statute that denied bail to all persons convicted of class A and unclassified felonies.[FN50] We reasoned that the legislature could legitimately conclude that the average unclassified or class A offender was more dangerous, and more of a flight risk, than the average class B or class C offender.[FN51]

FN49.685 P.2d 1255 (Alaska App.1984).

FN50.*Id.* at 1257-58.

FN51.*Id.*

[8]*Stiegele* is distinguishable from this case. All the individuals denied bail under the statute at issue in *Stiegele* had been convicted of serious felonies. Individuals who have been convicted of a crime have no constitutional right to bail [FN52] and a diminished liberty interest.[FN53] The statute was therefore not subject to heightened scrutiny, and the fact that it may have reached some individuals who were not a danger or a flight risk, and missed some who were, did not make it fatally under- or overinclusive.[FN54]

FN52.*Hosier v. State*, 976 P.2d 869, 871 (Alaska App.1999); *Wassillie*, 606 P.2d at 1283.

FN53.*Monroe v. State*, 847 P.2d 84, 89-90 (Alaska App.1993); *see also McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S.Ct. 2411, 2415, 91 L.Ed.2d 67 (1986) (noting that convicted felon's liberty interest is substantially diminished by a guilty verdict).

FN54.*Stiegele*, 685 P.2d at 1258.

By contrast, individuals charged with, but not yet convicted of, a crime involving domestic violence retain an important liberty interest in choosing their family living arrangements. Moreover, far more disparate individuals are burdened by this statute: the class includes individuals who have committed offenses ranging from murder to criminal mischief, and presumably some individuals who are innocent of any crime. Given the reach of the statute, and the importance of the right infringed, even if the State could show (which it has not) that the average person charged with domestic violence poses an ongoing danger to the alleged victim, the statute would likely still burden enough people who are not dangerous to violate our constitution.

[9][10] We recognize that we have a duty to construe a statute to avoid unconstitutionality if we can reasonably do so.[FN55] But the separation of powers doctrine "prohibits us from enacting legislation or redrafting patently defective statutes."[FN56]

FN55.*Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965).

FN56.*Bonjour*, 592 P.2d at 1238 (citing *State v. Campbell*, 536 P.2d 105, 110-11 (Alaska 1975), *overruled on other grounds by Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978)).

On its face, AS 12.30.027(b) eliminates all judicial discretion to permit a person charged with a crime involving domestic violence to return to the residence of the alleged victim. But as we have pointed out, the category of "crime involving domestic violence" includes many crimes that have nothing to do with physical assault committed by one domestic partner upon another. That is, this category includes many crimes where the State has no apparent interest in barring the defendant from returning to the home of the victim. Although we could speculate that the legislature was unaware of the furthest reaches of this provision, and that it meant to reach only certain types of crimes (for instance, threats or assaults), or certain types of individuals (for instance, domestic partners), construing the statute to conform with our speculations "would be stepping over the line of interpretation and engaging in legislation."[FN57]

FN57.*Gottschalk*, 575 P.2d at 296;*see also Myers v. Anchorage*, 132 P.3d 1176, 1186 (Alaska App.2006) (invalidating a municipal drug paraphernalia ordinance because any re-write would be "so drastic that we believe it falls outside a court's proper sphere of action").

*471 Moreover, even if we were to limit the reach of AS 12.30.027(b) to instances of assault by one domestic partner upon another, this narrower

category would still include situations where the State's interest in preventing the defendant from returning home would be questionable at best-as Judge Murphy pointed out in his example.

We conclude that there is no obvious way to narrow the definition of "crime involving domestic violence" so that it applies only to cases where (1) the State has a demonstrable interest in barring the defendant from returning to the alleged victim's home and (2) the State's interest clearly outweighs the substantial personal liberty interest in choosing one's living arrangements. Accordingly, we cannot use our power of judicial construction to re-write the statute.

We therefore hold that AS 12.30.027(b), as applied to individuals on pre-trial release, violates article I, section 1 of the Alaska Constitution. (We express no opinion as to whether this statute is constitutional as applied to individuals on post-conviction release.[FN58]) Having invalidated subsection (b) as it applies to Williams, we find it unnecessary to address Williams's other challenges to the statute.[FN59]

FN58. *See* AS 01.10.030 (providing for severability of unconstitutional provisions).

FN59. We also decline to address Williams's claim that the court erred in relying on hearsay evidence in imposing the residence restriction, finding that claim moot. *See State v. Roberts*, 999 P.2d at 153 ("Generally courts will not resolve an issue when it is moot.").

The State urges us to avoid ruling on the constitutionality of AS 12.30.027(b) because Judge Murphy held that the residence restriction was, in any event, appropriate in Williams's case. But from our review of the record it is not apparent that Judge Murphy considered whether the government's interests could be served by the less restrictive alternatives authorized by the Alaska Statutes.[FN60]

FN60. *See Dawson*, 894 P.2d at 680-81.

Moreover, we do not view this as a close question and see no reason to defer a ruling. The issue has been thoroughly briefed by the parties and by Amicus Curiae. And, as the State has previously emphasized, bail release of those charged with domestic violence is a recurring issue that tends to evade review because defendants have their cases resolved, or violate a condition of release, before we have a chance to rule on the issue.[FN61] We think it reasonably likely that, in the absence of guidance from our court, judges engaged in the daily press of bail hearings will enforce the residence restriction as it plainly reads, even if they harbor serious reservations about its constitutionality or appropriateness in a given case.

FN61. *See Roberts*, 999 P.2d at 153.

Conclusion

For the foregoing reasons, we REVERSE the decision of the district court and REMAND the case for a hearing and new findings consistent with this opinion.

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**Carpentino v. State
Alaska App.,2002.**

Court of Appeals of Alaska.
Michael A. **CARPENTINO**, Appellant,
v.
STATE of Alaska, Appellee.
No. A-7659.

March 1, 2002.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Ralph R. Beistline, J., of sexual abuse of a minor. Defendant appealed. The Court of Appeals, 38 P.3d 547, reversed. On state's petition for rehearing, the Court of Appeals, Mannheimer, J., held that state was not allowed to raise new argument that evidence of defendant's non-violent sexual relations with minors living in victim's household was admissible under rule governing other crimes evidence involving domestic violence.

Petition denied.

West Headnotes

[1] Criminal Law 110 ⚿1133

110 Criminal Law
110XXIV Review
110XXIV(K) Hearings
110k1133 k. Rehearing. Most Cited Cases
A party to an appeal cannot present new arguments in a petition for rehearing. Rules App.Proc., Rule 506(a).

[2] Statutes 361 ⚿206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
One of the prime directives of statutory construction is to avoid interpretations that render parts of a statute inoperative or superfluous, void or insignificant.

