

HPB

121



**FISCAL NOTE**

**REQUEST:**

Revision Date: \_\_\_\_\_  
Title: "An Act relating to sentences...  
individuals convicted of certain crimes."  
Sponsor: Rep. Bover  
Requestor: Rep. Bover

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

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

**FUNDING: (Thousands of Dollars)**

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**POSITIONS:**

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

**ANALYSIS : (Attach a separate page if necessary)**

This is a sentencing provision and, as such, it will not have a fiscal impact on the Department of Law.

Prepared by: Richard I. Pegues, Director Phone: 465-3672  
Division: Administrative Services Date: March 22, 1990  
Approved by Commissioner: Richard I. Pegues / FOR Date: March 22, 1990  
Agency: Department of Law

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

A M E N D M E N T #1

OFFERED IN THE HOUSE

BY EARNES

TO: CSHB 121(HESS)

Page 1, line 8: (TITLE)

Delete "penalty for"

Insert "definition of"

Page 2, lines 25 - 26:

Delete "class A misdemeanor [CLASS C FELONY]"

Insert "class C felony"

*motion to ret to 2<sup>nd</sup> rdg.  
passed w/c*  

---

*Am #1 ret to Juel  
w/pending am #1*

Original sponsor: Rules/Governor

1 IN THE HOUSE  
2  
3 BY THE HEALTH, EDUCATION AND  
4 SOCIAL SERVICES COMMITTEE  
5  
6 CS FOR HOUSE BILL NO. 121 (HESS)  
7  
8 IN THE LEGISLATURE OF THE STATE OF ALASKA  
9  
10 SIXTEENTH LEGISLATURE - FIRST SESSION  
11  
12 A BILL  
13  
14 For an Act entitled: "An Act relating to crimes of sexual assault on  
15 mentally incapable or incapacitated persons, and  
16 amending the penalty for the crime of sexual assault  
17 in the third degree; and providing for an effective  
18 date."  
19  
20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:  
21  
22 \* Section 1. AS 11.41.410(a) is amended to read:  
23  
24 (a) A person commits the crime of sexual assault in the first  
25 degree if, being any age,  
26  
27 (1) [BEING ANY AGE,] the defendant engages in sexual pene-  
28 tration with another person without consent of that person;  
29  
30 (2) [BEING ANY AGE,] the defendant attempts to engage in  
31 sexual penetration with another person without consent of that person  
32 and causes serious physical injury to that person;  
33  
34 (3) [BEING OVER THE AGE OF 18,] the defendant engages in  
35 sexual penetration with another person  
36  
37 (A) who the defendant knows is mentally incapable; and  
38  
39 (B) who is entrusted to the defendant's care  
40  
41 (i) by authority of law; or  
42  
43 (ii) in a facility or program that is required by  
44 law to be licensed by the Department of Health and Social  
45 Services.  
46  
47 \* Sec. 2. AS 11.41.420(a) is amended to read:  
48  
49 (a) An offender commits the crime of sexual assault in the

1 second degree if

2 (1) the offender engages in sexual contact with another  
3 person without consent of that person;

4 (2) [BEING OVER THE AGE OF 18,] the offender engages in  
5 sexual contact with a person

6 (A) who the offender knows is mentally incapable; and

7 (B) who is entrusted to the offender's care

8 (i) by authority of law; or

9 (ii) in a facility or program that is required by  
10 law to be licensed by the Department of Health and Social  
11 Services; or

12 (3) [BEING OVER THE AGE OF 18,] the offender engages in  
13 sexual penetration with a person who the offender knows is

14 (A) mentally incapable; or

15 (B) incapacitated.

16 \* Sec. 3. AS 11.41.425 is amended to read:

17 Sec. 11.41.425. SEXUAL ASSAULT IN THE THIRD DEGREE. (a) An  
18 offender commits the crime of sexual assault in the third degree if  
19 [BEING OVER THE AGE OF 18,] the offender engages in sexual contact  
20 with a person who the offender knows is

21 (1) mentally incapable; or

22 (2) incapacitated [TEMPORARILY INCAPABLE OF APPRAISING THE  
23 NATURE OF THE PERSON'S CONDUCT AND IS PHYSICALLY UNABLE TO EXPRESS  
24 UNWILLINGNESS TO ACT].

25 (b) Sexual assault in the third degree is a class A misdemeanor  
26 [CLASS C FELONY].

27 \* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

H O U S E

ENGROSS: \_\_\_\_\_

ENROLL: \_\_\_\_\_

CS HB # 121 (Hess)

SB # \_\_\_\_\_

HJR # \_\_\_\_\_

SJR # \_\_\_\_\_

HCR # \_\_\_\_\_

SCR # \_\_\_\_\_

HR # \_\_\_\_\_

DATE PASSED 3-31-89

ROLL CALL: YEAS: 26

EFFECTIVE DATE: YEAS: 28

NAYS: 0

NAYS: 0

EXCUSED: 5

EXCUSED: 5

ABSENT: 9

ABSENT: 7

*Am # 1 by Barnes:*

H O U S E

ENGROSS: \_\_\_\_\_

ENROLL: \_\_\_\_\_

CS HB # 121 (Hess)

SB # \_\_\_\_\_

HJR # \_\_\_\_\_

SJR # \_\_\_\_\_

HCR # \_\_\_\_\_

SCR # \_\_\_\_\_

HR # \_\_\_\_\_

DATE PASSED April 3, 1989

ROLL CALL: YEAS: \_\_\_\_\_

EFFECTIVE DATE: YEAS: \_\_\_\_\_

NAYS: \_\_\_\_\_

NAYS: \_\_\_\_\_

EXCUSED: \_\_\_\_\_

EXCUSED: \_\_\_\_\_

ABSENT: \_\_\_\_\_

ABSENT: \_\_\_\_\_

*Referred back to Judiciary Committee 2/5/89 pending*

*On reconsideration*

# HOUSE COMMITTEE REPORT

3/29

(7)  
 Date Referred: March 17, 1989  
 Date of Committee Action: 3/28/89

FURTHER REFERRALS:

Rule

The JUDICIARY Committee considered: HB 121

HOUSE BILL NO. 121 [SEXUAL ASSAULT ON CERTAIN PERSONS]  
 "An Act relating to crimes of sexual assault on mentally incapable or incapacitated persons; and providing for an effective date."

CSNB 121 (New)

- RECOMMENDATIONS:
- be replaced with \_\_\_\_\_  the same title
  - have 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): (Dept) APPROVES PREVIOUS: (Date/Dept)
- fiscal impact \_\_\_\_\_  fiscal note(s) \_\_\_\_\_
  - zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_
  - zero with analysis \_\_\_\_\_  zero fn/analysis Low 1/27/89

SIGNING DO PASS:

\_\_\_\_\_  
W. J. Guenbergo GUENBERGO  
John Goll GOLL  
Ed Ellis ELLIS  
Mike Davis DAVIS  
Clay Davidson DAVIDSON  
Mike Miller MILLER

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
<u>Terry Martin</u> MARTIN			melots amend

CO - Chairman's signature

1 IN THE HOUSE

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

2

HOUSE BILL NO. 121

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to crimes of sexual assault on  
7 mentally incapable or incapacitated persons; and  
8 providing for an effective date."

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

10 \* Section 1. AS 11.41.410(a) is amended to read:

11 (a) A person commits the crime of sexual assault in the first  
12 degree if,

13 (1) being any age, the defendant engages in sexual pene-  
14 tration with another person without consent of that person;

15 (2) being any age, the defendant attempts to engage in  
16 sexual penetration with another person without consent of that person  
17 and causes serious physical injury to that person;

18 (3) being any age [OVER THE AGE OF 18], the defendant  
19 engages in sexual penetration with another person

20 (A) who the defendant knows is mentally incapable;

21 and

22 (B) who is entrusted to the defendant's care

23 (i) by authority of law; or

24 (ii) in a facility or program that is required by  
25 law to be licensed by the Department of Health and Social  
26 Services.

27 \* Sec. 2. AS 11.41.420(a) is amended to read:

28 (a) An offender commits the crime of sexual assault in the  
29 second degree if

1           (1) the offender engages in sexual contact with another  
2 person without consent of that person;

3           (2) [BEING OVER THE AGE OF 18,] the offender engages in  
4 sexual contact with a person

5           (A) who the offender knows is mentally incapable,

6           (B) who is entrusted to the offender's care

7           (i) by authority of law; or

8           (ii) in a facility or program that is required by  
9 law to be licensed by the Department of Health and Social  
10 Services; or

11          (3) [BEING OVER THE AGE OF 18,] the offender engages in  
12 sexual penetration with a person who the offender knows is

13           (A) mentally incapable; or

14           (B) incapacitated.

