ALASKA LEGISLATURE COMMITTEE BILL FILES - 1987 - 1988 8879
CSSSHB 228 cont., HB 229 L.A. Finance 304

APPENDIX A

Regional Testing Service/State Board	Exam Frequency	Fee	Written	Practical	Additional Information
Florida	June, December	$280	Laws and rules of Florida	On mannequin: cast gold class II MOD onlay on bicuspid tooth; class II amalgam; pin amalgam endodontic access on posterior and anterior tooth. On patient: periodontal exercise, prosthetic impression and articulation.	Must furnish own patients (Supply companies will usually help.) About 52% pass annually. Must have taken national board within 10 years. No reciprocity with other states.
Georgia	June.	$200	Jurisprudence, periodontics and oral pathology slide exam (multiple choice)	Clinical class II amalgam, class III composite, cast gold class II inlay or onlay; laboratory: preparations and gold casting on dentiform, denture set-up.	Must furnish own patients, instruments, and handpieces. No reciprocity with other states.
Hawaii	twice a year; announced 60 days before exam	$250	Jurisprudence, oral diagnosis, treatment planning	Class III or II gold foil; class II amalgam: MOD onlay and ⅞ crown with 1 indirect wax-up, complete denture set	Must furnish own patients, but Hawaii does run ad in local college newspapers. Must furnish own handpieces, instruments, and supplies. No reciprocity with other states.
Indiana	twice a year	$100	Theoretical exam if all parts of national boards have not been completed; jurisprudence on Indiana laws.	Class II amalgam; class II, III, IV foil, or class I, V gold foil and composite, or MOD inlay or crown; prosthetic problem solving; Lab: anterior porcelain bonded to metal preparation; ¾ crown prep on bicusoid, wax, cast and finish; upper denture set-up; periodontal scaling and curretage; diagnosis and treatment planning.	Must have valid CPR certification before exam. Must furnish own patient. Must obtain malpractice insurance before the exam. Must furnish original dental school diploma.
Louisiana	May/June (annually)	$100	Ethics and jurisprudence, office emergencies, oral surgery, periodontics, oral pathology	Amalgam and composite, onlay procedure, removable prosthodontics, endodontics, occlusion	Must furnish own patients, liability insurance, equipment, and supplies. Content of examination is subject to change at the discretion of the board.
Mississippi	June (annually)	$200	Jurisprudence, dental anatomy, radiography	One MOD, DO, or MO amalgam; one four-surface amalgam replacing at least one cusp; one class III composite; one full gold crown; removable prosthetics	No reciprocity. All information subject to change for each examination. Must have valid CPR. Must furnish own patients.
Nevada	March, July (annually)	$200	Must have passed national board examination.	Complete denture fabrication; either a class II, III, or IV gold foil or a class II cast gold restoration, inlay, or onlay (restoration must be finished in one day); class II amalgam	Must furnish own patients, instruments, and supplies, including pre- and postoperative radiographs. Some disposable items will be available. No reciprocity.
New Mexico	January, June	$150	Jurisprudence, oral diagnosis, office emergencies	Class II amalgam; gold casting; MOD inlay; class III, IV or V gold foil	Must furnish own patients, instruments and high-low speed handpiece. Supply company assists with exam. No reciprocity. No licensure by credentials.
New York[3,6]	August, December	$245	Equivalent to Northeast Regional Board	Equivalent to Northeast Regional Board	Equivalent to Northeast Regional Board but valid only in New York. Open to eligible graduates of non-accredited and accredited schools. Must furnish own patients and instruments.

APPENDIX A

Regional Testing Service/State Board	Exam Frequency	Fee	Written	Practical	Additional Information
North Carolina	May, August	$75	Jurisprudence, periodontics, occlusion	Class II inlay or onlay; class II amalgam; oral surgery; removable prosthodontics (complete upper denture, partial design); periodontics; lab exercises; endodontics, crown preps	Must furnish own patients and instruments. No reciprocity. No licensure by credentials. No specialty exams.
Oklahoma	May, June, and December	$200	Jurisprudence	Prosthetic denture set-up; clinical operative procedures	Must furnish own patients and instruments. Must have valid CPR.
Oregon	June, December	$50	Jurisprudence, oral diagnosis, treatment planning, oral pathology, and general dentistry	Selection from the following: amalgam restoration, cast gold restoration, periodontics, prosthodontics	No reciprocity or temporary licenses. Must furnish own patients and instruments. Specialty exams available.
South Carolina	Summer	$200	Ethics and Jurisprudence	Clinical includes 2 class II amalgams, 2 composites; prosthetics: impressions, CR records, set mandibular and maxillary 6 interior teeth. Laboratory: Wax up 3-unit bridge, prep onlay, wax and cast on a dentiform.	
Texas	May/June, August/September	$100	Jurisprudence	3-unit fixed bridge; 2 class II amalgams; 2 composite restorations; prepare diagnosis and treatment plan from photographs, x-rays, models, etc.; denture set-up, ready for flasking	Must furnish own patients. No reciprocity or temporary licenses.
Virgin Islands	June, November	$65	Operative dentistry, pharmacology, prosthodontics, oral surgery and pain control, oral pathology and radiology, endodontics-periodontics, anatomic sciences, and dental anatomy from the national board exams if have not passed the national boards during the last two years.	Periodontics, radiology, oral surgery, operative dentistry	
Washington	June, September	$120		Class II amalgam; class II, III, V gold foil; MOD inlay and a periodontal section	Must furnish own patients, instruments, handpieces, and supplies. Some companies may have supplies for use at no cost. No reciprocity with other states.

NOTES: [1] Includes Connecticut, District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and West Virginia.
[2] Includes Arkansas, Kentucky, Tennessee, and Virginia.
[3] Includes Colorado, Iowa, Minnesota, Missouri, Kansas, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming.
[4] Includes Arizona, Idaho, Montana, and Utah.
[5] In addition to participating in the Northeast Regional Board, New York administers a separate series of examinations.
[6] The fee shown for New York includes license fee, exam fee, and first triennial registration fee.
a) Class V gold foil no longer a clinical examination requirement.

* SOURCE: The above information is compiled annually by American Student Dental Association and is published in the *ASDA Handbook*, Fall 1985,. pages 78–82. Reprinted with permission of American Student Dental Association.

APPENDIX B

Written Examination Requirements*

State	Recognizes Certificate of National Board Dental Examinations: Accepts Scores on National Board Exam	Time Limit (Years)	Additional Written Examinations
Alabama	Yes	0	Yes
Alaska	Yes	0	Yes
Arizona	Yes	0	Yes
Arkansas	Yes	0	Yes
California	Yes	0	—
Colorado	Yes	15	Yes
Connecticut	Yes	0	Yes
Delaware	No 1/	—	—
District of Columbia	Yes	—	—
Florida	Yes	10	Yes
Georgia	Yes	0	Yes
Hawaii	Yes	5	Yes
Idaho	Yes	0	Yes
Illinois	Yes	0	—
Indiana	Yes	0	Yes
Iowa	Yes	0	—
Kansas	Yes	0	Yes
Kentucky	Yes	0	—
Louisiana	Yes	—	—
Maine	Yes	—	—
Maryland	Yes	0	Yes
Massachusetts	Yes	5	Yes
Michigan	Yes	—	—
Minnesota	Yes	0	—
Mississippi	Yes	0	Yes
Missouri	Yes	—	—
Montana	Yes	0	Yes
Nebraska	Yes	0	—
Nevada	Yes	0	Yes
New Hampshire	Yes	0	Yes
New Jersey	Yes	0	Yes
New Mexico	Yes	—	—
New York	Yes	0	—
North Carolina	Yes	—	Yes
North Dakota	Yes	—	—
Ohio	Yes	0	Yes
Oklahoma	Yes	0	Yes
Oregon	Yes	0	Yes
Pennsylvania	Yes	0	—
Rhode Island	Yes	0	—
South Carolina	Yes	0	—
South Dakota	Yes	—	—
Tennessee	Yes	0	—
Texas	Yes	0	—
Utah	Yes	0	—
Vermont	Yes	0	—
Virginia	Yes	0	—
Washington	Yes	0	—
West Virginia	Yes	0	Yes
Wisconsin	Yes	0	—
Wyoming	Yes	—	—
Virgin Islands	Yes	—	—

*For graduates of accredited dental schools. Data as of January 1, 1986.
Source. Joint Commission on National Dental Examinations

1/ Delaware conducts their own written examinations.

APPENDIX C

Clinical Examination Requirements

State	Regional Test 1/	Time Limit (Years)	State Performance Examination	Limit to Times Taken
Alabama	—	—	Yes	2 times and (c)
Alaska	—	—	Yes	—
Arizona	WREB	5	Yes	2 times and education
Arkansas	SRTA	5	—	3 times and (d)
California	—	—	Yes	Unlimited
Colorado	CRDTS	5	No	3 times
Connecticut	NERB	5	No	Unlimited
Delaware	—	—	Yes	—
District of Columbia (f)	NERB	5	Yes	3 times and education
Florida	—	—	Yes	3 times and education
Georgia	—	—	Yes	3 times and education
Hawaii	—	—	Yes	—
Idaho	WREB	—	No	—
Illinois	NERB	10	Yes	Unlimited
Indiana	—	—	Yes	—
Iowa	CRDTS	5	No	2 times, education and (c)
Kansas	CRDTS	5	No	2 times, education and (c)
Kentucky	SRTA	5	No	Unlimited
Louisiana (f)	—	—	Yes	3 times and education
Maine (f)	NERB	5	No	—
Maryland	NERB	5	No	2 times and education
Massachusetts	NERB	5	No	—
Michigan (f)	NERB	10	(e)	3 times and education
Minnesota	CRDTS	5	No	—
Mississippi	—	—	Yes	2 times and education
Missouri	CRDTS	5	No	3 times and education
Montana	WREB	3	No	—
Nebraska	CRDTS	5	No	2 times and education
Nevada	—	—	Yes	2 times and (b)
New Hampshire	NERB	5	No	(c)
New Jersey	NERB	15	No	—
New Mexico (f)	—	—	Yes	Unlimited
New York	NERB	0	Yes	2 times and (d)
North Carolina	—	—	Yes	Unlimited
North Dakota (f)	CRDTS	5	No	—
Ohio	NERB	5	No	2 times and education
Oklahoma	—	—	Yes	2 times and (c)
Oregon	—	—	Yes	Unlimited
Pennsylvania	NERB	—	No	—
Rhode Island	NERB	—	No	Unlimited
South Carolina (f)	—	—	Yes	Unlimited
South Dakota (f)	CRDTS	5	No	—
Tennessee	SRTA	5	Yes	—
Texas	—	—	Yes	3 times (c)
Utah (f)	WREB	3	No	—
Vermont	NERB	5	No	—
Virginia	SRTA	5	No	3 times
Washington	—	—	Yes	Unlimited
West Virginia (f)	NERB	—	No	—
Wisconsin	CRDTS	5	No	—
Wyoming (f)	CRDTS	5	Yes	2 times and education
Virgin Islands (f)	—	—	Yes	2 times and education

Data as of January 1, 1986 unless otherwise indicated.

(a) Skip one testing before re-taking third time.
(b) Must wait one year before re-taking.
(c) Must have approval of the Board.
(d) Remedial training.
(e) Yes, for graduates of non-accredited schools.
(f) 1982 data.

Source: Joint Commission on National Dental Examinations

1/ CRDTS - Central Regional Dental Testing Service
NERB - Northeast Regional Board of Dental Examiners
SRTA - Southern Regional Testing Agency
WREB - Western Regional Examining Board

APPENDIX D

Summary of Requirements for Licensure by Credentials in Certain States Granting Licensure by Credentials

The states that grant licensure by credentials have individual requirements, of which the following is an overview. All states require a jurisprudence examination; however, this might be a formal, written examination, or a signed statement attesting that the candidate is familiar with the laws governing dentistry in the state. Candidates should write to the individual states for complete information and application.

State	Will accept applications from	Letters of recommendation	Personal interview	Years in practice
Arkansas	R	2	X	5
District of Columbia	Specialists Only		X	
Indiana	All states	3	X	5
Iowa	R	2	X	5
Kansas	R	5		5
Maine	All states	0	X*	5[1]
Maryland	All states	3	X	5[1]
Massachusetts	R	1	X	5
Michigan	On an individual basis	4	Rarely	No Limit
Minnesota	All states	4	X	2[2]
Missouri	All states	2		5
Nebraska	All states	2	X	1[3]
New Hampshire	R.	3	X	5
New York	All states	3		5
North Dakota	Has an option, but has not granted licensure by credentials in 5 years			
Oklahoma	R	10		5
Pennsylvania	All states	2		5
Rhode Island	R	3		5
Tennessee	R	1[4]		5
Vermont	At the discretion of the board	2		5

R = states that will issue licenses by credentials only to candidates from states with a reciprocal agreement.

*The state of Maine will require a personal interview with a candidate who passed a state board examination more than 1 year before applying to Maine for a license.

[1]Will issue a licensure by credentials to candidates who pass the Northeast Regional Board Examination in lieu of active practice.

[2]Two years of the past 3 years must have been in active practice.

[3]This requirement will change to 3 years of active practice.

[4]One letter of recommendation from each state board in each state in which the dentist has practiced.

Source: "Licensure by Credentials — Is it Working?", report published in the *Journal of the American Dental Association*, Vol 111, July 1985, pages 19–32.

APPENDIX E

ALASKA DENTAL LICENSES ISSUED

Information presented in this appendix was compiled from the dental license issue log maintained by the Department of Commerce and Economic Development's Division of Occupational Licensing.

	June 1, 1980 through October 17, 1984 [1]	October 17, 1984 through June 30, 1986	Total June 1, 1980 through June 30, 1986
Number issued based on credentials	8	14 [2]	22
Number issued based on examination	75	31	106
Total number issued	83	45	128
By credentials as percentage of total	9.6%	31.1%	17.2%

[1] The Alaska Board of Dental Examiners issued licenses based on candidates' credentials, pursuant to AS 08.36.234, from June 1, 1980 through October 17, 1984. At that time they ceased issuing licenses by credentials, by emergency order, as promulgated in 12 AAC 28.950.

[2] Licenses issued based on reinterview of candidates previously denied licensure by credentials, as recommended by the Ombudsman's office and the Attorney General's office.

