HB

34

24-LS0240\R
Luckhaupt
1/26/06

CS FOR HOUSE BILL NO. 34( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to the confidentiality of court files and records relating to judgment set asides granted after suspended imposition of sentence."

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

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **The person may petition the court for an order to make the court file and the record of the conviction, suspended imposition of sentence, and set aside confidential. In considering the petition, the court shall consider comments from the victim of the crime and the public. If the person has not been charged with a crime since the date of the set aside, the court may make the records and court file confidential. The court may assess the costs of the petition and hearing to the petitioner and shall require the petitioner to pay a fee for making the records and court file confidential. The fee shall he designed to reimburse the Department of Public**

Safety and the clerk of court for the actual costs of making the records and court file confidential. Upon entry of the order, the person shall be considered not to have been convicted or received a suspended imposition of sentence or a set aside for that crime. Upon payment of the costs, if assessed, and the fee for making the records and court file confidential, the person may provide a certified copy of the order to the clerk of the court and to the Department of Public Safety. Thereafter, the court file, the record of the conviction, the suspended imposition of sentence, or a set aside, and other official records, including electronic records, are confidential.

* **Sec. 2.** AS 12.62.160(b) is amended to read:

(b) Subject to the requirements of this section, and except as otherwise limited or prohibited by other provision of law, [OR] court rule, **or an order making records confidential issued under AS 12.55.085(e),** criminal justice information

(1) may be provided to a person when, and only to the extent, necessary to avoid imminent danger to life or extensive damage to property;

(2) may be provided to a person to the extent required by applicable court rules or under an order of a court of this state, another state, or the United States;

(3) may be provided to a person if the information is commonly or traditionally provided by criminal justice agencies in order to identify, locate, or apprehend fugitives or wanted persons or to recover stolen property, or for public reporting of recent arrests, charges, and other criminal justice activity;

(4) may be provided to a criminal justice agency for a criminal justice activity;

(5) may be provided to a government agency when necessary for enforcement of or for a purpose specifically authorized by state or federal law;

(6) may be provided to a person specifically authorized by a state or federal law to receive that information;

(7) in aggregate form may be released to a qualified person, as determined by the agency, for criminal justice research, subject to written conditions that assure the security of the information and the privacy of individuals to whom the information relates;

(8) may be provided to a person for any purpose, except that information may not be released if the information is nonconviction information or correctional treatment information;

(9) including information relating to a serious offense, may be provided to an interested person if the information is requested for the purpose of determining whether to grant a person supervisory or disciplinary power over a minor or dependent adult; and

(10) may be provided to the person who is the subject of the information.

*** Sec. 3.** AS 12.62.180(b) is amended to read:

(b) A person may submit a written request to the head of the agency responsible for maintaining past conviction or current offender information, asking the agency to seal such information about the person that, beyond a reasonable doubt, resulted from mistaken identity or false accusation. The decision of the head of the agency is the final administrative decision on **a** [THE] request **submitted under this subsection**.

*** Sec. 4.** AS 12.62.180(c) is amended to read:

(c) The person requesting that the information be sealed **under (b) of this section** may appeal an adverse decision of the agency to the court under applicable rules of procedure for appealing the decision of an administrative agency. The appellant bears the burden on appeal of showing that the agency decision was clearly mistaken. An appeal filed under this subsection may not collaterally attack a court judgment or a decision by prison, probation, or parole authorities, or any other action that is or could have been subject to appeal, post-conviction relief, or other administrative remedy.

*** Sec. 5.** AS 12.62.180(d) is amended to read:

(d) A person about whom information is sealed under **(b) of** this section may deny the existence of the information and of an arrest, charge, conviction, or sentence shown in the information. Information that is sealed under this section may be provided to another person or agency only

(1) for record management purposes, including auditing;

(2) for criminal justice employment purposes;

(3) for review by the subject of the record;

(4) for research and statistical purposes;

(5) when necessary to prevent imminent harm to a person; or

(6) for a use authorized by statute or court order.

* **Sec. 6.** AS 12.62.180 is amended by adding a new subsection to read:

(e) A person may submit a certified copy of an order making records confidential issued under AS 12.55.085(e) to the Department of Public Safety for maintaining criminal justice information. On receiving the certified copy of the order for making the information confidential, the Department of Public Safety shall make the information that relates to a conviction, a suspended imposition of sentence, or a set aside described in AS 12.55.085(e) confidential.

24-LS0240\X
Crawford
4/27/05

CS FOR HOUSE BILL NO. 34( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to the expungement of records relating to judgment set asides granted after suspended imposition of sentence."

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

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **The person may petition the court for an order of expungement. Not earlier than one year following the date of the set aside, if the person has not been charged with a crime since the date of the set aside, the court may issue the expungement order. Upon entry of such an order, the applicant shall be deemed not to have been convicted, or received a suspended imposition of sentence, or a set aside for that crime. Upon entry of such an order, the person may provide a certified copy of the order and payment for the cost of making the records confidential to the clerk of the court and to the Department of Public Safety. Thereafter, the record**

New Text Underlined [DELETED TEXT BRACKETED]

of the conviction, the suspended imposition of sentence, or a set aside and other official records including electronic records are confidential. Nothing in this subsection affects or prevents the use of an offender's prior conviction, including an expunged conviction, in a later criminal prosecution. For all other purposes, including responding to questions on employment applications, an offender whose conviction has been expunged may state that the offender has never been convicted of the crime.

* **Sec. 2.** AS 12.62.160(b) is amended to read:

(b) Subject to the requirements of this section, and except as otherwise limited or prohibited by other provision of law, [OR] court rule, **or an expungement order issued under AS 12.55.085(e),** criminal justice information

(1) may be provided to a person when, and only to the extent, necessary to avoid imminent danger to life or extensive damage to property;

(2) may be provided to a person to the extent required by applicable court rules or under an order of a court of this state, another state, or the United States;

(3) may be provided to a person if the information is commonly or traditionally provided by criminal justice agencies in order to identify, locate, or apprehend fugitives or wanted persons or to recover stolen property, or for public reporting of recent arrests, charges, and other criminal justice activity;

(4) may be provided to a criminal justice agency for a criminal justice activity;

(5) may be provided to a government agency when necessary for enforcement of or for a purpose specifically authorized by state or federal law;

(6) may be provided to a person specifically authorized by a state or federal law to receive that information;

(7) in aggregate form may be released to a qualified person, as determined by the agency, for criminal justice research, subject to written conditions that assure the security of the information and the privacy of individuals to whom the information relates;

(8) may be provided to a person for any purpose, except that information may not be released if the information is nonconviction information or

correctional treatment information;

(9) including information relating to a serious offense, may be provided to an interested person if the information is requested for the purpose of determining whether to grant a person supervisory or disciplinary power over a minor or dependent adult; and

(10) may be provided to the person who is the subject of the information.

*** Sec. 3.** AS 12.62.180(b) is amended to read:

(b) A person may submit a written request to the head of the agency responsible for maintaining past conviction or current offender information, asking the agency to seal such information about the person that, beyond a reasonable doubt, resulted from mistaken identity or false accusation. The decision of the head of the agency is the final administrative decision on **a** [THE] request **submitted under this subsection**.

*** Sec. 4.** AS 12.62.180(c) is amended to read:

(c) The person requesting that the information be sealed **under (b) of this section** may appeal an adverse decision of the agency to the court under applicable rules of procedure for appealing the decision of an administrative agency. The appellant bears the burden on appeal of showing that the agency decision was clearly mistaken. An appeal filed under this subsection may not collaterally attack a court judgment or a decision by prison, probation, or parole authorities, or any other action that is or could have been subject to appeal, post-conviction relief, or other administrative remedy.

*** Sec. 5.** AS 12.62.180(d) is amended to read:

(d) A person about whom information is sealed under **(b) of** this section may deny the existence of the information and of an arrest, charge, conviction, or sentence shown in the information. Information that is sealed under this section may be provided to another person or agency only

(1) for record management purposes, including auditing;

(2) for criminal justice employment purposes;

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(4) for research and statistical purposes;

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*** Sec. 6.** AS 12.62.180 is amended by adding a new subsection to read:

(e) A person may submit a certified copy of an expungement order issued under AS 12.55.085(e) to the head of the agency responsible for maintaining criminal justice information. Upon receipt of the certified copy of the order and the fee, if any, for sealing the information, the head of the agency shall seal information that relates to a conviction, a suspended imposition of sentence, or a set aside described in AS 12.55.085(e) and that is the subject of the expungement order. At a minimum, the head of the agency shall seal the following information in response to the expungement order:

(1) current offender information, as defined in AS 12.62.900;

(2) nonconviction information, as defined in AS 12.62.900, other than information that the person was arrested in connection with the crime that is the subject of the expungement order; and

(3) past conviction information, as defined in AS 12.62.900.

24-LS0240\S
Crawford
4/22/05

CS FOR HOUSE BILL NO. 34(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to the expungement of records relating to judgment set asides granted after suspended imposition of sentence."

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New Text Underlined [DELETED TEXT BRACKETED]

the suspended imposition of sentence, or a set aside and other official records including electronic records are sealed. For all purposes, including responding to questions on employment applications, an offender whose conviction has been expunged may state that the offender has never been convicted of the crime.

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(1) current offender information, as defined in AS 12.62.900;

(2) nonconviction information, as defined in AS 12.62.900, other than information that the person was arrested in connection with the crime that is the subject of the expungement order; and

(3) past conviction information, as defined in AS 12.62.900.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 22, 2005

SUBJECT: Expungement of Records -- CSHB 34(STA)
(Work Order No. 24-LS0240\L)

TO: Representative Paul Seaton
Attn: Louie Flora

FROM: James P. Crawford
Assistant Revisor

Accompanying this memo is the newest version of HB 34. At page 2, lines 2-4, the bill currently provides that the offender "may state that the offender has never been convicted of the crime." Do you want to add that the offender may also state that he or she has never received a suspended imposition of sentence or a set aside so that the category of authorized denials matches the categories of records that are being sealed?

Note two changes in the language of amendment no. 1, added to AS 12.55.085(e): First, I added the language "since the date of the set aside" after "person has not been charged with a crime" because that seemed to be the intent of the amendment. If I have misunderstood that intent, please let me know.

Second, the phrase "date of the set aside of the suspended imposition of sentence" has been shortened to "date of the set aside." I did this because it is not the suspended imposition of sentence ("SIS") that gets "set aside." Rather, it is the started-but-not-yet-completed process of conviction that gets set aside. Specifically, the court imposes a probation period on the person in connection with the court's order of suspension of imposition of sentence relating to that person.[1] Following this, the person's "good conduct" or "reform"[2] during the probationary/SIS period, if it occurs, leads the court to "discharge" the person[3] and to set aside the conviction process that, until that time, has been held in a sort of legal state of suspended animation. In sum, the SIS does not get set aside; it provides the person an opportunity to convince the court to order the incomplete conviction process be set aside.

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[1] AS 12.55.080; 12.55.085(a).

[2] AS 12.55.085(d).

[3] AS 12.55.085(d) and (e).

To understand the significance of the fact that the process is held in stasis in the SIS arena, some explanation is in order. A "conviction," which is sometimes referred to in the cases as "judgment of conviction," consists of two key elements: the first element is a determination of guilt or responsibility; the second element is the imposition of sentence. In the words of the Alaska Court of Appeals:

> We hold that a person has been "convicted of a felony" when the appropriate trier of fact has made a determination of guilt and sentence has been imposed.[4]

Note that the first element is also sometimes referred to as an "adjudication of guilt"[5] or as a "judgment."[6] Here, a caution is warranted: because some form of the word "judgment" may occasionally be used in connection with the term "conviction" (i.e., "judgment" of conviction) and also in connection with the first of two elements necessary to complete a "conviction" (i.e., a "judgment" in the sense of an "adjudication" of guilt or a "determination" of guilt), confusion can arise, so care in keeping these concepts separate is necessary.

With a SIS, the first element of the process (determination/adjudication/judgment of guilt) is present. However, the second element (imposition of sentence) is not. Imposition has been suspended -- hence, "suspended imposition of sentence." The result is that when SIS is imposed, the conviction process has not been completed, or perfected.

From a separation of powers doctrine standpoint, this is important. The nature of suspended imposition of sentence wipes the person's slate clean enough to resemble a pardon exercised by the governor under the executive's clemency power under art. III, sec. 21 of the constitution.

In light of this, if the conviction process relating to the person were completed (determination/adjudication/judgment of guilt + imposition sentence) AND the "slate-wiping-clean" effect of a SIS were imposed by a court with respect to the person, the result could be held to constitute an usurpation of the executive's clemency power granted

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[4] Berg v. State, 711 P.2d 553, 554 (Alaska App. 1985) (emphasis added).

[5] For example, in Fonville v. McLaughlin, 270 A.2d 529 (Del. 1970), the Deleware Supreme Court construed the term "conviction" to refer to a "judgment of conviction consisting of the adjudication of guilt by plea or verdict followed by the imposition of sentence." Id. at 530 (citing Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (1953) and People v. Fabian, 192 N.Y. 443, 85 N.E. 672) (emphasis added).

[6] For example, in Kitsap v. Huff, 620 P.2d 986, (Wash. 1980), the Washington Supreme Court construed the term "conviction" to consist of the entry of "judgment and sentence." Id. at 989 (emphasis added).

in art. III, sec. 21, Constitution of the State of Alaska. As a consequence, it is important to steer clear of creating or maintaining the statutory impression that a completed conviction process is what is being set aside in the SIS context, as opposed to only the first of two elements of that process (which again is the determination/adjudication/judgment of guilt element).

Because expungements have a similar "slate-wiping-clean" effect as a SIS or a pardon, the same conclusion follows: it is important to avoid the impression that a completed conviction process is being set aside. For this reason, I think it would be prudent to change the term "conviction" in AS 12.55.085(e), found on page 1, line 6 of the draft, to "judgment," or at least to "adjudication of guilt" or "determination of guilt."

With regard to issues raised by the Department of Public Safety, I have taken a first cut at conforming the criminal justice information statutes in AS 12.62 with the changes in this bill. At this stage, the provisions of the bill dealing with AS 12.62 represent a "rough draft," and The Department of Public Safety may be able to suggest additions or refinements to what I have done. The committee should carefully review what I have stitched together to determine if I'm in the right ballpark. In particular, the committee should make sure that the minimum information to be sealed under proposed AS 12.62.180(e), which is expressed in terms of definitions found in AS 12.62.900, meets with the committee's intent.

JPC:med
05-297.med

Enclosure

24-LS0240\I
Luckhaupt
4/18/05

CS FOR HOUSE BILL NO. 34( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to the expungement of records relating to judgment set asides granted after suspended imposition of sentence."

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

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **The person may petition the court for an order of expungement. The court may issue the order if the person has proven by a preponderance of the evidence that the person is not likely to reoffend. Upon entry of such an order, the applicant shall be deemed not to have been previously arrested, been adjudged, convicted, or received a suspended imposition of sentence, or a set aside. Upon entry of such an order, the person may provide a certified copy of the order and payment for the cost of sealing the records to the clerk of the court and to the Department of Public Safety. Thereafter, the record of the arrest, adjudication, conviction,**

suspended imposition of sentence or a set aside and other official records including electronic records are sealed. For all purposes, including responding to questions on employment applications, an offender whose conviction has been expunged may state that the offender has never been convicted of the crime.

Seaton

ALASKA STATE LEGISLATURE

Representative Bruce Weyhrauch

HOUSE DISTRICT 4

ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

(907) 465-3744
FAX (907) 465-2273

MEMORANDUM

DATE: April 20, 2005
TO: Members, House State Affairs Committee
FROM: Rep. Bruce Weyhrauch
SUBJECT: Amendments to HB 34 LS0240\I

At the State Affairs meeting on Saturday morning, Chair Seaton and Rep. Gruenberg called for a working group to redraft HB 34, legislation allowing for expungement of set asides under Alaska Law. That group met on Monday morning and their discussion resulted in Version "I," released on Tuesday afternoon. In advance of its next hearing, I asked Doug Wooliver to seek input from available judges in the court system so that the committee could consider their comments in a timely fashion. As a result of Mr. Wooliver's collaboration, we have worked out several amendments that I believe are necessary to keep the bill realistic, efficient and revenue neutral.

Amendment No. 1
The original objective was to allow the judiciary a certain degree of discretion in issuing expungement orders; however, comments indicated the language was vague and failed to provide concrete statutory guidance. For example, how could a judge predict whether or not a person would likely reoffend? A solution was to substitute a timeline for issuing an expungement order similar to the set aside process.

Amendment No. 2
Deleting records of arrest & adjudication from records that are sealed is cleaner and resolves any concern that miscellaneous records such as arraignment schedules should be included. HB 34 simply requires that a conviction record be sealed.

Amendment No. 3
Unfortunately, both the Court System and the Dept. of Public Safety believe that making the option of expungement available to convictions prior to passage would likely result in a steep increase in court hearings. That has a price tag. In the interest of keeping this legislation revenue neutral, I have no alternative but to keep the scope of HB 34 forward reaching.

If you have any questions or need further information, I invite you to contact myself, or my aide, Linda Sylvester.

I appreciate your support.

Representative _Bruce_Weyhrauch@legis.state.ak.us
www.akrepublicans.org/weyhrauch/

AMENDMENT No. 2

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

Page 1, Line 10,

DELETE: "arrest, adjudication"

Amendment #3

Page 1, Line 14,

DELETE: "arrest, adjudication"

Amendment #4 Conceptual

Page 1, line 11

Between "set aside" and ":"

insert "for that crime"

AMENDMENT No. 1

Adopted

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

Page 1, Line 7, Following, "expungement."

DELETE: "The court may issue the order if the person has proven by a preponderance of the evidence that the person is not likely to reoffend."

INSERT: "No sooner than one year following the date of the set aside of the suspended imposition of sentence, and if the person has not been charged with a crime, the court may issue the order of expungement."

AMENDMENT No. 2

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

#2 conf. adopted

Page 1, Line 10,

DELETE: "arrest, adjudication"

previously arrested, been adjudged.

Page 1, Line 14,

DELETE: "arrest, adjudication"

#3 adopted

#4 conceptual adopt.

AMENDMENT No. 15

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

Page 2, Line 5,

INSERT: APPLICABILITY: The amendment to AS 12.55.085(e) made by sec. 1 of this Act allowing the sealing of certain records only applies when a conviction, suspension of imposition of sentence, and the set aside under AS 12.55.085 have all occurred after the effective date of this ACT.

AMENDMENT No. 5 → W/ drawn (to subcommittee - Create Separate section)

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

Page 2, Line 5,

INSERT: APPLICABILITY: The amendment to AS 12.55.085(e) made by sec. 1 of this Act allowing the sealing of certain records only applies when a conviction, suspension of imposition of sentence, and the set aside under AS 12.55.085 have all occurred after the effective date of this ACT.

Changes made to 24-LS02240\I **Dated 4/18/05**

(This language incorporates sponsor's amendments #1, #2 & #3)

Section 1. AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **The person may petition the court for an order of expungement.**

[THE COURT MAY ISSUE THE ORDER IF THE PERSON HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT THE PERSON IS NOT LIKELY TO REOFFEND.] **No sooner than one year following the date of the set aside of the suspended imposition of sentence, and if the person has not been charged with a crime, the court may issue the expungement order.**

Upon entry of such an order, the applicant shall be deemed not to have been previously [ARRESTED, BEEN ADJUDGED,] convicted, received a suspended imposition of sentence, or a set aside. Upon entry of such an order, the person may provide a certified copy of the order and payment for the cost of sealing the records to the clerk of the court and to the Department of Public Safety. Thereafter, the record of the [ARREST, ADJUDICATION,] conviction, suspended imposition of sentence or a set aside and other official records including electronic records are sealed.

For all purposes, including responding to questions on employment applications, an offender whose conviction has been expunged may state that the offender has never been convicted of the crime.

INSERT: **APPLICABILITY. The amendment to AS 12.55.085(e) made by sec. 1 of this Act allowing the sealing of certain records only applies when a conviction, suspension of imposition of sentence, and the set aside under AS 12.55.085 have all occurred after the effective date of this ACT.**

AMENDMENT No. 6 adopted

BY: Rep. Weyhrauch

TO: HB 34 LS0240\I

Page 1, Line 13, following "cost of"

DELETE: "sealing the records"

INSERT: "making the records confidential"

Page 2, Line 2, following "electronic records are"

DELETE: "sealed"

INSERT: "confidential. Nothing in this section affects or prevents the use of an offenders prior conviction, including an expunged conviction, in a later criminal prosecution."

Attn: Jarus Crawford

24-LS0240\I
Luckhaupt
4/18/05

CS FOR HOUSE BILL NO. 34( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to the expungement of records relating to judgment set asides granted after suspended imposition of sentence."

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

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. **The person may petition the court for an order of expungement. The court may issue the order if the person has proven by a preponderance of the evidence that the person is not likely to reoffend. Upon entry of such an order, the applicant shall be deemed not to have been ~~previously arrested, been adjudged~~, convicted, or received a suspended imposition of sentence, or a set aside for that crime. Upon entry of such an order, the person may provide a certified copy of the order and payment for the cost of sealing the records to the clerk of the court and to the Department of Public Safety. Thereafter, the record of the ~~arrest, adjudication~~, conviction,**

Am #2 adopted

Am #4 adopted

Am #3 adopted

suspended imposition of sentence or a set aside and other official records including electronic records are sealed. For all purposes, including responding to questions on employment applications, an offender whose conviction has been expunged may state that the offender has never been convicted of the crime.

Linda Sylvester

ALASKA STATE LEGISLATURE

Representative Bruce Weyhrauch

HOUSE DISTRICT 4

ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

(907) 465-3744
FAX (907) 465-2273

Explanation of changes to HB 34 Version Y

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the persona a certificate that

- Provides that, under law, the person has not been convicted of a crime.
- The person may, within the 2 year period following the issuance of the certificate, petition the court for an order sealing the records of the arrest, the judgment, the suspended imposition of sentence, and the set aside.
- The court shall issue the order if the court finds that the person is not likely to reoffend.
- The order must state that the effect of the order under state law is that the person has not been arrested, been ajudged, convicted, or received a suspended imposition of sentence or a set aside unless the person re-offends.
- The person shall provide the order to the Dept. of Public Safety & the clerk of the court along with payment for the cost of sealing the record.
- The department & the clerk of the court shall seal all records pertaining to the arrest, judgment, suspended imposition of sentence, conviction, and set aside.
- The records sealed may be accessed only by law enforcement or court officers for the purposes of investigating crimes or assisting with criminal prosecutions.
- APPLICABILITY: This Act effects destruction of records of set asides that occur after the effective date of this Act.

Representative _Bruce_Weyhrauch@legis.state.ak.us
www.akrepublicans.org/weyhrauch/

24-LS0240\Y
Luckhaupt
4/15/05

CS FOR HOUSE BILL NO. 34( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Hawk

A BILL

FOR AN ACT ENTITLED

"An Act relating to the expungement of records relating to judgment set asides granted after suspended imposition of sentence."

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

*** Section 1.** AS 12.55.085(e) is amended to read:

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate [TO] that **provides that, under state law, the person has not been convicted of a crime. The person may, within the two-year period following the issuance of the certificate, petition the court for an order sealing the records of the arrest, the judgment, the suspended imposition of sentence, and the set aside. The court shall issue the order if the court finds that the person is not likely to reoffend. The order must state that the effect of the order under state law is that the person has not been arrested, been adjudged, convicted, or received a suspended imposition of sentence or a set aside unless the person reoffends. The person shall provide the**

order to the Department of Public Safety and the clerk of court along with payment for the cost of sealing the records. The department and the clerk of court shall seal all records pertaining to the arrest, judgment, suspended imposition of sentence, conviction, and set aside. The records sealed may be accessed only by law enforcement or court officers for the purpose of investigating crimes or assisting with criminal prosecutions [EFFECT].

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The amendment to AS 12.55.085(e) made by sec. 1 of this Act allowing the destruction (Sealing) of certain records only applies when a judgment, suspension of imposition of sentence, and set aside under AS 12.55.085 have all occurred after the effective date of this Act.

(1) Need amend to remove State liability for dissemination of information

(2) applicability to past

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB34 (STA) "Y" version

Page 1, line 11, in subsection (e) after "person" insert "has proven by a preponderance of the evidence that the person"

+ Limitation on liability to state

+ Application to past people

Discussion Items for State Affairs Committee Substitute for HB 34

"The person may provide the certificate to the Dept. of Public Safety and to the clerk of court. ***The department and the clerk of court shall destroy all records relating to the conviction, the suspended imposition of sentence, and the set aside, including records maintained under AS 12.62*** "

Issue No. 1.
The "Information Age" renders complete destruction of records impossible. Records exist as hard copies at various locations, in computer databases, and on software that is sold to vendors. Recognizing that it is physically impossible for the State of Alaska to physically destroy records that have been disseminated to the general public, HB 34 should be amended so that dissemination of a criminal record is prospective.

> "The state is not liable for any disclosures made prior to receipt of the certificate (or expungement order)."

Issue No. 2.
There are valid policy concerns about making a criminal proceeding unavailable to the legal system in the event of future criminal activity by the offender.

First Option: Retain nonpublic records for use by criminal justice system, and render the public information "confidential" opposed to "sealing the record."

> "Upon discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. Once the person has provided the certificate to the Department of Public Safety and to the clerk of court, the fact that the offender has been adjudicated of an offence shall not be included in the offender's public record of criminal history. A nonpublic record of a disposition under this subsection shall be retained by the clerk of the court. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution."

Second Option: Require that the qualified offender make an application to the court for an order of expungement. The advantage this option provides for another level of judicial review to evaluate whether or not expunging a record for a particular offender is in the interest of justice. After an order of expungement is issued, nonpublic records are retained for use by criminal justice system, and render the public information "confidential" opposed to "sealing the record.

> "Upon discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. The person may petition the court and may issue an order of expungement. Upon entry of such an order, the applicant shall be deemed not to have been previously convicted, or arrested as the case may be,

> and the court shall issue an order making the record of the conviction and other official records of the case, including records of the arrest whether or not the arrest resulted in a further criminal proceeding confidential. A nonpublic record of a disposition under this subsection shall be retained by the clerk of the court. Nothing in this section affects or prevents the use of an offender's prior conviction, including an expunged conviction, in a later criminal prosecution."

Issue No. 3.
Must an offender disclose expunged charges on employment applications and the like?

Ultimately, it is up to the individual how they respond to the question: "*have you ever been charged with a crime*?" Nevertheless, the intended effect of all state and federal expungement statutes is that the order restores the person to the status he occupied prior to the arrest and criminal proceedings. As such, a person who received an expungement order ***is*** entitled to answer "no." To avoid confusion, the bill should include language that clearly stating that.

The following is language used in the Federal First Offender Act:

> "A person for whom an expugement order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to state or acknowledge such arrests or criminal proceedings in response to an inquiry made of him for any purpose."

This language is from Washington Statute 9.94A.640:

> "For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of the crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution."

Issue No. 4.
The petitioner should bear all costs incurred by the court system for expenses resulting from expungement proceedings.

ALASKA STATE LEGISLATURE

REPRESENTATIVE BRUCE WEYHRAUCH

ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

(907) 465-3744
FAX (907) 465-2273

Sponsor Statement

HB 34

This Act authorizes the expungement, or the physical elimination of a record of a conviction that has been set aside following a suspended imposition of sentence.

Current statutes confer upon judges the power to suspend imposition of sentences (refened to as "SIS") when it is satisfied that the ends of justice and the best interest of both the public and the defendant will be served. Further, AS 12.55.085(e) gives the court the option ***to set aside*** that criminal conviction following the defendant's successful completion of the conditions of their suspended sentence. Clearly, this judicial tool is intended to liberate the deserving defendant from the lingering consequences of a criminal conviction.

Over the years, defendants and some judges mistakenly believed that the criminal conviction that had been set aside "went away" and the defendant was free of any of its consequences. However, in 1995, the Alaska Supreme Court ruled that the set aside statute didn't quite say that. In *Journey v. State*, the Court held that because Alaska's 1965 SIS statute omitted the term "expungement," the criminal information must remain in the individual's record. Without specific legislative authorization the conviction record remains and is readily available for the public, employers, credit agencies, and others to see.

HB 34 breathes life into Alaska's SIS statute by essentially completing the thought of the statutory intent. In other words, HB 34 writes into the law what many had assumed was already there: a criminal conviction set aside by the court may go away and the defendant can be free from its consequences. The record of that criminal conviction may be expunged.

This isn't a panacea for all Alaskans wayward in their youth. This is a very narrowly focused bill, and because of the applicability clause, SISs may only be expunged following passage of the bill. Additional language has been added as a disclaimer that the State of Alaska has no control over public records subject to expungement that have already been disseminated to the public.

As a practical matter, *expungement* refers to the deletion of the computerized criminal history information related to the set aside conviction.