15 \* Sec. 3. AS 11.41.425(a) is amended to read:

16          (a) An offender commits the crime of sexual assault in the third  
17 degree if [BEING OVER THE AGE OF 18,] the offender engages in sexual  
18 contact with a person who the offender knows is

19           (1) mentally incapable; or

20           (2) incapacitated [TEMPORARILY INCAPABLE OF APPRAISING THE  
21 NATURE OF THE PERSON'S CONDUCT AND IS PHYSICALLY UNABLE TO EXPRESS  
22 UNWILLINGNESS TO ACT].

23 \* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

# STATE OF ALASKA

## DEPARTMENT OF LAW

CRIMINAL DIVISION/THIRD JUDICIAL DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

March 29, 1988

House Judiciary Committee  
Box V  
Juneau, Alaska 99801

Re: House Bill 545  
Sexual Assault of Mentally Handicapped Persons

Dear Committee Members:

I am an Assistant District Attorney in Anchorage who prosecutes sexual assault cases. I have reviewed House Bill 545 which proposes significant amendments to the sexual assault laws relating to mentally handicapped victims. That bill greatly increases the protection against sexual exploitation of the mentally handicapped beyond present law.

The present criminal statute of second degree sexual assault does not adequately protect the mentally handicapped persons from sexual exploitation. It does not criminalize sexual contact crimes but only prohibits sexual penetration. It places a near impossible burden on the prosecution to prove that the mental handicap was so severe that the person does not even understand the nature of the conduct. Some judges say this means we have to prove the victim cannot even comprehend that someone is having sex with them. The proposed bill offers an alternative by allowing us instead to prove that the mental handicap affected the victim's ability to evaluate the consequences of her conduct even if she is capable of knowing that sex is occurring. The present second degree statute also includes a requirement to prove that the handicapped person would not have engaged in the conduct had they been mentally normal: The sex must occur "under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration." Since it is very difficult to prove that normal people would not have engaged in sex under most circumstances, it is difficult to meet this burden of proof.

Two 1987 cases in Anchorage illustrate the problems

STEVE COWPER, GOVERNOR

REPLY TO

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DILLINGHAM, ALASKA 99576-0470  
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☐ 145 MAIN STREET LOOP ROOM 201  
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PHONE (907) 283-3131

☐ 326 CENTER AVE SUITE 205  
KODIAK, ALASKA 99615-9998  
PHONE (907) 486-5744

☐ 809 S CHUGACH ST SUITE 3  
PALMER, ALASKA 99645-9998  
PHONE (907) 745-5027

☐ P.O. BOX 671  
VALDEZ, ALASKA 99686-0671  
PHONE (907) 835-2462

House Judiciary Committee

RE: House Bill 545

March 29, 1988

PAGE 2

in the present law which would be alleviated by the proposed bill.

Our office prosecuted the manager of an apartment building which had a number of female mentally handicapped tenants placed there by a social service agency. He was convicted of sex crimes against four of these severely mentally handicapped women who lived in the complex. He could only be convicted of a felony on two of them because he only penetrated those two. The other two women were only fondled by him. For these fondling crimes he could only be convicted of the class B misdemeanor of harassment carrying a maximum 90 day jail sentence.

In another case prosecuted last year the judge acquitted one of two defendants who were having sex in a park in broad daylight with a severely schizophrenic woman. Eyewitness and medical evidence proved she was being forcibly assaulted. All of the witnesses agree that the woman was so mentally ill that she could not even understand that these men were having sex with her. Part of the reason for the acquittal was the ambiguous requirement of present law to prove that the woman would not have engaged in the sexual activity had she been mentally normal. The judge reasoned that even normal people sometimes engage in group sex in public so the state had failed to prove that element. He felt the only way to prove this element was to prove that the woman was being raped or being physically injured because this is the only sexual activity to which normal people would not consent. But he acquitted him on the rape charge apparently because the woman did not testify since she was too mentally ill to be a competent witness. In other words, he ruled that to prove second degree sexual assault under present law the state had to prove first degree sexual assault, but the state could not prove first degree because the victim was so mentally ill. This was the strongest case of second degree sexual assault which could be brought under present law yet the judge acquitted the defendant and did not let the case go to the jury.

As I read House Bill 545 it would create a strong policy for protecting severely mentally handicapped people from sexual exploitation but would not criminalize consensual

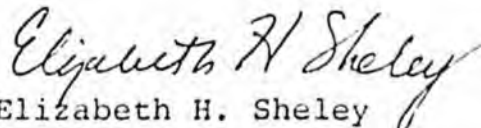
House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 3

sexual activity between two handicapped people or sexual activity with persons who were not severely mentally handicapped. The proposed law requires that the mental handicap be so severe that the person cannot either understand that sex is occurring or cannot give informed consent. These people need the protection of the criminal laws which this bill gives them without unnecessarily infringing on their privacy and sexual rights.

Very truly yours,

GRACE BERG SCHAIBLE  
ATTORNEY GENERAL

DWAYNE W. MCCONNELL  
DISTRICT ATTORNEY

  
Elizabeth H. Sheley  
Assistant District Attorney

EHS:bch

ON 44 Disk

Washington

H13 121

## CHAPTER 9A.44 SEXUAL OFFENSES

### Section

- 9A.44.010. Definitions.
- 9A.44.020. Testimony—Evidence—Written motion—Admissibility.
- 9A.44.030. Defenses to prosecution under this chapter.
- 9A.44.040. Rape in the first degree.
- 9A.44.045. Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984.
- 9A.44.050. Rape in the second degree.
- 9A.44.060. Rape in the third degree.
- 9A.44.070. Statutory rape in the first degree.
- 9A.44.080. Statutory rape in the second degree.
- 9A.44.090. Statutory rape in the third degree.
- 9A.44.100. Indecent liberties.
- 9A.44.110. Repealed.
- 9A.44.120. Admissibility of child's statement—Conditions.
- 9A.44.900. Decodifications and additions to this chapter.
- 9A.44.901. Construction—Sections decodified and added to this chapter.
- 9A.44.902. Effective date—1979 ex.s. c 244.

11:55 AM 11/11/83

### Library References

- |   |  |
|---|--|
| Criminal practice, post-trial proceedings, departure from the guidelines, first offender, see Wash.Prac. vol. 13, Ferguson, § 4321. | Jury instructions, Incest, definition, see Wash.Prac. vol. 11, WPIC 46.05. Sexual intercourse, definition, see Wash.Prac. vol. 11, WPIC 45.01. |
|---|--|

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### WESTLAW Electronic Research

WESTLAW supplements West's Revised Code of Washington Annotated and is useful for additional research. Enter a citation in INSTA-CITE for display of any parallel citations and case history. Enter a constitution, statute or rule citation in a case law database for cases of interest.

Example query for INSTA-CITE: IC 692 P.2d 874

Example query for Washington Constitution:  
Const. Constitution /s 8 + 3 5

Example query for statute: 59.12.030

Also, see the WESTLAW guide following the Preface pages of this volume.

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9A.44.050

CHAPTER 9A.44  
SEXUAL OFFENSES

Written motion—Admissibility.  
tion under this chapter.  
free.  
first degree rape—Restrictions on release  
—Application to offenses before July 1,

degree.  
degree.  
first degree.  
second degree.  
third degree.

Witness's statement—Conditions.  
Additions to this chapter.  
Provisions decodified and added to this chapter,  
e.g., s. c 244.

Primary References

ed. Jury instructions,  
es. Incest, definition, see Wash.Prac.  
ol. vol. 11, WPIC 46.05.  
Sexual intercourse, definition, see  
Wash.Prac. vol. 11, WPIC 45.01.

Electronic Research

Revised Code of Washington Annotated and  
. Enter a citation in INSTA-CITE for  
and case history. Enter a constitution,  
see law database for cases of interest.

Wash. IC 692 P.2d 874

Constitution:

2.030

Following the Preface pages of this volume.

SEXUAL OFFENSES

9A.44.010

9A.44.010. Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(3) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

(4) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

(5) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped;

(6) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

Formerly § 9.79.140, enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 1. Recodified as § 9A.44.010 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1981, ch. 123, § 1.

Historical Note

Laws 1979, Ex.Sess., ch. 244, § 17, re- Source:  
codified the section.

Laws 1981, ch. 123, § 1, in subsec. (2),  
added the language following "means  
one who is legally married to another".

Laws 1873, p. 187, § 37.  
Laws 1909, ch. 249, § 185.  
RRS § 2437.  
Former § 9.79.030.  
Laws 1973, 1st Ex.Sess., ch. 154, § 124.

