

HB

243

22-LS0770C
Luckhaupt
2/1/02

*Adopted
2-8-02*

CS FOR HOUSE BILL NO. 243(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE DYSON

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to sexual assault or abuse of a minor."

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

3 * Section 1. AS 11.41.445(b) is amended to read:

4 (b) In a prosecution under AS 11.41.410 - 11.41.440, whenever a provision of
5 law defining an offense depends upon a victim's being under a certain age, it is an
6 affirmative defense that, at the time of the alleged offense, the defendant

7 (1) reasonably ~~and in good faith~~ believed the victim to be that age or
8 older; and *delete Amendment #1 adopted*

9 (2) undertook reasonable measures to verify that the victim was
10 that age or older [, UNLESS THE VICTIM WAS UNDER 13 YEARS OF AGE AT
11 THE TIME OF THE ALLEGED OFFENSE].

Adopted
in subcommittee

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

To: HB 243

Amend AS 11.41.445(b) to read:

(b) In a prosecution under AS 11.41.410 - 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant

- and
- (1) reasonably and in good faith believed the victim to be that age or older;
 - (2) took reasonable measures to verify that the victim was that age or older.



Definitions of "good faith"
under AK Law

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Alaska Statutes.

Title 23. Labor and Workers' Compensation

Chapter 10. Employment Practices and Working Conditions

Section 699. Definitions.

previous: Section 670. Effect of Mandatory Testing Obligations.

next: Chapter 15. Employment Services

AS 23.10.699. Definitions.

In AS 23.10.600 - 23.10.699.

- (1) "alcohol" means ethanol, isopropanol, or methanol;
- (2) "drugs" means a substance considered unlawful under AS 11.71 or the metabolite of the substance;
- (3) "drug testing" means testing for evidence of the use of a drug;
- (4) "employee" means a person in the service of an employer;
- (5) "employer" means a person who employs one or more full-time employees under a contract of hire, express or implied, oral or written;
- (6) "good faith" means reasonable reliance on fact, or that which is held out to be factual, without the intent to deceive or be deceived and without reckless or malicious disregard for the truth;
- (7) "prospective employee" means a person who has made application to an employer, whether written or oral, to become an employee;
- (8) "random" means a scientifically valid method that ensures that all covered employees have an equal chance of being selected;



Alaska State Legislature

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Juneau, Alaska 99801-1182
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Toll free (800) 342-2199

REPRESENTATIVE FRED DYSON

Sponsor Statement for HB 243 Verify Age Required for Defense in Crimes

An Act relating to sexual assault or abuse of a minor

Last Updated: January 22, 2002

Contact: Representative Fred Dyson's office at (907) 465-2199

Periodically, sexual predators use the defense that they did not know that the victim was under age, and that the victim *said* he/she was of age. HB 243 will force the perpetrator to show they took some action to verify the victim's age. This requirement is a step beyond the claim that they "reasonably believed" the victim was of age.

According to an Alaska Public Health Publication, 36% of known male partners of teen mothers (17 and under) were 21 years of age or older. There seems to be growing evidence that the teen pregnancies experienced by many young teens are the result of non-voluntary sex.

Our existing law that covers minors having sex with minors whose ages are within three years (AS 11.41.440) will still apply.

- E-mail -
Representative_Fred_Dyson
@Legis.state.ak.us

- Internet -
<http://www.akrepublicans.org>

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 243
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to sexual assault or abuse of BRU Criminal Division
a minor." Component All
 Sponsor Representative Dyson
 Requester House Judiciary Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 HB 243 relates to sexual abuse of a minor where the definition of the crime depends on the victim being under a certain age. The bill requires that a defendant must have taken reasonable measures such as checking identification or verifying the victim's age with the victim's parents in order to assert the affirmative defense that the defendant believed the victim of be old enough to consent to sexual activity. It would be insufficient for the defendant to rely solely on the word of the victim or the victim's friends.

 Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division: Attorney General's Office Date/Time 1/17/02 10:57 A
 Approved by: Bob Meiners for Bruce M. Bolelho, Attorney General Date 1/17/2002
 Agency: Department of Law

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Alaska Association of Chiefs of Police

January 3, 2002

The Honorable Fred Dyson
Alaska House of Representatives
State Capitol, Room 104
Juneau, AK 99801-1182

Re: Support for HB 243

Dear Representative Dyson:

As you are aware, the Alaska Association of Chiefs of Police is actively engaged in supporting or opposing legislation that impacts law enforcement efforts in Alaska.

