
HB
229

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-10-88	1:30p.m.	
H. JUD.	5-5-87	1:30p.m.	
H. JUD.	10-23-87	1:00pm.	KETCH. CITY COUNCIL CHAMBERS
H. JUD.	2-16-88	1:30p.m.	

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/30/87 FURTHER REFERRALS: Finance

DATE: March 10, 1988

The Judiciary Committee has considered HB 229

"An Act relating to homicide by abuse."

RECOMMENDS:

[✓] replace with CS HB 229 (Jud) [ ] the same title

[ ] attached amendment(s) [✓] a new title

- [✓] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published _____
- [ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Change Title to: "An Act defining murder in the first degree to include homicide by a pattern or practice of assault or torture of a child under the age of 16.

Sec. 11.41.100. is amended to read:

Murder in the first degree. (a) A person commits the crime of murder in the first degree if,

(1) with intent to cause the death of another person, the person

(i) causes the death of any person; or

(ii) compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of torture or assault of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in A.S. 12.55.

Effective date?

5-0977B
Chenoweth
3/4/88

Original sponsors: Hudson, Ulmer,
Larson, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 229 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the definition of murder in the first degree to include homicide by a pattern or practice of torture or assault of a child under the age of 16."

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

* Section 1. AS 11.41.100(a) is amended to read:

(a) A person commits the crime of murder in the first degree if [(1)] with intent to cause the death of another person, the person

[(A)] [(1)] causes the death of any person; or

[(B)] [(2)] compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of torture or assault of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life.

5-0977B

Original sponsors: Hudson, Ulmer,
Larson, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 229 (Judiciary)

IN THE LECISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the definition of murder in the first degree to include homicide by a pattern or practice of assault or torture of a child under the age of 16."

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

* Section 1. AS 11.41.100(a) is amended to read:

(a) A person commits the crime of murder in the first degree if

(1) [,] with intent to cause the death of another person, the person

(A) [(1)] causes the death of any person; or

(B) [(2)] compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of assault or torture of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child in at least two separate instances.

* Sec. 2. AS 11.41.115(a) is amended to read:

(a) In a prosecution under AS 11.41.100(a)(1)(A) [AS 11.41.-100(a)(1)] or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from

a serious provocation by the intended victim.

5-0977B
Chenoweth
3/10/88

Original sponsors: Hudson, Ulmer,
Larson, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 229 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the definition of murder in the first degree to include homicide by a pattern or practice of torture of a child under the age of 16."

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

* Section 1. AS 11.41.100(a) is amended to read:

(a) A person commits the crime of murder in the first degree if

(1) [,] with intent to cause the death of another person, the person

(A) [(1)] causes the death of any person; or

(B) [(2)] compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of torture of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life; for purposes of this paragraph, a person "engages in a pattern or practice of torture" if the person inflicts serious physical injury to the child in at least two separate instances.

* Sec. 2. AS 11.41.115(a) is amended to read:

(a) In a prosecution under AS 11.41.100(a)(1)(A) [AS 11.41.-100(a)(1)] or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

5-0977B
Chenoweth
3/4/88

Original sponsors: Hudson, Ulmer,
Larson, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 229 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the definition of murder in the first degree to include homicide by a pattern or practice of torture or assault of a child under the age of 16."

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

* Section 1. AS 11.41.100(a) is amended to read:

(a) A person commits the crime of murder in the first degree if

(1) [,] with intent to cause the death of another person, the person

(A) [(1)] causes the death of any person; or

(B) [(2)] compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of torture or assault of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life.

Introduced: 3/30/87
Referred: Judiciary and Finance

5-0977A

IN THE HOUSE

BY HUDSON, ULMER, LARSON, MENARD, HOFFMAN AND GOLL

HOUSE BILL NO. 229

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to homicide by abuse."

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

* Section 1. AS 11.41 is amended by adding a new section to read:

Sec. 11.41.105. HOMICIDE BY ABUSE. (a) A person commits the crime of homicide by abuse if, under circumstances manifesting an extreme indifference to the life of a child under 16 years of age, the person engages in a pattern or practice of assault or torture of the child that results in the death of the child.

(b) Homicide by abuse is an unclassified felony and is punishable as provided in AS 12.55.

* Sec. 2. AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree or homicide by abuse shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: H.B. 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to homicide by abuse."
Sponsor: Rep Hudson, Ulmer, Larson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This legislation should have minimal impact on the Department of Corrections.

Prepared by: Susan E. Knighton, Director SK — Phone: 465-3376
Division: Administrative Services — Date: March 14, 1988

Approved by Commissioner: Susan Humphrey-Barnett — Date: March 14, 1988
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to homicide by abuse
Sponsor: Hudson, Ulmer, et. al.
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

KEB JMR 1/25/88

Prepared by: Barbara Miklos, Executive Director Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault Date: 1/20/88
Approved by Commissioner: Doug A. Scott, Dep. Comm Date: 1-28-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : HB 229
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title : "An Act relating to homicide by abuse."
Sponsor : Representative Hudson
Requestor : House Judiciary

Agency Affected : Department of Law
BRU : Prosecution
Components : ALL

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services
Date : January 19, 1988

Grace Berg Schaible
Approved by Commissioner : Attorney General
Date : January 19, 1988
Agency : Department of Law

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 229

This bill would allow prosecution for homicide by abuse where a person engages in a patte.n of assault of torture of a child under the age of 16 that results in the death of the child. Many of the cases which would be homicide by abuse under this new law are now being prosecuted as manslaughter or as criminally negligent homicide. Because the majority of these cases are already being prosecuted (although at a lower level), this bill will not have a significant fiscal impact on the department.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: 3/30/87

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to homicide by abuse."
Sponsor: Hudson, Ulmer, Larson, et al
Requestor: Judiciary, Finance

Agency Affected: Administration
BRU: Office of Public Advocacy
Components: _____

EXPENDITURES/REVENUES: (Th ands of Dollars)

OPERATING	FY 88	[illegible]	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 1/20/88

Approved by Commissioner: John Andrews
Date: 1/27/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 229
REQUEST: Publish Date:

Revision Date: 1-6-88 Agency Affected: Alaska Court System
Title: An act relating to homocide by abuse BRU: Trial Courts
Sponsor: Hudson, Ulmer, Larson, ... Components:
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 1-6-88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 1-6-88
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

POSITION PAPER

HB 229

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: __X__ None See attached fiscal note _____

Program impact: _____ None See analysis below __X__

Constitutional impact: _____ None See analysis below __X__

This bill creates a new crime of homicide by abuse. The apparent motivation for the bill is to increase the ease of conviction and the penalties for people who kill children. It is certainly hard not to sympathize with these purposes. However, a closer look at the bill and at the existing criminal law strongly suggests that the bill is not necessary and that sound policy dictates against making fundamental changes in the existing coherent criminal code.

a. The bill represents a major break with the principles underlying the comprehensive revised criminal code and presumptive sentencing scheme.

The existing criminal code defines four classes of criminal homicide. The distinctions among the classes rest primarily on the different culpable mental states. AS 11.41.100-.130, 11.81.900(a)(1)-(4). Thus, for example, first degree murder is defined as intentional homicide. AS 11.41.100(a). Second degree murder covers conduct which was not an intentional killing but was knowing or extremely reckless. AS 11.41.110(a). The bill creates a new crime which has elements comparable to existing second degree murder, because proof of an intentional killing is not required. However, the penalty provisions are equivalent to first degree murder.

The existing criminal code was the product of exhaustive study by professionals in the field of criminal justice and by the legislature. The purposes of the wholesale revision of the criminal code and sentencing statutes were to establish a coherent code which would distinguish among offenses according to their severity and to establish a penalty scheme which would eliminate unjustified disparity in sentencing. See AS 11.81.100, 12.55.005. The coherence of the code and the uniformity of the sentencing scheme are undermined each time a new crime is defined which does not fit within the existing framework.

b. Creating a new crime with an element of "pattern or practice" of abuse is not necessary to successful prosecution in child homicide cases.

The existing law allows prosecutors to charge and to convict defendants of murder when a death results from a pattern of abuse or torture which demonstrates manifest indifference to the value of the life of a child. AS 11.41.110(a)(2). Ordinarily, the history of abuse will be admissible. E.g., Rhodes v. State, 717 P.2d 422, 424-25 (Alaska App. 1986); Garner v. State, 711 P.2d 1191, 1192-93 (Alaska App. 1986); Jolley v. State, 655 P.2d 784, 785 (Alaska App. 1982). The only reported case where an Alaskan appellate court has held that a prior incident of abuse should have been excluded was Harvey v. State, 604 P.2d 586, 589 (Alaska App. 1979). At trial, Harvey conceded that he had severely spanked the victim, and the only point in dispute was whether or not the spanking, and not another assault by another person, caused the child's death. The state was allowed by the trial judge to present evidence that the defendant had once abused another child. The Supreme Court found that this incident of abuse on a different child was logically irrelevant to the issues disputed at trial. In more recent cases, where the issues at trial were the identity of the assailant or whether the assailant acted with manifest indifference to the value of the child's life, the appellate courts have approved admission of evidence of prior acts of abuse. Garner v. State, 711 P.2d at 1193; Rhodes v. State, 717 P.2d at 425. The holding in Rhodes approved admission of such evidence even where a different child was involved in the earlier incident.

c. Creating a new crime will not necessarily affect charging policies by prosecutors.

Substantial public outcry has been raised over one recent case, where a prosecutor elected to resolve a child homicide case by accepting a plea to negligent homicide. The prosecutor's decision may have reflected poor judgment, or it may have been influenced by a possibly erroneous evidentiary ruling by the trial judge. In either event, creating a new crime cannot compel prosecutors to charge the higher crime. The exercise of charging discretion by a prosecutor's office cannot be dictated by either the legislature or the courts. Norbert v. State, 718 P.2d 160 (Alaska App. 1986). Further, it is by no means clear that prosecutors consistently undercharge in child abuse cases. In two reported cases (Orrison v. State, 655 P.2d 782 (Alaska App. 1982) and Harvey v. State, 604 P.2d at 588), where there were no problems for the prosecutors with excluded evidence, the juries convicted the defendant of a less serious crime than what the prosecutor had charged.

d. The law should not distinguish among human lives on the basis of age.

By creating a special penalty scheme for non-intentional killings of one age group, the law seems to say that that group is valued more highly by our community than other age groups. It is doubtful

anyone could justify such a value judgment, which is why the present criminal code does not distinguish among assaultive crimes on the basis of the age of the victim.