179) 23 of complaining witness where compelling reason is shown. State v. [illegible] (1980) 94 Wash2d 733, 619 P.2d [illegible]

In attempted rape prosecution, court did not abuse its discretion in denying motion to have victim, who received mental health treatment in submit to psychological examination where defendant presented no compelling reason why victim should have been committed to possibly traumatic psychiatric examination when other more traditional and less intrusive means of assessing her credibility and perceptual abilities were presumably available, and in court carefully left issue open for further consideration if testimony showed victim's prior mental history might have had bearing upon her recitation of events at time of incident. State v. [illegible] (1980) 94 Wash2d 733, 619 P.2d 968.

In absence of any compelling reasons motions judge did not abuse discretion by refusing to order a psychiatric examination of alleged rape victim. State v. [illegible] (1979) 25 Wash.App. 15, 605 P.2d 786, affirmed 94 Wash.2d 733, 619 P.2d 968.

23. Evidence

Evidence of secretor type tests, results of which tended to some degree to make it more probable that defendant was guilty of rape and burglary with which he was charged, was properly admitted despite assertion that test results were irrelevant since they merely tended to include him in class of people who might have committed rape. State v. [illegible] (1983) 34 Wash.App. 775, 66 P.2d 1356.

Statements made by rape victim to physician for purpose of diagnosis or treatment are considered inherently trustworthy because declarant's well-being rests on truth of the statements. State v. [illegible] (1980) 27 Wash.App. 952, 621 P.2d 779.

Testimony of two victims, positively identifying defendant as perpetrator of two crimes, was substantial evidence which permitted jury to disbelieve defendant's alibi witnesses and to find defendant guilty on two counts of first-degree rape while armed with a deadly weapon. State v. [illegible] (1979) 21 Wash.App. 893, 600 P.2d 566.

Evidence showing lustful disposition should only be admitted in sex offense case where it tends to show lustful inclination toward offended female. State v. [illegible] (1970) 1 Wash.App. 785, 464 P.2d 730.

Evidence of complaints made by female is restricted to bare complaint unless statement is strictly part of res gestae in cases of rape and similar crimes. State v. [illegible] (1961) 58 Wash.2d 77, 360 P.2d 757.

24. Unanimity of Jury

Jury unanimity was not required on one of two alternative means charged in prosecution for first-degree rape charging commission by two alternative means, where constitutionally sufficient evidence supported both charged alternatives. State v. [illegible] (1987) 108 Wash.2d 506, 739 P.2d 1150.

9A.44.045. Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984

No person convicted of rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility: *Provided*, That every person convicted of rape in the first degree shall be confined for a minimum of three years: *Provided further*, That the board of prison terms and paroles shall have authority to set a period of confinement greater than three years but shall never reduce the minimum three-year period of confinement; nor shall the board release the convicted person during the first three years of confinement as a result of any type of good time calculation; nor shall the department of corrections permit the convicted person to participate in any work release program or furlough program during the first three years of confinement. This section applies only to offenses committed prior to July 1, 1984.

Enacted by Laws 1982, ch. 192, § 12, eff. April 1, 1982.

Law Review Commentaries

Forcible rape in Washington—criminal and civil sanctions. 19 Gonzaga L.Rev. 363 (1983/84).

Library References

Rape § 64. Sentencing guidelines, mandatory C.J.S. Rape § 86 et seq. minimum sentence, see Wash.Prac. Probation, deferred sentences, see vol. 13, Ferguson, § 4307. Wash.Prac. vol. 13, Ferguson, § 4318.

9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion; or  
 (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

(2) Rape in the second degree is a class B felony.

Formerly § 9.79.180, enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 2. Amended by Laws 1979, Ex.Sess., ch. 244, § 2, eff. July 1, 1979. Recodified as § 9A.44.050 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1983, ch. 118, § 2.

#### Historical Note

Laws 1979, Ex.Sess., ch. 244, §§ 2, 17, recodified the section, and, in subsec. (2), preceding "felony" inserted "class B"; and, following "felony" deleted ", and shall be punished by imprisonment in the state penitentiary for not more than ten years".

Laws 1983, ch. 118, § 2, at the end of the introductory paragraph of subsec. (1), deleted ", not married to the perpetrator".

#### Source:

Laws 1854, p. 80, § 33.

Laws 1869, p. 204, § 35.  
 Laws 1873, p. 187, § 37.  
 Code 1881, §§ 812, 814.  
 Laws 1886, p. 84, § 1.  
 Laws 1897, ch. 19, § 1.  
 Laws 1909, ch. 249, §§ 183, 184.  
 Laws 1919, ch. 132, § 1.  
 Laws 1937, ch. 74, § 1.  
 Laws 1943, ch. 112, § 1.  
 RRS §§ 2435, 2436.  
 Former §§ 9.79.010, 9.79.020.  
 Laws 1973, 1st Ex.Sess., ch. 154, §§ 122, 123.

#### Law Review Commentaries

Forcible rape in Washington—criminal and civil sanctions. 19 Gonzaga L.Rev. 363 (1983/84).

#### Library References

Rape ⇨ 1.

C.J.S. Rape § 1 et seq.

Jury instructions.

Defenses, rape, second degree or indecent liberties, see Wash.Prac. vol. 11, WPIC 19.03.

Rape, second degree, definition, see Wash.Prac. vol. 11, WPIC 41.01.  
 Rape, second degree, elements, see Wash.Prac. vol. 11, WPIC 41.02.

#### Notes of Decisions

Corpus delicti 1

Included offenses 2

#### 1. Corpus delicti

Threat of defendant to take his own child, in order to coerce defendant's estranged wife into engaging in sexual intercourse, constituted a threat of kidnapping when without legal authority and, as such, went to forcible compulsion so as to constitute crime of second-degree rape. State v. Tuitasi (1986) 46 Wash. App. 206, 729 P.2d 75.

Proof that male person had sexual intercourse with female, not his wife, and that at time she was incapable of giving her consent thereto because of unsoundness of mind, would establish corpus delicti of crime of rape under provisions now contained in this statute. State v. Meyer (1951) 37 Wash.2d 759, 226 P.2d 204.

#### 2. Included offenses

Where defendant was charged with assault in the second degree under section of statute relating to assault with intent to commit a felony, defendant was also charged with attempted rape in the sec-

dition; or

is incapable of consent by reason of being mentally incapacitated.

Third degree is a class B felony.

Enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 6, Recodified by Laws 1979, Ex.Sess., ch. 244, § 3, eff. July 1, 1979. Recodified as § 9A.44.060 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Former § 9A.44.060, § 2.

Historical Note

§ 2, 17. Laws 1869, p. 204, § 35. In subsec. ed "class deleted", imprisonment not more than five years. At the end of subsec. the perpetrator. Laws 1873, p. 187, § 37. Code 1881, §§ 812, 814. Laws 1886, p. 84, § 1. Laws 1897, ch. 19, § 1. Laws 1909, ch. 249, §§ 183, 184. Laws 1919, ch. 132, § 1. Laws 1937, ch. 74, § 1. Laws 1943, ch. 112, § 1. RRS §§ 2435, 2436. Former §§ 9.79.010, 9.79.020. Laws 1973, 1st Ex.Sess., ch. 154, §§ 122, 123.

Review Commentaries

—criminal law—Gonzaga

Library References

Rape, second degree, definition, Wash.Prac. vol. 11, WPIC 41.01. Rape, second degree, elements, Wash.Prac. vol. 11, WPIC 41.02.

Notes of Decisions

Proof that male person had sexual intercourse with female, not his wife, and that at time she was incapable of giving her consent thereto because of unsoundness of mind, would establish commission of crime of rape under provisions now contained in this statute. State v. Meyer (1951) 37 Wash.2d 759, 226 P.2d 204.

2. Included offenses

Where defendant was charged with assault in the second degree under section of statute relating to assault with intent to commit a felony, defendant was also charged with attempted rape in the

second degree under forcible compulsion section of that statute, and, under offenses as charged, proved and instructed upon the same evidence of physical violence on part of defendant constituted the "assault" committed with intent to commit rape" element of the crime of assault in the second degree and the "attempt to engage in sexual intercourse

"... by forcible compulsion" element of the crime of attempted rape in the second degree, only one offense was committed, not two. appropriate remedy was to set aside the conviction of the lesser offense of attempted rape in the second degree. State v. Hinz (1979) 22 Wash.App. 906, 594 P.2d 1350, affirmed 93 Wash.2d 510, 610 P.2d 1322.

9A.44.060. Rape in the third degree

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

Formerly § 9.79.190, enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 6. Amended by Laws 1979, Ex.Sess., ch. 244, § 3, eff. July 1, 1979. Recodified as § 9A.44.060 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979.

