ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3214.62 HHESS • HB 67 - HB 74 •

TABLE 4

LAPSE BETWEEN FILE DATE - DISPOSITION

Less 2 months	41	(48.8)
2 - 3 months	26	(31.1)
3 - 4 months	9	(10.7)
4 - 5 months	5	(6.0)
5 - 6 months	3	(3.6)
TOTAL	84	100.1

Washington

The New Sexual Abuse Hearsay Exception

SB 4461 was signed by Governor Spellman on April 1, 1982 and will become law on June 10, 1982. It is to be cited as Ch. 129, Laws of 1982.

The new law does the following:

Section 1 amends the Limitations of Actions statute, RCW 9A.04.080, by extending from three to five years the statute of limitations for Statutory Rape in the First Degree, Statutory Rape in the Second Degree, and Indecent Liberties (victim under 14 years of age).

This applies to offenses not barred as of June 10, 1982, but cannot operate to revive offenses already barred by the passage of years, since that would be an ex post facto application of the law. Thus a crime committed on or before June 10, 1979 is forever barred, but a crime committed after June 10, 1979 will have a five-year life of its own.

Section 2 adds to RCW 9A.44 a new section allowing a court to admit into evidence hearsay statements made by a sexual assault victim when under 10 years of age relating to the crime under certain circumstances. It does not supplant existing hearsay exceptions ("not otherwise admissible by statute or court rule"). The court must find:

(i) That the "time, content, and circumstances of the statement provide sufficient indicia of reliability", and

(ii) The child either:

(a) testifies in court; or

(b) is unavailable as a witness, and there is "corroborative evidence of the act."

The defendant must be advised of the State's attempt to use such hearsay statements "sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement." See F.R. Evid. 803(24).

Some questions raised by the new law are:

1. Is it an unconstitutional usurpation of the Supreme Court's power to control evidentiary rules?

The legislature has always had the power to promulgate rules of evidence (Ch. 10.58 RCW). The Supreme Court assumed similar power through its rulemaking authority and has superseded some statutory evidence rules (e.g. ER 609 on impeachment under RCW 10.52.030). See State v. Murray, 86 Wn.2d 165, 170 (1975). When the new Rules of Evidence were adopted, the legislature still retained its authority to affect the hearsay rule. As ER 802 says:

> Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

(emphasis added.)

2. It is an unconstitutional evidence rule because it violates a defendant's state and federal constitutional rights to confront witnesses against him.

The U.S. Constitution (Sixth Amendment) and Washington State Constitution (Art. 1, §22) both provide the right of the accused to confront witnesses against him in a criminal trial. Where the child testifies, allowing hearsay in evidence would not affect this right since the defendant could cross-examine the victim on these hearsay statements. However where the victim does not testify, confrontation clause problems will arise as the defendant cannot cross-examine the declarant.

Two Div. II opinions written by Judge Reed address this issue. State v. Parris, 30 Wn. App. 268 (1981), and State v. Valladares, 31 Wn. App. 63 (1982). Both conclude that the U.S. Supreme Court case of Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) is controlling.

> Roberts adopted a 2-pronged test for analyzing hearsay statements with respect to the Sixth Amendment: (1) the declarant must usually be unavailable; and (2) the statements must bear an adequate indicia of reliability; i.e. they must fall within a firmly rooted hearsay exception or there must be a particularized showing of trustworthiness.

31 Wn. App. at 71-72.

SB 4461 will pass this test since it requires (1) unavailability and (2) both corroborative evidence and a particularized showing of reliability. Also see State v. Carter, 23 Wn. App. 297 (1979); State v. Boast, 87 Wn.2d 447 (1976); and State v. Smith, 85 Wn.2d 840 (1975).

