HB
142

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: HB 142
ABBREVIATED TITLE: ESCAPE

SPONSER: HSE JUD ORIGINAL RECEIVED: April 11, 1991
WRITTEN REQUEST TO SCHEDULE REC'D: 4-11-91 FROM: Donnelly
SPONSER'S STATEMENT REC'D: with File FROM: ____
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FIVE DAY NOTICE GIVEN: Bu Hearing NOTICE OF HEARINGS GIVEN: ____
COMMITTEES OF REFERRAL: FIRST: STA SECOND: Jud THIRD: ____

COMMITTEE ACTION

Legislative Draftsman

DATE:

5-7-91 Heard — Passed Rec
5-7-91 Del to Sen Sec. 93

PERSONS TO BE NOTIFIED OF HEARING

1. SPONSOR HSE Jud
2. AGENCY
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Alaska State Legislature

House of Representatives

House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

M E M O R A N D U M

TO: Senator Rick Halford, Chair
Senate Judiciary Committee

FROM: Representative Dave Donley, Chair DD
House Judiciary Committee

RE: HB 142 - Crime of Escape

DATE: April 18, 1991

I would greatly appreciate if HB 142 could be scheduled for a judiciary committee hearing. The bill reverses the effects of two recent Alaska court of appeals' decisions relating to the crime of escape by closing two loopholes in existing law.

In the first case, Jacobson v. State, 786 P.2d 388 (Alaska App. 1990), the defendant escaped the scene of a crime after having been handcuffed by a police officer, but before being arrested on a specific charge. The court of appeals reversed the defendant's conviction, and held that the statute only allows escape charges to be brought after a defendant has been formally arrested on a specific charge. Section 2 of the bill closes this loophole by making it a crime to, having been placed under actual restraint by a peace officer before arrest, remove oneself from the restraint.

In the second case, Hubbard v. State, 800 P.2d 952 (Alaska App. 1990), the defendant was in court on a bail hearing, having been previously released on a theft charge. The judge ordered the defendant into custody but, before an officer could physically restrain the defendant, he fled the courtroom. The court of appeals held that the defendant could not be charged with a crime under these circumstances because there was no indication of any legislative intent to prohibit the conduct. Section 3 of the bill closes this loophole by including constructive restraint under an order of the court within the definition of official detention.

Thank you in advance for your help in scheduling this bill. Backup materials for the legislation are attached to this memorandum.

DD:lc

POSITION PAPER / DEPARTMENT OF PUBLIC SAFETY

BILL NO: HB 142

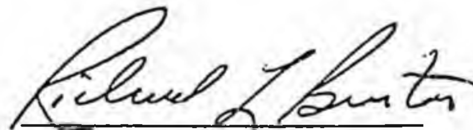
DATE: 3/13/91

TITLE: An Act relating to the crime of escape. . .

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

HB 142 amends Alaska's escape laws to clarify that an offender violates the law if he flees after having been placed under "restraint" by a peace officer or a court. This change in the language would return the meaning and scope of the law to what it was believed to be before two recent Alaska Court of Appeals' cases, Jacobson v. State and Hubbard v. State. These cases very narrowly construed the present law to exclude situations which police and prosecutors had believed to be covered.

The Department of Public Safety strongly supports HB 142.



Richard L. Burton
Commissioner

Superior Court
State of Alaska

FIRST JUDICIAL DISTRICT

DIMOND COURTHOUSE, BOX U
JUNEAU, ALASKA
99811-4100

Chambers of
Walter L. Carpeneti, Judge

(907) 463-4741

January 25, 1991

Honorable Fran Ulmer
Alaska State Representative
P.O. Box V
Juneau, AK 99811

Re: Draft legislation concerning
escape

Dear Representative Ulmer: Fran

Thank you for your letter of January 23, 1991, received here yesterday, concerning draft legislation addressing the opinions of the court of appeals in the Jacobson and Hubbard cases. You asked for my opinion or comments.

Re HB142

First, I believe that the proposed legislation clearly defines as criminal the conduct in question, and in that regard addresses the concerns raised by those two cases.

Second, note that the proposed changes would make the defendant's actions in Jacobson prosecutable as a misdemeanor, but not a felony. (I make this observation because the defendant's conduct in Jacobson arguably was felonious, although, of course, the court of appeals ruled that there was no violation of the statute.) It is a legislative decision as to whether the conduct should be a misdemeanor or a felony, but I wanted to make sure that you were aware that the draft provided that removing oneself from restraint placed by a peace officer prior to arrest would be only a misdemeanor, even if the person had been placed under restraint for a felony.

On January 17th I received from you a note regarding House Bill No. 21 and your requests for comments. I would make the following general observations:

1. The proposed legislation does not address at all the problem raised in the Jacobson and Hubbard cases. That is, it does not change or clarify the definition of "official detention".

2. The proposed legislation basically has the effect of creating a felony when one escapes from official detention for a misdemeanor (or from official detention in connection with a valid warrant), and during the escape takes a police vehicle or an emergency medical vehicle. That seems to me to be a policy decision for the legislature, and I do not believe that I can offer too much which would be helpful to that policy determination.

I hope these comments are helpful to you. Thank you for offering me the chance to comment. Please do not hesitate to contact me if you have any other questions.

Re: Rep. Barnes bill on stealing police cars

Sincerely,

Bud Carpeneti

Walter L. Carpeneti

Superior Court
State of Alaska

FIRST JUDICIAL DISTRICT

DIMOND COURTHOUSE, BOX U
JUNEAU, ALASKA
99811-4100

Chambers of
Walter L. Carpeneti, Judge

(907) 463-4741

December 6, 1990
(dictated 12/5/90)

Honorable Fran Ulmer
Alaska House of
Representatives
P.O. Box V
Juneau, AK 99811

Dear Fran:

Enclosed please find copies of the two cases which I mentioned to you during your visit yesterday.

Simply put, I cannot believe that the legislature would not have intended that the conduct of the defendants in these cases be prosecutable as escape. Mr. Jacobson was apprehended by a police officer under extremely suspicious circumstances in a darkened building after the officer had received a report of a burglary in progress. He ran from the officer when he realized, on a darkened stairway, that he was speaking to an officer of the law and not to a confederate. He was caught by the officer some hundred yards or so from the building. He feigned illness in an attempt to break away, which was momentarily successful, until tackled by the officer again. Brought back to the building by the officer, he was placed in handcuffs, which handcuffs were run around a post so as to secure Mr. Jacobson to the post. The officer left him under the guard of an armed officer. By tricking the officer and by pulling one hand through the handcuff, Mr. Jacobson was able to escape from the police. He was again caught, this time about 20 minutes later.

The narrow question in Jacobson was whether the defendant was "under official detention for a felony" when he fled. The legislature defined official detention to include "custody,

arrest, surrender in lieu of arrest, or confinement under an order of a court." I think it is clear that Mr. Jacobson was in custody. The court of appeals held that he was not. Its reasons are set out on page 393. They are wholly unpersuasive to me. (Briefly, it makes no sense to categorize these definitional terms according to whether they describe continuing circumstances or those which are fixed in time, and it does violence to legislative intent to effectively interpret away a term.) More importantly, I simply cannot believe that the legislative intended the kinds of distinctions found at page 393 when it passed this statute.

The Hubbard case is even more baffling. There, the defendant, in a courtroom, was ordered by a judge to remain in the courtroom while a bail hearing was set on. The defendant had previously been arrested, was out on release, had allegedly violated the conditions of release, and was released again. While the defendant was subsequently in court, the judge said "Mr. Hubbard will be remanded", which I take to mean that he would be remanded to custody while a bail hearing was scheduled. The judge requested the defendant to take a seat in the jury box, and he instead left the courtroom, ignoring a further call by the judge to remain.

Without sounding like a broken record, I simply cannot believe that the legislature, when it defined "official detention" as including "custody" (as well as "arrest, surrender in lieu of arrest, or confinement under an order of a court") did not intend that a person in Mr. Hubbard's situation be considered as being in custody.