The existing first and second degree murder statutes permit conviction and appropriately harsh punishments for defendants who kill through repeated assault or torture. Where the facts of a particular second degree murder case support a 99-year sentence, such a sentence is authorized, and the appellate courts have approved maximum sentences for second degree murder cases. E.g., Abruska v. State, 705 P.2d 1261, 1273-74 (Alaska App. 1985); Salud v. State, 630 P.2d 1008 (Alaska App. 1981)(99-year sentence reimposed and affirmed in unpublished opinion following remand); Nicholai v. State, MO&J No. 1336 (Alaska App. Feb. 27, 1987). The changes proposed by this bill are thus unnecessary to accomplish the objectives of the bill.

Based on the information above, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill.

Dana Fabe, Director
Public Defender Agency

4/30/87
Date

Brant McGee, Director
Office of Public Advocacy

4/30/87
Date

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 229
Publish Date :

REQUEST:

Revision Date:
Title : "An Act relating to homicide by abuse."
Sponsor : Hudson
Requestor : House Judiciary

Agency Affected : Department of Administratic
BRU : Public Defender Agency

Components : Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

AB (for)

Prepared by : Dana Fabe, Public Defender
Division : Public Defender Agency
Phone : 279-7541
Date : 4/30/87

Approved by Commissioner : Garrey Peska
Agency : Department of Administration
Date : 5/1/87

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : HB 229
Publish Date : 3/30/87

REQUEST:

Revision Date: 4/30/87
Title : "An Act relating to homicide by abuse..."
Sponsor : Hudson, Ulmer, Larson
Requestor : House Judiciary

Agency Affected : Administration
BRU : Office of Public Advocacy
Components :

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by : Brant McGee, Public Advocate
Phone : 274-1684
Division : Office of Public Advocacy
Date : 4/30/87

Approved by Commissioner : Garrey Peska
Date : 5/1/87
Agency : Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

P.O. BOX V
Juneau, Alaska
99811
(907)465 3744 or 4991

COMMITTEES:
Transportation
HESS
Telecommunications
Fisheries
International Trade

March 30, 1987

TO: All Members of the Alaska House of Representatives:

FROM: Representative Bill Hudson Bill

Attached is a copy of a bill which I turned in to the Chief Clerk's Office before session on Friday morning, March 27th.

The bill relates to homicide by abuse, and is intended as a strong statement to the issue of the abuse of the children of our state, who are unable to protect themselves from, in many cases, the very person they love the most.

I am not a lawyer. I am a father and a citizen who would seek to make efforts to make sure that people who kill a child, by engaging in a pattern or practice of assault or torture, are dealt with severely.

It is said about the recent case of the person who killed his girlfriend's innocent and helpless baby, and who could, according to current statute, be sentenced to no more than five years, that the rules of criminal evidence and procedure must be scrutinized so as not to let the perpetrators of these heinous crimes plead to lessor offenses. As I have said, I am not a lawyer. I am a parent. Many of my constituents are parents. I agree with the many constituents who have called my office, sent public opinion messages and who have come to see me regarding this important issue. In every instance, my constituents have suggested that stronger penalties be adopted for the senseless and shameful crime of child abuse which leads to the child's death.

It is my understanding that my colleague from Juneau is having prepared legislation which would seek to change the rules of criminal procedure as they relate to how these cases are handled in the judicial system. I look forward to cosponsoring that type legislation, and I applaud the concept. Meanwhile, I hope each of you will take a careful look at the legislation I have placed in your mail box this morning, and I would deeply appreciate unanimous cosponsorship from all members of this House of Representatives.

It is time we place a severe penalty on those who commit homicide by engaging in a pattern or practice of assault or torture of innocent and helpless children. A five year sentence which can be reduced for good time is far too liberal for me and I hope you'll agree we must make the penalty more severe. I truly believe my bill will deter those who abuse their children and will help to save lives.

BH:lkh

SUBSTITUTE SENATE BILL NO. 5089

State of Washington 50th Legislature 1987 Regular Session

by Committee on Judiciary (originally sponsored by Senators Halsan, Vognild, Talmadge, Bailey, Stratton, Newhouse, Benitz, Kreidler, Bauer, Johnson, Gaspard and Moore)

Read first time 1/21/87.

AN ACT Relating to homicide by abuse; amending RCW 9A.32.010, 9.94A.030, and 9.94A.320; adding a new section to chapter 9A.32 RCW; and prescribing penalties.

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

NEW SECTION. Sec. 1. A new section is added to chapter 9A.32 RCW to read as follows:

(1) A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern or practice of assault or torture of said child, person under sixteen years of age, developmentally disabled person, or dependent person.

(2) As used in this section, "dependent adult" means a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life.

(3) Homicide by abuse is a class A felony.

Sec. 2. Section 9A.32.010, chapter 260, Laws of 1975 1st ex. sess. as amended by section 1, chapter 10, Laws of 1983 and RCW 9A.32.010 are each amended to read as follows:

Homicide is the killing of a human being by the act, procurement or omission of another, death occurring within three years and a day, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (((3))) (4) excusable homicide, or (((4))) (5) justifiable homicide.

Sec. 3. Section 3, chapter 137, Laws of 1981 as last amended by section 17, chapter 257, Laws of 1986 and RCW 9.94A.030 are each amended to read as follows:

Sec. 3

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Commission" means the sentencing guidelines commission.

(2) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(3) "Community service" means compulsory service, without compensation, performed for the benefit of the community by the offender. For purposes of the interstate compact for out of state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

(4) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed pursuant to this chapter by a court. For first-time offenders, the supervision may include crime-related prohibitions and other conditions imposed pursuant to RCW 9.94A.120(5).

(5) "Confinement" means total or partial confinement as defined in this section.

(6) "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

(7) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.

(8) (a) "Criminal history" means the list of a defendant's prior convictions, whether in this state, in federal court, or elsewhere. The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) "Criminal history" includes a defendant's prior convictions in juvenile court if: (i) The conviction was for an offense which is a felony and is criminal history as defined in RCW 13.40.020(6)(a); (ii) the defendant was fifteen years of age or older at the time the offense was committed; and (iii) with respect to prior juvenile class B and C felonies, the defendant was less than twenty-three years of age at the time the offense for which he or she is being sentenced was committed.

(9) "Department" means the department of corrections.

(10) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community service work, or dollars or terms of a fine or restitution. The fact that an offender through "earned early release" can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

(11) "Drug offense" means any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.401(d)) or forged prescription for a controlled substance (RCW 69.50.403).

(12) "Escape" means escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), wilful failure to return from furlough (RCW 72.66.060), or wilful failure to return from work release (RCW 72.65.070).

(13) "Felony traffic offense" means vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), or felony hit-and-run injury-accident (RCW 46.52.020(4)).

(14) "Fines" means the requirement that the offender pay a specific sum of money over a specific period of time to the court.

(15)(a) "First-time offender" means any person who is convicted of a felony not classified as a violent offense or a sex offense under this chapter, and except as provided in (b) of this subsection, who previously has never been convicted of a felony in this state, federal court, or another state, and who has never participated in a program of deferred prosecution for a felony offense.

(b) For purposes of (a) of this subsection, a juvenile

adjudication for an offense committed before the age of fifteen years is not a previous felony conviction.

(16) "Nonviolent offense" means an offense which is not a violent offense.

(17) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

(18) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any the state or any other unit of government, for a substantial portion of each day with the balance of the day spent in the community.

(19) "Restitution" means the requirement that the offender pay a specific sum of money over a specific period of time to the court as payment of damages. The sum may include both public and private costs. The imposition of a restitution order does not preclude civil redress.

(20) "Serious traffic offense" means driving while intoxicated (RCW 46.61.502), actual physical control while intoxicated (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)).

(21) "Serious violent offense" is a subcategory of violent offense and means murder in the first degree, homicide by abuse, murder in the second degree, assault in the first degree, kidnapping in the first degree, or rape in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies.

(22) "Sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

(23) "Sex offense" means a felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes.

(24) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

(25) "Victim" means any person who has sustained physical or financial injury to person or property as a direct result of the crime charged.

(26) "Violent offense" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, robbery in the second degree, vehicular homicide, and vehicular assault;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in subsection (26)(a) of this section; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under subsection (26) (a) or (b) of this section.

Sec. 4. Section 3, chapter 115, Laws of 1983 as last amended by section 23, chapter 257, Laws of 1986 and RCW 9.94A.320 are each amended to read as follows:

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XIV	Aggravated Murder 1 (RCW 10.95.020)
XIII	Murder 1 (RCW 9A.32.030) Homicide by abuse (section 1 of this 1987 act)
XII	Murder 2 (RCW 9A.32.050)
XI	Assault 1 (RCW ((9A.36.010)) 9A.36.011)
X	Kidnapping 1 (RCW 9A.40.020) Rape 1 (RCW 9A.44.040) Damaging building, etc., by explosion with threat to human being (RCW 70.74.280(1))