3. When does the rule become effective?

Does the rule apply to trials after June 10 or crimes committed after June 10? The very clear answer is the

former, for trials after June 10. Two Snohomish County cases arising in trials held after an amendment to the marital privilege rule in RCW 5.60.060(1) are directly on point. In State v. Clevenger, 69 Wn.2d 136, 417 P.2d 994 (1966) and State v. Pope, 73 Wn.2d 919, 442 P.2d 994 (1968), when the crimes (child murder and sexual abuse by Dad) occurred, the marital privilege law would have barred the wife from testifying against her husband. The trials occurred after the amendment in 1965 added the clause saying the privilege would not apply "to a criminal action for a crime committed by the husband against a child of the wife." The court said it was not an ex post facto application of the law to allow the wife's testimony. The rule is set forth in Clevenger, supra at 141 and Pope at 924.

> The argument of appellant is completely answered by the language of the court in Hopt v. Utah, 110 U.S. 574, 28 L. Ed. 2d 262, 4 Sup. Ct. 202 [as follows]. . . .
> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilty, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect to that offence, be obnoxious to the constitutional inhibition upon ex post facto laws. But alternations which do not increase the punishment, nor change the ingredients of guilty, but - leaving untouched the nature of the crime and the amount of degree of proof essential to conviction - only remove existing classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may

regulate at pleasure. Such regulations of the mode in which the facts constituting guilty may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charge.

QUESTIONS AND ANSWERS ON SB 4461

Prepared by Robert S. Lasnik, King County Prosecuting Attorney's office

1. Q. What is hearsay?

   A. Hearsay is a statement made outside the trial offered at the trial to prove the truth to the statement. e.g. Smith hears a crash and as he turns to look at the accident, he hears a bystander scream, "Oh, my God, the red car ran that light!" At the trial on the issue of liability Smith testifies as to what the bystander shouted. This is hearsay.

2. Q. Is all hearsay inadmissible?

   A. No. Evidence Rule (ER) 803 contains 23 exceptions to the Hearsay Rule ranging from "dying declarations" to "excited utterances" and ER 804 has four more exceptions.

3. Q. Why are some hearsay statements admissible in evidence?

   A. As the common law developed, certain hearsay statements began to be allowed because they were inherently reliable. For instance, the hearsay statement above would be admitted as an "excited utterance", because it was a statement relating to a startling event made while under the stress of excitement caused by the event. The combination of the startling event and the lack of time to reflect and fabricate, leads to reliability. Some are admissible because of reliability and necessity, e.g. dying declarations.

4. Q. Who may alter the evidence rules as to hearsay exceptions?

   A. The Supreme Court, by its rulemaking authority, and the Legislature both have this power. See ER 802.

5. Q. What is the Confrontation Clause?

   A. The Sixth Amendment to the U.S. Constitution provides, among other protections for the accused in a criminal case, that he "shall enjoy the right.... to be confronted with the witnesses against him." This is the Confrontation Clause.

6. Q. If the Confrontation Clause means what it says, how could hearsay ever be admissible?

   A. It couldn't be. But, like many Constitutional provisions, it does not have a literal definition. The United States Supreme Court, and the Washington State Courts, both recognize that hearsay may be admitted under certain circumstances, regardless of whether that speaker is

called as a witness. If the person does testify, of course he may then be questioned about these out-of-court hearsay statements. If he does not testify, before the hearsay may be admitted, the judge must find that the statement has sufficient indicia of reliability, and that the witness is unavailable. See Ohio v. Roberts, 448 U.S. 56 (1980) and State v. Parris, 30 Wn. App. 268, 275 (1981).

7. Q. What does "unavailable" mean?

   A. ER 804(a)(1) defines "unavailability" and includes situations where a witness is ruled incompetent to testify due to illness, infirmity or age.

8. Q. What does SB 4461 do?

   A. It would allow a judge to admit into evidence at any trial, hearsay statements made by a child under the age of 10, relating to sexual contact performed on him or her by another, under certain circumstances. First the judge must find that the time, content and circumstances of the statement show it is a reliable, trustworthy statement.

      1. When the child testifies and is cross-examined, others may also testify as to what the child told them about the sexual assault.

      2. When the child is unavailable as a witness, due to incompetency, infirmity or death, such statements may also be testified to by others. However, in addition to a specific finding that the necessary indicators of reliability are present, the judge must also find additional corroboration that the act occurred.