In defense of the court of appeals, I believe that it is concerned about the policy implications of contrary decisions in these cases. The Jacobson court says as much at the top of the right-hand column on page 393. With due respect to the court, however, I believe it is for the legislature to weigh and then make those policy decisions, and for the courts to effectuate those decisions (short of a constitutional violation, which no one has argued here).

I hope this information is helpful to you. I would be happy to discuss it further with you.

Sincerely,

Bud Carpeneti

Walter L. Carpeneti

Enclosures

David W. JACOBSON, Appellant,

v.

STATE of Alaska, Appellee.

Nos. A-2217, A-2218.

Court of Appeals of Alaska.

Jan. 26, 1990.

Defendant was convicted in the Superior Court, First Judicial District, Juneau, Walter L. Carpeneti and Rodger W. Pegues, JJ., of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) an inventory of defendant's items did not impermissibly encroach on his privacy rights; (2) the police properly continued to inventory defendant's items even after they decided to seek a warrant; and (3) the term "official detention," as used in the escape statute, does not apply to investigative stops.

Affirmed in part, and vacated and remanded in part.

1. Searches and Seizures ⇐58

Police were authorized to open various closed containers for purposes of conducting inventory of defendant's property; only containers police opened were those that they themselves had packed and closed while seizing defendant's belongings from motel room, and those containers contained items that were in plain view when they were seized. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐58

Police properly continued to inspect defendant's belongings after deciding to apply for warrant; police continued to have legitimate interest in performing inventory even after they decided to seek warrant. U.S.C.A. Const.Amend. 4.

3. Weapons ⇐4

Butterfly knife is not "switchblade or gravity knife" and therefore does not qualify as prohibited weapon. AS 11.61.200(a)(3), (e)(1)(D).

4. Escape ⇐1

"Official detention," for purposes of escape in second-degree statute, does not apply to investigative stops. AS 11.56.310, 11.81.900(b)(34).

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

5. Escape ⇐1

"Custody," for purposes of escape in second-degree statute, begins upon arrest or surrender in lieu of arrest. AS 11.56.310, 11.81.900(b)(34).

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

Margaret W. Berck, Asst. Public Defender, Juneau, and John B. Salemi, Acting Public Defender, Anchorage, for appellant.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Atty. Gen., Juneau, for appellee.

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

OPINION

BRYNER, Chief Judge.

David W. Jacobson was convicted of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Superior Court Judge Rodger W. Pegues sentenced Jacobson to an aggregate term of seven years. Jacobson appeals, contending that the superior court erred in failing to suppress evidence that resulted from an unlawful search and seizure, in failing to dismiss the charges of escape and misconduct involving weapons, in denying his motion for a mistrial, and in admitting evidence of prior misconduct. Jacobson also challenges his sentence as excessive. We affirm the convictions for theft and burglary, reverse the conviction for misconduct involving a weapon, and remand for additional fin[...] [...]cape charge.

FACTS

On November 1, 1986, t[...] were called to investigate [...] glary at an office building [...] the building, a police offi[...] Jacobson. Jacobson ran [...] prehended a short distanc[...] officer led him back, Jacob[...] flee. He was subdued, [...] carport post outside the bu[...] *Miranda* warnings. Jaco[...] he was charged with and [...] police were "considering [...]

A short time later, Jaco[...] extricate one of his hand[...] avoided capture by swi[...] creek. Pursuing officers [...] in a nearby motel room. [...] room and placed him und[...]

The police seized Jacobs[...] longings from the motel [...] arrested him. After takin[...] the police station, they [...] items that had been in o[...] motel room but did not c[...] knapsack and bank bag [...] closed. When the inve[...] items of jewelry that appe[...] the police obtained a warr[...] search of all of Jacobson's [...]ings. Various stolen item[...] the course of the search. [...] police seized a butterfly [...] been in Jacobson's posses[...] room.

Jacobson was charged [...] theft, and escape. For [...] the butterfly knife, he w[...] misconduct involving a w[...] received separate jury tri[...] or Court Judge Rodger W[...] theft and burglary charg[...] and weapons misconduc[...] joined for trial without a [...] rior Court Judge Walter [...] being convicted on all c[...] cases were consolidated [...] Judge Pegues imposed [...] tive sentences totaling se[...]

remand for additional findings on the escape charge.

FACTS

On November 1, 1986, the Juneau police were called to investigate a possible burglary at an office building. Upon entering the building, a police officer encountered Jacobson. Jacobson ran but was apprehended a short distance away. As the officer led him back, Jacobson attempted to flee. He was subdued, handcuffed to a carport post outside the building, and given *Miranda* warnings. Jacobson asked what he was charged with and was told that the police were "considering burglary."

A short time later, Jacobson managed to extricate one of his hands. He fled and avoided capture by swimming across a creek. Pursuing officers located Jacobson in a nearby motel room. They entered the room and placed him under arrest.

The police seized Jacobson's personal belongings from the motel room when they arrested him. After taking the property to the police station, they inventoried the items that had been in open view at the motel room but did not open or search a knapsack and bank bag that had been closed. When the inventory disclosed items of jewelry that appeared to be stolen, the police obtained a warrant authorizing a search of all of Jacobson's personal belongings. Various stolen items were seized in the course of the search. In addition, the police seized a butterfly knife that had been in Jacobson's possession at the motel room.

Jacobson was charged with burglary, theft, and escape. For his possession of the butterfly knife, he was charged with misconduct involving a weapon. Jacobson received separate jury trials before Superior Court Judge Rodger W. Pegues on the theft and burglary charges. The escape and weapons misconduct charges were joined for trial without a jury before Superior Court Judge Walter Carpeneti. After being convicted on all counts, Jacobson's cases were consolidated for sentencing. Judge Pegues imposed partially consecutive sentences totaling seven years' imprisonment and specified that Jacobson would not be eligible for early release on parole.

SEARCH AND SEIZURE

On appeal, Jacobson contends that the superior court erred in denying his motion to suppress evidence, which challenged the warrantless police inventory of his personal property. After conducting an evidentiary hearing, Judge Carpeneti upheld the inventory, finding that it was performed for legitimate purposes and did not exceed the permissible limits set out in *Reeves v. State*, 599 P.2d 727, 736–38 (Alaska 1979).

[1] The court's decision must be upheld unless clearly erroneous. *State v. Bianchi*, 761 P.2d 127, 129–30 (Alaska App. 1988). Jacobson argues that the police were not authorized to open various closed containers for purposes of conducting the inventory. However, the only containers the police opened were those that they themselves had packed and closed while seizing Jacobson's belongings from the motel room. Those containers, such as Jacobson's shaving kit and grocery bags of clothing, contained items that were in plain view when they were seized. The police had a legitimate interest in protecting themselves against potential claims for loss by inventorying these items. The inventory did not impermissibly encroach on Jacobson's privacy rights. *See, e.g., Griffith v. State*, 578 P.2d 578, 580 (Alaska 1978).

[2] Jacobson also complains that the police continued to inventory his property even after they recognized items that were apparently stolen. In Jacobson's view, the fact that the police persisted in inspecting his belongings after deciding to apply for a warrant casts doubt on whether their actual purpose was to conduct an inventory. As correctly recognized by the superior court, however, even after the police decided to seek a warrant, they continued to have a legitimate interest in performing an inventory. Their continuation of the inventory does not establish an improper motive.