		Over 18 and deliver heroin or narcotic from Schedule I or II to someone under 18 and 3 years junior (RCW 69.50.406)
		Leading Organized Crime (RCW 9A.82.060(1)(a))
	IX	Robbery 1 (RCW 9A.56.200)
		Manslaughter 1 (RCW 9A.32.060)
		Statutory Rape 1 (RCW 9A.44.070)
		Explosive devices prohibited (RCW 70.74.180)
		Endangering life and property by explosives with threat to human being (RCW 70.74.270)
		Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic from Schedule I-V to someone under 18 and 3 years junior (RCW 69.50.406)
		Sexual Exploitation, Under 16 (RCW 9.68A.040(2)(a))
		Inciting Criminal Profiteering (RCW ~~((9A.82.060(1)(b))~~ ~~[RCW 9A.82.060(1)(b)]~~)) 9A.82.060(1)(b))
	VIII	Arson 1 (RCW 9A.48.020)
		Rape 2 (RCW 9A.44.050)
		Promoting Prostitution 1 (RCW 9A.88.070)
		Selling heroin for profit (RCW 69.50.410)
	VII	Burglary 1 (RCW 9A.52.020)
		Vehicular Homicide (RCW 46.61.520)
		Introducing Contraband 1 (RCW 9A.76.140)
		Statutory Rape 2 (RCW 9A.44.080)
		Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))
		Sexual Exploitation, Under 18 (RCW 9.68A.040(2)(b))
		Dealing in depictions of minor engaged in sexually explicit conduct (RCW 9.68A.050)
		Sending, bringing into state depictions of minor engaged in sexually explicit conduct (RCW 9.68A.060)
	VI	Bribery (RCW 9A.68.010)
		Manslaughter 2 (RCW 9A.32.070)
		Intimidating a Juror/Witness (RCW 9A.72.110, 9A.72.130)
		Damaging building, etc., by explosion with no threat to human being (RCW 70.74.280(2))
		Endangering life and property by explosives with no threat to human being (RCW 70.74.270)
		Indecent Liberties (without forcible compulsion) (RCW 9A.44.100(1) (b) ((and)), (c), and (d))
		Incest 1 (RCW 9A.64.020(1))
		Selling for profit (controlled or counterfeit) any controlled substance (except heroin) (RCW 69.50.410)
		Manufacture, deliver, or possess with intent to deliver heroin or narcotics from Schedule I or II (RCW 69.50.401(a)(1)(i))
		Intimidating a Judge (RCW 9A.72.160)
	V	Rape 3 (RCW 9A.44.060)
		Kidnapping 2 (RCW 9A.40.030)
		Extortion 1 (RCW 9A.56.120)
		Incest 2 (RCW 9A.64.020(2))
		Perjury 1 (RCW 9A.72.020)
		Extortionate Extension of Credit (RCW 9A.82.020)
		Advancing money or property for extortionate extension of credit (RCW 9A.82.030)
		Extortionate Means to Collect Extensions of Credit (RCW 9A.82.040)
		Rendering Criminal Assistance 1 (RCW 9A.76.070)
	IV	Robbery 2 (RCW 9A.56.210)
		Assault 2 (RCW ~~((9A.36.020))~~ (9A.36.021)
		Escape 1 (RCW 9A.76.110)
		Arson 2 (RCW 9A.48.030)
		Bribing a Witness/Bribe Received by Witness (RCW 9A.72.090, 9A.72.100)
		Malicious Harassment (RCW 9A.36.080)
		Wilful Failure to Return from Furlough (RCW 72.66.060)
		Hit and Run -- Injury Accident (RCW 46.52.020(4))

		Vehicular Assault (RCW 46.61.522)
		Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I-V (except marijuana) (RCW 69.50.401(a)(1)(ii) through (iv))
		Influencing Outcome of Sporting Event (RCW 9A.82.070)
		Use of Proceeds of Criminal Profiteering (RCW 9A.82.080 (1) and (2))
		Knowingly Trafficking in Stolen Property (RCW 9A.82.050(2))
	III	Statutory Rape 3 (RCW 9A.44.090)
		Extortion 2 (RCW 9A.56.130)
		Unlawful Imprisonment (RCW 9A.40.040)
		Assault 3 (RCW ((9A.36.030)) 9A.36.031)
		Unlawful possession of firearm or pistol by felon (RCW 9.41.040)
		Harassment (RCW 9A.46.020)
		Promoting Prostitution 2 (RCW 9A.88.080)
		Wilful Failure to Return from Work Release (RCW 72.65.070)
		Introducing Contraband 2 (RCW 9A.76.150)
		Communication with a Minor for Immoral Purposes (RCW 9.68A.090)
		Patronizing a Juvenile Prostitute (RCW 9.68A.100)
		Escape 2 (RCW 9A.76.120)
		Perjury 2 (RCW 9A.72.030)
		Intimidating a Public Servant (RCW 9A.76.180)
		Tampering with a Witness (RCW 9A.72.120)
		Manufacture, deliver, or possess with intent to deliver marijuana (RCW 69.50.401(a)(1)(ii))
		Recklessly Trafficking in Stolen Property (RCW 9A.82.050(1))
		Theft of livestock 1 (RCW 9A.56.080)
	II	Malicious Mischief 1 (RCW 9A.48.070)
		Possession of Stolen Property 1 (RCW 9A.56.150)
		Theft 1 (RCW 9A.56.030)
		Theft of Livestock 2 (RCW 9A.56.080)
		Burglary 2 (RCW 9A.52.030)
		Possession of controlled substance that is either heroin or narcotics from Schedule I or II (RCW 69.50.401(d))
		Create, deliver, or possess a counterfeit controlled substance (RCW 69.50.401(b))
		Computer Trespass 1 (RCW 9A.52.110)
	I	Theft 2 (RCW 9A.56.040)
		Possession of Stolen Property 2 (RCW 9A.56.160)
		Forgery (RCW 9A.60.020)
		Taking Motor Vehicle Without Permission (RCW 9A.56.070)
		Vehicle Prowl 1 (RCW 9A.52.095)
		Attempting to Elude a Pursuing Police Vehicle (RCW 46.61.024)
		Malicious Mischief 2 (RCW 9A.48.080)
		Reckless Burning 1 (RCW 9A.48.040)
		Unlawful Issuance of Checks or Drafts (RCW 9A.56.060)
		False Verification for Welfare (RCW 74.08.055)
		Forged Prescription (RCW 69.41.020)
		Forged Prescription for a Controlled Substance (RCW 69.50.403)
		Possess Controlled Substance that is a Narcotic from Schedule II, IV, or V or Non-narcotic from Schedule I-V (RCW 69.50.401(d))

SENATE P'LL REPORT

SSB 5089

BY Senate Committee on Judiciary (originally sponsored by Senators Halsan, Vognild, Talmadge, Bailey, Stratton, Newhouse, Benitz, Kreidler, Bauer, Johnson, Gaspard and Moore)

Prescribing penalties for homicide by abuse.

Senate Committee on Judiciary

Senate Hearing Date(s): January 16, 1987; January 19, 1987

Majority Report: That Substitute Senate Bill No. 5089 be substituted therefor, and the substitute bill do pass.
Signed by Senators Talmadge, Chairman; Halsan, Vice Chairman; McCaslin, Nelson.

Senate Staff: Carolyn Mayer (786-7465)
January 29, 1987

AS PASSED SENATE, JANUARY 28, 1987

BACKGROUND:

It has been reported that it is very difficult to obtain a conviction for murder in child abuse cases because such a conviction requires a showing that the adult involved intended to kill the child. Because of this, even in cases involving serious child abuse which results in the death of a child, prosecutors often charge only manslaughter.

SUMMARY:

A person is guilty of murder in the first degree when, under circumstances manifesting an extreme indifference to the life of a child or person under 16, the person engages in a pattern or practice of assault or torture of such child and thereby causes the death of the child.

A new crime of homicide by abuse is created. A person is guilty of this crime if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a person under 16, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern of assault or torture of said child or disabled or dependent person.

Dependent adult means a person who, because of physical or mental disability, or because of advanced age, is dependent upon another person to provide the basic necessities of life.

Homicide by abuse is classified the same as murder in the first degree for purposes of sentencing under the Sentencing Reform Act.

Fiscal Note: none requested

Senate Committee - Testified: Monica Benton, WAPA; Margie Kranz

Stanley NEITZEL, Appellant,

v.

STATE of Alaska, Appellee.

No. 6243.

Court of Appeals of Alaska.

Nov. 19, 1982.

Defendant was convicted in the Superior Court, Third Judicial District, Seaborn J. Buckalew, Jr., J., of second-degree murder, and he appealed. The Court of Appeals, Singleton, J., held that: (1) intoxication was not a defense to second-degree murder; (2) insofar as second-degree murder statute precluded consideration of intoxication in determining recklessness, it was not so irrational as to violate due process; (3) reckless murder was sufficiently distinguished from reckless manslaughter to satisfy equal protection; and (4) any error arising from trial court's failure to instruct on diminished capacity was harmless beyond a reasonable doubt.

Affirmed.

1. Homicide ⇐9, 28

Word "intentionally," as used in statute providing that to be guilty of second-degree murder defendant must intentionally perform an act, does not mean intent to cause a result; rather, it means knowingly; therefore, intoxication is not a defense to second-degree murder. AS 11.41.110(a)(2), 11.81.900(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Homicide ⇐23(1)

Second-degree murder statute requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the point that it manifests an extreme indifference to the value of human life. AS 11.41.110(a)(2).

3. Homicide ⇐23(1)

To be guilty of second-degree murder, defendant had to know he was firing a gun and being reckless regarding the circumstances, i.e., the location of the victim, her vulnerability, the direction in which he was shooting, and the result, i.e., her death. AS 11.41.110(a)(2).

4. Homicide ⇐74

Recklessness regarding the consequences is the required culpable mental state for reckless murder. AS 11.41.110(a)(2).

5. Constitutional Law ⇐258(3)
Homicide ⇐8

Insofar as second-degree murder statute precludes consideration of intoxication in determining recklessness, it is not so irrational as to violate due process. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law ⇐250.1(2)

Reckless murder is sufficiently distinguished from reckless manslaughter to satisfy equal protection. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐1173.2(3)

In prosecution in which defendant was convicted of second-degree murder, any error arising from trial court's failure to instruct on diminished capacity was harmless beyond reasonable doubt. AS 11.41.110(a)(2).

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

William H. Hawley, and Elizabeth Sheley, Asst. Attys. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Stanley Neitzel shot his girlfriend, Irene Reedy, in the head causing her death. The

undisputed evidence establishes that Neitzel fired a number of shots directly at Reedy while she sat on the ground. Many of these earlier bullets struck the ground within an inch of Ms.. Reedy before the fatal shot entered her head. Eyewitnesses were unsure of whether Neitzel fired at Reedy to discipline her for drinking vodka which belonged to him, to frighten her, to demonstrate his marksmanship by seeing how close he could come without hitting her, or to just have fun with his rifle. Neitzel denied any recollection of the incident. Two hours after the shooting his blood alcohol level was .15%. The state offered expert testimony suggesting that Neitzel's blood alcohol level could have been as high as .18% at the time of the crime. Neitzel was convicted of second degree murder in violation of AS 11.41.110(a)(2), which provides in relevant part:

> *Murder in the Second Degree.* (a) A person commits the crime of murder in the second degree if
>
> ....
>
> (2) he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ....

The trial court held that this statute did not require a specific intent and consequently Neitzel's intoxication at the time of Reedy's death was not a defense. Neitzel raises a number of objections in his appeal, but it is clear that these objections simply restate the propositions that he could only be convicted if (1) he intended to shoot *at Reedy*, and (2) he was reckless in evaluating the circumstances, *i.e.*, knew that shooting at Reedy endangered her life. According to the first prong of Neitzel's argument, he was entitled to an instruction that required the jury to consider his intoxication in determining whether he intended to shoot at Reedy. The trial court instructed the jury that intoxication was not a defense. According to the second prong of his argument, he was entitled to an instruction telling the jury that he personally must have known of the danger to Reedy before he could be convicted. In other words, a jury determination that the reasonably prudent person similarly situated would have been aware of the risk to Reedy was insufficient for conviction. We reject the first prong of Neitzel's argument but accept in part the second prong. We determine, nevertheless, that any error was harmless beyond reasonable doubt and therefore affirm the decision of the trial court.