Historical Note

Laws 1979, Ex.Sess., ch. 244, §§ 3, 17, recodified the section; and, in subsec. (1)(a), substituted a reference to RCW 9A.44.010(6) for a reference to RCW 9.79.140(6), and, in subsec. (2), preceding "felony" inserted "class C", and, following "felony" deleted "and shall be punished by imprisonment in the state penitentiary for not more than five years".

Laws 1869, p. 204, § 35. Laws 1873, p. 187, § 37. Code 1881, §§ 812, 814. Laws 1886, p. 84, § 1. Laws 1897, ch. 19, § 1. Laws 1909, ch. 249, §§ 183, 184. Laws 1919, ch. 132, § 1. Laws 1937, ch. 74, § 1. Laws 1943, ch. 112, § 1. RRS §§ 2435, 2436. Former §§ 9.79.010, 9.79.020. Laws 1973, 1st Ex.Sess., ch. 154, §§ 122, 123.

Source:

Laws 1854, p. 80, § 33.

Law Review Commentaries

Forcible rape in Washington—criminal and civil sanctions. 19 Gonzaga L.Rev. 363 (1983/84).

Library References

Rape § 1. C.J.S. Rape § 1 et seq. Jury instructions, rape, third degree,

Definition, see Wash.Prac. vol. 11, WPIC 42.01. Elements, see Wash.Prac. vol. 11, WPIC 42.02.

## Notes of Decisions

Intent 1  
 Marriage subsequent to offense 3  
 Multiple convictions for same act 5  
 Pregnancy 4  
 Sex life of victim 2

## 1. Intent

Every laying on of hands upon female of age of fifteen does not necessarily imply intent to have carnal knowledge. *State v. Leach* (1950) 36 Wash.2d 641, 219 P.2d 972.

## 2. Sex life of victim

In a prosecution for carnal knowledge of female child, testimony concerning prior acts of intercourse between defendant and prosecuting witness is admissible to show his lustful disposition toward her. *State v. Harold* (1954) 45 Wash.2d 505, 275 P.2d 895.

State was not required to prove previous chastity of prosecuting witness, nor would proof of unchastity in any way rebut state's proof that defendant carnally knew female, or that she was under age of eighteen years, or that she was not his wife, since former statute merely recited "any female child under the age of eighteen years," not any chaste female under eighteen years of age. *State v. Linton* (1950) 36 Wash.2d 67, 216 P.2d 761.

In prosecution for statutory rape, evidence that prosecutrix had sexual intercourse with others is not admissible. *State v. Gay* (1914) 82 Wash. 423, 144 P. 711.

## 3. Marriage subsequent to offense

In prosecution for statutory rape of one under age of consent, who had since married defendant, it is error to require wife to appear in court for purpose of being identified by witness, when her condition as to pregnancy was apparent and could be observed by jury, thereby in reality compelling wife to become witness against defendant. *State v. Winnett* (1907) 48 Wash. 93, 92 P. 904.

## 4. Pregnancy

Instruction that pregnancy of complaining witness is not in and of itself evidence that defendant is guilty of specific act of carnal knowledge charged in information, is correct statement of law, and sufficient cautionary instruction, if any be needed. *State v. Jennen* (1961) 58 Wash.2d 171, 361 P.2d 739.

In prosecution for carnal knowledge of female under age of consent, it is not error to permit jury to consider pregnancy of prosecuting witness as evidence that offense has been committed and of time at which it occurred. *State v. Jennen* (1961) 58 Wash.2d 171, 361 P.2d 739.

Where charge is carnal knowledge of child, pregnancy can be shown, as it proves corpus delicti and affects credibility of prosecutrix. *State v. Chambers* (1957) 50 Wash.2d 139, 309 P.2d 1055.

## 5. Multiple convictions for same act

Legislature did not intend that defendant be convicted of both nonconsensual rape and statutory rape for single act of intercourse. *State v. Birgen* (1962) 33 Wash. App. 1, 651 P.2d 240.

## 9A.44.100. Indecent liberties

(1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is less than sixteen years of age and the perpetrator is more than forty-eight months older than the person and is in a position of authority over the person; or

## of Decisions

## 3. Marriage subsequent to offense

In prosecution for statutory rape on one under age of consent, who had since married defendant, it is error to require wife to appear in court for purpose of being identified by witness, when her condition as to pregnancy was apparent and could be observed by jury, thereby in reality compelling wife to become witness against defendant. *State v. Winness* (1907) 48 Wash. 95, 92 P. 904.

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In prosecution for carnal knowledge of female under age of consent, it is not error to permit jury to consider pregnancy of prosecuting witness as evidence that offense has been committed and of time at which it occurred. *State v. Jennen* (1961) 58 Wash.2d 171, 361 P.2d 739.

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## 5. Multiple convictions for same act

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ent liberties when he knowingly  
his spouse to have sexual contact

less than fourteen years of age; or  
less than sixteen years of age and  
forty-eight months older than the  
authority over the person; or

12

(d) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section:

(a) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(b) "Person in a position of authority" means any person who is a parent or acting in the place of a parent and is charged with any of a parent's rights, duties, or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, education, or supervision of a child, either independently or through another, no matter how briefly, at the time of the act.

(3) Indecent liberties is a class B felony.

Formerly § 9A.88.100, enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.88.100. Recodified as § 9A.44.100 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1986, ch. 131, § 1.

## Historical Note

Laws 1979, Ex.Sess., ch. 244, § 17, recodified the section without change.

Laws 1986, ch. 131, § 1, in subsec. (1), inserted subd. (c); relettered former subd. (c) as (d); in subsec. (2), inserted subdivision designation "(a)"; and added subd. (b).

## Source:

Code 1881, § 816.

Laws 1905, ch. 33, § 1.

Laws 1909, ch. 249, §§ 189, 190.

Laws 1935, ch. 74, § 2.

RRS §§ 2441, 2442.

Former §§ 979.070, 979.080.

Laws 1955, ch. 127, § 1.

Laws 1973, 1st Ex.Sess., ch. 154,

§§ 128, 129.

## Law Review Commentaries

Impact of common law and reform statutes on rape prosecutions. Wallace D. Loh, 55 Wash.L.Rev. 543 (1980).

## Library References

Infants 13, 20.

Obscenity 3.

C.J.S. Assault and Battery § 74.

C.J.S. Infants §§ 5 et seq., 95 et seq.

C.J.S. Obscenity § 8 et seq.

Jury instructions.

Defenses, rape, second degree or indecent liberties, see Wash.Prac. vol. 11, WPIC 1903.

Indecent liberties, definition, see Wash.Prac. vol. 11, WPIC 4901.

Indecent liberties, elements, see

Wash.Prac. vol. 11, WPIC 4903.

Indecent liberties, sexual contact,

definition, see Wash.Prac. vol. 11,

WPIC 4903.

Sexual intercourse, definition, see

Wash.Prac. vol. 11, WPIC 4501.

Words and Phrases (Perm.Ed.)

## WESTLAW Electronic Research

See WESTLAW guide following the Preface of this volume.

# HOUSE COMMITTEE REPORT

(7)

Date Referred: January 27, 1989

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 3/16/89

The HEALTH, EDUCATION & SOCIAL SERVICES Committee recommends that:

HOUSE BILL NO. 121 [SEXUAL ASSAULT ON CERTAIN PERSONS]  
"An Act relating to crimes of sexual assault on mentally incapable or incapacitated persons; and providing for an effective date."

[X] be replaced with CSHB 121 (HESS) [ ] the same title  
[X] a new title

[ ] have attached amendment(s)

- [X] 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

APPROVES PREVIOUS:

- [ ] fiscal note(s) published: \_\_\_\_\_
- [X] zero fiscal notes(s) published: 1/27/89

SIGNING DO PASS:

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SIGNING OTHER THAN DO PASS:  
(Do Not Pass, No Recommendation, Amend)

Cheri Davis No Rec  
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[Signature]  
 Chairman's signature

STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 27, 1989

The Honorable Sam Cotten  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that corrects inequities in the law relating to sexual assault of mentally incapable and incapacitated persons. The current law was amended last year by CSHB 545(Jud), which was signed into law as ch. 96, SLA 1988.

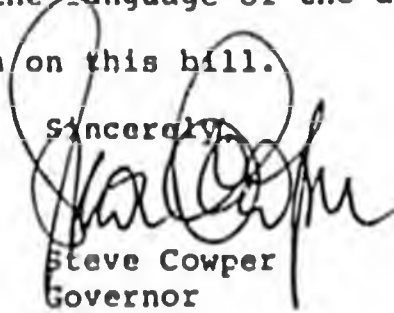
The inequity was created by an oversight, and had the effect of changing an uncontroversial law that had been in effect since the 1978 criminal code revision took effect. The main problem lies in the age element added to several provisions. For example, as a result of last year's amendments, if a 19-year-old and a 17-year-old sexually assault a person they know to be incapacitated, the 19-year-old could be prosecuted for a class B felony, and the 17-year-old would not have violated the law. Under prior law, both offenders could have been prosecuted.