Contact: Linda Sylvester
465-3744

HB 34 touches upon two sentencing statutes: AS 12.55.080 – Suspension of sentence and probation and AS 12.55.085(e) – Suspending imposition of sentence.

AS 12.55.080. Suspension of Sentence and Probation.

Upon entering a judgment of conviction of a crime, or at any time within 60 days from the date of entry of that judgment of conviction, a court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best.

AS 12.55.085. Suspending Imposition of Sentence.

(a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.
(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person p. ced upon probation is
(1) violating the conditions of probation;
(2) engaging in criminal practices; or
(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).
(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).
(d) The court may at any time during the period of probation rev oke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) **Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.**

(f) The court may not suspend the imposition of sentence of a person who

Pertinent Statutes

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, 11.41.410 - 11.41.530, or AS 11.46.400 ;
(2) uses a firearm in the commission of the offense for which the person is convicted; or
(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having substantially similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB034-DPS-SS-2-28-05
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An Act relating to the expungement of records relating to convictions
RDU: Statewide Services
Component: Criminal Records and ID
Sponsor: Represenative Weyhrauch
Requester:
Component No.: 1190

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

Passage of this bill will increase the workload and add to the responsibilities of the Statewide Services Division of the Department of Pubic Safety (DPS), but due to questions regarding the extent to which the bill will change recordkeeping, it is not possible to determine the precise fiscal impact.

It will be difficult to locate and destroy "all records relating to the conviction, the suspended imposition of sentence (SIS), and the set aside." Such records are in hard copy and electronic format throughout the DPS and the criminal justice system. Regardless of how effectively DPS (and the court system) can locate and destroy records, many records will exist in places other than the court system and DPS (e.g., Corrections, Law, municipalities, Alcohol Safety Action Program (ASAP), treatment providers).

Prepared by: Director David Schade
Phone 269-0202
Division: Statewide Services
Date/Time 2/28/05 4:33 PM
Approved by: Commissioner William Tandeske
Date 2/28/2005
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

ANALYSIS CONTINUATION

Also, it is not clear how broadly the language "records relating to the conviction, the SIS, and the set aside' should be interpreted.

Does this mean that other DPS records relating to the charge must be destroyed as well? Does it include internal Alaska State Trooper investigation records and pre-conviction court records? Does it include records regarding hearings, calendaring orders, transport orders, probation and release orders, temporary orders, etc.?

Destruction, if it could be accomplished, will leave a problematic gap in the records. For example, if an inquiry were made about the status of a charge that was filed in the past, and DPS destroyed all records of the conviction and the set aside, there would be no way for DPS to research and explain what happened regarding the charge. It would be impossible to explain that SIS was successful, a set aside was ordered, and records were destroyed. This could be harmful to the successful defendant. Also, AS 12.55.086 allows a jail term to be imposed for an SIS, so the destruction of all records relating to an SIS will leave a gap in the record as to why the defendant was incarcerated.

Does the language of the bill, which states that "the defendant may provide the certificate to DPS and the clerk," mean that only when a defendant provides the certificate to the clerk and the department are the department and the clerk obligated to do the destruction? How is that reconciled with AS 12.62.120, which requires the court to report to DPS "an acquittal, dismissal, conviction, or other disposition of charges" as well as "the imposition of a sentence or the granting of a suspended imposition of sentence under AS 12.55.085" and "a judgment of a court that reverses, remands, vacates, or reinstates a criminal charge, conviction, or sentence "?

Since presently a successful SIS can be put to subsequent uses (for example, sex offender registration, aggravating factors), how does the destruction of records requirement impact those uses?

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB034-DPS-ASTD-2-28-05
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety

Title: The expungement of records relating to conviction set asides
RDU: Alaska State Troopers
Component: AST Detachments

Sponsor: Representative Weyhrauch
Requester: House State Affairs
Component No.: 2325

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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 (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Passage of this bill will have an indeterminate fiscal impact on the Alaska State Troopers.

The language in this bill does not provide specific enough information for the Alaska State Troopers to determine the full extent of the records that will have to be destroyed.

Prepared by: Lieutenant Todd Sharp
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 2/28/05 11:55 AM
Approved by: Commissioner William Tandeske
Date 2/28/2005
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

Crimes Excluded from Set Aside Option

12.55.085 (f) The court may not suspend the imposition of a sentence of a person (1) who is convicted of a violation of **AS 11.41.100-11.41.220, 11.41.260-11.41.320, 11.41.410-11.41.530, or AS 11.46.400**;
(2) uses a firearm in the commission of the offense for which the person is convicted; or
(3) is convicted of a violation of AS 11.41.230-11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having substantially similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

AS 11.41.100-220

Article 1. Homicide

11.41.100	1st Degree Murder
11.41.110	2nd Degree Murder
11.41.120	Manslaughter
11.41.130	Criminally Negligent Homicide

Article 2. Assault & Reckless Endangerment

11.41.200	1st Degree Assault
11.41.210	2nd Degree Assault
11.41.220	3rd Degree Assault

skips 11.41.230 4th Degree Assault
11.41.250 Reckless Endangerment

AS 11.41.260-320

11.41.260	1st Degree Stalking
11.41.270	2nd Degree Stalking

Article 3. Kidnapping & Custodial Interference

11.41.300	Kidnapping
11.41.320	1st Degree Custodial Interference

skips 11.41.330 2nd Degree Custodial Interference

Crimes Excluded from Set Aside Option, cont'd ...

AS 11.41.410-530

Article 4. Sexual Offenses

11.41.410	1st Degree Sexual Assault
11.41.420	2nd Degree Sexual Assault
11.41.425	3rd Degree Sexual Assault
11.41.427	4th Degree Sexual Assault
11.41.434	1st Degree Sexual Abuse of a Minor
11.41.436	2nd Degree Sexual Abuse of a Minor
11.41.438	3rd Degree Sexual Abuse of a Minor
11.41.440	4th Degree Sexual Abuse of a Minor
11.41.450	Incest
11.41.455	Unlawful Exploitation of a Minor
11.41.458	1st Degree Indecent Exposure
11.41.460	2nd Degree Indecent Exposure

Article 5. Robbery, Extortion, & Coercion

11.41.500	1st Degree Robbery
11.41.510	2nd Degree Robbery
11.41.520	Extortion
11.41.530	Coercion

AS 11.46.400	1st Degree Arson

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

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). For increase in classification of misdemeanors committed in connection with a criminal street gang, see AS 12.55.137.

NOTES TO DECISIONS

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

Article 1. Homicide.

Section

Cross references. — For provision relating to withdrawal or withholding of cardiopulmonary resuscitation or other life-sustaining procedures, see AS 18.12.080.

NOTES TO DECISIONS

Evidence of other crimes involving domestic violence. — In a trial involving domestic violence, Alaska Evid. R. 404(b)(4) allows the state to introduce evidence of other "crimes involving domestic violence"

committed by a defendant; AS 18.66.990(3) defines "crimes involving domestic violence" as a crime against a person under this chapter committed by a household member against another household member. Freeman v. State, Ct. App. Op. No. 4550 (File No. A-7658), P.3d (Alaska Ct. App. 2002).

Collateral references. — 41 Am. Jur. 2d, Homicide, § 1 et seq.

40 C.J.S., Homicide, § 1 et seq.

Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Criminal responsibility for injury or death resulting from, 23 ALR2d 1401.

Causing one, by threats or fright, to leap or fall to his death, 25 ALR2d 1186.

Pregnancy as element of abortion or homicide based thereon, 46 ALR2d 1393.

Fright or shock, homicide by, 47 ALR2d 1072.

Homicide by juvenile as within jurisdiction of juvenile court, 48 ALR2d 663.

Corporation's criminal liability for homicide, 83 ALR2d 1117.

Presumption of deliberation or premeditation from the fact of killing, 86 ALR2d 656.

Criminal liability of parent, teacher, or one in loco parentis for homicide by excessive or improper punishment inflicted on child, 89 ALR2d 417.

Medical or surgical attention, failure to provide, 100 ALR2d 483.

Liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 ALR2d 769.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 ALR3d 1292.

Criminal liability for death resulting from unlawful furnishing intoxicating liquor or drugs to another, 32 ALR3d 589.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 ALR3d 1078.

Homicide based on killing of unborn child, 40 ALR3d 444.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Use of set gun or similar device on defendant's own property, 47 ALR3d 646.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 ALR3d 239.

Withholding food, clothing, or shelter, homicide by, 61 ALR3d 1207.

What constitutes "imminently dangerous" act within homicide statute, 67 ALR3d 900.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial ritualistic acts directly causing fatal injury, 78 ALR3d 1132.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offense such as assault, robbery, or homicide, 100 ALR3d 287.

Duty to retreat where assailant is social guest on premises, 100 ALR3d 532.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 ALR4th 884.

Criminal liability for injury or death caused by operation of pleasure boat, 8 ALR4th 886.

Homicide as precluding taking under will or by intestacy, 25 ALR4th 787.

Homicide by causing brain-dead condition of victim, 42 ALR4th 742.

Corporation's criminal liability for homicide, 45 ALR4th 1021.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

Sec. 11.41.100. Murder in the first degree. (a) A person commits the crime of murder in the first degree if

(1) with intent to cause the death of another person, the person

(A) causes the death of any person; or

(B) compels or induces any person to commit suicide through duress or deception;

(2) the person knowingly engages in conduct directed toward a child under the age of 16 and the person with criminal negligence inflicts serious physical injury on the child by at least two separate acts, and one of the acts results in the death of the child;

(3) acting alone or with one or more persons, the person commits or attempts to commit a sexual offense against or kidnapping of a child under 16 years of age and, in the course of or in furtherance of the offense or in immediate flight from that offense, any person causes the death of the child; in this paragraph, "sexual offense" means an offense defined in AS 11.41.410 — 11.41.470;

(4) acting alone or with one or more persons, the person commits or attempts to commit criminal mischief in the first degree under AS 11.46.475 and, in the course of or in furtherance of the offense or in immediate flight from that offense, any person causes the death of a person other than one of the participants; or

(5) acting alone or with one or more persons, the person commits terroristic threatening in the first degree under AS 11.56.807 and, in the course of or in furtherance of the

offense or in immediate flight from that offense, any person causes the death of a person other than one of the participants.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 1 ch 67 SLA 1988; am § 3 ch 54 SLA 1999; am § 3 ch 92 SLA 2002)

Cross references. — For punishment, see AS 12.55.125(a); for provisions on insanity and competency to stand trial, see AS 12.47. For applicability provisions relating to the 1999 amendment of subsection (a), see § 16, ch. 54, SLA 1999 in the 1999 Temporary and Special Acts.

Effect of amendments. — The 1999 amendment, effective June 5, 1999, rewrote paragraph (a)(2), added paragraph (a)(3) and made related stylistic changes.

The 2002 amendment, effective June 28, 2002, added paragraphs (a)(4) and (a)(5).

NOTES TO DECISIONS

Annotator's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.010.

The crime of murder protects the greater and distinct interest in the sanctity of life. Ladd v. State, 568 P.2d 960 (Alaska 1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1498, 55 L. Ed. 2d 524 (1978).

Under the common law, murder is the unlawful killing of a human being with malice aforethought. That definition of murder was substantially the equivalent of that found in former AS 11.15.010. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Murder, at common law, was defined as the unlawful killing of a human being with malice aforethought, either express or implied. Express malice could be found in the deliberate intention of the defendant to take the life of the deceased unlawfully, while implied malice could be found either where the evidence showed circumstances indicating that the defendant had a heart regardless of social duty, in that he knowingly did an act which might result in death or grievous bodily harm, or where defendant killed another in the course of perpetrating a felony. In all of these instances it did not matter whether the defendant actually intended to kill the deceased. Once malice could be found, the defendant could be held liable for all results which flowed naturally and probably from his volitional acts. In many cases the killing itself, if unexplained, was enough to support an inference of malice. Gray v. State, 463 P.2d 897 (Alaska 1970).

Elements of aggravated first-degree murder. — Subsection (a) and AS 12.55.125(a) jointly create two offenses, first-degree murder and aggravated first-degree murder, and the factors specified in AS 12.55.125(a)(1)-(3) are elements of aggravated first-degree murder. Malloy v. State, 1 P.3d 1266 (Alaska Ct. App. 2000).

Intent to kill required. — All intentional killings unless legally excused or mitigated to manslaughter are first-degree murder under the new code, and felony murder, which is second-degree murder, does not currently require an intent to kill. Carman v. State, 658 P.2d 131 (Alaska Ct. App. 1983).

A specific intent or purpose to kill is an essential element of the crime. Gray v. State, 463 P.2d 897 (Alaska 1970).

The purpose to kill is an essential averment in any indictment for the violation of this section. Gray v. State, 463 P.2d 897 (Alaska 1970).

Paragraph (a)(1) plainly requires proof of knowing (but not intentional) conduct rather than mere recklessness. Odom v. State, 798 P.2d 353 (Alaska Ct. App. 1990).

Regardless of the means used. — See Gray v. State, 463 P.2d 897 (Alaska 1970).

The purpose to kill is a state of mind which must be proved as a fact before there may be a conviction of first degree murder under this section. Gray v. State, 463 P.2d 897 (Alaska 1970).

The element of purpose must be alleged and proved. Marrone v. State, 359 P.2d 989 (Alaska 1961).

But proof of purpose need not be direct. It may be inferred from the circumstances attending the killing. Gray v. State, 463 P.2d 897 (Alaska 1970).

Use of a deadly weapon if unexplained is one circumstance which tends to prove intent to kill. Gray v. State, 463 P.2d 897 (Alaska 1970).

The use of a deadly weapon without circumstances of explanation or mitigation may justify a jury in inferring an intent to kill. Gray v. State, 463 P.2d 897 (Alaska 1970).

The fact of the killing, alone, does not support the finding of purpose or intent to kill. Gray v. State, 463 P.2d 897 (Alaska 1970).

Intent to kill found. — First-degree murder charge was supported by sufficient evidence of an intent to kill where defendant and friend were incensed by the fact that a Toyota had come so close to their car; their anger provided a motive for shooting at the driver. Moreover, the grand jury heard testimony that, when the Toyota failed to stop or veer off following defendant's rifle shot, defendant declared, "I missed." Gustafson v. State, 854 P.2d 751 (Alaska Ct. App. 1993).

Doctrine of diminished capacity. — See Johnson v. State, 511 P.2d 118 (Alaska 1973).

Heat of passion defense. The defense of heat of passion is available in prosecutions for attempted murder. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

Distinction between first degree murder, second degree murder, and manslaughter. — The offenses of first degree murder, second degree murder and manslaughter all require the same physical act, the unlawful killing of a human being. The difference is in the mental state of the perpetrator. Padie v. State, 557 P.2d 1138 (Alaska 1976); Eben v. State, 599 P.2d 700 (Alaska 1979), overruled on other grounds, Copelin v. State, 659 P.2d 1206 (Alaska 1983).

Manslaughter is included in the greater charge of murder. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13

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Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Every essential element of manslaughter by negligent homicide is necessarily included in the offense of murder in the first degree. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Both second degree murder and manslaughter would be lesser included offenses to first degree murder. Gray v. State, 463 P.2d 897 (Alaska 1970); Bendle v. State, 583 P.2d 840 (Alaska 1978); Gieffels v. State, 590 P.2d 55 (Alaska 1979).

Inciting commission of crime as lesser offense of first-degree murder under former AS 11.15.010. — See Cassell v. State, 645 P.2d 219 (Alaska Ct. App. 1982).

Contracting to kill. — One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. Braham v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

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. Mathis 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. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Evidence necessary for conviction in homicide case. — See Armstrong v. State, 502 P.2d 440 (Alaska 1972); Simpson v. State, 877 P.2d 1319 (Alaska Ct. App. 1994).

Statements against interest. — In defendant's murder-arson trial, hearsay statements of his wife and a third party implicating both defendant and his wife in the crimes were admissible as statements against interest. Porterfield v. State, 68 P.3d 1286 (Alaska Ct. App. 2003).

Questioning wife concerning husband's admission of guilt. — Trial court erred in granting a protective order which prohibited defendant, who was charged with first degree murder, from questioning a wife concerning her husband's statement to her that he had committed the murder. Salazar v. State, 559 P.2d 66 (Alaska 1976).

Evidence of victim's reputation for violence. — The court properly refused to allow the defendant to introduce evidence of the victim's reputation for violence, where the defendant picked up a rifle, hit the victim in the head with it, then knocked her down again, straddled her, and pointed the barrel toward her head as she lay prostrate, at which point the rifle discharged, killing the victim. Given this progress of events, the reasonableness of the defendant's initial decision to pick up the rifle had essentially no bearing on his guilt of second-degree murder. Norris v. State, 857 P.2d 349 (Alaska Ct. App. 1993).

Indictment sufficient. — See Flores v. State, 443 P.2d 72 (Alaska 1968).

Aggravating and mitigating factors. — Even though the aggravating and mitigating factors in AS 12.55.155 (c) and (d) did not apply to first-degree murder, it was proper for the parties to use these factors as points of reference at the defendant's sentencing. Sakeagak v. State, 952 P.2d 278 (Alaska Ct. App. 1998).

Instructions. — Where defendant was charged with first degree murder and the statute of limitations had run on the lesser offense of manslaughter, while the jury should not be instructed that they might find defendant guilty of manslaughter, defendant was entitled to an instruction on the mitigating effects of passion and provocation, requiring the jury to acquit him if he presented such evidence in mitigation and the state did not negate it. Padie v. State, 557 P.2d 1138 (Alaska 1976).

Normally a second-degree murder instruction should be given as a matter of course to juries hearing a first-degree murder case. This will avoid any possibility that such juries might be foreclosed from an alternative verdict which would be justified by certain possible findings of fact. Bendle v. State, 583 P.2d 840 (Alaska 1978).

Although the trial court erred in failing to give the jury an instruction of second-degree murder, the error became harmless once the jury found that the intentional killing was in the perpetration of the robbery. Bendle v. State, 583 P.2d 840 (Alaska 1978).

In a prosecution for first-degree murder, the terms contained in the indictment were sufficiently clear to be understood by the grand jury so that the prosecutor need not define them and the statute involved, and, in light of the evidence, the prosecutor was not required to instruct as to possible lesser included offenses. Oxereok v. State, 611 P.2d 913 (Alaska 1980).

Where the jury was given a proper lesser-included offense instruction on murder in the second degree, but nevertheless convicted defendant of murder in the first degree, given the jury's rejection of second-degree murder as a lesser-included offense, it is evident that defendant suffered no prejudice, even assuming a manslaughter instruction he challenged was inadequate. Ridgley v. State, 739 P.2d 1299 (Alaska Ct. App. 1987).

Where defendant convicted of first-degree murder claimed the trial court erred in failing to give a proper instruction on the lesser included offense of manslaughter, premised on the fact that the manslaughter instruction given to the jury referred only to reckless homicide and did not inform the jury that knowing and intentional homicides may qualify as manslaughter, this claim must fail if defendant has suggested no theory under which the evidence might have supported a conviction of manslaughter based on intentional or knowing conduct. Ridgley v. State, 739 P.2d 1299 (Alaska Ct. App. 1987).

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Trial court did not abuse its discretion in refusing to instruct the jury on the defense of diminished capacity due to intoxication, where the jury focused on defendant's main defense that he acted in the heat of passion, even though the jury asked the judge whether a person who was intoxicated could avail himself of heat of passion as a defense and was

answered in a separate instruction. Thompson v. State, 768 P.2d 127 (Alaska Ct. App. 1989), habeas corpus denied, 34 F.3d 1073 (9th Cir. 1994).

Only one conviction of murder should be allowed for the killing of one man. Gray v. State, 463 P.2d 897 (Alaska 1970).

Although there are several ways of committing first degree murder, it is still only one crime; and only one sentence can be imposed. Gray v. State, 463 P.2d 897 (Alaska 1970).

"Purposely" under former AS 11.15.010. — See Gray v. State, 463 P.2d 897 (Alaska 1970).

Former requirements of deliberation and premeditation construed. — See Jones v. United States, 12 Alaska 405, 175 F.2d 544 (9th Cir. 1949).

Penalties under former AS 11.15.010. — See Daniels v. United States, 17 Alaska 179, 246 F.2d 194 (9th Cir. 1957); Green v. State, 390 P.2d 433 (Alaska 1964).

Maximum sentence for first-degree murder upheld. — See Hoover v. State, 641 P.2d 1263 (Alaska Ct. App. 1982); Riley v. State, 720 P.2d 951 (Alaska Ct. App. 1986); Colgan v. State, 838 P.2d 276 (Alaska Ct. App. 1992).

Attorney request for withdrawal on appeal inadequate. — Where defendant's attorney submitted a brief identifying six issues that might be raised on appeal but did not explain why he believed those issues were frivolous, and where the brief contained only a cursory discussion of the facts underlying these potential issues and no discussion of the law, such abbreviated treatment did not allow the court to discharge its constitutional duty to verify independently that defendant's potential appellate issues were as frivolous as his attorney contended, and prevented the court from ruling on the attorney's request of withdrawal. Johnson v. State, 24 P.3d 1267 (Alaska Ct. App. 2001).

That crime would have been first-degree murder even under the common law's more restrictive definition justified judge in finding defendant's murder to be among the most serious first-degree murders and to merit the 99-year maximum sentence. Nelson v. State, 874 P.2d 298 (Alaska Ct. App. 1994).

Sentence upheld. — See Hofhines v. State, 511 P.2d 1292 (Alaska 1973); Brahm v. State, 571 P.2d 631 (Alaska 1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); Morgan v. State, 582 P.2d 1017 (Alaska 1978); Wilson v. State, 582 P.2d 154 (Alaska 1978); Bendle v. State, 583 P.2d 840 (Alaska 1978); Vail v. State, 599 P.2d 1371 (Alaska 1979); Brown v. State, 601 P.2d 221 (Alaska 1979); Sovalik v. State, 612 P.2d 1003 (Alaska 1980); Gest v. State, 619 P.2d 724 (Alaska 1980); Tugatuk v. State, 626 P.2d 95 (Alaska 1981); Nukapigak v. State, 663 P.2d 943 (Alaska 1983); Carman v. State, 658 P.2d 131 (Alaska Ct. App. 1983); Travelstead v. State, 689 P.2d 494 (Alaska Ct. App. 1984); Lewis v. State, 731 P.2d 68 (Alaska Ct. App. 1987); Jackson v. State, 750 P.2d 821 (Alaska Ct. App. 1988), cert. denied, 488 U.S. 828, 109 S. Ct. 80, 102 L. Ed. 2d 56 (1988); Denbo v. State, 756 P.2d 916 (Alaska Ct. App. 1988); Alexander v. State, 838 P.2d 269 (Alaska Ct. App. 1992).

Where two defendants were convicted of first-degree murder and one of second-degree murder for the same crime, the sentencing judge was entitled to make his own evaluation of the evidence in deciding how culpable was the behavior of the one convicted of second-degree murder, and where the record before the jury sufficed to support the conclusion that she was as guilty of premeditated murder as were the other defendants, the maximum term of 99 received by each of the defendants, though cert severe, was justified by the extreme nature of crime. Ridgley v. State, 739 P.2d 1299 (Alaska Ct. 1987).

Sentence of consecutive 99-year terms for two ders is not clearly mistaken where the defe presents a risk of continued criminal conduct would seriously threaten the public safety. Kru State, 702 P.2d 664 (Alaska Ct. App. 1985).

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

Denial of parole eligibility for defendant, who ceived a 99-year sentence after being convicted murder, was not clearly mistaken, where the re showed him to be a racist, a man full of anger, a with a severe alcohol problem, and a man wi proclivity for assaulting people with firearms, showed that he had just been released on re probation a few days before the murder. Stern v. S 827 P.2d 442 (Alaska Ct. App. 1992).

Sentencing of a 19 year old to a 65-year term imprisonment for second-degree murder was justi where defendant had burglarized a store and stolen about $19,000, threatened two people knew that he had committed the burglary and th had other instances of violent tendencies, and offense was among the most serious within the d nition of second-degree murder because defend incensed over a perceived minor slight, delibera aimed at a small car and, from short range, fire shot from a high caliber rifle toward its occupa Gustafson v. State, 854 P.2d 701 (Alaska Ct. A 1993).

Sentence for attempted first-degree murd upheld. — See Staael v. State, 718 P.2d 948 (Ala 1986).

Sentence for first-degree murder not clea mistaken. — See Green v. State, 761 P.2d (Alaska Ct. App. 1988).

Convictions affirmed but sentence remand for consideration of consecutive sentencing. See Tucker v. State, 721 P.2d 639 (Alaska Ct. A 1986).

Consecutive sentences f - first degree murder a attempted murder were remanded because judge h failed to find that a sentence of that length w necessary to protect the public the case was manded. Nelson v. State, 874 P.2d 298 (Alaska App. 1994).

Consecutive sentence vacated. — Trial co should not have imposed a five-year sentence tampering with physical evidence consecutively t 99-year sentence for murder, where the record wo not support the conclusion that defendant must incarcerated for the remainder of his life without possibility of parole. Thompson v. State, 768 P.2d (Alaska Ct. App. 1989), habeas corpus denied, 34 F 1073 (9th Cir. 1994).

Conviction reversed where trial court's fi ing of voluntary Miranda waiver was in error. See Hampel v. State, 706 P.2d 1173 (Alaska Ct. A 1985).

Conviction reversed because of admission

the maximum term of 99 years of the defendants, though certainly ted by the extreme nature of their tate, 729 P.2d 1299 (Alaska Ct. App.

secutive 99-year terms for two mur- ly mistaken where the defendant continued criminal conduct which reaten the public safety. Krukoff v. 4 (Alaska Ct. App. 1985).

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ersed because of admission of improperly seized evidence. — See Lowry v. State, 707 P.2d 280 (Alaska Ct. App. 1985).

Applied in Nukapigak v. State, 645 P.2d 215 (Alaska Ct. App. 1982); Clark v. State, 645 P.2d 1236 (Alaska Ct. App. 1982); Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982); Lowery v. State, 762 P.2d 457 (Alaska Ct. App. 1988).

Cited in Handley v. State, 615 P.2d 627 (Alaska 1980); Kirby v. State, 649 P.2d 963 (Alaska Ct. App. 1982); Page v. State, 657 P.2d 850 (Alaska Ct. App. 1983); Lerchenstein v. State, 697 P.2d 312 (Alaska Ct. App. 1985); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Ridgely v. State, 705 P.2d 924 (Alaska Ct. App. 1985); Peckham v. State, 723 P.2d 638 (Alaska Ct. App. 1986); Hastings v. State, 736 P.2d 1157 (Alaska Ct. App. 1987); Clifton v. State, 751 P.2d 27 (Alaska 1988); Peel v. State, 751 P.2d 1366 (Alaska Ct. App. 1988); Cole v. State, 754 P.2d 752 (Alaska Ct. App. 1988); Ciervo v. State, 756 P.2d 907 (Alaska Ct. App. 1988); Zeciri v. State, 779 P.2d 795 (Alaska Ct. App. 1989); Charles v. State, 780 P.2d 377 (Alaska Ct. App. 1989); Odom v. State, 798 P.2d 353 (Alaska Ct. App. 1990); Beagel v. State, 813 P.2d 699 (Alaska Ct. App. 1991); Dunkin v. State, 818 P.2d 1159 (Alaska Ct. App. 1991); Sam v. State, 842 P.2d 596 (Alaska Ct. App. 1992); Edwards v. State, 842 P.2d 1281 (Alaska Ct. App. 1992); Rudden v. State, 881 P.2d 328 (Alaska Ct. App. 1994); Tucker v. State, 892 P.2d 832 (Alaska Ct. App. 1995); Marino v. State, 934 P.2d 1321 (Alaska Ct. App. 1997); Wilson v. State, 967 P.2d 98 (Alaska Ct. App. 1998); Flanigan v. State, 3 P.3d 372 (Alaska Ct. App. 2000); Freeman v. State, Ct. App. Op. No. 4550 (File No. A-7658), P.3d (Alaska Ct. App. 2002); Maness v. State, 49 P.3d 1128 (Alaska Ct. App. 2002); Ramsey v. State, 56 P.3d 675 (Alaska Ct. App. 2002); Johnson v. State, 77 P.3d 11 (Alaska Ct. App. 2003); Andrus v. State, Ct. App. Op. No. 4842 (File No. A-8547), P.3d (Alaska Ct. App. Mar. 24, 2004); Seek v. State, Ct. App. Op. No. 4863 (File No. A-8363), P.3d (Alaska Ct. App. Apr. 28, 2004).

Collateral references. — Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Felonious killing of one cotenant or tenant by the entireties by the other as affecting latter's rights in the property, 42 ALR3d 1116.

What constitutes attempted murder, 54 ALR3d 612.

What constitutes murder by torture, 83 ALR3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 ALR4th 1028.