APPENDIX F

Total Dental Licensure Results by State Board in 1981

State Board	Total	Passed	Percent passed	Failed	Percent failed
Alabama	87	84	95.5%	3	3.5%
Alaska 1/	27	14	51.9%	13	48.1%
Arizona	137	137	100	0	0.0
Arkansas	49	49	100	0	0.0
California	1,535	781	50.9	754	49.1
CRDTS*	995	729	73.3	266	26.7
Colorado	225	225	100	0	0.0
Connecticut	191	191	100	0	0.0
Delaware	29	17	58.6	12	41.4
District of Columbia					
Florida	601	315	52.4	286	47.6
Georgia	200	200	100	0	0.0
Hawaii	26	16	61.5	10	38.5
Idaho	44	29	65.9	15	34.1
Illinois	507	469	92.5	38	7.5
Indiana	173	126	72.8	47	27.2
Iowa	122	122	100	0	0.0
Kansas	82	82	100	0	0.0
Kentucky	151	151	100	0	0.0
Maine	52	52	100	0	0.0
Maryland	305	305	100	0	0.0
Massachusetts	357	357	100	0	0.0
Michigan	95	95	100	0	0.0
Minnesota	188	188	100	0	0.0
Mississippi	52	39		13	
Missouri	218	218	100	0	0.0
Montana	30	30	100	0	0.0
Nebraska	98	98	100	0	0.0
Nevada	58	28	48.3	30	51.7
New Hampshire	47	47	100	0	0.0
New Jersey	478	478	100	0	0.0
New Mexico	42	36	85.7	6	14.3
New York	857	677	79	180	21.0
North Carolina	147	117	79.6	30	20.4
NERB*	2,628	2,280	86.8	348	13.2
North Dakota	31	31	100	0	0.0
Ohio	341	341	100	0	0.0
Oklahoma	130	130	100	0	0.0
Oregon	147	147	100	0	0.0
Pennsylvania	576	576	100	0	0.0
Rhode Island	42	42	100	0	0.0
South Carolina	91	91	100	0	0.0
South Dakota	40	32	80	8	20.0
SRTA*	597	572	95.8	25	4.2
Tennessee	166	166	100	0	0.0
Texas	519	464	89.4	55	10.6
Utah					
Vermont	22	22	100	0	0.0
Virginia	178	178	100	0	0.0
Washington	237	149	62.9	88	37.1
West Virginia	63	63	100	0	0.0
Wisconsin	211	211	100	0	0.0
Wyoming	47	32	68.1	15	31.9
WREB*	467	403	86.3	64	13.7
Puerto Rico	75	70	93.3	5	6.7
TOTAL	14,786	12,488	84.5	2,298	15.5

*Regional Testing results are not included in total.

Source: Council on Dental Education, American Dental Association.

1/ Alaska statistics were not published by the American Dental Association. Information included here was obtained from the Department of Commerce and Economic Development's Division of Occupational Licensing. Alaska results are not included in totals.

APPENDIX G

RECENT ALASKA DENTAL EXAMINATION STATISTICS

Information in this appendix was compiled and provided by the Department of Commerce and Economic Development's Division of Occupational Licensing.

	November 1983	June 1984	November 1984	June 1985	November 1985	August 1986 [4]
Number of applicants examined [1]	18	18	18	34	25	20
Number Failed [2]	6	16	8	21	16	5
Number Passed [3]	12	2	10	13	9	15
Percentage Failure Rate	33.3%	88.9%	44.4%	61.8%	64.0%	25.0%
Percentage Pass Rate	66.7%	11.1%	55.6%	38.2%	36.0%	75.0%

[1] Totals include candidates taking all or part of the examination.

[2] Totals include candidates failing all or part of the examination.

[3] Totals include candidates passing entire examination or those passing remaining parts not passed at prior examinations.

[4] The dental examination scheduled for June 1986 was postponed until August 1986 in order that a new examination site could be located and to allow restructuring of the examination's content and scoring procedures.

APPENDIX H

EXAMINATION STATISTICS: WESTERN STATES AND REGIONAL TESTING BOARDS/AGENCIES [1]

WASHINGTON - Over the last five years the failure rate for Washington state dental school graduates has been from 35% to 37%. Out-of-state graduates' failure rate has been approximately 50%. (These statistics include results from exam retakes - retake failure rate approximates 50%, regardless of whether candidates are in-state or out-of-state graduates.)

OREGON - Results from the most recent (June 1986) Oregon dental exam are as follows:

Number of candidates taking exam	70	(69 1st attempts)
Number Failing	7	
Number Passing	63	
Percentage Failure Rate	10%	
Percentage Pass Rate	90%	

Historically Oregon's passage rate has been in the 80 and 90 percentile range.

CALIFORNIA -	1984 *	1983 *
Number of candidates taking exam	1567	1884
Number Failing	753	849
Number Passing	814	1035
Percentage Failure Rate	48%	45%
Percentage Pass Rate	52%	55%

* (Statistics exclude results of retakes by California dental school graduates.)

NEVADA - Current statistics related to pass/fail rates for Nevada state dental examinations were not available for release by the Nevada State Board of Dental Examiners.

WESTERN REGIONAL EXAMINING BOARD (WREB) - The average annual pass rate on the WREB exam for the past five years is 76.8%, with a high of 81% and a low of 67%. This equates to an average failure rate of 23.2%, with a high of 33% and a low of 19%.

CENTRAL REGIONAL DENTAL TESTING SERVICE (CRDTS) - CRDTS evaluates approximately 1000 dental candidates per year, including candidates repeating the examination. The 1985 failure rate for the operative clinical examination administered by CRDTS was 10.8%.

NORTHEAST REGIONAL BOARD OF DENTAL EXAMINERS (NERB) - In the past ten years, failure rates on the NERB examination have ranged from a high of 34.4% in 1983 to a low of 19.8% in 1985. A failure, in these calculations, is a candidate who fails at least one of the five tests in his/her first examination attempt.

SOUTHERN REGIONAL TESTING AGENCY (SRTA) - Dental examination pass/fail statistics are not generated on an annual basis by SRTA, but instead are prepared for specific test sites. This information was not made available.

1/ Information obtained in this appendix was provided by the individual state boards or regulating bodies and by representatives of the various regional boards or testing agencies.

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BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

POUCH D
JUNEAU, ALASKA 99811
PHONE: 465-2500

November 3, 1986

Mr. Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
P.O. Box W
Juneau, AK 99811

Dear Mr. Wilkerson:

Thank you for the opportunity to review and comment on the preliminary audit findings of the Board of Dental Examiners. At this time, the department's position to the audit recommendations remains as noted in our response to the interim letter dated September 10.

The department agrees with recommendation number one, and will assist the board in the repeal of 12 AAC 28.950. Prior to taking a position for or against recommendation number two, the department is seeking more information regarding regional testing and its feasibility. There are many factors which must be investigated. Recently, the chairman of the Dental Board attended the Western Regional Exam in California; we will be receiving a report on this exam at the next board teleconference meeting which is scheduled for November 13.

Sincerely,

Loren H. Lounsbury
Commissioner

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103086a

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STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

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THE ALASKA BOARD OF DENTIAL EXAMINERS

Robert E. Warren, Chairman

December 16, 1986

Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811-3300

Re: "A Special Report on The Department of Commerce and Economic Development, Board of Dental Examiners August 27, 1986" (Confidential Preliminary Audit)

Audit Control Number: 08-4271-86-S

Dear Mr. Wilkerson:

On behalf of the Alaska Board of Dental Examiners, I offer the following response to the above-referenced confidential Preliminary Audit Report. As you know, that Report contains two recommendations. The Board provisionally concurs with one recommendation but strongly disagrees with the other.

1. Areas of Agreement. Recommendation Number 2, set forth on pages 12-15 of the Report, proposes that "The Alaska Board of Dental Examiners should affiliate with one or more of the four existing regional testing services for the examination of dental candidate's [sic] clinical skills in lieu of administering a State-run clinical examination." (Report, page 12.)

The Board provisionally agrees with this recommendation and is in the process of taking active steps to implement it. Geographically, the most logical affiliation for Alaska is the Western Regional Examining Board (WREB). As noted in Appendix A to the Report (at page 20, note 4), the WREB includes Arizonia, Idaho, Montana and Utah.

08-H8LH

On September 28-30, 1986, the Board's Hygenist member, Chris Baxter, and I personally attended the WREB autumn, 1986 examination, which was conducted at Loma Linda University in Loma Linda, California. I directly observed the entire four-day examination as it was administered to the 70 dental candidates and the 31 hygenist candidates. In my professional opinion, the examination as administered by the WREB was comprehensive, thorough, and fair.

More recently, on December 5-6, 1986, I attended the WREB Examination Review Committee meeting in Phoenix, Arizonia. While in Phoenix, I also attended the WREB General Membership Meeting and the meeting of the Board of Directors. My conclusion from my direct observations is that the WREB is a competent and highly professional testing agency.

At the upcoming January 15, 1987 meeting of the Alaska Board of Dental Examiners, the question of whether Alaska should join the WREB will be voted upon. Prior to the vote, I will present my field research and findings with respect to the WREB. Also, Dr. David Low, past President of the WREB and current Chairman of the WREB Examination Committee, will make a presentation. My recommendation will be that Alaska should join the WREB, thereby recognizing a passing grade on the WREB examination as satisfying the examination requirement of AS 08.36.130 and AS 08.36.160.

I might note in passing that only a portion of my travel expenses have been paid by the WREB and I have donated the balance of my travel expenses and my professional time. The State of Alaska has not absorbed any of these costs.

2. Areas of Disagreement. Recommendation Number 1, set forth at pages 11-12 of the Report, proposes that "The Alaska Board of Dental Examiners should issue dental licenses to qualified dentists based on their performance records in lieu of requiring they pass an examination. (Licensure

by credentials)." The Board strongly disagrees with this Recommendation.

In our experience, licensure by credentials runs a serious and substantial risk of authorizing incompetent or otherwise undesirable individuals to practice dentistry in Alaska for two reasons. First, licensure by credentials provides inadequate opportunity to investigate and verify the applicant's professional, clinical skills. Second, because there is presently no central clearing house of professional dental information in the United States, it is extremely difficult to weed out individuals who are the subject of outstanding complaints or disciplinary review proceedings in other states. In practice, the Board has found licensure by credentials to be inconsistent with the Board's responsibilities as established by AS 08.36.070(a).

AS 08.36.234 establishes licensure by credentials as a permitted practice: "The [B]oard may provide for the licensing without examination of a dentist who [satisfies the criteria of subsections (1)-(8)]." (Emphasis added.) The decision whether or not to implement this practice must be made in light of the more basic responsibilities of the Board. AS 08.36.070(a) mandates that the Board shall:

> (1) examine applicants and issue licenses to those applicants it finds qualified;
>
> . . .
>
> (8) adopt regulations ensuring that renewal of registration is contingent upon proof of continued professional competence by a licensed dentist....

(Emphasis added.)

As all dental patients know, the essence of dentistry is performing minutely delicate and precise procedures in the confined and extremely vulnerable area of the patient's mouth. In short, the practice of dentistry is at least as much craftsmanship as it is science. The only way to evaluate an individual dentist's abilities as a craftsman is to review examples of his work. The critical failure of licensing by credentials is that it does not adequately provide this review.

The premise of expedited licensing of dentists who have practiced for at least five years prior to applying for an Alaska license (See AS 08.36.234(3)) is that the prior period of practice in and of itself establishes technical professional competence. In reality, there are two flaws in this premise.

First, the standards of competence vary considerably from state to state and from region to region. Proof of continued professional competence is not required in many states. The consequence of accepting any individual's past practice as satisfactory credentials will, over time, lead to the lowering of competency standards in Alaska.

Second, in the case of dentists who have practiced in the military or in non-uniformed federal service (e.g., the Public Health Service), there has been no requirement of board certification or state licensing agency review of their competence. In Alaska, this is a matter of particular concern, since many dentists come to Alaska either in military or non-uniformed federal service and practice in remote areas virtually unsupervised.

AS 08.36.234(4) requires, as a prerequisite to licensure by credentials, that the applicant "...is not the subject of an unresolved complaint, review procedure or disciplinary proceeding undertaken by a dental licensing jurisdiction." In

reality, it is very difficult to verify this fact or to expose a misrepresentation of fact by an applicant. There presently exists no central clearing house of information regarding unresolved complaints or disciplinary proceedings. The varying privacy law standards of the several states has the effect of making this information unobtainable for many out-of-state applicants. And in the case of military and federal dentists, the individual may never have practiced in the state in which he or she obtained a license. In these instances the outside licensing-state board has no pertinent information on file, and only limited information about dental officers is available through a military commanding officer.

Our experience in Alaska with dentists licensed by credentials tends to confirm the seriousness of the risks of admitting incompetent or otherwise undesirable individuals into the practice of dentistry here. There have been numerous patient complaints against credentialled dentists filed with the State Division of Occupational Licensing. In one instance, the Board received a fortuitous report from the Illinois Attorney General's office that a licensed-by-credentials candidate had been charged with numerous counts of sexual abuse of patients in Illinois. Since these were pending charges that had not been entered of record, our earlier investigation of this applicant had not been able to uncover this information.

The Alaska Board of Dental Examiners' position on licensure by credentials is perhaps best summarized by Dr. George Hansen, President-Elect of the Alaska Dental Society. As he stated at the August 16, 1986 meeting of the Board of Dental Exmainers, "If the Board's goal is to protect dentists' freedom to practice, there should be licensure by credentials. But if the goal of the Board is to protect the public, the Board must examine applicants."

In closing, I would note for the record that none of the audit staff personnel who prepared the August 27, 1986 Special Report attended either a dental examination or a credentials interview.

Thank you for having given me this opportunity to respond to the Preliminary Report. My apologies for any inconvenience my delay in responding to the Report may have caused. In the interest of responding accurately to Recommendation Number 2, I concluded it would be best to wait until I returned from the December WREB Examination Review Committee meeting before composing this letter.

Very truly yours,

ROBERT E. WARREN, D.D.S.
Chairman
Alaska Board of Dental Examiners

rew:dkd

STATE OF ALASKA

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811-3300

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

January 6, 1987

Members of the Legislative Budget
and Audit Committee:

We have reviewed the Alaska Board of Dental Examiner's response to our preliminary report. Our comments follow:

Recommendation No. 1

There is nothing in the Board's response to make us change our position regarding dental licensure by credentials. Alaska Statute 08.36.234 is intended to provide a means for dental licensure without examination through the evaluation of a practicing dentist's theoretical knowledge and clinical skill based on their performance record. To this end, the provisions and requirements appear reasonable. Verification of a candidate's compliance with these provisions can be assured with minimal investigation if questions arise concerning the authenticity or validity of information provided on the candidate's application for licensure.

Investigations

The State of Alaska is currently active with the National Disciplinary Information System (NDIS). NDIS is a project of the National Clearinghouse on Licensure, Enforcement, and Regulation (CLEAR) which reports bi-monthly on disciplinary actions taken against licensed professionals in a number of professional disciplines. Its purpose is to alert state authorities and board members to disciplinary actions taken in other states so more complete information can be obtained about licensed professionals in their state. Review of reports provided through NDIS in conjunction with the review of a credential candidate's application provides an additional means for verifying that all final disciplinary actions have been disclosed.

Division of Occupational Licensing staff have stated that they do not foresee insurmountable difficulties in performing additional investigations and background checks of individual applicants if requested by the Board. Investigations of this nature commonly would identify and disclose situations where dentists are the subject of an unresolved

complaint, review procedure, or disciplinary proceeding undertaken by a dental licensing jurisdiction. The existence of unresolved issues of this nature may serve as grounds for denial by the Board of licensure without examination pursuant to AS 08.36.234(4).

It is our belief that Alaska law currently provides the Board adequate opportunity and means to investigate and verify a credential applicant's qualifications, as well as identify situations where incomplete or questionable information is attested to by applicants on their application for dental licensure.

Technical Ability and Professional Competence

We concur with the Board's belief that the only way to evaluate an individual dentist's abilities as a "craftsman" (technical skill) is to review examples of his/her work; however, we disagree that licensure by credentials is critically flawed in that it does not provide consideration of this issue.