The superior court did not err in denying Jacobson's motion to suppress.[1]

MISCONDUCT INVOLVING WEAPONS

[3] Jacobson next challenges his conviction for misconduct involving a weapon in the first degree. Jacobson was convicted of the offense under AS 11.61.200(a)(3), which prohibits, *inter alia*, possession of a "prohibited weapon." The term "prohibited weapon" is defined in AS 11.61.-200(e)(1)(D) to include a "switchblade or gravity knife." The state's theory in charging Jacobson was that the butterfly knife found in his motel room was a gravity knife. On appeal, Jacobson argues that the statutory prohibition against possessing "prohibited weapons" is impermissibly vague. We need not decide this issue. In *State v. Strange*, 785 P.2d 563, (Alaska App.1990), we held that a butterfly knife is not a "switchblade or gravity knife" and therefore does not qualify as a prohibited weapon. Our *Strange* holding requires that Jacobson's conviction for misconduct involving a weapon must be vacated.

ESCAPE

[4, 5] Jacobson was convicted of escape in the second degree in violation of AS 11.56.310. The statute provides, in relevant part, that "[o]ne commits the crime of escape in the second degree if, without lawful authority, one removes oneself from ... official detention for a felony...." As defined in AS 11.81.900(b)(34), "official detention" means "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...."

At trial, Jacobson maintained that he had not yet been formally arrested when he removed his handcuffs and eluded the police. Jacobson argued that he was therefore not under "official detention for a felony." In finding Jacobson guilty of escape, Judge Carpeneti did not find it necessary to determine whether Jacobson had been arrested. Instead, the judge found that a person who has been subjected to an investigative stop is in "custody" and therefore under "official detention" for purposes of the escape statute, even if the stop did not rise to the level of a full arrest. Finding that, at the very least, Jacobson had been subjected to an investigative stop for a possible burglary, Judge Carpeneti concluded that he was "under official detention for a felony" when he eluded the police.

The issue presented on appeal is thus whether "custody" as used in the statutory definition of "official detention" occurs when an individual is subjected to an investigative stop that falls short of a full arrest. Jacobson argues, as he did below, that he could not have been in "custody" for purposes of the escape statute without first being placed under arrest. Jacobson's argument finds support in *Beckman v. State*, 689 P.2d 500 (Alaska App. 1984). In *Beckman*, we adopted a narrow reading of the word "custody" as used in connection with Alaska's escape statute:

> "Custody" is not expressly defined in the provisions of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

Id. at 502 n. 3 (citations omitted).

In considering the applicability of *Beckman* to the present case Judge Carpeneti noted that *Beckman* appeared to be incorrect in pinpointing the source of Alaska's escape statute. In our discussion of the term "custody" in *Beckman*, we mistakenly indicated that Alaska's definition of "official detention" was derived from Missouri Revised Statute § 556.061(3) (1979). This error stemmed from the fact that the derivation table of the Alaska Department of Law's Criminal Law Manual (Manual) listed the Missouri statute in connection with

1. Jacobson further challenges as impermissible the warrantless seizure of property from his motel room. He did not raise this argument below, however, and we find no exceptional circumstances to justify consideration of the issue as a matter of plain error. *See Moreau v. State*, 588 P.2d 275, 279–81 (Alaska 1978).

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justify consideration of the of plain error. *See Moreau v.* 75, 279–81 (Alaska 1978).

Alaska's definition of "official detention."[2] Judge Carpeneti correctly recognized that the Manual's derivation table was not meant to reflect the actual derivation of statutes included in Alaska's Revised Criminal Code. Rather, the table was compiled after the adoption of the revised code and was intended only as a guide to statutory provisions in other jurisdictions that are similar to those in Alaska's code. For the actual derivation of provisions contained in the revised code, the derivation table refers its readers to the Tentative Draft of the Revised Criminal Code that was prepared by the Criminal Law Revision Subcommission (Subcommission).[3] Relying in part on his conclusion that *Beckman* was mistaken as to the source of Alaska's escape statute, Judge Carpeneti declined to follow the narrow interpretation of "custody" that we adopted in that case.

Beckman's mistake in attributing the origin of Alaska's escape statute to Missouri law has no bearing, however, on the validity of the narrow reading that we gave to the word "custody" in that case. Nothing in the actual history of Alaska's escape statute points to the appropriateness of a broader reading of the word. In fact, the contrary conclusion seems indicated.

Alaska's escape statute was adopted almost verbatim from the escape provision proposed by the Subcommission in its Tentative Draft. *See* Alaska Criminal Code Revision, Part IV, 46–49 (Tent. Draft 1977). The Subcommission, in turn, indicated that the Tentative Draft provision was based largely on then existing Alaska law. *Id.*

When the Subcommission issued the Tentative Draft, Alaska's escape statute provided, in relevant part, that "a person commits an escape if without lawful authority he ... wilfully removes himself from official detention...." *See* former AS 11.30.090 (ch. 171, § 1, SLA 1976). The term "official detention" was defined in former AS 11.30.100(2) (ch. 171, § 3, SLA 1976) as follows:

> "Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or to be delinquent, detention for extradition or deportation or any other detention for law enforcement purposes; but "official detention" does not include supervision on probation or parole, or constraint incidental to release on bail.

Under this statutory definition, it seems clear that "official detention" did not include the type of restraint inherent in a pre-arrest investigative stop.

Although the definition of "official detention" contained in the Tentative Draft differed somewhat from that set out in former AS 11.30.090, nothing in the Tentative Draft's commentary indicated that the changes in wording were intended to alter the substance of the existing definition in any way material to this case. In its commentary, the Subcommission described three significant ways in which the Tentative Draft's proposed escape provisions differed from then existing law. The description contains no mention of broadening the concept of "official detention" to include pre-arrest investigative stops. At least in the Subcommission's view, the definition of "official detention" embodied in the Tentative Draft (which was ultimately adopted as AS 11.81.900(b)(34)) was in substance identical to that contained in former AS 11.30.100(2).

Subsequent legislative commentary is also relevant. As enacted by the legislature in 1978, the Revised Criminal Code's second-degree escape statute made it unlawful to remove oneself from "official detention *on a charge of* a felony...." Former AS 11.56.310(a)(1)(B) (ch. 166, § 6, SLA 1978) (emphasis added). This language

2. *See* Alaska Department of Law, Criminal Code Manual, derivation table at 6—41 (1985).

3. *Id.* at 6—1-2 (emphasis in original):

> It should be noted that the derivation listing was compiled by the criminal division of the Department of Law *after* enactment of the revised code. Statutes from other jurisdictions that were actually considered by the criminal law revision subcommission are set out in a table appearing as an appendix to each volume of the six part tentative draft of the code published by the subcommission.

drew verbatim from the Tentative Draft, as well as from former AS 11.30.090(b)(1)—the statute in effect when the revised Alaska Criminal Code was adopted. In 1980, however, the legislature amended the second-degree escape statute to its current form, making it unlawful to remove oneself from "official detention *for* a felony." AS 11.56.310(a)(1)(B) (emphasis added).

The legislature explained its substitution of "for a felony" for "on a charge of a felony" as follows:

> This amendment is required to make clear that escape and permitting an escape can occur when a person has been arrested for a crime, though not necessarily formally charged with a crime by way of complaint, indictment or information.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 44 at 13, 1980 Senate Journal 1436. This commentary is telling. In stating that the amended statute would permit the prosecution of persons "arrested for a crime, though not necessarily formally charged ...," the legislature clearly indicated its view that, even under the amended version of the statute, an arrest was still necessary before escape could properly be charged.

In the present case, the state has cited no escape statutes or cases from other jurisdictions defining "custody" or "official detention" to include an investigative stop falling short of an actual arrest. Nor are we aware of any such authority. Our own brief survey of escape statutes indicates that other jurisdictions uniformly construe custody to begin with arrest or surrender in lieu of arrest.[4] While some jurisdictions have specific statutory provisions expressly defining custody as beginning at the point of formal arrest, others appear to reach the same conclusion without any express statutory definition. For example, in *State v. Blaine*, 133 Vt. 345, 341 A.2d 16, 17–20 (1975), the Supreme Court of Vermont considered a case prosecuted under former 13 V.S.A. § 1501, which prohibited "escape from lawful custody of a police officer." *Id.* 341 A.2d at 18. Although Vermont's escape statute apparently did not expressly define custody, the court in *Blaine* rejected the prosecution's contention that "custody" could be found in situations involving detention or restraint falling short of actual arrest. The court concluded that "lawful custody does not exist until the arrest is made." *Id.* 341 A.2d at 20.