Judicial abrogation of felony-murder doctrine, 13 ALR4th 1226.

Modern status of rules requiring "malice aforethought," "deliberation" or "premeditation" as elements of murder in first degree, 18 ALR4th 961.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 ALR4th 861.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference", 25 ALR4th 311.

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;

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while 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, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.020(a), 11.71.030(a)(1) or (2), or 11.71.040(a)(1) or (2) 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;

(4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony 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; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was

(A) a felony violation of AS 11.41;

(B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or

(C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

(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 19[illegible] am § 5 ch 4 SLA 1990; am § 1 ch 60 SLA 1996; am § 4 ch 54 SLA 1999)

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

For applicability provisions relating to the 1999 amendment of subsection (a), see § 16, ch. 54, SLA 1999 in the 1999 Temporary & Special Acts.

Effect of amendments. — The 1999 amendment, effective June 5, 1999, in subsection (a), in paragraph (3) added "under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while" at the beginning and inserted "sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree" near the middle, added paragraph (5), and made related stylistic changes.

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

NOTES TO DECISIONS

I. General Consideration.
II. Felony Murder.

I. GENERAL CONSIDERATION.

Annotator's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.010 and 11.15.030.

Common-law definition of murder. — Murder, at common law, was defined as the unlawful killing of a human being with malice aforethought, either express or implied. Johnson v. State, 511 P.2d 118 (Alaska 1973).

Second degree murder is a homicide which is unlawful, one that is not excusable under the law. Jennings v. State, 404 P.2d 652 (Alaska 1965).

And includes crime of involuntary manslaughter. — The crime of involuntary manslaughter is necessarily included in the offense of second degree murder. Jennings v. State, 404 P.2d 652 (Alaska 1965); Johnson v. State, 511 P.2d 118 (Alaska 1973).

Crime sufficiently distinguished from manslaughter. — The requirement of "extreme indifference to the value of human life" contained in the definition of second-degree murder (paragraph (a)(2)) sufficiently distinguishes that offense from manslaughter so as to satisfy the requirements of equal protection. Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Distinction between first degree murder, second degree murder, and manslaughter. — The offenses of first degree murder, second degree murder, and manslaughter all require the same physical act, the unlawful killing of a human being. The difference is in the mental state of the perpetrator. Padie v. State, 557 P.2d 1138 (Alaska 1976).

The term "intentionally" as used in former paragraph (a)(2) is not used "with respect to a result" and thus is not governed by the definition of "intentionally" in AS 11.81.900(a)(1), but should be given the meaning assigned to "knowingly" in AS 11.81.900(a)(2), since the mental state contemplated by the legislature in paragraph (a)(2) has respect to conduct ("performance of an act which results in death"). Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

"Reckless" mental state imputed to factors in paragraph (a)(2). — Since paragraph (a)(2) does not specifically establish a mental element for the result ("death") or the surrounding circumstances ("under circumstances manifesting an extreme indifference to the value of human life") involved in second-degree murder, a "reckless" mental state is to be imputed to those two factors based on application of AS 11.81.610(b). Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Specific intent to kill is an essential element of second-degree murder. As such, it must be proven by the state beyond a reasonable doubt. Gipson v. State, 609 P.2d 1038 (Alaska 1980).

The element of purpose must be alleged and proved. Marrone v. State, 359 P.2d 969 (Alaska 1961).

Former element of malice construed. — See Johnson v. State, 511 P.2d 118 (Alaska 1973).

Doctrine of diminished capacity. — See Johnson v. State, 511 P.2d 118 (Alaska 1973).

Intoxication is not a defense to second-degree murder, since evidence of intoxication is relevant only in regard to an offense involving intention to cause a result (AS 11.81.630), and second-degree murder is an offense in which the culpable mental state pertaining to the result ("death") is imputed to be recklessness. Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Substantial certainty to cause death and extreme indifference to value of human life. — Where an eyewitness saw defendant's passengers screaming for him to stop, and the record reflected that defendant's vehicle left the road in the process of attempting to negotiate a turn at 85 m.p.h., that defendant was well aware of the turn's dangerousness, having lived in the area for many years, and having driven the road and negotiated the same curve well over a hundred times, the jury was justified in concluding that the defendant was substantially certain because his passengers' deaths and that he manifested an extreme indifference to the value of human life. Stiegele v. State, 714 P.2d 356 (Alaska Ct. App. 1986).

State properly established the element of "extreme indifference to the value of human life" required for conviction of second-degree murder not only through

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evidence of defendant's egregiously dangerous driving, but also through evidence of defendant's extreme intoxication, decision to ignore warnings not to drive, and past dealings with the legal system regarding his attitude toward driving while intoxicated offenses. Jeffries v. State, 90 P.3d 185 (Alaska Ct. App. 2004).

Murder committed with automobile. — Where a driver's recklessness manifests an extreme indifference to human life, he can be charged with murder even though the instrument by which he causes death is an automobile. Pears v. State, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

The evidence is sufficient to show extreme indifference where the heavily intoxicated defendant drove his car on the wrong side of a divided highway for several miles, forcing several motorists to take evasive action, and apparently ignoring all warnings and attempts by other motorists to alert him to the danger that he posed. Ratliff v. State, 798 P.2d 1288 (Alaska Ct. App. 1990).

Offense of attempted second-degree murder was an impossibility. Huitt v. State, 678 P.2d 415 (Alaska Ct. App. 1984).

Evidence necessary for conviction in homicide case. — See Armstrong v. State, 502 P.2d 440 (Alaska 1972).

Case properly before jury. — See Dorman v. State, 622 P.2d 448 (Alaska 1981).

As to entitlement to second-degree murder instruction in first-degree murder case, see note to AS 11.41.100. Bendle v. State, 583 P.2d 840 (Alaska 1978).

Instructions. — See Gipson v. State, 609 P.2d 1038 (Alaska 1980).

Defendant may not be convicted of murder unless the jury finds that he possessed the culpable mental state specified in either the first or the second degree murder statute. He is entitled to have the jury instructed to this effect, and the fact that he can no longer be convicted of manslaughter because the statute of limitations has run on that offense in no way eases the state's burden of proof to convict him of murder. Padie v. State, 557 P.2d 1138 (Alaska 1976).

Jury instruction describing the test the jury was to apply in determining whether to return a verdict of guilty or not was not sufficiently misleading to constitute "plain error" which would warrant reversal. Dorman v. State, 622 P.2d 448 (Alaska 1981).

It was not harmless error in prosecution for felony-murder based on underlying crime of burglary to fail to give felony-murder merger instruction. Kirby v. State, 649 P.2d 963 (Alaska Ct. App. 1982).

The trial court did not err in declining to instruct the jury concerning imperfect self defense. Balentine v. State, 707 P.2d 922 (Alaska Ct. App. 1985).

In prosecution for extreme indifference murder, a fair reading of the given instructions in their entirety adequately conveyed the idea of defendant's subjective awareness of the risk to the jury. State v. Johnson, 720 P.2d 37 (Alaska 1986).

In the absence of a suggestion that "recklessness" under the criminal code was questioned, it is assumed that the grand jury understood the meaning of a reckless killing. Gustafson v. State, 854 P.2d 751 (Alaska Ct. App. 1993).

Constitutionality of former penalty. — See Green v. State, 390 P.2d 433 (Alaska 1964).

First conviction of murder for motor vehicle homicide. — See Pears v. State, 672 P.2d 903 (Alaska Ct. App. 1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985).

Exclusion of evidence relating to proximate cause not error. — See Kusmider v. State, 688 P.2d 957 (Alaska Ct. App. 1984).

Conviction affirmed. — See Castillo v. State, 614 P.2d 756 (Alaska 1980); Kusmider v. State, 688 P.2d 957 (Alaska Ct. App. 1984); Odom v. State, 798 P.2d 353 (Alaska Ct. App. 1990).

Where a vehicle belonged to a company owned by the defendant's brother, the vehicle was generally treated as the defendant's vehicle and he customarily drove it, and where defendant was seen driving the vehicle shortly before the accident, the jury could reasonably have concluded that the defendant was the driver of the vehicle, and guilty of second degree murder. Stiegele v. State, 714 P.2d 356 (Alaska Ct. App. 1986).

Conviction and sentence affirmed. — See Abruska v. State, 705 P.2d 1261 (Alaska Ct. App. 1985).

Conviction reversed where trial court erred in instructing jury on self-defense. — See Klumb v. State, 712 P.2d 909 (Alaska Ct. App. 1986).

Conviction reversed because of judicial error in not granting defendant's motion for change of venue. — See Nickolai v. State, 708 P.2d 1292 (Alaska Ct. App. 1985).

Sentencing considerations. — The benchmark sentencing range established in Page v. State, 657 P.2d 850 (Alaska App. 1983), governs sentencing in second-degree murder cases. Brown v. State, 973 P.2d 1158 (Alaska Ct. App. 1999).

It is appropriate for the court to consider drunken driving manslaughter cases as a point of reference for determining an appropriate sentence for an offender convicted of second-degree murder for comparable conduct. Ratliff v. State, 798 P.2d 1288 (Alaska Ct. App. 1990).

Defendant's sentence was vacated because the trial court misapplied the Court of Appeals of Alaska's Gustafson decision when it concluded that defendant's intentional assault on the officer meant that the resulting homicide was automatically equivalent to blameworthiness to first-degree murder and therefore he should presumptively receive the 99-year maximum sentence. Phillips v. State, 70 P.3d 1128 (Alaska Ct. App. 2003).

Sentence upheld. — See Condon v. State, 498 P.2d 276 (Alaska 1972); Johnson v. State, 511 P.2d 118 (Alaska 1973); Mills v. State, 592 P.2d 1247 (Alaska 1979); Ahwinona v. State, 598 P.2d 73 (Alaska 1979); Gipson v. State, 609 P.2d 1038 (Alaska 1980); La Londe v. State, 614 P.2d 808 (Alaska 1980); Nelson v. State, 619 P.2d 480 (Alaska Ct. App. 1980); Nielsen v. State, 623 P.2d 304 (Alaska 1981); Bryant v. State, 623 P.2d 310 (Alaska 1981); Davidson v. State, 642 P.2d 1383 (Alaska Ct. App. 1982); Faulkenberry v. State, 649 P.2d 951 (Alaska Ct. App. 1982); Van Cleve v. State, 649 P.2d 972 (Alaska Ct. App. 1982) (Decided under former AS 11.15.050); Page v. State, 657 P.2d 850 (Alaska Ct. App. 1983); Minchow v. State, 670 P.2d 719 (Alaska Ct. App. 1983); Pears v. State, 672 P.2d 903 (Alaska Ct. App. 1983); Jimmy v. State, 689 P.2d 504 (Alaska Ct. App. 1984); Komakhuk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

A twenty-five year sentence for second-degree murder based on either knowing or intentional conduct was affirmed. Arenas v. State, 727 P.2d 313 (Alaska Ct. App. 1986).

Where two defendants were convicted of first-de-

gree murder and one of second-degree murder for the same crime, the sentencing judge was entitled to make his own evaluation of the evidence in deciding how culpable was the behavior of the one convicted of second-degree murder, and where the record before the jury sufficed to support the conclusion that she was as guilty of premeditated murder as were the other defendants, the maximum term of 99 years received by each of the defendants, though certainly severe, was justified by the extreme nature of their crime. Ridgley v. State, 739 P.2d 1299 (Alaska Ct. App. 1987).

A sentence of 50 years' imprisonment for second-degree murder was upheld. See Norris v. State, 857 P.2d 349 (Alaska Ct. App. 1993).

Two concurrent terms of 18 years' imprisonment with 5 years suspended (13 years to serve) for two counts of vehicular homicide second-degree murder was not excessive. See Puzewicz v. State, 856 P.2d 1178 (Alaska Ct. App. 1993).

Sentence of 30 years for second-degree murder was not clearly mistaken. Hurn v. State, 872 P.2d 189 (Alaska Ct. App. 1994).

Maximum sentence upheld. — See Gregory v. State, 689 P.2d 508 (Alaska Ct. App. 1984); Boziel v. State, 864 P.2d 553 (Alaska Ct. App. 1993).

Sentence held excessive. — Concurrent sentences of twenty years for two counts of second degree murder and five years for one count of assault in the second degree held excessive. Pears v. State, 698 P.2d 1198 (Alaska 1985).

Sentence of 50 years in prison for second-degree murder was held excessive. The Page benchmark of from 20 to 30 years for second-degree murder was held ample to satisfy the multiple goals of imprisonment called for in Chaney, in a case in which a defendant whose principal problem was alcohol, which aggravated what might be considered the emotional disorder of jealousy, killed his lover. Road Yu v. State, 706 P.2d 348 (Alaska Ct. App. 1985); Blackhurst v. State, 721 P.2d 645 (Alaska Ct. App. 1986).

Facts of second-degree murder conviction held to be within mainstream of unintended, extremely reckless homicides defined by paragraph (a)(2) did not support sentence of 55 years. Brown v. State, 973 P.2d 1158 (Alaska Ct. App. 1999).

Sentence of fewer than 10 years' actual incarceration was clearly mistaken, where the circumstances surrounding defendant's killing of his wife's paramour more closely approached murder than manslaughter and the proper focus at sentencing would have been on deterrence of others and affirmation of community norms. State v. Krieger, 731 P.2d 592 (Alaska Ct. App. 1987).

Convictions for first-degree and second-degree murder affirmed but sentence remanded for consideration of consecutive sentencing. — See Tucker v. State, 721 P.2d 639 (Alaska Ct. App. 1986).

Applied in Blackhurst v. State, 721 P.2d 645 (Alaska Ct. App. 1986).

Cited in Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Stiegele v. State, 685 P.2d 1255 (Alaska Ct. App. 1984); State v. Burdine, 698 P.2d 1216 (Alaska Ct. App. 1985); Ridgely v. State, 705 P.2d 924 (Alaska Ct. App. 1985); LaPierre v. State, 734 P.2d 997 (Alaska Ct. App. 1987); Simpson v. State, 877 P.2d 1319 (Alaska Ct. App. 1994); Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995); Tucker v. State, 892 P.2d 832 (Alaska Ct. App. 1995); King v. State, 978 P.2d 1278 (Alaska Ct. App. 1999); J.R. v. State, 62 P.3d 114 (Alaska Ct. App. 2003); Porterfield v. State, 67 P.3d 1286 (Alaska Ct. App. 2003); Andrus v. State, Unpub. App. Op. No. 4842 (File No. A-8547), (Alaska Ct. App. Mar. 24, 2004).

II. FELONY MURDER.

Felony murder does not require intent to kill. — All intentional killings unless legally excused or mitigated to manslaughter are first-degree murder under the new code, and felony murder, which is second-degree murder, does not currently require an intent to kill. Carman v. State, 658 P.2d 131 (Alaska Ct. App. 1983).

Felony murder requires causal nexus. — The trial court's conviction for felony murder was reversed because the state failed to establish the necessary causal connection between the commission of the predicate felony, in this case arson, and the commission of the homicide. The state may not extract felony murder as an included crime merely under the combined succession of a homicide and a predicate felony. Hansen v. State, 845 P.2d 449 (Alaska Ct. App. 1993).

Separate convictions and punishments for felony murder and underlying felony. — The Alaska Constitution allows separate convictions and punishments for felony murder and the underlying felony, even though, under Alaska's cognate approach, the underlying felony may be a lesser included offense of felony murder. Todd v. State, 884 P.2d 668 (Alaska Ct. App. 1994), aff'd, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

The legislature intended to allow multiple punishments for felony murder and the predicate offense of robbery. Todd v. State, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

Felony murder and robbery are not the same offense for double jeopardy purposes; therefore, consecutive sentences are allowable. The statutes differ significantly in the intent and conduct required; the most obvious difference is the requirement under the felony-murder statute that someone have been killed. Todd v. State, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

The double jeopardy clause of the Alaska Constitution does not separate convictions for second-degree (felony) murder and the predicate offense of first-degree robbery. Todd v. State, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

Separate convictions and punishments for homicide and underlying felony. — Clearly Alaska law calls for separate convictions and punishments when the victim of the homicide is someone other than the victim of the underlying felony, as when a bystander or a police officer is killed during a robbery; but even when the defendant's crimes involve only one victim, the Alaska legislature intended to authorize separate convictions and punishments for the underlying felony and the resulting homicide. Todd v. State, 884 P.2d 668 (Alaska Ct. App. 1994), aff'd, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

From the legislative commentary to AS 11.41.115, two things are apparent: first, even in the situation described in the statute (a burglary committed for the purpose of killing someone) when the felony-murder rule does not apply, the legislature still envisioned the

NOTES TO DECISIONS

Origin. — This section is based on Illinois Criminal Code, Chapter 38 § 9-2(a). Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 234 (1984).

Heat of passion. — Finding in felony-murder prosecution that defendant did not act in self defense did not preclude heat of passion defense. Kirby v. State, 649 P.2d 963 (Alaska Ct. App. 1982).

Insufficient evidence of "heat of passion" to warrant instruction. Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 234 (1984).

Victim's preexisting anger did not in itself support a reasonable inference that his killer acted in a heat of passion after being seriously provoked by victim. Hilbish v. State, 891 P.2d 841 (Alaska Ct. App. 1995).

The reasonable person standard set forth in subsection (f)(2) governs the determination of whether that provocation was "by the intended victim," as required under subsection (a). Howell v. State, 917 P.2d 1202 (Alaska Ct. App. 1996).

To place the heat of passion defense in issue, a defendant need only produce "some evidence" to support it and so long as some evidence is presented to support the defense, matters of the credibility of conflicting witnesses is left to the jury. Howell v. State, 917 P.2d 1202 (Alaska Ct. App. 1996).

Heat of passion defense. In presenting a heat of passion defense under AS 11.41.115, a defendant cannot establish "serious provocation" by relying on the cumulative effect of acts and events which, as a matter of law, do not qualify as provocations. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

The father's act of purchasing a new vehicle could not as a matter of law constitute adequate provocation for homicide or attempted homicide under AS 11.41.115. The purchase of the vehicle was a lawful act, it was not directed at the mother, and it was not intended to influence her actions or emotions, despite the fact that the mother stated that seeing the father getting out of his new vehicle and walking to his attorney's office reminded the mother of how the father had obtained a judgment against her and had executed on her assets, so that she was left poor while he could afford a new vehicle. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

The rationale of allowing a heat of passion defense is that a person who commits murder in response to serious provocation is less blameworthy, and assumedly less of a danger to society, than a typical murderer. This same rationale applies equally to a person who attempts but fails to kill in response to serious provocation. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

When mother observed physical evidence suggesting that the father had sexually abused their child, this might have constituted provocation adequate to mitigate an ensuing homicidal assault on the father; however, this incident occurred years before the mother's attempted murder of the father, thus, as a matter of law, the mother could not rely on this incident as adequate provocation for her act of shooting the father, because any reasonable person would have cooled. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

Mother's phone call from her attorney's paralegal that trial court's custody order recommended that mother pay a portion of child's counseling expenses, which mother misunderstood to mean that the father declared he was too poor to bear, could not be categorized as provocation under the heat of passion defense of AS 11.41.115(f)(2) because the statute expressly stated that hearsay reports of the victim's conduct could not constitute serious provocation. Dandova v. State, 72 P.3d 325 (Alaska Ct. App. 2003).

Extreme emotional disturbance. — The legislature did not intend to make "extreme emotional disturbance" a defense to murder. Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 234 (1984).

As commonly defined, "passion" is sufficiently broad to encompass a range of emotions including fear, such that, in the absence of specific, narrowing statutory language, the heat of passion defense should be broadly interpreted to include emotions other than just rage or anger. LaPierre v. State, 734 P.2d 997 (Alaska Ct. App. 1987).

The state bears the burden of disproving heat of passion once the accused has presented "some evidence" on the issue. LaPierre v. State, 734 P.2d 997 (Alaska Ct. App. 1987).

Consideration of defendants mental abnormality. — The law has traditionally refused to consider a defendant's mental abnormality when deciding heat of passion claims. Xi Van Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995).

Self-defense. — See Pedersen v. State, 420 P.2d 327 (Alaska 1966). (Decided under former AS 11.15.010).

Person provoking difficulty thereby forfeits right to self-defense. — See note under this catchline under AS 11.81.335.

Constitutionality of separate convictions and punishments for felony murder and underlying felony. — The Alaska Constitution allows separate convictions and punishments for felony murder and the underlying felony, even though, under Alaska's cognate approach, the underlying felony may be a lesser included offense of felony murder. Todd v. State, 884 P.2d 668 (Alaska Ct. App. 1994), aff'd, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

Legislature intended separate convictions and punishments for homicide and underlying felony. — Clearly Alaska law calls for separate convictions and punishments when the victim of the homicide is someone other than the victim of the underlying felony, as when a bystander or a police officer is killed during a robbery; but even when the defendant's crimes involve only one victim, the Alaska legislature intended to authorize separate convictions and punishments for the underlying felony and the resulting homicide. Todd v. State, 884 P.2d 668 (Alaska Ct. App. 1994), aff'd, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

From the legislative commentary to AS 11.41.115, two things are apparent: first, even in the situation described in the statute (a burglary committed for the purpose of killing someone) when the felony-murder rule does not apply, the legislature still envisioned the defendant might be separately convicted of murder (first-degree murder) or manslaughter and the underlying burglary; second, because the legislature enacted a special provision to merge the two potential offenses in this specific situation, the legislature must

(Alaska 1979); LaBarbera v. State, 598 P.2d 947 (Alaska 1979); Peterson v. State, 602 P.2d 1254 (Alaska 1979); Adkinson v. State, 611 P.2d 528 (Alaska 1980), cert. denied, 449 U.S. 876, 101 S. Ct. 219, 66 L. Ed. 2d 97 (1980); Rodriguez v. State, 613 P.2d 1255 (Alaska 1980); Nygren v. State, 616 P.2d 20 (Alaska 1980); Richards v. State, 616 P.2d 870 (Alaska 1980); Phillips v. State, 625 P.2d 816 (Alaska 1980); Maloney v. State, 667 P.2d 1258 (Alaska Ct. App. 1983); Hughes v. State, 668 P.2d 842 (Alaska Ct. App. 1983); Adams v. State, 718 P.2d 164 (Alaska Ct. App. 1986).

Sentence of eight years with three years suspended for drunk driving manslaughter and two concurrent sentences of three years for second-degree assault were not clearly mistaken. Dresnek v. State, 718 P.2d 156 (Alaska 1986), cert. denied, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986).

Imposition of an aggravated presumptive term of ten years for nonalcohol-related vehicular manslaughter and a consecutive suspended four-year sentence for assault in the second degree was not clearly mistaken, where defendant's callousness and irresponsibility were evidenced by his conduct in eluding police officers, racing down a highway, and running red lights before colliding with another vehicle. Barney v. State, 786 P.2d 925 (Alaska Ct. App. 1990).

Despite defendant's good record and considerable prospects for rehabilitation, the seriousness behind defendant's actions in shooting and killing an unarmed, fleeing youth who had attempted to remove his commercial balloon-advertisement warranted the imposition of the five-year term for manslaughter. Lowe v. State, 866 P.2d 1320 (Alaska Ct. App. 1994).

A sentence of 25 years' imprisonment with seven years suspended (18 years to serve) for a vehicular homicide involving three deaths was supportable under Alaska sentencing law. Pusich v. State, 907 P.2d 29 (Alaska Ct. App. 1995).

Composite sentence of 25 years' imprisonment with six years suspended, for conviction of one count of manslaughter and five counts of first-degree assault, was not clearly mistaken where defendant killed person and seriously injured four others in two separate incidents while driving a snow machine in intoxicated condition. Ting v. Municipality of Anchorage, 929 P.2d 673 (Alaska Ct. App. 1997).

Sentence too lenient. — See State v. Abraham, 566 P.2d 267 (Alaska 1977).

A sentence of less than one year's actual incarceration for drunken-driver manslaughter was too lenient. State v. Lamebull, 653 P.2d 1060 (Alaska Ct. App. 1982).

Sentence held excessive. — See Jones v. State, 744 P.2d 410 (Alaska Ct. App. 1987).

Sentence modified. — See Notaro v. State, 655 P.2d 769 (Alaska 1980).

Remand for sentence review. — See Padie v. State, 594 P.2d 50 (Alaska 1979).

Applied in Pena v. State, 684 P.2d 864 (Alaska Ct. App. 1984); Williams v. State, 737 P.2d 360 (Alaska Ct. App. 1987); Wickham v. State, 770 P.2d 757 (Alaska Ct. App. 1989).

Quoted in Valentine v. State, 617 P.2d 751 (Alaska 1980); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Connolly v. State, 758 P.2d 633 (Alaska Ct. App. 1988).

Cited in Sears v. State, 653 P.2d 349 (Alaska Ct. App. 1982); Pena v. State, 664 P.2d 169 (Alaska Ct. App. 1983); Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Davis v. State, 684 P.2d 147 (Alaska Ct. App. 1984); State v. Jones, 751 P.2d 1379 (Alaska Ct. App. 1988); Roark v. State, 758 P.2d 644 (Alaska Ct. App. 1988); Ames v. Endell, 856 F.2d 1441 (9th Cir. 1988); Beagel v. State, 813 P.2d 699 (Alaska Ct. App. 1991); Puzewicz v. State, 856 P.2d 1178 (Alaska Ct. App. 1993); Panther v. Hames, 991 F.2d 576 (9th Cir. 1993); Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994); Blank v. State, 3 P.3d 359 (Alaska Ct. App. 2000); Morrison v. State, 7 P.3d 955 (Alaska Ct. App. 2000); State v. Blank, Sup. Ct. Op. No. 5783 (File No. S-9721), P.3d (Alaska Feb. 27, 2004).

Collateral references. — Who other than actor is liable for manslaughter, 95 ALR2d 175.

Failure to provide medical or surgical attention, 100 ALR2d 483.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 ALR3d 1292.

Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 ALR3d 589.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Homicide predicated on improper treatment of disease or injury, 45 ALR3d 114.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 ALR3d 239.

Homicide as affected by lapse of time between injury and death, 60 ALR3d 1323.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 ALR3d 283.

Proof of live birth in prosecution for killing newborn child, 65 ALR3d 413.

What constitutes "imminently dangerous" within homicide statute, 67 ALR3d 900.

Propriety of predicating manslaughter conviction on violation of local ordinance or regulation not dealing with motor vehicles, 85 ALR3d 1072.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Criminal liability for injury or death caused by operation of pleasure boat, 8 ALR4th 886.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 ALR4th 861.

Sec. 11.41.130. Criminally negligent homicide. (a) A person commits the crime of criminally negligent homicide if, with criminal negligence, the person causes the death of another person.

(b) Criminally negligent homicide is a class B felony. (§ 3 ch 166 SLA 1978; am § 5 ch 64 SLA 1999)

Cross references. — For applicability provisions relating to the 1999 amendment of subsection (b), see § 15, ch. 54, SLA 1999 in the 1999 Temporary & Special Acts.

Effect of amendments. — The 1999 amendment, effective June 5, 1999, substituted "class B" for "class C" in subsection (b).

NOTES TO DECISIONS

Annotator's notes. — Many of the cases cited in the notes below were decided under former AS 11.15.040 and 11.15.080.

Constitutionality. — This section is not unconstitutionally vague as the terms "substantial risk" and "gross deviation" are of general usage, commonly understood by the public, and sufficiently certain to give the requisite, guiding objective criteria for constitutional application. Panther v. Hames, 991 F.2d 576 (9th Cir. 1993).

Alaska's new criminal code totally abandons the unlawful act approach to manslaughter and contains no misdemeanor-manslaughter provisions. Keith v. State, 612 P.2d 977 (Alaska 1980).

For case holding that the misdemeanor-manslaughter doctrine was encompassed within former manslaughter statute, see Keith v. State, 612 P.2d 977 (Alaska 1980).

A criminal negligence theory was within the purview of former AS 11.15.040. DeSacia v. State, 469 P.2d 369 (Alaska 1970).

Meaning of "culpable negligence" under former AS 11.15.080. — See United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952); DeSacia v. State, 469 P.2d 369 (Alaska 1970); Stork v. State, 559 P.2d 99 (Alaska 1977).

Under the former culpable negligence statute it was assumed that purpose or intent to kill is absent. Giles v. United States, 10 Alaska 455, 144 F.2d 860 (9th Cir. 1944); United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Intent not element. — In Alaska, negligent homicide is a form of manslaughter, and intent is not an element of the crime. O'Leary v. State, 604 P.2d 1099 (Alaska 1979), overruled on other grounds, Evans v. State, 645 P.2d 155 (Alaska 1982).

Manslaughter distinguished. — Criminally negligent homicide is not the same as manslaughter based on recklessness under the relevant statute since recklessness requires conscious disregard of a known risk, while in contrast, the essence of criminal negligence is failure to perceive the risk. Edgmon v. State, 702 P.2d 643 (Alaska Ct. App. 1985).

