THE STATE of ALASKA
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The Honorable Natasha von Imhof, Co-Chair
Senate Finance Committee
Alaska State Capitol
Juneau, AK 99801

The Honorable Bert Stedman, Co-Chair
Senate Finance Committee
Alaska State Capitol
Juneau, AK 99801

Dear Senator von Imhof and Senator Stedman,

You have asked for an explanation of the law surrounding the marriage defense provisions in Alaska's sexual assault statutes. Alaska's sexual assault and sexual abuse of a minor statutes are based on the premise that there is consent when people engage in a sexual act.[1] In other words, a sexual act becomes criminal when one party lacks consent or is unable to consent. There are a number of classes of people who, as a matter of law, are unable to give consent: persons who are mentally incapable, incapacitated or unaware that the sexual act is being committed and children under a certain age. It is the people who fall into these categories that the law has said deserve special protection because they are unable to give meaningful consent. It is with this premise in mind that we can evaluate the law surrounding the marriage defense.

Elements of the Offense

The marriage defense applies to our sexual assault statutes when a victim is mentally incapable, incapacitated or unaware that the sexual act is being committed or when there is consent but due to a spouse's employment status the relationship is criminalized[2] For the purposes of this letter we will focus on situations where the victim is mentally incapable, incapacitated or unaware that the sexual act is being committed as those are the only provisions impacted by the Governor's proposal in SB 35.

In order for any crime to be committed there must be an act and a corresponding mental state. Those two things must occur simultaneously. Additionally, each element of a criminal offense

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[1] *See* AS 11.41.470(6) "sexual act" means sexual penetration or sexual contact.
[2] See AS 11.41.410-11.41.427.

must be proven by the State beyond a reasonable doubt.[3]

Alaska statutes criminalize sexual acts with persons who are mentally incapable, incapacitated, or unaware that the sexual act is being committed when the offender *knows* that the victim is mentally incapable, incapacitated, or unaware that the sexual act is being committed. Therefore, in order for the State to prove this crime it must prove 1.) there was a sexual act; 2.) the victim was mentally incapable, incapacitated, or unaware that the sexual act was being committed; and 3.) the offender *knew* the victim was mentally incapable, incapacitated, or unaware that the sexual act was being committed. Each of these elements must be proven beyond a reasonable doubt.

a. Sexual act

A sexual act is defined in statute as sexual penetration or sexual contact.[4] Sexual contact means the defendant's (i) knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast; or (ii) knowingly causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast.[5]

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[3] *See* Pattern Jury Instruction 1.06, PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, BEYOND A REASONABLE DOUBT:

"The fundamental obligation of jurors in a criminal trial is to apply the presumption of innocence and the burden of proof beyond a reasonable doubt. A defendant, although accused of a crime, begins trial with a clean slate – with no evidence favoring conviction. The presumption of innocence means that you must presume the defendant is innocent of the crime[s] charged. The presumption of innocence alone is sufficient for you to find a defendant not guilty. To overcome the presumption of innocence, the prosecution must prove every element of the crime[s] charged beyond a reasonable doubt.

This requirement that the prosecution must prove the defendant's guilt beyond a reasonable doubt is called the burden of proof. The prosecution always has the burden of proving the defendant guilty beyond a reasonable doubt. This burden never shifts throughout the trial. The defendant is not required to prove his or her innocence or to produce any evidence at all. Although a defendant is never required to produce any evidence, he or she may rely on evidence brought out through any witness, regardless of which party called the witness. A defendant has an absolute right not to testify. You must not draw any conclusion against the defendant if he or she does not testify.

What is a reasonable doubt? It is a doubt in your mind about the defendant's guilt that arises from the evidence presented, or from a lack of evidence. A reasonable doubt is based on reason and common sense. A defendant must never be found guilty based on mere suspicion, speculation, or guesswork.

What is proof beyond a reasonable doubt? It is the highest level of proof in our legal system. It is not enough that you believe a defendant is probably or likely guilty or even that the evidence shows a strong probability of guilt; the law requires more. Proof beyond a reasonable doubt is proof that overcomes any reasonable doubt about the defendant's guilt.

The prosecution is not required to prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty. If, after careful and impartial consideration of the evidence and the law, you do not have a reasonable doubt, then you must find the defendant guilty. If, on the other hand, you think the prosecution did not prove every element of the offense charged beyond a reasonable doubt, then you must find the defendant not guilty."

[4] AS 11.41.470(6).

[5] AS 11.81.900(59).

Sexual penetration is defined as: genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body.[6]

Both of the above definitions include an exemption for a recognized and lawful form of medical treatment. In addition, neither of the above definitions include touching someone anywhere other than a person's genitals, anus, or female breast. Therefore, it does not cover mere touching of another person on the hand or arm for example.

b. The victim was mentally incapable, incapacitated, or unaware that the sexual act was being committed.

The term "mentally incapable" has a specific definition in statute. In essence, a person is mentally incapable if the person suffers from a mental disease or defect that renders them unable to understand the nature or consequences of their conduct including the potential harm to that person.[7] In addition, the person must be mentally incapable *at the time that the sexual act occurred*.[8] If this was not the case, then the concept of being unable to consent would be

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[6] AS 11.81.900(60).

[7] AS 11.41.470(4).

