

SEB

19



ALASKA STATE LEGISLATURE
Senator Rick Halford
President of the Senate

While in Session:
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MEMORANDUM

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Senator Rick Halford

DATE: February 15, 1993

SUBJECT: Sponsor Statement -- SB 19, "An Act relating to the crime of conspiracy."

Organized crime is a serious problem in Alaska and one that is becoming increasingly worse. These professional criminal organizations are difficult to prosecute or eliminate because of the separation their leadership maintains from the crimes that subordinate members of the organization routinely commit. In order to circumvent this organizational defense mechanism, the federal government defined the crime of conspiracy some time ago and now Alaska is the only state that has not passed a similar law.

It is important that Alaska enact a conspiracy statute and I have introduced SB 19 to provide our state and local law enforcement agencies with this valuable tool for prosecuting criminal organizations, especially drug rings.

Senate Bill 19 defines the crime of conspiracy to mean agreeing with one or more people either to commit a crime or to promote, facilitate, or cause a crime to happen if one or more of the people involved in the agreement commits an overt act to further the conspiracy. This will allow law enforcement officials to arrest and prosecute individuals before they personally attempt a crime and also without their direct participation in a crime that has already occurred. The conspiracy to commit a crime is classified one level below the class of the crime which the offender conspired to commit.

sponsor statement

Senate Bill 19 will significantly increase the efficiency and effectiveness of the criminal justice system. Its passage will improve our position in the war against drugs by enabling the prosecution of entire drug networks, rather than merely street-level pushers. Thank you for your consideration of this legislation.

Alaska Statutes

Title 11. Criminal Law.

Chapter

- 41. Offenses Against the Person (§§ 11.41.110, 11.41.300, 11.41.410 — 11.41.425, 11.41.434 — 11.41.440, 11.41.455, 11.41.470, 11.41.500)
- 46. Offenses Against Property (§ 11.46.482)
- 56. Offenses Against Public Administration (§§ 11.56.300, 11.56.330, 11.56.375, 11.56.740)
- 61. Offenses Against Public Order (§§ 11.61.120, 11.61.125, 11.61.200 — 11.61.220)
- 71. Controlled Substances (§§ 11.71.030, 11.71.040, 11.71.060, 11.71.070, 11.71.140 — 11.71.180, 11.71.900)
- 73. Imitation Controlled Substances (§ 11.73.099)
- 76. Miscellaneous Offenses (§§ 11.76.100, 11.76.105)
- 81. General Provisions (§§ 11.81.335, 11.81.900)

Chapter 16. Parties to Crime.

Sec. 11.16.110. Legal accountability based upon the conduct of another: Complicity.

NOTES TO DECISIONS

Distinction between principals and accessories abrogated.

Alaskan law does not distinguish the criminal liability of principals and accomplices. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

Prosecution for conduct of 20-year-old mentally retarded daughter. — Where defendant was prosecuted for theft on the theory that he was legally accountable for the conduct of his 20-year-old mentally retarded daughter, the trial court committed reversible error in taking judicial notice of the "fact" that defendant's daughter was not mentally culpable for the crime of theft and then advising the jury that they must accept this fact as conclusively proven. *Smallwood v. State*, 781 P.2d 1000 (Alaska Ct. App. 1989).

Ambiguous indictment. — Language of an indictment which appeared to charge defendant as a principal, but which cited subparagraph (2)(B), was sufficient to charge him as an accomplice in a car bombing. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

Restitution. — Superior court could properly require minor to pay restitution for jewelry which was taken during a burglary which he admitted and for which the court adjudicated him a delinquent, where he did not contest the fact that his participation in the burglary made him legally accountable as an accomplice of the theft of the jewelry. *J.M. v. State*, 786 P.2d 923 (Alaska Ct. App. 1990).

Quoted in *Wagers v. State*, Ct. App. Op. No. 1127 (File No. A-3238), P.2d (1991).

State and Federal Statutes

Sec. 11.16.120. Exemptions to legal accountability for conduct of another.

NOTES TO DECISIONS

Quoted in *Wagers v. State*, Ct. App. Op. No. 1127 (File No. A-3238), P.2d (1991).

Chapter 31. Attempt and Solicitation.

Sec. 11.31.100. Attempt.

NOTES TO DECISIONS

Double jeopardy. — The statutes which proscribe attempted murder, possession of explosives, and arson differ markedly in the conduct which they prohibit and in the specific societal interests which they seek to preserve, and multiple sentences for the three offenses do not violate double jeopardy. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

Attempted kidnapping and other attempted crimes. — Every attempted sexual assault, attempted physical assault, or attempted armed robbery does not necessarily involve an attempted kidnapping.

In order to make these distinctions clear, it is important that the jury be properly instructed that conviction of attempted kidnapping under AS 11.41.300(a)(1)(C) and this section requires a dual intent (1) to physically or sexually assault the victim and (2) to restrain the victim beyond what was necessary to effectuate the assault. *Alan v. State*, 793 P.2d 1081 (Alaska Ct. App. 1990).

Cited in *Charles v. State*, 780 P.2d 377 (Alaska Ct. App. 1989); *Gantner v. State*, 789 P.2d 381 (Alaska Ct. App. 1990).

Sec. 11.31.110. Solicitation.

NOTES TO DECISIONS

Sentence upheld. — Composite sentence of 40 years of imprisonment for solicitation of murder in the first degree, attempted murder in the first degree, and assault in the first degree was not clearly

mistaken. *Marzuk v. State*, 796 P.2d 1374 (Alaska Ct. App. 1990).

Quoted in *Gargan v. State*, 805 P.2d 998 (Alaska Ct. App. 1991).

Chapter 41. Offenses Against the Person.

Article

1. Homicide (§ 11.41.110)
3. Kidnapping and Custodial Interference (§ 11.41.300)
4. Sexual Offenses (§§ 11.41.410 — 11.41.425, 11.41.434 — 11.41.440, 11.41.455, 11.41.470)
5. Robbery, Extortion, and Coercion (§ 11.41.500)

Article 1. Homicide.

Section

110. Murder in the second degree

Sec. 11.41.100. Murder in the first degree.

NOTES TO DECISIONS

Intent to kill required.

Paragraph (a)(1) plainly requires proof of knowing (but not intentional) conduct rather than mere recklessness. *Odum v. State*, 798 P.2d 363 (Alaska Ct. App. 1990).

Joinder of charges. — Cocaine charges and murder, kidnapping, and robbery charges were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. *Mathia v. State*, 778 P.2d 1161 (Alaska Ct. App. 1989).

Admissibility of evidence. — Where evidence of cocaine possession and sale would have been admissible on murder, kidnapping, and robbery charges, but the murder, robbery, and kidnapping evidence would not have been admissible on the cocaine charges, the appropriate action upon appeal from conviction on all

counts was to vacate the cocaine convictions but affirm the other convictions. *Mathia v. State*, 778 P.2d 1161 (Alaska Ct. App. 1989).

Sentence upheld.

Sentence of three consecutive 99-year terms for three counts of murder and another consecutive seven-year term for attempted murder (for a total sentence of 304 years) was not excessive, where defendant had gone on a killing spree, essentially hunting his victims down, and there was no way to rule out the possibility that he might commit another series of homicides. *Kanulie v. State*, 796 P.2d 844 (Alaska Ct. App. 1990).

Cited in *Zeciri v. State*, 779 P.2d 795 (Alaska Ct. App. 1989); *Charles v. State*, 780 P.2d 377 (Alaska Ct. App. 1989); *Odum v. State*, 798 P.2d 363 (Alaska Ct. App. 1990); *Bengel v. State*, Ct. App. Op. No. 1142 (File No. A-3457), P.2d (1991).

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

(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, 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 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; am § 5 ch 4 SLA 1990)

Chapter 05. Punishment.

Secs. 11.05.010 — 11.05.060. Punishments and sentences. [Repealed, § 21 ch 166 SLA 1978. For current law on attempt, see AS 1.31; for current sentencing provisions, see AS 12.55.]

Secs. 11.05.070 — 11.05.090. [Renumbered as AS 33.30.310, 33.30.320, and 33.30.300.]

Sec. 11.05.100. Computation and execution of jail sentences. [Repealed, § 21 ch 166 SLA 1978. For current sentencing provisions, see AS 12.55.]

Secs. 11.05.110 — 11.05.120. Employment of imprisoned persons. [Repealed, § 6 ch 53 SLA 1982.]

Sec. 11.05.130. [Renumbered as AS 33.30.290.]

Secs. 11.05.140 — 11.05.160. Imposition of punishment; punishment for felonies. [Repealed, § 21 ch 166 SLA 1978. For current sentencing provisions, see AS 12.55.]

Chapter 10. Parties to Crime.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.16 and 11.31.110.]

Chapter 15. Offenses Against the Person.

Secs. 11.15.010 — 11.15.050. Murder and manslaughter. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.100 — 11.41.140.]

Sec. 11.15.060. [Renumbered as AS 18.16.010.]

Secs. 11.15.070 — 11.15.340. Homicide, sexual offenses, assaults, robbery, larceny, kidnapping, black mail, libel and slander. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.]

Chapter 16. Parties to Crime.

Section	Section
100. Legal accountability based upon conduct	120. Exemptions to legal accountability for conduct of another
110. Legal accountability based upon the conduct of another: Complicity	130. Legal accountability of organizations

Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 37-51, 163-174.