The fact that a given defendant did not perceive a risk because he or she was mentally retarded, because he or she had bad eyesight or bad hearing, or because his or her experience had not fitted him or her to appreciate the risk would be irrelevant in proving negligence but highly relevant with regard to recklessness, whether the given individual was intoxicated or not, and consequently, elimination of intoxication as a basis for a finding that a specific individual did not appreciate a specific risk does not totally destroy the distinction between criminal negligence and recklessness. Edgmon v. State, 702 P.2d 643 (Alaska Ct. App. 1985).

The sole distinction between recklessness and criminal negligence — and, by extension, between manslaughter and criminally negligent homicide — lies in the accused's awareness of the risk that is caused by the accused's conduct. Panther v. State, 780 P.2d 386 (Alaska Ct. App. 1989), aff'd, 991 F.2d 576 (9th Cir. 1993).

There was only one statutory crime of manslaughter in Alaska, although it was defined in two statutes, former AS 11.15.040 (manslaughter) and former AS 11.15.080 (negligent homicide). Des Jardins v. State, 551 P.2d 181 (Alaska 1976).

Involuntary manslaughter is not a lesser crime than voluntary manslaughter. Des Jardins v. State, 551 P.2d 181 (Alaska 1976).

Negligent homicide is included in a charge of murder. Barbeau v. United States, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Every essential element of manslaughter by negligent homicide is necessarily included in the offense of murder in the first degree. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (D. Alaska 1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 968, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

There is no diminished capacity defense to the crime of negligent manslaughter, since manslaughter is a general rather than a specific intent crime. O'Leary v. State, 604 P.2d 1 99 (Alaska 1979), overruled on other grounds, Evans v. State, 645 P.2d 155 (Alaska 1982).

Proof required. — The state, in a criminal case under former AS 11.15.080, was not required to prove beyond a reasonable doubt that the defendant's negligence was the sole proximate cause of the death. Wren v. State, 577 P.2d 235 (Alaska 1978).

Where a defendant negligently created a risk of death to another person, the fact that the person actually died as a result of the combination of that negligence plus some other contributing factor did not serve to exculpate. Wren v. State, 577 P.2d 235 (Alaska 1978).

A decedent's conduct might be considered under former AS 11.15.080 insofar as it had a bearing on the defendant's alleged negligence. Negligence of the deceased might also be considered with reference to the issue of whether the defendant's culpable negligence had been the proximate cause of death. Otherwise, any negligence of the deceased was irrelevant. Wren v. State, 577 P.2d 235 (Alaska 1978).

The crime of negligent homicide is established upon proof that the accused was driving while intoxicated and that such act was the proximate cause of death. Lupro v. State, 603 P.2d 468 (Alaska 1979).

Where there is sufficient evidence that the driver was intoxicated at the time of the accident, the state need only show beyond a reasonable doubt that the

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of motor vehicle, 20 ALR3d 473.

Criminal liability for injury or death caused by operation of pleasure boat, 8 ALR4th 886.

Nature and elements of alcohol-related vehicular homicide, 64 ALR4th 166.

Sec. 11.41.135. Multiple deaths. If more than one person dies as a result of a person committing conduct constituting a crime specified in AS 11.41.100 — 11.41.130, each death constitutes a separately punishable offense. (§ 1 ch 143 SLA 1982)

NOTES TO DECISIONS

Constitutionality of section. — Alaska's constitutional prohibition against double jeopardy does not bar multiple sentences for multiple victims where one statute has been violated several times. State v. Dunlop, 721 P.2d 604 (Alaska 1986), overruling, Thessen v. State, 508 P.2d 1192 (Alaska 1973), and State v. Souter, 606 P.2d 399 (Alaska 1980), as well as, State v. Gibson, 543 P.2d 406 (Alaska 1975), overruled on other grounds, State v. Dunlop, 721 P.2d 604 (Alaska 1986), to the extent it affirmed Thessen.

Cited in Nukapigak v. State, 663 P.2d 943 (Alaska 1983).

Sec. 11.41.140. Definition. In AS 11.41.100 — 11.41.140 "person", when referring to the victim of a crime, means a human being who has been born and was alive at the time of the criminal act. A person is "alive" if there is spontaneous respiratory or cardiac function or, when respiratory and cardiac functions are maintained by artificial means, there is spontaneous brain function. (§ 3 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

Article 2. Assault and Reckless Endangerment.

Section
200. Assault in the first degree
210. Assault in the second degree
220. Assault in the third degree
230. Assault in the fourth degree
250. Reckless endangerment
260. Stalking in the first degree
270. Stalking in the second degree

Collateral references. — 6 Am. Jur. 2d, Assault and Battery, § 1 et seq.

6A C.J.S., Assault and Battery, § 1 et seq.

Indecent proposal to woman as assault, 12 ALR2d 991.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 ALR2d 1068.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 ALR2d 808.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 35 ALR2d 748.

Attempt to commit assault as criminal offense, 79 ALR2d 597.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 84 ALR2d 1017; 24 ALR4th 105.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Criminal responsibility for assault and battery by operation of mechanically defective motor vehicle, 88 ALR2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 ALR2d 396.

Deadly or dangerous weapon, intent to do physical harm as essential element of crime of assault with, 92 ALR2d 635.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for assault, 98 ALR2d 195.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 1 ALR3d 571.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 ALR3d 933.

Scienter as element of offense of assaulting, resisting, or impeding federal officer, 10 ALR3d 833.

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

Duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 ALR3d 584.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Consent as defense to charge of criminal assault and battery, 58 ALR3d 662.

Liability of owner or operator of theatre or other amusement to patron assaulted by another patron, 75 ALR3d 441.

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

Automobile as dangerous or deadly weapon within meaning of assault or batter statute, 89 ALR3d 1026.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal assault by third party, 93 ALR3d 999.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 ALR3d 854.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 ALR3d 287.

Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females, 5 ALR4th 708.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 ALR4th 607.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery, 8 ALR4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 ALR4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 ALR4th 1268.

Admissibility of expert or opinion testimony on battered wife or battered women syndrome, 18 ALR4th 1153.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 ALR4th 243.

Liability of one who provides, by sale or otherwise, firearm or ammunition to adult who shoots another, 39 ALR4th 517.

Fact that gun was unloaded as affecting criminal responsibility, 68 ALR4th 507.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 ALR5th 823

Sec. 11.41.200. Assault in the first degree. (a) A person commits the crime of assault in the first degree if

(1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;

(2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person;

(3) the person knowingly engages in conduct that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury.

(b) Assault in the first degree is a class A felony. (§ 3 ch 166 SLA 1978; am § 2 ch 143 SLA 1982; am § 2 ch 66 SLA 1988; am § 2 ch 79 SLA 1992)

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

NOTES TO DECISIONS

I. General Consideration.
II. Paragraph (a)(1).
III. Former Law.

I. GENERAL CONSIDERATION.

Constitutional considerations. — The Alaska or federal constitutions did not preclude defendant's conviction of first-degree assault, a class A felony, even though the same conduct under the same circumstances could have resulted in his conviction of second-degree assault, a class B felony. Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985).

Assault not continuing offense. — Assault is not typically regarded as a continuing offense. S.R.D. v. State, 820 P.2d 1088 (Alaska Ct. App. 1991).

Series of unrelated assaults over two-year period. — Repeated assaults, which were interspersed over a period of approximately two years, and constituted separate criminal episodes, encompassed a series of fourth-degree assaults, none of which could be deemed aggravated in itself, and were insufficient to support a conviction for assault in the first degree. S.R.D. v. State, 820 P.2d 1088 (Alaska Ct. App. 1991).

Self-defense. — In an assault case in which the defendant admits the assault, but raises self-defense, specific instances of the victim's prior conduct are considered to be admissible under Evidence Rule 405(b) to show (1) who was the aggressor, in which case defendant's knowledge of the incident is immaterial; and (2) that defendant acted reasonably in using the degree of force he did, in which case defen-

construing former statute relating to see Burleson v. State, 543 P.2d 1185 (5); Adams v. State, 558 P.2d 503 (Alaska ckley v. State, 644 P.2d 864 (Alaska Ct.

s construing former statute relating to g, stabbing, etc., with intent to kill or maim, see Hallback v. State, 361 P.2d 336 31); McCracken v. State, 521 P.2d 489 4); Fox v. State, 569 P.2d 1335 (Alaska d v. State, 573 P.2d 1379 (Alaska 1978); tate, 578 P.2d 966 (Alaska 1978); Christie 0 P.2d 310 (Alaska 1978); Abraham v. 2d 621 (Alaska 1979); Johnson v. State, 5 (Alaska 1979); Smith v. State, 614 P.2d 1980); Larson v. State, 614 P.2d 770 0); Nielsen v. State, 623 P.2d 304 (Alaska k v. State, 624 P.2d 818 (Alaska 1981).

s construing former statute relating to with intent to kill or commit rape or e Burke v. United States, 282 F.2d 763 0); Morrell v. State, 575 P.2d 1200 (Alaska v. Wassilie, 578 P.2d 971 (Alaska 1978); , 580 P.2d 304 (Alaska 1978); Abraham v. 2d 621 (Alaska 1979); Calantas v. State, 7 (Alaska 1979), aff'd on rehearing, 608 ska 1980); Brookins v. State, 600 P.2d 12 9); Holden v. State, 602 P.2d 452 (Alaska er v. State, 616 P.2d 884 (Alaska 1980).

construing former statute relating to ile armed, see Rivett v. State, 578 P.2d 1978); Sevier v. State, 614 P.2d 791).

s construing former statute relating to use of firearms, see Green v. State, 579 ka 1978); Christie v. State, 580 P.2d 310 8); Elisovsky v. State, 592 P.2d 1221); Loesche v. State, 620 P.2d 646 (Alaska

construing former statute relating to with a dangerous weapon, see Ball v. s, 147 F. 32 (9th Cir. 1906); Johnston v. s, 154 F. 445 (9th Cir. 1907); Eagleston v. s, 12 Alaska 213, 172 F.2d 194 (9th Cir. ull v. United States, 15 Alaska 135, 215 h Cir. 1954); Soper v. United States, 15 220 F.2d 158 (9th Cir. 1955), cert. denied, , 765 S. Ct. 58, 100 L. Ed. 739 (1955); ted States, 282 F.2d 763 (9th Cir. 1960); e, 363 P.2d 357 (Alaska 1961); Tracey v. 2d 732 (Alaska 1964); Thompson v. State, (Alaska 1968); Herrin v. State, 449 P.2d 1969); Wilson v. State, 473 P.2d 633); State v. Armantrout, 483 P.2d 696); Nielsen v. State, 492 P.2d 122 (Alaska s v. State, 524 P.2d 664 (Alaska 1974); 542 P.2d 159 (Alaska 1975); Bailey v. 2d 373 (Alaska 1976); Else v. State, 555 laska 1976); Dawson v. State, 557 P.2d 1976); Mutschler v. State, 560 P.2d 377); State v. Occhipinti, 562 P.2d 348); Nukapigak v. State, 562 P.2d 697), aff'd on rehearing, 576 P.2d 982 ; State v. Taylor, 566 P.2d 1016 (Alaska v. State, 568 P.2d 981 (Alaska 1977); e, 569 P.2d 783 (Alaska 1977); White v. 2d 1056 (Alaska 1978); Rivett v. State, Alaska 1978); Menard v. State, 578 P.2d 1978); State v. Wassilie, 578 P.2d 971 ; Christie v. State, 580 P.2d 310 (Alaska n v. State, 580 P.2d 700 (Alaska 1978);

v. State, 581 P.2d 226 (Alaska 1978); Mill v. 585 P.2d 546 (Alaska 1978), cert. denied, 444 827, 100 S. Ct. 51, 62 L. Ed. 2d 34 (1979); n v. State, 589 P.2d 863 (Alaska 1979); Price v. 590 P.2d 419 (Alaska 1979); Elisovsky v. State, 2d 1221 (Alaska 1979); Cooper v. State, 595 P.2d Alaska 1979); Gilbert v. State, 598 P.2d 87 ska 1979); Kraus v. State, 604 P.2d 12 (Alaska ; Holmes v. State, 604 P.2d 248 (Alaska 1979); ane v. State, 611 P.2d 61 (Alaska 1980); Sevier v. 614 P.2d 791 (Alaska 1980); Calder v. State, 619 102; (Alaska 1980); Loesche v. State, 620 P.2d (Alaska 1980); W v. State, 621 P.2d 18 (Alaska App. 1980); Grant v. State, 621 P.2d 1338 (Alaska); Kasak v. State, 624 P.2d 818 (Alaska 1981); off v. State, 627 P.2d 653 (Alaska Ct. App. 1981); Neal v. State, 628 P.2d 19 (Alaska 1981); State v. Ahwinona, 6 P.2d 488 (Alaska Ct. App. 1981); Davidson v. State, 642 P.2d 1383 (Alaska Ct. App. 1982); Sheakley v. State, 644 P.2d 864 (Alaska Ct. App. 1982); Dyer v. State, 666 P.2d 438 (Alaska Ct. App. 1983); Lee v. State, 673 P.2d 892 (Alaska Ct. App. 1983).

For cases construing former statute relating to assault and assault and battery, see Nichia v. United States, 72 F.2d 1000 (9th Cir. 1934); State v. Spencer, 514 P.2d 14 (Alaska 1973); Peter v. State, 572 P.2d 1179 (Alaska 1978); Rivett v. State, 578 P.2d 946 (Alaska 1978); Penn v. State, 588 P.2d 288 (Alaska 1978); Nix v. State, 624 P.2d 823 (Alaska Ct. App. 1981).

Collateral references. — Attempt to commit assault as criminal offense. 93 ALR5th 683.

Sec. 11.41.210. Assault in the second degree. (a) A person commits the crime of assault in the second degree if

(1) with intent to cause physical injury to another person, that person causes physical injury to another person by means of a dangerous instrument;

(2) that person recklessly causes serious physical injury to another person; or

(3) that person recklessly causes serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury.

(b) Assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 4 ch 102 SLA 1980; am § 3 ch 143 SLA 1982; am § 3 ch 79 SLA 1992)

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

NOTES TO DECISIONS

Former law. — See notes to AS 11.41.200 under analysis line III.

Constitutional considerations. — The Alaska or federal constitutions did not preclude defendant's conviction of first-degree assault, a class A felony even though the same conduct under the same circumstances could have resulted in his conviction of second-degree assault, a class B felony. Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985).

Prosecution not precluded by pleading no contest to negligent driving. — Negligent driving was an infraction, not an offense for double jeopardy purposes, and pleading no contest to negligent driving did not preclude a subsequent prosecution for the offense of second-degree assault. Carlson v. State, 676 P.2d 603 (Alaska Ct. App. 1984).

Belt as "dangerous instrument". — Defendant's use of a belt to beat his children posed a sufficient threat of serious physical injury to amount to the use of a "dangerous instrument." S.R.D. v. State, 820 P.2d 1088 (Alaska Ct. App. 1991).

Inoperable firearm as "dangerous instrument." — In a prosecution for assault in the second degree, an instruction to the jury that any firearm, whether or not operable, was a "dangerous weapon" correctly stated the law. Rhames v. State, 907 P.2d 21 (Alaska Ct. App. 1995).

Statutory presumption concerning intoxication. — A jury considering drunk driving, assault (involving motor vehicles), manslaughter, and negligent homicide cases should be made aware of the statutory presumption concerning intoxication in AS 28.35.033(a). Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985), aff'd, 718 P.2d 156 (Alaska 1986), cert. denied, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986).

Not lesser included offense of first-degree assault. — Third-degree assault, not second-degree assault, is a lesser included offense of first-degree assault. Komakhuk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

Effect of no contest plea. — Where the charging document did not allege that the defendant intentionally caused physical injury to the victim, but that he "recklessly" inflicted injury, the defendant did not concede the element of intent to cause physical injury when he pleaded no contest. Ashenfelter v. State, 988 P.2d 120 (Alaska Ct. App. 1999).

Jury instructions. — In prosecution for drunk driving manslaughter and second-degree assault, the trial court did not err in instructing the jury that if it found that there was .10% or more alcohol in defendant's blood at the time of the accident, it could infer that he was under the influence of intoxicating liquor. Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985), aff'd, 718 P.2d 156 (Alaska 1986), cert. denied, 479 U.S. 1021, 107 S. Ct. 679, 93 L. Ed. 2d 729 (1986).

Conviction upheld. — See Stapleton v. State, 696 P.2d 180 (Alaska Ct. App. 1985).

lefendant with no prior criminal con-
ecutive terms of four years with one
and one year with six months sus-
second-degree assaults and to a con-
one year with nine months suspended
ree assault, a composite term of five
and one-half years suspended was
than the corresponding second offense
m for the individual offenses and was
plain v. State, 924 P.2d 435 (Alaska Ct.

alia, defendants knew that their vic-
nth-old baby) was particularly vulner-
was a member of their household, and
nduct was among the most serious
nition of the offense, because the evi-
hat the baby's injuries had been life-
ntences of six years to serve was not
s v. State, 57 P.3d 688 (Alaska Ct. App

dant was convicted of second-degree
second-degree assault, and manufac-
n a local option area, given defendant's
d felony offender, his lengthy history of
rual assaults, his failure to be deterred
rison sentences, and his apparently
cision to inflict severe injuries on the
l judge was not clearly mistaken when
sentence that exceeded the normal
. Cleveland v. State, 91 P.3d 965
. 2004).

ld excessive. — Where a 20-year-old
ho seriously injured two persons while
ntoxicated was sentenced to two five-
it sentences after conviction of two
lt in the second degree, the concurrent
e years were clearly mistaken and the
was ordered to impose sentences not
years. Though the trial judge was
osing a sentence at the top of the range
offenders, the case was not exceptional
ant should not have been sentenced to
excess of four years, the presumptive
second felony offender. Jacko v. State,
Alaska Ct. App. 1984).

sentences of twenty years for two
d degree murder and five years for one
lt in the second degree held excessive.
698 P.2d 1198 (Alaska 1985).

entences of seven years with four years
two counts of assault in the second
robation for five years following incar-
upheld for a first felony offender where
ld have been charged as a first-degree
fendant registered a blood alcohol level
nt two and one-half hours after the
the defendant injured two persons in
ong way on a bridge and caused the
. Yerk v. State, 706 P.2d 341 (Alaska Ct.

or burglary, robbery and assault
e. — See Larson v. State, 688 P.2d 592
p. 1984).

State v. Silas, 595 P.2d 651 (Alaska
l v. State, 647 P.2d 618 (Alaska Ct. App.
v. State, 684 P.2d 144 (Alaska Ct. App.
v. State, 763 P.2d 1369 (Alaska Ct. App.

Stiegele v. State, 714 P.2d 356 (Alaska
); Cavanaugh v. State, 754 P.2d 757
p. 1988).

Stated in Coleman v. State, 621 P.2d 869 (Alaska 1980).

Cited in State v. Ahwinona, 635 P.2d 486 (Alaska Ct. App. 1981); Larson v. State, 656 P.2d 571 (Alaska Ct. App. 1982); Stiegele v. State, 685 P.2d 1255 (Alaska Ct. App. 1984); Davis v. State, 684 P.2d 147 (Alaska Ct. App. 1984); Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984); State v. Jones, 751 P.2d 1379 (Alaska Ct. App. 1988); Mudge v. State, 760 P.2d 1046 (Alaska Ct. App. 1988); Jones v. State, 765 P.2d 107 (Alaska Ct. App. 1988); Erickson v. State, 824 P.2d 725 (Alaska Ct. App. 1991); State v. Hernandez, 877 P.2d 1309 (Alaska Ct. App. 1994); Pickard v. State, 965 P.2d 755 (Alaska Ct. App. 1998); Wardlow v. State, 2 P.3d 1238 (Alaska Ct. App. 2000); Ramsey v. State, 56 P.3d 675 (Alaska Ct. App. 2002); Phillips v. State, 70 P.3d 1128 (Alaska Ct. App. 2003); Timothy v. State, 90 P.3d 177 (Alaska Ct. App. 2004).

Collateral references. — Attempt to commit assault as criminal offense. 93 ALR5th 683.

Sec. 11.41.220. Assault in the third degree. (a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument; or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person;

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment; or

(4) with criminal negligence causes serious physical injury under AS 11.81.900(b)(55)(B) to another person by means of a dangerous instrument.

(b) In a prosecution under (a)(3) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be 16 years of age or older, unless the victim was under 13 years of age at the time of the alleged offense.

(c) In this section, "the person's family member" means

(1) a spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the person, whether related by blood, marriage, or adoption;

(2) a person who lives or has lived, in a spousal relationship with the person;

(3) a person who lives in the same household as the person; or

(4) a person who is a former spouse of the person or is or has been in a dating, courtship, or engagement relationship with the person.

(d) Assault in the third degree is a class C felony. (§ 5 ch 102 SLA 1980; am § 4 ch 143 SLA 1982; am § 4 ch 79 SLA 1992; am §§ 2, 3 ch 40 SLA 1993; am §§ 1, 2 ch 54 SLA 1995; am § 13 ch 124 SLA 2004)

Revisor's notes. — Subsection (b) was enacted as (c). Relettered in 1995, at which time former subsection (b) was relettered as (d).

Effect of amendments. — The 2004 amendment, effective July 1, 2004, added paragraph (a)(4), and made related changes.

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

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

NOTES TO DECISIONS

"Dangerous instrument" defined. — Since "dangerous instrument" includes "deadly weapon," and "deadly weapon" includes "any firearm," which in turn is defined to include unloaded rifles, simple substitution yields an unambiguous statute that prohibits the use of an unloaded rifle to place another in fear of imminent serious physical injury. Siggelkow v. State, 648 P.2d 611 (Alaska Ct. App. 1982).

Former AS 11.41.210(a)(2) (prior to 1980 amendment) and AS 11.81.900(b)(11) (now (b)(12)) were not so ambiguous as to deprive defendant of fair warning that placing another in fear by means of an unloaded firearm, from any distance, was prohibited. Siggelkow v. State, 648 P.2d 611 (Alaska Ct. App. 1982).

Because of its solidity and mass, an automobile is normally easily capable of inflicting death or serious physical injury, and an automobile constitutes a "dangerous instrument" within the definition provided AS 11.81.900, except in unusual circumstances. State v. Waskey, 834 P.2d 1251 (Alaska Ct. App. 1992).

In a prosecution of defendant, who while lying on his back and wearing heavy boots, kicked a police officer in the back of the head, for third degree assault, the State's evidence was insufficient to support a finding that defendant's shod foot constituted a "dangerous instrument" for purposes of the third degree assault statute, AS 11.41.220. Hutchings v. State, 53 P.3d 1132 (Alaska Ct. App. 2002).

Effect of no contest plea. — Where the defendant pleaded no contest to third-degree assault, he was not entitled to dispute his guilt at the sentencing hearing, and the judge did not err in disregarding his protestations of innocence made under oath. Ashenfelter v. State, 988 P.2d 120 (Alaska Ct. App. 1999).

Lesser included offense of first-degree assault. — Third-degree assault, not second-degree assault, is a lesser included offense of first-degree assault. Komakhuk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

Instructions. — In prosecution for third-degree assault, the trial court erred in failing to give a lesser-included instruction on disorderly conduct. Norbert v. State, 718 P.2d 160 (Alaska Ct. App. 1986).

There was no error in the refusal of defendant's proposed jury instructions where the judge correctly instructed the jury that the state had to prove the defendant acted recklessly, rather than inadvertently, when he injured the victim in order to convict him of third-degree assault, and where the rejected instructions were superfluous. Ward v. State, 997 P.2d 528 (Alaska Ct. App. 2000).

Charge as to fear of injury. — Trial court properly refused to give a proposed instruction requiring the jury to find that the victim's fear of injury was reasonable, where defendant was charged as a result of an incident in which he threatened a police officer with a chain saw, and, since the officer was not actually injured, the issue before the jury was whether he was placed in fear of serious physical injury. Wyatt v. State, 778 P.2d 1169 (Alaska Ct. App. 1989).

Trial court properly denied an instruction requiring the jury to find that the victims' fear of injury was reasonable, where the victims, who were state troopers, testified that defendant's actions in drawing a pistol and cocking it had placed them in fear of being shot and that this was their reason for disarming and arresting him. DeHart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

"Unequivocal, unconditional, immediate and specific." — The letters written by the defendant were not so "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution," and his probation should not have been revoked on the basis that the letters supplied proof that the defendant committed third-degree assault. Powell v. State, 12 P.3d 1187 (Alaska Ct. App. 2000).

Instruction stating relationship between recklessness and driving while intoxicated. — In a trial for assault in the third degree and driving while intoxicated, an instruction that provided: "If you find that the defendant operated a motor vehicle while intoxicated, you may, but are not required to, infer that he acted recklessly," correctly stated the relationship between recklessness and driving while intoxicated and was appropriately phrased as a permissive inference. Lee v. State, 760 P.2d 1039 (Alaska Ct. App. 1988).

Supplemental instruction was prejudicial error. — It was prejudicial error requiring reversal to submit the supplemental instruction that allowed the jury to find that defendant assaulted the victim with the rifle after the close of evidence and after the jury had begun deliberating. Bowers v. State, 2 P.3d 1215 (Alaska 2000).

Domestic violence. — A conviction for assault in the third degree was a crime involving domestic violence pursuant to AS 12.30.027. State v. Roberts, 999 P.2d 151 (Alaska Ct. App. 2000).

Consideration of defendant's negligence. — Where, in a trial for assault in the third degree and driving while intoxicated, an instruction defined "the cause of an injury" as a cause "without which the injury would not have occurred," it required the jury to find that defendant's recklessness was a proximate cause of the injuries that allegedly resulted to the victim — that is, a cause that "contributes substantially" to the injuries and did not preclude the jury from considering the victim's own conduct to the extent that it may have been relevant to the issues of whether defendant acted recklessly and whether his recklessness caused the alleged injuries. Beyond that, defendant was clearly not entitled to an instruction informing the jury that the victim's negligence was a defense to the assault charge. Lee v. State, 760 P.2d 1039 (Alaska Ct. App. 1988).

Prior misconduct evidence. — Where defendant was tried for third-degree assault under AS 11.41.220(a)(1)(A) for threatening to kill his girlfriend and with three counts of second-degree sexual abuse of a minor under AS 11.41.436(a)(5)(A) for fondling the breasts of his girlfriend's teenage daughter, the trial judge abused his discretion by allowing the State to present evidence of sixty prior instances of defendant's misconduct which had little or nothing to do with the offenses charged. Defendant was entitled to a new trial. Bingaman v. State, 76 P.3d 398 (Alaska Ct. App. 2003).

Evidence of defendant's arms stockpile. — Trial judge did not abuse his discretion in allowing the state to introduce evidence of assault defendant's stockpile of arms and ammunition, where possession of the arsenal was relevant to demonstrate defendant's state of mind at the time he accosted victim and

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unconditional, immediate and letters written by the defendant uivocal, unconditional, immediate he person threatened, as to convey e and imminent prospect of execu- ation should not have been revoked the letters supplied proof that the ted third-degree assault. Powell v. 7 (Alaska Ct. App. 2000).

tating relationship between driving while intoxicated. — In in the third degree and driving in instruction that provided "If you lant operated a motor vehicle while ay, but are not required to, infer essly," correctly stated the relation- lessness and driving while intoxi- ropriately phrased as a permissive ate, 760 P.2d 1039 (Alaska Ct. App.

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ict evidence. — Where defendant hird-degree assault under AS or threatening to kill his girlfriend nts of second-degree sexual abuse 11.41.436(a)(5)(A) for fondling the riend's teenage daughter, the trial iscretion by allowing the State to of sixty prior instances of defen- which had little or nothing to do harged. Defendant was entitled to a n v. State, 76 P.3d 398 (Alaska Ct.

efendant's arms stockpile. — abuse his discretion in allowing the evidence of assault defendant's nd ammunition, where possession s relevant to demonstrate defen- l at the time he accosted victim and

ned handgun at him. Dutton v. State, 970 P.2d 925 Alaska Ct. App. 1999).

Sufficient evidence for conviction. — Evidence was sufficient to allow reasonable jurors to conclude that a correctional officer had been placed in immi- nent fear of being shot by defendant, where the two men were engaged in a physical struggle over the officer's gun and the officer believed that defendant was about to succeed in his efforts to gain control of the weapon. Perotti v. State, 818 P.2d 700 (Alaska Ct. App. 1991).

Where defendant came to a cabin occupied by the victim, demanded to be let inside, broke a window, and kicked in the door cutting the victim's hand, he was properly convicted on a plea of guilty of third-degree assault. Dayton v. State, 78 P.3d 270 (Alaska Ct. App. 2003).

Sentencing of first offender. — A first offender should normally receive a more favorable sentence than the presumptive term for a second offender, but the supreme court, in applying this rule, focuses on the period of actual incarceration, excluding suspended periods of imprisonment; so where defendant received only one year of unsuspended imprisonment, since the presumptive sentence for a second felony offender convicted of assault in the third degree is two years, his sentence did not violate the rule. Lee v. State, 760 P.2d 1039 (Alaska Ct. App. 1988).