9. Q. Has any other state adopted such an evidence law?

   A. No. Washington would be the first.

10. Q. Is there a requirement that all states share the same laws for criminal procedure?

   A. No. In Washington, the accused has some rights not guaranteed in other states and the prosecution has some powers denied prosecutors in other states. Chief Justice Burger in California v. Green, 339 U.S. at 171, emphasized the "importance in allowing the states to experiment and innovate, especially in the area of criminal justice. If the new standards and procedures are tried in one state, their success or failure will be a guide to others and to Congress."

WHAT DOES THE STRIKING AMENDMENT DO?

1. Limits use to criminal proceedings.

2. Limits use to hearsay statements not already covered by other evidence laws or rules (e.g. excited utterances, etc.).

3. Presents court with a form of a "totality of the circumstances" test on reliability for ALL statements covered by this section.

4. Requires either:

   (i) that the child testifies, or
   (ii) the child is unavailable as a witness and there is corroborative evidence of the act.

5. Requires notice to the defense of intention to offer such a statement in advance to allow time to prepare to meet it.

6. Adds a severability clause.

Incest as included within charge of rape. 76 ALR2d 484.

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

Fraud or impersonation, rape by. 91 ALR2d 591.

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

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 ALR3d 1227.

Liability of parent for injury to unemancipated child caused by parent's negligence. 41 ALR3d 904.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

Consent as defense in prosecution for sodomy. 58 ALR3d 636.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 ALR3d 1228.

What constitutes offense of "sexual battery." 87 ALR3d 1250.

Constitutionality of rape laws limited to protection of females only. 99 ALR3d 129.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 ALR4th 1009.

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

(2) being any age, the defendant attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) *[Repealed, § 10 ch 78 SLA 1983.]*

(4) *[Repealed, § 10 ch 78 SLA 1983.]*

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Effect of amendments. — The 1980 amendment inserted "or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person" near the end of paragraph (3) in subsection (a).

The 1982 amendment substituted "an unclassified felony and is punishable as provided in AS 12.55" for "a class A felony" at the end of subsection (b).

The 1983 amendment repealed paragraphs (3) and (4) of subsection (a).

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

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state

must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the penalty provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Categories constitute same offense. — All of the categories contained within the definition of sexual assault in the first degree under subsection (a)(1) through (a)(4) of this section, constitute the same offense for legal purposes. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

And none is more serious than others. — Nothing contained in the statutory language of this section or the legislative history of the provision suggests that the type of conduct listed in any one of subsection (a)'s four paragraphs was meant to be inherently more serious than any of the others. To the contrary, the grouping of these four separate sets of conduct together under the same criminal heading, with identical classifications as class A felonies, is a forceful indication of the legislature's conclusion that all four paragraphs were meant to be viewed as involving equally serious conduct. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Subsection (a)(1) is akin to the common law definition of rape. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Mental state required under (a)(1). — Lack of consent is a "surrounding circumstance" which requires a complementary mental state as well as conduct to constitute a crime. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

No specific mental state is mentioned in subsection (a)(1) of this section governing the surrounding circumstance of "consent"; therefore, the state must prove that the defendant acted "recklessly" regarding his putative victim's lack of consent. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction for similar offense. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Sufficient evidence of attempted assault. — A jury could reasonably infer that defendant's entering of victim's bed naked and uninvited and fondling her breasts were "substantial steps" toward the commission of sexual assault in the first degree so as to provide sufficient evidence of attempted assault. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial court did not commit plain error in failing to specifically instruct the jury that defendant had to recklessly disregard a substantial risk that the victim did not consent to intercourse before he could be convicted of first-degree sexual assault. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Instructions on lesser included offenses. — In a prosecution of first-degree sexual assault, where the undisputed evidence including defendant's testimony establish sexual penetration, there was no duty to instruct on attempted sexual penetration or forcible sexual contact.

rate, Ct. App. Op. No. 176 ... 655 P.2d 339 (1982); ... Ct. App. Op. No. 165 (File ... P.2d 1159 (1982); Ecker v. ... No. 190 (File No. 6726), ...92); Nukapigak v. State, ... 2667 (File No. 5620).