In short, there appears to be no support in the history of Alaska's escape statute or in the law of other jurisdictions for the conclusion that *Beckman* was incorrect in concluding that "custody" is "essentially synonymous to 'arrest.'" *Beckman*, 689 P.2d at 502 n. 3.

In rejecting the conclusion we reached in *Beckman*, Judge Carpeneti also reasoned that the statutory definition of "official detention" would not have separately included "custody" and "arrest" if both words meant precisely the same thing. The court's concern seems well-founded, since every word used in a statutory provision is presumed to have been intended to have some useful purpose. *See, e.g., Alaska Transportation Commission v. Airpac, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984). However, the narrow interpretation of "custody" we adopted in *Beckman* does not render the word superfluous as used in the statutory definition of "official detention."

Alaska Statute 11.81.900(b)(34) uses four separate terms to define "official detention": "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...." Of the fo
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4. The Model Penal Code § 242.6 at 216 states that "'[o]fficial detention' means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent...." *See also* N.Y. Penal Law § 205.00 (McKinney 1988), defining custody as "restraint by a public servant pursuant to an authorized arrest or an order of a court"; Or.Rev.Stat. § 162.135 (1987) defining custody as "the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order...."; Tex.Penal Code Ann. § 38.07 (Vernon 1974), applying escape statute to "[a] person arrested for, charged with, or convicted of...."; Utah Code Ann. § 76–8–309 (1978), defines "official custody" to mean "arrest, custody in a penal institution...."; Wash. Rev.Code § 9A.76.120 (1988), applying second-degree escape statute to persons "charged with a felony."

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court...." Of the four statutory terms, "arrest" and "surrender in lieu of arrest" involve discrete events of relatively brief duration. The remaining two terms, "custody" and "confinement under an order of a court," describe circumstances that are continuing in nature rather than fixed in time.

Once the police have completed arresting a person or once a person has surrendered in lieu of being arrested, that person typically remains in post-arrest detention pending the filing and disposition of charges or release on bail. In some situations, such as when an arrest is made pursuant to an outstanding warrant, the arrested person will be in "confinement under an order of a court" from the time the arrest is completed. In other situations, however, as when the police make a warrantless arrest at the scene of a crime, a period of post-arrest detention and confinement will ensue during which no charge will have been filed and no court order will have been issued to confine the arrested person. In such situations, the arrested person will nonetheless still be in "custody" and will therefore continue to be in "official detention" and subject to the penalties prescribed in the escape statute.

Thus, although "custody" and "arrest" are essentially synonymous insofar as they refer to the inception of "official detention" for purposes of the escape statute, "custody" is the broader of the two terms and encompasses post-arrest restraint. The legislature's use of the word "custody" in the definition of "official detention" is not inconsistent with the narrow interpretation we adopted in *Beckman*.[5]

In deciding to adhere to the narrow interpretation of "custody" that we adopted in *Beckman*, we are particularly concerned that serious practical problems might arise if our escape statute were extended to all persons who are subjected to investigative stops. All but the most casual encounters between citizens and police officers may be characterized as stops involving some degree of restraint or deprivation of liberty. *See, e.g., Waring v. State*, 670 P.2d 357, 363–66 (Alaska 1983); *Howard v. State*, 664 P.2d 603, 607–11 (Alaska App.1983). Under the view adopted by the trial court, most if not all such situations would involve "official detention" for purposes of the escape statute. In many cases, moreover, the stops would be based only on reasonable suspicion. The low quantum of evidence needed to effect an investigative stop would make it difficult to say with any degree of confidence whether the stop was "for a felony." Presumably, in all situations where the possibility of a felony had not yet been ruled out, the stop could be characterized as "official detention for a felony" and could serve as a basis for a second-degree escape charge.

We have found no authority to support such a sweeping interpretation of Alaska's escape statute. Accordingly, we conclude that the trial court erred in construing "official detention," as used in AS 11.56.310, to apply to investigative stops. In keeping with the position we adopted in *Beckman*, we hold that "custody," as used in AS 11.81.900(b)(34), begins upon arrest[6] or surrender in lieu of arrest.

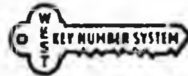
In the present case, Judge Carpeneti found it unnecessary to decide whether Jacobson had actually been arrested at the time he fled. Our conclusion that an arrest was a necessary predicate for an escape conviction requires us to remand this case to Judge Carpeneti for specific resolution of the issue.

5. Another concern voiced by Judge Carpeneti was that *Beckman*'s narrow construction of "custody" might encourage persons who are subjected to investigative stops to resist. This concern, however, seems unfounded. Those who resist or fail to cooperate with the police before being arrested are subject to sanctions other than prosecution for escape. *See, e.g.*, AS 11.56.700 (resisting arrest); AS 11.56.720 (refusing to assist a police officer). The issue is not whether such conduct is encouraged, but rather the level of sanction that the legislature intended to apply.

6. By "arrest" we refer to the statutory definition of the term. Under AS 12.25.160, "[a]rrest is the taking of a person into custody in order that the person may be held to answer for the commission of a crime." *See also Nome v. Ailak*, 570 P.2d 162, 167–69 (Alaska 1977).

If, after considering the evidence presented at trial, the judge finds beyond a reasonable doubt that Jacobson was under arrest and acted with the requisite culpable mental state, the judgment of conviction for escape may be left intact. If, on the other hand, the judge finds a reasonable doubt as to whether Jacobson was actually under arrest or acted with the applicable culpable mental state, a judgment of acquittal must be entered. We will retain jurisdiction over the appeal pending the resolution of this issue on remand.[7]

The convictions for burglary and theft are AFFIRMED. The conviction for misconduct involving a weapon is VACATED. This case is REMANDED for further findings on the escape charge.



7. Because an acquittal on the escape charge would significantly affect Jacobson's composite sentence, we find it preferable not to address Jacobson's sentencing arguments until completion of proceedings on remand. In addition to his sentencing arguments, Jacobson has raised two issues that require only brief consideration.

First, Jacobson argues that the trial court erred in denying a motion for mistrial that he made because members of his jury saw him in the custody of an officer and in close proximity to uniformed guards during the trial. We have consistently held, however, that neither the presence of guards nor a brief, inadvertent view of the defendant in custody is necessarily so prejudicial as to require a mistrial. *See, e.g., Hines v. State,* 703 P.2d 1175, 1178 (Alaska App. 1985); *Dunn v. State,* 653 P.2d 1071, 1086 (Alaska App.1982). The decision whether to grant a motion for a mistrial is consigned to the sound discretion of the trial court. *Roth v. State,* 626 P.2d 583, 585 (Alaska App.1981). Our review of the record in this case convinces us that the court did not abuse its discretion in denying Jacobson's motion for a mistrial in this case.

Second, Jacobson contends that the trial court erred in admitting evidence of other crimes during his burglary trial. Jacobson was charged with burglarizing one of several offices in an office building. The trial court allowed the state to admit evidence that property stolen from another office in the same building was found in Jacobson's possession. Jacobson contends that the challenged evidence was inadmissible under Alaska Rule of Evidence 404(b). We disagree. The challenged evidence was integrally related in time and circumstance to the crime with which Jacobson was charged and was highly relevant to discredit Jacobson's claim of mistake. Under the circumstances, the challenged evidence had legitimate relevance on an issue other than Jacobson's propensity to commit crime, and the trial court could readily find that its probative value substantially outweighed its potential for prejudice. *See Kugzruk v. State,* 436 P.2d 962, 966–68 (Alaska 1968). We find no abuse of discretion.