A similar inequity is present in those portions of last year's amendments that stated new crimes. For example, if a 19-year-old orderly in a licensed facility and a 17-year-old orderly in a licensed facility sexually assault a person they know to be mentally incapable, the 19-year-old could be prosecuted for an unclassified felony, and the 17-year-old would not have violated the law.

In addition, the bill substitutes the word "incapacitated," in AS 11.41.425(a)(2), for the existing law's description of the condition of being incapacitated. This change is made because "incapacitated" is defined in AS 11.41.470(1), and there is no need to repeat the language of the definition.

I urge your favorable action on this bill.

Sincerely,

  
Steve Cowper  
Governor

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Department of Law  
 Title: "Sexual assault on mentally  
incapable or incapacitated persons." BRU: Prosecution  
 Sponsor: Rules Committee Components: All  
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This bill corrects a drafting oversight in the law relating to sexual assault of mentally incapable or incapacitated persons, which passed the legislature last year as CSHB 545 (Jud). Because the changes proposed in the bill are remedial in nature, the bill will not have fiscal impact on the Department of Law.

Prepared by: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Date: December 27, 1988  
 Approved by Commissioner: Grace Berg Schable, Atty. Gen. Date: December 27, 1988  
 Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)



tional or knowing conduct. *Ridgely v. State*, Ct. App. Op. No. 727 (File Nos. A-30, A-43, A-56), 739 P.2d 1299 (1987).

**Maximum sentence for first-degree murder upheld.**

See *Riley v. State*, Ct. App. Op. No. 630 (File No. A-1258), P.2d (1986).

**Sentence upheld.** — See *Travelstead v. State*, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 494 (1984); *Lewis v. State*, Ct. App. Op. No. 673 (File No. A-793), 731 P.2d 68 (1987); *Jackson v. State*, Ct. App. Op. No. 781 (File No. A-2026), P.2d (1988).

Where two defendants were convicted of first-degree murder and one of second-degree murder for the same crime, the sentencing judge was entitled to make his own evaluation of the evidence in deciding how culpable was the behavior of the one convicted of second-degree murder, and where the record before the jury sufficed to support the conclusion that she was as guilty of premeditated murder as were the other defendants, the maximum term of 99 years received by each of the defendants, though certainly severe, was justified by the extreme nature of their crime. *Ridgely v. State*, Ct. App. Op. No. 727 (File Nos. A-30, A-43, A-56), 739 P.2d 1299 (1987).

Sentence of consecutive 99-year terms for two murders is not clearly mistaken where the defendant presents a risk of continued criminal conduct which would seriously threaten the public safety. *Kruhoff v. State*, Ct. App. Op. No. 487 (File No. A-183), P.2d (1985).

**Sentence for first degree murder upheld.** — See *Staael v. State*,

Ct. App. Op. No. 454 (File No. A-78), 697 P.2d 1059 (1985).

**Conviction and sentence affirmed.** — See *Clifton v. State*, Ct. App. Op. No. 657 (File No. A-853), 728 P.2d 649 (1986).

**Convictions for first-degree and second-degree murder affirmed but sentence remanded for consideration of consecutive sentencing.** — See *Tucker v. State*, Ct. App. Op. No. 633 (File No. A-918), P.2d (1986).

**Conviction reversed where trial court's finding of voluntary Miranda waiver was in error.** — See *Hampel v. State*, Ct. App. Op. No. 517 (File No. 7398), 706 P.2d 1173 (1985).

**Conviction reversed because of admission of improperly seized evidence.** — See *Lowry v. State*, Ct. App. Op. No. 528 (File No. A-249), 707 P.2d 280 (1985).

Cited in *Lerchenstein v. State*, Ct. App. Op. No. 453 (File No. 7729), 697 P.2d 312 (1985); *Hart v. State*, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); *Ridgely v. State*, Ct. App. Op. No. 503 (File No. A-30, A-43, A-56), 705 P.2d 924 (1985); *Peckham v. State*, Ct. App. Op. No. 639 (File No. 7029), P.2d (1986); *Hastings v. State*, Ct. App. Op. No. 706 (File No. A-602), P.2d (1987); *Clifton v. State*, Sup. Ct. Op. No. 3280 (File No. S-1945), P.2d (1988); *Peel v. State*, Ct. App. Op. No. 793 (File No. A-2293), 752 P.2d 472 (1988); *Cole v. State*, Ct. App. Op. No. 805 (File No. A-1505), P.2d (1988); *Ciervo v. State*, Ct. App. Op. No. 813 (File No. A-2033), P.2d (1988).

**Sec. 11.41.110. Murder in the second degree** (a) A person commits the crime of murder in the second degree

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from

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t. App. Op. No.  
P.2d 649 (1986).  
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517 (File No.  
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App. Op. No.  
2d 280 (1985).  
State, Ct. App.  
697 P.2d 312  
p. Op. No. 482  
1 651 (1985);  
Op. No. 503  
705 P.2d 924  
Ct. App. Op.  
29), P.2d  
Ct. App. Op.  
2), P.2d  
Sup. Ct. Op.  
15), P.2d  
App. Op. No.  
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Op. No. 805  
(1988);  
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that crime, any person causes the death of a person other than one of the participants.

(b) Murder in the second degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 1 ch 66 SLA 1988)

**Effect of amendments.** — The 1988 amendment, effective May 28, 1988, substituted "knowingly engages in conduct" for "intentionally performs an act" in subsection (a)(2).

**Legislative history reports.** — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

**Substantial certainty to cause death and extreme indifference to value of human life.** — Where an eyewitness saw defendant's passengers screaming for him to stop, and the record reflected that defendant's vehicle left the road in the process of attempting to negotiate a turn at 85 m.p.h., that defendant was well aware of the turn's dangerousness, having lived in the area for many years, and having driven the road and negotiated the same curve well over a hundred times, the jury was justified in concluding that the defendant was substantially certain to cause his passengers' deaths and that he manifested an extreme indifference to the value of human life. *Stiegele v. State, Ct. App. Op. No. 580 (File No. A-694), 714 P.2d 356 (1986).*

**Murder committed with automobile.** — Where a driver's recklessness manifests an extreme indifference to human life, he can be charged with murder even though the instrument by which he causes death is an automobile. *Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983), rev'd on other grounds, Sup. Ct. Op. No. 2931 (File No. S-208), 698 P.2d 1198 (1985).*

**Offense of attempted second-degree murder was an impossibility.** *Huitt v. State, Ct. App. Op. No. 348 (File No. 7141), 678 P.2d 415 (1984).*

**Instructions.** — The trial court did not err in declining to instruct the jury concerning imperfect self defense. *Balentine v. State, Ct. App. Op. No. 538 (File No. A-381), 707 P.2d 922 (1985).*

In prosecution for extreme indifference murder, a fair reading of the given in-

structions in their entirety adequately conveyed the idea of defendant's subjective awareness of the risk to the jury. *State v. Johnson, Sup. Ct. Op. No. 3064 (File No. S-616), 720 P.2d 37 (1986).*

**First conviction of murder for motor vehicle homicide.** — See *Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983), rev'd on other grounds, Sup. Ct. Op. No. 2931 (File No. S-208), 698 P.2d 1198 (1985).*

**Exclusion of evidence relating to proximate cause not error.** — See *Kusmider v. State, Ct. App. Op. No. 404 (File No. 7845), 688 P.2d 957 (1984).*

**Conviction affirmed.** — See *Castillo v. State, Sup. Ct. Op. No. 2124 (File No. 4561), 614 P.2d 756 (1980); Kusmider v. State, Ct. App. Op. No. 404 (File No. 7845), 688 P.2d 957 (1984).*

*Stiegele v. State, Ct. App. Op. No. 580 (File No. A-694), 714 P.2d 356 (1986).*

**Conviction and sentence affirmed.** — See *Abruska v. State, Ct. App. Op. No. 502 (File No. 7672), 705 P.2d 1261 (1985).*

**Conviction reversed where trial court erred in instructing jury on self-defense.** — See *Klumb v. State, Ct. App. Op. No. 575 (File No. A-859), 712 P.2d 909 (1986).*

**Conviction reversed because of judicial error in not granting defendant's motion for change of venue.** — *Nickolai v. State, Ct. App. Op. No. 545 (File No. A-610), 708 P.2d 1292 (1985).*

**Sentence upheld.** — See *Minchow v. State, Ct. App. Op. No. 299 (File No. A-15), 670 P.2d 719 (1983); Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983); Jimmy v. State, Sup. Ct. Op. No. 409 (File No. A-51), 689 P.2d 504 (1984); Komakhuk v. State, Ct. App. Op.*

**Collateral references.** — 1 Am. Jur. 2d, Abduction and Kidnapping, § 1 et seq. 1 C.J.S., Abduction, § 1 et seq.; 51 C.J.S., Kidnapping, § 1 et seq.