22 C.J.S., Criminal Law, §§ 79-99.
Criminal responsibility of one conspiring in offense which he is incapable of committing personally, 6 ALR 282; 74 ALR 1110; 131 ALR 1322.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 276.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one, present at homicide without preconcert or conspiracy, criminally responsible, 12 ALR 277.

Responsibility of persons participating in jail delivery for homicide committed by one of their number, 16 ALR 456.

Principal in second degree, or aider and abettor in case of felonious assault, 16 ALR 1043.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for legitimate purposes, with knowledge that it is to be used by another for criminal purposes, 103 ALR 331.

Coercion, compulsion or duress as defense to criminal prosecution, 40 ALR2d 903.

Necessary before fact in manslaughter, 85 ALR2d 176.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 868.

Acquittal of principal or his conviction of lesser degree of offense as affecting prosecution of accessory and aider and abettor, 9 ALR4th 972.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 ALM4th 192.

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law, 41 ALR4th 361.

Withdrawal of life supports from comatose patient, 47 ALR4th 18.

Criminal responsibility under 18 USCS 2(b) of one who lacks capacity to commit an offense but causes another to do so, 52 ALR Fed. 769.

Sec. 11.16.100. Legal accountability based upon conduct. A person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable under AS 11.16.110, or by both. (§ 1 ch 166 SLA 1978)

NOTES TO DECISIONS

Former law construed. — See Turner v. State, 612 P.2d 923 (Alaska 1973). (Decided under former AS 11.10.010.)

Legal accountability statutes apply to fish and wildlife offenses. Knudson v. State, 736 P.2d 776 (Alaska Ct. App. 1987).

Applied in Kinegak v. State, 747 P.2d 641 (Alaska Ct. App. 1987).

Cited in Dailey v. State, 676 P.2d 657 (Alaska Ct. App. 1984).

Sec. 11.16.110. Legal accountability based upon the conduct of another; Complicity. A person is legally accountable for the conduct of another constituting an offense if

(1) the person is made legally accountable by a provision of law defining the offense;

(2) with intent to promote or facilitate the commission of the offense, the person

(A) solicits the other to commit the offense; or

(B) aids or abets the other in planning or committing the offense; or

(3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct. (§ 1 ch 166 SLA 1978)

Cross references. — For solicitation, see AS 11.31.110.

NOTES TO DECISIONS

Editor's notes. — Some of the cases cited in the notes below were decided under former AS 12.15.010.

Distinction between principals and accessories abrogated. — Former AS 12.15.010 abrogated the distinction between principals and accessories. Tarnof v. State, 492 P.2d 109 (Alaska 1971).

By former AS 12.15.010, Alaska abolished the common-law distinction between accessories and principals to a crime. Rice v. State, 569 P.2d 419 (Alaska 1979).

Legal accountability statutes apply to fish and wildlife offenses. Knutson v. State, 736 P.2d 775 (Alaska Ct. App. 1987); Vaden v. State, 742 P.2d 784 (Alaska Ct. App. 1987).

Knowledge of fact of criminality irrelevant. — In order for a defendant to be found liable as an accomplice, the state need only prove that defendant intentionally aided co-defendant, knowing of co-defendant's criminal purpose. It is not necessary that he know of the criminality of the conduct. Mudge v. State, 760 P.2d 1046 (Alaska Ct. App. 1988).

Abrogation did not apply only to punishment. — The abrogation of the distinction between accessories and principals mandated by former AS 12.15.010 did not apply only to punishment. Scharver v. State, 661 P.2d 309 (Alaska 1977).

To "prosecute" one as a principal includes charging him as a principal. Scharver v. State, 661 P.2d 309 (Alaska 1977).

Aiders and abettors as principals. — Former AS 12.15.010 provided that anyone aiding or abetting the commission of a crime should be prosecuted, tried, and punished as a principal. Tarnof v. State, 492 P.2d 109 (Alaska 1971).

An accused who is indicted as a principal is subject to conviction upon evidence which shows that he only aided and abetted. Scharver v. State, 661 P.2d 309 (Alaska 1977).

One indicted as a principal may be convicted of the crime an evidence which shows that he merely aided and abetted. Hanson v. State, 460 P.2d 170 (Alaska 1969).

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. Thomas v. State, 391 P.2d 18 (Alaska 1964); Carman v. State, 602 P.2d 1255 (Alaska 1979); Hensel v. State, 604 P.2d 222 (Alaska 1979).

It can be inferred that the words "aid and abet" are used synonymously with various combinations of the words assist, advise, counsel, procure, encourage, incite and instigate. Tarnof v. State, 612 P.2d 923 (Alaska 1973); Carman v. State, 602 P.2d 1255 (Alaska 1979).

A defendant need not commit every element of an offense to be guilty as a principal under the law, so long as the state proves commission of the whole offense by someone and the aiding or abetting of the offense by the defendant. An-

they v. State, 621 P.2d 486 (Alaska 1974).

When person is guilty as accomplice. — See Gordon v. State, 633 P.2d 25 (Alaska 1976).

Not just any act of the defendant will suffice. The act must aid, abet, assist, or facilitate the commission of the particular substantive crime for which the state seeks to hold the defendant liable as an accomplice. Hensel v. State, 604 P.2d 222 (Alaska 1979).

Focus in determining accomplice's liability. — In determining an accomplice's liability for the crime committed by another, the focus is not only upon the substantive offense committed by the perpetrator; it is also upon the accomplice's acts and mental state vis-a-vis the criminal enterprise in general. Hensel v. State, 604 P.2d 222 (Alaska 1979).

With respect to the mental element, liability for the crime of another will attach only upon a showing that an individual had knowledge of the criminal enterprise and specifically intended, by his conduct, to aid, abet, assist, or participate in the criminal enterprise. Hensel v. State, 604 P.2d 222 (Alaska 1979).

Evidence of the defendant's diminished capacity is admissible to negate the elements of knowledge and specific criminal intent required for accomplice liability. Hensel v. State, 604 P.2d 222 (Alaska 1979).

Photographs are relevant to establish aiding and abetting the commission of the crime and may be admitted into evidence. In re P.H., 604 P.2d 837 (Alaska 1972).

A witness' testimony that he bought two ski masks at defendant's request which he knew at the time would be used

for a "hold-up," and that he paid his own money for them would have been sufficient to allow the jury to conclude that the witness was an accomplice in the robbery. Carman v. State, 602 P.2d 1255 (Alaska 1979).

In order to establish liability as accomplice in sale of cocaine, it was incumbent on the state to prove, first, that defendant was aware of another individual's plan to resell the cocaine, and, second, that in supplying the individual with cocaine, defendant acted with the intent to promote the other individual's plan. The state was not required to show defendant's awareness of and intent to promote the specific sale that actually occurred. Shindle v. State, 731 P.2d 592 (Alaska Ct. App. 1987).

Aiding and abetting undercover agents. — Defendants who aided and abetted undercover agents in committing illegal hunting acts were properly convicted as accomplices despite agents' lack of criminal liability. Vaden v. State, 760 P.2d 1102 (Alaska 1989).

Absence of accomplice-as-matter-of-law instruction not erroneous. — See Moseberg v. State, 724 P.2d 706 (Alaska 1981).

Applied in Dowell v. State, 728 P.2d 1220 (Alaska Ct. App. 1986); Kinegan v. State, 747 P.2d 641 (Alaska Ct. App. 1987); Thiel v. State, 762 P.2d 478 (Alaska Ct. App. 1988).

Quoted in Cole v. State, 764 P.2d 752 (Alaska Ct. App. 1988).

Cited in Dailly v. State, 675 P.2d 657 (Alaska Ct. App. 1984); Hale v. State, 764 P.2d 312 (Alaska Ct. App. 1988).

Sec. 11.16.120. Exemptions to legal accountability for conduct of another. (a) In a prosecution for an offense in which legal accountability is based on the conduct of another person,

(1) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of criminal intent,

(A) terminated the defendant's complicity before the commission of the offense;

(B) wholly deprived the defendant's complicity of its effectiveness in the commission of the offense; and

(C) gave timely warning to law enforcement authorities or, if timely warning could not be given to law enforcement authorities by

reasonable efforts, otherwise made a reasonable effort to prevent the commission of the offense;

(2) it is not a defense that

(A) the other person has not been prosecuted for or convicted of an offense based upon the conduct in question or has been convicted of a different offense or degree of offense;

(B) the offense, as defined, can be committed only by a particular class of persons to which the defendant does not belong, and the defendant is for that reason legally incapable of committing the offense in an individual capacity; or

(C) the other person is not guilty of the offense.

(b) Except as otherwise provided by a provision of law defining an offense, a person is not legally accountable for the conduct of another constituting an offense if

(1) the person is the victim of the offense; or

(2) the offense is so defined that the person's conduct is inevitably accidental to its commission. (§ 1 ch 166 SLA 1978)

NOTES TO DECISIONS

Conviction of necessary when principal is undercover agent. — A professional hunting guide could properly be convicted as an accessory to hunting violations when the principal was an undercover agent for the government, since the defense of entrapment under AS 11.81.460 provides an adequate remedy for a government overreaching. *Vaden v. State*, 742 P.2d 784 (Alaska Ct. App. 1987).

A justification defense is personal to an undercover agent, and not transferable to a defendant charged as his accomplice.

Vaden v. State, 768 P.2d 1102 (Alaska 1989).