To be guilty of second degree murder, the defendant must *inter alia* "intentionally" perform an act, such as intentionally shooting a gun. AS 11.81.900 provides in relevant part:

> (a) for purposes of this title, unless the context requires otherwise,
>
> (1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when his conscious objective is to cause that result ....

[1] After carefully reviewing the code and considering the history of its enactment, we are convinced that the word "intentionally" in AS 11.41.110(a)(2) was not used "with respect to a result" and therefore was not governed by AS 11.81.-900(a)(1). We conclude it should be given the meaning assigned to "knowingly" in the code definitions. "Knowingly" is defined as follows:

> [A] person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist; a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance
>
> ....

AS 11.81.900(a)(2).

In order to understand the legislature's intentions in enacting AS 11.41.110(a)(2), it

is necessary to briefly trace the evolution of what can best be described as reckless murder through the common law, the Model Penal Code, upon which our current statutes are modeled, the tentative draft prepared by the Alaska Code Revision Commission, Subcommission on Criminal Law (hereafter referred to as the Tentative Draft), and the Alaska Revised Criminal Code ultimately enacted by the legislature (hereafter referred to as the Revised Code). When such a study is completed, we believe the legislature's intent is clear.

At common law, murder was homicide committed with "malice aforethought." R. Perkins, *Criminal Law* § 1, at 34 (2d ed. 1969). "Aforethought" suggests planning but this term fell into disuse leaving "malice" the significant term differentiating murder from other forms of culpable homicide. *Id.* at 34–35. Malice was primarily defined to mean an intent to kill in the absence of (1) justification, (2) excuse, or (3) mitigation. *Id.* at 35.

This definition was subject to an exception which is central to the issue before us. Common law courts permitted a jury to find malice in the absence of a specific intent to kill where "in the absence of any circumstance of exculpation or mitigation an act [was] done with such heedless disregard of a harmful result, foreseen as a likely possibility, that it differs little in the scale of moral blameworthiness from an actual intent to cause such harm." *Id.* at 768. To distinguish such a crime from intentional murder, it is useful to call it "reckless murder," and to distinguish its *mens rea* from an intent to kill by calling it "constructive malice."

Typical examples of this kind of murder are: shooting, regardless of the consequences, into a home, room, train, or automobile in which others are known to be or might be. *Id.* at 36. Perkins calls the mental state accompanying such an act "a man-endangering-state-of-mind." *Id.* at 759.

The Tentative Draft prepared by the Subcommission on Criminal Law was based on a number of recent state codifications of criminal law. These codes in turn were substantially derived from the New York Revised Penal Code of 1965 which was based on the Model Penal Code.

A number of common law concepts underwent substantial modification in the American Law Institute's Model Penal Code (proposed official draft) which was published in 1962 (hereafter referred to as Model Penal Code). The Model Penal Code in turn underwent modification in the enactment of the New York Penal Code of 1965, at the hands of the Subcommission on Criminal Law which published its Tentative Draft in 1977, in the Revised Code enacted in 1978, and in the additional amendments added to our code in 1980. Nevertheless, the Model Penal Code is the foundation upon which our code rests and a researcher interested in discovering the meaning of a given Alaskan criminal statute must begin with the Model Penal Code and its comments and follow the evolution of the statute in question through the New York Penal Code of 1965 and the Alaska Tentative Draft to its place in the Revised Code. Having completed such a study, we are satisfied that the legislature intended to retain "reckless murder" essentially as it existed at common law. As always with statutory construction, what the legislature altered, modified, or eliminated from the Model Penal Code is often as important as what was retained. But, in evaluating modifications and comparing corresponding sections, it is wise to remember that the arrangement of sections and subsections sometimes differs between the Model Penal Code and its successors even though the substance remains the same. It is therefore necessary to review the code as a whole to make certain that what appears to be a substantial change in the Revised Code is not merely a minor variation in phrasing.

In this case we must review three Model Penal Code concepts: (1) culpable mental states; (2) the Model Penal Code definition of reckless murder (particularly the differences between reckless murder, as conceived by the drafters of the Model Penal Code, and manslaughter); and (3) finally, the treatment of intoxication as a defense

in the Model Penal Code, the Tentative Draft, and our Revised Code. Such a review will clarify the legislature's intent in defining reckless murder and the part intoxication plays in defending against a charge of reckless murder.

CULPABLE MENTAL STATES

The Model Penal Code provides that with the exception of violations and other strict liability offenses, with which we are not here concerned, a person is not guilty of an offense unless "he acted purposefully, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02. This requirement is also found in the Tentative Draft, proposed AS 11.11.100 and .110, and in the Revised Code, AS 11.81.600 and .610.[1]

The Model Penal Code, the Tentative Draft, and the Revised Code segregate ma-

1. AS 11.81.600 and .610 as originally enacted provided:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that

(1) no culpable mental state must be proved with respect to any element of an offense if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability";

(2) no culpable mental state must be proved with respect to a particular element of the offense if an intent to dispense with the culpable mental state requirement for that element clearly appears.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) When only one culpable mental state appears in a provision of law defining an offense, it is rebuttably presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

(b) Except as provided in § 600(b) of this chapter, if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally. These sections were amended in 1980 to provide:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state, except that no culpable mental state must be proved

(1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) Repealed by § 44 ch 102 SLA 1980.

(b) Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

In explaining the amendments to AS 11.81.600, the responsible legislative committee stated:

terial elements of offenses into three categories: (1) the nature of the conduct; (2) the circumstances surrounding the conduct; and (3) the results of the conduct. The Senate Committee Report which accompanied the enactment of the Revised Code describes these terms as follows:

> The Code distinguishes between three elements of offenses to which the culpable mental states apply
>
> . . . .
>
> The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. Knowingly is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly, and criminal negligence are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. Intentionally, recklessly and criminal negligence are the culpable mental states associated with results.

2 Senate Journal Supplement No. 47, at 140 (June 12, 1978). *See* Tentative Draft Part 2, at 14–15 (1977).

The culpable mental states referred to in the Tentative Draft are essentially the same as those mentioned in the Model Penal Code: purposefully, knowingly, recklessly, or negligently. *Compare* Model Penal Code § 2.02 *with* Tentative Draft 11.11.110 (the Tentative Draft substitutes the word "intentionally" for the word "purposefully"). The Tentative Draft defines "intentionally" using almost the same words that the Model Penal Code uses to define "purposefully," except that "purposefully" in the Model Penal Code can relate to the surrounding circumstances while the Tentative Draft restricts "intentionally" to conduct and results. *Compare* Model Penal Code § 2.02(a) *with* Tentative Draft 11.11.140(a)(1), which is substantially identical to New York Penal

> This amendment makes two changes regarding the code's general rules on culpability. The first is to clarify the general rule concerning culpability and to make clear that, with certain specified exceptions, a culpable mental state *must* be proven for every crime. For example, to commit Burglary in the Second Degree the state must establish that the defendant entered or remained unlawfully in a building with intent to commit a crime. The culpable mental state in this case is the intent to commit a crime. If the state establishes a voluntary act by the defendant in entering or remaining in a building, and in addition shows he acted with the intent to commit a crime, the crime of Burglary in the Second Degree has been established.
>
> The second change provides that culpability need not be established if a legislative intent to dispense with the culpability requirement appears. While the decision to eliminate the culpable mental state requirement must comport with constitutional due process guarantees, the courts should be specifically authorized to consider the legislature's intent (and most importantly, the commentary accompanying passage of the code) in determining whether the legislature intended to dispense with the culpability requirement in a particular statute.

2 Senate Journal Supplement No. 44, at 18–19 (May 29, 1980).

The amendment to AS 11.81.610 was explained as follows:

> The second amendment repeals AS 11.81.610(a) which provides that the use of one culpable mental state in a statute rebuttably presumes that the mental state applies to all elements of the crime. This rule is inappropriately broad and ignores the fact that, by definition, particular mental states only apply to particular elements of a crime. For example, "intentionally" only applies to elements of crimes that can be classified as "results" as opposed to "circumstances" or "conduct" to which the culpable mental state "knowingly" applies. Because of the requirement set forth in AS 11.81.600(b) . . . that ordinarily only one culpable mental state is required to be established for each crime, this section is superfluous and misleading.

2 Senate Journal Supplement No. 44, at 28 (May 29, 1980).

These amendments and the state's arguments based upon them will be discussed hereafter.

Code § 15.05(1). "Knowingly" is defined similarly in the Model Penal Code and the Tentative Draft except that the Tentative Draft limits "knowingly" to conduct and circumstances while the Model Penal Code permits "knowingly" to govern a result. *Compare* Model Penal Code § 2.02(2)(b) *with* Tentative Draft 11.11.140(a)(2).

"Recklessly" and "negligently" are defined in essentially the same way in both the Tentative Draft and the Model Penal Code. *Compare* Model Penal Code § 2.02(2)(c) *with* Tentative Draft 11.11.-140(a)(3) and Model Penal Code § 2.02(2)(d) *with* Tentative Draft 11.11.140(4). As we shall see, both the Model Penal Code and the Tentative Draft require knowledge of the risk presented by the actor's conduct before he can be found to have acted "recklessly," but both preclude consideration of "intoxication" in determining whether he had the requisite knowledge. *Accord* New York Penal Code § 15.05(3).

The foregoing provisions were incorporated into the Alaska Revised Code with only minor stylistic changes. The code retains from the Tentative Draft the three-fold division of elements of an offense into conduct, surrounding circumstances, and results. It also retains the four culpable mental states: intentionally, knowingly, recklessly, and criminal negligence. Knowingly, recklessly, and criminal negligence are defined as in the Tentative Draft. *Compare* AS 11.81.900(a)(1), (2), and (3) *with* Tentative Draft 11.11.140(a)(1), (2), and (3). The Revised Code, however, limits the scope of the term "intentionally" to govern only results while the Tentative Draft allows "intentionally" to govern conduct and results and the Model Penal Code uses the synonymous term "purposefully" to govern conduct, circumstances, and results. *Compare* Model Penal Code § 2.02(2)(a) *with* Tentative Draft 11.11.140(a)(1) and AS 11.-81.900(a)(1).