I would like to advise you of our support for HB 243, which appropriately places the responsibility for determining the age of potential sexual partners where it belongs. To often in the past, perpetrators have been able to avoid conviction by claiming they "thought" the person appeared to be older.

If we can be of any assistance during the upcoming hearings, please let me know.

Thank you for your efforts on behalf of Alaska's youth.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Clemons", is written over a horizontal line.

Tom Clemons
President, AACOP



Alaska State Legislature

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REPRESENTATIVE FRED DYSON

HB 243 Sponsor Statement

"An Act relating to sexual assault or abuse of a minor

Updated: April 20, 2001

Contact: Representative Fred Dyson's office at (907) 465-2199

Periodically sexual predators use the defense that they did not know that the victim was under age and that the victim said he/she was of age. HB 243 will force the perpetrator to show that verified the victim's age by some external, objective means.

In the State of Alaska we require people to show ID for the purchase of tobacco and alcoholic beverages. HB 243 will force sexual predators who prey upon minors to go through a similar process. Our existing law that covers minors having sex with minors whose ages are within three years (AS 11.41.440) will still apply.

- E-mail -
Representative_Fred_Dyson
@legis.state.ak.us

- Internet -
<http://www.akrepublicans.org>

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 243
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Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to sexual assault or abuse of BRU Criminal Division
a minor." Component All
Sponsor Representative Dyson
Requester House Judiciary Committee Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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1003 GF Match						
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1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 243 relates to sexual abuse of a minor where the definition of the crime depends on the victim being under a certain age. The bill requires that a defendant must have taken reasonable measures such as checking identification or verifying the victim's age with the victim's parents in order to assert the affirmative defense that the defendant believed the victim to be old enough to consent to sexual activity. It would be insufficient for the defendant to rely solely on the word of the victim or the victim's friends.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone 465-5370
Division: Attorney General's Office Date/Time 4/25/01 9:06 AM
Approved by: Kathryn Daughhettee for Bruce M. Botelho, Attorney General Date 4/25/01
Agency: Department of Law

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this case is REMANDED for further proceedings.



STATE of Alaska, Petitioner
and Cross-Respondent,

v.

Michael FREMGEN, Respondent
and Cross-Petitioner.

Court of Appeals Nos. A-1909, A-4939.

Court of Appeals of Alaska.

Feb. 17, 1995.

Hearing Granted April 4, 1995.

Defendant was indicted for sexual abuse of minor in first degree for engaging in sexual penetration with female under 13 years of age, and defendant filed motion challenging constitutionality of statute prohibiting him from defending against charges of sexual abuse of minor in first degree on the ground that he reasonably believed that she was over age 16. The Superior Court, Third Judicial District, Anchorage, Rene J. Gonzalez, J., concluded that statute was unconstitutional as applied to defendant, and state filed petition for review and defendant filed cross petition for review of his claim that statute was unconstitutional on its face. The Court of Appeals, Coats, J., held that defendant had constitutional right to present affirmative defense of reasonable mistake of age in his prosecution for sexual abuse of minor.

Affirmed.

1. Rape ⇌13

Defendant had constitutional right to present affirmative defense of reasonable

1. AS 11.41.434(a) states in relevant part:

An offender commits the crime of sexual abuse of a minor in the first degree if . . . being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age[.]

mistake of age in prosecution for sexual abuse of minor, though victim was under 13 years of age at time of alleged offense. AS 11.41.445(b).

2. Criminal Law ⇌20

State must prove criminal intent of defendant for conviction of serious crime; defendant may not be convicted of serious criminal offense based upon strict liability.

Eric A. Johnson, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Atty. Gen., Juneau, for petitioner and cross-respondent.

Mauri Long and Ray R. Brown, Dillon & Findley, P.C., Anchorage, for respondent and cross-petitioner.

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

OPINION

COATS, Judge.

The state indicted Michael Fremgen for six counts of sexual abuse of a minor in the first degree for engaging in sexual penetration with S.M., a female under thirteen years of age.¹ Fremgen filed a motion with the court in which he contended that Alaska Statute 11.41.445(b) was unconstitutional to the extent that it prohibited him from defending against the charge of sexual abuse of a minor in the first degree on the ground that he reasonably believed that S.M. was over the age of sixteen.² AS 11.41.445(b) establishes an affirmative defense to charges of sexual abuse of a minor and provides:

In a prosecution under AS 11.41.410—11.41.440, whenever a provision of law defining an offense depends upon a victim's [sic] being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older,

