

April 25, 2013

The Honorable Sean Parnell
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HCS CSSB 22(FIN) -- omnibus bill relating
to sex trafficking, other crimes, and criminal
procedures
Our file: JU2013200222

Dear Governor Parnell:

At the request of your legislative director, we have reviewed HCS CSSB 22(FIN), relating to the commencement of actions for felony sex trafficking and felony human trafficking; relating to the crime of sexual assault; relating to the crime of unlawful contact; relating to forfeiture for certain crimes involving prostitution; relating to the time in which to commence certain prosecutions; relating to release in a prosecution for stalking or a crime involving domestic violence or for violation of a condition of release in connection with a crime involving domestic violence; relating to interception of private communications for certain sex trafficking or human trafficking offenses; relating to use of evidence of sexual conduct concerning victims of certain crimes; relating to consideration of sentencing of the effect of a crime on the victim; relating to the time to make an application for credit for time served in a treatment program or while in other custody; relating to suspending imposition of sentence for sex trafficking; relating to consecutive sentences for convictions of certain crimes involving child pornography or indecent materials to minors; relating to the referral of sexual felonies to a three-judge panel; relating to the definition of "sexual felony" for sentencing and probation for conviction of certain crimes; relating to the definition of "sex offense" regarding sex offender registration; relating to the definition of "victim counseling centers" for disclosure of certain communications concerning sexual assault or domestic violence; relating to violent crimes compensation; relating to certain information in retention election of judges concerning sentencing of persons convicted of felonies; relating to the rights of certain victims of sexual assault to obtain legal and equitable remedies for injuries arising from the conduct of a perpetrator; relating to the definition of "sexual assault" for the purpose of adoption and the termination of parental rights in certain proceedings; relating to remission of sentences for certain sexual felony offenders; relating to forms for sexual assault, stalking, and domestic violence protective orders; relating to the subpoena power of the attorney general in cases involving the use of an Internet service account; relating to reasonable efforts in child-in-need-of-aid cases involving sexual abuse or sex offender

registration; relating to mandatory reporting by athletic coaches of child abuse or neglect; making conforming amendments; amending Rule 16, 32.1(b)(1), and 32.2(a), Alaska Rules of Criminal Procedure, and Rules 404(a) and (b), Alaska Rules of Evidence.

Sections 1, 22, and 23 of the bill are designed to overturn the majority decision in *Collins v. State*, 287 P.3d 791 (Alaska App. 2012). Collins used a mistaken interpretation of legislative intent regarding standards for referring sex offenders to a three-judge sentencing panel. In 2006, the legislature adopted increased penalties for persons convicted of sex felonies. The legislature adopted specific findings, among others, that sex felons are difficult to treat and are much more likely than other felons to reoffend, that many sex offenders begin victimizing others when the offender is relatively young (between 12 and 16 years of age), and that these crimes cause serious harm to victims, particularly to young girls. Two of the three judges on the court of appeals interpreted these legislative findings to mean that the legislature must intend that sex offenders with less than extraordinary prospects for rehabilitation or a history free of unprosecuted, undocumented, or undetected sexual offenses, have their cases referred to a three-judge panel. When the legislature made its findings and raised the sentencing ranges for sex felonies, it did not intend that different standards be applied to referral of a case involving a sex felony to a three-judge panel than for other felony offenses.

Section 1 of the bill would adopt legislative findings and intent to address the Collins decision, while secs. 22 and 23 of the bill would adopt new provisions in the statutory law addressing the transfer of a case from the sentencing judge to a three-judge panel in a case involving a sex felony. These three sections would overturn the majority decision and endorse the dissent in Collins.

Section 2 of the bill would allow a person to bring a civil action at any time against a perpetrator for damages based on injuries resulting from the crimes of felony sex trafficking and felony human trafficking.