Because the accomplice's state of mind is the focus in determining accomplice liability, defenses of entrapment, duress and heat of passion are not imputed to the accomplice. *Vaden v. State*, 768 P.2d 1102 (Alaska 1989).

"Renunciation" is an affirmative defense, and the burden is on the defendant to prove it by a preponderance of the evidence. *Hale v. State*, 764 P.2d 313 (Alaska Ct. App. 1988).

Quoted in *Kott v. State*, 678 P.2d 386 (Alaska 1984).

Sec. 11.16.130. Legal accountability of organizations.
(a) Except as otherwise expressly provided, an organization is legally accountable for conduct constituting an offense if the conduct

(1) is the conduct of its agent and

(A) within the scope of the agent's employment and in behalf of the organization; or

(B) is solicited, subsequently ratified, or subsequently adopted by the organization; or

(2) consists of an omission to discharge a specific duty of affirmative performance imposed on organizations by law.

(b) In this section "agent" means a director, officer, or employee of an organization or any other person who is authorized to act in behalf of the organization. (§ 1 ch 166 SLA 1978)

Cross references. — For schedule of fine for a person convicted of an offense, see AS 12.55.035(c).

Chapter 20. Offenses Against Property.

Secs. 11.20.010 — 11.20.070. Arson and Related Crimes. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.400 — 11.46.460.]

Secs. 11.20.080 — 11.20.135. Burglary. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.300 — 11.46.310.]

Secs. 11.20.140 — 11.20.277. Larceny. [Repealed, § 21 ch 166 SLA 1978. For current provisions on theft, see AS 11.46.100 — 11.46.295.]

Secs. 11.20.280 — 11.20.340. Embezzlement. [Repealed, § 21 ch 166 SLA 1978. For theft by failure to make required disposition of funds received or held, see AS 11.46.210.]

Sec. 11.20.345. Extortion. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.41.520.]

Sec. 11.20.350. Receiving Stolen Goods. [Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.190 and 11.46.210.]

Secs. 11.20.360 — 11.20.510. False Pretenses and Frauds. [Repealed, § 21 ch 166 SLA 1978. For theft by deception, see AS 11.46.180; for business and commercial offenses, see AS 11.46.600 — 11.46.740.]

Secs. 11.20.515 — 11.20.650. Malicious Mischief and Trespass. [Repealed, § 21 ch 166 SLA 1978. For criminal trespass, see AS 11.46.320 — 11.46.350; for criminal mischief, see AS 11.46.480 — 11.46.486.]

Sec. 11.20.660. [Renumbered as AS 11.76.120.]

Secs. 11.20.670 — 11.20.690. Misuse, Damage, or Destruction. [Repealed, § 21 ch 166 SLA 1978. For criminal mischief, see AS 11.46.480 — 11.46.486.]

Chapter 22. Alaska Credit Card Crimes Act.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.285 — 11.46.290.]

Chapter 25. Forgery and Counterfeiting.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.46.500 — 11.46.580.]

Chapter 30. Offenses Against Public Justice.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.66.]

Chapter 31. Attempt and Solicitation.

Section
100. Attempt
110. Solicitation
140. Multiple convictions barred

Section
150. Substantive crimes involving attempt or solicitation

Collateral references. — 21 Am. Jr. 2d, Criminal Law, §§ 158-162.

22 C.J.S., Criminal Law, §§ 73-78.
What amounts to attempt to manufacture intoxicating liquor within criminal law, 22 ALR 227.

Solicitation to crime as substantive common-law offense, 35 ALR 861.

What constitutes attempt to commit robbery, 55 ALR 714.

Criminal offense of obtaining money under false pretenses, or attempting to do so, predicated upon receipt or claim of benefits under insurance policy, 135 ALR 1167.

Attempt to commit crime as to driving, being in control of, or operating a motor vehicle while intoxicated, 47 ALR2d 590.

Entrapment to commit or attempt abortion, 53 ALR2d 1166.

What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Attempt to commit assault as criminal offense, 70 ALR2d 607.

Fact that gun was unloaded as affecting criminal responsibility for attempt to commit murder, 79 ALR2d 1432.

Attempts to receive stolen property, 85 ALR2d 259.

Attempt to escape or commit prison

breach as affected by mena employed, 96 ALR2d 520.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like, 6 ALR3d 241.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 23 ALR3d 1351.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 859.

Comment note on impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 ALR3d 375.

What constitutes attempted murder, 54 ALR3d 612.

Temporary unauthorized absence of prisoner as escape or attempted escape, 70 ALR3d 695.

What conduct amounts to an overt act or act done toward commission of larceny so as to sustain charge of attempt to commit larceny, 76 ALR3d 842.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 ALR3d 1309.

Use of force or intimidation in retaining

property or in attempting to escape, rather than in taking property, an element of robbery, 93 ALR3d 643.

Criminal liability of third persons for death of another as result of accused's attempt to kill self or assist another's suicide, 40 ALR4th 702.

Impossibility of consummation as defense to prosecution for attempt, 41 ALR4th 688.

What constitutes attempted bank robbery under 18 USCS § 2113(a), making it offense to take or attempt to take, by force, violence, or intimidation, any property, money, or other thing of value from bank, 37 ALR Fed. 255.

Criminal responsibility under 18 USCS § 2(b) of one who lacks capacity to commit an offense but who causes another to do so, 52 ALR Fed. 769.

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

(1) an unclassified felony if the crime attempted is murder in the first degree;

(2) a class A felony if the crime attempted is an unclassified felony other than murder in the first degree;

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

Cross references. — For legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982 in the Temporary and Special Act.

Effect of amendments. — The 1988 amendment, in subsection (d), inserted present paragraph (1), redesignated former paragraphs (1)-(6) as present paragraphs (2)-(6), and added "other than mur-

der in the first degree" at the end of paragraph (2).

Legislative history reports. — For a report on a 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 11.05.020.

The word "attempt" generally means the trial or physical effort to do a particular thing. *Wooldridge v. United States*, 237 F. 776 (9th Cir. 1916).

When attempt complete under former law. — See *Lemko v. United States*, 14 Alaska 587, 211 F.2d 73 (9th Cir. 1954); *Wooldridge v. United States*, 237 F. 776 (9th Cir. 1916).

In the area of attempt, criminal culpability was present under former AS 11.05.020 where there was the formation of criminal intent, a preparation to commit the crime, and a direct unequivocal act toward its perpetration. *Braham v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 66 L. Ed. 2d 410 (1978).

Mere preparation to commit a crime, not followed by an overt act done toward its commission, did not constitute an attempt under former AS 11.05.020. There were borderline cases where it was sometimes difficult to determine whether preparation to commit a crime has come near enough to the accomplishment of the act so that an attempt had been committed. *Gargan v. State*, 436 P.2d 968 (Alaska 1968).

Mere preparation to commit a crime, not followed by an overt act done toward its commission, did not constitute an attempt. *Lemko v. United States*, 14 Alaska 587, 211 F.2d 73 (9th Cir. 1954).

When one's acts were of such a preliminary nature so as to constitute mere preparation for the contemplated crime, there was no crime of attempt. *Braham v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 66 L. Ed. 2d 410 (1978).

Question of degree. — Whether an act taken or done in contemplation of the commission of a crime was merely preparatory and did not constitute attempt, or whether they were sufficiently close to the

consummation of the crime to amount to attempt, was a question of degree and depended upon the facts and circumstances of a particular case. *Braham v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 66 L. Ed. 2d 410 (1978).

Inadequacy of former statute. — Former AS 11.05.020 was apparently inadequate to codify effectively as a crime the situation involving the single act of contracting for another to perform a criminal act. *Braham v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 66 L. Ed. 2d 410 (1978).

Applicability of this section. — Since under Alaska law, delivery of cocaine is expressly defined to include an attempt of delivery, the more specific statute controls and this section, the general attempt statute, is therefore not applicable to delivery of cocaine. *Stuart v. State*, 698 P.2d 1218 (Alaska Ct. App. 1985).

Where defendant contracted with someone to kill another, when he instructed the killer to visit the victim, his intention being that there would be fostered a relationship of trust and confidence between the killer and the victim, thus placing the killer in a position where he would be closer to the victim and could more readily kill him, the killer's visit with the victim, at defendant's direction, was the doing of a direct, unequivocal act toward the commission of the crime of murder, which followed the formation of a criminal intent and a preparation to commit this crime. *Braham v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 66 L. Ed. 2d 410 (1978).

Factual impossibility not apparent to actor. — A factual impossibility which was not apparent to the actor at the time should not, as a matter of policy, insulate him from conviction for attempting the commission of the offense. *Gargan v. State*, 436 P.2d 968 (Alaska 1968).

"Empty pocket doctrine." — See

Gargan v. State, 436 P.2d 968 (Alaska 1968).

Attempt statute applied to attempted violation of narcotic drug statute. — Persons attempting to commit the crime defined by AS 17.10.010 of the Alaska Uniform Narcotic Drug Act (now repealed) were not exempted or excepted from the provisions of the attempt statute. *Simpson v. United States*, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

An attempt was necessarily included in an indictment for statutory rape. *Sekloff v. United States*, 283 F. 98 (9th Cir. 1922).

Failure to include "substantial step" language in indictment for attempted murder was a defect only as to form, where the indictment included a concise description of defendant's actions that constituted the offense, including the proper language regarding his state of mind. *Ciervo v. State*, 766 P.2d 907 (Alaska Ct. App. 1988).