Forcing another to transport one as constituting offense of kidnapping or of abduction, 62 ALR 200

Fiction of loss of services as a condition of action for abduction of child, 72 ALR 847.

Kidnapping or other criminal offense by taking or removal of child by, or under authority of, parent, or one in loco parentis, 77 ALR 317.

Offense of abduction or kidnapping as affected by defendant's belief in legality of his act, 114 ALR 870.

Fraud or false pretenses, kidnapping by, 95 ALR2d 450.

What is harm within provisions of statutes increasing penalty for kidnapping where victim suffers harm, 11 ALR3d 1053.

Seizure or detention for purposes of committing rape, robbery, or similar offense as constituting separate crime of kidnapping, 43 ALR3d 699.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim, 98 ALR3d 733.

**Sec. 11.41.300. Kidnapping.** (a) A person commits the crime of kidnapping if

(1) the person restrains another with intent to

(A) hold the restrained person for ransom, reward, or other payment;

(B) use the restrained person as a shield or hostage;

(C) inflict physical injury upon or sexually assault the restrained person or place the restrained person or a third person in apprehension that any person will be subjected to serious physical injury or sexual assault;

(D) interfere with the performance of a governmental or political function; or

(E) facilitate the commission of a felony or flight after commission of a felony; or

(2) the person restrains another

(A) by secreting and holding the restrained person in a place where the restrained person is not likely to be found; or

(B) under circumstances which expose the restrained person to a substantial risk of serious physical injury.

(b) In a prosecution under (a)(2)(A) of this section, it is an affirmative defense that

(1) the defendant was a relative of the victim;

(2) the victim was a child under 18 years of age or an incompetent person; and

(3) the primary intent of the defendant was to assume custody of the victim.

(c) Except as provided in (d) of this section, kidnapping is an unclassified felony and is punishable as provided in AS 12.55.

kidnapping by.

provisions of statute for kidnapping crim. 11 ALR3d

purposes of comparable offense as kidnapping.

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(d) In a prosecution for kidnapping, it is an affirmative defense which reduces the crime to a class A felony that the defendant voluntarily caused the release of the victim alive in a safe place before arrest, or within 24 hours after arrest, without having caused serious physical injury to the victim and without having engaged in conduct described in AS 11.41.410(a)(1) or (2) or 11.41.420. (§ 3 ch 166 SLA 1978; am § 7 ch 102 SLA 1980)

Cross references. — For punishment, see AS 12.55.125(b).

Effect of amendments. — The 1980 amendment inserted "or sexually assault him" following "injury upon him" near the beginning of subparagraph (a)(1)(C), and added "or sexual assault" at the end of sub-

paragraph (a)(1)(C).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Editor's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.260.

The crime of kidnapping is designed to protect the general personal security of citizens both in their persons and property. Ladd v. State, Sup. Ct. Op. No. 1480 (File No. 2475), 568 P.2d 960 (1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1498, 55 L. Ed. 2d 524 (1978).

Constitutionality of former statute. — See Levashakoff v. State, Sup. Ct. Op. No. 1446 (File No. 2830), 565 P.2d 504 (1977).

Scope of former statute. — See Crump v. State, Sup. Ct. Op. No. 2309 (File No. 4546), 625 P.2d 857 (1981).

For discussion of elements that were required to be proved under former AS 11.15.260, see Davis v. State, Ct. App. Op. No. 23 (File No. 5100), 635 P.2d 481 (1981).

Exemption. — The new criminal code, which states that it is an affirmative defense that defendant was a relative of the victim, provides for a broader exemption from the kidnapping statute than the absolute exemption for the abduction of a minor by his parent under former AS 11.15.260. Crump v. State, Sup. Ct. Op. No. 2309 (File No. 4546), 625 P.2d 857 (1981).

For case discussing the parental exemption contained in Alaska's former kidnapping statute, AS 11.15.260, Lythgoe v. State, Sup. Ct. Op. No. 2235 (File No. 4497), 626 P.2d 1082 (1980).

Liability of agent for person not entitled to custody of child. — Where a person, while acting as an agent for a parent

not entitled to custody, takes a child from one entitled to custody, the person can be convicted of both the substantive crime of kidnapping and conspiracy to kidnap. Crump v. State, Sup. Ct. Op. No. 2309 (File No. 4546), 625 P.2d 857 (1981).

Conspiracy to kidnap. — Conspiracy to kidnap is no longer defined as an offense in Alaska under the newly revised criminal code. Lythgoe v. State, Sup. Ct. Op. No. 2235 (File No. 4497), 626 P.2d 1082 (1980).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping were separate crimes with separate elements. Lacy v. State, Sup. Ct. Op. No. 2039 (File No. 3741), 608 P.2d 19 (1980).

Separate sentences were called for where defendant's conduct in kidnapping and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Occhipinti, Sup. Ct. Op. No. 1405 (File No. 3084), 562 P.2d 348 (1977).

Sentences upheld. — See Morrell v. State, Sup. Ct. Op. No. 1577 (File No. 2790), 575 P.2d 1200 (1978); Post v. State, Sup. Ct. Op. No. 1642 (File No. 2851), 580 P.2d 304 (1978); Davis v. State, Ct. App. Op. No. 23 (File No. 5100), 635 P.2d 481 (1981); Williams v. State, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence found excessive. — See Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981).

Applied in Nukapigak v. State, Ct. App. Op. No. 90 (File No. 5820), 645 P.2d 215 (1982); Bidwell v. State, Ct. App. Op. No. 199 (File No. 6290), 656 P.2d 592

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(b) In circumstances described in (a)(1) — (3) of this section, the person claiming the defense of justification may use nondeadly force if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Instructions. — Burden is on defendant to produce some evidence in support of claim of self-defense before he is entitled to jury instruction on that defense. Folger v. State, Ct. App. Op. No. 105 (File No. 5585), 648 P.2d 111 (1982).

Jury question. — Even a weak or implausible self-defense claim is a question for the jury. Folger v. State, Ct. App. Op. No. 105 (File No. 5585), 648 P.2d 111 (1982).

Applied in Kirby v. State, Ct. App. Op. No. 117 (File No. 5738), 649 P.2d 963 (1982).

Quoted in Cleveland v. Municipality of Anchorage, Sup. Ct. Op. No. 2390 (File No. 4956), 631 P.2d 1073 (1981).

Cited in Bell v. State, Ct. App. Op. No. 216 (File No. 6707), 657 P.2d 787 (1983).

Sec. 11.81.335. Justification: Use of deadly force in defense of self. (a) Except as provided in (b) of this section, a person may use deadly force upon another person when and to the extent

- (1) the use of nondeadly force is justified under AS 11.81.330; and
- (2) the person reasonably believes the use of deadly force is necessary for self defense against death, serious physical injury, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, or robbery in any degree.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating, except there is no duty to retreat if the person is

- (1) on premises which the person occupies as a residence and the person is not the initial aggressor; or
- (2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380. (§ 10 ch 166 SLA 1978)

Cross references. — For defenses to murder, see AS 11.41.115.

NOTES TO DECISIONS

Editor's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.100.

A finding of necessity is required before the homicide can be justifiable. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

Defendant failed to make showing of necessity required to present defense of justifiable homicide. — See Des Jardins v. State, Sup. Ct. Op. No. 1245 (File No. 2280), 551 P.2d 191 (1976).

Standards by which party attacked may act. — Where one is attacked by an

STATE OF ALASKA  
THE LEGISLATURE

OFFICE OF THE CLERK  
LEGISLATIVE AGENCY  
1000 EAST BROADWAY  
ANCHORAGE, ALASKA 99514

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 21, 1990

SUBJECT: Permanent Fund dividends of individuals  
convicted of crimes (2d CSHB 121 ( ))

TO: Representative Mark Boyer

FROM: Tamara Brandt Cook  
Director  
Division of Legal Services

Here is a new draft of HB 121. Since the bill now deals with sentencing of defendants convicted of certain offenses, and only incidentally addresses the use of permanent funds as payment for enhanced penalties, provisions dealing with priority rights of creditors to permanent funds can no longer be included in the bill without violating the single subject requirement of the constitution. I have, therefore, eliminated provisions changing those priorities from this draft and have added a priority for payments that can now be ordered under this draft as a new, last item to AS 43.23.-065(b). That way, existing priorities are not altered by this draft.