Sentence of defendant with no prior criminal convictions to consecutive terms of four years with one year suspended and one year with six months suspended for two second-degree assaults and to a concurrent term of one year with nine months suspended for a third-degree assault, a composite term of five years with one and one-half years suspended was more favorable than the corresponding second offense presumptive term for the individual offenses and was not excessive. Splain v. State, 924 P.2d 435 (Alaska Ct. App. 1996).

For a first felony offender convicted of third-degree assault, a sentence of five years with one year suspended (four years to serve), which exceeded the three-year presumptive term for a third felony offender, was not excessive based upon aggravating factors in the facts of the case, and by defendant's history of repeated serious violence against the same victim. Pickard v. State, 965 P.2d 755 (Alaska Ct. App. 1998).

Conviction reversed. — Defendant's conviction for assault in the third degree was vacated where, apart from the victim's testimony that defendant's hand was in a fist when he struck her, there was nothing in the record to establish that the manner in which he used his hands was inordinately violent or particularly calculated to inflict serious physical injury. Konrad v. State, 763 P.2d 1369 (Alaska Ct. App. 1988).

Material breach of plea bargain. — Where defendant's conduct fell within the core of third-degree assault as defined in subparagraph (a)(1)(A) of this section, and the state had agreed to reduce the charge to a misdemeanor (fourth degree assault) only because defendant had pleaded guilty to a federal felony, defendant's withdrawal of his federal plea significantly defeated the state's expectations and was therefore a material breach of the plea agreement. Dutton v. State, 970 P.2d 925 (Alaska Ct. App. 1999).

Multiple sentences for multiple violations of statute. — See State v. Dunlop, 721 P.2d 604 (Alaska 1986).

Double jeopardy. — Where defendant committed arson and in doing so placed other persons in danger of serious physical injury, double jeopardy did not preclude convictions for both arson in the first degree and assault in the third degree. Hathaway v. State, 925 P.2d 1343 (Alaska Ct. App. 1996).

Conviction and sentence upheld. — See Contreras v. State, 675 P.2d 654 (Alaska Ct. App. 1984); Andrejko v. State, 695 P.2d 246 (Alaska Ct. App. 1985).

Sentence upheld. — See Smith v. State, 682 P.2d 1125 (Alaska Ct. App. 1984); Contreras v. State, 767 P.2d 1169 (Alaska Ct. App. 1989); Perotti v. State, 818 P.2d 700 (Alaska Ct. App. 1991).

Composite sentence of 31 years with five years suspended, with one of the conditions of probation being that defendant "cannot have a family-type situation in which any children under the age of 16 are involved," was not excessive. Sweetin v. State, 744 P.2d 424 (Alaska Ct. App. 1987).

A total term of twenty-five years with ten years suspended was not excessive where sentence represented conviction of one class A felony (convictions of alternative counts of attempted kidnapping were merged into a single count), three class C felonies (third-degree assault), and two class A misdemeanors (reckless endangerment); this was so under the circumstances of this case, even though defendant was a first offender. Ramsey v. State, 834 P.2d 811 (Alaska Ct. App. 1992).

A defendant who victimizes two or more people by a single assaultive act commits a separately punishable assault for each victim; likewise, a single act of recklessness that kills two or more people constitutes a separately punishable manslaughter for each victim. Thus, even if an assault on a bar employee had arisen from exactly the same act as the assault and killing of another bar employee, it still would constitute a separately punishable crime under Alaska law. Todd v. State, 884 P.2d 668 (Alaska Ct. App. 1994), aff'd, 917 P.2d 674 (Alaska 1996), cert. denied, 519 U.S. 966, 117 S. Ct. 391, 136 L. Ed. 2d 306 (1996).

A sentence of five years and nine months with three years suspended for multiple convictions, the most serious of which was assault in the third degree, was not excessive where the presentence report emphasized that the defendant had a history of assaults on active duty police officers and where the sentencing judge stated that the defendant's behavior of totally losing control of himself and engaging in dangerous and assaultive behavior was a consistent pattern and that he was a "dangerous person" for whom rehabilitation was very guarded. Lonis v. State, 998 P.2d 441 (Alaska Ct. App. 2000).

Sentence found excessive. — Composite sentence of 41 years for convictions of sexual assault in the first degree, kidnapping, three counts of assault in the third degree and one count of assault in the fourth degree was excessive; the defendant should not have received a sentence in excess of 30 years. Patterson v. State, 689 P.2d 146 (Alaska Ct. App. 1984).

Total sentence of fifty years, imposed after convictions of two counts of first-degree robbery and two counts of third-degree assault, was clearly mistaken, where defendant was a youthful offender who had never before demonstrated a proclivity toward comparable acts of aggravated violence and the court's decision to base defendant's sentence on the assumption that he was incorrigible was unjustified. DeGross v. State, 816 P.2d 212 (Alaska Ct. App. 1991).

Sentence held too lenient. — Where defendant was convicted of DWI, and his conduct and the two

injuries that resulted from it justified a sentence of several months' incarceration and he was also convicted of one count of felony assault, and defendant, a Coast Guard yeoman, might have been ordered to undergo a period of up to 90 days' voluntary restriction to quarters, because the sentencing court ignored the 90-day confinement alternative to imprisonment that defendant himself had argued for and without explanation or comment imposed only the requirement of community service, the sentence was disapproved. State v. Monk, 886 P.2d 1315 (Alaska Ct. App. 1994).

Order to attend AA meetings vacated. — Provision in judgment ordering defendant to attend Alcoholics Anonymous meetings was vacated, and his case was remanded for further proceedings, where the trial court's decision was insufficiently explained and had no adequate support in the record. Karl v. State, 770 P.2d 299 (Alaska Ct. App. 1989).

Applied in Wolf v. State, 647 P.2d 609 (Alaska Ct. App. 1982); McManners v. State, 650 P.2d 414 (Alaska Ct. App. 1982); Bidwell v. State, 656 P.2d 592 (Alaska Ct. App. 1983); Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983); Morton v. State, 684 P.2d 144 (Alaska Ct. App. 1984); Smaker v. State, 695 P.2d 238 (Alaska Ct. App. 1985); Napageak v. State, 729 P.2d 893 (Alaska Ct. App. 1986); Wickham v. State, 770 P.2d 757 (Alaska Ct. App. 1989); Fuzzard v. State, 13 P.3d 1163 (Alaska Ct. App. 2000).

Quoted in Butts v. State, 53 P.3d 609 (Alaska Ct. App. 2002); Hughes v. State, 56 P.3d 1088 (Alaska Ct. App. 2002).

Stated in Maynard v. State, 652 P.2d 489 (Alaska Ct. App. 1982); Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988); Atkinson v. State, 869 P.2d 486 (Alaska Ct. App. 1994).

Cited in Lerchenstein v. State, 697 P.2d [illegible] (Alaska Ct. App. 1985); New v. State, 714 P.2d [illegible] (Alaska Ct. App. 1986); Ackermann v. State, 715 P.2d 5 (Alaska Ct. App. 1986); Witt v. State, 725 P.2d [illegible] (Alaska Ct. App. 1986); Newsom v. State, 726 P.2d [illegible] (Alaska Ct. App. 1986); Arenas v. State, 727 P.2d [illegible] (Alaska Ct. App. 1986); Weston v. State, 656 P.2d [illegible] (Alaska Ct. App. 1982); Rollins v. State, 757 P.2d [illegible] (Alaska Ct. App. 1988); Jones v. State, 765 P.2d [illegible] (Alaska Ct. App. 1988); Hilburn v. State, 765 P.2d 1382 (Alaska Ct. App. 1988); Newcomb v. State, [illegible] P.2d 1240 (Alaska Ct. App. 1989); State v. Malone, [illegible] P.2d 34 (Alaska Ct. App. 1991); State v. Jeske, [illegible] P.2d 6 (Alaska Ct. App. 1991); Lewis v. State, 845 P.2d 447 (Alaska Ct. App. 1993); Mustafoski v. State, [illegible] P.2d 824 (Alaska Ct. App. 1994); State v. Hernandez, 877 P.2d 1309 (Alaska Ct. App. 1994); Johnson v. State, 889 P.2d 1076 (Alaska Ct. App. 1995); Peterson v. State, 930 P.2d 414 (Alaska Ct. App. 1996); Griffin v. State, 9 P.3d 301 (Alaska Ct. App. 2000); Hunter v. State, 22 P.3d 12 (Alaska Ct. App. 2001); Brockway v. State, 37 P.3d 427 (Alaska Ct. App. 2001); Freeman v. State, Ct. App. Op. No. 4550 (File No. A-7658), (Alaska Ct. App. 2002); Pearce v. State, 45 P.3d [illegible] (Alaska Ct. App. 2002); Ramsey v. State, 56 P.3d [illegible] (Alaska Ct. App. 2002); Cathey v. State, 60 P.3d [illegible] (Alaska Ct. App. 2002); Nelson v. State, 68 P.3d [illegible] (Alaska Ct. App. 2003); Timothy v. State, 90 P.3d [illegible] (Alaska Ct. App. 2004).

Collateral references. — Attempt to commit assault as criminal offense. 93 ALR5th 683.

Sec. 11.41.230. Assault in the fourth degree. (a) A person commits the crime of assault in the fourth degree if

(1) that person recklessly causes physical injury to another person;

(2) with criminal negligence that person causes physical injury to another person by means of a dangerous instrument; or

(3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.

(b) Assault in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 6 ch 102 SLA 1980; am § 5 ch 143 SLA 1982)

Cross references. — For sentences for violations of this section committed against certain officers, employees, and emergency responders, see AS 12.55.135(d).

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

NOTES TO DECISIONS

"Fear of imminent physical injury". — To convict defendant of fourth-degree assault in beating his child with a belt, the state was not required to prove that he actually struck the child, only that he recklessly placed the child in fear of imminent physical injury. S.R.D. v. State, 820 P.2d 1088 (Alaska Ct. App. 1991).

Recklessness. — Second-degree assault requires proof of intent to cause physical injury, whereas fourth-degree assault requires proof only of recklessness, the two offenses differing only in their culpable mental state elements. Willett v. State, 836 P.2d 955 (Alaska Ct. App. 1992).

The fact that defendant simply "lashed out" violently at the victim without specifically intending to cause her injuries did not substantially mitigate the offense. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

"Dangerous instrument". — Where defendant was charged with second-degree assault for kicking

aynard v. State, 652 P.2d 489 (Alaska
Edwin v. State, 762 P.2d 499 (Alaska
Atkinson v. State, 869 P.2d 486 (Alaska

erchenstein v. State, 697 P.2d 312
p. 1985); New v. State, 714 P.2d 378
p. 1986); Ackermann v. State, 716 P.2d
pp. 1986); Witt v. State, 725 P.2d 728
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p. 1986); Arenas v. State, 727 P.2d 313
). 1986); Weston v. State, 656 P.2d 1186
p. 1982); Rollins v. State, 757 P.2d 601
p. 1988); Jones v. State, 765 P.2d 107
p. 1988); Hilburn v. State, 765 P.2d
t. App. 1988); Newcomb v. State, 779
ka Ct. App. 1989); State v. Malone, 819
a Ct. App. 1991); State v. Jeske, 823
Ct. App. 1991); Lewis v. State, 845 P.2d
. App. 1993); Mustafoski v. State, 867
ka Ct. App. 1994); State v. Hernandez,
(Alaska Ct. App. 1994); Johnson v.
1076 (Alaska Ct. App. 1995); Petersen
2d 414 (Alaska Ct. App. 1996); Griffin v.
301 (Alaska Ct. App. 2000); Hurd v.
12 (Alaska Ct. App. 2001); Brockway v.
427 (Alaska Ct. App. 2001); Freeman v
Op. No. 4550 (File No. A-7658), P.3d
App. 2002); Pearce v. State, 45 P.3d 679
p. 2002); Ramsey v. State, 56 P.3d 675
p. 2002); Cathey v. State, 60 P.3d 192
p. 2002); Nelson v. State, 68 P.3d 402
p. 2003); Timothy v. State, 90 P.3d 177
p. 2004).

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with second-degree assault for kicking

victim, there was at least some evidence to sup-
port a finding that defendant's feet were not danger-
ous instruments, and because the defendant's use of a
dangerous instrument was therefore in dispute, the
trial court erred in denying defendant's conviction for
assault in the second degree. Willett v. State, 836 P.2d
955 (Alaska Ct. App. 1992).

Fourth-degree assault as lesser included offense of first-degree sexual assault. — See Nathaniel v. State, 668 P.2d 851 (Alaska Ct. App. 1983).

Fourth-degree assault as a component of sexual assault. — Under either a sufficiency-of-the-evidence or a double-jeopardy analysis, sexual assault defendant's separate conviction for fourth-degree assault was improper; where the victim testified that defendant's act of running to the door placed her in fear that he was going to lock the door and reconvince a sexual assault, the fourth-degree assault was simply a component of the sexual assault, and, moreover, the State did not prove the culpable mental state. David v. State, Ct. App. Op. No. 4862 (File No. A-8408), P.3d (Alaska Ct. App. Apr. 28, 2004).

Fourth-degree assault as lesser included offense of attempted sexual assault in the first degree. — See Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983).

Fourth-degree assault as lesser included offense of robbery in the second degree. — Conviction for robbery in the second degree was reversed where there was at least some evidence presented at trial to justify finding that the defendant was guilty of assault but not robbery, so that a lesser included offense instruction on assault was required. Marker v. State, 692 P.2d 977 (Alaska Ct. App. 1984).

Cross-examination of psychiatrist. — Allowing the prosecutor to cross-examine a psychiatrist by reference to defendant's prior convictions for driving while intoxicated was not an abuse of discretion, where defendant, by putting his mens rea directly in issue through the witness's expert testimony, opened the witness up to cross-examination about the basis for his opinion. Jansen v. State, 764 P.2d 308 (Alaska Ct. App. 1988).

Instructions. — In prosecution for fourth-degree assault, since there was evidence from which the jury could infer that defendant believed he had to kick his uncle to prevent harm to his daughter, and that this belief was reasonable, he was entitled to an instruction on defense of a third person as justification for his conduct. David v. State, 695 P.2d 1233 (Alaska Ct. App. 1985).

Trial court did not abuse its discretion in refusing to instruct the jury on the lesser included offense of assault in the fourth degree at defendant's trial for sexual assault in the first degree, where there was no evidence of a disputed fact to distinguish sexual assault from assault in the fourth degree, and a finding of guilt on the sexual assault offense would have been inconsistent with an acquittal on a fourth-degree assault charge. Dolchok v. State, 763 P.2d 977 (Alaska Ct. App. 1988).

Introduction into evidence of tape recording of incident not erroneous and conviction upheld. — See O'Neill v. State, 675 P.2d 1288 (Alaska Ct. App. 1984).

Conviction and sentence upheld. — See Contreras v. State, 675 P.2d 654 (Alaska Ct. App. 1984).

Sentence found excessive. — Composite sentence of 41 years for convictions of sexual assault in the first degree, kidnapping, three counts of assault in the third degree and one count of assault in the fourth degree was excessive, the defendant should not have received a sentence in excess of 30 years. Patterson v. State, 689 P.2d 146 (Alaska Ct. App. 1984).

Sentence affirmed. — See Afcan v. State, 711 P.2d 1198 (Alaska Ct. App. 1986).

Sentence disapproved. — Trial court's sentencing decision was clearly mistaken where the sentence fell near the bottom of the authorized range of sentences for fourth-degree assault and the evidence concerning defendant's background and personal characteristics provided little basis for characterizing his case as particularly mitigated, including two prior misdemeanor convictions. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

Applied in Bidwell v. State, 656 P.2d 592 (Alaska Ct. App. 1983); Jackson v. State, 657 P.2d 405 (Alaska Ct. App. 1983); Hutt v. State, 678 P.2d 415 (Alaska Ct. App. 1984); Olp v. State, 738 P.2d 1117 (Alaska Ct. App. 1987).

Quoted in Maynard v. State, 652 P.2d 489 (Alaska Ct. App. 1982); Michael v. State, 737 P.2d 193 (Alaska Ct. App. 1988).

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993); Sosa v. State, 4 P.3d 951 (Alaska 2000).

Cited in Folger v. State, 648 P.2d 111 (Alaska Ct. App. 1982); Kelly v. State, 652 P.2d 112 (Alaska Ct. App. 1982); Moxie v. State, 662 P.2d 990 (Alaska Ct. App. 1983); Davis v. State, 684 P.2d 147 (Alaska Ct. App. 1984); Norbert v. State, 718 P.2d 160 (Alaska Ct. App. 1986); Weston v. State, 656 P.2d 1186 (Alaska Ct. App. 1982); Noel v. State, 754 P.2d 280 (Alaska Ct. App. 1988); Alfred v. State, 758 P.2d 130 (Alaska Ct. App. 1988); Jones v. State, 765 P.2d 107 (Alaska Ct. App. 1988); State v. Hernandez, 877 P.2d 1308 (Alaska Ct. App. 1994); Samaniego v. City of Kodiak, 2 P.3d 75 (Alaska 2000); Griffin v. State, 9 P.3d 301 (Alaska Ct. App. 2000); Heaps v. State, Ct. App. Op. No. 1741 (File No. A-7472), P.3d (Alaska Ct. App. 2001); Hutchings v. State, 53 P.3d 1132 (Alaska Ct. App. 2002); Nelson v. State, 68 P.3d 402 (Alaska Ct. App. 2003); Bingaman v. State, 76 P.3d 398 (Alaska Ct. App. 2003); Dayton v. State, 78 P.3d 270 (Alaska Ct. App. 2003).

Collateral references. — Standard for judging conduct of minor motorist charged with gross negligence, recklessness, wilful or wanton misconduct, or the like, under guest statute or similar common-law rule, 97 ALR2d 851.

Sec. 11.41.250. Reckless endangerment. (a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(b) Reckless endangerment is a class A misdemeanor. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Conviction reversed because of inconsistent verdicts. – See Davis v. State, 684 P.2d 147 (Alaska Ct. App. 1984).

Sufficient evidence to support revocation of probation. — Trial court properly revoked defendant's probation, pursuant to AS 12.55.110, on charges of first-degree assault under AS 11.41.200(a)(4), and reckless endangerment under subsection (a) of this section, where there was sufficient evidence to show that defendant failed to satisfy the conditions of probation, including participation in drug treatment. Raphael v. State, Ct. App. Op. No. 4800 (File No. A-6275), P.3d (Alaska Ct. App. Dec. 17, 2003).

Term of imprisonment upheld. — Defendant's lengthy misdemeanor record and the circumstances of his reckless endangerment conviction, particularly the near miss of a pedestrian, justified the imposition of a maximum term for driving while his license was suspended and a consecutive three-month unsuspended term for reckless endangerment. Joseph v. State, 775 P.2d 519 (Alaska Ct. App. 1989).

A total term of twenty-five years with ten years suspended was not excessive where sentence represented conviction of one class A felony (convictions on alternative counts of attempted kidnapping were merged into a single count), three class C felonies (third-degree assault), and two class A misdemeanors (reckless endangerment); this was so under the circumstances of this case, even though defendant was a first offender. Ramsey v. State, 834 P.2d 811 (Alaska Ct. App. 1992).

Quoted in Michael v. State, 767 P.2d 193 (Alaska Ct. App. 1988).

Sec. 11.41.260. Stalking in the first degree. (a) A person commits the crime of stalking in the first degree if the person violates AS 11.41.270 and

(1) the actions constituting the offense are in violation of an order issued or filed under AS 18.66.100 — 18.66.180 or issued under former AS 25.35.010(b) or 25.35.020;

(2) the actions constituting the offense are in violation of a condition of probation, release before trial, release after conviction, or parole;

(3) the victim is under 16 years of age;

(4) at any time during the course of conduct constituting the offense, the defendant possessed a deadly weapon;

(5) the defendant has been previously convicted of a crime under this section, AS 11.41.270, or AS 11.56.740, or a law or ordinance of this or another jurisdiction with elements similar to a crime under this section, AS 11.41.270, or AS 11.56.740; or

(6) the defendant has been previously convicted of a crime, or an attempt or solicitation to commit a crime, under (A) AS 11.41.100 — 11.41.250, 11.41.300 — 11.41.460, AS 11.56.807, 11.56.810 , AS 11.61.120, or (B) a law or an ordinance of this or another jurisdiction with elements similar to a crime, or an attempt or solicitation to commit a crime, under AS 11.41.100 — 11.41.250, 11.41.300 — 11.41.460, AS 11.56.807, 11.56.810, or AS 11.61.120, involving the same victim as the present offense.

(b) In this section, "course of conduct" and "victim" have the meanings given in AS 11.41.270(b).

(c) Stalking in the first degree is a class C felony. (§ 1 ch 40 SLA 1993; am § 3 ch 64 SLA 1996; am § 4 ch 92 SLA 2002)

Revisor's notes. — The location of the designation of subparagraph (a)(6)(A) was incorrect in § 1, ch. 40, SLA 1993 because of a manifest clerical error. The statute as set out above has been corrected.

Effect of amendments. — The 2002 amendment, effective June 28, 2002, inserted section references in paragraph (a)(6).

Editor's notes. — Section 8, ch. 40, SLA 1993 provides: "APPLICABILITY. AS 11.41.260 and 11.41.270, enacted by sec. 1 of this Act, apply to acts committed on or after [May 28, 1993]. However, to the extent a previous conviction is an element of the offense under AS 11.41.260, that previous conviction may have occurred before, on, or after May 28, 1993."

Legislative history reports. — For Senate letter of intent in connection with the enactment of this section, see 1993 Senate Journal 1026 — 1027.

NOTES TO DECISIONS

Constitutionality. — The potential due process and overbreadth problems in the definition of stalking do not require invalidation of the stalking statutes; rather, those problems should be resolved on a case-by-case basis. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Legitimate nonconsensual contacts and telephone calls not prohibited. — The stalking statutes do not prohibit telephone calls or other nonconsensual contact made for a legitimate purpose, even when the defendant knows that the person contacted may or will unreasonably perceive the contact as threatening. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

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Sec. 11.41.270. Stalking in the second degree. (a) A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member.

(b) In this section,

(1) "course of conduct" means repeated acts of nonconsensual contact involving the victim or a family member;

(2) "family member" means a

(A) spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the victim, whether related by blood, marriage, or adoption;

(B) person who lives, or has previously lived, in a spousal relationship with the victim;

(C) person who lives in the same household as the victim; or

(D) person who is a former spouse of the victim or is or has been in a dating, courtship, or engagement relationship with the victim;

(3) "nonconsensual contact" means any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued; "nonconsensual contact" includes

(A) following or appearing within the sight of that person;

(B) approaching or confronting that person in a public place or on private property;

(C) appearing at the workplace or residence of that person;

(D) entering onto or remaining on property owned, leased, or occupied by that person;

(E) contacting that person by telephone;

(F) sending mail or electronic communications to that person;

(G) placing an object on, or delivering an object to, property owned, leased, or occupied by that person;

(4) "victim" means a person who is the target of a course of conduct.

(c) Stalking in the second degree is a class A misdemeanor. (§ 1 ch 40 SLA 1993)

Legislative history reports. — For Senate letter of intent in connection with the enactment of this section, see 1993 Senate Journal 1026 — 1027.

NOTES TO DECISIONS

Constitutionality. — The potential due process and overbreadth problems in the definition of stalking do not require invalidation of the stalking statutes; rather, those problems should be resolved on a case-by-case basis. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Legitimate nonconsensual contacts and telephone calls not prohibited. — The stalking statutes do not prohibit telephone calls or other nonconsensual contact made or a legitimate purpose, even when the defendant knows that the person contacted may or will unreasonably perceive the contact as threatening. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

Stated in Cook v. State, 36 P.3d 710 (Alaska Ct. App. 2001).

Article 3. Kidnapping and Custodial Interference.

Collateral references. — 1 Am. Jur. 2d, Abduction and Kidnapping, § 1 et seq.

1 C.J.S., Abduction, § 1 et seq.; 51 C.J.S., Kidnapping, § 1 et seq.

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

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

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

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 ALR4th 823.

Abduction of own child, 49 ALR4th 7.

Seizure or detention for purposes of committing rape, robbery, or similar offense as constituting separate crime of kidnapping, 39 ALR5th 283.

Validity, construction, and application of statutes and ordinances regulating sexual performance by child, ALR5th 291.

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

(1) the person restrains another with intent to

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

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

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

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

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

(F) commit an offense in violation of AS 11.41.434 — 11.41.438 upon the restrained person or place the restrained person or a third person in apprehension that a person will be subject to an offense in violation of AS 11.41.434 — 11.41.438; or

(2) the person restrains another

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

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

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

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

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

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

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

(d) In a prosecution for kidnapping, it is an affirmative defense which reduces the crime to a class A felony that the defendant voluntarily caused the release of the victim alive in a safe place before arrest, or within 24 hours after arrest, without having caused serious physical injury to the victim and without having engaged in conduct described in AS 11.41.410(a), 11.41.420, 11.41.434, or 11.41.436. (§ 5 ch 166 SLA 1978; am § 7 ch 104 SLA 1980; am § 6 ch 4 SLA 1990; am §§ 3, 4 ch 99 SLA 1998)

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

Effect of amendments. — The 1998 amendment, effective September 14, 1998, added subparagraph (a)(1)(F) and added section references in subsection (d).

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

NOTES TO DECISIONS

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

The crime of kidnapping is designed to protect the general personal security of citizens both in their persons and property. Ladd v. State, 568 P.2d 960 (Alaska 1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1498, 55 L. Ed. 2d 524 (1978).

Constitutionality of former statute. — See Levshakoff v. State, 565 P.2d 504 (Alaska 1977).

Scope of former statute. — See Crump v. State, 625 P.2d 857 (Alaska 1981).

For discussion of elements that were required to be proved under former AS 11.15.260, see Davis v. State, 635 P.2d 481 (Alaska Ct. App. 1981).

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. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Defense that victim was defendant's relative. — The new criminal code, which states that it is an affirmative defense that defendant was a relative of the victim, provides for a broader exemption from

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kidnapping statute than the absolute exemption for the abduction of a minor by his parent under former AS 11.15.260. Crump v. State, 625 P.2d 857 (Alaska 1981).

Former parental exemption. — For case discussing the parental exemption contained in Alaska's former kidnapping statute, AS 11.15.260, see Lythgoe v. State, 626 P.2d 1082 (Alaska 1980).

Liability of agent for person not entitled to custody of child. — Where a person, while acting as an agent for a parent not entitled to custody, takes a child from one entitled to custody, the person can be convicted of both the substantive crime of kidnapping and conspiracy to kidnap. Crump v. State, 625 P.2d 857 (Alaska 1981).

Act of restraint shown. — The jury could have concluded that defendant had secured victim's presence in his van through deception — by luring her with false promises of information concerning a child custody dispute — thereby committing an act of restraint. State v. McDonald, 872 P.2d 627 (Alaska Ct. App. 1994).

"Restraint" incidental to some other offense. — Trial is the proper remedy where kidnapping has been charged, but it is apparent that any "restraint" was incidental to the commission of some other offense, whether that offense be robbery or sexual assault. Alam v. State, 776 P.2d 345 (Alaska Ct. App. 1989).

Act of restraint as basis for kidnapping and murder. — In prosecution for kidnapping and murder, the jury was not instructed that, for purposes of the kidnapping charge, it was required to find an act of restraint going beyond any act incidental to victims murder; the jury instructions thus left open the possibility that the verdict of guilt on the kidnapping charge was based on the jury's finding of an act of restraint that was integral to the conduct on which it based defendant's conviction for murder. Therefore, the trial court properly recognized the potential violation of defendant's double jeopardy rights and correctly declined to impose a sentence for kidnapping. State v. McDonald, 872 P.2d 627 (Alaska Ct. App. 1994).

If the defendant's restraint of a victim is significant enough, that restraint can constitute the independent crime of kidnapping even though the restraint might simply be part of the defendant's plan for committing the target crime. Hurd v. State, 22 P.3d 12 (Alaska Ct. App. 2001).

Restraint exceeded minimal necessary for crime of coercion. — Where the state presented evidence that defendant restrained the victim for thirty to forty-five minutes, a restraint that far exceeded whatever minimal restraint might conceivably be inherent in the crime of coercion, the superior court correctly denied defendant's motion for a judgement of acquittal on the kidnapping charge. Hurd v. State, 22 P.3d 12 (Alaska Ct. App. 2001).

Significant movement. — Evidence that the defendant carried his victim a distance close to 800 feet from a playground and for a time period of about five minutes before his pursuers were able to overpower him and free the child, was sufficient to establish significant movement and that the carrying away was not merely incidental to his attempt to sexually assault the victim. Yates v. State, Ct. App. Op. No. 4186 (File No. A-7072), P.2d (Alaska Ct. App. 2000).