For our present purposes, the primary difference between the Model Penal Code, the Tentative Draft, and the Revised Code (if we reserve for later discussion their respective treatment of intoxication) lies in the progressive narrowing of the scope of the term "intentionally." With this background we can now undertake an analysis of the code's treatment of "intoxication" as a defense.

INTOXICATION

The Model Penal Code contains the following provision regarding intoxication:

> (1) Except as provided in Subsection (4) of this Section [relating to involuntary intoxication], intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

Model Penal Code § 2.08. The Tentative Draft is substantially the same. It provides:

> (a) Voluntary intoxication or drug use does not, as such, constitute a defense to a criminal charge, but in a prosecution for an offense, evidence that the defendant used drugs or was intoxicated may be offered whenever it is relevant to negate an element of the crime that requires a culpable mental state.
>
> (b) When recklessness establishes an element of the offense, if the defendant, due to voluntary intoxication or drug use, is unaware of a risk of which he would have been aware had he not been intoxicated or not using drugs, that unawareness is immaterial.

Tentative Draft 11.11.130. The defense is substantially narrowed in the Revised Code. AS 11.81.630 provides in relevant part:

> Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.

Thus, in the Tentative Draft, as in the Model Penal Code, intoxication is relevant

with regard to any offense that requires knowledge or intent as the culpable mental element. Only where the culpable mental element is recklessness do these codes preclude jury consideration of intoxication. It should be noted that the Model Penal Code commentary makes it clear that the rule barring evidence of intoxication is a rule of substantive law, not of evidence. Thus, the drafters of the Model Penal Code recognized that as a matter of evidence intoxication is relevant wherever a mental state including recklessness is an issue. What the drafters have done is resolve, as a matter of policy, to define offenses to exclude consideration of intoxication. The reasons for this decision will be discussed later in connection with Neitzel's contention that such a determination violates due process of law. It is important to recognize that the Revised Code went beyond the Tentative Draft and the Model Penal Code in excluding evidence of intoxication where an offense required that the offender act "knowingly." Thus, under the Revised Code, evidence of intoxication is only admissible where the offense requires that a person act "intentionally" as defined in AS 11.81.900(a)(1). In conclusion, the Model Penal Code and the Tentative Draft provide that recklessness may be found despite unawareness of a risk where intoxication accounts for the failure to perceive the risk. Model Penal Code § 2.08(2); Tentative Draft 11.11.130(b). This provision is also found in the Revised Code. AS 11.81.900(a)(3). In addition, the Revised Code provides that "a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance." AS 11.81.900(a)(2). This provision which does not occur in either the Model Penal Code or the Tentative Draft reinforces the modification to what is now AS 11.81.630 in establishing a legislative determination that only intent to cause a result can be negated by evidence of intoxication.

RECKLESS MURDER

We may now proceed to review "constructive malice murder" as it progressed from the Model Penal Code through the Tentative Draft to the Revised Code. Since this form of murder is closely related to manslaughter, it is necessary to discuss that crime as well.

The Model Penal Code and the Tentative Draft establish one offense of murder which can be committed purposefully, knowingly, or, under limited circumstances, recklessly. The Tentative Draft differs from the Model Penal Code in substituting the word "intentionally" for "purposefully." *Compare* Model Penal Code § 210.2 *with* Tentative Draft 11.41.110. The Model Penal Code also differs from the Tentative Draft in requiring that felony murder be committed "recklessly" while the Tentative Draft permits an accidental felony murder. *Compare* Model Penal Code § 210.2(b) *with* Tentative Draft 11.41.110(a)(3). The Tentative Draft also follows the common law in making an act motivated by an intent to cause serious physical injury resulting in death sufficient for murder. Tentative Draft 11.41.110(a)(1). The Model Penal Code apparently treats this as a possible example of reckless murder. Model Penal Code § 210.2(b); A.L.I., *Model Penal Code and Commentaries*, Part II § 210.2, at 28–29 (1980).

The Model Penal Code and the Tentative Draft generally define manslaughter in the same way. *Compare* Model Penal Code § 210.3 *with* Tentative Draft 11.41.110(b) and 11.41.120. They include reckless homicide as well as intentional and knowing homicide where mitigated.

The Revised Code departs from both the Model Penal Code and the Tentative Draft in retaining two degrees of murder. Intentional murder (and inducing suicide) is first degree murder, AS 11.41.100, while homicide resulting from an intent to cause serious physical injury or knowledge that the actor's conduct is substantially certain to cause death or serious physical injury is second degree murder, AS 11.41.110(a)(1). Felony murder is carried over from the Tentative Draft into the Revised Code but

reduced to second degree murder. AS 11.41.110(a)(3).

In addition, the Revised Code contains, with some modifications, the reckless murder provision currently under consideration. The Model Penal Code states that, subject to mitigation to manslaughter, "criminal homicide constitutes murder when [*inter alia*] it is committed recklessly under circumstances manifesting extreme indifference to the value of human life ...." Model Penal Code § 210.2(1)(b). The Tentative Draft states that: "A person commits the crime of murder if ... he recklessly causes the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." Tentative Draft 11.41.110.(a)(2). Finally, the Revised Code states: "A person commits the crime of murder in the second degree if ... he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." AS 11.41.110(a)(2).

Neitzel and the state both note the slight variation in language between the Model Penal Code and the Tentative Draft on the one hand and the Revised Code on the other. They infer substantial differences in legislative meaning.

Neitzel argues that the legislature intended to require a specific intent to do the act evidencing a "man-endangering-state-of-mind," such as shooting at Ms. Reedy, and that intoxication is relevant to negate this intent. The state counters that the intent mentioned in the murder statute refers to conduct, not to the result, rendering the statutory definition inapplicable. The state further argues that the legislature, in deleting a reference to recklessness regarding the surrounding circumstances, *i.e.*, the presence of Ms. Reedy and her vulnerability, wished an objective standard similar to negligence rather than a recklessness standard to apply to these circumstances.

The state relies primarily on the 1980 amendments to AS 11.81.600 which eliminate the requirement that a culpable mental state must be proved "with respect to each element of the offense" and the requirement that a legislative intent to dispense with a culpable mental state "clearly appear." The legislative history indicates that the legislature expected that most statutes would only require one mental state and that the courts should consider legislative history in determining the meaning of statutes whether the statutes themselves are clear or not. We note, however, that these amendments came two years after enactment of AS 11.41.110(a)(2) which establishes the elements of reckless murder, and consequently cannot be viewed as establishing the legislature's intent in 1978 when the code was originally adopted. *Wright v. State*, 651 P.2d 846 (Alaska App. 1982).

[2] While the positions of the parties are forcefully argued, we reject both. In so doing, we recognize that among the advantages of adopting a Model Penal Code provision is recourse to the commentary which accompanies it. The commentary is frequently an invaluable aid in statutory construction. Further, where identical statutes are adopted in a number of jurisdictions, judicial decisions in each jurisdiction are available to all, and where a common interpretation is given identical statutes, the public interest in certainty and predictability in the laws is advanced. Where, as here, minor modifications are made in the language of a model act, the parties understandably assume that the legislature intended major modifications in meaning. In the instant case, we find that assumption to be unsound and conclude that the legislature intended AS 11.41.110(a)(2) to have the same meaning as Model Penal Code § 210.2(b). In our view, the difference in terminology, *i.e.*, substituting "intentionally" for "recklessly" resulted from an attempt to consistently apply other changes which the legislature made in the scope of such Model Penal Code terms as "intentionally," "knowingly," and "recklessly." As we interpret it, AS 11.41.110(a)(2) requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the

point that it manifests an extreme indifference to the value of human life. This is what we understand Model Penal Code § 210.2(1)(b) to mean as well.

We believe the Senate comment to this section, which we will discuss momentarily, viewed in the light of other sections of the Revised Code, compels this conclusion. As mentioned before, the Model Penal Code, the Tentative Draft, and the Revised Code divide elements of offenses into three categories: conduct, surrounding circumstances, and results. Applying this structure to AS 11.41.110(a)(2) we find:

1. *Conduct:* performing an act.
2. *Surrounding Circumstances:* under circumstances manifesting an extreme indifference to the value of human life.
3. *Result:* the death of another person.

It is to these elements that we must apply the culpable mental states described in the code. As we do so, we must bear in mind that the legislature, in enacting the Revised Code, departed from the Model Penal Code and the Tentative Draft in narrowing the scope of those culpable mental states. Thus, "intentionally" applies only to results, AS 11.81.900(a)(1), "knowingly" applies only to conduct and circumstances, AS 11.81.900(a)(2), and "recklessly" applies only to results and circumstances, AS 11.81.900(a)(3). *See* 2 Senate Journal Supplement No. 44, at 28 (May 29, 1980). Further, AS 11.81.610(b) provides:

> Except as provided in AS 11.81.600(b) [relating to violations and strict liability offenses], if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to
>
> (1) conduct is "knowingly"; and
>
> (2) a circumstance or a result is "recklessly."

In light of these provisions, the legislative comment to AS 11.41.110(a)(2) becomes clear:

> Subsection (a)(2) describes conduct that is very similar to the "substantially certain" clause in subsection (a)(1). Under this provision, however, the defendant need not necessarily know that his conduct is substantially certain to cause death or serious physical injury. An example of conduct covered by this provision would be shooting through a tent under circumstances where the defendant did not know a person was inside or persuading a person to play "russian [sic] roulette". The defendant is only required to intent to perform the act; there is no requirement that he intend to cause death or that he know that his conduct is substantially certain to cause death.

2 Senate Journal Supplement No. 47, at 10 (June 12, 1978).

[3] The Tentative Draft allowed "intentionally" to govern conduct as well as results. The Revised Code confines "intentionally" to results leaving conduct to be governed by "knowingly." Apparently overlooking this change in the scope of the culpable mental states, the legislature used the word "intentionally" in AS 11.41.110(a)(2) to govern conduct, *i.e.*, performing the act, when by the definitions adopted by the legislature only "knowingly" can govern conduct.[2] The comment makes it clear that "recklessness" rather than knowledge or intent was to govern the "surrounding circumstances" and "the result." No mental element is specifically established for the result ("death") and the surrounding circumstances ("under circumstances mani-

2. The Tentative Draft provided:

> (a) For purposes of this title, unless the context otherwise requires,
>
> (1) a person acts "intentionally" with respect to a result or to conduct described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in the conduct . . . .