In order to obtain a dental license in Alaska based on credentials, a candidate must possess a license from another state, territory, or region with licensing requirements at least equivalent in scope, quality, and difficulty to those of this state at the time of licensure (AS 08.36.234(2)). In all jurisdictions, initial licensure is based, at least in part, on the successful completion of a clinical examination wherein a dentist's "craftmanship" is assessed. This requirement, coupled with the requirement that an applicant has been engaged in continuous active practice averaging at least 20 hours per week for each of the five years immediately preceding the application (AS 08.36.234(3)), serve to evidence adequate clinical skill and continued application of those skills.

The requirement of five years of practice prior to eligibility for licensure by credentials is not intended to, nor does it, in and of itself establish technical professional competence as is suggested by the Board. It is a combination of this requirement, the requirement that an applicant be licensed in another jurisdiction, as well as fulfillment of the other requirements of AS 08.36.234, that serve as a basis for deeming a credential candidate technically and professionally competent to practice dentistry in Alaska.

Patient Complaints

Complaints lodged with the Division of Occupational Licensing do not support the Board's contention that there have been numerous complaints against credentialed dentists and,

as a result, a serious risk incurred from licensing dentists in this manner. Our review of the Division's complaint logs identified a total of 47 complaints filed since June 1, 1980 involving 35 individual dentists, only one of whom was licensed by credentials.

Gerald L. Wilkerson

Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of ~~5-DAY NOTICE~~ Blue
IN ~~ACCORDANCE~~ WITH UNIFORM RULE 23

FURTHER: FINANCE

**FISCAL NOTE(S) ATTACHED _____ **
IN ACCORDANCE WITH AS 24.08.035
(see below)

5/8/87 DATE TURNED INTO OFFICE 5/11/87

Mr. President:

HESS Committee considered CS SSHB 228(HESS)

regulation of the practice of denistry; efd.

and recommended:

[ ] replace with CS _____ [] same title
[] new title

[X] attached amendment(s) and

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

[ ] letter of intent adopted and attached

** Committee [X] attached or [ ] adopted fiscal note(s)
[ ] zero [X] fiscal impact previous

MEMBERS SIGNING DO PASS

Rick Halford
Jerry P. Greenwood
Jack Hoffbeck
Floyd Joe

OTHER RECOMMENDATIONS

Paul Fink Do Pass
Chairman signature and recommendation

[ ] Committee Backup Attached

(11)

HOUSE COMMITTEE REPORT

Date referred: 3/14/88 FURTHER REFERRALS:

DATE: 4/12/88

The Finance Committee has considered HB 229

"An Act relating to homicide by abuse."

RECOMMENDS:

[X] replace with CS HB 229 (Jud.) [ ] the same title [X] a new title

[ ] attached amendment(s)

[X] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[X] zero fiscal note (4) Dept. Law, Public Safety, Court System, Administration

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[X] same as previous zero fiscal note published 3/14/88 (Dept. of Correct.)

SIGNING DO PASS:

ADAMS Al Adams

POURCHOT Bob Pourchot

LARSON Ronald J. Larson

SWACK

BOILER Mark Boyer

FRANK

WALLIS Ray Wallis

RIEGER Steve Rieger

SIGNING OTHER RECOMMENDATIONS:

GOLL

BROWN Fay Brown

DAVIS Mike Davis

Al Adams

Chairman's signature

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 229(JUD)
PUBLISH DATE: HOUSE 3/14/88

FISCAL NOTE

No. 1

REQUEST:

Revision Date: _____
Title: "An Act relating to homicide by abuse."
Sponsor: Rep Hudson, Ulmer, Larson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
_____
Components: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

This legislation should have minimal impact on the Department of Corrections.

Prepared by: Susan E. Knighton, Director SK
Phone: 465-3376
Division: Administrative Services
Date: March 14, 1988

Approved by Commissioner: Susan Humphrey-Barnett
Date: March 14, 1988
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title: "An Act relating to homicide by abuse."
Sponsor: Representative Hudson
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution

Components: ALL

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: January 19, 1988

Grace Berg Schaible

Approved by Commissioner: Attorney General
Date: January 19, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 229

This bill would allow prosecution for homicide by abuse where a person engages in a pattern of assault of torture of a child under the age of 16 that results in the death of the child. Many of the cases which would be homicide by abuse under this new law are now being prosecuted as manslaughter or as criminally negligent homicide. Because the majority of these cases are already being prosecuted (although at a lower level), this bill will not have a significant fiscal impact on the department.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: An Act relating to homicide by abuse
Sponsor: Hudson, Ulmer, et. al.
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

KEB
JAR
1/25/88

Prepared by: Barbara Miklos, Executive Director Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault Date: 1/20/88

Approved by Commissioner: Dale O. Hoffbeck, Dep. Comm. Date: 1-28-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

JAN 2 1988

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 229
REQUEST: Publish Date:

Revision Date: 1-6-88
Title: An act relating to homocide by abuse
Sponsor: Hudson, Ulmer, Larson, ...
Requestor: House Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 1-6-88

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 1-6-88
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: 3/30/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to homicide by abuse."
Sponsor: Hudson, Ulmer, Larson, et al
Requestor: Judiciary, Finance

Agency Affected: Administration
BRU: Office of Public Advocacy
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 1/20/88

Approved by Commissioner: John Andrews
Date: 1/27/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FEB 1 1988

LEGISLATIVE FINANCE

page ____ of ____

Offered: 3/14/88
Referred: Finance

5-0977B

Original sponsors: Hudson, Ulmer,
Larson, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 229 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the definition of murder in the first degree to include homicide by a pattern or practice of assault or torture of a child under the age of 16."

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

* Section 1. AS 11.41.100(a) is amended to read:

(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) [(1)] causes the death of any person; or

(B) [(2)] compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages in a pattern or practice of assault or torture of a child under the age of 16 that results in the death of the child under circumstances manifesting extreme indifference to the value of human life; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child in at least two separate instances.

* Sec. 2. AS 11.41.115(a) is amended to read:

(a) In a prosecution under AS 11.41.100(a)(1)(A) [AS 11.41.-100(a)(1)] or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from

a serious provocation by the intended victim.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 229(JUD)
PUBLISH DATE: HOUSE 3/14/88

FISCAL NOTE

No. 1

REQUEST:

Revision Date: _____
Title: "An Act relating to homicide by abuse."
Sponsor: Rep. Hudson, Ulmer, Larson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

This legislation should have minimal impact on the Department of Corrections.

Prepared by: Susan E. Knighton, Director SK
Phone: 465-3376
Division: Administrative Services
Date: March 14, 1988

Approved by Commissioner: Susan Humphrey-Barnett
Date: March 14, 1988
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: "An Act relating to homicide by abuse."
Sponsor: Rep. Hudson, Ulmer, Larson
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
_____
Components: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

This legislation should have minimal impact on the Department of Corrections.

Susan E. Knighton

Susan E. Knighton, Director 465-3376

Prepared by: _____ Phone: _____
Division: Administrative Services Date: 4-11-88

Approved by Commissioner: Susan Humphrey Barnett Date: 4-11-88
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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APR 13 1988
LEGISLATIVE FINANCE

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: 3/30/87

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to homicide by abuse."
Sponsor: Hudson, Ulmer, Larson, et al
Requestor: Judiciary, Finance

Agency Affected: Administration
BRU: Office of Public Advocacy
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 1/20/88

Approved by Commissioner: John Andrews
Date: 1/27/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FEB 1 1988

LEGISLATIVE FINANCE

page ___ of ___

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 229
REQUEST: Publish Date:

Revision Date: 1-6-88 Agency Affected: Alaska Court System
Title: An act relating to homocide by abuse BRU: Trial Courts
Sponsor: Hudson, Ulmer, Larson, ... Components:
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel Phone: 264-8228
Division: Alaska Court System Date: 1-6-88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 1-6-88
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: An Act relating to homicide by abuse
Sponsor: Hudson, Ulmer, et. al.
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

KSB JAR 1-28-88

Prepared by: Barbara Miklos, Executive Director Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault Date: 1/20/88
Approved by Commissioner: Frank A. Rothschi, Dep. Comm. Date: 1-28-88
Agency: Public Safety

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

JAN 3 0 1988

HB 229

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 229
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title: "An Act relating to homicide by abuse."
Sponsor: Representative Hudson
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: ALL

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: January 19, 1988

Grace Berg Schaible

Approved by Commissioner: Attorney General — Date: January 19, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 229

This bill would allow prosecution for homicide by abuse where a person engages in a pattern of assault of torture of a child under the age of 16 that results in the death of the child. Many of the cases which would be homicide by abuse under this new law are now being prosecuted as manslaughter or as criminally negligent homicide. Because the majority of these cases are already being prosecuted (although at a lower level), this bill will not have a significant fiscal impact on the department.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

X *CRIMINAL DIVISION CENTRAL OFF*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
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_ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
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April 11, 1988

Honorable Albert P. Adams
Chairman, House Finance Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Adams:

At your staff's request, we are enclosing a copy of a letter we provided to the sponsor of CSHB 229. Should the committee have any questions regarding our letter, I will be available.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Stephanie E. Joannides
Stephanie E. Joannides
Assistant Attorney General

SEJ:jf-92

Enclosure

March 24, 1988

Honorable Bill Hudson
Alaska State House
P.O. Box V (MS 3100)
Juneau, Alaska 99811

RE: CS for House Bill 229 (Judiciary)

Dear Representative Hudson:

This is in response to your request that we review and comment upon CSHB 229. From my review of the bill, it appears that the primary objective is to increase the penalty for killing children under circumstances manifesting an extreme indifference to the value of human life. I therefore suggest that the bill be drafted to more directly accomplish that result, by changing the sentencing provisions, rather than changing the definitions of crimes.

Traditionally, murder in the first degree required a premeditated intent to kill. Alaska has abolished the requirement of premeditation but still requires an intent to kill. The crimes of murder in the second degree, manslaughter and criminally negligent homicide encompass all the other acts resulting in the death of another person, but which fall short of a clear intent to kill. Since the situation you are addressing involves unintentional (although extremely indifferent) killings, it is more appropriately classified as murder in the second degree, and no statutory change to the definition of that crime is required.

You have, however, focused on one of the anomalies of Alaska's sentencing laws. Because second-degree murder is an "unclassified" felony, it is not part of the presumptive sentencing system. Therefore, in imposing sentence a judge is not legally required to take into account statutory aggravating factors, which apply only to presumptive sentences. As you know, one of those aggravating factors is that "the defendant knew or reasonably should have know that the victim of the offense was particularly vulnerable or incapable of resistance due to ...extreme youth...." AS 12.55.155(c)(5). It would be quite simple to amend AS 12.55.125(b) to provide for an increased penalty, of perhaps a ten or fifteen-year minimum, for murder in

the second degree under those circumstances.

This more direct way of accomplishing your objective has the added advantage of avoiding the extremely difficult task of proving "a pattern or practice of assault or torture", which appears in the current version of the bill. The present wording requires that the two acts of serious physical injury "results" in the death, which may be impossible to prove in most instances. The Paulo/Pinkerton case in Juneau is a good example of the difficulty faced by the prosecution. In that case there was evidence of a broken arm on one occasion and then a month later the death resulted from a hard blow to the infant's abdomen. Even assuming the broken arm is legally "serious physical injury", it could not be proven that it contributed to the death, that is, that the death "resulted" from the combination of the broken arm and the other injury that are used to establish the "pattern or practice".

Should you wish to implement this suggestion, I will be more than happy to assist your staff.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Stephanie E. Joannides
Stephanie E. Joannides
Assistant Attorney General

SEJ/llm

ALASKA NETWORK
ON
DOMESTIC VIOLENCE
AND
SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women In Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC);
Maniilaq Regional Women's Crisis Program; MEN, Inc.;
Safe & Fear-Free Environment (SAFE); Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

HB 229

AN ACT AMENDING THE DEFINITION OF MURDER IN THE FIRST DEGREE TO INCLUDE HOMICIDE BY A PATTERN OR PRACTICE OF ASSAULT OR TORTURE OF A CHILD UNDER THE AGE OF 16.

The Alaska Network on Domestic Violence and Sexual Assault supports the concept of House Bill 229. Child abuse is a particularly heinous crime in that the offender exerts tremendous control and power over a child victim who has little or sometimes no ability to protect themself. Child abuse that results in death should be segregated out from other crimes in some manner and recognized within law for what it is: indifference to the value of human life in the utmost extreme. It is not at all the same as an isolated act of assault against an adult that results in death. It is a form of assaultive behavior against a person who is particularly incapable of defending themself that is repetitious and systematic and results in death.

POSITION PAPER

HB 229

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: __X__ None See attached fiscal note _____

Program impact: _____ None See analysis below __X__

Constitutional impact: _____ None See analysis below __X__

This bill creates a new crime of homicide by abuse. The apparent motivation for the bill is to increase the ease of conviction and the penalties for people who kill children. It is certainly hard not to sympathize with these purposes. However, a closer look at the bill and at the existing criminal law strongly suggests that the bill is not necessary and that sound policy dictates against making fundamental changes in the existing coherent criminal code.

a. The bill represents a major break with the principles underlying the comprehensive revised criminal code and presumptive sentencing scheme.

The existing criminal code defines four classes of criminal homicide. The distinctions among the classes rest primarily on the different culpable mental states. AS 11.41.100-.130, 11.81.900(a)(1)-(4). Thus, for example, first degree murder is defined as intentional homicide. AS 11.41.100(a). Second degree murder covers conduct which was not an intentional killing but was knowing or extremely reckless. AS 11.41.110(a). The bill creates a new crime which has elements comparable to existing second degree murder, because proof of an intentional killing is not required. However, the penalty provisions are equivalent to first degree murder.

The existing criminal code was the product of exhaustive study by professionals in the field of criminal justice and by the legislature. The purposes of the wholesale revision of the criminal code and sentencing statutes were to establish a coherent code which would distinguish among offenses according to their severity and to establish a penalty scheme which would eliminate unjustified disparity in sentencing. See AS 11.81.100, 12.55.005. The coherence of the code and the uniformity of the sentencing scheme are undermined each time a new crime is defined which does not fit within the existing framework.

b. Creating a new crime with an element of "pattern or practice" of abuse is not necessary to successful prosecution in child homicide cases.

The existing law allows prosecutors to charge and to convict defendants of murder when a death results from a pattern of abuse or torture which demonstrates manifest indifference to the value of the life of a child. AS 11.41.110(a)(2). Ordinarily, the history of abuse will be admissible. E.g., Rhodes v. State, 717 P.2d 422, 424-25 (Alaska App. 1986); Garner v. State, 711 P.2d 1191, 1192-93 (Alaska App. 1986); Jolley v. State, 655 P.2d 784, 785 (Alaska App. 1982). The only reported case where an Alaskan appellate court has held that a prior incident of abuse should have been excluded was Harvey v. State, 604 P.2d 586, 589 (Alaska App. 1979). At trial, Harvey conceded that he had severely spanked the victim, and the only point in dispute was whether or not the spanking, and not another assault by another person, caused the child's death. The state was allowed by the trial judge to present evidence that the defendant had once abused another child. The Supreme Court found that this incident of abuse on a different child was logically irrelevant to the issues disputed at trial. In more recent cases, where the issues at trial were the identity of the assailant or whether the assailant acted with manifest indifference to the value of the child's life, the appellate courts have approved admission of evidence of prior acts of abuse. Garner v. State, 711 P.2d at 1193; Rhodes v. State, 717 P.2d at 425. The holding in Rhodes approved admission of such evidence even where a different child was involved in the earlier incident.

c. Creating a new crime will not necessarily affect charging policies by prosecutors.