[3] Criminal Law 110 ⚿1133

110 Criminal Law
110XXIV Review
110XXIV(K) Hearings
110k1133 k. Rehearing. Most Cited Cases
On petition for rehearing, state was not allowed to raise new argument that evidence of defendant's non-violent sexual relations with minors living in victim's household was admissible in prosecution for sexual abuse under rule governing other crimes evidence involving domestic violence; evidence was not incontrovertibly admissible under the rule, given that statutory definition of "domestic violence" was not clear. Rules App.Proc., Rule 506(a); Rules of Evid., Rule 404(b)(4).

[4] Criminal Law 110 ⚿374

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k374 k. Proof and Effect of Other Offenses. Most Cited Cases
In prosecution for sexual abuse of a minor, state failed to establish foundation for admitting evidence, under rule allowing evidence of other crimes involving domestic violence, that defendant once shared a bed with victim's three-year-old sister, assuming "domestic violence" included non-violent sexual relations with minors living in victim's household, where state never alleged that defendant engaged in sexual misconduct with the sister. Rules of Evid., Rule 404(b)(4).

*1138 Michael D. Dieni, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.
Ben M. Herren, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

OPINION

MANNHEIMER, Judge.

In *Carpentino v. State*, 38 P.3d 547 (Alaska App.2002), we reversed Carpentino's convictions for sexual abuse of a minor. We reached this decision because we concluded that the trial judge mistakenly allowed the State to introduce evidence that Carpentino had gotten into bed with two other children in the same family (siblings of the victim named in the indictment).

The State now seeks rehearing. The State's argument can be summed up in one sentence: the State asserts that we committed plain error when we failed to perceive that the disputed evidence was admissible under Alaska Evidence Rule 404(b)(4).

The State has never before argued that the disputed evidence was admissible under Evidence Rule 404(b)(4). The normal rule is that a party may not raise a new argument in a petition for rehearing. Thus, it appears that the State is procedurally estopped from pursuing its claim. But in any event, as we explain below, the State has failed to show that the challenged evidence was obviously and incontrovertibly admissible under Evidence Rule 404(b)(4). We therefore deny the State's petition for rehearing.

Summary of our earlier decision

Carpentino was indicted on seven counts of sexual abuse of a minor for engaging in various acts of sexual penetration and sexual contact with an eight-year-old girl. At Carpentino's trial, the State was allowed to introduce evidence that Carpentino had once climbed into bed with the victim's older brother; the boy testified that Carpentino sexually abused him and then threatened to kill him if he revealed the abuse. The State was also allowed to introduce evidence that Carpentino had once spent the night in the same bed with the victim's three-year-old sister. The State did not allege that Carpentino did this with a sexual motive; rather, the State argued that Carpentino's action merely demonstrated his "plan" or "scheme" to get into bed with young children.

The trial judge agreed with the State that all of this evidence was admissible under Evidence Rule 404(b)(1) to prove Carpentino's "scheme" or "plan". But on appeal, we concluded that the challenged evidence was relevant only to prove Carpentino's propensity to commit sexual abuse and that the evidence was therefore barred by Evidence Rule 404(b)(1).[FN1]

FN1. *See Carpentino*, 38 P.3d at 550-52.

On appeal, the State argued that Evidence Rule 404(b)(2) provided an alternative rationale for admitting this evidence. Rule 404(b)(2) applies to prosecutions for sexual abuse of a minor; it authorizes the admission *1139 of evidence "of other acts by the defendant toward the same or another child ... if the prior offenses (i) occurred within the 10 years preceding the date of the offense charged[,] (ii) are similar to the offense charged[,] and (iii) were committed upon persons similar to the [victim]."

However, as we pointed out in our opinion, there were two problems with the State's theory. First, although the State alleged that Carpentino had once shared a bed with the younger of the two siblings, the State never alleged that Carpentino sexually abused or intended to sexually abuse this younger child. Without an allegation of sexual misconduct, Carpentino's alleged act of getting into bed with the younger child did not qualify for admission under Evidence Rule 404(b)(2).[FN2] Second, even though the State did allege that Carpentino had sexually abused the older sibling, the trial judge found that the older sibling was not "similar" to the victim-a foundational requirement for admission under Rule 404(b)(2)(iii). We held that the trial judge did not abuse his discretion when he reached this conclusion.[FN3]

FN2. *See id.* at 553.

FN3. See id. at 553-54.

The State's petition for rehearing

The State has now filed a petition for rehearing in which the State advances a new rationale for admitting the challenged evidence. The State argues that its evidence was admissible under Evidence Rule

404(b)(4), which states that "[i]n a prosecution for a crime involving domestic violence", the trial judge is authorized to admit "evidence of other crimes involving domestic violence [perpetrated] by the defendant against the same or another person".

[1] The State has never before advanced this rationale for admitting the challenged evidence. This, in itself, is seemingly fatal to the State's claim, for a party can not present new arguments in a petition for rehearing:

> It is elementary law that parties can not require this court to address claims or arguments that were not briefed. A party's failure to brief an issue constitutes an abandonment of that issue. Appellate Rule 506(a) allows a party to seek rehearing when this court "has overlooked ... or failed to consider a principle directly controlling" the decision on appeal, or when this court "has overlooked ... [a] material ... proposition of law". However, Rule 506(a) was not intended to allow parties to raise new arguments after they have had a chance to analyze an appellate court's decision. Rule 506(a) implicitly limits rehearing to legal principles or propositions that were raised by the parties in the normal course of the appeal.

Booth v. State, 903 P.2d 1079, 1090 (Alaska App.1995) (citation omitted).

The State recognizes this procedural problem and attempts to circumvent it in two ways.

First, the State asserts that its argument based on Evidence Rule 404(b)(4) is merely "a variation of the argument[s] that [were] presented" in its brief. This is simply not so. Each subsection of Evidence Rule 404(b) contains a distinct rule governing the admission of evidence of a person's other crimes. Our decision in Carpentino's appeal illustrates that these subsections work independently: the State argued that the challenged evidence was admissible under subsections (b)(1) and (b)(2), and we were accordingly obliged to address each subsection separately (and at length).

Even if subsection (b)(4) arguably provides a different basis for admitting the challenged evidence, a claim based on subsection (b)(4) is not merely a reworking or a variant of the State's earlier arguments. It is a new and different argument.

Anticipating that we might take this view of the matter, the State next asks us to make an exception to the normal rule that new arguments can not be raised in a petition for rehearing. The State argues that we should relax this rule in the interest of justice because the challenged evidence in Carpentino's case is so clearly admissible under Evidence Rule 404(b)(4). But again, this is not so.

*1140 The State's argument requires us to interpret a statute that has not previously been construed: the definition of "domestic violence" codified in AS 18.66.990(3) and (5). The State contends that this statutory definition of "domestic violence" clearly includes non-violent acts of sexual abuse. But as we explain below, the meaning of this statute is not clear. Moreover, the State's interpretation of this statute presents difficult legal issues because it tends to make Evidence Rule 404(b)(2) superfluous. Finally, even if we accepted the State's interpretation of the statute, the evidence regarding the victim's three-year-old sister would still not be admissible under Evidence Rule 404(b)(4) because the State never alleged that Carpentino engaged in (or attempted to engage in) sexual misconduct with the victim's sister.

