HB 349

Adopted

AMENDMENT # 1

OFFERED IN THE SENATE **BY Senator Hollis French**
TO: ~~SB~~ HB 349 (1322\Q.A)

Page 2, lines 11-14

Delete all material

Page 2, line 11

Insert

(B) any criminal action, to impeach the defendant, codefendant, or a former defendant in the case if the prosecution shows that the evidence

(i) was the product of a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 US 436 (1966) and

(ii) was not obtained in substantial violation of the rights of the defendant, codefendant, or a former defendant in the case, as appropriate.

REPRESENTATIVE RALPH SAMUELS

HOUSE DISTRICT 29

CS HB 349

Sponsor Statement

"An Act Amending Rule 412, Alaska Rules of Evidence"

HB 349 is a bill that promotes truth telling by criminal defendants who choose to testify at trial.

Every criminal defendant has a constitutional right to testify in his defense. But that right must never be construed to include the right to commit perjury. Alaska's current law prevents courts from using suppressed prior inconsistent statements to challenge the credibility of defendants. This perverts the truth-finding process. It gives those who would lie under oath in a bid to escape justice a license to deceive jurors and judges as happened in a recent murder trial in Anchorage.

Under the supervision of a judge, a new law will permit prosecutors to cross-examine defendants using prior suppressed statements and evidence. Passage of HB 349 will bring Alaska into the mainstream of American and federal jurisprudence where such rules have been the law for years.

Email: Representative_Ralph_Samuels@legis.state.ak.us

Session: Alaska State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-2095 Fax: (907) 465-3810

Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0246 Fax: (907) 269-0242

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 349(JUD)
(H) Publish Date: 2/18/04

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating Rule 412, Alaska Rules of Evidence."
RDU Criminal
Component CDCO
Sponsor Representatives Samuels, McGuire, Stolze, Dahlstrom, Wilson
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
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						
CHANGE IN REVENUES ( )						

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 (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Rule 412, Alaska Rules of Evidence is amended in this bill to allow illegally obtained evidence to be used if a statement illegally obtained in violation of the Miranda Warning would be used to accuse or charge the person who made the statement if the prosecution shows that the statement was otherwise voluntary and not coerced. The bill also makes admittable illegally obtained evidence in a prosecution to impeach a witness if the prosecution shows that the evidence did not substantially violate the rights of the witness.

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

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 1/23/04 4:28 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/23/2004
Agency Department of Law

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 349(JUD)
(H) Publish Date: 2/19/04

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act amending Evidence Rule 412
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Representatives Samuels, McGuire..
Requester: (H) Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill, as amended in the CS, could have a fiscal impact on the operations of the Agency, but hopefully not a significant one. If enacted however, there will be additional hearings required to determine admissibility of illegally obtained evidence, and likely constitutional challenges, both of which will affect the operations of the Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 2/13/04 12:00 AM
Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

Number of states that permit the use of illegally seized evidence to impeach

29 states in addition to ALL federal courts under the Harris opinion by the US Sup. Ct.

Those states are:
1. Arkansas
2. Georgia
3. Tennessee
4. Arizona
5. Colorado
6. Florida
7. Illinois
8. Missouri
9. New York
10. Texas
11. Pennsylvania
12. Washington
13. Alabama
14. Delaware
15. Florida
16. Indiana
17. Kentucky
18. Louisiana
19. Maryland
20. Massachusetts
21. Michigan
22. Minnesota
23. Mississippi
24. Montana
25. New Jersey
26. Oregon
27. South Dakota
28. Virginia
29. California

The only states which do not permit it are Hawaii ,West Virginia and Alaska

That's not to say the remaining 19 states do or do not permit it-it's just that there are no reported cases for those states to say the issue may not ever have been addressed by the courts in those states.

IMPORTANT: Even though AK doesn't permit illegally seized evidence to impeach a defendant at trial, an Alaska case that DOES permit illegally seized evidence to be used by the judge when "it is reliable, when the police conduct involved in obtaining the evidence does not shock the conscience of the court, and when it is clear that the evidence was not obtained for purposes of influencing the sentencing judge"
Elson v. State, 633 P2d 292 (Alaska App 1982).

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ALASKA RULES OF COURT

2003 — 2004 Main Edition

A list of specific rules changed in this edition can be found after the title/copyright pages.