Indictment need not specify intent to be proved for attempted rape. — There is authority for the proposition that a specific intent must be proved for the crime of attempted rape. But there is no authority supporting the proposition that the indictment must specify that intent. *Stato v. Thomas*, 625 P.2d 1092 (Alaska 1974).

Even though there is no question that the crime of attempt requires a specific intent, it seems equally beyond dispute that a charge of attempt to commit a specific crime clearly advises the defendant of the offense with which he is charged. *Stato v. Thomas*, 625 P.2d 1092 (Alaska 1974).

Indictment charging attempted rape and citing only the rape statute held sufficient. — See *Stato v. Thomas*, 625 P.2d 1092 (Alaska 1974).

Attempted kidnapping was class A felony under this section before 1982 amendment. — Under the law as it existed before the 1982 amendment to this section became effective, attempted kidnapping was unquestionably a class A felony. *Galbraith v. State*, 693 P.2d 880 (Alaska Ct. App. 1985).

Attempted first-degree sexual assault. — At the very least, a defendant must have formed a specific intent to engage in sexual penetration in order to be convicted of attempted first-degree sexual assault. *Baden v. State*, 667 P.2d 1275 (Alaska Ct. App. 1983).

Five-year presumptive sentence for

attempted sexual assault. — It was not manifestly unjust to impose a five-year presumptive term upon defendant's conviction of attempted sexual assault of a minor, and he was not automatically entitled as a matter of law to have his case referred to a three-judge panel for sentencing. *Aveoganna v. State*, 767 P.2d 25 (Alaska Ct. App. 1988).

Offense of attempted second-degree murder was an impossibility. *Hult v. State*, 678 P.2d 416 (Alaska Ct. App. 1984).

Applicability of partial affirmative defense. — A person charged with attempted kidnapping is not entitled to assert a partial defense when the intended victim of the crime is voluntarily released unharmed; under the plain language of AS 11.41.300(d), the partial affirmative defense applies only in a prosecution for kidnapping. *Laraby v. State*, 710 P.2d 427 (Alaska Ct. App. 1985).

Defendant may be found guilty though attempt not expressly charged. — Jury could find defendant guilty of the attempt to commit the crime of possessing narcotic drugs despite the fact that the attempt was not expressly charged. *Simpson v. United States*, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Substantial evidence of attempt. — In a prosecution for possession of narcotic drugs, although there was no substantial evidence that defendant committed the crime charged in the information, there was substantial evidence that she attempted to commit the crime charged. *Simpson v. United States*, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Evidence sufficient to support conviction. — See *McCarlo v. State*, 677 P.2d 1268 (Alaska Ct. App. 1984).

Conviction reversed because of insufficient evidence. — See *Harvey v. State*, 728 P.2d 646 (Alaska Ct. App. 1986).

Defendant's conviction of attempted sexual abuse of a minor in the second degree was reversed, where evidence showing that he wrote notes to an eight-year-old girl asking her to be his girlfriend and to kiss him established only that he engaged in preparatory conduct and not that he took a substantial step toward sexual contact with the girl. *Sullivan v. State*, 766 P.2d 61 (Alaska Ct. App. 1988).

Same offense for sentencing purposes. — Assault with intent to rob and attempted robbery constituted the "same offense" for sentencing purposes. *Brookins*

v. State, 600 P.2d 12 (Alaska Ct. App. 1979).

Conviction and sentence upheld. — See *Andrejko v. State*, 695 P.2d 246 (Alaska Ct. App. 1985).

Convictions reversed because of erroneous jury instruction. — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. *Laesler v. State*, 684 P.2d 139 (Alaska Ct. App. 1984).

Sentence upheld. — See *Howie v. State*, 494 P.2d 800 (Alaska 1972); *Spensman v. State*, 643 P.2d 202 (Alaska 1976); *Ibrahim v. State*, 671 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); *Johnson v. State*, 680 P.2d 700 (Alaska 1978); *Ferguson v. State*, 690 P.2d 43 (Alaska 1979); *Morris v. State*, 692 P.2d 1244 (Alaska 1979); *Romil v. State*, 619 P.2d 722 (Alaska 1980); *Travelstead v. State*, 689 P.2d 484 (Alaska 1984); *Schnecker v. State*, 739 P.2d 1310 (Alaska Ct. App. 1987).

Sentence for attempted first degree murder upheld. — See *Stancel v. State*, 718 P.2d 918 (Alaska 1986).

Conviction of attempted first-degree sexual assault affirmed. — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent; and plain error was not established though the prosecutor's expressions which might have been construed as a personal

opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and invited. *Potts v. State*, 712 P.2d 386 (Alaska Ct. App. 1986).

Sentence under former AS 11.41.410(b) and this section held excessive. — See *Ballhouse v. State*, 687 P.2d 1168 (Alaska Ct. App. 1984).

Sentence held excessive. — See *Hansen v. State*, 657 P.2d 802 (Alaska Ct. App. 1983).

Applied in *Nicholson v. State*, 656 P.2d 1209 (Alaska Ct. App. 1982); *Patterson v. State*, 732 P.2d 1102 (Alaska Ct. App. 1987); *Allen v. State*, 769 P.2d 467 (Alaska Ct. App. 1989).

Stated in *State v. Silas*, 695 P.2d 651 (Alaska 1975); *Romil v. State*, 619 P.2d 722 (Alaska 1980); *Coleman v. State*, 621 P.2d 869 (Alaska 1980); *Clark v. State*, 645 P.2d 1236 (Alaska Ct. App. 1982); *Tazruk v. State*, 656 P.2d 788 (Alaska Ct. App. 1982); *Velez v. State*, 762 P.2d 1297 (Alaska Ct. App. 1988).

Cited in *Handley v. State*, 616 P.2d 627 (Alaska 1980); *Walker v. State*, 662 P.2d 948 (Alaska Ct. App. 1983); *Hell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983); *Brower v. State*, 683 P.2d 290 (Alaska Ct. App. 1984); *Hart v. State*, 702 P.2d 651 (Alaska Ct. App. 1985); *Chief v. State*, 718 P.2d 476 (Alaska Ct. App. 1986); *Haatinga v. State*, 736 P.2d 1167 (Alaska Ct. App. 1987); *James v. State*, 739 P.2d 1314 (Alaska Ct. App. 1987); *Stevens v. State*, 748 P.2d 771 (Alaska Ct. App. 1988); *James v. State*, 764 P.2d 1336 (Alaska Ct. App. 1988); *Ervin v. State*, 761 P.2d 121 (Alaska Ct. App. 1988); *Rohison v. State*, 763 P.2d 1357 (Alaska Ct. App. 1988); *Konrad v. State*, 763 P.2d 1369 (Alaska Ct. App. 1988); *Lawrence v. State*, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,
(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is a

- (1) class A felony if the crime solicited is an unclassified felony;
- (2) class B felony if the crime solicited is a class A felony;
- (3) class C felony if the crime solicited is a class B felony;
- (4) class A misdemeanor if the crime solicited is a class C felony;
- (5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Cross references. — For legislative purpose of ch. 46, SLA 1982, see § 1, ch. 46, SLA 1982, in the Temporary and Special Acts; for legal accountability based on the conduct of another and complicity, see AS 11.18.110.

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSH 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 26, 1980.

NOTES TO DECISIONS

Former law construed. — See *McConkey v. State*, 604 P.2d 823 (Alaska 1972); *Cassill v. State*, 645 P.2d 219 (Alaska Ct. App. 1982). (Decided under former AS 11.10.070.)

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See *Ibrahim v. State*, 671 P.2d 631

(Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

Quoted in *Sullivan v. State*, 766 P.2d 61 (Alaska Ct. App. 1988).

Cited in *Hoover v. State*, 641 P.2d 1263 (Alaska Ct. App. 1982); *P.S. v. State*, 655 P.2d 1319 (Alaska Ct. App. 1982); *Monroe v. State*, 762 P.2d 1017 (Alaska Ct. App. 1988).

Sec. 11.31.140. Multiple convictions barred. (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

(c) A person may not be convicted on the basis of the same course of conduct of both (1) a crime defined by AS 11.31.100 or 11.31.110; and (2) the crime that is the object of the attempt or solicitation.

(d) This section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime defined by AS 11.31.100 or 11.31.110 and commission of the crime that is the object of the attempt or solicitation. (§ 2 ch 166 SLA 1978)

NOTES TO DECISIONS

Conspiracy is separate offense. — The crime of conspiracy is generally regarded as a separate offense from the substantive crime that is the object of the conspiracy. Unlike the other preliminary offenses of attempt and solicitation, conspiracy does not merge into a conviction for the substantive crime. *Lythgoe v. State*, 626 P.2d 1082 (Alaska 1980).

The merger rule means that a defendant can be convicted of both conspiracy and the object of the conspiracy. One reason advanced for this special treatment of conspiracy as a separately punishable offense is that conspiracy has been regarded as a serious crime in itself. *Lythgoe v. State*, 626 P.2d 1082 (Alaska 1980).

Sec. 11.31.150. Substantive crimes involving attempt or solicitation. Notwithstanding AS 11.31.140(d),

(1) a person may not be charged under AS 11.31.100 if the crime allegedly attempted by the defendant is defined in such a way that an attempt to engage in the proscribed conduct constitutes commission of the crime itself;

(2) a person may not be charged under AS 11.31.110 if the solicitation in question is defined as a specific crime under other provisions of law. (§ 2 ch 166 SLA 1978)

NOTES TO DECISIONS

Cited in *Stuart v. State*, 698 P.2d 1218 (Alaska Ct. App. 1985).