Tentative Draft 11.11.140.

This provision was based on New York Penal Code § 15.05(1) (1965). The reference to "intentionally" with respect to conduct was deleted when the Revised Code was enacted. *See* AS 11.81.900(a)(1). Thus, AS 11.81.900(a)(1) is distinguishable from the statutes which permit "intentionally" to govern conduct. *See People ex rel. Russel v. District Court*, 521 P.2d 1254, 1256-57 (Colo.1974) (analyzing Colorado Revised Statute 40-3-102(1)(d) (1963)).

festing extreme indifference to the value of human life") in AS 11.41.110(a)(2). Consequently, "recklessly" governs those elements. It is clear that if Neitzel fired at Ms. Reedy intending her death and killed her, he would be guilty of first degree murder, not second degree murder. *See* AS 11.41.100(a)(1). The victim's death is the only result mentioned in AS 11.41.110(a)(2). In conclusion, applying the statutory terminology as defined in the code, to be guilty of second degree murder Neitzel had to know he was firing a gun and be reckless regarding: (1) the circumstances, *i.e.*, the location of Ms. Reedy, her vulnerability, and the direction in which he was shooting; and (2) the result, *i.e.*, her death. Under the Revised Code, intoxication is not relevant in evaluating the culpable mental states of "knowingly," AS 11.81.900(a)(2), or "recklessly," AS 11.81.900(a)(3).

The state concedes that the word "intentionally" modifies conduct and not a result. It nevertheless argues that silence regarding the surrounding circumstances should be construed to establish either strict liability or an objective test similar to criminal negligence. We reject this argument. The Model Penal Code provides in substance that if one mental element is provided for an offense, it applies to all the material elements of the offense in the absence of a contrary purpose. *See* Model Penal Code § 2.02(4). This provision was carried over in the Tentative Draft and the Revised Code (*see* AS 11.81.610(a)), but was repealed in 1980. *See supra* note 1.

[4] AS 11.81.600(b) specifies that strict liability must be expressly designated. Further, in the commentary to AS 11.81.-610, the drafters stated:

> Under subsection (b), if a statute does not specify any culpable mental state, conduct is required to be engaged in "knowingly" and results and circumstances are required to be engaged in "recklessly." "Criminal negligence" will not apply unless the term is expressly included in the statute defining the offense.

2 Senate Journal Supplement No. 47, at 144 (June 12, 1978). Under these circumstances, we conclude that "recklessly" governs the surrounding circumstances and the result in reckless murder.

In addition to his statutory construction arguments, Neitzel objects to this analysis on two grounds. First, he contends that holding an intoxicated person to the same standard as a sober person deprives the intoxicated person of due process of law. He relies upon *Kimoktoak v. State*, 584 P.2d 25, 33–35 (Alaska 1978). Secondly, he contends that reckless murder is insufficiently distinguished from reckless manslaughter so that his conviction deprives him of the equal protection of the law. He relies, *inter alia*, on *Keith v. State*, 612 P.2d 977, 986 n. 31 (Alaska 1980).

Kimoktoak is inapposite. There the court interpreted former AS 11.70.030 to permit evidence of intoxication to negate knowledge where knowledge was an element of an offense. The court relied on cases from California similarly interpreting California Penal Code § 22, which at that time was identical to former AS 11.70.030. The court did not base its holding on the constitution. Current Alaska law expressly precludes this result with regard to offenses established in the Revised Code. *See* AS 11.81.630, .640 and .900(a)(2).

[5] Neitzel does not dispute his ability to know he was firing a gun. The focus of his due process attack is on the claim that he recklessly disregarded the surrounding circumstances. In this regard, the Revised Code follows the Model Penal Code in precluding evidence of intoxication on the issue of recklessness. *See* Model Penal Code § 2.08(2). We do not consider the legislative judgment to preclude consideration of intoxication in determining recklessness so irrational that it violates due process. *Cf. Morgan v. Municipality of Anchorage*, 643 P.2d 691, 692 (Alaska App.1982) (city need not prove that person prosecuted for driving while intoxicated knew his driving was impaired). The commentary to the Model Penal Code sets out the arguments for considering intoxication on the issue of recklessness and then explains its reasons for rejecting those arguments as follows:

The case thus made is worthy of respect, but there are strong considerations on the other side. We mention first the weight of the prevailing law which here, more clearly than in England, has tended towards a special rule for drunkenness. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.

A.L.I. Model Penal Code, Tentative Draft No. 9 § 2.08 at 8–9 (1959). We find these considerations persuasive. *Accord State v. Ramos*, 648 P.2d 119, 120–22 (Ariz.1982); *People v. LeGrand*, 61 A.D.2d 815, 402 N.Y.S.2d 209, 211, *cert. denied*, 439 U.S. 835, 99 S.Ct. 117, 58 L.Ed.2d 130 (1978).

Neitzel's equal protection argument is also unfounded. Neitzel argues that reckless murder, as we define it, is conceptually indistinguishable from reckless manslaughter. *See* B. Gegan, *A Case of Depraved Mind Murder*, 49 St. John's L.Rev. 417, 440–50 (1974) (criticizing the comparable New York statute on this ground). If intoxication is held to be a defense to murder but not manslaughter, Neitzel concludes the two offenses are kept separate and the equal protection problem disappears.

[6] We reject this argument because even without allowing intoxication as a defense to murder, the two offenses are sufficiently distinct to avoid equal protection problems. The Revised Code simply follows the Model Penal Code in distinguishing reckless murder from reckless manslaughter. The drafters of the Model Penal Code suggest the following reasons:

> Section 210.2(1)(b) also provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.
>
> Recklessness, as defined in Section 2.02(2)(c), presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness may be found and where it should be assimilated to purpose or knowledge for purposes of grading. Under the Model Code, this judgment must be made in terms of whether the actor's conscious disregard of the risk, given the circumstances of the case, so far departs from acceptable behavior that it constitutes a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Ordinary recklessness in this sense is made sufficient for a conviction of manslaughter under Section 210.3(1)(a). In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provo-

cation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.

Insofar as Subsection (1)(b) includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill, it reflects both the common law and much pre-existing statutory treatment usually cast in terms of conduct evidencing a "depraved heart regardless of human life" or some similar words. Examples usually given include shooting into a crowd or into an occupied house or automobile, though they are not, of course, exhaustive.

Some indication of the content of this concept as a means of differentiating murder and manslaughter may be afforded by prior decisional law. One case involved a game of Russian roulette, where the defendant pointed a revolver loaded with a single cartridge at his friend. The weapon fired on the third try, and the fatal wound resulted. The court affirmed the conviction for murder, despite ample evidence that the defendant had not desired to kill his friend, with the statement that "malice in the sense of a wicked disposition is evidenced by the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others." In another case, the defendant's claimed intention was to shoot over his victim's head in order to scare him. The court held that, even crediting this assertion, the jury could find the defendant guilty of murder on the ground that his act showed "such a reckless disregard for human life as was the equivalent of a specific intent to kill." A third illustration involved a defendant who fired several shots into a house which he knew to be occupied by several persons. The court affirmed his conviction of murder because the defendant's conduct was "imminently dangerous" and "evinced a wicked and depraved mind regardless of human life." Other acts held to show sufficient recklessness to justify a conviction of murder include shooting into a moving automobile and throwing a heavy beer glass at a woman carrying a lighted oil lamp. The Model Code formulation would permit a jury to reach the same conclusion in each of these cases.

A.L.I., *Model Penal Code and Commentaries*, Part II § 210.2, at 21–23 (1980) (footnotes omitted). The commentator concludes:

> Given the Model Code definition of recklessness, the point involved is put adequately and succinctly by asking whether the recklessness rises to the level of "extreme indifference to the value of human life." As has been observed, it seems undesirable to suggest a more specific formulation. The variations referred to above [various formulations from modern codes discussed in the commentary] retain in some instances greater fidelity to the common-law phrasing but they do so at great cost in clarity. Equally obscure are the several attempts to depart from the common law to which reference has been made. The result of these formulations is that the method of defining reckless murder is impaired in its primary purpose of communicating to jurors in ordinary language the task expected of them. The virtue of the Model Penal Code language is that it is a simpler and more direct method by which this function can be performed.

Id. at 25–26 (footnotes omitted).

In conclusion, jurors asked to evaluate conduct resulting in death to determine whether it was negligent, reckless or malicious must weigh four factors:

(1) The social utility of the actor's conduct.

(2) the magnitude of the risk his conduct creates including both the nature of forseeable harm and the likelihood that the conduct will result in that harm;

(3) the actor's knowledge of the risk; and

(4) any precautions the actor takes to minimize the risk.

See G. Fletcher, *Rethinking Criminal Law* § 4.3, at 259–62 (1978) (Homicide by Excessive Risk Taking); W. LaFave and A. Scott, *Handbook on Criminal Law* § 70, at 541–45 (1972) (Depraved-Heart Murder). Under the Revised Code, negligent homicide and reckless manslaughter are satisfied by conduct creating a significant risk of death absent justification or excuse. They differ only in the actor's knowledge of the risk. In differentiating reckless murder from reckless manslaughter, the jury is asked to determine whether the recklessness manifests an extreme indifference to human life. In so doing, it might pay particular attention to the social utility of the defendant's conduct and the precautions he takes to minimize the apparent risks. In evaluating the social utility of the actor's conduct, the jury must of course consider defenses such as provocation, necessity, the defense of self and of others, if supported by the evidence. Shooting at someone, by itself, is devoid of social utility and consequently has been used by the commentators as the paradigm of extreme indifference to human life. Where, however, a gun is fired at an attacking lion in an attempt to rescue the victim and the bullet strikes the victim, the social utility of the conduct may excuse it despite the magnitude of the risk. *Cf. Lee v. State*, 490 P.2d 1206 (Alaska 1971) (a civil case where the victim was shot in the course of her rescue from a lioness; jury absolved defendant of gross negligence, case remanded for trial for ordinary negligence), *overruled on other grounds, Munroe v. City Council*, 545 P.2d 165, 170 n. 11, *modified on rehearing*, 547 P.2d 839 (Alaska 1976).

In addition, the jury may evaluate any precautions taken. Thus, a person may be reckless in the sense that he knowingly engages in conduct which creates a forseeable risk of death and amounts to a gross deviation from the standard of conduct that a reasonable person would observe in the sense that the social utility of his conduct does not warrant exposing another to the risk of death. He may, however, still not manifest an extreme indifference to the life of the person endangered if he takes substantial precautions to minimize the risk.