The relationship between Evidence Rule 404(b)(4) and the definition of "domestic violence" codified in AS 18.66.990(3)

Evidence Rule 404(b)(4), by its terms, applies only to "prosecution [s] for a crime involving domestic violence". At first blush, it would seem that Evidence Rule 404(b)(4) has no application to Carpentino's case. Carpentino was charged with sexually abusing an eight-year-old child. Although non-violent sexual relations with a minor are rightly condemned, most people would not apply the term "domestic violence" to this criminal activity. Rather, "domestic violence" is normally understood to mean violent assault committed by one domestic partner against another.[FN4]

> FN4. See, *e.g.*, the "Introduction" section to Deborah M. Goelman and Roberta L. Valente's *When Will They Ever Learn? Educating to End Domestic Violence* (American Bar Association Commission on Domestic Violence, 1997):
>
> Domestic violence is a societal problem of epidemic proportions. Experts estimate that 2 to

> 4 million American women are battered every year, and that between 3.3 and 10 million children witness violence in their homes. Battering affects families across America in all socioeconomic, racial and ethnic groups. As information about the extent and impact of domestic violence emerges, it has been identified as a criminal justice issue, a public health crisis, and a costly drain on economic productivity.... Legal professionals who are uninformed about domestic violence issues may endanger the safety of victims or contribute to a society which has historically condoned the abuse of intimate partners.

But the State points out that Evidence Rule 404(b)(4) uses a special definition of "domestic violence". Rule 404(b)(4) declares that, for purposes of that rule, "domestic violence" and "crime involving domestic violence" have the meanings specified in AS 18.66.990. The State argues that, under the definitions contained in AS 18.66.990, any person who has sexual relations (even non-violent sexual relations) with a minor living in the same household commits an act of "domestic violence".

The State is correct that AS 18.66.990 contains a broad definition-indeed, a potentially sweeping definition-of "domestic violence". According to subsection (3) of this statute, the terms "domestic violence" and "crime involving domestic violence" include any of the following crimes (and attempts to commit any of the following crimes) when committed by one household member against another:

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

(B) burglary under AS 11.46.300-11.46.310;

(C) criminal trespass under AS 11.46.320-11.46.330;

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

(E) criminal mischief under AS 11.46.480-11.46.486;

(F) terroristic threatening under AS 11.56.810;

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

(H) harassment under AS 11.61.120(a)(2)-(4)[.]

This list of crimes obviously encompasses a broader range of conduct than physical assault upon a spouse or live-in companion. But this list is only half of the reason why the legislature's definition of "domestic violence" is so sweeping. The other contributing factor is the legislature's expansive definition of "household member".

*1141 Under AS 18.66.990(3), "domestic violence" occurs whenever one of the above-listed crimes is "committed by one household member against another". One might assume that this phrase refers to crimes in which the perpetrator and the victim share the same household. But the legislature has defined "household member" much more broadly. Under AS 18.66.990(5), "household member" includes:

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

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

(H) minor children of a person in a relationship that is described in (A)-(G) of this paragraph[.]

Thus, under subsection (E), the term "household member" includes one's first cousins and great-aunts and uncles, no matter where they reside. Under

> 4 million American women are battered every year, and that between 3.3 and 10 million children witness violence in their homes. Battering affects families across America in all socioeconomic, racial and ethnic groups. As information about the extent and impact of domestic violence emerges, it has been identified as a criminal justice issue, a public health crisis, and a costly drain on economic productivity.... Legal professionals who are uninformed about domestic violence issues may endanger the safety of victims or contribute to a society which has historically condoned the abuse of intimate partners.

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

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

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

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

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

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

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

(H) minor children of a person in a relationship that is described in (A)-(G) of this paragraph[.]

Thus, under subsection (E), the term "household member" includes one's first cousins and great-aunts and uncles, no matter where they reside. Under

subsections (C) and (H) (in combination), "household member" also includes the children of a high school or college sweetheart that one has not seen or thought of in thirty years.

Potential difficulties posed by the statutory definition of "domestic violence"

The apparently expansive scope of "crime involving domestic violence" leads to some strange results.

For example, if an elderly uncle comes to visit his favorite nephew and, while lighting his pipe, recklessly scorches a table cloth or a chair, the old man has seemingly just committed an act of "domestic violence" as defined in AS 18.66.990(3). That is, the uncle has committed the listed offense of criminally negligent burning under AS 11.46.430 (negligently damaging the property of another by fire), and the victim is related to the perpetrator within the fourth degree of consanguinity-thus qualifying them as "household members" under AS 18.66.990(5)(E).

Similarly, if a group of former college roommates decide to hold a twenty-year reunion at one of their homes, and if one of the visiting former roommates gets drunk and recklessly jams his friend's CD player while trying to insert a CD into it, this roommate has seemingly just committed an act of "domestic violence". The intoxicated roommate has committed the listed offense of fourth-degree criminal mischief under AS 11.46.486(a)(1) (tampering with the property of another with reckless disregard for the risk of harm or loss), and all of the former college roommates are "household members" under AS 18.66.990(5)(B).

Because the statutory definition of "domestic violence" apparently leads to these counter-intuitive results, we conclude that the meaning of this statute is not as clear as the State would have it. Rather, the interpretation of AS 18.66.990(3) presents difficulties. And because Evidence Rule 404(b)(4) expressly incorporates this statutory definition of "domestic violence", the proper scope of Evidence Rule 404(b)(4) is likewise subject to potential dispute. In other words, the meaning of Evidence Rule 404(b)(4) is not "plain".

There is yet another problem with the State's interpretation of Evidence Rule 404(b)(4). If the statutory definition of "domestic violence" is taken at face value and applied to Evidence Rule 404(b)(4) as the State suggests, then subsection (b)(4) would seemingly make Evidence Rule 404(b)(2) obsolete in prosecutions for sexual abuse of a minor.

Evidence Rule 404(b)(2) applies to "prosecution[s] ... involving ... sexual abuse of a minor". It authorizes the admission of evidence "of other acts by the defendant toward the same or another child", but only if the proposed evidence meets the three foundational criteria set forth in subsections (i), (ii), and (iii)-that "the prior offenses (i) occurred within the 10 years preceding the date of the *1142 offense charged[,] (ii) are similar to the offense charged[,] and (iii) were committed upon persons similar to the [victim]."

But under the State's interpretation of Evidence Rule 404(b)(4), evidence of the defendant's sexual abuse of other children would be admissible without regard to whether the State proved the three foundational criteria set forth in subsection (b)(2). This follows because, under the State's interpretation of AS 18.66.990(3), any prosecution for sexual abuse of a minor would be a "prosecution for a crime involving domestic violence", and any act of sexual abuse of a minor would constitute a "crime involving domestic violence".