Substantial public outcry has been raised over one recent case, where a prosecutor elected to resolve a child homicide case by accepting a plea to negligent homicide. The prosecutor's decision may have reflected poor judgment, or it may have been influenced by a possibly erroneous evidentiary ruling by the trial judge. In either event, creating a new crime cannot compel prosecutors to charge the higher crime. The exercise of charging discretion by a prosecutor's office cannot be dictated by either the legislature or the courts. Norbert v. State, 718 P.2d 160 (Alaska App. 1986). Further, it is by no means clear that prosecutors consistently undercharge in child abuse cases. In two reported cases (Orrison v. State, 655 P.2d 782 (Alaska App. 1982) and Harvey v. State, 604 P.2d at 588), where there were no problems for the prosecutors with excluded evidence, the juries convicted the defendant of a less serious crime than what the prosecutor had charged.

d. The law should not distinguish among human lives on the basis of age.

By creating a special penalty scheme for non-intentional killings of one age group, the law seems to say that that group is valued more highly by our community than other age groups. It is doubtful

anyone could justify such a value judgment, which is why the present criminal code does not distinguish among assaultive crimes on the basis of the age of the victim.

The existing first and second degree murder statutes permit conviction and appropriately harsh punishments for defendants who kill through repeated assault or torture. Where the facts of a particular second degree murder case support a 99-year sentence, such a sentence is authorized, and the appellate courts have approved maximum sentences for second degree murder cases. E.g., Abruska v. State, 705 P.2d 1261, 1273-74 (Alaska App. 1985); Salud v. State, 630 P.2d 1008 (Alaska App. 1981)(99-year sentence reimposed and affirmed in unpublished opinion following remand); Nicholai v. State, MO&J No. 1336 (Alaska App. Feb. 27, 1987). The changes proposed by this bill are thus unnecessary to accomplish the objectives of the bill.

Based on the information above, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill.

(for)

Dana Fabe, Director
Public Defender Agency

4/30/87
Date

Brant McGee, Director
Office of Public Advocacy

4/30/87
Date

Sec. 11.31.150. Substantive crimes involving attempt or solicitation.

NOTES TO DECISIONS

Cited in Stuart v. State, Ct. App. Op. No. 464 (File No. A-276), 698 P.2d 1218 (1985).

Chapter 41. Offenses Against the Person.

Article
4. Sexual Offenses (§§ 11.41.443, 11.41.445)

Article 1. Homicide.

Sec. 11.41.100. Murder in the first degree.

NOTES TO DECISIONS

Conviction reversed where trial court's finding of voluntary Miranda waiver was in error. — See Hampel v. State, Ct. App. Op. No. 517 (File No. 7396), 706 P.2d 1173 (1985).

Conviction reversed because of admission of improperly seized evidence. — See Lowry v. State, Ct. App. Op. No. 528 (File No. A-249), 707 P.2d 280 (1985).

Sentence upheld. — See Travelstead v. State, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 494 (1984).

Sentence of consecutive 99-year terms for two murders is not clearly mistaken where the defendant presents a risk of continued criminal conduct which would seriously threaten the public safety. Krukoff v. State, Ct. App. Op. No. 467 (File No. A-183), 702 P.2d 664 (1985).

Sentence for attempted first degree murder upheld. — See Staael v. State, Ct. App. Op. No. 454 (File No. A-78), 697 P.2d 1050 (1985).

Cited in Lerchenstein v. State, Ct. App. Op. No. 453 (File No. 7729), 697 P.2d 312 (1985); Hart v. State, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); Ridgely v. State, Ct. App. Op. No. 503 (File No. A-30, A-43, A-56), 705 P.2d 924 (1985).

Sec. 11.41.110. Murder in the second degree.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

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 to cause his passengers' deaths and that he manifested an extreme indifference to the value of human life. Stiegele v. State, Ct. App. Op. No. 580 (File No. A-694), 714 P.2d 356 (1986).

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, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983), rev'd on other grounds, Sup. Ct. Op. No. 2931 (File No. S-206), 698 P.2d 1196 (1985).

First conviction of murder for motor vehicle homicide. — See Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983), rev'd on other grounds, Sup. Ct. Op. No. 2931 (File No. S-206), 698 P.2d 1195 (1985).

Offense of attempted second-degree murder was an impossibility. Hunt v. State, Ct. App. Op. No. 345 (File No. 7141), 678 P.2d 415 (1984).

Exclusion of evidence relating to proximate cause not error. — See Kusmider v. State, Ct. App. Op. No. 404 (File No. 7845), 688 P.2d 957 (1984).

Instructions. — The trial court did not err in declining to instruct the jury concerning imperfect self defense. Balentine v. State, Ct. App. Op. No. 536 (File No. A-381), 707 P.2d 922 (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, Sup. Ct. Op. No. 3064 (File No. S-616), ___ P.2d ___ (1986).

Conviction affirmed.

See Kusmider v. State, Ct. App. Op. No. 404 (File No. 7845), 688 P.2d 957 (1984).

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, Ct. App. Op. No. 550 (File No. A-694), 714 P.2d 356 (1986).

Conviction and sentence affirmed. — See Abruska v. State, Ct. App. Op. No. 502 (File No. 7672), 705 P.2d 1261 (1985).

Conviction reversed where trial court erred in instructing jury on self-defense. — See Klumb v. State, Ct. App. Op. No. 575 (File No. A-659), 712 P.2d 909 (1986).

Conviction reversed because of judicial error in not granting defendant's motion for change of venue. — See Nickola v. State, Ct. App. Op. No. 545 (File No. A-610), 708 P.2d 1292 (1985).

Sentence upheld. See Minchow v. State, Ct. App. Op. No. 299 (File No. A-15), 670 P.2d 719 (1983), Pears v. State, Ct. App. Op. No. 309 (File No. 6783), 672 P.2d 903 (1983), Jimmy v. State, Sup. Ct. Op. No. 409 (File No. A-51), 689 P.2d 504 (1984), Komakhuk v. State, Ct. App. Op. No. 626 (File No. A-1051), ___ P.2d ___ (1986).

Maximum sentence upheld. — See Gregory v. State, Sup. Ct. Op. No. 411 (File No. A-430), 689 P.2d 508 (1984).

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, Sup. Ct. Op. No. 2931 (File No. S-206), 698 P.2d 1195 (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, Ct. App. Op. No. 521 (File No. A-557), 706 P.2d 345 (1985).

Cited in Walsh v. State, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984), Stiegele v. State, Ct. App. Op. No. 382 (File No. A-399), 685 P.2d 1255 (1984), State v. Burdine, Ct. App. Op. No. 462 (File No. A-678), 698 P.2d 1216 (1985), Ridgely v. State, Ct. App. Op. No. 503 (File No. A-30, A-43, A-56), 705 P.2d 924 (1985).

Sec. 11.41.115. Defenses to murder.

NOTES TO DECISIONS

Stated in Walsh v. State, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984).

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A-56 P.2d

Sec. 11.41.120. Manslaughter.

NOTES TO DECISIONS

Criminally negligent homicide 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, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (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, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (1985).

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, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Prima facie case. — In most cases when the state shows that an intoxicated person drove a car and caused a death, it has made a prima facie case of manslaughter as defined in this statute. St. John v. State, Ct. App. Op. No. 602 (File No. A-779), 715 P.2d 1205 (1986).

Jury instructions. — The trial court did not err in instructing the jury that it had to unanimously acquit defendant of manslaughter before it could consider a lesser-included offense — negligent homicide. Dresnek v. State, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985), holding that in the future trial courts instructing juries should make it clear that the juries are free to discuss the evidence and the law in any order they find convenient.

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, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

The trial court erred in instructing the jury that a person who operates a motor vehicle while under the influence of alcohol is reckless per se, whether he is aware of the risks his conduct poses or not. St. John v. State, Ct. App. Op. No. 602 (File No. A-779), 715 P.2d 1205 (1986).

Jury instruction given on the relationship between intoxication and recklessness, challenged for the first time on appeal was not plain error. Adams v. State, Ct. App. Op. No. 617 (File No. A-880), 715 P.2d 164 (1986).

Evidence held sufficient to convict. — See Gibbs v. State, Ct. App. Op. No. 341 (File No. 7807), 676 P.2d 606 (1984).

Conviction reversed where relevant, highly probative character evidence regarding the victim was not admitted and a hearsay statement by a friend of the defendant was admitted. Williamson v. State, Ct. App. Op. No. 430 (File No. 6950), 692 P.2d 965 (1984).

The error in refusing to admit direct evidence that the other suspect in the death of an eighteen-month-old child had formerly abused her own child was not harmless, so the defendant's conviction was reversed. Garner v. State, Ct. App. Op. No. 569 (File No. A-731), 711 P.2d 1191 (1986).

Multiple sentences for multiple violations of statute. — See Dunlop v. State, Sup. Ct. Op. No. 3065 (File Nos. S-923, S-1163), P.2d (1986). See also AS 11.41.135 and notes thereto.

Sentence for manslaughter while driving under the influence, upheld. — See Clemans v. State, Ct. App. Op. No. 358 (File No. 7584), 680 P.2d 1179 (1984).

Sentence upheld. — See Maloney v. State, Ct. App. Op. No. 273 (File No. 6187), 667 P.2d 1258 (1983). Hughes v. State, Ct. App. Op. No. 283 (File No. 5217), 665 P.2d 842 (1983). Adams v. State, Ct. App. Op. No. 617 (File No. A-880), 718 P.2d 164 (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, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Applied in Pena v. State, Sup. Ct. Op. No. 2851 (File Nos. 6174, 7052), 684 P.2d 864 (1984).

Quoted in Walsh v. State, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984).

Cited in Walsh v. State, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984); Davis v. State, Ct. App. Op. No. 391 (File No. 7794), 684 P.2d 147 (1984); New v. State, Ct. App. Op. No. 587 (File No. A-815), 714 P.2d 378 (1986).

Sec. 11.41.130. Criminally negligent homicide.

NOTES TO DECISIONS

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, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (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, Ct. App. Op. No. 481 (File No. A-16), 702 P.2d 643 (1985).

Reckless vs. criminally negligent. — To be reckless, a person must be aware of and consciously disregard a risk, while a person is criminally negligent if he or she fails to perceive, and, therefore, disregards the risk in question. When a defendant is intoxicated and, therefore, unaware of a risk, the state is still obligated to prove that the defendant, given his faculties, his education, his experience, and his intelligence, would have perceived that risk but for his intoxication. St. John v. State, Ct. App. Op. No. 602 (File No. A-779), 715 P.2d 1205 (1986).

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, Ct. App. Op. No. 455 (File No. A-19), 697 P.2d 1059 (1985).

Conviction reversed because of inconsistent verdicts. — See Davis v. State, Ct. App. Op. No. 391 (File No. 7794), 684 P.2d 147 (1984).

Sentence excessive. — A sentence of five years with three years suspended for criminally negligent homicide was excessive where defendant was a first offender and the sentencing court did not find any significant aggravating factors or extraordinary circumstances surrounding defendant's offense, and the court of appeals remanded for a reduction of the sentence to three years with two years suspended. Shaisnikoff v. State, Ct. App. Op. No. 418 (File No. A-354), 690 P.2d 25 (1984).

Cited in Stiegele v. State, Ct. App. Op. No. 382 (File No. A-399), 685 P.2d 1255 (1984).

Sec. 11.41.135. Multiple deaths.

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. Dunlop v. State, Sup. Ct. Op. No.

Ct App Op
677 P.2d 912

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677 P.2d 912
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3065 (File Nos S-923, S-1163, P.2d (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, P.2d (Alaska 1975) to the extent it adopted Thessen.

Article 2. Assault and Reckless Endangerment.

Sec. 11.41.200. Assault in the first degree.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Serious physical injury. — In determining whether a victim has sustained a serious physical injury, it is far more appropriate to evaluate the nature of the injuries inflicted rather than the individual victim's physiological response to that injury. James v. State, Ct. App. Op. No. 304 (File No. 6981), 671 P.2d 855 (1983), rev'd on other grounds sub. nom. State v. James, Sup. Ct. Op. No. 2925 (File No. S-186), 698 P.2d 1161 (1985).

The trial court properly allowed presentation of evidence concerning the statistical risk of injuries such as those suffered by defendant's victim, and this evidence was sufficient to allow the question of serious physical injury to be submitted to the jury. James v. State, Ct. App. Op. No. 304 (File No. 6981), 671 P.2d 855 (1983), rev'd on other grounds sub. nom. State v. James, Sup. Ct. Op. No. 2925 (File No. S-186), 698 P.2d 1161 (1985).

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 defendant must know of the victim's past acts of violence. Amarok v. State, Ct. App. Op. No. 303 (File No. 6873), 671 P.2d 882 (1983).

Lesser included offense. — Third-degree assault, not second-degree assault, is a lesser included offense of first-degree assault. Komakhuk v. State, Ct. App. Op. No. 626 (File No. A-1081), P.2d (1986).

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, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 671 (1985).

General verdict of guilt upheld. — Trial court did not err in permitting a general verdict of guilt where the defendant had been charged with first degree assault, the single offense described in the section, under two theories. State v. James, Sup. Ct. Op. No. 2925 (File No. S-186), 698 P.2d 1161 (1985).

Conviction and sentence upheld. — See Contreras v. State, Ct. App. Op. No. 328 (File Nos. 6797-6799, 677 P.2d 884 (1984).

Conviction and sentence for kidnaping, assault in the first degree, misconduct involving weapons in the first degree and robbery in the first degree were affirmed. See Wortham v. State, Sup. Ct. Op. No. 414 (File No. 735), 666 P.2d 1 (1984).

Sentence upheld. — See Hassler v. State, Ct. App. Op. No. 276 (File No. 7552), 667 P.2d 732 (1983).

Sentence held excessive. — See Rhodes v. State, Ct. App. Op. No. 613 (File No. A-857), 717 P.2d 422 (1986).

Cited in Brown v. State, Ct. App. Op. No. 463 (File No. A-95), 698 P.2d 671 (1985); New v. State, Ct. App. Op. No. 587 (File No. A-815), 714 P.2d 379 (1986); Chief v. State, Ct. App. Op. No. 615 (File No. A-951), 718 P.2d 473 (1986).

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Chapter 41. Offenses Against The Person.

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

NOTES TO DECISIONS

Cited in Leuch v. State, Sup. Ct. Op. No. 2419 (File No. 5255), 633 P.2d 1006 (1981).

Article 1. Homicide.

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

40 C.J.S., Homicide, § 1 et seq.

Homicide by wanton or reckless use of firearm without express intent to inflict injury, 5 ALR 603; 23 ALR 1554.

Homicide or assault in attempting to prevent elopement, 8 ALR 660.

Wife's confession of adultery as affecting degree of homicide in killing her paramour, 10 ALR 470.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 275.

Intoxication as reducing homicide from murder to manslaughter, 12 ALR 868; 79 ALR 897.

Responsibility of persons participating in jail delivery for homicide committed by one of their number, 15 ALR 456.

Recommendation for mercy, 17 ALR 117; 55 ALR 639.