Sections 3 - 8 of the bill relate to prohibiting persons in positions of authority as either probation or parole officers, juvenile probation officers, or juvenile facility staff from engaging in consensual sexual acts with people they supervise. Sections 3 and 4 of the bill would amend the crime of sexual assault in the third degree, a class C felony, to prohibit a probation or parole officer from engaging in sexual penetration with a person on probation or parole. Additionally, a juvenile probation officer or juvenile facility staff would be prohibited from engaging in sexual penetration with a person 18 or 19 years of age on juvenile probation or in a juvenile facility. Sections 5 and 6 of the bill would amend the crime of sexual assault in the fourth degree, a class A misdemeanor, to prohibit a probation or parole officer from engaging in sexual contact with a person on probation or parole. A juvenile probation officer or juvenile facility staff would also be prohibited from engaging in sexual contact with a person 18 or 19 years of age on probation or in a juvenile facility. These additions to the law would be similar to the law prohibiting a police officer or a correctional officer from this conduct with a person in the officer's custody. The terms "juvenile facility staff," "juvenile probation officer," "parole officer," and "probation officer" would be defined; the definition of "probation officer" would include a person who supervises therapeutic court participants. Section 7 of the bill would add a defense to the crime

of sexual assault in the fourth degree that the offender and the person were married. Section 8 of the bill would adopt an affirmative defense to the prohibition of a parole or probation officer from engaging in sexual penetration or sexual contact with a parolee or probationer. The affirmative defense is that the officer and the person on probation or parole had a preexisting dating or sexual relationship before the alleged offense, and that the relationship continued until the date of the alleged offense.

Section 9 of the bill would fill a gap in the law that prohibits a person ordered by a court not to contact a victim or witness as part of a sentence or a condition of release. The amendment would prohibit a defendant who has been ordered by the court not to contact a victim or witness, but who has not been released from jail, to refrain from contacting the victim or witness. This conduct is a class A misdemeanor.

Section 10 of the bill would amend the existing statute that allows the state to request forfeiture of property used to institute, aid, or facilitate, or property received or derived from, sex trafficking or felony prostitution. The amendment would make forfeiture discretionary with the court and would provide that forfeiture occur at sentencing.

Section 11 of the bill would allow the state to prosecute a person for distribution of child pornography, felony sex trafficking, and human trafficking at any time without regard to the time elapsed from the commission of the crime. Section 11 of the bill also would establish a 10-year statute of limitation period for prosecution of a probation or parole officer for engaging in sexual penetration with a person on probation or parole, or for prosecution of a juvenile probation officer or juvenile facility staff for engaging in sexual penetration with a person 18 or 19 years of age on juvenile probation or in a juvenile facility.

Sections 12 and 13 of the bill would allow the court the discretion, in releasing on bail a person in connection with a crime involving domestic violence or stalking, to require the person to participate in a monitoring program with a global positioning device or similar technological means that meets guidelines for a monitoring program adopted by the Department of Corrections in consultation with the Department of Public Safety.

Section 14 of the bill would require that a person arrested for a violation of a condition of release in connection with a crime involving domestic violence appear before a judge in person or by telephone before release from custody.

Section 15 of the bill would authorize the attorney general to make a written application to a court for an order allowing interception of the private communications of a person that may provide evidence that the person is committing or planning to commit sex trafficking in the first or second degree or human trafficking in the first degree. Sex trafficking and human trafficking are crimes that require cooperation among perpetrators. Interception of the communications of a person under these circumstances would facilitate the investigation of these crimes.

Section 16 of the bill would expand the protection of a victim of sexual assault, sexual abuse of a minor, or unlawful exploitation of a minor by excluding evidence of the victim's sexual conduct both before and after the person was victimized. Current law provides this protection for evidence of sexual conduct before the offense charged. This rule is commonly referred to as the "rape shield law," and the purpose is to exclude evidence of the victim's private sexual conduct unless the proponent has a valid evidentiary reason for its admission at trial. Section 16 of the bill also would require the defendant to make the request to admit this evidence at least five days before trial, unless the request was based on information learned after the deadline or otherwise for good cause.