LexisNexis

(iii) Judgment on a plea of guilty or nolo contendere is reversed on direct or collateral review.

(b) This rule shall not apply to (1) the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas when offered in subsequent proceedings as prior inconsistent statements, and (2) proceedings by a defendant to attack or enforce a plea agreement.

(Added by SCO 364 effective August 1, 1979)

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Annotations

Cases

When examining a defendant's conduct to determine whether punitive damages are appropriate, it should make no difference that the defendant is insured or uninsured; accordingly, where jury responded "no" to question on special verdict form on whether plaintiff was entitled to punitive damages, exclusion of evidence of liability insurance was, if error, merely harmless error, even though defendant was allowed to present evidence to demonstrate his inability to absorb a punitive damage award. **Shane v. Rhines**, Op. No. 2750, 672 P2d 895 (Alaska 1983).

Where liability was not an issue in victim's suit against driver, evidence of driver's insurance coverage focused on the relevance of insurance to the driver's financial condition, a purpose not excluded by Alaska R. Evid. 411. **Fleegel v. Estate of Boyles**, Op. No. 5641, 61 P.3d 1267 (Alaska 2002).

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

(Added by SCO 364 effective August 1, 1979)

Annotations

Cases

Where the arrest is lawful, fact that arresting officer uses excessive force does not make the evidence obtained as a result of the arrest the product of illegality. **Martin v. State**, Op. No. 2298, 623 P2d 1225 (Alaska 1981).

Illegally seized evidence may be considered in fashioning a sentence when the illegally seized evidence is reliable, when the police conduct involved in obtaining the evidence does not shock the conscience of the court, and when it is clear that the evidence was not obtained for purposes of influencing the sentencing judge. **Elson v. State**, Op. No. 40, 633 P2d 292 (Alaska App. 1982).

The traditional requirement of standing has not been abrogated in search and seizure cases by adoption of this rule. **G.R. v. State**, Op. No. 61, 638 P2d 191 (Alaska App. 1982).

Defendant did not have standing to argue that his confession should be suppressed on the ground that it was the product of an illegal arrest and detention of his companion. **G.R. v. State**, Op. No. 61, 638 P2d 191 (Alaska App. 1981).

Defendant had no standing to object to police officers' contact with his building manager and no right to seek suppression of the evidence derived from her even if the contact was the result of a trespassory entrance into the apartment building. **Hubert v. State**, Op. No. 62, 638 P2d 677 (Alaska App. 1981).

Defendant had standing to contest the illegal arrest of codefendant which led to defendant's confession. **Unger v. State**, Op. No. 65, 640 P2d 151 (Alaska App. 1982).

This rule, which permits evidence illegally obtained to be used under certain circumstances in perjury prosecutions, applies to such evidence regardless of the basis for determining that it was illegally obtained. **Wortham v. State**, Op. No. 69, 641 P2d 223 (Alaska Op. No. 1982).

Suppression of illegally obtained evidence in defendant's cocaine prosecution was not res judicata nor did it collaterally estop the state from using the evidence in defendant's subsequent perjury prosecution where there was no suggestion that this rule was considered at the first suppression hearing. **Wortham v. State**, Op. No. 69, 641 P2d 223 (Alaska App. 1982).

Illegally obtained tape recording of conversation between defendant and undercover police agent which was properly suppressed at defendant's drug trial was admissible at defendant's subsequent perjury trial where the recording was made in good faith and was not an intentional violation of the law. **Wortham v. State**, Op. No. 214, 657 P2d 856 (Alaska App. 1983).

Although this rule is not necessarily limited to violations of constitutional rights, it does not automatically apply to violations of all statutes. **Harker v. State**, Op. No. 2665, 663 P2d 932 (Alaska 1983).

Illegally obtained tape recording of conversation between defendant and undercover police agent was admissible at defendant's perjury trial. **Wortham v. State**, Op. No. 2697, 666 P2d 1042 (Alaska 1983).

This rule contains a standing requirement for search and seizure violations, but under the Alaska Constitution there are

exceptions to the requirement. Waring v. State, Op. No. 2719, 670 P2d 357 (Alaska 1982).