Finally, and most importantly, the jury must consider the nature and gravity of the risk, including the harm to be foreseen and the likelihood that it will occur. For both murder and manslaughter, the harm to be foreseen is a death. Therefore, the significant distinction is in the likelihood that a death will result from the defendant's act. Where the defendant's act has limited social utility, a very slight though significant and avoidable risk of death may make him guilty of manslaughter if his act causes death. Driving an automobile has some social utility although substantially reduced when the driver is intoxicated. The odds that a legally intoxicated person driving home after the bars close will hit and kill or seriously injure someone may be as low as one chance in a thousand and still qualify for manslaughter. Where murder is charged, however, an act must create a much greater risk that death or serious physical injury will result. This is the point, in the Model Penal Code commentary "that recklessness . . . can fairly be assimilated to purpose or knowledge. . . ."

How likely death must be before murder can be charged is not susceptible to mathematical demonstration. An examination of the classic example given to distinguish murder from manslaughter—Russian roulette—gives some guidance. If a revolver had six chambers in its cylinder and only one contains a bullet and we assume no imperfection in the revolver, then the odds are one in six that a bullet will fall under the hammer when the cylinder is spun and the trigger is pulled. Stated otherwise a participant has a 16.7% chance of being killed or seriously injured and an 83.3% chance of not being killed or seriously injured in a game of Russian Roulette each

time he puts the gun to his temple and pulls the trigger. The act is so dangerous and so lacking in social utility, however, that it demonstrates extreme indifference to human life and effects [illegible] murder from manslaughter.

The commentary to the Model Penal Code suggests that all of these concepts are adequately conveyed to the jury in the single phrase "extreme indifference to the value of human life." We therefore hold that the Revised Code sufficiently distinguishes between reckless murder and reckless manslaughter to satisfy equal protection.[3]

[7] The trial court instructed the jury on second degree murder, manslaughter and negligent homicide. The jury was specifically informed that manslaughter and negligent homicide were lesser included offenses of second degree murder. The court defined recklessness for the jury. It did not tell the jury that murder was a strict liability offense or that negligence regarding the surrounding circumstances was sufficient to establish murder. While the parties debated distinctions between "objective" and "subjective" theories of extreme indifference murder out of the jury's presence in their arguments to the court regarding jury instructions, it does not appear that the instructions actually given the jury differed materially from what we find to be the controlling law. To the extent that the [illegible] authorize additional instructions differentiating murder from manslaughter in terms of the actual utility of Neitzel's conduct measured against the gravity of the risk that Neitzel's conduct presented to Ms. Reedy, a question we do not decide, no such instructions were requested. Neitzel would be hard-put to argue that his conduct had any social utility; his conduct closely approximates the examples frequently used in the common law and in the Model Penal Code to differentiate reckless murder from manslaughter.[4] While we hold that recklessness regarding the consequences was the required culpable mental state for reckless murder, we conclude that the instructions given adequately conveyed that idea to the jury. We find no evidence other than that relating to intoxication which would support an instruction on diminished capacity and, as we have seen, intoxication cannot be considered by the jury in determining the culpable mental states of "knowingly" and "recklessly" under the Revised Code. We therefore conclude that any error in the instructions was

3. Our decision is therefore compatible with *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (Colo.), *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977), and *People v. Poplis*, 30 N.Y.2d 85, 330 N.Y.S.2d 365, 281 N.E.2d 167 (1972), which distinguish reckless murder from reckless manslaughter under similar statutes thereby avoiding an equal protection challenge. *People v. Marcy*, 628 P.2d 69, 78–79 (Colo.1981), would support an argument that knowingly engaging in conduct "under circumstances manifesting an extreme indifference to the value of human life," AS 11.41.110(a)(2), is virtually indistinguishable from "knowing that his conduct is substantially certain to cause death or serious physical injury to another person," AS 11.41.110(a)(1). Neitzel does not make this argument and it would do him no good if he did since both subsections constitute second degree murder and intoxication would not be relevant to preclude a finding of the relevant mental state under either. Consequently, we do not decide whether AS 11.41.110(a)(2) reaches conduct which AS 11.41.110(a)(1) does not. We note however that a game of Russian roulette is not substantially certain to cause death or serious physical injury and the legislative report clearly views the two subsections as similar but distinct. *See* 2 Senate Journal Supplement No. 47, at 9–10 (June 12, 1978) (legislative commentary on AS 11.41.110(a)(2)).

Finally, we note that Neitzel does not argue that "extreme indifference" requires more than one potential victim and therefore we do not reach that issue. *See People v. Jones*, 193 Colo. 250, 565 P.2d 1333, *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977).

4. The common way to distinguish between two related concepts is to give examples. Most of the examples customarily given of conduct which exhibits "extreme indifference to human life" so closely parallel Neitzel's conduct that they would have been more favorable to the state than the instructions actually given. The United States Supreme Court for this reason rejected a demand for greater clarification on the issue of causation in connection with a prosecution under the similar New York statute. *See Henderson v. Kibbe*, 431 U.S. 145, 156 n. 16, 97 S.Ct. 1730, 1738 n. 16, 52 L.Ed.2d 203, 214 n. 16 (1977).

not indicate psychiatric problems of such dimensions or of such a nature as would justify remanding for further psychiatric evaluation.[6]

[4] While a five-year sentence for an 18-year-old charged with his first felony is doubtlessly a severe sentence,[7] we cannot say that the trial judge was clearly mistaken. He indicated that he was aware of the criteria for sentencing that we have often enunciated based on the case of *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970). Furthermore, armed robbery is a very serious offense,[8] and the five-year sentence under the circumstances here involved is consistent with other sentences imposed for armed robbery in Alaska.[9]

AFFIRMED.

6. It is clear that Mr. Marks has a substantial drinking problem, and there are also indications that he feels guilty as the result of the death of his 13-year-old sister who fell out of the rear of a station wagon that he was driving.

7. In *Donlun v. State*, 527 P.2d 472, 475 (Alaska 1974), we stated:

> The American Bar Association has stated that in the vast majority of cases prison sentences are significantly higher than are needed to adequately protect the interests of the public and that, except for cases involving *particularly* serious offenses, dangerous offenders and professional criminals, maximum prison terms ought not to exceed five years. (emphasis in original)

8. Roubery involves somewhat different considerations, given its higher potential for injury. The court has affirmed substantial sentences where violence has actually occurred or where life has been endangered, or where prior convictions indicate that "less stern measures have proven unsuccessful." Nonetheless, the opinions evidence a willingness to take a hard look at the age, background and psychiatric profile of the individual offender, and it cannot be said that the court considers the possibility of sentence relief to be automatically foreclosed in the robbery area. However, it would appear appropriate to take into consideration the potential injury to the victim in arriving at a proper sentence. Certainly, the use of weapons aggravates the nature of the crime. (footnotes omitted)

R. Erwin, Five Years of Sentence Review in Alaska, 5 U.C.L.A.—Alaska L.Rev. 1, 13 (1975).

9. *Cleary v. State*, 548 P.2d 952 (Alaska 1976) (2 consecutive 10-year sentences in addition to 5-year federal sentence reversed and remanded); *Davenport v. State*, 543 P.2d 1204 (Alaska 1975) (20-year sentence remanded); *Avery v. State*, 514 P.2d 637 (Alaska 1973) (15 years reversed and remanded); *Hixon v. State*, 508 P.2d 526 (Alaska 1973) (10-year sentence for robbery affirmed); *Hawthorne v. State*, 501 P.2d 155 (Alaska 1972) (10-year sentence for robbery remanded for psychological evaluation and resentencing); *Robinson v. State*, 492 P.2d 106 (Alaska 1971) (10-year sentence for robbery affirmed); *Robinson v. State*, 484 P.2d 686 (Alaska 1971) (sentence creating term of 22 years imprisonment remanded).

Although we remanded many of of these cases, we did not do so because we were convinced that the sentences were excessive. Thus, in *Hawthorne*, we did not reverse a 10-year sentence although we remanded for psychological evaluation. We recommended a psychological evaluation for purposes of resentencing in *Davenport*, and in *Robinson*, 484 P.2d 686 (Alaska 1971), we remanded for psychological evaluation as well as further evidence on parole board policies. In *Avery*, we reversed a 15-year sentence based on improper sentencing procedures but indicated that under the facts of that case, a 15-year sentence might not be excessive.

Roger A. PADIE, Petitioner,

v.

STATE of Alaska, Respondent.

No. 3113.

Supreme Court of Alaska.

Dec. 30, 1976.

Defendant was put on trial in the Superior Court, Third Judicial District, Anchorage District, Seaborn J. Buckalew, Jr., J., for murder. Petition for review was then brought requiring consideration of question of whether criminal trial jury may be instructed on elements of lesser included offense when statute of limitations has run on lesser offense but not on

charged offense. The Supreme Court, Connor, J., held that just as defendant may not be charged with time-barred offense, he could not be convicted of it, even as lesser offense included in one which is not time-barred; and that where defendant's prosecution for manslaughter was barred by statute of limitations, but prosecution for murder was not, and where defendant proposed defense of killing in heat of passion, instruction on manslaughter could not be given, but defendant was entitled to instruction on mitigating effects, of passion and provocation, requiring jury to acquit him if he presented such evidence in mitigation and State did not negate it.

Judgment entered.

1. Criminal Law ⇐147

Just as a defendant may not be charged with a time-barred offense, he may not be convicted of it, even as a lesser offense included in one which is not time-barred.

2. Criminal Law ⇐146

Statute of limitations is to be construed in favor of the criminal defendant.

3. Criminal Law ⇐145½

Statute of limitations is jurisdictional.

4. Criminal Law ⇐145½

Criminal defendant, charged with non-time-barred offense of murder, by seeking an instruction on lesser included time-barred offense of manslaughter, did not waive the defense of the statute of limitations pertaining to manslaughter. AS 11.15.010, 11.15.030, 11.15.040, 12.10.010; Rules of Criminal Procedure, rule 31(c).

5. Homicide ⇐42

A provoked killing in the heat of passion is not murder; the provocation negates the malice which is an essential element of murder. AS 11.15.040.