Sexual abuse of a minor (in any degree) is "a crime against the person under AS 11.41", thus satisfying the requirement of AS 18.66.990(3)(A). And, seemingly, sexual abuse of a minor will invariably be "committed by one household member against another"-because, under AS 18.66.990(5)(D), the definition of "household member" includes not only adults and minors who live in the same household but also "adults or minors who are engaged in or who have engaged in a sexual relationship". In other words, even when the perpetrator and the victim have never lived together, sexual abuse of a minor seemingly will (by definition) invariably constitute "domestic violence". Thus, under the State's interpretation, evidence of a defendant's sexual abuse of another child will always be admissible under Evidence Rule 404(b)(4) even though the State can not prove the foundational facts that are required to make this same evidence admissible under Evidence Rule 404(b)(2).

[2] Such an interpretation of Evidence Rule 404(b)(4)"violates one of the primary rules of statutory construction: that a court should assume that the legislature did not enact redundant or useless statutes." [FN5] As the Alaska Supreme Court has declared, "One of the prime directives of statutory construction is to avoid interpretations that render parts of a statute 'inoperative or superfluous, void or insignificant'." [FN6] The State's interpretation of Evidence Rule 404(b)(4) would seemingly inflict this fate on Evidence Rule 404(b)(2).

FN5. *Wurthmann v. State*, 27 P.3d 762, 772 (Alaska App.2001) (Mannheimer, J., dissenting).

FN6. *Champion v. State*, 908 P.2d 454, 464 (Alaska App.1995) (quoting *22,757 Square Feet, more or less v. State*, 799 P.2d 777, 779 (Alaska 1990)).

[3] For these reasons, we reject the State's invitation to relax the normal rule that new contentions can not be raised in a petition for rehearing. Even assuming that we would relax this rule when faced with obvious error and manifest injustice, the State has shown neither obvious error nor manifest injustice here. The State's request for relaxation of the rule hinges on its underlying assertion that the challenged evidence in Carpentino's case was clearly admissible, beyond any argument, under Evidence Rule 404(b)(4). As we have explained at length, that is not the case.

Even under the State's interpretation of Rule 404(b)(4), the State's evidence regarding the three-year-old sister would not be admissible

[4] There is one more problem with the State's assertion of plain error. Even if we accepted the State's interpretation of "domestic violence", the State's evidence that Carpentino once shared a bed with the victim's three-year-old sister would still not be admissible under Evidence Rule 404(b)(4). The State never alleged that Carpentino engaged in (or attempted to engage in) sexual misconduct with the sister. Thus, even under the State's interpretation of "domestic violence", the State never alleged that Carpentino engaged in a "crime involving domestic violence" with the three-year-old. The State thus failed to establish the necessary foundation for admitting this evidence under Rule 404(b)(4).

Conclusion

The State acknowledges that the law normally precludes a party from raising a new argument in a petition for rehearing. Nevertheless, the State asserts that the disputed evidence in Carpentino's case is incontrovertibly admissible under Evidence Rule 404(b)(4), and we should therefore relax the *1143 normal rule in order to prevent manifest injustice.

As we have explained here, half of the State's evidence (the evidence relating to the victim's three-year-old sister) is incontrovertibly *inadmissible* under Rule 404(b)(4), even as the State has interpreted it. Moreover, the State's interpretation of Rule 404(b)(4) presents serious legal difficulties. In short, the State's evidence was not clearly and incontrovertibly admissible under Evidence Rule 404(b)(4).

Because the State has failed to show that our earlier decision was manifest error, we need not decide whether we should recognize an exception to the normal rule that new issues can not be raised in a petition for rehearing.

The State's petition for rehearing is DENIED.

Alaska App.,2002.
Carpentino v. State
42 P.3d 1137

END OF DOCUMENT

Sec. 11.41.270. Stalking in the second degree.

(a) A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

(b) In this section,

(1) "course of conduct" means repeated acts of nonconsensual contact involving the victim or a family member;

(2) "family member" means a

(A) spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the victim, whether related by blood, marriage, or adoption;

(B) person who lives, or has previously lived, in a spousal relationship with the victim;

(C) person who lives in the same household as the victim; or

(D) person who is a former spouse of the victim or is or has been in a dating, courtship, or engagement relationship with the victim;

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(4) "victim" means a person who is the target of a course of conduct.

(c) Stalking in the second degree is a class A misdemeanor.

Alaska State Legislature
Representative Lindsey Holmes
State Capitol Room 405
Phone: 465-4919
Fax: 465-2137
Email: Rep.Lindsey.Holmes@legis.state.ak.us

MEMORANDUM

Date: 27 March 2008

To: Senator Hollis French,
Chair, Senate Judiciary Committee

From: Representative Lindsey Holmes

RE: Hearing Request, House Bill 307

I respectfully request that House Bill 307, relating to repeat domestic violence offenders, be scheduled for a hearing in the Senate Judiciary Committee. Please feel free to contact me, or my aide Katie Conway, with questions or thoughts at 465-4919.

Attached you will find a background packet for House Bill 307. This includes the current version of the bill, a sponsor's statement, a sectional analysis, six fiscal notes and backup materials.

Thank you for your consideration.

25-LS1236\O
Luckhaupt
4/2/08

SENATE CS FOR CS FOR HOUSE BILL NO. 307(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HOLMES, GARA, DAHLSTROM, FAIRCLOUGH, JOHNSON, BUCH, HARRIS AND DOLL, Lynn, Salmon, Ramras, Samuels, Edgmon, Crawford, Doogan, Gardner, Olson, Gatto, Kerttula, LeDoux, Kawasaki, Nelson, Wilson, Gruenberg, Guttenberg, Rose

A BILL

FOR AN ACT ENTITLED

"An Act relating to penalizing certain misdemeanor domestic violence assaults as felonies."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INTENT. It is the intent of the legislature that the courts and the Department of Law should ensure that the enhanced penalty under AS 11.41.220(a)(5), added by sec. 2 of this Act, is applied to the perpetrators of domestic violence and not to innocent victims of domestic violence.

*** Sec. 2.** AS 11.41.220(a) is amended to read:

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

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury would cause a reasonable caregiver to seek medical attention from a health care professional in the form of diagnosis or treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment; [OR]

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(56)(B) to another person by means of a dangerous instrument; **or**

(5) commits a crime involving domestic violence that is a violation of AS 11.41.230(a)(1) or (2) and, within the preceding 10 years, the person was convicted on two or more separate occasions of crimes under

(A) AS 11.41.100 - 11.41.170;

(B) AS 11.41.200 - 11.41.220, 11.41.230(a)(1) or (2), 11.41.280, or 11.41.282;

(C) AS 11.41.260 or 11.41.270;

(D) AS 11.41.410, 11.41.420, or 11.41.425(a)(1); or

(E) a law or ordinance of this or another jurisdiction with elements similar to those of an offense described in (A) - (D) of this paragraph.