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

CHRISTOPHER HUBBARD, Appellant,	Court of Appeals No. A-3025 Trial Court No. 3ANS-88-5537CR
v.	OPINION
STATE OF ALASKA, Appellee.	[No. 1092 - November 16, 1990]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Joan M. Katz, Judge.

Appearances: Jacqueline Bressers, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Appellant. Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Cutler, Superior Court Judge.*

COATS, Judge.

Christopher Hubbard was convicted by a jury of escape in the second degree, a class B felony. AS 11.56.310(a)(1)(B). Hubbard appeals his conviction, arguing that the trial court erred by refusing to dismiss the indictment against him because the evidence which the state presented did not establish that he was

*Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

"in custody" at the time of the alleged escape. We agree with Hubbard and reverse his conviction.

In September 1988, Christopher Hubbard was charged with theft in the second degree and was released on bail. On September 20, 1988, Hubbard appeared for a preindictment hearing before District Court Judge Elaine Andrews. Hubbard sat in the back of the courtroom; and his attorney sat at defense counsel's table.

At the hearing, the prosecutor alleged that Hubbard had violated the conditions of bail by not remaining within the custody of his third-party custodian. He explained that within hours of being released on bail, Hubbard was rearrested on city charges: driving without a valid operator's license, giving false information to a police officer, resisting arrest, and carrying a concealed weapon. At the time of the second arrest, Hubbard was not in the presence of a third-party custodian. Apparently he was re-released on bail after the second arrest. Hubbard's attorney claimed that Hubbard had not violated the conditions of his original bail -- he told the court that when Hubbard was rearrested, he was on his way to get married, and one of the third-party custodians had been driving the car behind him.

The court responded as follows:

> Well, I think at this stage Mr. Hubbard will be remanded and we can set on a bail hearing . . . Mr. Hubbard can take a seat in the jury box because he's gonna be in custody while we decide what happens here.

Judge Andrews then set bail at $10,000, and asked, "Mr. Hubbard, do you want to come forward and take a seat in the jury box?" Hubbard did not take a seat in the jury box; he instead left the

courtroom while the parties were scheduling his bail review hearing. Judge Andrews called out to Hubbard as he left, but he did not respond. Judge Andrews then issued an arrest warrant and set bail at $20,000.

Hubbard was indicted for escape in the second degree in violation of AS 11.56.310(a)(1)(B). The indictment charged that Hubbard

> knowingly and without lawful authority remove[d] himself from the State of Alaska Court Building while under official detention for a felony offense.

Hubbard moved to dismiss the indictment, arguing that he was not under "official detention" when he left the courtroom. The motion was denied. The case proceeded to trial before Judge Katz on the escape charge. The underlying charge for theft in the second degree, for which Hubbard had been released on bail, was dismissed.

At trial, after the state rested its case, Hubbard moved for judgment of acquittal on the ground that the state had not established that he was in "official detention" when he left the courtroom. This motion was also denied.

Hubbard challenges the indictment which charged him with escape in the second degree under AS 11.56.310(a)(1)(B). The statute states:

> (a) One commits the crime of escape in the second degree if, without lawful authority, one
>
> (1) removes oneself from
>
> (B) official detention for a felony. . .

Official detention is defined in AS 11.81.900(b)(34) as:

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custody, arrest, surrender in lieu of arrest, or confinement under an order of a court in a criminal or juvenile proceedings, other than an order of conditional bail release.

The question which this case presents is whether Judge Andrews' statement, "Mr. Hubbard, do you want to come forward and take a seat in the jury box" was sufficient to create an "official detention" pursuant to AS 11.81.900(b)(34). Hubbard argues that the escape statute does not apply to him because he was never under any physical restraint before he left the courtroom. The state contends that Hubbard's construction of the statute is too narrow. The state concedes that some kind of physical contact is necessary to effectuate an arrest, but it argues that a mere order from the court can trigger "custody" and "confinement under an order of a court." The statutes do not define the terms, "custody" and "confinement under an order of the court."[1]

In previous decisions, we have held that before a person was in "official detention" for purposes of the escape statute, the state must establish that the defendant was clearly under some form of official restraint. Normally, before a defendant could be convicted of escape, we have required the state to show that the defendant was under arrest. In Maynard v. State, 652 P.2d 489, 492 n. 6 (Alaska App. 1982), we quoted with approval what appears to be the majority rule from R. Perkins, Criminal Law:

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[1]. Hubbard argues that he was released on bail at the time of his alleged escape and therefore his actions were not covered by the escape statute. We assume, for purposes of this opinion, that Judge Andrews had revoked Hubbard's bail before he left the courtroom. We therefore assume that Hubbard did not fall within the "conditional bail release" exclusion of AS 11.81.900(b)(34).

> Escape and the kindred offenses are clearly in the nature of obstructions of justice but they have been dealt with so commonly as distinct crimes that it seems wise to treat them as such. And before any effort to explore this field is attempted a clarification of terms is needed. The word 'escape' is used in two different senses in regard to the factual occurrence indicated, and in two (or more) different senses in its use as the name of a crime. In the technical sense an 'escape' is an unauthorized departure from legal custody; in a loose sense the word is used to indicate either such an unlawful departure or an avoidance of capture. And while the word is regularly used by the layman in the broader sense it usually is limited to the narrower meaning when used in the law, -- although this is not always so. It is employed in this subsection exclusively in the technical sense. Thus if an officer approaches an offender for the purpose of making an arrest, which he is unable to do because the other eludes him by running away, there has been no 'escape' as the term is used here. It is necessary, however, to bear in mind that 'arrest' is also a technical term. If an officer having authority to make an arrest actually touches his arrestee, for the manifested purpose of apprehending him, the arrest is complete 'although he does not succeed in stopping or holding him even for an instant.' In such a case there is legal custody of the arrestee for an instant although the imprisonment is constructive rather than effective. Hence there would be an escape, if such an arrestee ran away after being touched by the officer with appropriate words of arrest and lawful authority for this purpose.

R. Perkins, Criminal Law at 500 (2d ed. 969)(citations omitted). In Maynard, we concluded that "[t]he offense of escape is complete when a person once in lawful custody, voluntarily removes himself from that custody without lawful authority." Maynard, 652 P.2d at 492.

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In Beckman v. State, 689 P.2d 500, 502 n. 3 (Alaska App. 1984), this court focused on the meaning of "custody" as it is used in the definition of "official detention" in the escape statute:

> "Custody" is not expressly defined in the provision of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

In Jacobson v. State, 786 P.2d 388, 390-94 (Alaska App. 1990), we followed Beckman in interpreting the escape statute. In Jacobson, the defendant was stopped by the police and handcuffed at the scene of a possible burglary. The defendant managed to free himself from one of the handcuffs and fled from the scene. He was convicted of escape in the second degree. On appeal, we concluded that the court could find that the defendant was "under official detention for a felony" for purposes of the escape statute only if he was under arrest for a felony when he eluded the police. Id. at 393. We remanded to the trial court to determine whether the defendant was under arrest for a felony at the time that he fled.

The state asks us to conclude that Hubbard was in "confinement under an order of a court in a criminal . . . [proceeding]." The state points out that some jurisdictions have held that a defendant may be in "constructive custody" by order of the court. The state cites United States v. Peterson, 592 F.2d 1035 (9th Cir. 1979). See also Harrell v. State, 743 S.W.2d 229, 231 (Tex. Cr. App. 1987). In Peterson, the defendant appeared with his counsel for sentencing. The court imposed sentence and ordered that sentence to begin immediately. The court ordered Peterson's

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counsel to take him to the marshal's office so that Peterson could begin his sentence. When Peterson's counsel stopped to talk to someone in the hall, Peterson slipped away. Peterson was convicted of escape under 18 U.S.C. § 751(a) which provides:

> Whoever escapes or attempts to escape . . . from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate. . . shall . . . be fined not more than $5,000 or imprisoned not more than five years or both.