A defendant has standing to assert the violation of a co-defendant's fourth amendment rights if he or she can show (1) that a police officer obtained the evidence as a result of gross or shocking misconduct, or (2) that the officer deliberately violated the co-defendant's rights. Waring v. State, Op. No. 2719. 670 P2d 357 (Alaska 1983).

Assuming, without deciding, that the warnings received by defendant regarding his testimony at a coroner's inquest were less than adequate to safeguard his right to remain silent, his testimony was nevertheless not involuntary or the product of coercion; therefore, his testimony at the coroner's inquest could be used against him in subsequent trial for perjury. Esmailka v. State, Op. No. 721, 740 P2d 466 (Alaska App. 1987).

Exclusionary rule did not apply to error by trial court in using telephonic testimony in support of search warrant without following statutory procedure since violation of statute was not in bad faith and since there was no claim that absent telephonic testimony warrant would have been invalid. Burrece v. State, Op. No. 1618, 976 P2d 241 (Alaska App. 1999).

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or ot failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or cor ration, association, or other organization or ent either public or private, who is rendered professio legal services by a lawyer, or who consults a law with a view to obtaining professional legal service

(2) A representative of the client is one hav authority to obtain professional legal services anc act on advice rendered pursuant thereto, on behal the client.

(3) A lawyer is a person authorized, or reas ably believed by the client to be authorized, to pi tice law in any state or nation.

(4) A representative of the lawyer is one (ployed to assist the lawyer in the rendition of pro sional legal services.

(5) A communication is confidential if intended to be disclosed to third persons other t those to whom disclosure is in furtherance of rendition of professional legal services to the cl or those reasonably necessary for the transmissio the communication.

(b) **General Rule of Privilege.** A client ha privilege to refuse to disclose and to prevent other person from disclosing confidential comm cations made for the purpose of facilitating rendition of professional legal services to the cli (1) between the client or the client's representa and the client's lawyer or the lawyer's representat or (2) between the client's lawyer and the lawy representative, or (3) by the client or the clie lawyer to a lawyer representing another in a matte common interest, or (4) between representative the client or between the client and a representa of the client, or (5) between lawyers representing client.

(c) **Who May Claim the Privilege.** The pi lege may be claimed by the client, the clie guardian or conservator, the personal representa of a deceased client, or the successor, trustee similar representative of a corporation, associat or other organization, whether or not in existe The person who was the lawyer at the time of communication may claim the privilege but only behalf of the client. The authority to do so is sumed in the absence of evidence to the contrary.

of insurance coverage is a tenuous one, as is its converse, evidence of insurance coverage or of the absence of such coverage lacks great probative value on the issue of fault. More importantly, perhaps, the rule is designed to prevent a jury from deciding a close case on an improper basis — i.e., whether or not a party is insured. There is a danger that insurance evidence might skew the decision-making process of the jury by making it regret a possibly wrong decision against an uninsured person much more than a similar decision under identical facts against a person whose insurance status is unknown, or by making the jury regret any erroneous decision against an insured party less than it would an erroneous decision against a person whose insurance status is unknown. This is not to suggest that a jury will intentionally make a mistake. It suggests only that in close cases someone must bear the risk of error, that the presence or absence of insurance is not regarded as an appropriate guide for allocating the risk, and that it is possible that a jury will misuse insurance evidence. This rule, identical to the federal rule, is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence of this rule describes the limitations on it. Whereas evidence of insurance coverage is inadmissible to prove negligence, there are several well established issues for which evidence of insurance coverage, or the lack of it, has probative value and is therefore admissible. Evidence of insurance of an object often indicates the person who controls or owns the object in question. Or, if A has insured B, there is some reason to draw the inference that A considers himself responsible for B's acts. While it is inconclusive proof of an agency relationship, the existence of such insurance has evidentiary value in helping to establish such a relationship.

Bias or prejudice of a witness or juror is a common concern when a witness or juror is connected with an insurance company. Such information often has been elicited during voir dire when a prospective juror is asked whether or not he has any connection with the insurance business. Although this is often a legitimate question, it may serve to remind the jury that a party may be insured. Similarly, questions as to a witness' affiliation with insurance interests may be legitimate impeachment tools, despite the danger of misuse of the insurance evidence.