Homicide by unlawful act aimed at another, 18 ALR 917.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify, 18 ALR 1368; 61 ALR 321.

Homicide as affected by time elapsing between wound and death, 20 ALR 1006; 93 ALR 1470.

Humanitarian motives, homicide as affected by, 25 ALR 1007.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 ALR 921.

Death from arson. 87 ALR 414

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR2d 210

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

Use of set gun or similar device on defendant's own property. 44 ALR2d 383

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

Employer's liability to employee or agent for physical injury received as result of assault by third person. 9 ALR3d 517

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

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

Power of court to order or authorize discontinuation of extraordinary medical means of sustaining human life. 79 ALR3d 237.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient. 99 ALR3d 554

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

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

Sec. 11.41.100. Murder in the first degree. (a) A person commits the crime of murder in the first degree if, with intent to cause the death of another person, the person

(1) causes the death of any person; or

(2) compels or induces any person to commit suicide through duress or deception.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978)

Cross references. — For punishment, see AS 12.55.125(a), for provisions on insanity and competency to stand trial, see AS 12.47

NOTES TO DECISIONS

Editor'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, Sup. Ct. Op. No. 1480 (File No. 2475), 568 P.2d 960 (1977), cert. denied, 435 U.S. 928, 98 S. Ct. 1496, 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 (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, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

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, Ct. App. Op. No. 206 (File No. 5503), 658 P.2d 131 (1963).

A specific intent or purpose to kill is an essential element of the crime. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

The purpose to kill is an essential averment in any indictment for the violation of this section. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

Regardless of the means used. — See Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (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, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

The element of purpose must be alleged and proved. Marrone v. State, Sup. Ct. Op. No. 5 (File No. 5), 359 P.2d 969 (1961).

But proof of purpose need not be direct. It may be inferred from the circumstances attending the killing. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

Use of a deadly weapon if unexplained is one circumstance which tends to prove intent to kill. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (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, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

The fact of the killing, alone, does not support the finding of purpose or intent to kill. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

Doctrine of diminished capacity. — See Johnson v. State, Sup. Ct. Op. No. 885 (File No. 1477), 511 P.2d 118 (1973).

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, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976); Eben v. State, Sup. Ct. Op. No. 1920 (File No. 3525), 599 P.2d 700 (1979).

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

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. 190 (1950), aff'd, 13 Alaska 551, 195 F.2d 947 (9th Cir. 1951), cert. denied, 343 U.S. 906, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952).

Both second degree murder and manslaughter could be lesser included offenses to first degree murder. Gray v. State, Sup. Ct. Op. No. 595, File Nos. 1003, 1005, 463 P.2d 897 (1970). Bendle v. State, Sup. Ct. Op. No. 1710 (File No. 2859), 583 P.2d 840 (1978). Gieffels v. State, Sup. Ct. Op. No. 1787 (File No. 3258), 590 P.2d 55 (1979).

Inciting commission of crime as lesser offense of first-degree murder under former AS 11.15.010. — See Cassell v. State, Ct. App. Op. No. 91 (File No. 5138), 645 P.2d 219 (1982).

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978).

Evidence necessary for conviction in homicide case. — See Armstrong v. State, Sup. Ct. Op. No. 843 (File No. 1337), 502 P.2d 440 (1972).

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, Sup. Ct. Op. No. 1347 (File No. 2548), 559 P.2d 66 (1976).

Indictment sufficient. — See Flores v. State, Sup. Ct. Op. No. 491 (File No. 879), 443 P.2d 73 (1968).

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, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (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, Sup. Ct. Op. No. 1710 (File No. 2859), 583 P.2d 840 (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, Sup. Ct. Op. No. 1710 (File No. 2859), 583 P.2d 840 (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. Ostrosk v. State, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Only one conviction of murder should be allowed for the killing of one man. Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (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, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

"Purposely" under former AS 11.15.010. — See Gray v. State, Sup. Ct. Op. No. 595 (File Nos. 1003, 1005), 463 P.2d 897 (1970).

Former requirements of deliberation and premeditation construed. — See Jones v. United States, 12 Alaska 407, 177 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, Sup. Ct. Op. No. 196 (File No. 404), 390 P.2d 433 (1964).

Maximum sentence for first-degree murder upheld. See Hoover v. State, Ct. App. Op. No. 72, File No. 6223, 641 P.2d 126 (1982).

Sentence upheld. — See Hoffmire v. State, Sup. Ct. Op. No. 904 (File No. 1545), 511 P.2d 1292 (1973). Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978). Morgan v. State, Sup. Ct. Op. No. 1663 (File No. 2894), 582 P.2d 1017 (1978). Wilson v. State, Sup. Ct. Op. No. 1692 (File No. 3404), 582 P.2d 154 (1978). Bendle v. State, Sup. Ct. Op. No. 1710 (File No. 2859), 583 P.2d 840 (1978). Vail v. State, Sup. Ct. Op. No. 1922 (File Nos. 3309, 3382), 599 P.2d 137 (1979). Brown v.

State, Sup. Ct. Op. No. 1947, File No. 3252, 601 P.2d 22 (1979); Smallie v. State, Sup. Ct. Op. No. 2109, File No. 3903, 612 P.2d 1003 (1980); Gustv v. State, Sup. Ct. Op. No. 2218, File No. 4834, 619 P.2d 724 (1980); Tuckfield v. State, Sup. Ct. Op. No. 2322, File No. 4412, 626 P.2d 95 (1981); Carman v. State, Ct. App. Op. No. 206, File No. 5569, 676 P.2d 1311 (1984); Nukapigak v. State, Sup. Ct. Op. No. 2667, File No. 5820, P.2d (1984).

Applied in Nukapigak v. State, Ct. App. Op. No. 9, File No. 5[illegible], 615 P.2d 615 (1982); [illegible] v. State, Ct. App. Op. No. 90, File No. 5[illegible], 647 P.2d [illegible] (1982).

Stated in Norton v. State, Ct. App. Op. No. 172, File No. 6211, 657 P.2d 847 (1982).

Cited in Hendrix v. State, Sup. Ct. Op. No. 2155, File No. 3941, 615 P.2d 627 (1980); Kirby v. State, Ct. App. Op. No. 117, File No. 5738, 649 P.2d 90 (1982); Page v. State, Ct. App. Op. No. 207, File No. 6[illegible], 667 P.2d 67[illegible] (1983).

Collateral references. — Homicide by companion of defendant while attempting to escape from scene of crime as murder in first degree. 22 ALR 858, 108 ALR 847.

Death resulting from arson as within contemplation of statute which makes homicide in perpetration of felony murder in first degree. 87 ALR 414.

What conduct amounts to an overt act or act done toward commission of murder so as to sustain charge of attempt to murder. 98 ALR 918.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 166 ALR 1194.

Inference of malice or intent to kill where killing is by blow with deadly weapon. 22 ALR2d 854.

Felonious killing of one co-participant by the entireties by the other as affecting latter's rights in the property. 71 ALR2d 1098.

What constitutes attempted murder. 84 ALR3d 612.

What constitutes murder by torture. 6 ALR3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 95 ALR3d 925.

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 intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants.

(b) Murder in the second degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978)

Cross references. — For provision [illegible] see AS 12.55.125(i).

NOTES TO DECISIONS

I General Consideration
II Felony Murder

I. GENERAL CONSIDERATION.

Editor'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, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (1973).

Second degree murder is a homicide which is unlawful, and that is not excusable under the law. Jennings v. State, Sup. Ct. Op. No. 295 (File No. 581), 404 P.2d 652 (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, Sup. Ct. Op. No. 295 (File No. 581), 404 P.2d 652 (1965); Johnson v. State, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (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. Nettze v. State, Ct. App. Op. No. 172, File No. 6243, 655 P.2d 325 (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, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1136 (1976).

The term "intentionally" as used in 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". Nettze v. State, Ct. App. Op. No. 172, File No. 6243, 655 P.2d 325 (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). Nettze v. State, Ct. App. Op. No. 172, File No. 6243, 655 P.2d 325 (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, Sup. Ct. Op. No. 2006 (File No. 3594), 609 P.2d 1038 (1980).

The element of purpose must be alleged and proved. Marrone v. State, Sup. Ct. Op. No. 5, File No. 5, 359 P.2d 969 (1961).

Former element of malice construed. — See Johnson v. State, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (1973).

Doctrine of diminished capacity. — See Johnson v. State, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (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. Nettze v. State, Ct. App. Op. No. 172, File No. 6243, 655 P.2d 325 (1982).

Evidence necessary for conviction in homicide case. — See Armstrong v. State, Sup. Ct. Op. No. 843, File No. 1337, 502 P.2d 440 (1972).

Case properly before jury. — See Dorman v. State, Sup. Ct. Op. No. 2272 (File No. 4444), 622 P.2d 448 (1981).

As to entitlement to second-degree murder instruction in first-degree murder case, see note to AS 11.41.100. Bendle v. State, Sup. Ct. Op. No. 1710, File No. 2879, 587 P.2d 240 (1978).

Instructions. — See [illegible] v. State, Sup. Ct. Op. No. [illegible], File No. [illegible], [illegible] P.2d 1018 (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. Padro v. State, Sup. Ct. Op. No. 1359, File No. 3114, 557 P.2d 1138 (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, Sup. Ct. Op. No. 2272, File No. 4444, 622 P.2d 448 (1981).

It was not harmless error to prosecute for felony-murder based on underlying crime of burglary to fail to give felony-murder merger instruction. Kirby v. State, Ct. App. Op. No. 117, File No. 5738, 649 P.2d 963 (1982).

Constitutionality of former penalty. — See Green v. State, Sup. Ct. Op. No. 190, File No. 404, 390 P.2d 431 (1964).

Conviction affirmed. — See Castillo v. State, Sup. Ct. Op. No. 2124, File No. 4561, 614 P.2d 756 (1980).

Sentence upheld. — See Cordero v. State, Sup. Ct. Op. No. 802, File No. 1411, 498 P.2d 276 (1972); Johnson v. State, Sup. Ct. Op. No. [illegible], File No. 1477, 511 P.2d 118 (1973); Miller v. State, Sup. Ct. Op. No. 1825, File No. 3984, 592 P.2d 1247 (1979); Ahwinona v. State, Sup. Ct. Op. No. 1894, File No. 4220, 595 P.2d 76 (1979); Gipson v. State, Sup. Ct. Op. No. [illegible], File No. [illegible], 606 P.2d [illegible] (1980); State, Sup. Ct. Op. No. [illegible], File No. 4540, 611 P.2d [illegible] (1980); [illegible] v. State, Ct. App. Op. No. [illegible], File No. [illegible], 619 P.2d 480 (1980); [illegible] v. State, Sup. Ct. Op. No. 2220, File No. [illegible], [illegible] (1981); Bryant v. State, Sup. Ct. Op. No. 2284, File No. [illegible], [illegible] (1981); Davidson v. State, Ct. App. Op. No. 78, File No. 443[illegible], 642 P.2d [illegible] (1982); Faulkenberry v. State, Ct. App. Op. No. 110, File No. 6231, 645 P.2d [illegible] (1982); Van Cleve v. State, Ct. App. Op. No. 121, File No. [illegible], 645 P.2d [illegible] (1982) (decided under former [illegible]); Page v. State, Ct. App. Op. No. [illegible], File No. 6205, 657 P.2d [illegible] (1983).

II. FELONY MURDER.

Felony murder does not require intent to kill. — [illegible] unless [illegible] by [illegible] under the new code and [illegible] which is second-degree murder does not currently require an intent to kill. Carmack v. State, Ct. App. Op. No. 2[illegible], File No. 3503, 658 P.2d 131 (1983).

Former felony murder provisions construed. — See Gray v. State, Sup. Ct. Op. No. 595, File Nos. 1003, 1017, 402 P.2d 867 (1970); Morgan v. State, Sup. Ct. Op. No. 1663, File No. 2884, 502 P.2d 1017 (1972); Thomas v. State, Sup. Ct. Op. No. 872, File No. 1607, 506 P.2d [illegible] (1973); Beasley v. State, Sup. Ct. Op. No. 1710, File No. 2830, 516 P.2d [illegible] (1973); Green v. State, Sup. Ct. Op. No. [illegible], File No. 3278, 560 P.2d [illegible] (1977); Decker v. State, Ct. App. Op. No. [illegible], File No. 4369, 632 P.2d 241 (1981).

Collateral references. — Drunkenness as affecting existence of elements essential to murder in second degree. 5 ALR 1052.

Spouse's confession of adultery as affecting [illegible] killing spouse or his or her paramour. 21 ALR3d 925.

Sec. 11.41.115. Defenses to murder. (a) In a prosecution under AS 11.41.100(a)(1) or 11.41.110(a)(1), it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

(b) In a prosecution under AS 11.41.110(a)(3), it is an affirmative defense that the defendant

(1) did not commit the homicidal act or in any way solicit or aid in its commission;

(2) was not armed with a dangerous instrument;

(3) had no reasonable ground to believe that another participant, if any, was armed with a dangerous instrument; and

(4) had no reasonable ground to believe that another participant, if any, intended to engage in conduct likely to result in death or serious physical injury.

(c) A person may not be convicted of murder in the second degree under AS 11.41.110(a)(3) if the only underlying crime is burglary, the sole purpose of the burglary is a criminal homicide, and the person killed is the intended victim of the defendant. However, if the defendant causes the death of any other person, the defendant may be convicted of murder in the second degree under AS 11.41.110(a)(3). Nothing in this subsection precludes a prosecution for or conviction of murder in the first degree or murder in the second degree under AS 11.41.110(a)(1) or (2) or of any other crime, including manslaughter or burglary.

(d) *[Repealed, § 44 ch 102 SLA 1980.]*

(e) Nothing in (a) or (b) of this section precludes a prosecution for or conviction of manslaughter or any other crime not specifically precluded.

(f) In this section,

(1) "intended victim" means a person whom the defendant was attempting to kill or to whom the defendant was attempting to cause serious physical injury when the defendant caused the death of the person the defendant is charged with killing;

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as the defendant reasonably believed them to be. Insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation. (§ 3 ch 166 SLA 1978; am §§ 3, 44 ch 102 SLA 1980)

Cross references. — For use of deadly force in defense of self as justification of conduct, see AS 11.81.335; for provisions concerning insanity and competency to stand trial, see AS 12.47.

Effect of amendments. — The 1980 amendment substituted "Nothing in (a) or (b)" for "Nothing in (a), (b), or (d)" at the beginning of subsection (e), and repealed 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, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Origin. — This section is based on Illinois Criminal Code Chapter 38 § 9-2(a); Martin v. State, Ct. App. Op. No. 261 (File No. 6665), 664 P.2d 612 (1983).

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, Ct. App. Op. No. 117 (File No. 5748), 649 P.2d 963 (1982).

Insufficient evidence of heat of passion to warrant instruction. Martin v. State, Ct. App. Op. No. 261 (File No. 6665), 664 P.2d 612 (1983).

Extreme emotional disturbance. — The legislature did not intend to make "extreme emotional disturbance" a defense to murder. Martin v. State, Ct. App. Op. No. 261 (File No. 6665), 664 P.2d 612 (1983).

Self-defense. — See Pedersen v. State, Sup. Ct. Op. No. 369 (File No. 621), 422 P.2d 327 (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.