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

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 subsection (a)(1)(C) and AS 11.31.100 requires a duel intent (1) to physically or sexually assault the victim and (2) to restrain the victim beyond what was necessary to effectuate the assault. Alam v. State, 793 P.2d 1081 (Alaska Ct. App. 1990).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping were separate crimes with separate elements. Lacy v. State, 608 P.2d 19 (Alaska 1980).

Three separate counts of kidnapping. — Defendant, who was charged with three separate counts of kidnapping, could be convicted on only one count, where all three counts involved the same victim and a single, continuing episode of restraint. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Defendant's restraint of a pedestrian, by blocking her movements with his automobile and by temporarily struggling with her, was at most incidental to an attempt to sexually assault or physically assault her and, consequently, could not, as a matter of law, constitute kidnapping. Alam v. State, 793 P.2d 1081 (Alaska Ct. App. 1990).

Aggravating and mitigating factors. — Although statutory aggravating and mitigating factors do not apply to the sentencing for an unclassified felony such as kidnapping, a sentencing judge is authorized to consider those factors when deciding an appropriate sentence. Yates v. State, Ct. App. Op. No. 4186 (File No. A-7072), P.2d (Alaska Ct. App. 2000).

Separate sentences were called for where defendant's conduct in kidnapping and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Occhipinti, 562 P.2d 348 (Alaska 1977).

Applicability of partial affirmative defenses. — 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 subsection (d), the partial affirmative defense applies only in a prosecution for kidnapping. Laraby v. State, 710 P.2d 427 (Alaska Ct. App. 1985).

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. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Sexual assault and kidnapping are sufficiently distinct to warrant separate sentences without violation of double jeopardy, even when the assault and kidnapping are part of a single continuous transaction. Wilson v. State, 670 P.2d 1149 (Alaska Ct. App. 1983).

Convictions for kidnapping and sexual assault do not merge. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Conviction and sentence upheld. — Conviction and sentence for kidnapping, assault in the first degree, misconduct involving weapons in the first degree and robbery in the first degree were affirmed. See Wortham v. State, 689 P.2d 1133 (Alaska Ct. App. 1984); 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. Laseter v. State, 684 P.2d 139 (Alaska Ct. App. 1984).

Sentences upheld. — See Morrell v. State, 575 P.2d 1200 (Alaska 1978); Post v. State, 580 P.2d 304 (Alaska 1978); Davis v. State, 635 P.2d 481 (Alaska Ct. App. 1981); Williams v. State, 652 P.2d 478 (Alaska Ct. App. 1982); Contreras v. State, 767 P.2d 1169 (Alaska Ct. App. 1989); Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991); Alexander v. State, 838 P.2d 269 (Alaska Ct. App. 1992).

Sentence of 20 years for kidnapping and 10 years for first-degree sexual assault, with the sexual assault sentence made consecutive to the kidnapping sentence, was not excessive. Wilson v. State, 670 P.2d 1149 (Alaska Ct. App. 1983).

The court's imposition of consecutive sentences for the two kidnappings and one robbery arising out of the same transaction does not violate double jeopardy. Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987), cert. denied, 488 U.S. 926, 109 S. Ct. 309, 102 L. Ed. 2d 328 (1988).

Composite sentence of 12 years for kidnapping, first-degree physical assault, and first-degree sexual assault not too lenient. See Garrison v. State, 762 P.2d 465 (Alaska Ct. App. 1988).

A total term of twenty-five years with ten years suspended was not excessive where sentence represented conviction of one class A felony (convictions of alternative counts of attempted kidnapping were merged into a single count), three class C felonies (third-degree assault), and two class A misdemeanors (reckless endangerment); this was so under the circumstances of this case, even though defendant was a first offender. Ramsey v. State, 834 P.2d 811 (Alaska Ct. App. 1992).

A 50-year sentence was justified where the judge found that the defendant was a dangerous offender whose conduct and criminality would continue if released, that treatment had been provided for the defendant from an early age, but that his psychiatric conditions were likely to persist and cause him continuing problems, and that there was no reasonable prospect that the defendant could be rehabilitated or deterred. Yates v. State, Ct. App. Op. No. 4186 (File No. A-7072), P.2d (Alaska Ct. App. 2000).

Sentence found excessive. — See Hintz v. State, 627 P.2d 207 (Alaska 1981).

Composite sentence of 41 years for convictions of sexual assault in the first degree, kidnapping, three counts of assault in the third degree and one count of assault in the fourth degree was excessive; the defendant should not have received a sentence in excess of 30 years. Patterson v. State, 689 P.2d 146 (Alaska Ct. App. 1984).

Parental kidnapping. — In a child custody proceeding, the court erred in implying that a mother had violated policies against parental kidnapping where the most serious allegation against her was that she took the child to another state because she wanted to get away from the father and did not want any interference in raising the child. Vachon v. Pugliese, 931 P.2d 371 (Alaska 1996).

Applied in Nukapigak v. State, 645 P.2d 215 (Alaska Ct. App. 1982); Bidwell v. State, 656 P.2d 592 (Alaska Ct. App. 1983); Baker v. State, 655 P.2d 1324 (Alaska Ct. App. 1983); Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); Barry v. State, 675 P.2d 1292 (Alaska Ct. App. 1984).

Quoted in Bowell v. State, 728 P.2d 1220 (Alaska Ct. App. 1986), overruled on other grounds, Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991).

Stated in Walker v. Endell, 850 F.2d 470 (9th Cir. 1987).

Cited in Nukapigak v. State, 663 P.2d 943 (Alaska 1983); Johnson v. State, 665 P.2d 566 (Alaska Ct. App. 1983); Nylund v. State, 716 P.2d 387 (Alaska Ct. App. 1986); Newsom v. State, 726 P.2d 561 (Alaska Ct. App. 1986); Ervin v. State, 761 P.2d 124 (Alaska Ct. App. 1988); Robison v. State, 763 P.2d 1357 (Alaska Ct. App. 1988); White v. State, 773 P.2d 211 (Alaska Ct. App. 1989), Brandon v. State, 778 P.2d 221 (Alaska Ct. App. 1989); Ross v. State, 877 P.2d 777 (Alaska Ct. App. 1994); Johnson v. State, 889 P.2d 1076 (Alaska Ct. App. 1995); Howarth v. State, Pub. Defender Agency, 925 P.2d 1330 (Alaska 1996); Wardlow v. State, 2 P.3d 1238 (Alaska Ct. App. 2000); Pearce v. State 45 P.3d 679 (Alaska Ct. App. 2002).

Sec. 11.41.320. Custodial interference in the first degree. (a) A person commits the crime of custodial interference in the first degree if the person violates AS 11.41.330 and causes the child or incompetent person to be

(1) removed from the state; or

(2) kept outside the state.

(b) Custodial interference in the first degree is a class C felony. (§ 3 ch 166 SLA 1978; am § 6 ch 54 SLA 1999)

Cross references. — For applicability provisions relating to the 1999 amendment of subsection (a), see § 16, ch. 54, SLA 1999 in the 1999 Temporary & Special Acts.

Effect of amendments. — The 1999 amendment, effective June 5, 1999, substituted "child or incompetent person" for "victim" in the introductory language of subsection (a); added paragraph (a)(2) and the paragraph (a)(1) designation; and made a related stylistic change.

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5, ... substituted ... for ... "victim" in the introductory language (a); added paragraph (a)(2) and the (1) designation; and made a related e.

NOTES TO DECISIONS

In general. — The crime of custodial interference was designed to protect any custodian from deprivation of his or her custody rights — even if that deprivation results from the actions of a person who also has a right to physical custody of the child; the crime does not focus on the legal status of the defendant, but rather focuses on the defendant's actions, the effect of the defendant's actions, and the intent with which those actions were performed. Strother v. State, 891 P.2d 214 (Alaska Ct. App. 1995).

Rights of joint custodian. — When a child is entrusted to joint custodians, neither custodian may take exclusive physical custody of the child in a manner that defeats the rights of the other joint custodian. Strother v. State, 891 P.2d 214 (Alaska Ct. App. 1995).

Protracted period. — Retention of child in another state for over a year satisfied the "protracted period" requirement. Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Defendant's knowledge and intent. — In a prosecution for custodial interference, the trial court erred in barring the testimony of defendant's attorney that he had advised defendant that there was a substantial doubt as to the validity of the state's actions relating to the custody of her child since such testimony was relevant to the issue of whether defendant had the culpable mental state required for custodial interference. Cornwall v. State, 915 P.2d 640 (Alaska Ct. App. 1996).

Defendant's testimony. — In a prosecution of defendant for first degree custodial interference, the trial court erred when it barred defendant's testimony; defendant, who disclaimed any reliance on the affirmative defense of necessity, was entitled to testify that he did not have the conscious objective to withhold his child for a protracted period, even if his proffered testimony did not appear plausible in the circumstances of his case. Perrin v. State, 66 P.3d 21 (Alaska Ct. App. 2003).

Necessity defense unavailable. — The trial court did not err in denying defendant the right to rely on a necessity defense in prosecution for custodial intervention in the first degree. Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Proof of elements of first-degree custodial interference. — A person commits first-degree custodial interference regardless of whether the child's removal from Alaska occurs before or after the person takes unlawful control of the child. State v. District Court, 962 P.2d 895 (Alaska Ct. App. 1998).

Sentence upheld. — Sentence of five years with three years suspended for custodial interference in the first degree, followed by a five-year suspended imposition of sentence for theft in the second degree, was not excessive, where defendant had seized his children in direct defiance of a court order and it was deemed necessary to impose a substantial suspended sentence in order to deter him from future criminal violations. Sandelin v. State, 766 P.2d 1184 (Alaska Ct. App. 1989).

Prosecution not barred. — Alaska prosecution for custodial interference, based on defendant's act of taking his son out of the state on or about August 2, 1988, was not barred by an Arizona conviction for custodial interference on or about March 9, 1990, and based upon defendant's act of keeping his son from the lawful custody of the son's natural mother. The two charges encompassed different acts and could support different charges. Seaman v. State, 825 P.2d 907 (Alaska Ct. App. 1992).

Collateral references. -- Kidnapping or other criminal offense by taking or removal of child by, or under authority of, parent or one in loco parentis, 20 A.L.R.4th 823.

Validity, construction and application of statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Sec. 11.41.330. Custodial interference in the second degree. (a) A person commits the crime of custodial interference in the second degree if, being a relative of a child under 18 years of age or a relative of an incompetent person and knowing that the person has no legal right to do so, the person takes, entices, or keeps that child or incompetent person from a lawful custodian with intent to hold the child or incompetent person for a protracted period.

(b) Custodial interference in the second degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

In general. — The crime of custodial interference was designed to protect any custodian from deprivation of his or her custody rights — even if that deprivation results from the actions of a person who also has a right to physical custody of the child; the crime does not focus on the legal status of the defendant, but rather focuses on the defendant's actions, the effect of the defendant's actions, and the intent with which those actions were performed. Strother v. State, 891 P.2d 214 (Alaska Ct. App. 1995).

Rights of joint custodian. — When a child is entrusted to joint custodians, neither custodian may take exclusive physical custody of the child in a manner that defeats the rights of the other joint custodian. Strother v. State, 891 P.2d 214 (Alaska Ct. App. 1995).

Proof of elements of first-degree custodial interference. — A person commits first-degree custodial interference regardless of whether the child's removal from Alaska occurs before or after the person

takes unlawful control of the child. State v. District Court, 962 P.2d 895 (Alaska Ct. App. 1998).

Evidence held sufficient. — Husband engaged in acts that undeniably defeated his wife's co-extensive right of custody when he removed child to another state, left two letters telling his wife that she would never again see either him or their daughter, and for several weeks was successful in keeping both his own whereabouts and the child's whereabouts hidden from his wife and the authorities; this conduct was sufficient to constitute the actus reus of the offense custodial interference: the keeping of the child with legal right to do so. Strother v. State, 891 P.2d (Alaska Ct. App. 1995).

Protracted period. — See note under same cat line, AS 11.41.320, Gerlach v. State, 699 P.2d (Alaska Ct. App. 1985).

Cited in Perrin v. State, 66 P.3d 21 (Alaska Ct. A 2003).

Sec. 11.41.370. Definitions. In AS 11.41.300 — 11.41.370, unless the context re quires otherwise,

(1) "lawful custodian" means a parent, guardian, or other person responsible authority of law for the care, custody, or control of another;

(2) "relative" means a parent, stepparent, ancestor, descendant, sibling, uncle, or au including a relative of the same degree through marriage or adoption;

(3) "restrain" means to restrict a person's movements unlawfully and without conse so as to interfere substantially with the person's liberty by moving the person from one place to another or by confining the person either in the place where the restricti commences or in a place to which the person has been moved; a restraint is "withou consent" if it is accomplished

(A) by acquiescence of the restrained person, if the restrained person is under 16 yea of age or is incompetent and the restrained person's lawful custodian has not acquiesce in the movement or confinement; or

(B) by force, threat, or deception. (§ 3 ch 166 SLA 1978)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

NOTES TO DECISIONS

Restraint that constitutes independent crime of kidnapping. — If the defendant's restraint of a victim is significant enough, that restraint can constitute the independent crime of kidnapping even though the restraint might simply be part of the defendant's plan for committing a separate target crime. Hurd v. State, 22 P.3d 12 (Alaska Ct. App. 2001).

Restraint by deception. — The jury could have concluded that defendant had secured victim's presence in his van through deception — by luring her with false promises of information concerning a child custody dispute — thereby committing an act of restraint. State v. McDonald, 872 P.2d 627 (Alaska Ct. App. 1994).

Defense that victim was defendant's relative. — The new criminal code, which states in AS 11.41.300(b)(1) that it is an affirmative defense that defendant was a relative of the victim, provides for a broader exemption from the kidnapping statute than the absolute exemption for the abduction of a minor by his parent under former AS 11.15.260. Crump v. State, 625 P.2d 857 (Alaska 1981).

Quoted in Alam v. State, 793 P.2d 1081 (Alaska Ct. App. 1990).

Stated in Strother v. State, 891 P.2d 214 (Alaska Ct. App. 1995).

Cited in Gerlach v. State, 699 P.2d 358 (Alaska Ct. App. 1985).

Article 4. Sexual Offenses.

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p. 1995).

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...ferences. — For provisions concerning ... procedure in certain sexual offense... 12.45.046 and 12.45.046. For authority of court to order a defendant to submit to a blood test when sexual penetration is an element of the offense, see AS 18.15.300.

NOTES TO DECISIONS

... — The Alaska Revised Code provisions ...xual offenses are based on a proposed ...Code. Reynolds v. State, 664 P.2d 621 ...App. 1983).

...iting suspended sentence. — The prohi... ...st the granting of a suspended imposition ... applies to persons convicted of an attempt...

to commit one of the sexual offenses defined in the criminal code. Mack v. State, 900 P.2d 1202 (Alaska Ct. App. 1995).

Cited in Rowe v. Burton, 884 F. Supp. 1372 (D. Alaska 1994), reversed on other grounds, sub nom., Doe v. Otte, 248 F.3d 832 (9th Cir. 2001).

...eral references. — 41 Am. Jur. 2d, Incest ... 65 Am. Jur. 2d, Rape, § 1 et seq.; 70 Am ...domy, § 1 et seq.
...S., Incest, §§ 2-7; 43 C.J.S., Infants, §§ 96 ...J.S., Rape, § 1 et seq.; 81 C.J.S., Sodomy, § 1

...y Morosco, The Prosecution and Defense of ...es (Matthew Bender).
...pment to commit offense of sodomy, 52 ALR2d

...as included within charge of rape, 76 ALR2d

...inal responsibility of husband for rape, or ...o commit rape, on wife, 84 ALR2d 1017; 24 ...105.
...or impersonation, rape by, 91 ALR2d 591.
...petency as defense to charge of rape, attempt to ...or assault with intent to commit rape, 23 ALR3d ...
...Rape or similar offense based on intercourse with ...woman who is allegedly mentally deficient, 31 ALR3d ...
...Consent as defense in prosecution for sodomy, 58 ALR3d 636.
...Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.
...What constitutes offense of "sexual battery," 87 ALR3d 1250.

Constitutionality of rape laws limited to protection of females only, 99 ALR3d 129.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 ALR4th 1009.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases, 6 ALR4th 1066.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Validity of sodomy statute, 20 ALR4th 1009.

Criminal reponsibility of husband for rape, or assault to commit rape, on wife, 24 ALR4th 105.

Necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Admissibility of expert testimony on rape trauma syndrome, 42 ALR4th 879.

Mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of or in the course of medical treatment, 65 ALR4th 1064.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping, 39 ALR5th 283.

Sec. 11.41.410. Sexual assault in the first degree. (a) An offender commits the crime of sexual assault in the first degree if

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

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

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

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA

1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am ch 79 SLA 1992; am § 3 ch 30 SLA 1996; am § 1 ch 61 SLA 1996)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Editor's notes. — From May 16 through September 9, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social Services" appeared where "the state" now appears in (a)(3)(B)(ii).

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

For legislative letter of intent relating to amendments to (a) of this section by ch. 96, SLA (CSHB 545 (Jud)), see 1988 House Journal 3068.

NOTES TO DECISIONS

I. General Consideration.
II. Former Law.
  A. Generally.
  B. Age of Consent.
  C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the penalty provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Convictions for two separate offenses did not constitute double jeopardy. — Where evidence showed that defendant had slightly penetrated the victim's vagina one evening and forced her to perform fellatio on him the next morning, the two acts were sufficiently distinct, for double jeopardy purposes, to support convictions for two separate offenses. Kepley v. State, 791 P.2d 1020 (Alaska Ct. App. 1990).

Basis for initiating prosecution. — Reliance by the criminal division of the Department of Law on a report of sexual abuse for purposes of initiating prosecution is not prohibited by AS 47.17.025. Strehl v. State, 722 P.2d 276 (Alaska Ct. App. 1986).

Paragraph (a)(1) is akin to the common law definition of rape. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Mental state required under paragraph (a)(1). — Lack of consent is a "surrounding circumstance" which requires a complementary mental state as well as conduct to constitute a crime. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

No specific mental state is mentioned in paragraph (a)(1) of this section governing the surrounding circumstance of "consent"; therefore, the state must prove that the defendant acted "recklessly" regarding his putative victim's lack of consent. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Attempted sexual assault in the first degree and sexual assault in the second degree closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Merger of sexual assault and sexual abuse convictions. — Defendant's convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual penetration with a child could not properly support separate sentences and convictions for both offenses. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Sexual assault and kidnapping are sufficiently distinct to warrant separate sentences without violation of double jeopardy, even when the assault and kidnapping are part of a single continuous transaction. Wilson v. State, 670 P.2d 1149 (Alaska Ct. App. 1983).

Convictions for kidnapping and sexual assault do not merge. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Constitutionality of conviction for similar offense. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Requirement for conviction of attempt. — At the very least, a defendant must have formed the 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).

Withdrawal of consent after penetration. — Alaska's sexual assault statutes do not limit "sexual penetration" to the moment of initial penetration, and nothing in the legislative history supports the argument that once a person is sexually penetrated with consent, that consent cannot be withdrawn. McGill v. State, 18 P.3d 77 (Alaska Ct. App. 2001).

Confessions. — Statement of confession made by defendant arrested for two counts of first-degree sex

…ony. — It was not error to admit …concerning complaints made by a … mother and a school counselor. … 626 P.2d 1060 (Alaska 1980).

…minary hearing to state all the … claimed rape in response to an …d and tell what happened is not a …ent. Tanksley v. United States, 10 … d 58 (9th Cir. 1944).

…recording of sodium pentothal …prosecution for statutory rape and …or to admit the recording of a …terview, even as a prior consistent …mited purpose of rehabilitating an …. Lindsey v. United States, 16 …d 893 (9th Cir. 1956).

…public from trial. — The trial …uming the power of excluding the … on the charge of rape of an adult … United States, 10 Alaska 443, 145 …44).

…ng the defendant his presumption …predecision by the court of his guilt …ied woman must be relieved of the … public trial because she is called … he story of the defendant's crime … aksley v. United States, 10 Alaska … th Cir. 1944).

… The use of the following instruc… rape case is prohibited: "A charge … against the defendant in this case … ly made and, once made, difficult to … n if the person accused is innocent. … requires that you examine the … male person named in the indict… …. Burke v. State, 624 P.2d 1240 …

…ent is not an element of the offense … instruction that the law assumes … ntends the natural consequences of … was not error. Walker v. State, 652 … 82).

…fficiently covering question of … See Tanksley v. United States, 10 … 2d 58 (9th Cir. 1944).

…nstruction on consent of female …sent, see Rose v. United States, 240 … 17).

… rape upheld. — See Kvasnikoff v. … 2 (Alaska Ct. App. 1983).

…mplaining witness of her conduct … h… alleged rape, corroborated and … ner sole evidence of the rape itself, … ct on the inference that the defen… …s untrue, and that she was the … 1 of a brutal outrage. Tanksley v. … Alaska 443, 145 F.2d 58 (9th Cir. …

…tempted sexual assault in the first … section as it read before the 1983 …AS 11.31.100 was affirmed. Sexual … nonconsensual genital intercourse … of of a specific sexual intent; and … t established though the prosecu… …hich might have been construed as … of the guilt of the defendant or an … to a defendant's need for treatment … uninvited. Potts v. State, 712 P.2d … pp. 1985).

…ersed. — Convictions for lewd and …ward children under former AS 11.15.134(a) and for rape under former AS 11.15.120(a) were reversed where evidence admitted concerning alleged assaults on victims other than those in the case at hand was improper propensity evidence; neither intent nor identity were at issue, and the acts did not constitute an admissible common scheme or plan or prove facts in dispute. Bolden v. State, 720 P.2d 957 (Alaska Ct. App. 1986).

Convictions under former AS 11.15.134, former AS 11.41.410(a)(4) and former AS 11.41.440(a)(2) were reversed where extensive evidence of prior consistent statements was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. Nitz v. State, 720 P.2d 55 (Alaska Ct. App. 1986).

Sentencing. — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of Donlun v. State, 527 P.2d 472 (Alaska 1974), was not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." Edenshaw v. State, 631 P.2d 506 (Alaska Ct. App. 1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. Newsom v. State, 533 P.2d 904 (Alaska 1975).

Sentence for rape upheld. — See Gordon v. State, 501 P.2d 772 (Alaska 1972); Torres v. State, 521 P.2d 386 (Alaska 1974); Newsom v. State, 533 P.2d 904 (Alaska 1975); Ames v. State, 533 P.2d 246 (Alaska 1975), modified on rehearing, 537 P.2d 1116 (Alaska 1975); Coleman v. State, 553 P.2d 40 (Alaska 1976); Nukapigak v. State, 562 P.2d 697 (Alaska 1977), aff'd on rehearing, 576 P.2d 982 (Alaska 1978); Bordewick v. State, 569 P.2d 184 (Alaska 1977); Morrell v. State, 575 P.2d 1200 (Alaska 1978); Alexander v. State, 578 P.2d 591 (Alaska 1978); State v. Vassilie, 578 P.2d 971 (Alaska 1978); Moore v. State, 597 P.2d 975 (Alaska 1979); Wagner v. State, 598 P.2d 936 (Alaska 1979); Wikstrom v. State, 603 P.2d 908 (Alaska 1979); Tate v. State, 606 P.2d 1 (Alaska 1980); Mallott v. State, 608 P.2d 737 (Alaska 1980); Cochrane v. State, 611 P.2d 61 (Alaska 1980); Alexander v. State, 611 P.2d 469 (Alaska 1980); Helmer v. State, 616 P.2d 884 (Alaska 1980); Tuckfield v. State, 621 P.2d 1350 (Alaska 1981); Edenshaw v. State, 631 P.2d 506 (Alaska Ct. App. 1981); Kompkoff v. State, 626 P.2d 1091 (Alaska Ct. App. 1981); Williams v. State, 652 P.2d 478 (Alaska Ct. App. 1982); Smith v. State, 691 P.2d 293 (Alaska Ct. App. 1984); Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987).

Conviction and sentence for rape upheld. — See Morgan v. State, 673 P.2d 897 (Alaska Ct. App. 1983).

Sentence for rape too lenient. — See State v. Lancaster, 550 P.2d 1257 (Alaska 1976); State v. Wassilie, 578 P.2d 971 (Alaska 1978); State v. Jensen, 650 P.2d 422 (Alaska Ct. App. 1982).

Sentence for rape held excessive. — See Ahvik v. State, 613 P.2d 1252 (Alaska 1980); Hintz v. State, 627 P.2d 207 (Alaska 1981); Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglar term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. Nix v. State, 653 P.2d 1093 (Alaska Ct. App. 1982).

Unsuspended 20-year term for three counts of first-degree sexual assault, imposed under AS 11.41.410 as it read before the 1982 amendment to the section and AS 12.55.125(c), on a first offender with a lengthy history of sexually assaultive conduct committed against his stepdaughters was clearly mistaken. The sentencing record did not justify the assumption that the defendant was destined to fail at rehabilitation that appeared to have been central in the decision on sentencing. There was no indication that the defendant ever resorted to violence or threats of violence, no physical injury resulted from the assaults, and the emotional and psychological injuries suffered by the victims were probably somewhat less than usual in such cases; the fact that the assaultive conduct was repeated over an extended period of time, while a significant aggravating factor, did not justify treating the defendant as a worst offender and imposing a maximum sentence. Polly v. State, 706 P.2d 700 (Alaska Ct. App. 1985).

Sentence for attempted rape upheld. — See Shelton v. State, 611 P.2d 24 (Alaska 1980) (decided under former AS 11.15.130).

Sentence for assault with intent to rape upheld. — See Fomin v. State, 619 P.2d 718 (Alaska 1980).

Sentence for attempted sexual assault and burglary held excessive. — See Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985) (decided under section as it read before 1982 amendment).

Collateral references. — Defense of mistake of fact as to victim's consent in rape prosecution. 102 ALR5th 447.

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if

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

(2) the offender engages in sexual contact with a person

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

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state;

(3) the offender engages in sexual penetration with a person who the offender k
is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed; or

(4) the offender engages in sexual contact with a person who the offender know
unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the vi

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978
§ 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79
1992; am § 4 ch 30 SLA 1996; am § 2 ch 61 SLA 1996)

Editor's notes. — From May 16 through September 9, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social Services" appeared where "the state" now appears in (a)(2)(B)(ii).

Legislative history reports. — For legisl
letter of intent relating to the amendments to
this section by ch. 96, SLA 1988 (CSHB 545 (Jud)
1988 House Journal 3065.

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Constitutionality. — Where man was convicted of second-degree sexual assault under paragraph (a)(3) for engaging in sexual penetration with a woman who was so intoxicated that she was either incapacitated or unaware of the sexual penetration, the court of appeals held that the definition of second-degree sexual assault did not violate the single subject clause of the Alaska Constitution and was not unconstitutionally vague. Ragsdale v. State, 23 P.3d 653 (Alaska Ct. App. 2001).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Construction. — The statutory language in this section is not so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope; the trial court did not err in rejecting defend
's claim of vagueness and overbreadth. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Attempt to commit sexual assault is a crime under Alaska law and requires that defendant, intending to engage in sexual contact with another person without regard to that person's lack of consent, take a substantial step toward accomplishing this goal. Guertin v. State, 854 P.2d 1130 (Alaska Ct. App. 1993).

Mentally incapable. — To appreciate the na
and consequences of engaging in an act of se
penetration, the victim must have the capacit
understand the full range of ordinary and foresee
social, medical, and practical consequences that
act entails. Jackson v. State, 890 P.2d 587 (Alaska
App. 1995).

To prove that defendant knew of victim's incapac
the state was not required to demonstrate abso
certainty on defendant's part; there was substan
circumstantial evidence in the trial record to supp
an inference that defendant acted with awareness
substantial probability that victim was mentally
capable. Jackson v. State, 890 P.2d 587 (Alaska
App. 1995).

Where the state presented no expert testimony
prove that victim was "mentally incapable" but
stead, relied on the testimony of victim's mother
on the jury's ability to observe the manner in whi
victim spoke and acted, both when she testified
trial and during a videotaped pretrial police intervi
which was introduced at trial, defendant's argume
that, absent expert testimony, there was insufficien
evidence to support a finding that victim was "men
tally incapable" was unpersuasive; victim's persona
appearance before the jury and her videotaped pre
trial interview with the police provided compelling
evidence of her incapacity. Jackson v. State, 890 P.2d
587 (Alaska Ct. App. 1995).

Health care workers. — When the state's case fo
second degree sexual assault is based on the allega
tion that a conscious patient was subjected to touch
ing that exceeded the bounds of legitimate treatment
the state must also prove that the health care worker
knew that there was at least a substantial probability
that the patient was unaware that the touching ex
ceeded the bounds of legitimate treatment. Ritter v.
State, 16 P.3d 191 (Alaska Ct. App. 2001).