*** Sec. 3.** AS 11.41.220 is amended by adding new subsections to read:

(e) In (a)(5) of this section, when considering whether a conviction has occurred in the preceding 10 years, the date that sentence is imposed is the date that a

previous conviction has occurred.

(f) In (a)(5) of this section, when determining whether a person has committed a crime involving domestic violence, "household member" means

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

(2) adults or minors who live together;

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

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

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

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

(7) parents or children of a person in a relationship that is described in (1) - (6) of this subsection.

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

APPLICABILITY. AS 11.41.220(a)(5), added by sec. 2 of this Act, applies to offenses committed on or after the effective date of this Act. References to previous convictions apply to convictions for offenses committed on or after the effective date of this Act.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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STATE OF ALASKA

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MEMORANDUM January 30, 2008

SUBJECT: Constitutionality of Three Strikes Penalties for Domestic Violence Offenders under *Blakely v. Washington* (HB 307)
(Work Order No. 25-LS1236\E)

TO: Representative Lindsey Holmes

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked if sec. 2 of HB 307, which enhances penalties for misdemeanor domestic violence offenders[1] is constitutional under *Blakely v. Washington*, 540 U.S. 1174, 124 S. Ct. 1493, 158 L. Ed. 2d 75 (2004). In my opinion it is.

HB 307 provides that a person who commits a crime of domestic violence that is a misdemeanor crime against a person and the person has been previously convicted on two prior occasions of crimes involving domestic violence that are crimes against a person then the current offense becomes a class C felony and the person shall be sentenced for a class C felony. Obviously, to comply with *Blakely* a jury will need to find the necessary facts of the present offense, those being the various elements of the misdemeanor crime against a person with which the person is accused and the fact that the offense constituted a crime of domestic violence -- the victim of the offense was a household member with the accused.[2] We currently utilize a similar procedure for enhancing a felony sentence based upon the domestic violence aggravating factor.[3] This

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[1] A "three strikes" law for misdemeanor domestic violence offenses.

[2] Unless, of course, the accused waives having a jury decide these issues.

[3] AS 12.55.155(c)(18) provides:

> (c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:
>
> . . .
>
> (18) the offense was a felony
>
> (A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;

domestic violence aggravating factor must also be proved to the jury beyond a reasonable doubt.[4] AS 12.55.155(f).

It is my opinion that proof of the existence of the two prior convictions in HB 307 can be done before a judge without a jury. *Blakely* does not require that proof of prior convictions be made by a jury but allows these decisions to be made by a judge.

> **Other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Blakely, *supra*, 124 S. Ct. at 2536, *quoting Apprendi v. New Jersey*, 530 U.S. 466, (2000) (emphasis added).[5] See, also, *State v. Hermann*, 140 P.3d 895 (Alaska App. 2006); *Milligrock*, *supra*.

It can be argued that the decision to be made with regard to prior convictions in HB 307 goes beyond a mere finding that the previous convictions exist but requires a finding that the previous convictions were crimes involving domestic violence and it is this finding that must go to the jury. It is still my opinion that *Blakely* does not mandate this result. Other jurisdictions have held that findings by a judge that prior convictions that are otherwise derivative of a defendant's criminal history are not implicated by *Blakely*. *Carson v. State*, 813 N.E. 2d 1187 (Ind. Ct. App. 2004). Furthermore, that these prior convictions are crimes involving domestic violence can be established before the court solely by the record of conviction in at least some cases by the fact of the defendant's prior conviction and by observing that the defendant received an enhanced minimum sentence under AS 12.55.135(c) or (g)[6] or if the aggravating factor in AS 12.55.155(c)(18) was applied.[7]

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[4] The Alaska Court of Appeals has previously found, in at least two cases, that failure to submit this aggravating factor to the jury is subject to a harmless error analysis and, where the evidence was indisputed that the victim and defendant lived in the same household or were spouses, that failure to submit the issue to a jury was harmless beyond a reasonable doubt. See, *Milligrock v. State*, 118 P.3d 11 (Alaska App. 2005) (lived in same household); *Cloyd v. State*, __ P.3d__, 2007 Alas. App. LEXIS 44 (Alaska App. 2007) (spouses).

[5] *Blakely* built upon the decision in *Apprendi*, which required that a jury decide beyond a reasonable doubt that a hate crime law that increased the statutory maximum for an underlying offense applied to the defendant's conduct.

[6] Factors that increase a minimum sentence or require imposition of a mandatory minimum sentence do not have to be submitted to a jury under *Blakely*.

[7] Certainly this will not cover all possible prior offenses but will cover the most common assault in the fourth degree for which a mandatory minimum sentence is imposed under

Finally, in *Shepard v. United States*, 544 U.S. 13, 161 L. Ed. 2d 205, 125 S. Ct. 1254 (2005), the U.S. Supreme Court considered whether a judge may determine under federal law if a defendant's prior conviction for burglary was for a violent crime.[8] Under federal law only some burglary offenses would satisfy this requirement, but it was not clear from the charging documents or from the conviction itself that Shepard's conviction was of the required type as Shepard had pled guilty to a generic form of burglary and there was nothing in the record to show that Shepard had admitted the facts that made his conviction "violent" for purposes of an enhanced sentence under federal law in his present case. The Court found that this decision had to be made by the jury.

> While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality [citation omitted] therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.

Shepard, 544 U.S. at 25 - 26. In light of *Shepard*, even if my opinion that *Blakely* does not apply to findings concerning these prior offenses is incorrect it still does not follow that HB 307 is unconstitutional. There is nothing in HB 307 that prevents the jury from deciding if the victim of these prior offenses was a household member of the offender. There is no reason to think that the prosecutors and the courts will not be able apply this sentencing provision. Submitting the issue of whether the victim of the prior offenses was a household member with the accused would clearly be constitutional under *Blakely* and *Shepard* and while it may not be entirely beneficial to defendants, as the jury may hear evidence of their prior crimes which may not endear the jury to them, there is nothing in HB 307 that prevents the Department of Law and the Alaska Court System from applying HB 307 is this manner if that is what the Department of Law and the courts think that *Blakely* requires.[9, 10]

AS 12.55.135. In other situations, if *Blakely* applies, the issue of whether these prior offenses were committed against a household member (and therefore are crimes involving domestic violence) could be submitted to the jury.

[8] This finding increased the maximum sentence that may be imposed on the defendant.