2. Under the statutes prohibiting sexual abuse of minors, the age of consent in Alaska is 16 years. See AS 11.41.436(a)(1).

on the sexual assault i)(1). Kidnapping is separately punishable by nine years' imprisonment of five. AS 125(b).

sexual assault, Judge Johnson to the eight years. Because of mitigating factors or reasons, the sentencing imposed a lesser term. 72 P.2d 466, 467 (Alaska) sentenced Johnson to five years for his crime and two years of that sentence consecutively to the sexual assault, for a combined sentence of seven years. Thus, for his crime of unclassified crime in effect received only the minimum composite sentence court was empowered to

Johnson proposes, we do not view this as a separate crime. The circumstance aggravating sexual assault, Johnson's total sentence hardly seems beyond the bounds within which the state properly exercise its discretion. We independently reviewed the record, we conclude that the sentence below was not clearly an error. v. State, 519 P.2d 811.

conviction and sentence as to Russell G. Johnson.

ensome on the trial court. camera review of an already likely to result in more than mental incursion on the private person who is the subject of

vent that in camera review information that was not prior court should permit the significance and may, in its motion by Russell Johnson on the information.

unless the victim was under 18 years of age at the time of the alleged offense. (Emphasis added.)

Superior Court Judge Rene J. Gonzalez conducted an evidentiary hearing on Fremgen's motion. Several witnesses testified at this hearing. At the conclusion of the hearing, Judge Gonzalez found that there was a substantial basis to Fremgen's defense that S.M. exhibited a sexual and physical maturity which could lead a reasonable person to believe that she was older than her actual age of just under thirteen years. Judge Gonzalez rejected Fremgen's claim that AS 11.41.445(b) was unconstitutional on its face. He concluded, however, that the statute was unconstitutional as applied to Fremgen. Judge Gonzalez ruled that Fremgen would be allowed to present an affirmative defense that he reasonably believed that S.M. was age sixteen or older.³

[1] The state filed a petition for review in this court. Fremgen filed a cross-petition asking for review on the constitutional challenges which Judge Gonzalez rejected. This court granted both petitions. The parties have briefed and argued the case to this court. We now affirm Judge Gonzalez's ultimate decision allowing Fremgen to present a defense of reasonable mistake of age. However, unlike Judge Gonzalez, we base our conclusion upon the Alaska Supreme Court's decision in *State v. Guest*, 583 P.2d 836 (Alaska 1978). Following *Guest*, we find that

3. Fremgen concedes that unless he can show that he reasonably believed that S.M. was 16 years of age or older, he cannot establish the defense of reasonable mistake of age. Fremgen acknowledges that even if he reasonably believed that S.M. was 13 years of age or older but under 16, this would be sufficient showing of criminal intent to allow his conviction for sexual abuse of a minor in the first degree. See *Bell v. State*, 668 P.2d 829, 832-33 (Alaska App.1983) (no violation of due process to refuse to allow a reasonable mistake of age defense for a charge of inducing a person under the age of sixteen to engage in prostitution where defendant's knowledge that he was promoting prostitution was sufficient to provide criminal intent). See also *Ortberg v. State*, 751 P.2d 1368, 1374 (Alaska App.1988) (no *mens rea* requirement that defendant know that damage he caused exceeded \$500 for criminal mischief charge); *Noblitt v. State*, 808 P.2d 280, 284-86 (Alaska App.1991) (no *mens rea* requirement in hindering prosecution case that defen-

convicting Fremgen of sexual abuse of a minor without allowing him to present the affirmative defense of a reasonable mistake of age would violate his right to due process of law under the Alaska Constitution. We accordingly do not consider Judge Gonzalez's ruling that AS 11.41.445(b) was unconstitutional as applied to Fremgen.

In *Guest*, the defendants were charged with the statutory rape of a fifteen-year-old female in violation of former AS 11.15.120.⁴ Prior to trial, the defendants asked the trial judge to give an instruction that if the defendants held a reasonable belief that the fifteen-year-old victim was sixteen years of age or older, then the jury must find the defendants not guilty of the charges of statutory rape. 583 P.2d at 837. The trial judge agreed to give the instruction if the evidence at trial supported it.⁵ The state petitioned for review from the trial judge's decision to give the instruction. The supreme court affirmed, overruling a prior decision.⁶ Earlier decisions by the court in *Speidel v. State*, 400 P.2d 77 (Alaska 1969), and *Alex v. State*, 484 P.2d 677 (Alaska 1971), played an important part in the court's reasoning. The supreme court noted that it had held in both cases that "it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent." *Guest*, at 888.⁷ The court stated:

defendant know that person he aided committed a felony).