But, the fact that evidence of insurance is sometimes admissible does not mean that it must be admitted whenever offered for a proper purpose. The danger of misuse of the evidence by the jury does not totally disappear when the evidence is introduced for a reason other than to prove fault or absence thereof, even though a limiting instruction will be given upon request under Rule 105. Rule 403 requires the trial judge to balance the probative value of the evidence on one issue against the potential danger that the jury will favor uninsured defendants and disfavor insured defendants.

Trial lawyers are on notice that insurance is admissible for some purposes and not others. Alaska R. Civ. P. 26(b) (2) allows discovery of insurance agreements, and the parties should be able to obtain a judicial decision on whether insurance evidence is to be admitted or otherwise utilized and for what purposes before such evidence is brought to the attention of the jury. *Poulin v. Zartman*, 542 P.2d 251, 265 (Alaska 1975).

If this rule is to have maximum effectiveness, it must be enforced by the trial judge. Inadvertent or deliberate tactical references to insurance should be cured immediately, if possible, with instructions to the jury to disregard the information. The trial judge is vested with wide discretion to grant a new trial where such slips are not easily cured. *See Peters v. Benson*, 425 P.2d 149, 152-153 (Alaska 1967).

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York*, 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 695 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26 (g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants

to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States,* 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis,* 317 N.E.2d 545 (Ill. 1974), *cert. denied,* 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan,* 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano,* 425 U.S. 564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda,* if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra,* where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtaining it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

ARTICLE V. PRIVILEGES

Introductory Comment

Article V provides for eight different privileges and recognizes that other privileges may be created by statute or court rule. Because most of the privileges covered by Article V were recognized before the adoption of these Rules, the Reporter's Comments do not attempt to state the rationales for the various privileges and to justify them. Most of the privileges have been debated elsewhere, and the privileges have survived the debate. The Reporter's Comments accompanying the various rules do explain, however, why particular approaches to defining rules were taken and why others were rejected.

Two rules of privilege which are found in several jurisdictions are omitted from these rules. One is the privilege for official information; the other is the privilege previously provided by Rule 43 (h) (7), Alaska R. Civ. P., covering evidence tending to degrade the character of a witness. This Comment explains the omissions.

The Wigmore treatise, 8 Wigmore on Evidence § 2378, at 807-08, (J. McNaughton rev. 1961), states that the best collection of arguments in favor of an official information privilege is as follows (quoting Gellhorn & Byse, Administrative Law Cases and Comments 617-18 (4th ed. 1960):

> [The discussion relates to the SEC and summarizes that agency's brief in a federal case]. The documents and testimony relating to intra-agency discussions, communications, memoranda, reports, recommendations, positions taken at staff and Commission level with respect to the

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ISAIAH L WALLNER,
DOB: 12/29/76
APSIN ID: 6714211
DMV NO. 6714211
SSN: 574-84-4768
ATN: 107-284-518

Defendant.

Court No. 3AN-S02-4342 Cr.
Search Warrant Nos: 3AN-02-229, 230, 231 SW

INFORMATION

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990: ALL COUNTS

Count I - AS 11.41.100(a)(1)(A)
Murder In The First Degree
Isaiah L Wallner - 001

Count II - AS 11.41.110(a)(1)
Murder In The Second Degree
Isaiah L Wallner - 002

Count III - AS 11.56.610(a)(1)
Tampering With Physical Evidence
Isaiah L Wallner - 003

THE DISTRICT ATTORNEY CHARGES:

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
(907) 269-6300

Count I

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER intentionally caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.100(a)(1)(A) and against the peace and dignity of the State of Alaska.

Count II

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER with intent to cause serious physical injury to Brenda L. Wallner or knowing that the conduct was substantially certain to cause death or serious physical injury to another person, caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.110(a)(1) and against the peace and dignity of the State of Alaska.

Count III

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L WALLNER destroyed, mutilated, altered, suppressed, concealed, or removed physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation.

All of which is a class C felony offense being contrary to and in violation of AS 11.56.610(a)(1) and against the peace and dignity of the State of Alaska.

The undersigned swears under oath this Information is based upon a review of police report 02-24984 submitted to date.