[9] That HB 307 does not set forth the specific procedures to be utilized with regard to these prior convictions also does not imply unconstitutionality, or that the bill is lacking in any way, as the legislature has also not set forth the procedure to be utilized for those aggravating factors that must be proven to a jury under AS 12.55.155(f). Instead the

A wholly different approach would be to create a different type of enhancement for a current domestic violence offense.[11] For example, we could provide that a person who commits a misdemeanor crime of domestic violence shall be sentenced as a class C felon if the person has two prior convictions for any of various felonies or misdemeanors that could constitute domestic violence and that are crimes against persons under AS 11.41.[12] Then we could set up a procedure to allow the judge to not sentence the person as a felon (and only impose the normal misdemeanor penalty for the offense) if the defendant shows the prior convictions were not crimes of domestic violence. There is authority for this approach that places the burden of proof on the defendant.

> *Apprendi*, however, does not apply to the trial court's discretionary decision . . . to strike a prior conviction. . . . *Apprendi* carved out a "narrow exception" for sentence enhancements based on "the fact of a prior conviction." The *Almendarez-Torres* exception was not altered by *Blakely*. . . .
>
> Because the sentence enhancement was based on Stevenson's four prior convictions, the calculation of his sentence falls within the *Almendarez-Torres* exception to *Apprendi*. Furthermore, because the trial judge's

---

legislature said that those factors "shall be presented to a trial jury under procedures set by the court." AS 12.55.155(f)(2).

[10] The *Shepard* Court considered something similar to this and said:

> The dissent charges that our decision may portend the extension of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." *Post*, at 38, 161 L. Ed. 2d, at 225. According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.

Shepard, 544 U.S. at 26.

[11] An enhancement that is a hybrid between the approach used in HB 323, the Governor's crime bill, and HB 307.

[12] Crimes involving domestic violence are listed in AS 18.66.990(3).

> consideration of evidence not proved to the jury constituted a discretionary decision not to decrease Stevenson's sentence, *Apprendi* is inapposite. Finding a defendant to be outside the "spirit" of the Three Strikes law is a mitigating factor in sentencing, rather than a prerequisite to imposing an enhanced sentence. Thus, the trial judge's consideration of facts not proved to a jury did not offend Stevenson's constitutional rights under *Apprendi*. . . .

Stevenson v. Lewis, 2004 U.S. App. LEXIS 22511 (9th Cir. Oct. 28, 2004)

JPL:ljw
08-047.ljw

ALASKA STATE LEGISLATURE

Representative Lindsey Holmes
Representative Nancy Dahlstrom
Representative Anna Fairclough
Representative Les Gara
Representative John Harris
Representative Craig Johnson
Representative Bob Buch
Representative Andrea Doll

House Bill 307: "Three Domestic Violence Strikes: 3rd misdemeanor conviction will be charged as a felony."

Sponsor Statement

Alaska's domestic violence rates are one of the highest in the country. Alaska currently has the highest per capita rate of female homicide death by a male perpetrator. This violence becomes a vicious cycle—according to the National Coalition Against Domestic Violence, boys who witness domestic violence are twice as likely to abuse when they become adults. This cycle of violence needs to stop.

House Bill 307 seeks increased penalties for repeat domestic violence offenders. The bill provides that a domestic violence misdemeanor assault is treated as a felony if the offender has two prior convictions for domestic violence felonies or for domestic violence misdemeanor assault. The bill is narrowly tailored. It applies prospectively only, so all three offenses would need to occur after the effective date of the bill. It contains a 10 year lookback, so all three offenses would need to occur within 10 years of each other.

As of 2005, at least 1[illegible] other states had enacted enhanced penalties for repeat domestic violence offenders. With this bill, Alaska will join these other states is sending a strong message that serial battering will not be tolerated.

Alaskans need to feel safe in their homes and in their relationships. Domestic violence harms everyone in a community, not just the victims. Increasing penalties for repeat offenses is just one part of the solution to this complex problem.

Please do not hesitate to contact us if you have any questions or if you need additional information.

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ALASKA STATE LEGISLATURE

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House Bill 307: "Three Domestic Violence Strikes: 3rd misdemeanor conviction will be charged as a felony."

Sectional Analysis

Section 1. Adds intent language that establishes the defendant in a domestic violence case subject to an enhanced penalty must be the perpetrator of the crime and not an innocent victim of domestic violence.

Section 2. Amends Alaska Statute 11.41.220, assault in the third degree, to provide that when a person has been previously convicted on two or more separate occasions in the preceding 10 years of a domestic violence felony or of domestic violence assault in the fourth degree, then that person's third or next domestic violence assault in the fourth degree is increased to assault in the third degree and punished as a class C felony.

Section 3. Clarifies the date on which a conviction is understood to have occurred for purposes of the 10 year lookback. Defines "household member" for purposes of proving that a crime involved domestic violence.

Section 4. This section establishes that the new statute is prospective only and will not be applied to previous domestic violence convictions.

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MEMORANDUM February 8, 2008

SUBJECT: May prior convictions that have occurred before the effective date of a new offense be used to aggravate the offense or a sentence imposed for the new offense? (Work Order No. 25-LS1236/E)

TO: Representative Lindsey Holmes

FROM: Gerald P. Luckhaupt
Legislative Counsel

Question Presented: May prior convictions that have occurred before the effective date of a new offense be used to aggravate the offense or a sentence imposed for the new offense?

Answer: Yes. The ex post facto[1] clause of the United States and Alaska Constitutions[2] do not prevent the use of prior convictions to aggravate or enhance an offense, or the punishment for that offense.[3] The use of prior convictions to aggravate or enhance an offense, or punishment for that offense, is not an attempt to recriminalize or further punish the prior criminal activity but to punish the current criminal conduct in a manner that accurately reflects the defendant's recidivism.

This issue was settled in Alaska in 1980 in *Danks v. State*, 619 P.2d 720 (Alaska 1980). In *Danks*, the defendant argued that he should not be subject to a mandatory three year revocation of his driver's license for his third drunk driving conviction. Danks argued that his prior convictions predated the statute that mandated the three year revocation and that application of the revocation period to his current offense would be an unconstitutional ex post facto law. The Alaska Supreme Court rejected Danks' argument:

---

[1] An ex post facto law is "[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such act or deed." *Black's Law Dictionary*.

[2] The United States Constitution provides that the states may not enact "any ex post facto law." Art. I, § 10. The Constitution of the State of Alaska provides that "[n]o bill of attainder or ex post facto law shall be passed." Art. I, § 15.

[3] Sometimes this argument is also framed in terms of double jeopardy, that being, that punishment is being exacted twice for the same conduct. Framing the argument in this manner has not resulted in any more success than an ex post facto approach.

> Danks also argues that the three-year revocation provision of AS 28.15.210(c), if applied to him, would be unconstitutional as an ex post facto law, because his first two OMVI offenses took place prior to the 1974 enactment of section 210(c). But the United States Supreme Court has rejected a similar attack on application of a habitual offender statute, providing enhanced punishment for a fourth felony conviction, when one of the prior convictions was obtained before the statute was passed. In *Gryger v. Burke*, 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948), the Court rejected Gryger's ex post facto argument summarily:
>
> > 'Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' (citations omitted).
>
> 334 U.S. at 732, 68 S. Ct. 1258, 92 L. Ed. at 1687. *Gryger* is dispositive of any claim based on the federal constitution, and we see no reason for us to interpret Alaska's constitutional provision differently.