On appeal, the Ninth Circuit held that Peterson's actions violated the escape statute when the government proved that he had willfully failed to comply with the court's order placing him in custody. Although the Peterson case provides authority in support of the state's proposition, it is distinguishable because the federal statute is different from the Alaska statute. The federal statute appears to be more broad than the Alaska statute.

We believe that Alaska cases such as Jacobson point in the direction of strictly defining the phrase "official detention for a felony." We have consistently followed the maxim of statutory interpretation that ambiguities in penal statutes must be narrowly read and strictly construed against the government. Kinnish v. State, 777 P.2d 1179, 1181 (Alaska App. 1989); 3 C. Sands, Sutherland Statutory Construction § 59.04 at 13 (4th ed. 1974). We see no indication of any legislative intent to adopt a doctrine of "constructive restraint." See State v. Sanchez, 701 P.2d 571 (Ariz. 1985). Furthermore, we believe that there are sound reasons for requiring the state to prove that a person has been physically placed under arrest before allowing that person to

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be convicted of a felony. If the state were allowed to prove that a defendant was in custody without establishing that an arrest had been made, ambiguous situations might occur in which reasonable people could differ concerning the defendant's status. Such ambiguities could well result in a lack of notice. Adopting a bright-line rule for determining when a person is in custody will ensure objective, clear, and unambiguous notice to all concerned. See Model Penal Code and Commentaries, § 242.2 at 214 (1980) and Sanchez, 701 P.2d at 573.

We accordingly conclude that since Hubbard was never placed under arrest before he left the courtroom, he was never in custody or in confinement under an order of a court. Thus he was never under "official detention for a felony" as is required for violation of AS 11.56.310(a)(1)(B). We therefore conclude that the trial court erred in failing to dismiss the indictment against Hubbard. We accordingly reverse Hubbard's conviction and order the trial court to dismiss the indictment.

REVERSED.

David W. JACOBSON, Appellant,

v.

STATE of Alaska, Appellee.

Nos. A-2217, A-2218.

Court of Appeals of Alaska.

Jan. 26, 1990.

Defendant was convicted in the Superior Court, First Judicial District, Juneau, Walter L. Carpeneti and Rodger W. Pegues, JJ., of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) an inventory of defendant's items did not impermissibly encroach on his privacy rights; (2) the police properly continued to inventory defendant's items even after they decided to seek a warrant; and (3) the term "official detention," as used in the escape statute, does not apply to investigative stops.

Affirmed in part, and vacated and remanded in part.

1. Searches and Seizures ⇔58

Police were authorized to open various closed containers for purposes of conducting inventory of defendant's property; only containers police opened were those that they themselves had packed and closed while seizing defendant's belongings from motel room, and those containers contained items that were in plain view when they were seized. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇔58

Police properly continued to inspect defendant's belongings after deciding to apply for warrant; police continued to have legitimate interest in performing inventory even after they decided to seek warrant. U.S.C.A. Const.Amend. 4.

3. Weapons ⇔4

Butterfly knife is not "switchblade or gravity knife" and therefore does not qualify as prohibited weapon. AS 11.61.200(a)(3), (e)(1)(D).

4. Escape ⇔1

"Official detention," for purposes of escape in second-degree statute, does not apply to investigative stops. AS 11.56.310, 11.81.900(b)(34).

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

5. Escape ⇔1

"Custody," for purposes of escape in second-degree statute, begins upon arrest or surrender in lieu of arrest. AS 11.56.310, 11.81.900(b)(34).

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

Margaret W. Berck, Asst. Public Defender, Juneau, and John B. Salemi, Acting Public Defender, Anchorage, for appellant.

W.H. Hawley, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Douglas B. Baily, Atty. Gen., Juneau, for appellee.

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

OPINION

BRYNER, Chief Judge.

David W. Jacobson was convicted of theft in the second degree, burglary in the second degree, escape in the second degree, and misconduct involving a weapon in the first degree. Superior Court Judge Rodger W. Pegues sentenced Jacobson to an aggregate term of seven years. Jacobson appeals, contending that the superior court erred in failing to suppress evidence that resulted from an unlawful search and seizure, in failing to dismiss the charges of escape and misconduct involving weapons, in denying his motion for a mistrial, and in admitting evidence of prior misconduct. Jacobson also challenges his sentence as excessive. We affirm the convictions for theft and burglary, reverse the conviction for misconduct involving a weapon, and remand for additional fin
cape charge.

FACTS

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ohn B. Salemi, Acting
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R, C.J., and COATS
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remand for additional findings on the escape charge.

FACTS

On November 1, 1986, the Juneau police were called to investigate a possible burglary at an office building. Upon entering the building, a police officer encountered Jacobson. Jacobson ran but was apprehended a short distance away. As the officer led him back, Jacobson attempted to flee. He was subdued, handcuffed to a carport post outside the building, and given *Miranda* warnings. Jacobson asked what he was charged with and was told that the police were "considering burglary."

A short time later, Jacobson managed to extricate one of his hands. He fled and avoided capture by swimming across a creek. Pursuing officers located Jacobson in a nearby motel room. They entered the room and placed him under arrest.

The police seized Jacobson's personal belongings from the motel room when they arrested him. After taking the property to the police station, they inventoried the items that had been in open view at the motel room but did not open or search a knapsack and bank bag that had been closed. When the inventory disclosed items of jewelry that appeared to be stolen, the police obtained a warrant authorizing a search of all of Jacobson's personal belongings. Various stolen items were seized in the course of the search. In addition, the police seized a butterfly knife that had been in Jacobson's possession at the motel room.

Jacobson was charged with burglary, theft, and escape. For his possession of the butterfly knife, he was charged with misconduct involving a weapon. Jacobson received separate jury trials before Superior Court Judge Rodger W. Pegues on the theft and burglary charges. The escape and weapons misconduct charges were joined for trial without a jury before Superior Court Judge Walter Carpeneti. After being convicted on all counts, Jacobson's cases were consolidated for sentencing. Judge Pegues imposed partially consecutive sentences totaling seven years' imprisonment and specified that Jacobson would not be eligible for early release on parole.

SEARCH AND SEIZURE

On appeal, Jacobson contends that the superior court erred in denying his motion to suppress evidence, which challenged the warrantless police inventory of his personal property. After conducting an evidentiary hearing, Judge Carpeneti upheld the inventory, finding that it was performed for legitimate purposes and did not exceed the permissible limits set out in *Reeves v. State*, 599 P.2d 727, 736–38 (Alaska 1979).

[1] The court's decision must be upheld unless clearly erroneous. *State v. Bianchi*, 761 P.2d 127, 129–30 (Alaska App. 1988). Jacobson argues that the police were not authorized to open various closed containers for purposes of conducting the inventory. However, the only containers the police opened were those that they themselves had packed and closed while seizing Jacobson's belongings from the motel room. Those containers, such as Jacobson's shaving kit and grocery bags of clothing, contained items that were in plain view when they were seized. The police had a legitimate interest in protecting themselves against potential claims for loss by inventorying these items. The inventory did not impermissibly encroach on Jacobson's privacy rights. *See, e.g., Griffith v. State*, 578 P.2d 578, 580 (Alaska 1978).

[2] Jacobson also complains that the police continued to inventory his property even after they recognized items that were apparently stolen. In Jacobson's view, the fact that the police persisted in inspecting his belongings after deciding to apply for a warrant casts doubt on whether their actual purpose was to conduct an inventory. As correctly recognized by the superior court, however, even after the police decided to seek a warrant, they continued to have a legitimate interest in performing an inventory. Their continuation of the inventory does not establish an improper motive.