On May 22, 2002, at approximately 6:52 a.m. the Anchorage Police Department received a 911 call from Patricia Barazi stating that there was a female in the parking lot, unable to breathe, who had apparently been stabbed in the chest. A second call came from the upstairs neighbors who reported a female screaming for help in apartment number nine. Anchorage Police Officers arrived at the scene, in the

DISTRICT ATTORNEY, STATE OF ALASKA
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parking lot at 1338 Ingra. Officers Foraker and Robinson made contact with the female, trying to hold her still, waiting for the paramedics. She was later identified as Brenda Wallner. When asked who did this to her, she replied "my husband", and when asked why, she said she did not know. The victim was transported to ARH and was declared dead at approximately 7:30 a.m. She had at least one stab wound in her chest, one on her arm, and three stab wounds in the back.

Sgt. Spadafora and Officer Jensen knocked at the door of the victim and suspect's apartment, 1335 Hyder #9. A person later identified as the defendant, Isaiah Wallner, the victim's husband, opened the door, and the police entered. The defendant was seated on the floor in the corner of the kitchen, with a knife to his throat. After refusing repeated demands to drop the knife, he was shot with a less lethal weapon four times. He was taken into custody and transported to Providence Medical Center for treatment of his injuries. He had bruising and tearing on both legs, and one arm.

After treatment for his injuries, he was transported to the Anchorage Police Department for an interview. He stated that he had been working the night shift, getting off work at 1:30 a.m. He walked home. The victim and two children were asleep on mattresses in a bedroom upstairs. One child, T.W., 20 months, is the child of the defendant and the victim. The other child, T.G., eight years old, is the child of the victim. His father lives out of state. The defendant stated that he sat on the corner of the mattress watching the victim sleep from approximately 1:45 until 5:00. He stated that he was "contemplating killing her". At one point he went down to the kitchen and got a paring knife, returning to the bedroom. The victim woke up and went to the kitchen. The victim and the defendant got into a verbal argument. Part of the argument included the fact that she was going to get a divorce, and take his child out of state. The defendant stated that she was always "poking" at him, calling him names, arguing about minor things. At one point the victim asked the defendant what he had been doing earlier that morning and he told her that he had been contemplating killing her. She told him that she was going out to call the police. He went upstairs to get the knife where he had left it, and then returned to the kitchen. The victim pushed him away to get to the

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door, after he pulled the knife on her. He said that he did not want her to call the police. They began to struggle, and he admitted stabbing her in the back. He said he was looking for a good "vantage point" when he stabbed her in the back. When asked how far the knife went in, he stated "all the way". She fell to the floor on her back, and he stabbed her in the chest. According to the defendant, the victim then said to him "I'm going to die". The defendant let go of the knife. The victim was able to get out of the apartment. The defendant stated he began pacing around the kitchen. He said that there was a lot of blood. He began cleaning up the blood with a mop, and then heard the sirens. When he heard a knock on the door, he looked out and saw the police. He unlocked the door and left it ajar. He sat down with another knife, holding it to his throat. He admitted he wanted to kill himself. He said he would not drop the knife because he did not want to go to jail. He said that neither he nor the victim had been drinking or using drugs. When he was told that his wife had died, he responded "I wish there was the death penalty, I deserve it."

Members of the crime scene team recovered the murder weapon near where the victim had been found. Bloodstain patterns reveal that the stabbing was confined to the kitchen. There was quite a bit of blood in the kitchen, and it was noted that there was an attempt to mop up blood. There was a bloody palm print on the door leading outside from the hallway of the apartment building, where the victim had apparently run.

The eight-year-old boy, T.G. was also interviewed. He said he saw the defendant go into the kitchen and get a knife and stab his mom in the chest. He also said that his mom had been "grumpy" that morning.

BAIL INFORMATION

Defendant has following Alaska criminal conviction:

08/02/95 Damage Property

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NCIC indicates Tennessee shows the following arrests but no disposition on the cases.

03/16/00	Possession of Marijuana
03/16/00	Possession of Drug Paraphernalia
03/16/00	Carrying Weapon For Purpose Of Going Armed
01/26/02	Domestic Assault
02/29/02	Theft Of Property

Particulars of these police contacts will be filed in a bail document tomorrow.

Dated at Anchorage, Alaska, this 22nd day of May, 2002.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: MaryAnne Henry
Mary Anne Henry
Assistant District Attorney
Alaska Bar No. 7610097

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2002 at Anchorage, Alaska.