ORMER LAW.

Generally.

... — The cases cited in the ... decided under former AS ... 15.130.

ranks among the most ... Newson v. State, Sup. Ct. ... No. 2159), 533 P.2d 904 ... ncaster, Sup. Ct. Op. No. ... 1), 550 P.2d 1257 (1976); ... Sup. Ct. Op. No. 1630 ... P.2d 971 (1978); Ahvak ... Op. No. 2123 (File No. ...52 (1980).

h a crime as forcible ... erious is because it ... eration of the victim's ... tal part of her sanctity ... man being. Gerson v. ... No. 831 (File No. 1535), ... Torres v. State, Sup. ... le No. 1951), 521 P.2d ... State, Sup. Ct. Op. No. ...45), 533 P.2d 246, ... ng on other grounds, ...0); Newsom v. State, ...6 (File No. 2159), 533 ... te v. Lancaster, Sup. ... e No. 2571), 551 P.2d ... ck v. State, Sup. Ct. ... 3341), 569 P.2d 184 ... lie, Sup. Ct. Op. No. ... 578 P.2d 971 (1978).

under former law, ... States, 253 F. 38 (9th ...

was required for ... tory rape. — See ... Op. No. 1709 (File ...6 (1978).

AS 11.15.120 was ... ement of intent, the ... inal intent was ... Sup. Ct. Op. No. ...3 P.2d 836 (1978). ... ent crime, and all ... nviction is proof of ... mission of the ... State, Sup. Ct. ...921), 652 P.2d 94 ...

Lesser included offense. — The Alaska statutes do not proscribe fornication, and therefore, it could not be considered an offense of a lesser degree to statutory rape. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978); Tookak v. State, Ct. App. Op. No. 108 (File No. 4656), 648 P.2d 1018 (1982).

The offense of assault with intent to commit rape is a lesser included offense to rape. Tuckfield v. State, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981).

Attempt. — Every element of an attempt is comprised in an assault with intent to commit the offense of rape. Sekinoff v. United States, 283 F. 38 (9th Cir. 1922).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping were separate crimes with separate elements. Lacy v. State, sup. Ct. Op. No. 2039 (File No. 3741), 608 P.2d 19 (1980).

Separate sentences were called for where defendant's conduct in kidnapping and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Occhipinti, Sup. Ct. Op. No. 1405 (File No. 3084), 562 P.2d 348 (1977).

B. Age of Consent.

Female under age of consent is in law incapable of consent. — The crime of rape is commited upon a female under the age of consent with or without her consent since she is in law incapable of consent. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Thus, it is not necessary to establish her consent as an essential element of the crime. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Indictment need not allege consent of female under age of consent. — An indictment for rape of a girl under the age of consent is not insufficient because it fails to allege that the act was done with her consent. Callahan v. United States, 240 F. 683 (9th Cir. 1917); Rose v. United States, 240 F. 685 (9th Cir. 1917).

Defense of reasonable mistake of age. — A charge of statutory rape was defensible where an honest and reasonable mistake of fact as to the victim's age was shown. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

The charge of statutory rape was legally unsupportable unless a defense of reasonable mistake of age was allowed. To refuse such a defense would have been to impose criminal liability without any criminal mental element. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

While, where an offender was aware he was committing an act of fornication, a mistake of fact did not serve as a complete defense, it should have served to reduce the offense to that which the offender would have been guilty of had he not been mistaken. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Under former AS 11.15.120, if an accused had a reasonable belief that the person with whom he had sexual intercourse was 16 years of age or older, he could not have been convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was 18 years of age or older, he could still have been criminally liable for contribution to the delinquency of a minor. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

For approved instruction on consent of female under age of consent, see Rose v. United States, 240 F. 685 (9th Cir. 1917).

C. Procedure.

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Charging defendant with the crime of murder committed "in the attempt to perpetrate a rape" fails to allege the separate crime of rape with sufficient clarity to support a conviction. Alto v. State, Sup. Ct. Op. No. 1443 (File No. 2339), 565 P.2d 492 (1977).