Chapter 35. Abandonment and Nonsupport.

[Repealed, § 1 ch 39 SLA 1970 and § 21 ch 166 SLA 1978. For current law on desertion and nonsupport of a minor, see AS 11.51.100 — 11.51.120.]

Chapter 36. Failure to Permit Visitation with Minor Child.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.51.125.]

Chapter 40. Crimes Against Morality and Decency.

[Repealed, § 21 ch 166 SLA 1978. For current law, see AS 11.51.130, 11.51.140, AS 11.61.110, 11.61.130, 11.61.140 and AS 11.66.100 — 11.66.150.]

Chapter 41. Offenses Against the Person.

Article

1. Homicide (§§ 11.41.100 — 11.41.140)
2. Assault and Reckless Endangerment (§§ 11.41.200 — 11.41.250)
3. Kidnapping and Custodial Interference (§§ 11.41.300 — 11.41.370)
4. Sexual Offenses (§§ 11.41.410 — 11.41.470)
5. Robbery, Extortion, and Coercion (§§ 11.41.600 — 11.41.630)

Cross references. — For provisions authorizing arrest without warrant in certain cases where the police officer has reasonable cause to believe that the person has committed a crime under this chapter, see AS 12.25.030(b).

NOTES TO DECISIONS

Cited in *Leuch v. State*, 633 P.2d 1006 (Alaska 1981).

Article 1. Homicide.

Section	Section
100. Murder in the first degree	130. Criminally negligent homicide
110. Murder in the second degree	135. Multiple deaths
115. Defenses to murder	140. Definition
120. Manslaughter	

Collateral references. — 41 Am. Jur. 2d, Homicide, § 1 et seq.
40 C.J.S., Homicide, § 1 et seq.
Homicide by wanton or reckless use of firearm without express intent to inflict injury, 5 ALR 603; 23 ALR 1654.
Homicide or assault in attempting to prevent elopement, 8 ALR 660.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 276.
Intoxication as reducing homicide from murder to manslaughter, 12 ALR 888; 74 ALR 897.
Responsibility of persons participating

the assessment of the civil penalty shall be determined de novo, and shall include the right of a trial by jury, the right to counsel, and the right to confront witnesses. The facts of the violation shall be proved beyond a reasonable doubt.

Civil action

(h) If an individual does not request a hearing pursuant to subsection (e) of this section and the Attorney General issues an order pursuant to such subsection, or if an individual does not under subsection (g) of this section seek judicial review of such an order, the Attorney General may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with section 1961 of Title 28. Such interest shall accrue from the expiration of the 30-day period described in subsection (g) of this section. In such an action, the decision of the Attorney General to issue the order, and the amount of the penalty assessed by the Attorney General, shall not be subject to review.

Limitation

(i) The Attorney General may not under this subsection commence proceeding against an individual after the expiration of the 5-year period beginning on the date on which the individual allegedly violated subsection (a) of this section.

Expungement procedures

(j) The Attorney General shall dismiss the proceedings under this section against an individual upon application of such individual at any time after the expiration of 3 years if—

- (1) the individual has not previously been assessed a civil penalty under this section;
- (2) the individual has paid the assessment;
- (3) the individual has complied with any conditions imposed by the Attorney General;
- (4) the individual has not been convicted of a Federal or State offense relating to a controlled substance; and
- (5) the individual agrees to submit to a drug test, and such test shows the individual to be drug free.

A nonpublic record of a disposition under this subsection shall be retained by the Department of Justice solely for the purpose of determining in any subsequent proceeding whether the person qualified for a civil penalty or expungement under this section. If a record is expunged under this subsection, an individual concerning whom such an expungement has been made shall not be held there-

after under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this section or the results thereof in response to an inquiry made of him for any purpose.

(Pub.L. 91-513, Title II, § 405, formerly Pub.L. 100-690, Title VI, § 6486, Nov. 18, 1988, 102 Stat. 4384, renumbered and amended Pub.L. 101-647, Title X, § 1002(g)(1), (2), Nov. 29, 1990, 104 Stat. 4823.)

EDITORIAL NOTES

Prior Provisions. A prior section 405 of Pub.L. 91-513, Title II, Oct. 27, 1970, 84 Stat. 1265, was redesignated section 418 by Pub.L. 101-647, § 1002(a)(1). See Section 859 of this title.

§ 845. Transferred to § 859

§ 845a. Transferred to § 860

§ 845b. Transferred to § 861

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-518, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265, amended Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

§ 847. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(Pub.L. 91-513, Title II, § 407, Oct. 27, 1970, 84 Stat. 1265.)

§ 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to

1924, 98 Stat. 2031, as amended, set out as a note under section 3551 of this title.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

However, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 88, 294 (Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096; Mar. 4, 1909, ch. 321, § 178a, as added Sept. 27, 1944, ch. 425, 58 Stat. 752).

This section consolidates said sections 88 and 294 of title 18, U.S.C., 1940 ed.

To reflect the construction placed upon said section 88 by the courts the words "or any agency thereof" were inserted. (See *Hias v. Henkel*, 1909, 30 S.Ct. 249, 216 U.S. 462, 54 L.Ed. 569, 17 Ann.Cas. 1112, where court said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." Also, see *United States v. Walter*, 1923, 44 S.Ct. 10, 263 U.S. 15, 68 L.Ed. 137, and definitions of department and agency in section 6 of this title.)

The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year.

The injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor is described by the late Hon. Grover M. Moscovitz, United States district judge for the eastern district of New York, in an address delivered March 14, 1944, before the section on Federal Practice of the New York Bar Association, reported in 3 Federal Rules Decisions, pages 380-392.

Hon. John Paul, United States district judge for the western district of Virginia, in a letter addressed to Congressman Eugene J. Keogh dated January 27, 1944, stresses the inadequacy of the 2-year sentence prescribed by existing law in cases where the object of the conspiracy is the commission of a very serious offense.

The punishment provision of said section 294 of title 18 was considered for inclusion in this revised section. It provided the same penalties for conspiracy to violate the provisions of certain counterfeiting laws, as are applicable in the case of conviction for the specific violations. Such a punishment would seem desirable for all con-

spiracies as for such offenses as counterfeiting and transporting stolen property in interstate commerce.

A multiplicity of unnecessary enactments inevitably leads to confusion and disregard of law. (See reviser's note under section 493 of this title.)

Since consolidation was highly desirable and because of the strong objections of prosecutors to the general application of the punishment provision of said section 294, the revised section represents the best compromise that could be devised between sharply conflicting views.

A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. Special conspiracy provisions were retained in sections 241, 286, 372, 757, 794, 956, 1201, 2271, 2384 and 2388 of this title. Special conspiracy provisions were added to sections 2153 and 2154 of this title.

§ 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than \$5,000 or imprisoned not more than six years, or both.

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 54 (Mar. 4, 1909, ch. 321, § 21, 35 Stat. 1092).

Scope of section was enlarged to cover all possessions of the United States. When the section was first enacted in 1861 there were no possessions, and hence the use of the words "State or Territory" was sufficient to describe the area then subject to the jurisdiction of the United States. The word "District" was inserted by the codifiers of the 1909 Criminal Code.

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands,

CRIMINAL INSTRUCTIONS

8.05A CONSPIRACY ELEMENTS

The defendant is charged in [Count _____ of] the indictment with conspiring to _____ in violation of Section _____ of Title _____ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [beginning on or about _____ and ending on or about _____] [starting sometime before _____] there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the con-

OFFENSES UNDER TITLE 18

spiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which further some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

Comment

Proof of an overt act is not expressly required by every conspiracy statute. See, e.g., 18 U.S.C. § 1951(a) (Conspiracy to Interfere with Commerce by Threats or Violence), § 1962(d) (Conspiracy to Engage in Racketeer Influenced and Corrupt Organizations), § 2384 (Seditious Conspiracy); 21 U.S.C. § 846 (Conspiracy to Possess a Controlled Substance with Intent to Distribute), § 963 (Conspiracy to Import or Export a Controlled Substance). "The overwhelming weight of authority now holds that proof of an overt act is not necessary to charge and convict on conspiracy [where the statute does not require it]." *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, 109 S.Ct. 99 (1988). However, Ninth Circuit law is to the contrary. See *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir.1980).

A court, in making a preliminary factual determination under Rule 801(d)(2)(E), may admit hearsay statements offered on the existence of the conspiracy and the membership of the speaker

CRIMINAL INSTRUCTIONS

and any persons discussed in the statement. *Bourjaily v. United States* 483 U.S. 171 (1987).

Venue lies in the district in which the conspiracy was entered or in any district in which there was an overt act. *Hyde & Schneider v. United States*, 225 U.S. 347 (1912); *Grigg v. Bolton*, 53 F.2d 158 (9th Cir.1931), *cert. denied*, 285 U.S. 538 (1932).