Linda D. Krasier
Notary Public in and for Alaska
My commission expires: 06/20/05

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

ISAIAH L. WALLNER,
DOB: 12/29/76
APSIN ID: 6714211
DMV NO. 6714211
SSN: 574-84-4768
ATN: 107-284-518

Defendant.

No. 3AN-S02-4342 CR.

INDICTMENT

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

The following counts charge a crime involving DOMESTIC VIOLENCE as defined in AS 18.66.990: All

Count I - AS 11.41.100(a)(1)(A)
Murder In The First Degree
Isaiah L. Wallner - 001

Count II - AS 11.41.110(a)(1)
Murder In The Second Degree
Isaiah L. Wallner - 002

Count III - AS 11.56.610(a)(1)
Tampering With Physical Evidence
Isaiah L. Wallner - 003

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THE GRAND JURY CHARGES:

Count I

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER intentionally caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.100(a)(1)(A) and against the peace and dignity of the State of Alaska.

Count II

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER with intent to cause serious physical injury to Brenda L. Wallner or knowing that the conduct was substantially certain to cause death or serious physical injury to another person, caused the death of Brenda L. Wallner.

All of which is an unclassified felony offense being contrary to and in violation of AS 11.41.110(a)(1) and against the peace and dignity of the State of Alaska.

Count III

That on or about May 22, 2002, at or near Anchorage in the Third Judicial District, State of Alaska, ISAIAH L. WALLNER destroyed, mutilated, altered, suppressed, concealed, or removed physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation.

All of which is a class C felony offense being contrary to and in violation

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of AS 11.56.610(a)(1) and against the peace and dignity of the State of Alaska.

DATED this 30 day of May, 2002 at Anchorage, Alaska.

A true bill

Grand Jury Foreperson

Sharon A. S. Illsley
Assistant District Attorney
Bar No. 9009057

02-229 SW; 02-230 SW; 02-231 SW

WITNESSES EXAMINED BEFORE THE GRAND JURY:
Det. Pamela Perrenoud DSN 930
Karen Larkin
Dr. Franc Fallico

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Wallner convicted of murder
FIRST DEGREE: Man who killed wife destroyed evidence also, jury finds.

7/24/03
Thursday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

A man who stabbed his wife 43 times intended to kill her, an Anchorage jury concluded Wednesday, convicting Isaiah **Wallner**, 28, of first-degree murder after one day of deliberation. Judge Larry Card set sentencing for Nov. 25.

Prosecutor Sharon Illsley said after the verdict that she'll wait for a report on **Wallner** from the Department of Corrections before deciding what sentence to request. However, it's "a very aggravated case," she said.

The sentence range for first-degree murder is from 20 to 99 years with about 60 years the average.

Wallner also was convicted of destroying evidence for trying to clean up his bloodied kitchen before police arrived.

There was never any question that **Wallner** killed his wife, stabbing her repeatedly with a paring knife the morning of May 22, 2002. But defense attorney Craig Howard insisted it was an unreasoning rage killing and urged jurors to convict **Wallner** of second-degree murder or even manslaughter.

Brenda **Wallner**, 28, stumbled from the couple's Hyder Street apartment shortly after 6 a.m., crying for help, awakening several neighbors who came to her aid. She had been stabbed in both lungs and in her heart, Illsley told jurors. She named her husband as her killer before she died.

Her two sons, 8 years and 20 months, were in the apartment and the 8-year-old witnessed the murder.

Shortly after being taken in to custody, **Wallner** told police he came home from his night job at about 1:45 a.m. and watched his sleeping wife for hours, contemplating killing her. According to charging documents, he said he was unhappy because she wanted a divorce and because she was always nagging him.

He said he went to the kitchen at one point and got a knife, then returned to the bedroom. When his wife woke up, an argument started and he told her he had been thinking about killing her. She said she was going to a nearby gas station to call police. Their apartment had no phone. He started stabbing her because he didn't want her to call police, he said.

