



February 15, 2010

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The Honorable Hollis French  
Chair, Senate Judiciary Committee  
Alaska State Senate  
State Capitol, Room 417  
Juneau, AK 99801-1182

**Re: Senate Bill 222**  
**Constitutional Issues**

Chair French:

Thank you for the opportunity to submit written testimony regarding Senate Bill 222. As you know, the American Civil Liberties Union of Alaska ("ACLU) represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation.

**Section 16 Proposed Amendments to**  
**Rule 16 of the Rules of Criminal Procedure**

Section Sixteen of the Bill proposes changes to the rules of criminal procedure that violate the state and federal constitutional rights to a fair trial and to effective representation, and would result in lengthy and costly litigation. The Section proposes that relevant evidence should be revealed to defendants, defense attorneys, and defense experts only at a state facility, under the control of a law enforcement agency. While protecting the privacy of the victims of certain crimes is an important interest, the proposed changes to the Rules of Criminal Procedure unnecessarily restrict the rights of the accused.

In some cases, the use of a technological expert is invaluable. Defendants are entitled to establish, for example, that images at issue in a trial are not illegal material, were placed on the drive by another party, or were altered in some way. The computer source files would require review at length by an expert witness. Being forced to conduct the review at a local police department or District Attorney's office would make the work of these experts essentially impossible. Moreover, the analysis of hard drives and other media would likely require unique analysis programs which would necessitate examining the images on the expert's own computers. The proposed Rule Amendment would effectively deprive defendants of the effective use of expert testimony, which would be a key defense resource in these cases.

Even where the use of an expert is unnecessary, the defense attorney may need to review the files at length, to establish the exact nature of images or files, or to determine whether some of them are duplicates. Requiring defense attorneys to do their work at times and places convenient to the state is unnecessarily and unconstitutionally restrictive.

A case from Washington State perfectly illustrates why the proposed rule would result in lengthy and expensive litigation which would ultimately result in the overturning of the statute. In *State v. Boyd*, for example, the prosecution in a child pornography case sought and obtained a protective order from the court which only permitted the defense to view the evidence at a state facility. 158 P.3d 54 (Wash. 2007). The Supreme Court of Washington ruled that the Rules of Evidence, the Fifth Amendment right to a fair trial, and the Sixth Amendment right to effective representation by counsel all required that the protective order be struck down and the defendant be granted a new trial, because the defendant could not be adequately represented nor fairly tried under the order.

The important privacy of needs of victims can be protected without the measures laid out in Section 16. For example, the *Boyd* court upheld an order requiring the defense to keep "mirror image" hard drives of evidence under lock and key, to use firewall software on any computer viewing images that was connected to the internet, making the attorney personally and professionally responsible for any unauthorized release of the images, and allowing state experts to verify the complete eradication of the images after the conclusion of the case.

The power of a court to issue a protective order in a particular case already exists and needs no augmentation by the legislature. An order issued after consideration of the unique facts of an individual case is far more likely to survive appellate review than a blanket rule set down by the legislature.

Section 16 of S.B. 222 violates the state and federal constitutional rights to a fair trial and to effective representation. We recommend the Bill be revised so that the courts would be permitted to manage the disclosure of evidence on a case-by-case basis, rather than by instituting a blanket rule that would invite litigation.

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### **Section 15 Requirement for Registration of Sex Offenders from Other Jurisdictions**

Section 15 proposes to expand the list of those required to register as sex offenders to include anyone required to register in another jurisdiction. The ACLU of Alaska has numerous objections to this amendment.

The Alaska Supreme Court ruled in *Doe v. State* that those convicted of sex offenses in Alaska before the enactment of the sex offender registry statutes in 1994 could not be required to register, as the statute would otherwise violate the *ex post facto* provision of the State Constitution. 189 P.3d 999 (Alaska 2008). In many other jurisdictions, the state courts have not declared their state sex offender statutes to offend their own *ex post facto* rules. The Alaska *ex post facto* provision may prohibit mandatory registration for those convicted of offenses in another state prior to 1994. A final determination would need to be made by the Alaska Supreme Court, likely after lengthy litigation, and potentially overturning many convictions.

The proposed amendment in Section 15 also usurps the State's own policy making decisions. In Alaska, for instance, the legislature has set the age of consent at sixteen. This amendment would nullify the legislature's judgment and require someone convicted of having sex with a 17-year-old in another state to report to the Department of Public Safety and face incarceration should he fail to report on time. Should he end up incarcerated, the people of the state of Alaska will be paying \$44,000 a year to incarcerate someone as a consequence for committing an underlying act which would not even be a crime in Alaska.

The current state of the law in Alaska is that anyone convicted under appropriate Alaska statutes or similar statutes in another state, such as rape, sexual assault, etc., must register in Alaska. Section 15 would therefore expand the registry not to the most culpable and the most dangerous, but to those convicted of designated sex offenses that lie outside the most dangerous sex offenses: particularly, those convicted of having sex with 16 or 17 year olds; those convicted of prostitution offenses; and those convicted of some other minor offenses, like indecent exposure. These offenders are not particularly more likely to commit the rapes and molestations that the registry is designed to protect Alaskans from.

Generally, registries have been ineffective in preventing crime. A Rutgers University study showed that the New Jersey sex offender registry had "no demonstrable effect in reducing sexual re-offenses." The study also showed the enactment of the law had no effect on the number of victims of sex offenses, no effect on how long those convicted of sex offenses remained arrest-free, and no effect on the type of sex offenses committed. The legislature should look for proven, effective methods of preventing sex offenses. The proposed expansion of the sex offender registry in S.B. 222 is not a means to do this.

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### **Section Three – Eliminating the Mental State Requirement of the Failure to Register Statute**

Subsection (b) of Section Three of the Bill eliminates any mental state requirement, or *mens rea*, for the offense of failure to register, which means that a person who accidentally or in good faith neglects to complete the registration requirement every three months could still be found guilty of the offense. Subsection (c) creates an affirmative defense that registration became impossible because of an unforeseen circumstance and that the individual orally registered with the Department of Public Safety as soon as possible.

Generally, the criminal law requires “not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.” *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969). The Alaska courts have held that, for major felonies, a mental state requirement is mandatory, while some minor offenses, such as hunting or public health related offenses, may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see also* *State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996).

In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has no provision for mental state but no language stating that no mental state requirement exists. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484 P.2d 677 (Alaska 1971). With an explicit statement that no mental state is required in Section Three, the courts will not be able to avoid the constitutional conflict and may rule the statute unconstitutional.

Of note, as well, are the unique conditions here in Alaska. Many registered sex offenders live off the road system and in remote villages in which mail service gets interrupted, travel and telecommunications are irregular, and weather could keep an offender from being able to comply. Placing the burden on the defendant to prove his innocence reverses our legal tradition and the traditional balance of powers between the defense and the prosecution. The elimination of the mental state requirement and the substitution of a restrictive affirmative defense make Section Three subject to attack under the Alaska constitution.

### **Conclusion**

We hope that the Judiciary Committee will note these constitutional infirmities in Sections Three, Fifteen, and Sixteen of Senate Bill 222 and consider amending them or eliminating them from the Bill to avoid these concerns.

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While the ACLU of Alaska takes very seriously the need to address the epidemic of sexual assault in Alaska, these sections are not well-crafted to vindicate the state's purposes. The sections we have identified present substantial Constitutional problems and will likely entangle the state in litigation, should S.B. 222 pass as currently written.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman  
*Executive Director*  
ACLU of Alaska