The superior court did not err in denying Jacobson's motion to suppress.[1]

MISCONDUCT INVOLVING WEAPONS

[3] Jacobson next challenges his conviction for misconduct involving a weapon in the first degree. Jacobson was convicted of the offense under AS 11.61.200(a)(3), which prohibits, *inter alia*, possession of a "prohibited weapon." The term "prohibited weapon" is defined in AS 11.61.-200(e)(1)(D) to include a "switchblade or gravity knife." The state's theory in charging Jacobson was that the butterfly knife found in his motel room was a gravity knife. On appeal, Jacobson argues that the statutory prohibition against possessing "prohibited weapons" is impermissibly vague. We need not decide this issue. In *State v. Strange*, 785 P.2d 563, (Alaska App.1990), we held that a butterfly knife is not a "switchblade or gravity knife" and therefore does not qualify as a prohibited weapon. Our *Strange* holding requires that Jacobson's conviction for misconduct involving a weapon must be vacated.

ESCAPE

[4, 5] Jacobson was convicted of escape in the second degree in violation of AS 11.56.310. The statute provides, in relevant part, that "[o]ne commits the crime of escape in the second degree if, without lawful authority, one removes oneself from ... official detention for a felony...." As defined in AS 11.81.900(b)(34), "official detention" means "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...."

At trial, Jacobson maintained that he had not yet been formally arrested when he removed his handcuffs and eluded the police. Jacobson argued that he was therefore not under "official detention for a felony." In finding Jacobson guilty of escape, Judge Carpeneti did not find it necessary to determine whether Jacobson had been arrested. Instead, the judge found that a person who has been subjected to an investigative stop is in "custody" and therefore under "official detention" for purposes of the escape statute, even if the stop did not rise to the level of a full arrest. Finding that, at the very least, Jacobson had been subjected to an investigative stop for a possible burglary, Judge Carpeneti concluded that he was "under official detention for a felony" when he eluded the police.

The issue presented on appeal is thus whether "custody" as used in the statutory definition of "official detention" occurs when an individual is subjected to an investigative stop that falls short of a full arrest. Jacobson argues, as he did below, that he could not have been in "custody" for purposes of the escape statute without first being placed under arrest. Jacobson's argument finds support in *Beckman v. State*, 689 P.2d 500 (Alaska App. 1984). In *Beckman*, we adopted a narrow reading of the word "custody" as used in connection with Alaska's escape statute:

> "Custody" is not expressly defined in the provisions of Alaska law dealing with escape. However, definitions of "custody" contained in escape statutes from other jurisdictions suggest that, in context, the word is intended to have a narrow meaning, essentially synonymous to "arrest."

Id. at 502 n. 3 (citations omitted).

In considering the applicability of *Beckman* to the present case Judge Carpeneti noted that *Beckman* appeared to be incorrect in pinpointing the source of Alaska's escape statute. In our discussion of the term "custody" in *Beckman*, we mistakenly indicated that Alaska's definition of "official detention" was derived from Missouri Revised Statute § 556.061(3) (1979). This error stemmed from the fact that the derivation table of the Alaska Department of Law's Criminal Law Manual (Manual) listed the Missouri statute in connection with Alaska's definition of "of
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1. Jacobson further challenges as impermissible the warrantless seizure of property from his motel room. He did not raise this argument below, however, and we find no exceptional circumstances to justify consideration of the issue as a matter of plain error. *See Moreau v. State*, 588 P.2d 275, 279–81 (Alaska 1978).

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Alaska's definition of "official detention."[2] Judge Carpeneti correctly recognized that the Manual's derivation table was not meant to reflect the actual derivation of statutes included in Alaska's Revised Criminal Code. Rather, the table was compiled after the adoption of the revised code and was intended only as a guide to statutory provisions in other jurisdictions that are similar to those in Alaska's code. For the actual derivation of provisions contained in the revised code, the derivation table refers its readers to the Tentative Draft of the Revised Criminal Code that was prepared by the Criminal Law Revision Subcommission (Subcommission).[3] Relying in part on his conclusion that *Beckman* was mistaken as to the source of Alaska's escape statute, Judge Carpeneti declined to follow the narrow interpretation of "custody" that we adopted in that case.

Beckman's mistake in attributing the origin of Alaska's escape statute to Missouri law has no bearing, however, on the validity of the narrow reading that we gave to the word "custody" in that case. Nothing in the actual history of Alaska's escape statute points to the appropriateness of a broader reading of the word. In fact, the contrary conclusion seems indicated.

Alaska's escape statute was adopted almost verbatim from the escape provision proposed by the Subcommission in its Tentative Draft. *See* Alaska Criminal Code Revision, Part IV, 46–49 (Tent. Draft 1977). The Subcommission, in turn, indicated that the Tentative Draft provision was based largely on then existing Alaska law. *Id.*

When the Subcommission issued the Tentative Draft, Alaska's escape statute provided, in relevant part, that "a person commits an escape if without lawful authority he ... wilfully removes himself from official detention...." *See* former AS 11.30.090 (ch. 171, § 1, SLA 1976). The term "official detention" was defined in former AS 11.30.100(2) (ch. 171, § 3, SLA 1976) as follows:

> "Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or to be delinquent, detention for extradition or deportation or any other detention for law enforcement purposes; but "official detention" does not include supervision on probation or parole, or constraint incidental to release on bail.

Under this statutory definition, it seems clear that "official detention" did not include the type of restraint inherent in a pre-arrest investigative stop.

Although the definition of "official detention" contained in the Tentative Draft differed somewhat from that set out in former AS 11.30.090, nothing in the Tentative Draft's commentary indicated that the changes in wording were intended to alter the substance of the existing definition in any way material to this case. In its commentary, the Subcommission described three significant ways in which the Tentative Draft's proposed escape provisions differed from then existing law. The description contains no mention of broadening the concept of "official detention" to include pre-arrest investigative stops. At least in the Subcommission's view, the definition of "official detention" embodied in the Tentative Draft (which was ultimately adopted as AS 11.81.900(b)(34)) was in substance identical to that contained in former AS 11.30.100(2).

Subsequent legislative commentary is also relevant. As enacted by the legislature in 1978, the Revised Criminal Code's second-degree escape statute made it unlawful to remove oneself from "official detention *on a charge of* a felony...." Former AS 11.56.310(a)(1)(B) (ch. 166, § 6, SLA 1978) (emphasis added). This language

2. *See* Alaska Department of Law, Criminal Code Manual, derivation table at 6—41 (1985).

3. *Id.* at 6—1-2 (emphasis in original):

> It should be noted that the derivation listing was compiled by the criminal division of the Department of Law *after* enactment of the revised code. Statutes from other jurisdictions that were actually considered by the criminal law revision subcommission are set out in a table appearing as an appendix to each volume of the six part tentative draft of the code published by the subcommission.

drew verbatim from the Tentative Draft, as well as from former AS 11.30.090(b)(1)—the statute in effect when the revised Alaska Criminal Code was adopted. In 1980, however, the legislature amended the second-degree escape statute to its current form, making it unlawful to remove oneself from "official detention *for* a felony." AS 11.56.310(a)(1)(B) (emphasis added).

The legislature explained its substitution of "for a felony" for "on a charge of a felony" as follows:

> This amendment is required to make clear that escape and permitting an escape can occur when a person has been arrested for a crime, though not necessarily formally charged with a crime by way of complaint, indictment or information.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 44 at 13, 1980 Senate Journal 1436. This commentary is telling. In stating that the amended statute would permit the prosecution of persons "arrested for a crime, though not necessarily formally charged ....," the legislature clearly indicated its view that, even under the amended version of the statute, an arrest was still necessary before escape could properly be charged.

In the present case, the state has cited no escape statutes or cases from other jurisdictions defining "custody" or "official detention" to include an investigative stop falling short of an actual arrest. Nor are we aware of any such authority. Our own brief survey of escape statutes indicates that other jurisdictions uniformly construe custody to begin with arrest or surrender in lieu of arrest.[4] While some jurisdictions have specific statutory provisions expressly defining custody as beginning at the point of formal arrest, others appear to reach the same conclusion without any express statutory definition. For example, in *State v. Blaine*, 133 Vt. 345, 341 A.2d 16, 17–20 (1975), the Supreme Court of Vermont considered a case prosecuted under former 13 V.S.A. § 1501, which prohibited "escape from lawful custody of a police officer." *Id.* 341 A.2d at 18. Although Vermont's escape statute apparently did not expressly define custody, the court in *Blaine* rejected the prosecution's contention that "custody" could be found in situations involving detention or restraint falling short of actual arrest. The court concluded that "lawful custody does not exist until the arrest is made." *Id.* 341 A.2d at 20.