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OFFENSES UNDER TITLE 18

8.05B MULTIPLE CONSPIRACIES

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Comment

Absent variance between the allegations of the indictment and the evidence presented, there is no need to instruct the jury on the issue of multiple conspiracies. *United States v. Zemek*, 634 F.2d 1159 (9th Cir.1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Mayo*, 646 F.2d 369, 370 (9th Cir.), *cert. denied*, 454 U.S. 1127 (1981). But where there is variance, *e.g.*, where the indictment charges a single conspiracy and the evidence indicates two or more possible conspiracies, a multiple conspiracy instruction is proper. *United States v. Perry*, 550 F.2d 524, 533 (9th Cir.), *cert. denied*, 431 U.S. 918, 434 U.S. 827 (1977) (citing *United States v. Varelli*, 407 F.2d 735, 746 (7th Cir.1969)). Failure to give a multiple conspiracy instruction if none is requested does not amount to plain error *United States v. Krasn*, 614 F.2d 1229, 1235-36 (9th Cir.1980).

In cases where the conspiracy charged involves only two persons, it is useful to instruct the jury that should it find either conspirator not guilty of conspiracy it must acquit both. *United States v. Coven*, 662 F.2d 162, 173 (2d Cir.1981), *cert. denied*, 456 U.S. 916 (1982); *see also United States v. Glickman*, 604 F.2d 625, 631-33 (9th Cir.1979), *cert. denied*, 444 U.S. 1080 (1980).

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v. *Bolton*, 53
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CRIMINAL INSTRUCTIONS

8.05C CONSPIRACY—KNOWING OF AND ASSOCIATION WITH OTHER CONSPIRATORS

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with [the other defendant] [or] [other conspirators] in the overall scheme, the defendant would, in effect, have agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that (1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy, (2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired, and (3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

Comment

A person may be a member of a conspiracy even though the person does not know all of the purpose of the conspiracy. *United States v. Escalante*, 637 F.2d 1197, 1200 (9th Cir.), cert. denied, 449 U.S. 856 (1980); *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 971 (1977).

A single conspiracy can be established even though it took place during a long period of time during which new members joined and old members dropped out. *United States v. Green*, 523 F.2d 229, 233 (2d Cir.1975), cert. denied, 423 U.S. 1074 (1976). See also *United States v. Thomas*, 586 F.2d 123, 132 (9th Cir.1978); *United States v. Perry*, 550 F.2d 524 (9th Cir.), cert. denied, 431 U.S. 918, 434 U.S. 827 (1977).

OFFENSES UNDER TITLE 18

8.05D WITHDRAWAL FROM CONSPIRACY

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy.

Comment

It is proper to instruct that continued participation in a conspiracy is presumed unless there is evidence of withdrawal. *United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir.1980). See also *United States v. Basey*, 613 F.2d 198, 202 (9th Cir.1979), cert. denied, 446 U.S. 919 (1980).

If requested, an instruction on the government's burden of disproving withdrawal should be given. *United States v. Read*, 658 F.2d 1225 (7th Cir.1981). See generally Instructions 1.03, 3.02, *supra*, and Comments.

In the absence of a statute of limitations defense, do not use this instruction if the conspiracy charged in the indictment requires no proof of an overt act charged, since the crime is complete upon entering into the conspiracy. If the statute of limitations is a defense, this instruction should be modified to require the government to disprove withdrawal before the limiting date.

CRIMINAL INSTRUCTIONS

8.05E CONSPIRACY—PINKERTON
CHARGE

Each member of a conspiracy is responsible for the actions of other members performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime. Therefore, you may find the defendant guilty of [e.g., distributing cocaine] as charged in Count _____ of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

First, a person named in Count _____ of the indictment [e.g., knowingly distributed cocaine];

Second, the person was a member of the conspiracy charged in Count _____ of the indictment;

Third, the person [e.g., distributed cocaine] in furtherance of the conspiracy; and

Fourth, the defendant was a member of the same conspiracy.

Comment

The Pinkerton Charge derives its name from *Pinkerton v. United States*, 328 U.S. 640 (1946). "[A conspirator] is liable for the acts of his co-conspirators though he was not aware of the performance of those acts, nor even of the existence of the actors." *Hernandez v. United States*, 300 F.2d 114, 122 (9th Cir.1962). If warranted by the evidence, additional language may be added to the instruction to inform the jury that a conspirator may not be convicted of a substantive offense committed by a co-conspirator if commission of the offense could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. See *United States v. Roselli*, 472 F.2d 879, 894 n. 25 (9th Cir.1970), cert. denied, 401 U.S. 924 (1971).

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO: SB 19

Revision Date: _____ Dept. Affected: Public Safety
 Title: An act relating to the crime BRU: Alaska State Troopers
of conspiracy. Component: Criminal Investigation Bureau
 Sponsor: Senator Halford
 Requestor: Senator Halford COMPONENT SERIAL NO. 830

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year (FY 93) impact: \$ _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: 269-5691
 Division: Alaska State Troopers Date: 1/11/93
 Approved by Commissioner: *Richard I. Burton* Date: 1/13/93
 Agency: Richard I. Burton Dept. of Public Safety

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Fiscal Notes

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. S.B. 19

Revision Date: February 11, 1992
 Title: "An Act relating to the crime of conspiracy."
 Sponsor: Senator Halford
 Requestor: _____

Dept. Affected: Corrections
 BRU: Statewide Programs
 Component: _____
 COMPONENT SERIAL NO. 700

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	365.0	365.0	365.0	365.0	365.0	365.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	365.0	365.0	365.0	365.0	365.0	365.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	365.0	365.0	365.0	365.0	365.0	365.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	365.0	365.0	365.0	365.0	365.0	365.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: \$ -0-

ANALYSIS: (Attach a separate page if necessary)

See Attached Analysis.

Prepared by: Dana LaTour, Special Assistant
 Division: Office of the Commissioner
 Approved by Commissioner: Lloyd G. Rupp, Commissioner
 Agency: Department of Corrections

Pt no: 465-3376
 Date: 02-11-93
 Date: 02-11-93

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FISCAL NOTE

SB 19: "An Act relating to the crime of conspiracy."

Page 2

Data on the number of cases and average sentences for conspiracy convictions is not available to the Department of Corrections since this has not been a crime in Alaska in the past. However, based on information obtained last session from the Department of Law, Criminal Division, it appears likely that the conspiracy statute would enable more effective prosecution of drug crimes in particular. Since conspiracies to commit murder, or kidnapping rarely occur, the impact on the Department is unpredictable.

The Department of Law predicts that the conspiracy law will facilitate more effective prosecution of cases involving multiple defendants and may encourage defendants to cooperate with the State to get reduced charges. The result will be more offenders sentenced for drug charges, rather than increasing sentence length.

According to 1992 booking statistics, there were 203 offenders incarcerated whose most serious charges were unclassified (10), class A (10) and class B (183) Misconduct Involving a Controlled Substance (MICS) offenses.

If this bill results in a ten percent increase in convictions for drug offenses about 20 additional cases will be added each year. Since 90% of the relevant MICS offense are class B felonies, the mean sentence length for a MICS B felony is used to calculate additional bed days. Mean sentence length is 20.1 months. Subtracting one-third of the sentence for statutory good time results in time served of slightly over one year. Twenty additional offenders serving one additional year would result in 7300 additional bed-days per year.

Because populations within correctional facilities are already exceeding emergency caps, it is assumed that these offenders will either be placed in Community Residential Center (CRC) beds, or that other offenders in the correctional centers will be displaced and moved to CRC beds. The daily cost of placement is \$50.

The calculation used in computing the cost is:

7300 beds days per year x \$50 per CRC bed = \$365,000.

Fiscal Note

SB 19: "An Act relating to the crime of conspiracy."

Page 3

The estimated costs are based on CRC beds since it is not possible to predict when the increases in incarceration would actually require adding more prison beds to the system. Cost of placement in a correctional center is approximately \$100 per day.

The current prison beds are full. The Department's master plan indicates a need to build between 500- 700 additional beds by 1996 if other measures to reduce inmate population are not addressed.

If this bill results in any substantial increase in convictions and prison sentences for offenses other than the 10% increase in drug offenses described above, or if sufficient prisoners cannot be diverted to community residential centers contract beds, then the effect of this bill may be to add increasing pressure on the already overcrowded correctional facilities.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. SB 19

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act relating to the crime of BRU: Trial Courts
conspiracy Components: _____
 Sponsor: Halford
 Requestor: Halford COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	121.1	121.1	121.1	121.1	121.1	121.1
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	121.1	121.1	121.1	121.1	121.1	121.1

CAPITAL						
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REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS	121.1	121.1	121.1	121.1	121.1	121.1
1003 GF MATCH						
1004 GF						
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTIA						
OTHER						
TOTAL	121.1	121.1	121.1	121.1	121.1	121.1

POSITIONS:

FULL-TIME	1.0	1.0	1.0	1.0	1.0	1.0
PART-TIME	3.0	3.0	3.0	3.0	3.0	3.0
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached

Prepared by: C. S. Christensen III, Staff Counsel *Arthur H. Snowden, Jr.* Phone: 264-8228
 Division: Alaska Court System *Robert S. Fisher, Fiscal Officer* Date: 02/04/93

Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System Date: 02/04/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Alaska Court System

Fiscal Analysis

SB 19

This bill creates a new crime of conspiracy to promote or facilitate a heinous offense. Its purpose is to create a crime under which persons not presently prosecutable can be prosecuted.

The Department of Law has not estimated the number of prosecutions which will result from this legislation. When similar legislation was considered in 1987, the department projected a need for two additional attorneys, a paralegal, and a secretary, indicating a potentially large caseload. OPA has estimated that it will defend 25 co-defendants charged as a result of this legislation, in addition to those co-defendants represented by the Public Defender. Most of these co-defendants will be entitled to separate trials. Experience in other states and at the federal level demonstrates that conspiracy cases generally require extensive pre-trial motion work, and are more likely to go to trial than other felony cases.