Danks, *supra*, at 724 - 725. Since that decision the Alaska Court of Appeals has consistently ruled that the ex post facto provision of our Constitution is not implicated by a statute that enhances a crime or increases the punishment for a crime based upon the existence of prior offenses, regardless of whether those offenses have occurred before or after the statute was enacted. For example, in *Westby v. State*, 2006 Alas. App. LEXIS 150 (Alaska Ct. App. 2006), the court said:

> Westby argues that *Danks* is distinguishable because it involved a license revocation proceeding, not a criminal conviction. But the reasoning in *Danks* applies equally in Westby's case, and we have previously relied on *Danks* to uphold a statute that increased a defendant's punishment for a crime based on convictions that were entered before the statute was enacted. Accordingly, we reject Westby's constitutional claim.

And, in *Lemon v. State*, 654 P.2d 277, 278 (Alaska Ct. App. 1982), the defendant argued that Alaska's former habitual criminal law was unconstitutional as applied to him because it allowed his sentence to be increased based upon two prior convictions that occurred before the law was enacted. The court rejected the defendant's argument stating:

> Lemon argues that two of the convictions which the court relied upon in sentencing him as a habitual criminal occurred prior to enactment of the habitual criminal statute so that using them to enhance his sentence violated state and federal constitutional prohibitions against ex post facto laws and placing a defendant twice in jeopardy. This precise claim was rejected by the United States Supreme Court in Gryger v. Burke, 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948). Similar claims were rejected by our supreme court in Danks v. State, 619 P.2d 720 (Alaska 1980) and by this court in Carter v. State, 625 P.2d 313, 315 (Alaska App. 1981). We find no error.

And finally, in *Petersen v. State*, 930 P.2d 414, 433 - 434 (Alaska Ct. App. 1996), the Alaska Court of Appeals considered the situation where a prior offense is used as an element of a greater offense to increase the offense to a higher level of crime and the statute creating the greater offense was enacted after the prior offense was committed. The court quoted from *Gryger* and *Danks* and held that the same rule applies:

> This is the accepted view on this matter, both as to increased punishments and to new offenses that include, as an element of the crime, proof that the defendant was previously convicted of an offense:
>
> > If the defendant commits crime A at a time when there is no habitual criminal statute, then such a statute is passed imposing increased punishment for a second offense, and then the defendant commits crime B, it is not within the ex post facto prohibition to apply the habitual criminal statute to crime B. No additional punishment is prescribed for crime A, but only for the new crime B, which was committed after the statute was passed. *Similarly, it is permissible to define a crime as limited to certain conduct engaged in by persons who have theretofore been convicted of some other offense and to apply the statute to one whose earlier offense and conviction predated the enactment of this [new] statute.*
>
> Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law (1986), § 2.4, Vol. 1, p. 139 (emphasis added by the court).
>
> Petersen's case is slightly different: his offense became first-degree stalking, not strictly because of his prior criminal conviction, but because he was on probation from that prior conviction and because one of his conditions of probation forbade him from having contact with R.H. Compare AS 12.55.155(c)(20) (for purposes of presumptive sentencing, an offense is aggravated if "the defendant . . . was on parole or probation for another felony"). Nevertheless, the same rule applies: the legislature

can validly enhance the degree of a defendant's crime based on the defendant's pre-existing conditions of probation or based on a restraining order previously entered against the defendant. We therefore reject Petersen's contention that there was any illegality in convicting him of first-degree stalking because he violated a condition of probation imposed before the stalking law took effect. This did not constitute a retroactive application of the stalking law.

GPL:ljw
08-077.ljw

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January 24, 2008

Representative Jay Ramras
House Judiciary Committee Chair
State Capitol
Juneau AK 99801-1182

Dear Representative Ramras:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for considering HB 307, an act relating to penalizing certain misdemeanor domestic violence offenses as felonies.

The APOA State Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Angella Long
State President

State of Alaska
Department of Public Safety
Council on Domestic Violence & Sexual Assault

Sarah Palin, Governor
Walter Monegan, Commissioner

February 8, 2008

Representative Lindsey Holmes
State Capitol, Room 405
Juneau, Alaska 99801-1182

Subject: Support for HB 307

Dear Representative Holmes and HB 307 Sponsors:

Thank you for introducing HB307, Domestic Violence Offenses, a bill that will hold the most serious repeat domestic violence offenders accountable for their actions.

We must turn the tide of Alaska's chronically high rates of interpersonal violence. To accomplish that, victims must be kept safe and perpetrators must know that they will be appropriately punished for their actions. We believe the legislation you propose sends a strong message that our state will not tolerate the levels of domestic violence that currently exist.

This bill's welcome message is that "serial battering" is a serious crime that Alaska will not accept. When repeat offenders are held to a higher standard of accountability, the message to both victims and perpetrators is that the recurrence of harm to an individual matters. We expect the classification of such behavior as a felony to act as a deterrent and, if not, then it would provide a heavier consequence to include prison time and oversight by Department of Corrections upon release.

As you probably know, as of 2005, at least 26 states have also taken a stand on this issue by enacting some type of enhanced penalty for repeat domestic violence offenders. We encourage Alaska to join them and appreciate the opportunity to support this legislation.

Sincerely,

Chris Ashenbrenner

Chris Ashenbrenner
Executive Director

"Public Safety through Public Service"

Council on Domestic Violence & Sexual Assault
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February 20, 2008

Representative Lindsey Holmes
Members of House Finance

Dear Rep. Holmes and members of HFIN Committee:

The Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) supports the intention of this legislation 1000%. At first glance it would seem that this bill is something ANDVSA would wholeheartedly support because the criminalization of such behavior sends the message that domestic violence is a serious crime and one that is not easily tolerated in Alaska. Moverover, the bill targets repeat offenders with multiple convictions and those who have multiple victims. However, we have a few concerns we'd like addressed/discussed before passage of such a bill.

As was made clear during the CJS Summit, Senator French stated that we don't have all the information we need to make informed decisions on juveniles being referred to the criminal justice system, and therefore we need an improved method of tracking people who progress through the system. We don't know how many crimes of domestic violence are charged in the first place; we know convictions. We don't know how many are plead down to disorderly conduct or 4th degree assault. If we are not currently charging/convicting domestic violence, and we then increase the penalty to a felony, are we merely giving perpetrators more to bargain with? Perpetrators have a knack for using the criminal justice system against victims. We want some assurances that the system can accommodate this law, and we want to make sure we have the tools to judge its efficacy. If perpetrators are not being convicted of the crimes they are charged with, how are we determine efficacy?