Section 17 of the bill would require a prosecuting attorney, at a crime victim's request and before an offender's sentencing hearing, to provide the victim with any letters of support for the offender submitted to the court for consideration that are part of the presentence report.

Section 18 of the bill would require a defendant claiming credit, as part of the sentence for time spent in a treatment program as a condition of bail release, to file written notice 10 days before the sentencing hearing on that offense. The notice must include the number of days the person is claiming as credit. A court may not consider a request for credit made more than 90 days after the deadline except for good cause. Section 18 of the bill also would require a person to make a request for credit for time spent in a treatment program pending appeal not later than 90 days after the case is returned to the trial court following appeal. A court may not consider a request for credit made after the deadline except for good cause.

Section 19 of the bill would require a defendant claiming credit for time spent in a treatment program as a condition of probation or a condition of bail release in connection with a petition to revoke probation to file notice of the request 10 days before the disposition hearing. The notice must include the number of requested days of credit. A court may not consider a request for credit made more than 90 days after the disposition hearing except for good cause.

Section 20 of the bill would make a person convicted of sex trafficking ineligible for a suspended imposition of sentence.

Section 21 of the bill would require the court, in sentencing a person convicted of two or more crimes of distribution of child pornography, possession of child pornography, or distribution of indecent material to minors, to give some consecutive time for each crime or attempted or solicited crime for which the defendant is being sentenced.

For discussion of secs. 22 and 23 of the bill, please refer to the discussion for sec. 1 of the bill.

Section 24 of the bill would correct an error in the definition of "sexual felony" by including the crimes of sex trafficking in the first degree and online enticement of a minor in the definition. The term is used in AS 12.55.125(i), which adopts higher sentencing ranges for most sex felonies, including sex trafficking in the first degree and online enticement of a minor.

Section 25 of the bill would add, to those crimes that require registration as a sex offender, the felony of being a patron of a prostitute who is under 18 years of age in violation of AS 11.66.100, if the patron is 18 years of age or older and at least three years older than the prostitute. Section 25 also corrects a reference to the crime of sex trafficking in the first degree and the third degree in the sex offender registration law.

Sections 26 and 27 of the bill would make conforming amendments to the warning on sexual assault, stalking, and domestic violence protective orders. Certain violations of these protective orders are a class A misdemeanor under AS 11.56.740. The maximum fine for a class A misdemeanor has been raised to \$10,000 under AS 12.55.035. Sections 26 and 27 of the bill would update the warning to describe the maximum fine under current law.

Section 28 of the bill would make an addition to the definition of "victim counseling center" to include a victim counseling center operated by or contracted by a branch of the armed forces of the United States. The effect of this change is to extend the privilege for confidential communications between a victim of sexual assault or domestic violence and their counselors to counseling organizations that provide services to victims connected with the military.

Section 29 of the bill would amend the law addressing persons who are eligible for violent crimes compensation to include victims of sex trafficking in the first degree, sex trafficking in the third degree if the person induced or caused to engage in prostitution is 20 years of age or older, human trafficking in any degree, and unlawful exploitation of a minor.

Sections 30, 42, and 43 of the bill would strengthen and make more explicit statutes and court rules that require a court to consider a crime's impact on the victim. Section 42 of the bill would require the presentence report to include a victim's impact statement or an explanation of why the victim or victim's representative could not be interviewed. Section 43 of the bill would require the court to take the victim's impact statement into account when preparing the sentencing report and would allow the court to take the statement into consideration for other purposes. Section 30 of the bill would require the Alaska Judicial Council to include, with other information about the judge in connection with a retention election, information about a judge's consideration of victims when imposing sentence in felony offenses that involve victims.

Sections 31 and 32 of the bill would make conforming amendments to the statutes that provide a savings clause in the state adoption code. In the code, a victim of sexual abuse or incest who becomes pregnant as a result of the crime may initiate proceedings to terminate the parental rights of the perpetrator. If the victim initiates those proceedings, the law "saves" other legal and equitable civil remedies for them against the perpetrator. Sections 31 and 32 of the bill would make additions to the savings clause and to a corresponding definition of "sexual assault" to specify that victims of sexual assault, in any degree, also are covered under the savings clause.