Alaska Court System

Fiscal Analysis

SB 19

Personal Services

	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Pro Tem Superior Court Judge Anchorage, 12 months	\$24,150	\$16,841	\$40,991
Pro Tem Superior Court Judge Fairbanks, 6 months	12,251	8,439	20,690
Pro Tem Superior Court Judge Juneau, 6 months	12,075	8,420	20,495
In-Court Clerk, Anchorage	27,108	11,816	<u>38,924</u>
			<u>\$121,100</u>

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 19

Revision Date: February 5, 1993
Title: "An Act relating to the crime of Conspiracy."
Sponsor: Senator Halford
Requestor: Senator Halford

Department Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division

Phone: 465-3672
Date: February 5, 1993

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 5, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 19

ANALYSIS (Continued):

This bill creates a crime of conspiracy when two or more people agree to commit a criminal offense and one of them does some act in furtherance of the agreement. The bill extends the application of the conspiracy law to offenses against a person under AS 11.41, punishable as unclassified or class A felonies, and to offenses involving controlled substance, under AS 11.71, punishable as unclassified, class A, or class B felonies.

The Department of Law believes there will not be a significant increase in the number of cases due to the conspiracy law. Current law permits prosecution of those who directly commit crimes, as well as those who are accomplices (AS 11.16). Because our present accomplice law allows us to prosecute people who aid and abet a criminal, it is unlikely that the conspiracy law (which requires proof of an agreement to commit the crime) will result in significantly more cases being prosecuted. Instead, the crime of conspiracy will be added as another count in a case that would have been prosecuted anyway.

In those cases that cannot be charged under current law, the crime of conspiracy will permit some additional cases to be prosecuted and some fiscal impact could result, although there may be offsetting cost savings.

The major effect of the conspiracy law is to permit the introduction of additional evidence in a trial. Thus the jury is permitted to hear, for example, more evidence about the overall drug operation, rather than being limited to evidence about specific drug sales on specific dates. The jury does not therefore view those sales in isolation, but is allowed to see the "big picture", and the state's case is made stronger. We believe that defendants charged under the conspiracy law will cooperate with the state to try to get a reduced charge, and therefore fewer trials will occur. Another potential cost-savings is that multiple defendants charged with conspiracy will be able to be tried in a joint trial, rather than separate trials as is usually the practice now. Naturally the effects of any new law cannot be predicted with precise certainty. However, conspiracy laws and stiff drug penalties are nothing new in the rest of the country.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 5, 1993

SUBJECT: Sectional Summary of SB 19 (Work Order No. 8-LS0246A)

TO: Senator Rick Halford
Attn: John

FROM: Jerry Luckhaupt *JEL*
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill creates AS 11.31.120, the crime of conspiracy. That section would make it a crime for a person

- redo sectional* {
- (1) with the intent to promote or facilitate a serious felony offense;
 - (2) to agree with one or more other persons to engage in or cause that serious felony offense; and
 - (3) an overt act in furtherance of the conspiracy is performed by one of the persons involved in the conspiracy.

This section clarifies criminal liability for certain situations, provides affirmative defenses that may be raised by the defendant, and defines "serious felony offense." Conspiracy is punishable as an unclassified, class A, class B or class C felony depending on the classification of the crime that was the object of the conspiracy.

Section 2 of the bill amends AS 11.31.140(a) to provide that it is not a defense to prosecution for conspiracy that the crime the defendant conspired to commit was actually committed.

Section 3 of the bill amends AS 11.31.140(b) to provide only one conviction for conspiracy, attempt, or solicitation is permitted for conduct that was designed to commit the same crime.

Section 4 of the bill amends AS 11.31.140(d) permits a prosecutor to charge both conspiracy to commit an offense and commission of the underlying offense.

Legal Services - Sectional

Senator Rick Halford
February 5, 1993
Page 2

Section 5 of the bill amends AS 12.25.125(b) to provide that a person convicted of conspiracy to commit murder in the first degree shall be sentenced to a definite term of imprisonment of not less than five years and not more than 99 years.

GPL:pl
93-065.plm

FRANK H. MURKOWSKI

ALASKA

COMMITTEES:

SELECT COMMITTEE ON INTELLIGENCE (VICE CHAIRMAN)
ENERGY AND NATURAL RESOURCES
FOREIGN RELATIONS
VETERANS' AFFAIRS
SELECT COMMITTEE ON INDIAN AFFAIRS

United States Senate

WASHINGTON, DC 20510-0202
(202) 224-6666

February 28, 1991

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(907) 283-5808

109 MAIN STREET
KETCHIKAN, AK 99901-6489
(907) 225-6880

The Honorable Rick Halford
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Halford:


When I had the opportunity to speak before the State Legislature earlier this month, I expressed my deep concern about the escalation of drug activity in Alaska. We must recognize that the weakness of our state's drug laws sends an unfortunate message to those who would traffic in illegal drugs. I applaud your efforts to address this problem by introducing legislation calling for a state conspiracy law. The passage of such a law should dispel any notion drug organizations may have that Alaska is a safe haven for their illicit operations.

It is time to give law enforcement in Alaska the tools necessary to break the criminal organizations that prey on our youth. Your legislation is an important step toward achieving that goal. The enactment of a state conspiracy law would allow us to bring down entire drug organizations rather than just prosecuting the pushers who are easily replaced.

We cannot simply rely upon the federal criminal justice system to deal with the rise of criminal organizations in Alaska. While federal conspiracy laws play a significant role in combatting criminal organizations, we must give the state's law enforcement community the ability to use effectively their valuable resources to stem the tide of drugs washing up on Alaska's shores. We must make every effort to ensure that state and local law enforcement can take the steps necessary to adequately protect our youth and our communities.

I am hopeful that the Legislature will act quickly to provide for this protection by enacting a criminal conspiracy statute.

Sincerely,


Frank H. Murkowski
United States Senator

Supporting documents



U. S. Department of Justice

United States Attorney

District of Alaska at Anchorage

February 18, 1992

Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567

FTS-868-5071
Commercial: (907) 271-5071
Fax Number: (907) 271-3224

The Honorable Rick Halford
State Senate
Alaska State Legislature

Re: State Conspiracy Laws
Violent Crime, Drugs, Guns and Fraud
Law Enforcement Coordinating Committee

Dear Mr. Halford: 

It is important that the Legislature enact conspiracy laws to address violent crime, drugs, guns and fraud. This is an area of criminal law that has been neglected by the State for too long. Organized crime in Alaska must be adequately addressed.

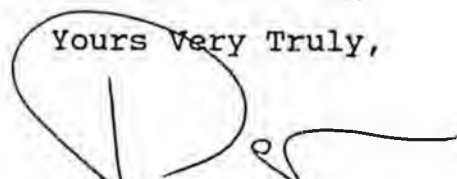
Enclosed for your review is my article that was published in "The Anchorage Times" this past Saturday. The article sets forth my position on the need for State conspiracy laws.

It is vitally important for the welfare of the citizens of this State and local law enforcement that conspiracy laws are enacted this session. The laws should adequately address Alaska's growing organized complex criminal element.

Please do not hesitate to contact me if I may be of assistance. I will be happy to meet with you. Your assistance and support is greatly appreciated by law enforcement and all concerned Alaska citizens.

Best Wishes.

Yours Very Truly,


WEVLEY WILLIAM SHEA
United States Attorney

WWS:kjm

Enclosure

cc: Chuck Farmer, Coordinator
Law Enforcement Coordinating Committee

RECK - YOU KNOW AS WELL AS I THE
IMPORTANCE OF THIS LEGISLATION!!
THANKS, WEV

FBI National Academy Associates

Alaska Chapter



February 16, 1993

Senator Rick Halford
Alaska State Legislature
Box V
Juneau, AK 99811

Dear Senator Halford:

The Alaska Chapter of the FBI National Academy Associates is once again supporting Senate Bill 19 (An Act relating to the Crime of Conspiracy).

Alaska's criminal justice system will be enhanced with passage of this bill. Law enforcement in Alaska requires legislation which offers the ability through the judicial system to prosecute those individuals or groups involved with the crime of conspiracy.

I have spoken with Chief O'Leary from the Anchorage Police Department and he "absolutely" supports and concurs with this legislation.

We strongly support your efforts toward passage of SB 19.

Sincerely,

Timothy W. Foster
President

TWF/ljc

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To: <i>John Stapp</i>	From: <i>Tim Foster</i>	
Ct:	Co:	
Dept:	Phone #	
Fax #	Fax #	

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Bill Wilson, 139th, VP, South Central
Mike Gerrill, 169th, VP, Northern
Chip Oddie, 163rd, VP, Southern

Alaska Association Chiefs of Police



February 4, 1993

Senator Rick Halford
Alaska State Capitol
Room 111
Juneau, AK 99801-1182

Dear Senator Halford:

On behalf of the Alaska Association of Chiefs of Police I would like to express our support for Senate Bill 19. For several years Alaskan law enforcement has been united in its request to the legislature for a Statute dealing with the Crime of Conspiracy.

There have been many serious felony crimes committed over the years that may well not have occurred if law enforcement had been able to pursue the offenders utilizing a Conspiracy Statute. Limiting conspiracy to serious felony offenses only is a sensible approach that should alleviate some past concerns.