In addition, I must alert you to a possible constitutional problem related to "bill stripping" as is done in this draft. HB 121 originally dealt with AIDEA and, under this draft, now deals with an entirely different subject. In Van Brunt v. State, 653 P.2d 343 (Alaska Ct. App. 1982) the Court of Appeals addressed the three readings requirement of Article II, section 14. The court stated the general rule that a bill does not have to be read three times in its amended form, even if the amendment has completely revised the bill. However, the court also noted an exception to that rule. Under the exception, the bill must be read three times (in its amended form) if the amendment changes the subject of the bill or is not germane to and within the scope of the original title.

That decision casts doubt on what has been a long standing practice of the legislature -- gutting a bill and using the

Representative Mark Boyer  
Page 2  
March 21, 1990

number as a vehicle for entirely different material. To avoid the question it would be necessary to introduce this draft as a new bill.

TBC:lmb  
L10/020

Enclosure

go0919hD  
Cook  
3/21/90

Original sponsor(s): Rules/Governor

1 IN THE HOUSE

2 2d CS FOR HOUSE BILL NO. 121 ( )  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 SIXTEENTH LEGISLATURE - SECOND SESSION  
5 A BILL

6 For an Act entitled: "An Act relating to sentences of individuals con-  
7 victed of certain crimes."

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

9 \* Section 1. AS 12.55.015 is amended by adding a new subsection to  
10 read:

11 (g) A court, in imposing a sentence on a defendant convicted of  
12 an offense listed in AS 18.67.101(2), shall order the defendant to pay  
13 an amount not to exceed \$1,500 to the crime victim compensation fund  
14 (AS 18.67.162). As a source of payment, the court may order the next  
15 permanent fund dividend the defendant applies or has applied for that  
16 is issued at least 30 days after the date of the order to be paid to  
17 the crime vic ~ ensation fund, subject to the rights of other  
18 creditors in that dividend under AS 43.23.065(b) and (c).

19 \* Sec. 2. AS 43.23.065(b) is amended to read:

20 (b) An exemption is not available under this section for perma-  
21 nent fund dividends taken to satisfy

22 (1) child support obligations required by court order or  
23 decision of the child support enforcement agency under AS 47.23.140 -  
24 47.23.220;

25 (2) court ordered restitution under AS 12.55.045 - 12.55.-  
26 051 or 12.55.100; [OR]

27 (3) a debt owed by an eligible individual to an agency of  
28 the state, unless the debt is contested and an appeal is pending, or  
29 the time limit for filing an appeal has not expired; or

1                    (4) court ordered payments to the crime victim compensation  
2 fund under AS 12.55.015(g).  
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Cook  
3/8/90

Original sponsor(s): Rules/Governor

1  
2 IN THE HOUSE

3 ~~2d~~ CS FOR HOUSE BILL NO. 121 ( )  
4 IN THE LEGISLATURE OF THE STATE OF ALASKA  
5 SIXTEENTH LEGISLATURE - SECOND SESSION  
6 A BILL

7 For an Act entitled: "An Act relating to permanent fund dividends of  
8 individuals convicted of certain crimes."

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

10 \* Section 1. AS 12.55.015 is amended by adding a new subsection to  
11 read:

12 (g) A court, in imposing a sentence on a defendant convicted of  
13 an offense listed in AS 18.67.101(2), shall order the next permanent  
14 fund dividend the defendant applies or has applied for and is eligible  
15 for, that is issued at least 30 days after the date of the order, to  
16 be paid to the crime victim compensation fund (AS 18.67.162).

17 \* Sec. 2. AS 14.43.120(i) is amended to read:

18 (i) If a loan is in default, the commission shall notify the  
19 borrower that repayment of the remaining balance is accelerated and  
20 due by sending the borrower a notice by registered or certified mail.  
21 The permanent fund dividend of a borrower may be taken under  
22 AS 43.23.065(b) [AS 43.23.065(b)(3)] to satisfy the balance due on the  
23 defaulted loan.

24 \* Sec. 3. AS 43.23.065(b) is amended to read:

25 (b) An exemption is not available under this section for perma-  
26 nent fund dividends taken to satisfy

27 (1) child support obligations required by court order or  
28 decision of the child support enforcement agency under AS 47.23.140 -  
29 47.23.220;

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(2) court ordered restitution under AS 12.55.045 - 12.55.-  
051 or 12.55.100; [OK]

(3) court ordered payments to the crime victim compensation  
fund under AS 12.55.015(g); or

(4) a debt owed by an eligible individual to an agency of  
the state, unless the debt is contested and an appeal is pending, or  
the time limit for filing an appeal has not expired.

(d) When a missing person is found, the law enforcement agency and the clearinghouse shall destroy all records in their files obtained under this section. (§ 1 ch 72 SLA 1988)

**Sec. 18.65.640. Reports upon finding a missing person.** A person who has filed a missing person report with the clearinghouse or a law enforcement agency shall immediately notify the clearinghouse or the law enforcement agency when the location of the missing person is determined. (§ 1 ch 72 SLA 1988)

**Sec. 18.65.650. Civil penalty.** The commissioner of public safety, or a person designated by the commissioner of public safety, may file a civil complaint in the district court to enforce AS 18.65.640. A person who fails to comply with AS 18.65.640 is subject to a civil fine of not more than \$1,000. (§ 1 ch 72 SLA 1988)

**Sec. 18.65.660. Definition.** In AS 18.65.600 — 18.65.660 "clearinghouse" means the missing persons information clearinghouse established in AS 18.65.600. (§ 1 ch 72 SLA 1988)

## **Chapter 67. Violent Crimes Compensation Board.**

### **Section**

**101. Incidents and offenses to which this chapter applies**

**Sec. 18.67.101. Incidents and offenses to which this chapter applies.** The board may order the payment of compensation in accordance with the provisions of this chapter for personal injury or death that resulted from

(1) an attempt on the part of the applicant to prevent the commission of crime, or to apprehend a suspected criminal, or aiding or attempting to aid a police officer to do so, or aiding a victim of crime; or

(2) the commission or attempt on the part of one other than the applicant to commit any of the following offenses:

(A) murder in any degree;

(B) manslaughter;

(C) criminally negligent homicide;

(D) assault in any degree;

(E) kidnapping;

(F) sexual assault in any degree;

(G) sexual abuse of a minor;

(H) robbery in any degree;

(I) threats to do bodily harm; or

(J) driving while intoxicated or another crime resulting from the operation of a motor vehicle, boat, or airplane when the offender is

is found, the law enforcement agency destroy all records in their files obtained (2 SLA 1988)

on finding a missing person. A person report with the clearinghouse or immediately notify the clearinghouse or on the location of the missing person (1988)

v. The commissioner of public safety, commissioner of public safety, may file a writ to enforce AS 18.65.640. A person 65.640 is subject to a civil fine of not SLA 1988)

in AS 18.65.600 — 18.65.660 "clearinghouse information clearinghouse established (ch 72 SLA 1988)

**Compensation Board.**

offenses to which this chapter payment of compensation in accordance with this chapter for personal injury or death

an applicant to prevent the commission of a suspected criminal, or aiding or abetting a crime, or aiding a victim of crime; or on the part of one other than the following offenses:

le;

;

another crime resulting from the offense or airplane when the offender is

intoxicated. (§ 2 ch 35 SLA 1979; am § 2 ch 96 SLA 1983; am § 40 ch 14 SLA 1987; am § 1 ch 22 SLA 1989)

Effect of amendments. — The 1987 amendment deleted "contributing to the delinquency of a minor under AS 11.51.170(a)(4)" following "robbery in any degree" in paragraph (2).  
The 1989 amendment, effective August

6, 1989, inserted the subparagraph designations "(A) — (J)" in paragraph (2); substituted "any degree" for "the first or second degree" in present subparagraph (2)(D); and made related punctuation changes.

**Chapter 70. Fire Protection.**

**Article**

- 1. Prevention and Investigation (AS 18.70.075, 18.70.095)
- 3. General Provisions (AS 18.70.310)

**Article 1. Prevention and Investigation.**

**Section**

- 75. Authority of fire department officers
- 95. Smoke detection devices

**Sec. 18.70.075. Authority of fire department officers.** (a) A fire officer of a municipal fire department or a fire department registered under AS 29.60.130, while providing fire protection or other emergency services, has the authority to

- (1) control and direct activities at the scene of a fire or emergency;
- (2) order a person to leave a building or place in the vicinity of a fire or emergency, for the purpose of protecting the person from injury;
- (3) blockade a public highway, street, or private right-of-way temporarily while at the scene of a fire or emergency;
- (4) trespass upon property at or near the scene of a fire or emergency at any time of the day or night;
- (5) enter a building, including a private dwelling, or premises where a fire is in progress, or where there is reasonable cause to believe a fire is in progress, to extinguish the fire;
- (6) enter a building, including a private dwelling, or premises near the scene of a fire for the purpose of protecting the building or premises or for the purpose of extinguishing the fire that is in progress in another building or premises;
- (7) upon 24-hour notice to the owner or occupant, conduct a prefire planning survey in all buildings, structures, or other places within the municipality or the registered fire department's district, except the interior of a private dwelling, where combustible material is or may become dangerous as a fire menace to the building;
- (8) direct the removal or destruction of a fence, house, motor vehicle, or other thing judged necessary to prevent the further spread of a fire.