Section 33 of the bill would provide that a person convicted of an unclassified or class A sexual felony is not eligible for mandatory parole, also called "good time."

Sections 34 - 37 of the bill would address the procedure for a law enforcement officer to obtain an administrative subpoena for the business records of an Internet service provider. These subpoenas may be issued in the investigation of the crimes of online enticement of a minor, unlawful exploitation of a minor, distribution of child pornography, possession of child pornography, and distribution of indecent material to a minor. The amendments would allow the attorney general to designate the deputy attorney general for the civil division or the criminal division to evaluate applications for the subpoena, in addition to the attorney general. The investigation of these cases often requires a prompt response to a request for a subpoena and having two attorneys who may approve them will assist law enforcement in their investigations.

Section 38 of the bill would add to the circumstances that allow a court to decide that reasonable efforts by the Department of Health and Social Services to reunite a child who is in an out-of-home placement with the child's family are not required. The amendment would provide that the court may make this determination if it finds by clear and convincing evidence that the parent or guardian has sexually abused the child or another child of the parent or guardian or that the parent or guardian is registered or required to register as a sex offender.

Sections 39 and 40 of the bill would clarify that athletic coaches are included in the category of school teachers and school administrative staff members of public and private schools who are required to report to authorities if they have reasonable cause to believe that a child has suffered harm from child abuse or neglect. The term "athletic coach" would be defined to include a paid leader or assistant of a sports team. The amendments would impose these duties on a narrower class of coaches than the bill originally proposed. As originally proposed, these duties would have applied to a paid or volunteer athletic coach of a sports team in a public or private school, in a public or private postsecondary institution, sponsored by a municipality or other local government organization, or that received public funding. As now proposed, these duties would apply only to paid coaches of public or private school sports teams.

Section 41 of the bill would amend a court rule to limit the publication of child pornography that occurs during the discovery process in a prosecution for unlawful exploitation of a minor. Because every viewing of child pornography is an additional harm to the victim, Section 41 of the bill would require that the defendant and the defendant's attorney view the material where it is stored. If a defendant is not represented, sec. 41 of the bill would require the court to arrange for the defendant to be supervised while viewing the material. If the defendant requests that an expert witness view the material, sec. 41 of the bill would require the court to arrange to send the material directly to the expert.

For discussion of secs. 42 and 43 of the bill, please refer to the discussion for sec. 30 of the bill.

Section 44 of the bill would amend Rule 404(b)(2)(i), Alaska Rules of Evidence. Under Rule 404, evidence of the defendant's prior bad acts is generally not admissible at a trial. There are several exceptions to this rule. Evidence in the prosecution of a physical or sexual assault or abuse of a minor that describes other similar acts by the defendant toward the same victim or other similar victims may be admissible. Current law, however, limits the admissible evidence

to acts committed within 10 years preceding the date of the currently charged crime. Section 44 of the bill would remove this time limitation. Other exceptions to the general rule, for example, sexual assault and domestic violence prosecutions, do not limit the use of prior acts to those committed within 10 years of the current offense. Further, the 10-year limit is problematic because a person convicted of a crime against a child may have been incarcerated for a significant period for the previous offense. The question of whether the prior act occurred too far in the past is then left to the judge to determine under the circumstances of the case.

Section 45 of the bill notes that the amendments proposed by sec. 16 of the bill to the rape shield law would have the effect of changing a court rule.

Section 46 of the bill would adopt applicability provisions.

Section 47 of the bill notes that the amendments proposed by sec. 16 of the bill to the rape shield law require a two-thirds majority vote in each house because they constitute an indirect court rule change.

Section 48 of the bill would provide an effective date of July 1, 2013.

The bill presents no constitutional or other legal concerns.

Sincerely,

Michael C. Geraghty
Attorney General

MCG:DEB:pav