If we can be of any assistance in the passage of your bill please let me know.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Ronald L. Otte", is written over a horizontal line.

Ronald L. Otte
President

RLO/lp

THE VOICE OF THE TIMES

Without a headline, a major cocaine ring is cracked

By WILLIAM J. TOBIN

Early on a frigid Saturday morning 2 1/2 weeks ago, federal agents — with state law enforcement agencies participating — staged one of the biggest drug busts in Anchorage history.

You didn't read anything about it in the paper.

Not a word was published about the raids on three hangouts where 10 accused crack cocaine dealers were arrested.

There was nothing printed about a federal grand jury indictment that charged 11 men and five women — the 10 who were arrested that Saturday morning and six others — with a whole series of federal crimes ranging from conspiracy, drug trafficking, the use of firearms as part of drug dealing activities, operating crack cocaine houses, the preparation of false birth certificates and raft of other illegal activities.

U.S. Attorney Wevley W. Shea promptly made available to the news media details of the Jan. 23 raids and copies of the 32-page indictment. The arrests and charges, for reasons unknown, simply were ignored — regarded as a non-event.

Also ignored was the U.S. attorney's report of the arrests and charges that was hand-carried to the office of Gov. Walter J. Hickel, with copies to Alaska Atty. Gen. Charlie Cole and to state Public Safety Commissioner Richard L. Burton. The report, pointing out the success of the federal law enforcement action, renewed Shea's long-standing recommendation for enactment of state conspiracy laws, which he views as an essential tool against organized crime in Alaska.

For being such an apparent non-event, the Jan 23 raids were part of a massive crime crackdown.

Consider:

- The operation was led by the Federal Bureau of Alcohol, Tobacco & Firearms, including more than a dozen agents brought to Anchorage aboard a Washington State Air National Guard transport.

- Agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Marshal Service, the U.S. Customs Service and the Internal Revenue Service were involved.

- State agencies represented in the raids were the Alaska State Troopers, the Drug Interdiction Unit of the Alaska Na-



tional Guard, the Alaska Department of Public Safety and the Alaska State Crime Lab.

- And, of course, officers of the Anchorage Police Department were very much a part of the crackdown.

In days since the raids, two others of the accused drug dealers have been arrested — raising to 12 the number of those taken into custody. Of those, nine are still in jail and three have been released on bail. The remaining four are fugitives — subjects of an on-going search that presumably extends well beyond Alaska.

Meanwhile, the indictment gives a clue as to how widespread this particular crack cocaine operation was in Anchorage. According to the federal charges, this gang operated from or ran so-called crack houses — fortified with a small arsenal of semi-automatic weapons — at 11 locations:

- 9360 Campbell Terrace
- 1315 Hyder St.
- 7601 Little Bend Circle
- 4203 Dimond Blvd., No. B
- 227 E. 12th Ave., No. 1
- 227 E. 12th Ave., No. 2
- 1027 Nelchina, No. 5
- 937 E. 10th, No. 3
- 45340 E. 26th, No. 73
- 9332 Sea Parrot
- 601 E. 16th, No. A3

In addition, for six weeks last November and December, the indictment charges, the gang rented a room at a hotel in the railroad area and used it as yet another place to make crack cocaine or to cut pure cocaine into diluted packages to increase the volume available for street sales.

In setting up the crack houses, the indictment charges, the "premises would be fortified, including the keeping of firearms, and a means of conducting crack cocaine sales established, such as creating a pass-through slot in a door so that customers would exchange money for drugs without gaining entry."

They were sophisticated operations, federal agents said, and included the use of a communications system that involved electronic pagers and at least one cellular telephone.

During one three-month period, July to September last year, one of these pagers received more than 2,000 calls, federal agents said.

John Bobb, resident agent in charge of the Bureau of Alcohol, Tobacco and Firearms in Anchorage, said the January raids and arrests were the culmination of an investigation that began in 1991.

Both he and Shea hailed the success of what they called a "coordinated takedown" of a major drug ring that had been supplying crack cocaine throughout the Anchorage area.

The arrests, Shea said, "dealt a major blow to the trafficking of crack cocaine in Alaska."

At the same time, however, he warned that Anchorage and Alaska are not immune to crack cocaine — which some think is just a problem facing the inner cities of America's big metropolitan centers.

"It is available in Anchorage," he said, and "it is cheap, it is addictive." And, as this January crackdown makes clear, it is part of a real and ugly underworld in Anchorage.

It is an underworld under attack by a host of men and women in law enforcement agencies in Anchorage — including the FBI, the BATF, the DEA, Customs, IRS, the U.S. Marshal's office, the Troopers, the Anchorage police. They're out there on the front line, in a grimy and dangerous environment.

And their work, in this case, at least, doesn't merit a headline, even on an inside page.

William J. Tobin is an editor of The Anchorage Times.



Tobin

OPINION

TAKING A STAND

Without conspiracy laws Alaska easy target for organized crime

Alaska is unique. Approximately 50 percent of our population resides in the Anchorage area. Much of Alaska's remaining population is isolated. This isolation and lack of a transportation infrastructure places a substantial burden on state and local law enforcement.

Crime in Alaska is complex and organized in the areas of illicit drugs, fraud, corruption and violent crime. Federal law enforcement agencies work closely with state and local agencies in combating crime. This is a federal, state and local "team approach" with communication, coordination and cooperation to attack state-wide crime.

Federal conspiracy laws assist federal law enforcement in effectively addressing criminal organizations. A conspiracy is an agreement between two or more persons to commit a crime or accomplish a legal purpose through illegal action. Alaska does not have state conspiracy laws. Virtually all other states do.

Local law enforcement is the first line of defense for crime involving drugs, guns and violence. The Alaska State Troopers and Anchorage Police Department, as well as state prosecutors, are severely restricted without state conspiracy laws. As the complexity of criminal organizations has increased, the burden placed upon state law enforcement has increased.

State prosecutors should have the basic "tools" to attack crime. It is a tremen-



Wewley William Shea

dous handicap not to have state conspiracy laws to address criminal organizations. The public should demand and have adequate protection.

Anchorage over the past few years has become a base or transshipment point for complex criminal organizations. In the last eight months, the United States Attorney for Alaska has initiated prosecution of the following criminal organizations:

• **MEXICAN MARIJUANA/COCAINE CONSPIRACY**

The Anchorage area was the site of numerous, very high quality marijuana "indoor grows." The marijuana was exported to the Lower 48 in exchange for cocaine and cash. The U.S. Attorney's Organized Crime and Drug Enforcement

State prosecutors cannot prosecute criminal organizations without conspiracy laws. Alaska's problem is complex due to the previous state "legalization" of marijuana. Alaska is looked upon as a haven for drug traffickers.

Task Force led by the Drug Enforcement Administration and composed of federal, state and local law enforcement investigated and prosecuted the case. The conspiracy investigation involved the U.S. Attorney for the Eastern District of Washington.

• **NIGERIAN HEROIN CONSPIRACY**

Nigerian heroin traffickers established a smuggling conspiracy utilizing Anchorage International Airport as a transshipment point to the Lower 48. United States Customs has intercepted over 60 pounds of pure China-white heroin with a street value of \$1 million per pound. The heroin conspiracy operated primarily in New York, Florida and Texas. The heroin originated in Thailand and was shipped to Anchorage via Japan and the Philippines. The conspiracy investigation involved the U.S. Attorney Offices in Texas, Hawaii, Washington, New York and Florida.

• **MUSLIM CRIPS CRACK-COCAINE CONSPIRACY**

The Muslim Crips gang of Los Angeles has attempted to make inroads in the crack cocaine distribution in Anchorage. Recently Crips were arrested in Anchorage on drug and gun charges. The investigation involved the U.S. Attorney for the Central District of California.

State prosecutors cannot prosecute criminal organizations without conspiracy laws. Alaska's problem is complex due to the previous state "legalization" of marijuana. Alaska is looked upon as a haven for drug traffickers. In addition, individuals who conspire to manufacture, transport and distribute drugs look upon Alaska as a "permissive" environment since Alaska has no conspiracy laws. Virtually all other states have conspiracy laws.

Over the past 16 years, state and local law enforcement, as well as concerned citizen organizations, such as the Anchorage Chamber of Commerce, have stressed the importance of the Alaska state Legislature enacting conspiracy laws to address criminal organizations.

However, the Legislature has failed to act and the governor has not supported the conspiracy legislation.

The U.S. Attorney's Law Enforcement Coordinating Committee comprised of federal, state and local law enforcement agencies recognizes that Alaska laws are not adequate to address the criminal organizations in Alaska. This is especially true in the area of drugs, guns and violence. More cases are prosecuted federally due to inadequate state laws.

The Federal Court System in Alaska is not adequate to handle the drastically increasing criminal element in Alaska that thrives on drugs, guns, fraud and corruption. Alaska Attorney General Charles Cole, as well as local district attorneys, support enacting adequate state conspiracy laws to address the criminal environment in Alaska.

The Anchorage Chamber of Commerce anticipates that Gov. Walter Hickel and concerned legislators will again be addressing Alaska's need for conspiracy laws. The Anchorage Chamber of Commerce urges all Alaska citizens to support the enactment of conspiracy laws necessary to address an increasing criminal element in Alaska.

Wewley William Shea is U.S. Attorney for the Eastern District of Washington. Comments expressed in Taking a Stand do not necessarily reflect the policies or position of The Anchorage Times.