[8] *See* Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW §17.4(b) Incapacity (2nd ed. 2003):

> "Under English common law, the established rule was 'that unlawful and forcible connection with a woman in a state of unconsciousness at the time, whether that state has been produced by the act of the prisoner or not, is presumed to be without her consent, and is rape.'
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> On the infrequent occasions when the issue arose, American courts reached the same result . . . Sometimes the statutory reference is only to a victim who is unconscious, and sometimes unconscious is listed with some alternative condition, such as asleep, physically powerless, or physically incapable of resisting. Some statutes refer more generally to where a physical condition has affected the person in some way, such as by making the person unaware that a sex act is being committed, incapable of consent, or substantially limited in the ability to resist. However, much more common is use of the broader general term of 'physically helpless,' usually specifically as including the situations where the victim is unconscious, asleep, or for any other reason is physically unable to communicate non-consent.
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> . . . .
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> The second situation is that in which the sexual intercourse has been with a mentally incompetent female. Under English common law this situation was considered no different from intercourse with an unconscious person, and certainly the rationale for criminal liability is essentially the same in the two situations. Here, the 'critical issue is to define the degree of mental disease or deficiency that suffices to make non-coercive intercourse a crime,' for the statute should not be so broad as to cover persons suffering from only a relatively slight mental deficiency, nor so narrow as to protect only those in a state of absolute imbecility. The Model Penal Code solution is to describe the requisite circumstances as where the woman 'suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct.'"

Also see, ***People v. Lint***, 2000 WL 33407124 (Mich. App. 2000)(Michigan uses the Model Penal Code definition of "mentally incapable", as does Alaska, in their sexual assault laws and interpreted this phrase to require the mental incapacity to be at the time of the offense.) *But see* VA Code Ann. §18.2-61; ORS 163.305(4); RCW 9A.44.010(4). Virginia, Oregon, and Washington statutes all use the express language "at the time" in their statutes defining "mentally incapable".

meaningless. Thus, if the person was coherent and able to give meaningful consent at the time the sexual act occurred one of the elements of the offense is not met and there is no crime.

Similarly, the term "incapacitated" is defined in statute as temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act.[9] A common example of "incapacitated" is when a person is incapacitated due to the use of prescription drugs or alcohol. Again, the person must be incapacitated at the time that the sexual act occurred or there is no crime.

c. The offender *knew* the victim was mentally incapable, incapacitated, or unaware that the sexual act was being committed.

In addition to the fact that a sex act occurred and the condition of the victim, the State must prove that the offender knew that the victim was mentally incapable, incapacitated, or unaware that the sexual act was occurring. "Knowing" is a specific mental state that is defined in statute as when a person is aware that the conduct is of that nature or that a particular circumstance exists; knowledge is established if a person is *aware of a substantial probability of its existence, unless the person actually believes it does not exist.*

Spouses with a mental disease or defect.

Several scenarios have circulated the Capitol regarding persons who are married and one of them may have Alzheimer's or dementia. The examples stress that these mental diseases are fluid and it may be difficult to determine whether the person is mentally incapable. The concerns surrounding these fact patterns are that a person may believe that their spouse consented when, in fact, the spouse may have been mentally incapable and unable to consent, leading to unwarranted criminal charges.

It is true that these particular diseases are fluid and a person may recognize their family members at one moment and, at another moment, the family members could be complete strangers to them.[10] However, the thing that stays the same in these types of hypotheticals is that the State must prove each of the elements of the offense beyond a reasonable doubt.

First, the case would need to come to the attention of the State in some manner. When a victim is unable to be a witness for themselves, as is often the case in these situations, there are two main ways in which the case would be investigated by law enforcement 1.) there is a witness to the offense or evidence of the offense; or 2.) a medical professional notices physical evidence of sexual activity.

If a case were forwarded for prosecution, the prosecutor would have to evaluate that case to determine if 1.) evidence exists to prove beyond a reasonable doubt that a sex act occurred; 2.) evidence exists to prove beyond a reasonable doubt that the victim was mentally incapable at the time that the sex act occurred; 3.) evidence exists to prove beyond a reasonable doubt that the offender *knew* that the victim was mentally incapable at the time of the sex act. In situations where the victim is lucid at times and not at others, it would be very difficult to prove that the victim was mentally incapable at a particular moment in the past. Testimony from doctors and

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[9] AS 11.41.470(2).

[10] See https://alzheimer.ca/en/Home/About-dementia/Alzheimer-s-disease/Stages-of-Alzheimer-s-disease

any witnesses to the act may assist in proving that however, the State would also have to prove that the victim's spouse knew that the victim was mentally incapable. If the victim's spouse believed that they were lucid and giving meaningful consent, due to the fluidity of the victim's mental situation, it would be next to impossible for the State to show that the belief of the victim's spouse is unreasonable. It is in this way that the law is designed to protect both the victim's autonomy over his/her body and the victim's spouse from being convicted of a crime due to a mistake.

We understand and respect the intimacy that comes with marriage, but the law, even with the marriage defense repealed, does not criminalize consensual sex acts. While the hypotheticals that have been circulated center around the spouse that perhaps mistakenly believes that the victim consented, another troubling scenario to consider, and one that the current law allows, is the sexual assault of a mentally incapable person by a spouse who knows the victim cannot and is not consenting.

Sincerely,

John Skidmore
Director, Criminal Division,
Alaska Department of Law