The evidence presented to the grand jury was
sufficient to support the massage therapist/health
care worker's indictment on six counts of second-

(1) engages in sexual contact with a person who the offender knows is
(A) mentally incapable;
(B) incapacitated; or
(C) unaware that a sexual act is being committed;
(2) while employed in a state correctional facility or other placement designated by commissioner of corrections for the custody and care of prisoners, engages in penetration with a person who the offender knows is committed to the custody Department of Corrections to serve a term of imprisonment or period of temp commitment; or
(3) engages in sexual penetration with a person 18 or 19 years of age who the of knows is committed to the custody of the Department of Health and Social Services AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.
(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; ch 4 SLA 1990; am § 7 ch 79 SLA 1992; am § 1 ch 33 SLA 2000)

Effect of amendments. — The 2000 amendment, effective August 9, 2000, in subsection (a) added the present paragraph (1) designation, redesignated former paragraphs (1)-(3) as subparagraphs (1)(A)-(1)(C), and added paragraphs (2) and (3).

Legislative history reports. — For governor's transmittal letter concerning the amendment section (a) by § 1, ch. 33, SLA 2000 (HB 99), House Journal 256.

NOTES TO DECISIONS

Cited in Herreid v. State, 69 P.3d 507 (Alaska Ct. App. 2003).

Sec. 11.41.427. Sexual assault in the fourth degree. (a) An offender commits crime of sexual assault in the fourth degree if
(1) while employed in a state correctional facility or other placement designated by commissioner of corrections for the custody and care of prisoners, the offender engages sexual contact with a person who the offender knows is committed to the custody Department of Corrections to serve a term of imprisonment or period of temp commitment; or
(2) the offender engages in sexual contact with a person 18 or 19 years of age who offender knows is committed to the custody of the Department of Health and Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the p
(b) Sexual assault in the fourth degree is a class A misdemeanor. (§ 2 ch 33 SLA

Legislative history reports. — For governor's transmittal letter concerning the enactment of this section by § 2, ch. 33, SLA 2000 (HB 99), House Journal 256.

Sec. 11.41.430. Sexual assault in the third degree. [Repealed, § 10 ch 78 SLA 198 current law, see AS 11.41.420(a)(2).]

Sec. 11.41.432. Defenses. (a) It is a defense to a crime charged under 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is
(1) mentally incapable; or
(2) married to the person and neither party has filed with the court for a separ divorce, or dissolution of the marriage.
(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.4 11.41.420, it is not a defense that the victim was, at the time of the alleged offense legal spouse of the defendant. (§ 4 ch 96 SLA 1988; am § 27 ch 50 SLA 1989)

Legislative history reports. — For an analysis of the 1989 amendment to this section, see Senate-House Joint Journal Supplement No. 10, May 5, p. 5, under "Sec. 27."

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 151 SLA 1990)

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

For legislative letter of intent in connection with the amendment of subsection (a) by § 1, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Annotator's notes. — Some of the cases cited in the notes below were decided under former AS 11.15.134. Some were also decided under former AS 11.41.410(a)(4), which provided that a person 18 years of age or older who engaged in sexual penetration with another person under 18 years of age who was entrusted to his care by authority of law or was his child committed sexual assault in the first degree.

For cases construing former rape statute, see AS 11.41.410, Notes to Decisions, analysis line II.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. Anderson v. State, 562 P.2d 351 (Alaska 1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. Anderson v. State, 562 P.2d 351 (Alaska 1977).

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see Anderson v. State, 562 P.2d 351 (Alaska 1977).

Physical conduct punished under former statute. — See Anderson v. State, 562 P.2d 351 (Alaska 1977); Smiloff v. State, 579 P.2d 28 (Alaska 1978).

Former section prohibited fellatio. — See Anderson v. State, 562 P.2d 351 (Alaska 1977).

Specific intent is no longer an element of sexual abuse of a minor. Boggess v. State, 783 P.2d 1173 (Alaska Ct. App. 1989).

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. Anderson v. State, 562 P.2d 351 (Alaska 1977).

Intrusion into genitals. — Cunnilingus and fellatio do not require an intrusion into the genitals. Murray v. State, 770 P.2d 1131 (Alaska Ct. App. 1989).

Defendant's conviction for sexual abuse of a minor was affirmed where there was substantial evidence to support the conclusion beyond any reasonable doubt that defendant committed digital penetration and engaged in cunnilingus; because cunnilingus constitutes sexual penetration as a matter of law, any ambiguity in the record regarding whether defendant engaged in oral contact versus oral penetration was irrelevant. Mason v. State, Ct. App. Op. No. 4885 (File No. A-8504), P.3d (Alaska Ct. App. June 23, 2004).

Joinder with second-degree offense count. — Because defendant was contemplating a defense of accident or inadvertence to second-degree sexual abuse charges, the court did not abuse its discretion in ordering continued joinder of the two counts of second-degree sexual abuse and one count of sexual abuse of a minor in the first degree. Petersen v. State, 838 P.2d 812 (Alaska Ct. App. 1992).

Similar out-of-state statutes. — The elements of the California statute under which the defendant was convicted for lewd or lascivious acts upon a child were not sufficiently similar to the Alaska offense of attempted sexual abuse of a minor in the first degree to qualify as a prior felony for presumptive sentencing purposes. Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998).

Testimony by victim via closed-circuit television. — The superior court did not violate the defendant's right to confrontation by permitting the minor alleged to have been abused to testify via one-way closed-circuit television from a room adjacent to the courtroom, pursuant to AS 12.45.046. Reutter v. State, 886 P.2d 1298 (Alaska Ct. App. 1994).

Victim's statement held admissible under hearsay exception. — The victim's statement to a prosecution witness, made two or three days after the incident, that the victim's father came into her bed while she was undressed and "did something wrong" was admissible under the first-complaint hearsay exception. Nusunginya v. State, 730 P.2d 172 (Alaska Ct. App. 1986).

tantial evidence that intercourse without consent, and the fact that he defendant's home, a sentence of carceration under former AS disapproved and a sentence of at ecommended. State v. Couey, 680 t. App. 1984).

sentencing for conviction un- – See State v. Covington, 711 P.2d pp. 1985).

ly mistaken. — A sent e of 24 ars suspended, upon conviction of ual abuse of a minor in the first y mistaken, where the trial court a 10- to 15-year benchmark estab- sions concerning aggravated cases and nothing in the record estab- tence in excess of 15 years was ct the public. Mosier v. State, 747 t. App. 1987).

years with five years suspended for ler, for sexual abuse of a minor in was clearly mistaken, where the volve multiple acts with multiple felony record. Zackar v. State, 761 Ct. App. 1988).

ars with five years suspended was where defendant was a first felony therwise good record. Lawrence v. 3 (Alaska Ct. App. 1988).

of sixt years upon conviction of ual abuse of a minor in the first mistaken, and the case was re- sition of a total sentence not to with ten years suspended, where t's reliance upon the seriousness of urder conviction placed inordinate te weight on a single aggravating ate, 770 P.2d 1131 (Alaska Ct. App.

sentencing. — See Lewis v. State, ka Ct. App. 1985); Bodine v. State, ska Ct. App. 1987); Howell v. State, ka Ct. App. 1988).

probation. — Conditions of proba- endant from unauthorized contact and with other girls under 18-years ague or unduly restrictive of his otected right to freedom of associa- , 745 P.2d 1379 (Alaska Ct. App.

nore v. State, 655 P.2d 786 (Alaska lson v. State, 758 P.2d 1294 (Alaska n v. State, 769 P.2d 457 (Alaska Ct n v. State, 796 P.2d 840 (Alaska Ct. State, 840 P.2d 1000 (Alaska Ct. State, 20 P.3d 1121 (Alaska 2001). is v. State, 790 P.2d 1379 (Alaska

v. State, 676 P.2d 610 (Alaska Ct v. State, 698 P.2d 1230 (Alaska Ct v. State, 715 P.2d 1174 (Alaska Ct v. State, 739 P.2d 1314 (Alaska Ct son v. State, 747 P.2d 535 (Alaska rby v. State, 748 P.2d 757 (Alaska ger v. State, 748 P.2d 1172 (Alaska nes v. State, 754 P.2d 1336 (Alaska sterback v. State, 789 P.2d 1037 1990); Cook v. State, 792 P.2d 682 1990); Capwell v. State, 823 P.2d App. 1991); Curl v. State, 843 P.2d

1244 (Alaska Ct. App. 1992); Boerma v. State, 843 P.2d 1246 (Alaska Ct. App. 1992); Nunn v. State, 846 P.2d 135 (Alaska Ct. App. 1993); State v. Angaiak, 847 P.2d 1068 (Alaska Ct. App. 1993); Haire v. State, 877 P.2d 1302 (Alaska Ct. App. 1994); Beltz v. State, 895 P.2d 513 (Alaska Ct. App. 1995); Plate v. State, 925 P.2d 1057 (Alaska Ct. App. 1996); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Gwalthney v. State, 964 P.2d 1285 (Alaska Ct. App. 1998); Krack v. State, 973 P.2d 100 (Alaska Ct. App. 1999); Harmon v. State, 11 P.3d 393 (Alaska Ct. App. 2000); Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000); Jack C. v. State, 68 P.3d 1274 (Alaska 2003); Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988; am § 2 ch 151 SLA 1990)

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

For legislative letter of intent in connection with the amendment of subsection (a) by § 2, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

"Female breast." — The legislature intended that the term "female breast," as used in the statutory definition of "sexual contact" contained in AS 11.81.900(b)(53) (now (b)(54)), be applied according to its plain meaning — referring to all females regardless of age or degree of development. Stephan v. State, 810 P.2d 564 (Alaska Ct. App. 1991).

"Crime of violence." — Defendant's conviction for sexual abuse constituted a crime of violence for purposes of a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C.S. § 924(e). United States v. Melton, 344 F.3d 1021 (9th Cir. 2003).

No culpable mental state required. — Under the current statutory definition of "sexual contact," the offense of sexual abuse of a minor in the second degree may properly be established by evidence proving knowing conduct within the scope of AS 11.81.900(b)(52)(A) (now (b)(54)(A)); no secondary culpable mental state need be established with respect to surrounding circumstances. Van Meter v. State, 743 P.2d 385 (Alaska Ct. App. 1987).

In a prosecution for sexual abuse of a minor in the second degree, there was no need for the jury to find that defendant acted with the specific intent of achieving sexual satisfaction. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Burden of proving exclusions. — If some evidence of justification is advanced in the record, the state must bear the additional burden of establishing that the defendant's conduct did not fall within the exclusions of AS 11.81.900(b)(52)(B) (now (b)(54)(B)). Van Meter v. State, 743 P.2d 385 (Alaska Ct. App. 1987).

Defense of misunderstanding as to victim's age. — Defendant was entitled to defend on the ground that he reasonably believed the thirteen year old victim was sixteen years of age or older, where most of the information he knew about her came from a telephone conversation with her in which he claimed she discussed her prior sexual history and experience in detail. Bibbs v. State, 814 P.2d 738 (Alaska Ct. App. 1991).

Separate counts arising from single episode. — Defendant was properly convicted of four counts of

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in Smith v. State, 745 P.2d 1375 (Alaska Ct. App. 1987); Patterson v. State, 747 P.2d 535 (Alaska Ct. App. 1987); Jager v. State, 748 P.2d 1172 (Alaska Ct. App. 1988); Foster v. State, 751 P.2d 1383 (Alaska Ct. App. 1988); Russell v. State, 752 P.2d 1022 (Alaska Ct. App. 1988); Lahmeyer v. State, 765 P.2d 985 (Alaska Ct. App. 1988); Allen v. State, 769 P.2d 457 (Alaska Ct. App. 1989); Geer v. State, 778 P.2d 599 (Alaska Ct. App. 1989); Hayes v. State, 790 P.2d 713 (Alaska Ct. App. 1990); Nunn v. State, 845 P.2d 435 (Alaska Ct. App. 1993); Heath v. State, 849 P.2d 786 (Alaska Ct. App. 1993); Kolkman v. State, 857 P.2d 1202 (Alaska Ct. App. 1993); Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994); Mullin v. State, 886 P.2d 1323 (Alaska Ct. App. 1994); State v. Fremgen, 896 P.2d 1083 (Alaska Ct. App. 1995); Cole v. State, 902 P.2d 820 (Alaska Ct. App. 1996); Plate v. State, 920 P.2d 1057 (Alaska Ct. App. 1996); Williams v. State, 928 P.2d 600 (Alaska Ct. App. 1996); Beaver v. State, 933 P.2d 1178 (Alaska Ct. App. 1997); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998); Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000); Mason v. State, Ct. App. Op. No. 4885 (File No. A-8504), P.3d (Alaska Ct. App. June 23, 2004).

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim; or

(3) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983; am § 3 ch 151 SLA 1990; am § 14 ch 124 SLA 2004)

Revisor's notes. — The material in paragraph (a)(3) was enacted as paragraph (a)(1), and renumbered in 2004 in order to maintain consistency of existing references within charging documents, court judgments, and the state criminal history computer system.

Effect of amendments. — The 2004 amendment, effective July 1, 2004, added paragraph (a)(3).

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Conviction for lesser degree of offense. — The legislature intended AS 11.81.615 to permit a court or jury to convict a sexual offender of a lesser degree of offense, in this case, third-degree sexual abuse, despite the fact that the evidence reasonably (or even convincingly) demonstrated that the defendant committed a greater degree of offense because the victim was younger than alleged. Thiessen v. State, 844 P.2d 1137 (Alaska Ct. App. 1993).

Position of authority. — Whether the live-in boyfriend of the minor's mother was in a position of authority was a question of fact for the jury; and because defendant assumed authority over the victim as her stepfather and primary caretaker, the jury reasonably concluded that he was in a position of authority over her for purposes of this statute. Wurthmann v. State, 27 P.3d 762 (Alaska Ct. App. 2001).

Applicability of motor vehicle insurance. — Where taxi driver was found to have knowingly engaged in sexual penetration and sexual contact with a minor, his sexual contact with the minor was deliberate rather than accidental, and because his motor vehicle insurance agreement only covered injuries "caused by an accident," there was no coverage under this provision. Kim v. National Indem. Co., 6 P.3d 264 (Alaska 2000), overruled on other grounds, Shaw v. State Farm Mut. Auto Ins. Cos., 19 P.3d 588 (Alaska 2001).

Quoted in Toney v. Fairbanks N. Star Borough Sch. Dist., 881 P.2d 1112 (Alaska 1994).

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in State v. Ridgway, 750 P.2d 362 (Alaska Ct. App. 1988); M.C. v. Northern Ins. Co., 1 P.3d 673 (Alaska 2000); Hartvigsen v. State, Ct. App. Op. No. 4215 (File No. A-6838), P.2d (Alaska Ct. App. 2000).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

t. App. 1993); Steve v. State, 875 P.2d App. 1994); Mullin v. State, 886 P.2d t. App. 1994); State v. Fremgen, 889 ka Ct. App. 1995); Cole v. State, 923 ta Ct. App. 1996); Plate v. State, 926 ka Ct. App. 1996); Williams v. State, Alaska Ct. App. 1996); Beaver v. State, Alaska Ct. App. 1997); State v. Simp- 90 (Alaska Ct. App. 1997); Scroggins v. 442 (Alaska Ct. App. 1998); Schuma- 11 P.3d 39 7 (Alaska Ct. App. 2000); e, Ct. App. Op. No. 4885 (File No. d (Alaska Ct. App. June 23, 2004).

hird degree. (a) An offender d degree if
in sexual contact with a person younger than the offender;
s in sexual penetration with a younger than the offender, and o the victim; or
in sexual penetration with a ars younger than the offender.
s C felony. (§ 2 ch 78 SLA 1983;

es. — Section 32(a), ch. 124, SLA 2004, the 2004 amendment of (a) of this "to offenses committed on or after July

history reports. — For legislative in connection with the amendment of by § 3, ch. 151, SLA 1990 (HCS CSSB 1990 House Journal, p. 4199.

her and primary caretaker, the jury ncluded that he was in a position of her for purposes of this statute. State, 27 P.3d 762 (Alaska Ct. App.

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te v. Ridgway, 750 P.2d 362 (Alaska Ct. J.C. v. Northern Ins. Co., 1 P.3d 673 Hartvigsen v. State, Ct. App. Op. No. A-6838), P.2d (Alaska Ct. App.

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(1) being under 16 years of age, the offender engages in sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 151 SLA 1990; am § 15 ch 124 SLA 2004)

Effect of amendments. — The 2004 amendment, effective July 1, 2004, deleted "sexual penetration or" preceding "sexual conduct" in paragraph (a)(1).

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

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

For legislative letter of intent in connection with the amendment of subsection (a) by § 4, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Specific intent crime. — Sexual abuse of a minor is a specific intent crime. J.E.C. v. State, 681 P.2d 1358 (Alaska Ct. App. 1984).

Instructions. — The trial court erred in its instructions regarding the mens rea required for sexual abuse of a minor under former AS 11.41.440(a)(2) and contributing to the delinquency of a minor under former AS 11.51.130(a)(4). Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984).

Although the trial court erred in refusing to give defendant's proposed instruction that he had to have a specific intent to arouse or gratify his or the child's sexual desires in order to be convicted of violating former AS 11.41.440(a)(2), this error was harmless beyond reasonable doubt where the jury was told that defendant had to knowingly engage in sexual contact with the child. J.E.C. v. State, 681 P.2d 1358 (Alaska Ct. App. 1984).

Probationary sentence. — Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision. State v. Coats, 669 P.2d 1329 (Alaska Ct. App. 1983).

Conviction under pre-1983 section upheld. — See Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985).

Conviction and sentence under pre-1983 section upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Conviction reversed. — Conviction under the pre-1983 version of this section was reversed where the jury was not properly instructed regarding the culpable mental state for the crime. Potts v. State, 712 P.2d 385 (Alaska Ct. App. 1985).

Remand in light of Flink v. State. — Case involving a non-jury trial under this section as it read before 1983 was remanded for application of the specific intent standard that the defendant acted with the specific intent to achieve his own sexual arousal or the sexual arousal of the victim. Colgan v. State, 711 P.2d 533 (Alaska Ct. App. 1985).

Applied in Goulden v. State, 656 P.2d 1218 (Alaska Ct. App. 1983); Higgs v. State, 676 P.2d 610 (Alaska Ct. App. 1984).

Cited in Stores v. State, 625 P.2d 820 (Alaska 1980); Hodges v. State, 660 P.2d 1203 (Alaska Ct. App. 1983); State v. R.H., 683 P.2d 269 (Alaska Ct. App. 1984); Kizzire v. State, 715 P.2d 272 (Alaska Ct. App. 1986); Agwiak v. State, 750 P.2d 846 (Alaska Ct. App. 1988); McGlauflin v. State, 857 P.2d 366 (Alaska Ct. App. 1993); Toney v. Fairbanks N. Star Borough Sch. Dist., 881 P.2d 1112 (Alaska 1994).

Collateral references. — Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases, 6 ALR4th 1066.

Sec. 11.41.443. Spousal relationship no defense. [Repealed, § 61 ch 50 SLA 1989. For current law, see AS 11.41.432(b).]

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.434 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in Smith v. State, 745 P.2d 1375 (Alaska Ct. App. 1987); Patterson v. State, 747 P.2d 535 (Alaska Ct. App. 1987); Jager v. State, 748 P.2d 1172 (Alaska Ct. App. 1988); Foster v. State, 751 P.2d 1383 (Alaska Ct. App. 1988); Russell v. State, 752 P.2d 1022 (Alaska Ct. App. 1988); Lahmeyer v. State, 765 P.2d 985 (Alaska Ct. App. 1988); Allen v. State, 769 P.2d 457 (Alaska Ct. App. 1989); Geer v. State, 778 P.2d 599 (Alaska Ct. App. 1989); Hayes v. State, 790 P.2d 713 (Alaska Ct. App. 1990); Nunn v. State, 845 P.2d 435 (Alaska Ct. App. 1993); Heath v. State, 849 P.2d 786 (Alaska Ct. App. 1993); Kolkman v. State, 857 P.2d 1202 (Alaska Ct. App. 1993); Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994); Mullin v. State, 886 P.2d 1323 (Alaska Ct. App. 1994); State v. Fremgen, 889 P.2d 1083 (Alaska Ct. App. 1995); Cole v. State, 923 P.2d 820 (Alaska Ct. App. 1996); Plate v. State, 923 P.2d 1057 (Alaska Ct. App. 1996); Williams v. State, 928 P.2d 600 (Alaska Ct. App. 1996); Beaver v. State, 933 P.2d 1178 (Alaska Ct. App. 1997); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998); Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000); Mason v. State, Ct. App. Op. No. 4885 (File No. A-8504), P.3d (Alaska Ct. App. June 23, 2004).

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim; or

(3) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983; am § 3 ch 151 SLA 1990; am § 14 ch 124 SLA 2004)

Revisor's notes. — The material in paragraph (a)(3) was enacted as paragraph (a)(1) and renumbered in 2004 in order to maintain consistency of existing references within charging documents, court judgments, and the state criminal history computer system.

Effect of amendments. — The 2004 amendment, effective July 1, 2004, added paragraph (a)(3).

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Conviction for lesser degree of offense. — The legislature intended AS 11.81.615 to permit a court or jury to convict a sexual offender of a lesser degree of offense, in this case, third-degree sexual abuse, despite the fact that the evidence reasonably (or even convincingly) demonstrated that the defendant committed a greater degree of offense because the victim was younger than alleged. Thiessen v. State, 844 P.2d 1137 (Alaska Ct. App. 1993).

Position of authority. — Whether the live-in boyfriend of the minor's mother was in a position of authority was a question of fact for the jury; and because defendant assumed authority over the victim as her stepfather and primary caretaker, the jury reasonably concluded that he was in a position of authority over her for purposes of this statute. Wurthmann v. State, 27 P.3d 762 (Alaska Ct. App. 2001).

Applicability of motor vehicle insurance. — Where taxi driver was found to have knowingly engaged in sexual penetration and sexual contact with a minor, his sexual contact with the minor was deliberate rather than accidental, and because his motor vehicle insurance agreement only covered injuries "caused by an accident," there was no coverage under this provision. Kim v. National Indem. Co., 6 P.3d 264 (Alaska 2000), overruled on other grounds, Shaw v. State Farm Mut. Auto Ins. Cos., 19 P.3d 588 (Alaska 2001).

Quoted in Toney v. Fairbanks N. Star Borough Sch. Dist., 881 P.2d 1112 (Alaska 1994).

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in State v. Ridgway, 750 P.2d 362 (Alaska Ct. App. 1988); M.C. v. Northern Ins. Co., 1 P.3d 673 (Alaska 2000); Hartvigsen v. State, Ct. App. Op. No. 4215 (File No. A-6838), P.2d (Alaska Ct. App. 2000).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 151 SLA 1990; am § 15 ch 124 SLA 2004)

Effect of amendments. — The 2004 amendment, effective July 1, 2004, deleted "sexual penetration or" preceding "sexual conduct" in paragraph (a)(1).

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

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

For legislative letter of intent in connection with the amendment of subsection (a) by § 4, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Specific intent crime. — Sexual abuse of a minor is a specific intent crime. J.E.C. v. State, 681 P.2d 1358 (Alaska Ct. App. 1984).

Instructions. — The trial court erred in its instructions regarding the mens rea required for sexual abuse of a minor under former AS 11.41.440(a)(2) and contributing to the delinquency of a minor under former AS 11.51.130(a)(4). Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984).

Although the trial court erred in refusing to give defendant's proposed instruction that he had to have a specific intent to arouse or gratify his or the child's sexual desires in order to be convicted of violating former AS 11.41.440(a)(2), this error was harmless beyond reasonable doubt where the jury was told that defendant had to knowingly engage in sexual contact with the child. J.E.C. v. State, 681 P.2d 1358 (Alaska Ct. App. 1984).

Probationary sentence. — Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision. State v. Coats, 669 P.2d [illegible] (Alaska Ct. App. 1983).

Conviction under pre-1983 section upheld. — See Moor v. State, 709 P.2d 498 (Alaska Ct. App. 1985).

Conviction and sentence under pre-1983 section upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Conviction reversed. — Conviction under the pre-1983 version of this section was reversed where the jury was not properly instructed regarding the culpable mental state for the crime. Potts v. State, 712 P.2d 335 (Alaska Ct. App. 1985).

Remand in light of Flink v. State. — Case involving a non-jury trial under this section as it read before 1983 was remanded for application of the specific intent standard that the defendant acted with the specific intent to achieve his own sexual arousal or the sexual arousal of the victim. Colgan v. State, 711 P.2d 533 (Alaska Ct. App. 1985).

Applied in Gouldon v. State, 656 P.2d 1218 (Alaska Ct. App. 1983); Higgs v. State, 676 P.2d 610 (Alaska Ct. App. 1984).

Cited in Stores v. State, 625 P.2d 820 (Alask. . 1980); Hodges v. State, 660 P.2d 1207 (Alaska Ct. App. 1983); State v. R.H., 683 P.2d 269 (Alaska Ct. App. 1984); Kizzire v. State, 715 P.2d 272 (Alaska Ct. App. 1986); Agwiak v. State, 750 P.2d 846 (Alaska Ct. App. 1988); McGlauflin v. State, 857 P.2d 366 (Alaska Ct. App. 1993); Toney v. Fairbanks N. Star Borough Sch. Dist., 881 P.2d 1112 (Alaska 1994).

Collateral references. — Assault with intent to commit unnatural sex act upon minor as affected by latter's consent. 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases. 6 ALR4th 1066.

Sec. 11.41.443. Spousal relationship no defense. [Repealed, § 61 ch 50 SLA 1989. For current law, see AS 11.41.432(b).]

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.434 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

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

(1) reasonably believed the victim to be that age or older; and

(2) undertook reasonable measures to verify that the victim was that age or older. (§ ch 166 SLA 1978; am § 2 ch 43 SLA 1985; am § 1 ch 83 SLA 2002)

Effect of amendments. — The 2002 amendment, effective September 18, 2002, in subsection (b) designated the paragraphs and substituted the language in paragraph (2) for "unless the victim was under years of age at the time of the alleged offense."

NOTES TO DECISIONS

Constitutionality of mistake of age defense. — In promulgating subsection (b), the Alaska legislature balanced society's interest in deterring sexual abuse of minors against the policy of allowing defendants to show that they did everything reasonably possible to ascertain the age of their sexual partners; such a balancing — and, in particular, the decision to allocate the burden of proof to the defendant — is within the constitutional bounds of legislative action and does not violate the Federal Constitution's guarantee of due process. Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994)

Because the defendant's belief concerning the victim's age is a matter of defense, not an element of the crime, the legislature can constitutionally allocate the burden of proof where it sees fit, in light of the societal interests involved; therefore, subsection (b) is constitutional. Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994).

Burden of proof in mistake of age defense. Subsection (b) creates a mistake-of-age defense relieve defendants from strict liability for sexual lations with children older than 13 and younger t 16; however, the defendant must prove this excul tory mistake by a preponderance of the eviden Steve v. State, 875 P.2d 110 (Alaska Ct. App. 199

Allowance of affirmative defense not requir — In prosecution for sexual abuse of minor in degree, trial court was required to allow defendan present an affirmative defense that he reasona believed that at the time that he engaged in sex penetration with victim, she was sixteen years of or older. State v. Fremgen, 889 P.2d 1083 (Alaska App. 1995).

Applied in Jager v. State, 748 P.2d 1172 (Alaska App. 1988).

Cited in Peters v. State, 943 P.2d 418 (Alaska App. 1997).

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years age or older, that person engages in sexual penetration with another who is relate either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Separate sentences for incest and second-degree assault. — Where the two statutes required proof of different conduct and the social interests to be vindicated or protected by each statute were different, separate sentences on defendant's convictions for incest and second-degree sexual assault did not violate double jeopardy. Harmon v. State, 11 P.3d 393 (Alaska Ct. App. 2000).

Death of defendant abated prosecution under former section. Hartwell v. State, 423 P.2d 2 (Alaska 1967) (decided under former AS 11.40.110)

Cited in Theodore v. State, 692 P.2d 987 (Alaska App. 1985); Bingaman v. State, 76 P.3d 398 (Alas Ct. App. 2003); Mason v. State, Ct. App. Op. No. 48 (File No. A-8504), P.3d (Alaska Ct. App. Jun 23, 2004).

Collateral references. — Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 70

Rape, incest as included within charge of, 76 ALR2 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a liv performance, film, audio, video, electronic, or electromagnetic recording, photograph negative, slide, book, newspaper, magazine, or other material that visually or aurall

depicts the conduct listed in (1) — (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct.