Severance of counts involving various victims. — Where defendant was prosecuted on multiple counts of unlawful entry with intent to rape, rape, assault, and burglary, involving various victims, the trial court did not err in denying severance of the counts since evidence regarding the attack on each of the alleged victims would have been admissible in the trial of each of the other charges if the charges had been separately tried. Nix v. State, Ct. App. Op. No. 157 (File No. 5841), 653 P.2d 1093 (1982).

Character evidence. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Questioning victim's credibility. — While a defendant could properly seek to question the victim's credibility, the established rule is that this may not be done by

must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

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Instructions. — The trial court did not commit plain error in failing to specifically instruct the jury that defendant had to recklessly disregard a substantial risk that the victim did not consent to intercourse before he could be convicted of first-degree sexual assault. Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Instructions on lesser included offenses. — In a prosecution of first-degree sexual assault, where the undisputed evidence including defendant's testimony establish sexual penetration, there was no duty to instruct on attempted sexual penetration or forcible sexual contact.

Hartley v. State, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

The 10-year presumptive term for first-degree sexual assault under the provisions of AS 12.55.125(c) was meant by the legislature to be appropriate in the majority of cases, which are those cases involving conduct that is characteristic of the offense of rape and that fall into the middle-ground between the most serious and least serious extremes for the offense, and it must be recognized that this presumptive term takes into account the high potential for the use of violence and the likelihood of some physical injury in the first-degree sexual assaults falling within the definition of subsection (a)(1) of this section. Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982), modified on other grounds and aff'd on rehearing, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983).

Sentence upheld. — See Reynolds v. State, Ct. App. Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Where record supported finding that defendant was the leader of a group of three or more persons who participated in offense of sexual assault in the first degree, such evidence, combined with consideration of prior, similar actions and of defendant's apparent lack of remorse, warranted imposition of eight-year sentence. Willard v. State, Ct. App. Op. No. 240 (File No. 6265), 662 P.2d 971 (1983).

Sentence of 10 years imprisonment, with eight suspended, was not excessive for conviction of attempted sexual assault in first degree. Van Hatten v. State, Ct. App. Op. No. 269 (File No. 5877), P.2d (1983).

Sentence for attempted sexual assault and burglary held excessive. — See Hansen v. State, Ct. App. Op. No. 218 (File No. 6965), 657 P.2d 862 (1983).

Applied in Nukapigak v. State, Ct. App. Op. No. 90 (File No. 5820), 645 P.2d 215 (1982); Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982); Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Stated in Born v. State, Ct. App. Op. No. 41 (File No. 5095), 633 P.2d 321 (1981); Peetook v. State, Ct. App. Op. No. 178 (File No. 6630), 655 P.2d 1308 (1982); Tazruk v. State, Ct. App. Op. No. 195 (File No. 6954), 655 P.2d 788 (1982).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980); State v. Jane Doe, Ct. App. Op. No. 104 (File No. 5716), 647 P.2d 1107 (1982); Koganaluk v. State, Ct. App. Op. No. 176 (File No. 6531), 655 P.2d 339 (1982); Ernart v. State, Ct. App. Op. No. 185 (File No. 6244), 656 P.2d 1199 (1982); Ecker v. State, Ct. App. Op. No. 190 (File No. 6726), 656 P.2d 577 (1982); Nukapigak v. State, Sup. Ct. Op. No. 2667 (File No. 5820), P.2d (1983).

II. FORMER LAW.

A. Generally.

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.120 and 11.15.130.

Forcible rape ranks among the most serious crimes. Newson v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); Ahvik v. State, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980).

The reason such a crime as forcible rape is most serious is because it amounts to a desecration of the victim's person which is a vital part of her sanctity and dignity as a human being. Gordon v. State, Sup. Ct. Op. No. 931 (File No. 1535), 501 P.2d 772 (1972); Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); Ames v. State, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing on other grounds, 537 P.2d 1116 (1975); Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); Bordewick v. State, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978).

Definition of rape under former law. — Sekinoff v. United States, 283 F. 38 (9th Cir. 1922).