4. Former AS 11.15.120 provided in relevant part

Rape. (a) a person who ... (2) being 16 years of age or older, carnally knows and abuses a person under 16 years of age, is guilty of rape.

5. The parties in *Guest* stipulated that they expected the evidence at trial to support a reasonable belief on the part of the defendants that the alleged victim was 16 years of age or older at the time of the alleged act of sexual intercourse. *Id.* at 837.

6. *Anderson v. State*, 384 P.2d 669 (Alaska 1963).

7. The court also referred to its decision in *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978), as supporting the same principle.

We believe that the charge of statutory rape is legally unsupportable under the principles of *Speidel*, *Alex* and *Kimoktoak* unless a defense of reasonable mistake of age is allowed. To refuse such a defense would be to impose criminal liability without any criminal mental element. The defense of reasonable mistake of fact is generally allowed in criminal cases to permit the defendant to show that he lacked criminal intent. When that opportunity is foreclosed the result is strict criminal liability.

[I]n such cases, where the particular statute is not a public welfare type of offense, either a requirement of criminal intent must be read into the statute or it must be found unconstitutional.

583 P.2d at 838-39 (footnote and citations omitted).⁸

[2] The state points out that in *Guest* the supreme court quoted from what was then the tentative draft of the Alaska Criminal Code which ultimately became law as AS 11.41.445(b). *Id.* at 838 n. 2. The state contends that by setting out in its entirety proposed AS 11.41.445(b), the supreme court "tacitly approved the draft." This is certainly a possibility. However, as a lower court within the state court system, we are bound

8. The court defined "public welfare" offenses as a rather narrow class of regulatory offenses which imposed stringent duties on those who were connected with activities affecting the public health, safety and welfare. The court stated that:

The penalties for the infraction of strict liability offenses are usually relatively small and conviction of them carries no great opprobrium. Statutory rape may not be categorized as a public welfare offense. It is a serious felony. *Id.* at 838 (citation omitted).

by the decisions of the Supreme Court of Alaska. The clear language of *Guest* is sweeping, and unmistakably requires the state to prove criminal intent for the conviction of a serious crime. *Id.* at 838. *Guest* specifically applied this principle to require a defense of reasonable mistake of age. Furthermore, the *Guest* opinion does not stand alone. The Supreme Court of Alaska has consistently refused to allow a defendant to be convicted of a serious criminal offense based upon strict liability. See *Hentzner v. State*, 613 P.2d 821 (Alaska 1980); *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484 P.2d 677 (Alaska 1971); *Speidel v. State*, 460 P.2d 77 (Alaska 1969).

We conclude that under *Guest v. State*, Judge Gonzalez was required to allow Fremgen to present an affirmative defense that he reasonably believed that at the time that he engaged in sexual penetration with S.M., she was sixteen years of age or older. We accordingly AFFIRM Judge Gonzalez's decision.⁹



9. Fremgen concedes that at trial he will have the burden of establishing by a preponderance of the evidence that he reasonably believed that during the incidents charged S.M. was sixteen years of age or older. Reasonable mistake of age is an affirmative defense under which the defendant has the burden of proof under AS 11.41.445. We recently upheld the allocation of the burden of proof in *Steve v. State*, 875 P.2d 110, 115-23 (Alaska App.1994).

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 210106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

January 31, 2002

Representative Fred Dyson
State Capitol
Juneau, AK 99801-1182

Dear Representative Dyson:

I am writing you on behalf of the Alaska Peace Officers Association (APOA) State Board of Directors, who recently met and discussed proposed legislation for this legislative session.

APOA discussed House Bill 243 (22-LS0770A) related to the sexual assault or abuse of a minor. Although we understand and support the spirit in which this bill was introduced, we believe there should not be an affirmative defense to these crimes by simply checking government-issued photo identification or checking with a victim's parents. Clearly, the responsibility in cases such as these lies on the offender, and "reasonable measures" should extend far beyond what this legislation suggests.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the discussion and revision of this proposed legislation.

Sincerely,

COPY

Leo Brandlen
State President

cc: House Judiciary Chair, Rep. Norman Rokeberg

Business Manager

Joseph Young
Anchorage

Board of Directors

Leo Brandlen, President
Anchorage

Chuck Kopp, Vice President
Kenai

Michael Corkill, Past President
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Kim Wannamaker, Member
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Angella Long, Member
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James See, Member
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John Lucking, Jr., Member
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Thecla LaLonde, Member
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