(c) Unlawful exploitation of a minor is a

(1) class B felony; or

(2) class A felony if the person has been previously convicted of unlawful exploitation of a minor in this jurisdiction or a similar crime in this or another jurisdiction.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983; am §§ 1 — 3, ch 161 SLA 1990; am § 8 ch 79 SLA 1992; am §§ 1, 2 ch 65 SLA 2000; am § 1 ch 131 SLA 2004)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 2000 amendment, effective May 23, 2000, inserted ", video, electronic, or electromagnetic" and "or aurally" in subsections (a) and (b) and deleted "printed" preceding "material" near the end of subsection (b).

The 2004 amendment, effective September 27, 2004, added paragraph (c)(2) and made related changes.

NOTES TO DECISIONS

"Live performance". — This section covers private, noncommercial live performances; however, "live performance" does not include the situation in which a male adult requests a child to display his or her genitals to that adult in private. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Solicitation of crime. — Where defendant was charged with soliciting the crime of unlawful exploitation of a minor based on his asking victims to take off their clothes and let him photograph them, defendant's argument that he did not "solicit" the crime because the victims could not be guilty of the intended crime was foreclosed by the provision of AS 11.31.110 that it is no defense that the person solicited could not be guilty of the crime that is the object of the solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Defendant's convictions for soliciting the crime of unlawful exploitation of a minor which were based on his asking victims to take off their clothes and let him photograph them were erroneous since defendant did not ask anyone else to engage in the prohibited conduct, i.e., inducing a child to engage in one of the sexual activities prohibited by this section, and thus he did not commit the crime of solicitation. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Aggravating factors. — Where the superior court found an aggravating factor at the defendant's original sentencing, he faced a sentence more severe than the four-year presumptive term for second felony offenders at the time of his sentencing for exploitation of a minor. Harris v. State, 980 P.2d 482 (Alaska Ct. App. 1999).

Stipulation of seriousness does not preclude mitigation of other charges. — Where defendant pleaded no contest to three felonies, including attempted delivery of LSD to a minor, unlawful exploitation of a minor, and possession of child pornography, as part of a plea bargain he stipulated that his conduct with regard to the drug charge was among the most serious because he was factually guilty of the completed crime, but asked the superior court to find that his other two offenses were mitigated under AS 12.55.155(d)(9), the trial court erred in not doing so; defendant's private creation and private possession of photographic and videographic images for the personal use of himself and his lover was among the least serious conduct. Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004).

Denial of motion to withdraw no contest plea. — Defendant's alleged mistake concerning the admissibility of police testimony was found not to have substantially affected his decision-making, where his desire to spare his family the stress of a trial was his main motivation in accepting the plea bargain; thus, pursuant to Alaska R. Crim. P. 11(h)(2), the mistake

was not a fair and just reason for allowing him to withdraw his three felony no contest pleas, to a single class A felony for LSD charges, exploitation of a minor under subsection (a) of this section, and possession of child pornography under AS 11.61.127(a). Parker v. State, Ct. App. Op. No. 4850 (File No. A-8114), P.3d (Alaska Ct. App. Mar. 31, 2004).

Conviction and sentence upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Withdrawal of plea bargain denied. — Where defendant pleaded no contest to three felonies as part of a plea bargain, his decision to plead no contest was not materially influenced by his mistaken understanding concerning the consequences of winning suppression motion; trial court did not err in denying defendant's motion to withdraw his plea. Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004).

Applied in Qualle v. State, 652 P.2d 481 (Alaska App. 1982); Harris v. State, 790 P.2d 1379 (Alaska App. 1990).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988); Scroggins v. State, 951 P.2d (Alaska Ct. App. 1998).

Sec. 11.41.458. Indecent exposure in the first degree. (a) An offender commits the crime of indecent exposure in the first degree if

(1) the offender violates AS 11.41.460(a);

(2) while committing the act constituting the offense, the offender knowingly masturbates; and

(3) the offense occurs within the observation of a person under 16 years of age.

(b) Indecent exposure in the first degree is a class C felony. (§ 3 ch 81 SLA 1998)

Collateral references. — What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 ALR5th 229.

Sec. 11.41.460. Indecent exposure in the second degree. (a) An offender commits the crime of indecent exposure in the second degree if the offender knowingly exposes the offender's genitals in the presence of another person with reckless disregard for the offensive, insulting, or frightening effect the act may have.

(b) Indecent exposure in the second degree before a person under 16 years of age is a class A misdemeanor. Indecent exposure in the second degree before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983; am § 4 ch 81 SLA 1998)

Effect of amendments. — The 1998 amendment, effective June 11, 1998, inserted "in the second degree" throughout, and in subsection (a) substituted "if the offender knowingly exposes the offender's genitals in the presence of another person" for "if the offender intentionally exposes the offender's genitals to another person," and deleted "on that person" from the end.

Collateral references. — What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place. 95 ALR5th 229.

Sec. 11.41.468. Forfeiture of property used in sexual offense. (a) Property used to aid a violation of AS 11.41.410 — 11.41.458 or to aid the solicitation of, attempt to commit, or conspiracy to commit a violation of AS 11.41.410 — 11.41.458 may be forfeited to the state upon the conviction of the offender.

(b) In this section, "property" means computer equipment, telecommunications equipment, photography equipment, video or audio equipment, books, magazines, photographs, videotapes, audiotapes, and any equipment or device, regardless of format or technology employed, that can be used to store, create, modify, receive, transmit, or distribute digital or analog information, including images, motion pictures, and sounds. (§ 2 ch 41 SLA 2003)

Cross references. — For statement of legislative intent applicable to this section, see § 1, ch. 41, SLA 2003, in the 2003 Temporary and Special Acts.

Effective dates. — Section 2, ch. 41, SLA 2003, which enacted this section, took effect on September 3, 2003.

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "health care worker" includes a person who is or purports to be an anesthesiologist, acupuncturist, chiropractor, dentist, health aide, hypnotist, massage therapist, mental health counselor, midwife, nurse, nurse practitioner, osteopath, naturopath, physical therapist, physical therapy assistant, physician, physician assistant, psychiatrist, psy-

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defendant's motion to withdraw his plea. P
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Applied in Qualle v. State, 652 P.2d 481 (Ala
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App. 1990).

Cited in Lawrence v. State, 764 P.2d 318 (
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AS 11.41.410 — 11.41.470, unless th

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gist, psychological associate, radiologist, religious healing practitioner, surgeon, technician, or a substantially similar position;

"incapacitated" means temporarily incapable of appraising the nature of one's own uct or physically unable to express unwillingness to act;

"legal guardian" means a person who is under a duty to exercise general supervi- over a minor or other person committed to the custody of the Department of Health Social Services under AS 47.10 or AS 47.12 as a result of a court order, statute, or lation, and includes Department of Health and Social Services employees, foster nts, and staff members and other employees of group homes or youth facilities where minor or other person is placed as a result of a court order or the action of the artment of Health and Social Services, and police officers, probation officers, and al workers when those persons are exercising custodial control over a minor or other son.

"mentally incapable" means suffering from a mental disease or defect that renders person incapable of understanding the nature or consequences of the person's duct, including the potential for harm to that person;

"position of authority" means an employer, youth leader, scout leader, coach, cher, counselor, school administrator, religious leader, doctor, nurse, psychologist, ardian ad litem, babysitter, or a substantially similar position, and a police officer or bation officer other than when the officer is exercising custodial control over a minor;

"sexual act" means sexual penetration or sexual contact;

"victim" means the person alleged to have been subjected to sexual assault in any ree or sexual abuse of a minor in any degree;

"without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, by the express or implied threat of death, imminent physical injury, or kidnapping to inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988; am § 28 ch 50 SLA 1989; am § 5 ch 151 SLA 990; am § 9 ch 79 SLA 1992; am § 7 ch 63 SLA 1997; am § 3 ch 33 SLA 2000)

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms and in 1990 and 1992 to maintain alphabetical order.

In 2001, "physician assistant" was substituted for "physician's assistant" in the definition of "health care worker" to correct a manifest error.

Cross references. — For definition of terms used in this title, see AS 11.81.900.

Effect of amendments. — The 2000 amendment, effective August 9, 2000, rewrote paragraph (3) primarily to include references to the Department of Health and Social Services.

Editor's notes. — Section 27(c), ch. 63, SLA 1997 provides that the amendment made by § 7, ch. 63, SLA 1997 applies "to offenses committed on or after July 1, 1997."

NOTES TO DECISIONS

Incapacitated. — A sleeping person can be "incapacitated" within the meaning of paragraph (2) of this section. King v. State, 978 P.2d 1278 (Alaska Ct. App. 1999).

Applied in Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982); Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983); Nathaniel v. State, 668 P.2d 851 (Alaska Ct. App. 1983); Wilson v. State, 670 P.2d 1149 (Alaska Ct. App. 1983).

Quoted in Woods v. State, 667 P.2d 184 (Alaska 1983); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985); Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988); Ritter v. State, 16 P.3d 191 (Alaska Ct. App. 2001).

Cited in Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982); Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995); McGill v. State, 18 P.3d 77 (Alaska Ct. App. 2001).

Article 5. Robbery, Extortion, and Coercion.

Collateral references. — 13 Am. Jur. 2d, Burglary, § 1 et seq.; 31A Am. Jur. 2d, Extortion, Blackmail, and Threats, §§ 20-47; 50 Am. Jur. 2d, Larceny, § 1 et seq.; 67 Am. Jur. 2d, Robbery, § 1 et seq.

12A C.J.S., Burglary, § 1 et seq.; 35 C.J.S., Extortion, § 1 et seq.; 52A C.J.S., Larceny, § 1 et seq.; 77 C.J.S., Robbery, § 1 et seq.

"Intimidation" as element of bank robbery under 18 U.S.C.A. § 2113(a). 163 ALR Fed. 225.

Sec. 11.41.500. Robbery in the first degree. (a) A person commits the crime of robbery in the first degree if the person violates AS 11.41.510 and, in the course of violating that section or in immediate flight thereafter, that person or another participant

(1) is armed with a deadly weapon or represents by words or other conduct that either that person or another participant is so armed;

(2) uses or attempts to use a dangerous instrument or a defensive weapon or represents by words or other conduct that either that person or another participant is armed with a dangerous instrument or a defensive weapon; or

(3) causes or attempts to cause serious physical injury to any person.

(b) Robbery in the first degree is a class A felony. (§ 3 ch 166 SLA 1978; am § 1 ch 59 SLA 1991)

NOTES TO DECISIONS

I. General Consideration.
II. Former Law.

I. GENERAL CONSIDERATION.

Legislative intent. — The legislature clearly intended that anyone who used a dangerous instrument — any kind of weapon — should be liable for the aggravated offense of robbery in the first degree; beyond that, it intended that offenders who used firearms — a particularly dangerous subcategory of dangerous instrument — should further be subject to an enhanced presumptive term. Burks v. State, 706 P.2d 1190 (Alaska Ct. App. 1985).

Criminal intent. — Although the crime of robbery is not defined in AS 11.41.510 as requiring an intent to permanently deprive another of property, the provisions of this section clearly require proof of criminal intent and therefore do not violate the due process clause of the Alas. Const., art. I, § 7. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

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. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Search of apartment upheld. — Consent to search defendant's room in the apartment was valid because the information given to police indicated that the witness renting the apartment had the requisite degree of authority to consent to the search, but even if the witness did not actually possess the requisite authority, the officers' search of the bedroom was still lawful under the doctrine of apparent authority. Fitts v. State, 25 P.3d 1130 (Alaska Ct. App. 2001).

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. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Double jeopardy. — Imposition of sentence under both AS 11.41.500 and AS 12.55.125(c)(2) does not violate prohibition against double jeopardy; the enhanced presumptive terms operate independently of the elements of the underlying offenses. Abdulbaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Lesser included offense. — In prosecution for both robbery and assault, failure to give an instruction on a lesser included offense of joyriding was not harmless error and the court of appeals therefore reversed defendants' convictions for first-degree robbery and remanded for a new trial. Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984), rev'd on other grounds, 710 P.2d 1013 (Alaska 1985).

On retrial of robbery charge, the jury was to be instructed on the lesser included offense of theft since, while theft might not technically be a lesser included offense of robbery, it was obviously closely related to both robbery and the lesser offense of joyriding, and since the jury would be instructed on joyriding, it should also be given the option of considering theft as a lesser included offense. Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984), rev'd on other grounds, 710 P.2d 1013 (Alaska 1985).

Under the cognate approach, joyriding was a lesser-included offense of robbery, since an element of robbery is the unauthorized taking or attempted taking of property; and joyriding is the unauthorized taking of a vehicle. Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984), rev'd on other grounds, 710 P.2d 1013 (Alaska 1985).

Burden of proof. — Defendant's sentence for first-degree robbery was vacated where the trial judge applied the wrong standard of proof in finding that he possessed a firearm during the robbery as a sentencing factor; the state was obliged to prove his possession of the gun beyond a reasonable doubt. Tuttle v. State, 65 P.3d 884 (Alaska Ct. App. 2002).

evidence could not justify it. Cooper v. State, 595 P.2d 648 (Alaska 1979).

Collateral references. — Gambling or lottery paraphernalia as subject of robbery, 51 ALR2d 1396.

Stolen money or property as subject of robbery, 89 ALR2d 1435.

Purse snatching as robbery or theft, 42 ALR3d 1381.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin operated machine, 45 ALR3d 1286.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 ALR3d 727.

Retaking of money lost at gambling as robbery or larceny, 77 ALR3d 1363.

Robbery by means of toy or simulated gun or pistol, 81 ALR3d 1006.

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, as element of robbery, 93 ALR3d 643.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offe such as assault, robbery, or homicide, 100 ALR3d

Coercion, compulsion, or duress as defens charge of robbery, larceny, or related crime, 1 AL 481.

Admissibility of evidence of accused's drug a tion or use to show motive for theft of property than drugs, 2 ALR4th 1298.

Dog as deadly or dangerous weapon for purpos statutes aggravating offenses such as assault robbery, 7 ALR4th 607.

Walking cane as deadly or dangerous weapon purpose of statutes aggravating offenses such a sault and robbery, 8 ALR4th 842.

Parts of the human body, other than feet, as de or dangerous weapons for purposes of statutes ag vating offenses such as assault and robbery, 8 AL 1268.

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

Sec. 11.41.510. Robbery in the second degree. (a) A person commits the crim robbery in the second degree if, in the course of taking or attempting to take prop from the immediate presence and control of another, the person uses or threatens immediate use of force upon any person with intent to

(1) prevent or overcome resistance to the taking of the property or the retention of property after taking; or

(2) compel any person to deliver the property or engage in other conduct which mig aid in the taking of the property.

(b) Robbery in the second degree is a class B felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

For cases construing former law, see notes to AS 11.41.500, analysis line II.

Legislative intent. — From the face of the statute it is clear that the legislature, in passing this robbery statute, intended to emphasize the fact that robbery is a crime against the person and deemphasize the theft aspects of the offense. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Intent to deprive victim of property. — The plain language of this section does not indicate that an intent to permanently deprive the victim of the property is an essential element of the offense. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Use of force against any person. — The crime of robbery is committed not only when a defendant uses force upon the person who possesses the property, but whenever a defendant uses force upon any person with the intent to prevent or overcome anyone's resistance to the taking, or to compel any person to engage in conduct that might facilitate the taking. Thus, if defendant used force or threatened to use force against wife with the intent of preventing or overcoming resistance to the taking of property from husband, he committed robbery; if defendant used a knife against wife for these purposes, then he used a dangerous instrument during the commission of the offense under AS 12.55.125(c)(2). McGrew v. State, P.2d 625 (Alaska Ct. App. 1994).

Duress treated as affirmative defense. — trial for robbery and kidnapping placing the burden prove duress on defendant was constitutional, the statutes as to robbery and kidnapping pro particular action undertaken with a particular o tive, and because Alaska does not consider dure be the negation of specific intent, duress may, co tent with due process, be treated as an affirma defense. Walker v. Endell, 828 F.2d 1378 (9th 1987), cert. denied, 488 U.S. 926, 109 S. Ct. 309, L. Ed. 2d 328 (1988).

Instruction on accomplice liability. — prosecution for second-degree robbery, even th the state's primary theory was that the defen struck the victim, while others took the proper was not error for the trial court to instruct on ac plice liability since, to evaluate the defendant's the jury necessarily had to receive instruction o rules governing the defendant's liability for the ac the others in taking the property. Baker v. State, P.2d 479 (Alaska Ct. App. 1995).

Sentence affirmed. — See Solomon v. State, P.2d 809 (Alaska Ct. App. 1987).

Upon conviction of second-degree robbery, wi

the defendant was a third-felony offender, eligible for a presumptive term of six years imprisonment, and two aggravating factors were found, i.e., the victim sustained physical injury and the defendant was on felony probation when he committed the crime, the court did not err in sentencing the defendant to serve an additional three years beyond a composite term of six years and 10 months to which he had been sentenced in two unrelated cases. Baker v. State, 905 P.2d 479 (Alaska Ct. App. 1995).

Consecutive sentences not violative of double jeopardy. — The court's imposition of consecutive sentences for the two kidnappings and one robbery arising out of the same transaction does not violate double jeopardy. Walker v. Endell, 828 F.2d 1378 (9th Cir. 1987), cert. denied, 488 U.S. 926, 109 S. Ct. 309, 102 L. Ed. 2d 328 (1988).

Determination of whether sentence excessive. — When a state sentence is imposed consecutively to a federal term of imprisonment, the combined length of incarceration must be considered in determining whether the sentence imposed by the state court is excessive. Williams v. State, 759 P.2d 575 (Alaska Ct. App. 1988).

Conviction and sentence affirmed. — See Roberts v. State, 680 P.2d 503 (Alaska Ct. App. 1984).

Conviction reversed where assault in the fourth degree was a lesser offense necessarily included in the offense charged, robbery in the second degree; since there was at least some evidence presented at trial to justify a finding that the defendant was guilty of assault but not of robbery, a lesser included offense instruction on assault was required. Marker v. State, 692 P.2d 977 (Alaska Ct. App. 1984).

Applied in Abdulhaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Quoted in Frankson v. State, 645 P.2d 225 (Alaska Ct. App. 1982); Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984); Napayonak v. State, 793 P.2d 1059 (Alaska Ct. App. 1990).

Stated in Walker v. Endell, 850 F.2d 470 (9th Cir. 1987); State v. Delagarza, 8 P.3d 362 (Alaska Ct. App. 2000).

Cited in Hugo v. City of Fairbanks, 658 P.2d 155 (Alaska Ct. App. 1983); Nighswonger v. State, 662 P.2d 445 (Alaska Ct. App. 1983); Nighswonger v. State, 680 P.2d 105 (Alaska Ct. App. 1984); Newell v. State, 771 P.2d 873 (Alaska Ct. App. 1989); Singleton v. State, 921 P.2d 636 (Alaska Ct. App. 1996); Lamont v. State, 934 P.2d 774 (Alaska Ct. App. 1997); Andrews v. State, 967 P.2d 1016 (Alaska Ct. App. 1998).

Collateral references. — "Intimidation" as element of bank robbery under 18 U.S.C.A. § 2113(a). 163 ALR Fed. 225.

Sec. 11.41.520. Extortion. (a) A person commits the crime of extortion if the person obtains the property of another by threatening or suggesting that either that person or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense; or

(7) inflict any other harm which would not benefit the person making the threat or suggestion.

(b) A threat or suggestion to perform any of the acts described in (a) of this section includes an offer to protect another from any harmful act when the offeror has no apparent means to provide the protection or when the price asked for rendering the protection service is grossly disproportionate to its cost to the offeror.

(c) It is a defense to a prosecution based on (a)(2), (3), or (4) of this section that the property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit, or other official action relates, or as compensation for property or lawful services.

(d) In this section, "property of another" means property in which a person has an interest that the defendant is not privileged to infringe, whether or not the defendant also

has an interest in the property and whether or not the person from whom [illegible] was obtained or withheld also obtained the property unlawfully. "Property" [illegible] does not include property in the possession of the defendant in which another [illegible] security interest, even if legal title is in the secured party under a conditional [illegible] contract or other security agreement; in the absence of a specific agreement to the contrary, the holder of a security interest in property is not privileged to infringe the debtor's right of possession without the consent of the debtor.

(e) Extortion is a class B felony. (§ 3 ch 166 SLA 1978; am § 2 ch 9 SLA 1994)

Revisor's notes. — Subsection (d) was formerly (e) and subsection (e) was formerly (d); relettered in 2002.

Legislative history reports. — For explanation of the 1994 enactment of (e) (now (d)) of this section, see 1994 House Journal Supplement No. 12, [illegible] 22, 1994, page 2.

NOTES TO DECISIONS

Offense against person. — The legislature adhered to the majority view that extortion is a crime against the person, not against property. Woodward v. State, 855 P.2d 423 (Alaska Ct. App. 1993).

Claim-of-right does not include physical threats. — Claim-of-right provision set out in subsection (c) of this statute does not extend to threats of physical injury charged under subparagraph (a)(1). Woodward v. State, 855 P.2d 423 (Alaska Ct. App. 1993).

Cited in Baker v. State, 22 P.3d 493 (Alaska Ct. App. 2001).

Collateral references. — 31A Am. Jur. 2d, Extortion, Blackmail, and Threats, §§ 20-47.

35 C.J.S., Extortion, §§ 2-23; 86 C.J.S., Threats, §§ 2-31.

What constitutes "property" obtained within extortion statute, 67 ALR3d 1021.

Truth as defense to charge of criminal intimidation, extortion, blackmail, threats, and the like, based upon threats to disclose information about victim, 39 ALR4th 1011.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person." 87 ALR5th 715.

Sec. 11.41.530. Coercion. (a) A person commits the crime of coercion if the person compels another to engage in conduct from which there is a legal right to abstain or abstain from conduct in which there is a legal right to engage, by means of instilling in the person who is compelled a fear that, if the demand is not complied with, the person who makes the demand or another may

(1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or commit any other crime;

(2) accuse anyone of a crime;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;

(4) take or withhold action as a public servant or cause a public servant to take or withhold action;

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense.

(b) It is a defense to a prosecution under (a)(2), (3), or (4) of this section that the defendant reasonably believed that the accusation or exposure was true or that the lawsuit or other invocation of official action was justified and that the defendant's sole intent was to compel or induce the victim to take reasonable action to correct the wrong that is the subject of the accusation, exposure, lawsuit, or invocation of official action or to refrain from committing an offense.

(c) Coercion is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Evidence supported separate charge of kidnapping. — Where the state presented evidence that defendant restrained the victim for thirty to forty-five minutes, a restraint that far exceeded whatever minimal restraint might conceivably be inherent in the crime of coercion, the superior court correctly denied defendant's motion for a judgment of acquittal on the kidnapping charge. Hurd v. State, 22 P.3d 12 (Alaska Ct. App. 2001).

Attempted coercion is not lesser included offense of terroristic threatening. Konrad v. State, 763 P.2d 1369 (Alaska Ct. App. 1988).

State failed to prove element of demand. — The court's adjudication that defendant violated his probation by committing coercion was reversed where the letters written by defendant did not contain any explicit demand for specific action or restraint from action on the part of anyone and the state did not prove the element of demand. Powell v. State, 12 P.3d 1187 (Alaska Ct. App. 2000).

Cited in Mustafoski v. State, 867 P.2d 824 (Alaska Ct. App. 1994).

Collateral references. — 31A Am. Jur. 2d, Extortion, Blackmail, and Threats, §§ 20-47; 52 Am. Jur. 2d Malicious Mischief, § 1 et seq.

86 C.J.S., Threats, §§ 2-23.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 ALR4th 481.

Prosecution of union officer or member for specific threats to employer's property or person, in connection with labor dispute, 43 ALR4th 1141.

Chapter 45. Offenses Against the Public Peace.

[Repealed, § 21 ch 166 SLA 1978. For similar law, see AS 11.61.100 — 11.61.150 and AS 11.66.270.]

Chapter 46. Offenses Against Property.

Article

Cross references. — For increase in classification of misdemeanors committed in connection with a criminal street gang, see AS 12.55.137.

Article 1. Theft and Related Offenses.

Section

Collateral references. — 50 Am. Jur. 2d, Larceny, § 1 et seq.

52 C.J.S., Larceny, § 1 et seq.

Rights of owner of stolen money against one who won it in gambling transaction from thief, 44 ALR2d 1242.

NOTES TO DECISIONS

Construction with other law. — The enactment of paragraph (a)(2) indicates that the legislature must have intended for the "drives, tows away, or takes" language in AS 11.46.360(a) to refer to a defendant's initial act of driving, towing away, or taking and thereby to limit AS 11.46.360(a) to cases where the original taking was trespassory. Accordingly, in first-degree vehicle theft cases, the state must prove [illegible] the defendant's initial taking of the vehicle was [illegible] passory. Dobberke v. State, 40 P.3d 1244 (Alaska [illegible] App. 2002).

Quoted in Eppenger v. State, 966 P.2d 995 (Ala[illegible] Ct. App. 1998).

Article 4. Arson, Criminal Mischief, and Related Offenses.

Collateral references. — 5 Am. Jur. 2d, Arson and Related Offenses, § 1 et seq.; 52 Am. Jur. 2d, Malicious Mischief, § 1 et seq.

6A C.J.S., Arson, § 1 et seq.; 54 C.J.S., Malicious Mischief, § 1 et seq.

Sufficiency of evidence on issue of negligence in action for spread of fire purposely and lawfully kindled, 24 ALR2d 241.

Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 ALR2d 1456.

Burning of building by mortgagor as burning property of another so as to constitute arson, 76 ALR2[illegible] 524.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 ALR4th 960.

What constitutes "burning" in order to justify charge of arson, 28 ALR4th 482.

Pyromania and the criminal law, 51 ALR4th 124[illegible]

Sec. 11.46.400. Arson in the first degree. (a) A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.

(b) Arson in the first degree is a class A felony. (§ 4 ch 166 SLA 1978; am § 1 ch 39 SLA 1983)

Legislative history reports. — For Senate letter of intent relating to ch. 39, SLA 1983, see 1983 Senate Journal, pp. 106 and 171; for House letter of intent on that Act, see 1983 House Journal, p. 1250; see also 1983 House Journal, p. 1699.

NOTES TO DECISIONS

For cases construing former first degree arson statute, see Salinas v. United States, 277 F.2d 914 (9th Cir. 1960); Rank v. State, 373 P.2d 734 (Alaska 1962), overruled on other grounds, Shafer v. State, 456 P.2d 466 (Alaska 1969); Stumbaugh v. State, 599 P.2d 166 (Alaska 1979); Williams v. State, 614 P.2d 1384 (Alaska 1980); Mossberg v. State, 733 P.2d 273 (Alaska Ct. App. 1987).

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).

Where defendant committed arson and in doing so placed other persons in danger of serious physical injury, double jeopardy did not preclude convictions for both arson in the first degree and assault in the third degree. Hathaway v. State, 925 P.2d 1343 (Alaska Ct. App. 1996).

Offense against property. — Because arson is an offense against property, a defendant who was charged with setting one fire and damaging one piece of property could not be convicted of nine counts of arson which were differentiated only by the fact that

Current presumptive terms compared to presumptive ranges in Senate Bill 56
Chapter 2, SLA 2005 Effective: March 23, 2005

Dept. of Law, March 2005

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a prior sex felony	Third+ Felony	Sex Felony with two prior sex felonies	Max
Unclassified Sex Offense	(8) **8 to 12**	weapon or serious injury (10) **12 to 16**	(15) **15 to 20**	(20) **20 to 30**	(25) **25 to 35**	(30) **30 to 40**	(40) **99**
A Felony Sex Offense	(5) **5 to 8**	weapon or serious injury (10) **10 to 14**	(10) **12 to 16**	(15) **15 to 20**	(15) **15 to 25**	(20) **20 to 30**	(30)
A Felony	(5) **5 to 8**	weapon, serious injury, or police victim (7) **7 to 11**	(10) **10 to 14**	n/a	(15) **15 to 20**	n/a	(20)
B Felony Sex Offense	(0; 1 to 3 by court-made law) **2 to 4**	n/a	(5) **5 to 8**	(10) **10 to 14**	(10) **10 to 14**	(15) **15 to 20**	(20)
B Felony	(0; 1 to 3 by court-made law) **1 to 3 (SIS permitted if prison imposed as condition)**	crim neg hom of child: (0; 1 to 3 by court-made law) **2 to 4**	(4) **4 to 7**	n/a	(6) **6 to 10**	n/a	(10)
C Felony Sex Offense	(0) **1 to 2**	n/a	(2) **2 to 5**	(3) **3 to 6**	(3) **3 to 6**	(6) **6 to 10**	(10)
C Felony	(0) **0 to 2 (SIS permitted)**	felony guiding crimes (1) **1 to 2**	(2) **2 to 4**	n/a	(3) **3 to 5**	n/a	(5)

Numbers in parentheses are the presumptive terms and maximums that apply to crimes committed before March 23, 2005

Numbers in **bold** show the new presumptive ranges and new maximum