Criminal intent was required for conviction of statutory rape. — See State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Although former AS 11.15.120 was silent as to any requirement of intent, the requirement of criminal intent was inferred. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Rape is a general intent crime, and all that is required for a conviction is proof of the voluntary commission of the prohibited act. Walker v. State, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 58 (1982).

tate, Ct. App Op. No 176
. 655 P.2d 339 (1982);
Ct. App Op. No 186 (File
P.2d 1199 (1982); Ecker v.
o. No. 190 (File No. 6726,
982); Nukapigak v. State,
2667 (File No. 5820).

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Lesser included offense. — The Alaska statutes do not proscribe fornication, and therefore, it could not be considered an offense of a lesser degree to statutory rape. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978); Teokak v. State, Ct. App. Op. No. 108 (File No. 4656), 648 P.2d 1018 (1982).

The offense of assault with intent to commit rape is a lesser included offense to rape. Tuckfield v. State, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981).

Attempt. — Every element of an attempt is comprised in an assault with intent to commit the offense of rape. Sekinoff v. United states, 283 F. 38 (9th Cir. 1922).

Separate crimes. — Rape, assault with a dangerous weapon, and kidnapping were separate crimes with separate elements. Lacy v. State, sup. Ct. Op. No. 2039 (File No. 3741), 608 P.2d 19 (1980).

Separate sentences were called for where defendant's conduct in kidnapping and raping his victim and assaulting her with a deadly weapon constituted the commission of three distinct offenses, each of which violated a different societal interest. State v. Occhipinti, Sup. Ct. Op. No. 1405 (File No. 3084), 562 P.2d 348 (1977).

B. Age of Consent.

Female under age of consent is in law incapable of consent. — The crime of rape is commited upon a female under the age of consent with or without her consent since she is in law incapable of consent. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Thus, it is not necessary to establish her consent as an essential element of the crime. Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Indictment need not allege consent of female under age of consent. — An indictment for rape of a girl under the age of consent is not insufficient because it fails to allege that the act was done with her consent. Callahan v. United States, 240 F. 683 (9th Cir. 1917); Rose v. United States, 240 F. 685 (9th Cir. 1917).

Defense of reasonable mistake of age. — A charge of statutory rape was defensible where an honest and reasonable mistake of fact as to the victim's age was shown. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

The charge of statutory rape was legally unsupportable unless a defense of reasonable mistake of age was allowed. To refuse such a defense would have been to impose criminal liability without any criminal mental element. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

While, where an offender was aware he was committing an act of fornication, a mistake of fact did not serve as a complete defense, it should have served to reduce the offense to that which the offender would have been guilty of had he not been mistaken. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

Under former AS 11.15.120, if an accused had a reasonable belief that the person with whom he had sexual intercourse was 16 years of age or older, he could not have been convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was 18 years of age or older, he could still have been criminally liable for contribution to the delinquency of a minor. State v. Guest, Sup. Ct. Op. No. 1709 (File No. 3533), 583 P.2d 836 (1978).

For approved instruction on consent of female under age of consent, see Rose v. United States, 240 F. 685 (9th Cir. 191").

C. Procedure.

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Charging defendant with the crime of murder committed "in the attempt to perpetrate a rape" fails to allege the separate crime of rape with sufficient clarity to support a conviction. Alto v. State, Sup. Ct. Op. No. 1443 (File No. 2339), 565 P.2d 492 (. 77).

Severance of counts involving various victims. — Where defendant was prosecuted on multiple counts of unlawful entry with intent to rape, rape, assault, and burglary, involving various victims, the trial court did not err in denying severance of the counts since evidence regarding the attack on each of the alleged victims would have been admissible in the trial of each of the other charges if the charges had been separately tried. Nix v. State, ct. App. Op. No. 157 (File No. 58 ,1), 653 P.2d 1093 (1982).

Character evidence. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Questioning victim's credibility. — While a defendant could properly seek to question the victim's credibility, the established rule is that this may not be done by

extrinsic evidence on a collateral matter Moss v. State, Sup. Ct. Op. No. 2239 (File No. 4389), 620 P.2d 674 (1980).