Applied in Weston v. State, Ct. App. Op. No. 153 (File No. 5754), 650 P.2d 1188 (1982).

Quoted in Houston v. State, Sup. Ct. Op. No. 1970 (File No. 4339), 612 P.2d 784 (1979).

Cited in Wright v. State, Ct. App. Op. No. 204 (File No. 6569), 676 P.2d 1226 (1983).

Collateral references. — Voluntary intoxication as defense to homicide. 12 ALR 861; 79 ALR 897.

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

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

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

Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

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.

Withdrawal, after provocation of conflict, as reviving right of self-defense. 55 ALR3d 1000.

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

Effect of voluntary drug intoxication upon criminal responsibility. 70 ALR3d 9.

When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 ALR3d 195.

Sec. 11.41.120. Manslaughter. (a) A person commits the crime of manslaughter if the person

(1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree; or

(2) intentionally aids another person to commit suicide.

(b) Manslaughter is a class A felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

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

Alaska's new criminal code totally abandons the unlawful act approach to manslaughter and contains no misdemeanor-manslaughter provisions. Keith v. State, Sup. Ct. Op. No. 2099 (File No. 4003), 612 P.2d 977 (1980).

For case holding that the misdemeanor-manslaughter doctrine was encompassed within former manslaughter statute, see Keith v. State, Sup. Ct. Op. No. 2099 (File No. 4003), 612 P.2d 977 (1980).

Requirements for manslaughter under former law. — See United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (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); United States v. Ahsweine, 15 Alaska 485, 17 F.R.D. 211 (D. Alas. 1955); Jennings v. State, Sup. Ct. Op. No. 295 (File No. 581), 404 P.2d 652 (1965); Johnson v. State, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (1973).

Offense is included in the greater charge of murder. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (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).

An indictment for first degree murder is sufficient to embrace involuntary manslaughter. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (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).

Involuntary manslaughter is necessarily included in the offense of second degree murder. Johnson v. State, Sup. Ct. Op. No. 888 (File No. 1477), 511 P.2d 118 (1973).

Depending on the facts of a given case, both second degree murder and manslaughter could be lesser included offenses to first degree felony murder. Gieffels v. State, Sup. Ct. Op. No. 1787 (File No. 3258), 590 P.2d 55 (1979).

Second-degree murder distinguished. — The requirement of "extreme indifference to the value of human life" contained in the definition of second-degree murder (AS 11.41.110(a)(2)) sufficiently distinguishes that offense from manslaughter so as to satisfy the requirements of equal protection. Neitzel v. State, Ct. App. Op. No. 172 (File No. 6243), 655 P.2d 325 (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, Sup. Ct. Op. No. 1379 (File No. 3113), 557 P.2d 1138 (1976).

Involuntary manslaughter is not a lesser crime than voluntary manslaughter. DeJardins v. State, Sup. Ct. Op. No. 1247 (File No. 2280), 551 P.2d 181 (1976).

There is no statutory distinction in Alaska between voluntary and involuntary manslaughter. La Londe v. State, Sup. Ct. Op. No. 2142 (File No. 4541), 614 P.2d 808 (1980).

Second degree arson and manslaughter considered separate offenses. — Since the second degree arson statute protected a property interest while the manslaughter statute protected the paramount personal interest of protection of human life, they should have been considered separate offenses for double jeopardy purposes. Jacinth v. State, Sup. Ct. Op. No. 1829 (File No. 3507), 593 P.2d 263 (1979).

For case decided prior to the enactment of AS 11.41.150 which held that consecutive sentences could not be imposed for convictions on numerous counts of manslaughter under circumstances where the one act of arson involved multiple victims, see Thessen v. State, Sup. Ct. Op. No. 872 (File No. 1607), 508 P.2d 1192 (1973).

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). DeJardins v. State, Sup. Ct. Op. No. 1247 (File No. 2280), 551 P.2d 181 (1976).

For cases construing former culpable negligence statute, see note to AS 11.41.130.

Statute of limitations. — While there is no statute of limitations in Alaska for the offense of murder, the crime of manslaughter is subject to a five-year statute of limitations. Padie v. State, Sup. Ct. Op. No. 1849 (File No. 3564), 594 P.2d 50 (1979).

Where defendant's waiver of the relevant statute of limitations was knowingly, intelligently, and voluntarily entered, it was made for defendant's benefit and after consultation with counsel, and defendant's waiver did not [illegible] any of the policy reasons underlying criminal statutes of limitations, the superior court possessed jurisdiction to accept defendant's plea of nolo contendere to the charge of manslaughter after the statute of limitations had run. Padie v. State, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Doctrine of diminished capacity. — See Johnson v. State, Sup. Ct. Op. No. 88[illegible] (File No. 1477), 511 P.2d 11[illegible] (1973).

Intoxication constituted no defense to the crime of manslaughter because the crime as defined under former AS 11.15.040 required no specific intent which could possibly have been negated by the intoxication. Kwasnikoff v. State, Sup. Ct. Op. No. 1034 (File No. 19[illegible]), 521 P.2d 903 (1974).

Self-defense. — See Gregory v. State, Sup. Ct. Op. No. 757 (File No. 1419), 492 P.2d 108 (1971).

Judge entitled to know details of accused's criminal conduct. — The trial judge is entitled to know to the fullest extent possible the details of accused's criminal conduct. Egelak v. State, Sup. Ct. Op. No. 463 (File No. 855), 438 P.2d 712 (1968).

Hence, he may examine photographs of victim's body. — It was not prejudicial error for the trial judge to have examined the photographs of the victim's body prior to imposition of sentence. Egelak v. State, Sup. Ct. Op. No. 463 (File No. 855), 438 P.2d 712 (1968).

View of evidence on motion for judgment of acquittal. — Where defendant was tried for murder and convicted of the included offense of manslaughter, the supreme court stated that the rule adopted for Alaska was that on a motion for judgment of acquittal, the trial court must take the view of the evidence, and the inferences therefrom, which is most favorable to the prosecution. Eaton v. State, Sup. Ct. Op. No. 194 (File No. 223), 3[illegible] P.2d 21[illegible] (1964).

Evidence held sufficient to establish cause of death. — See West v. State, Sup. Ct. Op. No. 319 (File No. 572), 409 P.2d 847 (1966).

The circumstantial evidence was substantial evidence sufficient, beyond a reasonable doubt, to support the superior court's finding that defendant was guilty of the crime of manslaughter. Kwasnikoff v. State, Sup. Ct. Op. No. 1034 (File No. 19[illegible]), 521 P.2d 90[illegible] (1974).

Evidence necessary for conviction in homicide case. — See Armstrong v. State, Sup. Ct. Op. No. [illegible] (File No. [illegible]), 502 P.2d 4[illegible] (1972).

Evidence held sufficient to convict. — See Jacobson v. State, Sup. Ct. Op. No. 182[illegible] (File No. [illegible]), [illegible] P.2d 26[illegible] (1979).

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, Sup. Ct. Op. No. 135[illegible] (File No. [illegible]), [illegible] P.2d [illegible] (1976).

On appeal from a conviction of manslaughter, it was held that the trial court erred in including in its instruction on presumption of innocence that such presumption was not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment. Reynolds v. United States, 16 Alaska 5[illegible], 2[illegible] F.2d 4[illegible] (9th Cir. 1956).

Homicide, being a most serious crime, normally calls for the imposition of significant sanctions. State v. A[illegible], Sup. Ct. Op. No. [illegible] (File No. [illegible]), [illegible] P.2d 2[illegible] (1977).

Review of evidence on appeal. — In an appeal from a conviction of the crime of manslaughter, the court must consider the evidence in the light most favorable to the government. Reynolds v. United States, 16 Alaska 5[illegible], 2[illegible] F.2d 4[illegible] (9th Cir. 1956).

Reduction of murder conviction. — The standard for reducing a murder conviction to manslaughter is the "reasonable person standard." An intentional killing in the sudden heat of passion is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable person in the passion of the moment to lose self control and commit the act on impulse and without reflection. LaLonde v. State, Sup. Ct. Op. No. 2[illegible] (File No. 474[illegible]), 614 P.2d 808 (1980).

Sentence upheld. — See Gregory v. State, Sup. Ct. Op. No. 757 (File No. 1419), 492 P.2d 108 (1971); Hartley v. State, Sup. Ct. Op. No. 92[illegible] (File No. 1665), 513 P.2d 1115 (1973); Stallman v. State, Sup. Ct. Op. No. [illegible] (File No. [illegible]), [illegible] P.2d 202

(1975); Lavlock v. State, Sup. Ct. Op. No. 1265, File No. 2749, 549 P.2d 1182 (1976); Godwin v. State, Sup. Ct. Op. No. 1270, File No. 2790, 554 P.2d 455 (1976); Bishop v. State, Sup. Ct. Op. No. 1545, File No. 3451, 573 P.2d 850 (1978); Alpiak v. State, Sup. Ct. Op. No. 1671, File No. 3884, 581 P.2d 664 (1978); Ripley v. State, Sup. Ct. Op. No. 1789, File No. 3432, 590 P.2d 48 (1979); Jacinth v. State, Sup. Ct. Op. No. 1829, File No. 3507, 599 P.2d 265 (1979); Labarbera v. State, Sup. Ct. Op. No. 1902, File No. 3445, 585 P.2d 947 (1978), decided under former AS 11.15.040; Peterson v. State, Sup. Ct. Op. No. 1977, File No. 4470, 602 P.2d 1254 (1979); Adkinson v. State, Sup. Ct. Op. No. 2090, File No. 3506, 611 P.2d 525, cert. denied, 449 U.S. 876, 101 S. Ct. 219, 66 L. Ed. 2d 97 (1980); Rodriguez v. State, Sup. Ct. Op. No. 2131, File No. 5032, 613 P.2d 1255 (1980); Nygren v. State, Sup. Ct. Op. No. 2194, File No. 4219, 610 P.2d 20 (1980); Richards v. State, Sup. Ct. Op. No. 2175, File No. 4620, 616 P.2d 870 (1980); Phillips v. State, Sup. Ct. Op. No. 2229, File No. 4877, 625 P.2d 816 (1980).

Sentence too lenient. — See State v. Abraham, Sup. Ct. Op. No. 1448, File No. 3171, 506 P.2d 207 (1977).

A sentence of less than one year's actual incarceration for drunken-driver manslaughter was too lenient. State v. Lamebull, Ct. App. Op. No. 165, File No. 6068, 638 P.2d 1060 (1982).

Sentence held excessive. — See Sumabat v. State, Sup. Ct. Op. No. 1645, File No. 3739, 580 P.2d 323 (1978); Husted v. State, Ct. App. Op. No. 25, File No. 5509, 629 P.2d 985 (1981).

Sentence modified. — See Notaro v. State, Sup. Ct. Op. No. 2055, File No. 4727, 608 P.2d 769 (1980).

Remand for sentence review. — See Padie v. State, Sup. Ct. Op. No. 1843, File No. 3564, 594 P.2d 50 (1979).

Quoted in Valentine v. State, Sup. Ct. Op. No. 2100, File No. 4124, 617 P.2d 751 (1980).

Cited in Sears v. State, Ct. App. Op. No. 151, File No. 6092, 654 P.2d 449 (1982); Pena v. State, Ct. App. Op. No. 245, File No. 6174, 664 P.2d 169 (1983); Martin v. State, Ct. App. Op. No. 261, File No. 6663, 664 P.2d 612 (1983).

Collateral references. — Wanton or reckless use of firearms without expressed intent to inflict injury. 5 ALR 905, 25 ALR 1554.

Aiding and abetting suicide. 12 ALR 1275.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law. 99 ALR 756.

Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence" appearing in statute defining or governing manslaughter. 161 ALR 10.

Who other than actor is liable for manslaughter. 95 ALR2d 175.

Failure to provide medical or surgical attention. 100 ALR2d 453.

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 559.

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. 58 ALR3d 239.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 132.

Necessity and effect in homicide prosecution of expert medical testimony as to cause of death. 65 ALR3d 255.

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. 95 ALR3d 925.

Criminal liability for injury or death caused by operation of pleasure boat. — See ALR4th 880.

Propriety of man-slaughter conviction in prosecution for negligent abuse or neglect 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 C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

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

Alaska's new criminal code totally abandons the unlawful act approach to manslaughter and contains no misdemeanor-manslaughter provisions. Keith v. State, Sup. Ct. Op. No. 2099 (File No. 4003), 612 P.2d 977 (1980).

For case holding that the misdemeanor-manslaughter doctrine was encompassed within former manslaughter statute, see Keith v. State, Sup. Ct. Op. No. 2099 (File No. 4003), 612 P.2d 977 (1980).

A criminal negligence theory was within the purview of former AS 11.15.040. DeSacia v. State, Sup. Ct. Op. No. 608 (File No. 1071), 469 P.2d 369 (1970).

Meaning of "culpable negligence" under former AS 11.15.080. — See United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 965, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952); DeSacia v. State, Sup. Ct. Op. No. 608, File No. 1071, 469 P.2d 369 (1970); Stone v. State, Sup. Ct. Op. No. 1365, File No. 2705, 559 P.2d 99 (1977); O'Leary v. State, Sup. Ct. Op. No. 2003, File No. 3466, 604 P.2d 1099 (1979).

Under the former culpable negligence statute it was assumed that purpose or intent to kill is absent. United States v. Barbeau, 12 Alaska 725, 92 F. Supp. 196 (1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 965, 72 S. Ct. 1064, 96 L. Ed. 1364 (1952); Giles v. United States, 10 Alaska 455, 144 F.2d 860 (9th Cir. 1944).

In Alaska, negligent homicide is a form of manslaughter, and intent is not an element of the crime. O'Leary v. State, Sup. Ct. Op. No. 2003 (File No. 3466), 604 P.2d 1099 (1979).

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). DeJardin v. State, Sup. Ct. Op. No. 1245 (File No. 2280), 551 P.2d 181 (1976).

Involuntary manslaughter is not a lesser crime than voluntary manslaughter. DeJardin v. State, Sup. Ct. Op. No. 1245 (File No. 2280), 551 P.2d 181 (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. 965, 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 (1950), aff'd, 13 Alaska 551, 193 F.2d 945 (9th Cir. 1951), cert. denied, 343 U.S. 965, 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, Sup. Ct. Op. No. 2003, File No. 3466, 604 P.2d 1099 (1979).

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, Sup. Ct. Op. No. 1595, File No. 3156, 577 P.2d 257 (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, Sup. Ct.

Op. No. 1598, File No. 3156, 577 P.2d 245 (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, Sup. Ct. Op. No. 1598, File No. 3156, 577 P.2d 245 (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, Sup. Ct. Op. No. 1960, File No. 2987, 603 P.2d 468 (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 intoxication was the cause of the victim's death. Lupro v. State, Sup. Ct. Op. No. 1960, File No. 2987, 603 P.2d 468 (1979).

Indictment supported by evidence. — Indictment which in negligent homicide charge stated that defendant did unlawfully, by culpable negligence, kill a child by striking the child with his hand with excessive force and violence, was supported by the evidence although the pathologist who examined the infant told the grand jury that death resulted from a "blunt force injury of some kind" to the head and no evidence showed that defendant ever struck the child on the head, since a "blunt force injury to the head" does not necessarily require a blow to the head itself, the term "striking" as used in the indictment was not limited to a blow or a punch, but might include other forms of violent physical conduct, and the grand jury testimony established that defendant had severely spanked the child and then beaten him against the floor. Harvey v. State, Sup. Ct. Op. No. 1990, File No. 3921, 604 P.2d 586 (1979).