But this statement was ruled inadmissible at the trial because police continued questioning **Wallner** after he mentioned possibly wanting to contact a lawyer. Thus, when **Wallner** took the witness stand Tuesday and said that his wife had a knife, that he stabbed her in self defense only after she lunged at him, and that he wasn't thinking of killing her, Illsley couldn't use his prior statement to suggest he was lying.
Illsley declined to discuss the suppressed statement but said Wednesday that there are legal consequences for lying under oath.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

All Archives

Wallner says he stabbed his wife in self-defense
TRIAL: Defendant said he snapped when she came after him with knife.

7/23/03
Wednesday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

A man accused of killing his wife by stabbing her 43 times took the witness stand Tuesday and said it was self-defense.
Isaiah **Wallner** said his wife, Brenda, also had a knife the morning of May 22, 2002, when harsh words in the couple's apartment kitchen escalated to fatal violence.
Prosecutor Sharon Illsley told jurors **Wallner** killed his unarmed wife deliberately, stabbing her repeatedly after working himself into a fury over a series of minor irritations that culminated when she tried to leave the apartment to call police from a corner gas station.
The Hyder Street apartment did not have a phone.
Mortally wounded, Brenda **Wallner** ran from the apartment, covered in her own blood with a knife handle protruding from her chest, according to a neighbor who came to her aid. Before dying, she told witnesses and police that her husband killed her.
But **Wallner** said it wasn't an intentional killing. He just snapped when his wife lunged at him with her knife, he said. That caused him to also pick up a knife. He said he couldn't be more specific about what happened because he doesn't remember the killing.
Police found no trace of a second knife because he washed it and put it back in the drawer, he said. When police asked him about what happened that day, he didn't mention his wife also had a knife because he was trying to protect her.
Wallner's loss of memory caused some problems for him on cross-examination. He couldn't explain why his allegedly armed wife, who weighed 20 pounds more than him, had 43 wounds and he had only what seemed to be a fingernail scratch on his face.
And, although he doesn't remember what he repeatedly referred to as "the incident," he said his stepson's eyewitness testimony that he stabbed Brenda **Wallner** three times in the back "when she wasn't looking" was wrong.
According to medical testimony, Brenda **Wallner** had three stab wounds in her back, including one in each lung. She also had a knife wound in the heart, which Illsley said was probably the last blow delivered before she ran from the apartment. "He buried the knife in her chest" to keep her from leaving, but she got out, although it was too late for anyone to save her, Illsley said.
To assist Wallner's memory, Illsley played a tape of him talking to police shortly after the killing. He was sitting at his kitchen table threatening suicide with a knife and they were trying to talk to him. At one point he told them, "I think I lost it when she said she was going to call the cops when I said I was contemplating killing her."
Wallner said this wasn't what happened.

"So, you have no memory of what happened," Illsley snapped. "But you remember what didn't happen."

The two-knife theory dominated a long, agitated closing argument by defense attorney Craig Howard. "This was an uncontrollable rage," he told jurors, set off by a knife swipe from Brenda, the real cause of the scrape on Isaiah's face.

The defendant had no "conscious objective" to kill his wife, so he is obviously not guilty of first-degree murder, Howard said.

"Ms. Illsley should go into writing pulp fiction," he said, accusing the prosecution of trying to hide the presence of a second knife.

The 8-year-old stepson who witnessed the killing told police his mother started the fight and said he saw his stepfather clean and put a knife in the drawer after his mother left the apartment, Howard said. Police didn't photograph the contents of the drawer because they leaped to the conclusion that the bloody knife found on the ground outside was the only one involved, he said.

The woman who testified that Brenda had a knife sticking out of her chest before she fell down was wrong, Howard said. The dying woman must have been carrying it in her hand. Use deductive logic, he urged jurors.

And why was the knife found with the victim so bloody since she obviously didn't stab anyone with it? Because the **Wallners** must have somehow switched knives before she left the apartment, Howard said.

Illsley told jurors there was no second knife. Offering a photograph of Brenda Wallner's palms, sliced with defensive wounds, Illsley said it was obvious the victim wasn't holding anything in her hands during the attack.

The jury is expected to begin deliberating the case today.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

BILL ROTH / Anchorage Daily News

Murder defendant Isaiah **Wallner** said Tuesday that police found no trace of a second knife because he washed it and put it back in the drawer.

Photo 1: IsaiahWallner_072303.jpg

All Archives

Trial focuses on whether man meant to kill wife
MURDER? Brenda Wallner was cut 43 times in May 2002.