We are also concerned about how this legislation will affect victims who are arrested, especially in rural Alaska where anecdotal evidence suggests that women who are arrested are unlikely to contest charges because they want to get back home and be reunited with their children or who don't want to cause 'any more problems' to the perpetrator. National research does suggest that battered women are more likely to accept plea bargains in order to be with their children ("The Impact of Arrests and Convictions on Battered Women" *National Clearinghouse for the Defense of Battered Women, 2006*). In House Judiciary we heard the testimony of a father on behalf of his daughter who saw first-hand how her boyfriend manipulated the system into getting her arrested.

Having said all of the above, again, we support the intent of this bill. We also urge you to continue to ask questions which address these unintended consequences to victims who must navigate our court system in areas of Alaska where it's not always beneficial for them to do so. We want our laws to reflect our values – that if you continue to commit a crime of domestic violence, there will be dire consequences. I want to thank Representative Holmes and all of the other sponsors for their commitment to protecting victims. Let's make sure that our good intentions don't re-victimize them.

Sincerely,

Peggy Brown
Executive Director, ANDVSA

HB

331

ALASKA STATE LEGISLATURE
House of Representatives

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Representative Bob Roses

email: Representative_Bob_Roses@legis.state.ak.us

Date: April 5, 2008

To: Senator Hollis French, Chair
Senate Judiciary Committee

From: Representative Bob Roses

Re: CS HB 331 (L&C)

I respectfully request you schedule CS HB 331 – Motor Vehicle:Insurance/Licenses for Senate Judiciary Committee consideration at your earliest convenience.

Enclosed are:

1. The most recent version of CS HB 331(L&C)
2. Current Sponsor Statement
3. Current Sectional Analysis
4. Current Fiscal Notes
5. Communications of support
6. Additional Background Material

Thank you for your consideration of this request. Please contact Crystal Koeneman at 465-4939 in my office if you have any questions or concerns.

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CSHB 331 (L&C) – MOTOR VEHICLES:INSURANCE/LICENSES

Sectional Analysis

Section 1 – Provides that a violation of AS 28.05.071 (Notifying the DMV of a change of address) be punishable by a civil fine of up to $25. Currently this is a class B misdemeanor.

Section 2 – Provides a legal defense to a person charged with the crime of driving without a license, for failure to have legally required automobile insurance, when the driver proves they in fact had automobile insurance. This closes a loophole in current law.

Section 3 – Makes driving without insurance a Class B Misdemeanor, punishable by a minimum fine of $500. It is currently an unclassified misdemeanor to drive without insurance, and the current law imposes no required fine.

Section 4 – Provides that DMV should send the required insurance paperwork to a driver's last known address, not just the address DMV has on file.

ALASKA STATE LEGISLATURE
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Representative Bob Roses

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CSHB 331 (L&C) – MOTOR VEHICLES:INSURANCE/LICENSES
Sponsor Statement

Current law states that a person who changes their name or address must notify the Department of Public Safety or the Department of Administration within 30 days. House Bill 331 changes the crime from a Class B Misdemeanor to a fine not to exceed $25 for those that do not notify the departments.

House Bill 331 closes a loophole in the law that has caused a number of drivers to be charged criminally for driving without auto insurance when, in fact, they had insurance. Under current law a driver can lose their license for driving without insurance, and can be criminally charged for driving when their license is subsequently suspended. Those are proper penalties. But a loophole exists in the law that lets drivers who in fact had insurance to be charged with a crime.

Currently, drivers involved in an accident must show law enforcement proof of insurance. When they do, an officer then asks the driver to fill out paperwork informing the DMV that the driver had insurance at the time of the accident. Many drivers incorrectly assume that when they show proof of insurance at the accident scene, the subsequent paperwork is unnecessary. If the DMV does not receive the paperwork, even if the law enforcement office substantiated that the driver had insurance at the scene of the accident, the driver's license will be suspended. DMV will send a reminder notice to the driver when the paperwork is not received. However, rather than sending the notice to the latest address the state knows about - normally the address provided to the police officer at the time of the accident - the law requires the notice be sent to the address on the person's license.

This bill also increases the penalty for uninsured motorists. Under CSHB 331 it is a class B misdemeanor to drive without insurance, punishable by a minimum fine of $500 and up to 90 days in jail. It is currently an unclassified misdemeanor to drive without insurance, and the current law imposes no required fine.

House Bill 331 requires drivers to have automobile insurance, and prevents drivers from being charged with crimes they did not commit. I urge your support.

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION

ANNETTE KREITZER, COMMISSIONER

SARAH PALIN, GOVERNOR

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February 19, 2008

The Honorable Bob Roses
State Capitol Room 416
Juneau, AK 99801

Dear Representative Roses,

Your continued concern for proper notification of licensed drivers is admirable, and HB331 demonstrates that concern.

The passage of this legislation will allow the Division of Motor Vehicles (DMV) to mail licensing notices to the most current address available following a motor vehicle crash. This will alleviate instances where the address on the departmental record has not yet been updated and drivers do not receive notices that may affect their driving privilege. DMV supports your bill that will enhance the notification procedures for the department thus helping the drivers who unfortunately have been involved in a motor vehicle crash.

Thank you for your concern. You have the Department's support.

Sincerely.

Annette Kreitzer

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services

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February 20, 2008

Memorandum

TO Representative Bob Roses

FROM Tim Spengler TCS
Legislative Analyst

RE Mandatory Auto Insurance Law

You asked whether states have mandatory automobile insurance laws. You also wished to know what penalties states impose for individuals who do not comply with the law.

According to the Insurance Information Institute, liability insurance is currently compulsory in 48 states and the District of Columbia.[1] Only New Hampshire and Wisconsin do not require liability insurance. The Institute's *Issues Update on Compulsory Auto/Uninsured Motorist* from February 2008 notes that although automobile insurance is mandatory across the vast majority of states, as many as 30% of drivers in some states are estimated to be uninsured.

The following information about penalties is from *AutoInsuranceRemedy.com*:

> Most states require proof of insurance which typically must be shown when the car is registered, following an accident or when driving on the highway. **Many states have severe penalties for drivers who do not carry the necessary coverage. These penalties can range from as little as a $100 fine to the following: a suspension of a driver's license and suspension of the car registration for up to six months, up to a $5000 fine, and up to one year in jail.**[2]

Below is a sampling of penalties states impose on individuals who do not comply with their mandatory automobile insurance laws.

- Alabama—Possible fine of $500 for the first offense and a $1,000 fine and/or license suspension for six months for the second offense.
- California— Fine of up to $200.
- Massachusetts—Fine up to $5,000 plus jail term of up to one year in jail.

[illegible] is a primary source of information, analysis and [illegible]

AutoInsuranceRemedy.com is a full service auto insurance site. It includes information about the different kinds of car insurance [illegible]