In short, there appears to be no support in the history of Alaska's escape statute or in the law of other jurisdictions for the conclusion that *Beckman* was incorrect in concluding that "custody" is "essentially synonymous to 'arrest.'" *Beckman*, 689 P.2d at 502 n. 3.

In rejecting the conclusion we reached in *Beckman*, Judge Carpeneti also reasoned that the statutory definition of "official detention" would not have separately included "custody" and "arrest" if both words meant precisely the same thing. The court's concern seems well-founded, since every word used in a statutory provision is presumed to have been intended to have some useful purpose. *See, e.g., Alaska Transportation Commission v. Airpac, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984). However, the narrow interpretation of "custody" we adopted in *Beckman* does not render the word superfluous as used in the statutory definition of "official detention."

Alaska Statute 11.81.900(b)(34) uses four separate terms to define "official detention": "custody, arrest, surrender in lieu of arrest, or confinement under an order of a court...." Of the f[...]
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4. The Model Penal Code § 242.6 at 216 states that "'[o]fficial detention' means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent...." *See also* N.Y. Penal Law § 205.00 (McKinney 1988), defining custody as "restraint by a public servant pursuant to an authorized arrest or an order of a court"; Or.Rev.Stat. § 162.135 (1987) defining custody as "the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order...."; Tex.Penal Code Ann. § 38.07 (Vernon 1974), applying escape statute to "[a] person arrested for, charged with, or convicted of...."; Utah Code Ann. § 76-8-309 (1978), defines "official custody" to mean "arrest, custody in a penal institution...."; Wash. Rev.Code § 9A.76.120 (1988), applying second-degree escape statute to persons "charged with a felony."

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court...." Of the four statutory terms, "arrest" and "surrender in lieu of arrest" involve discrete events of relatively brief duration The remaining two terms, "custody" and "confinement under an order of a court," describe circumstances that are continuing in nature rather than fixed in time.

Once the police have completed arresting a person or once a person has surrendered in lieu of being arrested, that person typically remains in post-arrest detention pending the filing and disposition of charges or release on bail. In some situations, such as when an arrest is made pursuant to an outstanding warrant, the arrested person will be in "confinement under an order of a court" from the time the arrest is completed. In other situations, however, as when the police make a warrantless arrest at the scene of a crime, a period of post-arrest detention and confinement will ensue during which no charge will have been filed and no court order will have been issued to confine the arrested person. In such situations, the arrested person will nonetheless still be in "custody" and will therefore continue to be in "official detention" and subject to the penalties prescribed in the escape statute.

Thus, although "custody" and "arrest" are essentially synonymous insofar as they refer to the inception of "official detention" for purposes of the escape statute, "custody" is the broader of the two terms and encompasses post-arrest restraint. The legislature's use of the word "custody" in the definition of "official detention" is not inconsistent with the narrow interpretation we adopted in *Beckman*.[5]

In deciding to adhere to the narrow interpretation of "custody" that we adopted in *Beckman*, we are particularly concerned that serious practical problems might arise if our escape statute were extended to all persons who are subjected to investigative stops. All but the most casual encounters between citizens and police officers may be characterized as stops involving some degree of restraint or deprivation of liberty. *See, e.g., Waring v. State*, 670 P.2d 357, 363–66 (Alaska 1983); *Howard v. State*, 664 P.2d 603, 607–11 (Alaska App.1983). Under the view adopted by the trial court, most if not all such situations would involve "official detention" for purposes of the escape statute. In many cases, moreover, the stops would be based only on reasonable suspicion. The low quantum of evidence needed to effect an investigative stop would make it difficult to say with any degree of confidence whether the stop was "for a felony." Presumably, in all situations where the possibility of a felony had not yet been ruled out, the stop could be characterized as "official detention for a felony" and could serve as a basis for a second-degree escape charge.

We have found no authority to support such a sweeping interpretation of Alaska's escape statute. Accordingly, we conclude that the trial court erred in construing "official detention," as used in AS 11.56.310, to apply to investigative stops. In keeping with the position we adopted in *Beckman*, we hold that "custody," as used in AS 11.81.900(b)(34), begins upon arrest[6] or surrender in lieu of arrest.

In the present case, Judge Carpeneti found it unnecessary to decide whether Jacobson had actually been arrested at the time he fled. Our conclusion that an arrest was a necessary predicate for an escape conviction requires us to remand this case to Judge Carpeneti for specific resolution of the issue.

5. Another concern voiced by Judge Carpeneti was that *Beckman*'s narrow construction of "custody" might encourage persons who are subjected to investigative stops to resist. This concern, however, seems unfounded. Those who resist or fail to cooperate with the police before being arrested are subject to sanctions other than prosecution for escape. *See, e.g.,* AS 11.56.700 (resisting arrest); AS 11.56.720 (refusing to assist a police officer). The issue is not whether such conduct is encouraged, but rather the level of sanction that the legislature intended to apply.

6. By "arrest" we refer to the statutory definition of the term. Under AS 12.25.160, "[a]rrest is the taking of a person into custody in order that the person may be held to answer for the commission of a crime." *See also Nome v. Ailak*, 570 P.2d 162, 167–69 (Alaska 1977).

If, after considering the evidence presented at trial, the judge finds beyond a reasonable doubt that Jacobson was under arrest and acted with the requisite culpable mental state, the judgment of conviction for escape may be left intact. If, on the other hand, the judge finds a reasonable doubt as to whether Jacobson was actually under arrest or acted with the applicable culpable mental state, a judgment of acquittal must be entered. We will retain jurisdiction over the appeal pending the resolution of this issue on remand.[7]

The convictions for burglary and theft are AFFIRMED. The conviction for misconduct involving a weapon is VACATED. This case is REMANDED for further findings on the escape charge.

7. Because an acquittal on the escape charge would significantly affect Jacobson's composite sentence, we find it preferable not to address Jacobson's sentencing arguments until completion of proceedings on remand. In addition to his sentencing arguments, Jacobson has raised two issues that require only brief consideration.

First, Jacobson argues that the trial court erred in denying a motion for mistrial that he made because members of his jury saw him in the custody of an officer and in close proximity to uniformed guards during the trial. We have consistently held, however, that neither the presence of guards nor a brief, inadvertent view of the defendant in custody is necessarily so prejudicial as to require a mistrial. *See, e.g., Hines v. State,* 703 P.2d 1175, 1178 (Alaska App. 1985); *Dunn v. State,* 653 P.2d 1071, 1086 (Alaska App.1982). The decision whether to grant a motion for a mistrial is consigned to the sound discretion of the trial court. *Roth v. State,* 626 P.2d 583, 585 (Alaska App.1981). Our review of the record in this case convinces us that the court did not abuse its discretion in denying Jacobson's motion for a mistrial in this case.

Second, Jacobson contends that the trial court erred in admitting evidence of other crimes during his burglary trial. Jacobson was charged with burglarizing one of several offices in an office building. The trial court allowed the state to admit evidence that property stolen from another office in the same building was found in Jacobson's possession. Jacobson contends that the challenged evidence was inadmissible under Alaska Rule of Evidence 404(b). We disagree. The challenged evidence was integrally related in time and circumstance to the crime with which Jacobson was charged and was highly relevant to discredit Jacobson's claim of mistake. Under the circumstances, the challenged evidence had legitimate relevance on an issue other than Jacobson's propensity to commit crime, and the trial court could readily find that its probative value substantially outweighed its potential for prejudice. *See Kugzruk v. State,* 436 P.2d 962, 966–68 (Alaska 1968). We find no abuse of discretion.