7/15/03
Tuesday
B1
Alaska
Final

By SHEILA TOOMEY
Anchorage Daily News
Staff

With stab wounds in both lungs, a knife handle protruding from her chest, and blood leaking from dozens of slices in her body, Brenda Wallner ran from her Fairview apartment one Wednesday morning last summer, screaming for help.
She collapsed near Patricia Barazi's first-floor balcony in a pool of blood that so drenched her T-shirt that the first police officer on the scene thought she was wearing a red top.
She fought to keep breathing and lived long enough to tell police and other people who came to her aid that her husband, Isaiah Wallner, killed her.
"I asked her, 'Who did this to you,' " said Karen Larkin, who was driving down Ingra Street on her way to work about 6:45 a.m. on May 22, 2002, and stopped to help.
"She told me, 'My husband did it.' "
In all, her husband did it 43 times, according to prosecutor Sharon Illsley in opening statements Monday at Wallner's trial: 24 stab wounds were found on Brenda Wallner's body, and 19 defensive cuts.
So whodunit is not an issue in Judge Larry Card's sixth-floor courtroom. The only question is intent. Despite the carnage, Isaiah intended only to hurt Brenda, attorney Craig Howard told jurors. He did not intend to kill her.
The issue is first-degree murder vs. second-degree murder and a commensurate difference in the likely prison sentence. First-degree sentences tend to be from 65 to 99 years.
Second-degree is more likely to earn a defendant 30 to 60 years.
Howard said the fact that most of the stab wounds, made with a common kitchen paring knife, were superficial is evidence the defendant didn't mean to kill his wife. Only three wounds were fatal, he said.
The Wallners met in Tennessee. She was a customer at a gas station where he worked, Howard said. They fell in love but had a contentious off-and-on relationship. She had an 8-year-old son by a previous marriage, and the two of them had a son together in September 2000. They married in 2001 and life was great, Howard said.
Isaiah's father is an Alaska state trooper and his mother lives in Tennessee, so he split his time between the two, Howard said. He came back to Alaska hoping to find a better job.
At the time of the murder, Isaiah, now 28, worked nights at a fast-food restaurant and Brenda, 30, worked days in an ulu factory.
Everything was fine on May 21 and 22, Howard told jurors during the defense opening

statement. Isaiah walked home from work with a co-worker and was upbeat about life. So how did Brenda end up mortally wounded a few hours later?

"Sometime in the early morning hours there was a confrontation between Isaiah and Brenda. It became irrational on both sides," Howard said. Isaiah's attack was a rage killing, he said. Brenda was walking and yelling when she left the apartment, so Isaiah had no way of knowing she was mortally wounded.

Howard said the fact that Wallner didn't realize his wife was dead until police told him shows he didn't intend to kill her.

After Brenda ran out, Isaiah started mopping up the blood in the kitchen, Illsley said. When police tracked Brenda's blood trail back to the apartment, they found Isaiah holding a knife to his neck, threatening suicide. Police tried to talk him down, then shot him with nonlethal ammunition and took him into custody.

What no one mentioned Monday were Isaiah's alleged statements to police as he sat there with the knife. He said he watched his wife sleep for about three hours after he got home from work and contemplated killing her because she wanted a divorce, according to charging papers filed at the time of his arrest. The statements are not admissible at the trial.

Wallner is a slight, pale man with a long, dark pony tail. He has not cut his hair since his wife died, Howard said. At the defense table, Wallner closed his eyes at the sight of bloody pictures of his wife on the overhead projector and bowed his head at the sound of her voice on a tape made as she lay dying.

The trial is expected to wrap up this week or early next week.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

Graphic 1: Quote marks_071503.pdf

All Archives

STATE OFFICE

ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

February 9, 2004

Representative Ralph Samuels
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Samuels,

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for co-introducing HB 349, an act amending Rule 412, Alaska Rules of Evidence.

This proposed Alaska Rules of Evidence change will allow for statements to be admitted by the court, for impeachment purposes, if the statement was otherwise voluntary and not coerced and not obtained in substantial violation of rights of the witness. This change will be of benefit for the citizens and law enforcement of the State of Alaska. We thank you for addressing this issue.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo J. Brandlen

Leo J. Brandlen
State President