Sentencing considerations. — In any case involving loss of life, and particularly in an offense involving driving while under the influence of alcohol, major considerations in sentencing are the goals to deterrence of the members of the community and community condemnation of the offender and the offense so as to reaffirm societal norms and to maintain respect for those norms. Rosendahl v. State, Sup. Ct. Op. No. 1807, File No. 4087, 591 P.2d 538 (1979).

Sentence for negligent homicide upheld. — See Sandvik v. State, Sup. Ct. Op. No. 1419, File No. 2738, 564 P.2d 20 (1977); Annayoc v. State, Sup. Ct. Op. No. 1805, File No. 3704, 590 P.2d 904 (1979); Rosendahl v. State, Sup. Ct. Op. No. 1807, File No. 4087, 591 P.2d 538 (1979); Contreras v. State, Ct. App. Op. No. 144, File No. 6530, 652 P.2d 110 (1982).

Sentence for negligent homicide involving a vehicle disapproved as too lenient. — See State v. Lupro, Ct. App. Op. No. 27, File No. 5473, 630 P.2d 18 (1981), decided under former AS 11.15.080.

Sentence excessive. — Sentence of five years with three years suspended was clearly mistaken where defendant was young, had no prior criminal record, the evidence showed that at the time of the accident defendant had been drinking but was not intoxicated, and the major cause of the accident appeared to have been that defendant was operating the car carelessly because she had been out all night with friends and had not had enough sleep. Sears v. State, Ct. App. Op. No. 151, File No. 669, 653 P.2d 349 (1982).

Collateral references. — Overturning boat, negligent homicide by, 3 ALR 1104.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 ALR 922.

Drowsiness of operator of automobile, 160 ALR 515.

Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence" appearing in statute defining or governing manslaughter, 161 ALR 10.

Druggist's criminal responsibility for death or injury in consequence of mistake, 55 ALR2d 714.

Criminal responsibility of motor vehicle operator for accident arising from physical defect, illness, drowsiness, or falling asleep, 63 ALR2d 983.

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

Criminal [illegible] for [illegible] or death caused by operation of pleasure boat, 8 ALR4th 886.

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)

Cited in Nukapigak v. State, Sup. Ct. Op. No. 2667 (File No. 5820), [illegible] P.2d [illegible] (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.

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

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

Acquittal or [illegible] as to [illegible] offense as bar to charge as to the other offense, where [illegible] person is [illegible] assaulted [illegible] directed at [illegible]. 2 ALR 600.

Homicide or assault in attempting to prevent elopement. 8 ALR 660.

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

Intent of aider in case of felonious assault. 16 ALR 1047.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify. 18 ALR 1368, 61 ALR 321.

Conviction or acquittal upon charge of murder of or assault upon one person as bar to prosecution for like offense against another person at the same time. 2[illegible] ALR [illegible], [illegible] ALR 222.

Homicide or assault in defense of habitation or property. 2[illegible] ALR 508, [illegible] ALR 1541, [illegible] ALR [illegible].

[illegible] as aggravated assault or assault with a deadly weapon. [illegible] ALR 1158.

Acquittal or conviction of assault and battery as bar to prosecution for rape or assault with intent to commit rape, based on same transaction. 78 ALR 1218.

Right and responsibilities, civil or criminal, of police officers in respect of [illegible] of persons under [illegible] third degree. 79 ALR 457.

Assault with intent to ravish, of rate consenting female under age of consent. 81 ALR 599.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law. 99 ALR 756.

Assault or negligent operation of automobile, 90 ALR 845

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 ALR 634

Assault to rob with intention to take property in payment of claim or debt, 116 ALR 997

Admissibility on issue of self-defense or defense of another, or prosecution for homicide or assault, of evidence of specific acts of violence by deceased or person assaulted against others than defendant, 121 ALR 380

Indecent proposal to woman as assault, 12 ALR2d 971

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 ALR2d 1005

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 ALR2d 805

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 745

Attempt to commit assault as criminal offense, 79 ALR2d 597

Fact that gun was unloaded as affecting criminal responsibility for assault, 79 ALR2d 1412

Criminal responsibility of husband for rape or assault to commit rape on wife, 84 ALR2d 1017

Admissibility in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 920

Criminal responsibility for assault and battery by operator 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 490

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, 95 ALR2d 197

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 963

Scienter as element of offense of assaulting, resisting, or impeding federal officer, 10 ALR3d 843

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

Kicking as aggravated assault or assault with dangerous or deadly weapon, 33 ALR3d 922

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 battery 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 1265

...ment of offense of ... or impeding federal ...

...ense to charge of rape, ... assault with intent to ... ALR3d 1351

...ravated assault, or ... use of deadly weapon, ...

...d as condition of ... one is attacked at his ...siness or employment. ...

...lling of or injury to ... during attempted ...3d 620

...e to charge of criminal ... 58 ALR3d 662

...or operator of theatre ... to patron assaulted by ... ALR3d 441

...or assault to commit ... by intent to collect or ... 88 ALR3d 1309

...angerous or deadly ...aming of assault or ... ALR3d 1026

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...fe as deadly or dan... ...purposes of statute ... such as assault. ... 100 ALR3d 287

...truction of penal stat... ...abuse. 1 ALR4th 38

...f assault and battery ...tion of females only ...reater penalties for ... 5 ALR4th 705

...angerous weapon for ...ggravating offenses ... robbery. 7 ALR4th ...

...deadly or dangerous ...ose of statutes ...such as assault and ... 2

...multiple victims as ... assaults or homi... ...

...n body, other than ...gerous weapons for ...ggravating offenses ...robbery. 8 ALR4th

Admissibility of expert or ... testimony on battered wife or battered woman syndrome. 18 ALR4th 1153.

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; or

(3) the person intentionally performs an act that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life.

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

Effect of amendments. — The 1982 amendment in paragraph (1) of subsection (a), substituted "that person recklessly causes" for "with intent to cause" and deleted "to cause physical injury to any person" following "another person."

NOTES TO DECISIONS

I General Consideration
II Subsection (a)(1)
III Former law

I. GENERAL CONSIDERATION.

Quoted in Smith v. State, Sup. Ct. Op. No. 2121, File No. 4228, 614 P.2d 300 (1980); Blackburn v. State, Ct. App. Op. No. 243, File No. 7224, 662 P.2d 1100 (1983).

Stated in State v. Silas, Sup. Ct. Op. No. 1851 (File No. 4237, 595 P.2d 651, 1979); Coleman v. State, Sup. Ct. Op. No. 2190 (File No. 4416, 621 P.2d 869, 1980).

Cited in Handley v. State, Sup. Ct. Op. No. 2158, File Nos. 3946, 4097, 615 P.2d 627, 1980; Folger v. State, Ct. App. Op. No. 105, File No. 5565, 645 P.2d 111 (1982).

II. SUBSECTION (a)(1).

Mens rea and result. — Subsection (a)(1) of this section requires intent to cause serious physical injury as the mens rea and physical injury as the result. Wettanen v. State, Ct. App. Op. No. 200 (File No. 6352, 656 P.2d 1213, 1983).

Dangerous instrument. — The requirement of a "dangerous instrument" in subsection (a)(1) of this section serves to define the surrounding circumstances from which intent is normally inferred. Wettanen v. State, Ct. App. Op. No. 200 (File No. 6352, 656 P.2d 1213, 1983).

The requirement of a dangerous instrument in subsection (a)(1) of this section serves to shift the focus of the trier of facts' attention from the result (physical injuries), which in any given case may have been unforeseeable to the defendant at the time the assault was committed, to the manner in which the assault was committed. Thus, the defendant is protected against a finding of first-degree assault in which the jury determines fault solely by finding serious physical injury and then inferring an intent to cause that serious physical injury from the injuries alone. Wettanen v. State, Ct. App. Op. No. 200 (File No. 6352, 656 P.2d 1213, 1983).

While feet are not dangerous instruments per se, they may become so, however they are shod, if used in such a way as to be capable of causing death or serious physical injury. Wettanen v. State, Ct. App. Op. No. 200, File No. 6352, 656 P.2d 1213 (1983).

HOUSE JUDICIARY COMMITTEE
February 16, 1988
1:30 p.m.

MEMBERS PRESENT

Representative John Sund, Chairman
Representative Fran Ulmer, Vice Chairman
Representative Sam Cotten
Representative Max Gruenberg
Representative Robin Taylor
Representative Ramona Barnes

MEMBERS ABSENT

Representative Mike Navarre

COMMITTEE CALENDAR

HB 261: An Act relating to ignition interlock devices; and establishing a class C misdemeanor.

HB 229: An Act relating to homicide by abuse.

WITNESS REGISTER

Representative Bill Hudson
Alaska State Legislature
P.O. Box V
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Position: Sponsor of HB 229

Gayle Horetski
Deputy Commissioner
Department of Public Safety
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465-4322
Position: Support HB 229

Dana Fabe
Director
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Position: Opposed HB 229

Louise Howerter
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Position: Supports HB 229

Charles Rohrbacher
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Position: Supports HB 229

PREVIOUS ACTION

HB 261:	Jrn-Date	Jrn-Pg		Action
	04/08/87	777	(H)	Read the first time with referral(s)
	04/08/87	777	(H)	HESS, Judiciary, Finance
	01/22/88	1970	(H)	HES RPT CS(HESS) 6DP 1NR
	01/22/88	1970	(H)	Zero Fiscal Note/ Analysis 1/22/88
	01/22/88	1970	(H)	Referred to Judiciary

Previous Judiciary committee consideration and testimony of HB 261 was held on 2/12/88.

HB 229:	Jrn-Date	Jrn-Pg		Action
	03/30/87	674	(H)	Read the first time with referral(s)
	03/30/87	674	(H)	Judiciary then Finance
	03/30/87	688	(H)	Co-Sponsors added: Ellis, Davidson, and Gruenberg
	04/01/87	712	(H)	Co-Sponsor added: Hanley
	04/03/87	733	(H)	Co-Sponsor added: Collins
	01/18/88	1932	(H)	Co-Sponsor added: Taylor

Previous Judiciary committee consideration and testimony of HB 229 was held on 5/5/87 and 10/23/87.

ACTION NARRATIVE

TAPE 100, SIDE 1
Number 001

Chairman Sund called the meeting to order at 1:35 p.m. Present were Representative Ulmer, Representative Cotten and Representative Gruenberg. Chairman Sund brought HB 261, which was heard on February 12, before the committee for consideration.

Representative Gruenberg moved that the committee adopt a CS, dated 2/15/88, which incorporated an amendment on page 3, lines 4-7, that read, "A condition of probation imposed under this subsection takes effect after any period of license revocation imposed under AS 28.15.165(d) or 28.15.181(c)." The purpose is to insure that it is not in lieu of a license revocation as requested by the Department of Law.

Representative Barnes and Representative Taylor arrived at 1:36 p.m.

There was no objection to adopt the CS and so it was adopted. Representative Gruenberg discussed the previous hearing on HB 261 and the amendment offered by the Department of Law. He explained the bill and the use of the ignition interlock device.

Number 99

Chairman Sund asked if there were any questions on HB 261. Representative Ulmer moved to pass the bill from committee with individual recommendations.

Representative Cotten noted that the bill makes it a crime to loan a car to a person who has an interlock device installed. He asked how a person is supposed to know another has the device. Representative Gruenberg discussed the provision. Representative Cotten asked if he loaned his car if he would commit a crime. Representative Gruenberg replied that "knowingly" on page 2, line 6, provides that a person has to know that the device is a condition of probation.

Chairman Sund brought up the operation of the devices in weather below sixty degrees. Representative Gruenberg noted that the bill allows the commissioner to certify the devices for certain areas and conditions where they will operate.

Representative Cotten referred to his previous question and asked if he would have to know a person was on probation

under AS 12.55.102 before lending his car. Representative Gruenberg affirmed and said there had to be specific knowledge.

Representative Taylor stated that the bill doesn't give leeway to the court with regard to the ten year mandatory. Chairman Sund remarked that the bill doesn't deal with that issue. Representative Taylor expressed his concern with the cost of the devices and suggested there may be less costly alternatives which should be considered. Representative Ulmer noted that the devices were an option to the court. Chairman Sund noted that a person can teach their spouse or family members to use the code on the device.

Representative Gruenberg discussed the HESS Committee amendment on page 3, lines 25-27, which gives the judge discretion to have a defendant pay for the device in lieu of a fine. Representative Taylor remarked that, by putting this into statutes, it lays a scenario without consideration of other options. Representative Gruenberg pointed out that a payment plan for the devices is also available.

Number 270

Representative Cotten asked about the establishment of a class C misdemeanor, where there had never been one before. Representative Gruenberg responded that a bill passed the House last year which already established a class C misdemeanor, although it did not pass the Senate. Chairman Sund asked if it was necessary to have a class C misdemeanor in the bill. Representative Gruenberg replied that it was unless the committee wanted it to be a class B or A and criminalize it more. Representative Cotten wanted to know what offense is being established by a class C misdemeanor. Representative Gruenberg noted it was in Section 2, on page 2, line 4, and that other offenses could be added to that classification later. Chairman Sund restated his question and asked if the bill and the establishment of a new misdemeanor classification were separable ideas. Representative Gruenberg responded, that if separated, the penalty would be heavier and the crime doesn't warrant it. Representative Taylor pointed out that if a violation occurs, the person is already subject to revocation of probation. Representative Gruenberg remarked that the penalty deals with someone other than the person on probation.

Chairman Sund stated that he would hold HB 261 over until tomorrow to work on the class C misdemeanor portion. Representative Ulmer withdrew her motion to pass the bill.

Chairman Sund announced HB 229 would be up next. He noted information in the committee files and invited Representative Hudson to address the committee. He asked him to discuss what is broken and what needs to be fixed with regard to the proposed legislation.

Number 340

Representative Hudson, sponsor of HB 229, testified that he introduced the bill last year after hundreds of calls and a consensus that statutes don't adequately deal with death to children by abuse. He discussed the Paulo case in Juneau and pointed out that if his proposed legislation were law, the evidence of past abuse in that case could have been let in and a conviction could have resulted in a twenty year sentence rather than five. He recalled previous testimony about the purpose of the bill and the support it has received. He stated that people who have a pattern of assault or torture that results in death of a victim should go to jail for at least twenty years. He noted that the only opposition received was from the Office of Public Advocacy and the Public Defender Agency, which he characterized as reactive agencies who defend persons who commit these crimes.

Representative Hudson recalled the major arguments in opposition: 1) the bill represents a major break with principles underlying the comprehensive revised criminal code and presumptive sentencing scheme, 2) by creating a new crime, it will not necessarily affect charging policies by prosecutors, and 3) the law should not distinguish among human lives on the basis of age.

Representative Hudson addressed the arguments. Regarding the first, he placed a higher priority on the loss of a life than on the fact that the criminal code and presumptive sentencing scheme was being revised. Secondly, passage of HB 224 will enable prosecutors to more effectively defend cases brought by the state against those who have killed by engaging in a pattern of abuse/torture. In relation to the third argument, he felt that children do not have the ability to defend themselves against people who abuse them and they are even loyal to their abusers who are oftentimes family. They are a special class of people, but it is not his intent to place a higher value on life because of age. He felt that it was proper public policy to deal harshly with people who kill others by abuse and torture.