6. Homicide ⇐42, 309(4)

A provoked killing in the heat of passion constitutes manslaughter and a defendant charged with murder who presents such evidence is entitled to an instruction on manslaughter as a lesser included offense. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

7. Homicide ⇐152

State must negate defense that killing was done in the heat of passion beyond a reasonable doubt before a defendant may be convicted of murder. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

8. Homicide ⇐23(1), 35

Offenses of first-degree murder, second-degree murder, and manslaughter require same physical act, the unlawful killing of a human being; the difference is in the mental state of the perpetrator. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

9. Homicide ⇐152

That defendant could no longer be convicted of manslaughter due to running of statute of limitations would in no way ease the State's burden of proof to convict him of murder. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

10. Homicide ⇐295(1)

Where defendant's prosecution for murder was not barred by statute of limitations, but he could not be prosecuted for manslaughter due to running of statute of limitations, and where defendant proposed defense claiming killing was done in heat of passion, no instruction on manslaughter could be given, but defendant would be entitled to instruction on mitigating effect of passion as provocation, requiring jury to acquit him if he presented such evidence in mitigation and State did not negate it. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

11. Criminal Law ⇐805(1)

Jury instructions must accurately reflect the law.

12. Homicide ⇐309(4)

Instruction on lesser included offense of manslaughter would only be proper if state of evidence was such that jury could

rationally conclude that defendant was not guilty of murder by reason of passion and provocation. AS 11.15.010, 11.15.030, 11.15.040; Rules of Criminal Procedure, rule 31(c).

Wendell P. Kay, Kay, Christie, Fuld & Saville, and John Anthony Smith and Max F. Gruenberg, Anchorage, for petitioner.

Avrum M. Gross, Atty. Gen., Juneau, and Joseph D. Balfe, Dist. Atty., and W. H. Hawley, Asst. Dist. Atty., Anchorage, for respondent.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, and BURKE, Justices.

CONNOR, Justice.

This petition for review requires us to consider whether a criminal trial jury may be instructed on the elements of a lesser included offense when the statute of limitations has run on the lesser offense but not the charged offense.

On November 3, 1966, Michael Christian disappeared in Anchorage. His body has never been found. On May 9, 1975, more than eight years later, Roger A. Padie was indicted for the first degree murder of Christian. A mistrial was declared in Padie's first trial in September 1976. We have granted his petition for review, and stayed the retrial pending our decision, to consider this question of first impression in Alaska and to guide the court on retrial.

The general statute of limitations, AS 12.10.010, specifies that a prosecution for murder may be commenced at any time. A prosecution for any other offense must be commenced by indictment or warrant within five years after the offense was committed. Hence at the time Padie was indicted, no charge other than murder could be brought for conduct occurring at the time of Christian's disappearance.

[1-4] Just as a defendant may not be charged with a time-barred offense, he may not be convicted of it, even as a lesser offense included in one which is not time-barred. Nearly all courts which have considered the question have so held. *See, e. g., Askins v. United States,* 102 U.S.App. D.C. 198, 251 F.2d 909 (1958); *People v. Picetti,* 124 Cal. 361, 57 P. 156 (1899); *People v. Di Pasquale,* 161 A.D. 196, 146 N.Y.S. 523 (1914). *But see, e. g., People v. Lohnes,* 76 Misc.2d 507, 351 N.Y.S.2d 279 (Sup.Ct.1973). *See generally* Annot., 47 A.L.R.2d 887 (1956), and cases cited therein. This conclusion follows from the principles that the statute of limitations is to be construed in favor of the defendant, and that the statute of limitations is jurisdictional.[1] By seeking an instruction on manslaughter, now time-barred, Padie

1. The State cites two recent cases considering an analogous problem under 18 U.S.C. § 1153, the Major Crimes Act. This act confers federal jurisdiction over certain enumerated serious crimes committed by Indians on Indian reservations. Among the crimes is "assault resulting in serious bodily injury." Simple assault and battery is not among the crimes listed.

In *Keeble v. United States,* 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), a defendant charged under the Major Crimes Act with assault resulting in serious bodily injury sought an instruction on simple assault, a lesser included offense. The trial court denied the instruction on the ground that there was no federal jurisdiction over this offense. Keeble appealed his conviction of the greater, charged offense on the ground that he was prejudiced by denial of the instruction on the lesser offense. The Supreme Court agreed, and held that he was entitled to the instruction even though the lesser offense was not named in the jurisdictional statute.

Felicia v. United States, 495 F.2d 353 (8th Cir.), *cert. denied,* 419 U.S. 849, 95 S.Ct. 88, 42 L.Ed.2d 79 (1974), considered a question not addressed in *Keeble*: whether, if the jury found the defendant guilty of the lesser offense, a judgment of conviction could be entered. The defendant claimed the federal court was without jurisdiction over the lesser offense, assault and battery, since it was not listed in the Major Crimes Act. The court disagreed.

In view of the general rule that the statute of limitations prevents conviction for a time-barred offense even when it is a lesser offense included in one which is not time-barred, we do not find *Felicia* persuasive.

does not waive the defense of the statute. *Askins, supra. See also Waters v. United States,* 328 F.2d 739, 742–44 (10th Cir. 1964).

[5–7] Padie intends to introduce evidence of passion and provocation in his defense. A provoked killing in the heat of passion is not murder; the provocation negates the malice which is an essential element of murder.[2] 1 R. Anderson, *Wharton's Criminal Law and Procedure* § 274 (1957). Such a killing constitutes manslaughter (AS 11.15.040), and a defendant charged with murder who presents such evidence is entitled to an instruction on manslaughter as a lesser included offense. Alaska R.Crim.Proc. 31(c); *Gray v. State,* 463 P.2d 897, 906 (Alaska 1970); *Jennings v. State,* 404 P.2d 652, 655 (Alaska 1965).

Prior to the first trial of this case, Padie requested such an instruction. The trial court denied it, and also ruled that the statute of limitations barred Padie from presenting evidence of provocation and passion.

Our statutes define first degree murder as a killing by "[a] person . . . of sound memory and discretion, purposely, and . . . of deliberate and premeditated malice" or a killing by poison or in the commission of certain enumerated felonies. AS 11.15.010. Second degree murder is a killing carried out "purposely and maliciously." AS 11.15.030. Manslaughter is an unlawful killing which is neither first nor second degree murder. AS 11.15.040.

[8] All three of these offenses require the same physical act, the unlawful killing of a human being. The difference is in the mental state of the perpetrator. *Jennings v. State,* 404 P.2d 652, 655 (Alaska 1965).[3] Mr. Justice Frankfurter expressed this somewhat more graphically:

> "[A] muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

Leland v. Oregon, 343 U.S. 790, 803, 72 S. Ct. 1002, 1009, 96 L.Ed. 1302, 1311 (1952) (dissenting opinion).

[9] Hence Padie may not be convicted of murder unless the jury finds that he possessed the culpable mental state specified in either the first or the second degree murder statute. He is, of course, entitled to have the jury instructed to this effect. That he can no longer be convicted of manslaughter in no way eases the State's burden of proof to convict him of murder.

If Padie presents evidence of provocation and passion, but no instruction tells the jury how this evidence relates to the element of malice, the jury will be left in doubt as to the relevance and legal effect of this evidence.[4] We agree with Padie that there is a danger that they might convict him of second degree murder in those circumstances even though, correctly in-

2. The State must negate this defense beyond a reasonable doubt before a defendant may be convicted of murder. *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975).

3. For a review of the history of Alaska's criminal homicide statutes, and their relationship to each other, see *Gray v. State,* 463 P.2d 897, 901–07 (Alaska 1970).

4. Mr. Justice Frankfurter stressed the need for complete and clear jury instructions on the mental element of each degree of criminal homicide, when the defendant's mental state is a principal issue:

> "[T]he justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon. The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case. . . ."

Fisher v. United States, 328 U.S. 463, 486–87, 66 S.Ct. 1318, 1330, 90 L.Ed. 1382, 1396 (1946) (dissenting opinion) (footnote omitted).

structed, they would recognize that he was guilty of no crime more serious than manslaughter.[5] Padie seeks only the same protection against an unjustified conviction for murder which is given to defendants as a matter of course when the lesser offense is not time-barred.

In *Askins v. United States*, 102 U.S. App.D.C. 198, 251 F.2d 909 (1958), a conviction of a time-barred lesser offense was set aside. The court said that the defendant was not to be denied relief because he had not objected to the instruction on the lesser offense.

> "[H]e could have requested that only the issue of first degree murder be submitted to the jury. But he lost no right by not doing the latter. He was not required to ask for a verdict of either first degree murder or of not guilty; he could seek a verdict of either second degree murder [time-barred] or of not guilty . . . ."

Id. at 912.

Two years later, a panel including two of the three judges who decided *Askins*, decided *Chaifetz v. United States*, 109 U.S.App.D.C. 349, 288 F.2d 133 (1960), *rev'd in part on other gds.*, 366 U.S. 209, 81 S. Ct. 1051, 6 L.Ed.2d 233 (1961). *Chaifetz* held that, since the defendant could not be convicted of the lesser offense (citing *Askins*), the jury could not be told of it, even at the defendant's request, since all jury instructions must accurately reflect the law. Chaifetz was convicted of the greater offense, not time-barred, charged in the indictment. At trial he had unsuccessfully asked for a jury instruction on the time-barred lesser offense. On appeal he contended that he was prejudiced by denial of the instruction. His conviction was affirmed.

[10–12] We agree with the *Chaifetz* decision that jury instructions must accurately reflect the law. Accordingly, the jury should not be instructed that they may find Padie guilty of manslaughter. Nevertheless, Padie is entitled to an instruction on the mitigating effect of passion and provocation, requiring the jury to acquit him if he presents such evidence in mitigation and the state does not negate it.[6] The instruction we authorize in this case avoids the problems faced by the *Askins* and *Chaifetz* courts, because it does not permit the jury to find Padie guilty of manslaughter. The drafting of such an instruction we leave to the trial court.[7]

ERWIN, J., not participating.

5. "[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."

Keeble v. United States, 412 U.S. 205, 212–13, 93 S.Ct. 1993, 1997, 36 L.Ed.2d 844, 850 (1973), described in note 1 *supra*. (Emphasis in original.)

6. The instruction may be given only in the circumstances in which an instruction on a lesser included offense would ordinarily be proper, that is, if the state of the evidence is such that the jury could rationally conclude that Padie is not guilty of murder by reason of passion and provocation. *Keeble v. United States*, *supra* 412 U.S. at 208, 93 S.Ct. at 1995, 36 L.Ed.2d at 847.

7. We find it unnecessary to reach Padie's contention that the due process clause entitles him to this instruction. Nor do we consider the question, to which some of the cited authorities relate, whether Padie could in these circumstances plead guilty to manslaughter.