§ 24 ch 99 SLA A 1989)

subsection (d) was corrected by the revisor. For further reports. — For a full letter related to this section by ch. 11 276(Fin) am), see 933-934.

Department shall receive dividend fund; procedure Act (AS 43.23.065) providing a permanent fund dividend for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not credited or received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual.

procedure Act (AS 43.23.065) providing an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not credited or received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual.

in rural areas, who are eligible for public transportation need assistance to establish eligibility and to apply for permanent fund dividends; and

Department of Corrections shall administer the program.

Amendment AS 43.23.065; am § 3 ch 138 SLA 1986; am § 3 ch 26 SLA 1989)

Five cash under

under the Administrative Procedure Act (AS 43.23.065) that establish time limits for permanent fund dividend or for public transportation need assistance to establish eligibility and to apply for permanent fund dividends; and

ment shall set the time limit for applications for permanent fund dividends so that the number of eligible applicants is determined by October 1 of the year for which the dividend is declared and permanent fund dividends for a year are paid before April 30 of the year following that year;

"(3) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not credited or received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual;

"(4) assist residents of the state, particularly in rural areas, who because of language, disability, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends; and

"(5) provide the commissioner of administration with information necessary to maintain individual annuity account records and administer the annuity program."

Effect of amendments. — The 1984 amendment substituted "October" for "December" in paragraph (2).

The 1988 amendment, effective May 26, 1988, deleted "and" at the end of paragraph (3), and added paragraphs (5) and (6).

Editor's notes. — Section 4, ch. 54, SLA 1988 provides that the amendments made to this section by ch. 54, SLA 1988 apply "only to eligibility for permanent fund dividends for years after 1988."

Sec. 43.23.065. Exemption of permanent fund dividends.

(a) Except as provided in (b) of this section, 50 percent of the annual permanent fund dividend payable to an individual is exempt from levy, execution, garnishment, attachment, or any other remedy for the collection of debt. This exemption applies to an eligible individual's permanent fund dividend both before and after payment is made to the individual.

(b) An exemption is not available under this section for permanent fund dividends taken to satisfy

(1) child support obligations required by court order or decision of the child support enforcement agency under AS 47.23.140 — 47.23.220;

(2) court ordered restitution under AS 12.55.045 — 12.55.051 or 12.55.100; or

(3) a debt owed by an eligible individual to an agency of the state, unless the debt is contested and an appeal is pending, or the time limit for filing an appeal has not expired.

(c) Claims listed in (b) of this section have priority in the order listed over other claims on a permanent fund dividend. (§ 1 ch 102 SLA 1982; am § 1 ch 157 SLA 1984; am § 1 ch 57 SLA 1985; am § 67 ch 138 SLA 1986; am § 3 ch 26 SLA 1989)

Revisor's notes. — Sections 12 and 13, ch. 99, SLA 1985, amend this section and add new (b) and (c). The amendments are effective if § 1, ch. 99, SLA 1985 is repealed (see § 25, ch. 99, SLA 1985). If the amendments become law, the section will read: "(a) Fifty percent of a cash permanent fund dividend payment is exempt from levy, execution, garnishment, attachment, or any other remedy for the col-

lection of debt. This exemption applies to an eligible individual's permanent fund dividend both before and after payment is made to the individual. An exemption is not available under this section for cash permanent fund dividend payments taken to satisfy (1) child support obligations required by court order or decision of the child support enforcement agency under AS 47.23.140 — 47.23.220; (2) a debt owed

# STATE OF ALASKA

## DEPARTMENT OF LAW

CRIMINAL DIVISION/THIRD JUDICIAL DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

March 29, 1988

House Judiciary Committee  
Box V  
Juneau, Alaska 99801

Re: House Bill 545  
Sexual Assault of Mentally Handicapped Persons

Dear Committee Members:

I am an Assistant District Attorney in Anchorage who prosecutes sexual assault cases. I have reviewed House Bill 545 which proposes significant amendments to the sexual assault laws relating to mentally handicapped victims. That bill greatly increases the protection against sexual exploitation of the mentally handicapped beyond present law.

The present criminal statute of second degree sexual assault does not adequately protect the mentally handicapped persons from sexual exploitation. It does not criminalize sexual contact crimes but only prohibits sexual penetration. It places a near impossible burden on the prosecution to prove that the mental handicap was so severe that the person does not even understand the nature of the conduct. Some judges say this means we have to prove the victim cannot even comprehend that someone is having sex with them. The proposed bill offers an alternative by allowing us instead to prove that the mental handicap affected the victim's ability to evaluate the consequences of her conduct even if she is capable of knowing that sex is occurring. The present second degree statute also includes a requirement to prove that the handicapped person would not have engaged in the conduct had they been mentally normal: The sex must occur "under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration." Since it is very difficult to prove that normal people would not have engaged in sex under most circumstances, it is difficult to meet this burden of proof.

Two 1987 cases in Anchorage illustrate the problems

STEVE COWPER, GOVERNOR

REPLY TO

X 1031 WEST 4TH AVENUE, SUITE 520  
ANCHORAGE, ALASKA 99501-5906  
PHONE (907) 277-8622

☐ P.O. BOX 470  
DILLINGHAM, ALASKA 99576-0470  
PHONE (907) 842-2482

☐ 145 MAIN STREET LOOP, ROOM 201  
KENAI, ALASKA 99611-9998  
PHONE (907) 283-3131

☐ 326 CENTER AVE., SUITE 205  
KODIAK, ALASKA 99615-9998  
PHONE (907) 486-5744

☐ 809 S. CHUGACH ST., SUITE 3  
PALMER, ALASKA 99645-9998  
PHONE (907) 745-5027

☐ P.O. BOX 671  
VALDEZ, ALASKA 99686-0671  
PHONE (907) 835-2462

House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 2

in the present law which would be alleviated by the proposed bill.

Our office prosecuted the manager of an apartment building which had a number of female mentally handicapped tenants placed there by a social service agency. He was convicted of sex crimes against four of these severely mentally handicapped women who lived in the complex. He could only be convicted of a felony on two of them because he only penetrated those two. The other two women were only fondled by him. For these fondling crimes he could only be convicted of the class B misdemeanor of harassment carrying a maximum 90 day jail sentence.

In another case prosecuted last year the judge acquitted one of two defendants who were having sex in a park in broad daylight with a severely schizophrenic woman. Eyewitnesses and medical evidence proved she was being forcibly assaulted. All of the witnesses agree that the woman was so mentally ill that she could not even understand that these men were having sex with her. Part of the reason for the acquittal was the ambiguous requirement of present law to prove that the woman would not have engaged in the sexual activity had she been mentally normal. The judge reasoned that even normal people sometimes engage in group sex in public so the state had failed to prove that element. He felt the only way to prove this element was to prove that the woman was being raped or being physically injured because this is the only sexual activity to which normal people would not consent. But he acquitted him on the rape charge apparently because the woman did not testify since she was too mentally ill to be a competent witness. In other words, he ruled that to prove second degree sexual assault under present law the state had to prove first degree sexual assault, but the state could not prove first degree because the victim was so mentally ill. This was the strongest case of second degree sexual assault which could be brought under present law yet the judge acquitted the defendant and did not let the case go to the jury.

As I read House Bill 545 it would create a strong policy for protecting severely mentally handicapped people from sexual exploitation but would not criminalize consensual

House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 3

sexual activity between two handicapped people or sexual activity with persons who were not severely mentally handicapped. The proposed law requires that the mental handicap be so severe that the person cannot either understand that sex is occurring or cannot give informed consent. These people need the protection of the criminal laws which this bill gives them without unnecessarily infringing on their privacy and sexual rights.

Very truly yours,

GRACE BERG SCHAIBLE  
ATTORNEY GENERAL

DWAYNE W. MCCONNELL  
DISTRICT ATTORNEY

*Elizabeth H. Sheley*  
Elizabeth H. Sheley  
Assistant District Attorney

EHS:bch