Regarding the argument that creating a new crime with an element of pattern or practice of abuse was not necessary for successful prosecution of homicide cases involving child abuse, he referred to AS 11.41.110. It provides that

"a person commits the crime of murder in the second degree if the person intentionally performs an act that results in the death of another person under circumstances manifesting in extreme indifference to the value of human life and upon conviction of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree, a person shall be sentenced to a definite term of imprisonment of at least five years but not more than ninety-nine." Representative Hudson and others who support the legislation do not believe five years is a sufficient penalty to pay where there is repeated terrorism that ultimately ends up in the death of a child. HB 229 provides for a sentence of at least twenty years, because abusing a person until they die should get a punishment higher than that for conviction of murder in the second degree, kidnapping, or misconduct involving a controlled substance. He discussed an infant assault case cited by the Public Defender where evidence was admitted that the defendant had previously killed his five week old infant. The judge concluded that the evidence could establish the fact that the defendant did not have a high regard for human life and was sentenced to fifteen years, which was later reduced to ten years by the Supreme Court. He felt HB 229 would enable prosecutors to present evidence of past practices of abuse or torture leading to death and provide for an appropriate length of imprisonment.

He addressed the definition of restraint as "to hold back from action, to deprive of physical liberty," which is what happens when anyone is abused. He also addressed classified versus unclassified felonies. He cited AS 11.81.250, "For purposes of sentencing under AS 12.55, all offenses defined in this title are classified on the basis of their seriousness according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender, and except for murder in the first and second degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified." He believed it was more appropriate that homicide by abuse be an unclassified felony. He urged the committee to support HB 229 and pass it out.

Number 542

Representative Taylor commented on a previous suggestion by Representative Hudson to change age sixteen to eighteen on line 11. Representative Hudson stated he would entertain it as a recommendation. He commented that bill drafters suggested sixteen, but age eighteen appears to be a legitimate concern as it covers the same group.

Chairman Sund commented on the concept that children should be treated differently because they are unable to defend themselves and noted that many elderly and mentally retarded people would also fall within that concept, regardless of age. Representative Hudson remarked that he had considered that, adding that Washington statute includes elderly and incapacitated people. Chairman Sund noted that Washington also has a different structure for criminal offenses as well. Representative Hudson indicated his interest in including persons who, because of physical or mental disability, or because of extreme advanced age, are dependent on another person.

Chairman Sund commented that creating a distinguishing factor or category of victim to determine the kind of crime establishes two classes of people, which is a major philosophical change in the criminal code. It says that one type of life is worth more than another depending on age or physical or mental condition. Representative Hudson believed strongly that it was a valid public policy to address the acceptance of a deviation from traditional policy.

Representative Gruenberg commented that a distinction is already made with HB 237, with sexual assaults of minors and with elder abuse. Chairman Sund commented that the committee dealt with the pattern or practice issue on HB 237 along with an extensive discussion with evidence Rule 404(b).

Representative Ulmer felt it was not a value of life issue, but rather the nature of relationship and the inability to protect oneself that makes this a more heinous crime and justifies a more serious sentence. Representative Cotten asked Representative Hudson to restate his position regarding extending the bill to other persons unable to defend themselves. Representative Hudson said he would support such language and provided a definition of a dependent adult.

Chairman Sund asked for examples of why the existing criminal code is unable to adequately address this type of offense. He referred to the Paulo case and asked if the proposed law change was to deal with that as one specific incident or if it is a broad issue. He also requested a comparison of what issues brought up by HB 229 have been dealt with in HB 237, such as evidentiary issues and aggravators.

Number 685

Louise Howerter, of Justice for Children, testified. She mentioned other homicide by abuse cases in Alaska. She

read testimony which referred to these offenses as the most heinous and merciless crime that can be committed. It goes beyond torture and often covers a period of years. Child victims have no control over their situation. She discussed particular cases of abuse that resulted in death of children, including the Paulo case in Juneau. She brought up the Washington bill, noted it's quick passage, and mentioned that three other states have followed suit. She noted petitions last year that had over 6,000 signatures in support of a more severe sentence for homicide by abuse. She noted that Alaska's abuse rate is five times greater than any other state and that it could be subdued by passage of HB 229, which makes a strong public statement to those who abuse.

Number 750

Gayle Horetski, of the Department of Public Safety, addressed the committee next. She offered to work with the committee on HB 229, based on her past years of experience as a prosecutor. She mentioned that Stephanie Joannides, of the Department of Law, asked her to inform the committee of her willingness to work on the bill also. Ms. Horetski suggested that line 11, which reads "extreme indifference to the life of a child," should be changed to "welfare" of the child, because language for second degree murder already includes extreme indifference to the "life of a person." She felt it was broader language and would be more inclusive. Regarding the "pattern or practice" language, she felt that the focus was on the repeated abuse of a child and asked the committee to consider a single act that is sufficiently dangerous that results in death, similar to the existing second degree murder statute. She mentioned that the committee could deal with it in consideration of a definition for "pattern or practice."

Representative Ulmer stated that if "pattern or practice" were replaced with "engages in assault or torture," it would make sense if HB 237 passes and there is a change in Rule 404 that allows some prior evidence in. She asked if HB 237 doesn't pass, and HB 229 passes without "pattern or practice" language, would there still be an evidentiary problem with getting prior incidents in. Ms. Horetski replied that if the crime is defined as a pattern or practice, then the evidence of repeated acts would come in. On the flip side, there has to be a pattern or practice in order to prove the crime, so one incident may not be enough, two may not either, as it is not defined. If the issue is admissibility of evidence of other acts, then the change of Rule 404 in HB 237 is the clearest way to do it. If HB 237 doesn't pass, then "pattern or practice" fixes it for that element, but it wouldn't apply to single acts.

Representative Gruenberg commented that since, by definition, most murders are some type of assault he would have difficulty limiting this offense to children. Ms. Horetski stated that requiring a pattern or practice narrows the scope of offenses to which it applies. She suggested that if that is the intent, a definition would be needed to clarify so that the prosecutor and judge know how to instruct the jury.

Number 843

Dana Fabe, Public Defender, discussed the difference between second and first degree murder. It used to be based on malice and forethought or premeditation, now it is whether there is intent to kill or engaging in an act with extreme indifference to the value of life. To say that someone has to intend to kill someone unless it's a child, and then there doesn't have to be an intent to kill, basically shakes up the entire system. She noted there are many types of people who can't defend themselves, including sleeping adults. The act itself is what the intent can be drawn from. If someone is ruthlessly beating a child, it is possible that intent to kill can be inferred and first degree murder could be charged. If there is no intent to kill, it is clear that it is second degree murder. Her problem with HB 229 is that it changes the entire code based on a factor of age or mental capacity. She noted that a benchmark had been set regarding sentencing and the five year minimum is rarely applied.

TAPE 100, SIDE 2
Number 001

Ms. Fabe continued. She felt that the judge would take into account the age and helplessness of the victim during sentencing. She believed the Paulo case was an aberration and it was her understanding that it was never charged as a murder, but rather as manslaughter and then charged down to negligent homicide. If convicted on second degree murder, the judge could have sentenced up to ninety-nine years. The framework of the criminal code is based on the mental state and the result it causes, and a new factor shouldn't be added without looking at the whole code. It could be set up as aggravators or a higher offense when certain factors are there, but to take what is basically second degree murder and say it is first degree if the victim is under or over a certain age or has a certain mental state is a concern because it engrafts another way of doing things into the code without a general overview of the entire code.

Number 58

Representative Hudson thought that a statement needed to be made as public policy and that it would do no harm to err on the side of children. He asked if it wasn't good public policy to take a growing crime and address it with a tool that deals with the heinousness of the crime. He made reference to sentencing policy for people who kill police officers and felt that children require extra consideration.

Ms. Fabe pointed out that assaults to police officers get a particular sentence. The assault statute is not changed, but the sentence is higher. She felt a better approach was to change the mandatory minimum sentence for second degree murder or add an aggravator based on the age of the child. She asked if, by making a distinction for child victims of homicide by abuse, should it also apply to assault, so that second degree assault would be moved up to first degree based on the age of a child.

Chairman Sund stated that there were two considerations, one was the reason for the bill and the other was the factual basis behind it. He discussed his involvement in rewriting the criminal code in the 70's and suggested that if changes were going to be made, there should be an overall look at the code.

Representative Taylor asked if there were examples of other cases besides the Paulo case. He said the law can be changed, but reduced charges by the D.A. will produce the same result as without the legislation.

Number 175

Representative Barnes mentioned the rewrite of sexual assault statutes in 1982 and the fact that arguments against changing the code then were the same as she's heard regarding HB 229. She felt that the change has worked well and taken these types of criminals off the street. She didn't believe revising the code upward would necessarily affect the whole code, it could be amended in places and ways that wouldn't harm other areas of the code. She felt abusers deserve a harsher sentence and that it may change the criminal code, but it was good public policy.

Chairman Sund indicated his intention to request an overall look at sentencing by the Judicial Council.

Representative Taylor asked about the benchmark mentioned by Ms. Fabe. Ms. Fabe responded that the benchmark was the Page case, which established a standard second degree murder sentence at twenty to thirty years.

Representative Cotten pointed out the issues with HB 229 that needed improvement were the definition of pattern or practice, whether to require more than one act for the law to take effect, and whether it should apply to elderly, mentally, or otherwise impaired persons. He hoped there was no suggestion that people were indifferent to the situation because it may not conform with the criminal code.

Representative Gruenberg discussed the language "indifference to life" versus "welfare" and supported leaving it the way it is to make it tighter. He asked if Ms. Fabe or Ms. Horetski had any comments. Ms. Fabe responded that an anomaly would be set up if someone committed an act indifferent to a life, which would be more serious and could a get second degree murder conviction, whereas someone could commit an act that was indifferent to the welfare of a child, which was less serious but could get a first degree conviction. Ms. Horetski replied that she was looking at it from the viewpoint of effective prosecution, in which case "welfare" would be broader.

Number 343

Charles Rohrbacher, testified next. He served on the grand jury investigating the death of Richard Johnson (victim in the Paulo case). He focused on the question of what's broken and discussed the grand jury process. There was no proposed indictment by the D.A.'s office when they received the case, rather they conducted an investigation by calling a variety of witnesses and questioning the circumstances of the death of the child. They were to ascertain facts and see how they matched with current statutes to determine how the person could be charged. The indictment they brought against Mr. Paulo was the best they could do in terms of the evidence they had and what the statutes said. They favored a second degree murder charge, but they were frustrated because it didn't match the standard. They couldn't prove there was intent to kill the child or that he was acting with substantial certainty to cause death. The child had a broken arm from having it tied behind his back a few weeks prior and the Division of Family and Youth Services was investigating the treatment of the child. The jury was concerned, because there seemed to be an incentive not to seek medical treatment for the injury that caused his death. He asked the medical witnesses if a reasonable person would have known that there was something seriously wrong with the child during the twelve hours before he died and they affirmed that. There was no way to establish exactly what happened and there didn't seem to be anything in statutes that addressed abusive acts that contributed to death. Second degree murder didn't seem to fit, but the jury felt it was a more serious offense than manslaughter.

Chairman Sund asked if the District Attorney told the jury they couldn't prove second degree murder. Mr. Rohrbacher replied that they had the statutes before them and they compared what had been presented with what the law said. They asked for clarification and explanation about the gradation of responsibility for homicide, but the D.A. did not guide them.

Representative Ulmer restated the problem that it is very difficult to prove a more aggravated second degree murder in these kinds of cases because intent to kill can't be shown because there is often no witness. It is difficult to prove the state of mind for a more serious offense.

Chairman Sund mentioned the change from "intentionally performing an act that results in a death" in the second degree murder statute to "knowingly engages in conduct that results in a death" as proposed by HB 229. He asked Mr. Rohrbacher if the grand jury had discussed that and whether it is an actual representation of what the real law is. Mr. Rohrbacher replied that they were convinced from the testimony and evidence that the perpetrator had struck the child violently one time, yet there were allegations that there were a couple of prior acts, but they could only focus on the one act. The dilemma was that there was no way to ascertain whether there was intent to kill the child at the time he was struck, but there seemed to be strong reluctance by the perpetrator and his partner to take the necessary steps that may have saved the child's life. They even seemed to be deterred from seeking medical attention because of the fear of what would happen. Balanced against the possibility of being prosecuted for child abuse or the possibility the child would die and then nothing would happen, it seemed the perpetrator was prepared to take the chance. He didn't think they wanted the child to die, but it seemed a reckless disregard for the safety and welfare of the child. There didn't seem to be anything in the statute that could address that type of equation.

Number 525

Representative Gruenberg stated that it sounded like the D.A. didn't adequately instruct the jury in the law with regard to looking for the proper charge. Mr. Rohrbacher replied in the negative and said the D.A. gave the jury the range of possible offenses to consider given the testimony. The situation and acts they were presented with didn't seem to fit the statutes presented. Representative Gruenberg asked if the grand jury and the D.A. carefully discussed whether the defendant could be charged higher and whether the D.A. didn't feel he could. Mr. Rohrbacher affirmed that they discussed it.

Representative Hudson asked, if the language proposed in HB 229 were in statute, would it have been helpful to the grand jury. Mr. Rohrbacher said it would but they may have had a problem with establishing a pattern, as the proof didn't seem sufficient to show a pattern, but other than that, it is exactly what they were looking for.

Number 600

Pat Marlin, of Justice for Children, testified next. She mentioned an earlier case of homicide by abuse in Juneau that she remembered. She felt a state policy was needed on how children are treated and high public sentiment supports it. She wanted people to be treated fairly under the law, but didn't want defendants to have more rights than children who can't defend themselves. She felt confident that the law can be changed properly.

Chairman Sund felt it should be clarified that no one was advocating abuse of children. There are laws that provide for offenses, although they may not be as severe as some would like. He felt it was important to listen to both sides, the defense and prosecution, who are the ones that will be interpreting the law and putting it into practice. He wanted the committee to find out what the problems are and work on them in a rational manner so that the code is fair and doesn't "hopscotch."

Number 703

Representative Ulmer thanked Ms. Marlin and Ms. Howerter for raising people's awareness statewide through their organization. She remarked that the only thing she disagreed with was that the bill would save lives. She was a co-sponsor to HB 229 because she believed people should be held responsible for these types of crimes. She felt what would save lives was education, better parenting, and raising the level of awareness about child abuse. Ms. Marlin agreed, adding that HB 229 gives the message that the offenses aren't taken lightly.

Chairman Sund stated that he was considering requesting another state sentencing study and a look at the three judge panel in the form of a proposal to the Alaska Judicial Council. Representative Taylor asked if it would be possible to highlight child abuse cases. Representative Ulmer remarked that abuse/assault cases are not distinguished on the basis of age, so there are no statistics for children. Ms. Marlin commented that she tried to find out how different judges sentence and that it was not public information.

Chairman Sund assigned himself, Representative Ulmer and Representative Barnes to a subcommittee on HB 229 for further work on the bill. He mentioned he wanted to make sure it lined up with HB 237. He adjourned the meeting at 3:06 p.m.