Corroboration of prosecutrix's testimony. — No corroboration of the prosecutrix's testimony is necessary in statutory rape cases. Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior history of sexual activity with victim. — Whether evidence in a statutory rape prosecution of prior history of sexual activity with the prosecutrix is justified as background or the ongoing nature of the relationship is probative, the nexus of these reasons justifies an exception to the general rule against admissibility of prior bad acts. Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior misconduct. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Evidence of prior sexual offenses. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Determining age from appearances. — See Toores v. State, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Admission of defendant's driver's license into evidence to establish his age was harmless beyond a reasonable doubt. Torres v. state, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Psychiatric testimony. — See Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence. Freeman v. State, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Hearsay testimony. — It was not error to admit hearsay testimony concerning complaints made by a rape victim to her mother and a school counselor. Greenway v. State, Sup. Ct. Op. No. 2206 (File No. 4754), 626 P.2d 1060 (1980).

Failure at preliminary hearing to state all the facts attending a claimed rape in response to an instruction to proceed and tell what happened is not a ground of impeachment. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Error to admit recording of sodium pentothal interview. — In a prosecution for statutory rape and sodomy, it was error to admit the recording of a sodium-pentothal interview, even as a prior consistent statement for the limited purpose of rehabilitating an impeached witness. Lindsey v. United States, 16 Alaska 268, 237 F.2d 893 (9th Cir. 1956).

Or to exclude public from trial. — The trial court erred in assuming the power of excluding the public from a trial on the charge of rape of an adult woman. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

It would be denying the defendant his presumption of innocence and a predecision by the court of his guilt to hold that a married woman must be relieved of the embarrassment of a public trial because she is called upon to testify to the story of the defendant's crime and her shame. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Verdict supported by evidence. — Testimony of complaining witness of her conduct before and after the alleged rape, corroborated and contradicted, and her sole evidence of the rape itself, supports the verdict on the inference that the defendant's defense was untrue, and that she was the unfortunate victim of a brutal outrage. Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Instructions. — The use of the following instruction in a statutory rape case is prohibited: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the indictment with caution." Burke v. State, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Since specific intent is not an element of the offense of rape, giving an instruction that the law assumes that every person intends the natural consequences of his voluntary acts was not error. Walker v. State, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 88 (1982).

Instruction sufficiently covering question of impeachment. — See Tanksley v. United States, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

For approved instruction on consent of female under age of consent, see Rose v. United States, 240 F. 685 (9th Cir. 1917).

Sentencing. — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of Donlun v. State, Sup. Ct. Op. No. 1092 (File No. 2188), 527 P.2d 472 (1974), was

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not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." Edenshaw v. State, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).

Sentence for rape upheld. — See Gordon v. State, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); Torres v. State, Sup. Ct. Op. No. 1031 (File No. 1911), 522 P.2d 386 (1974); Newsom v. State, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); Ames v. State, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing, 537 P.2d 1116 (1975); Coleman v. State, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976); Nukapigak v. State, Sup. Ct. Op. No. 1410 (File No. 2915), 562 P.2d 697 (1977), aff'd on rehearing, 576 P.2d 982 (1978); Bordewick v. State, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); Morrell v. State, Sup. Ct. Op. No. 1577 (File No. 2790), 575 P.2d 1200 (1978); Alexander v. State, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); Moore v. State, Sup. Ct. Op. No. 1880 (File No. 4032), 597 P.2d 975 (1979); Wagner v. State, Sup. Ct. Op. No. 1897 (File No. 4381), 598 P.2d 936 (1979); Wikstrom v. State, Sup. Ct. Op. No. 1987 (File No. 4535), 603 P.2d 908 (1979); Tate v. State, Sup. Ct. Op. No. 2020 (File No. 4550), 606 P.2d 1 (1980); Mallott v. State, Sup. Ct. Op. No. 2027 (File No. 3364), 608 P.2d 737 (1980); Alexander v. State, Sup. Ct. Op. No. 2077 (File No. 3522), 611 P.2d 469 (1980); Cochrane v. State, Sup. Ct. Op. No. 2086 (File No. 4531), 611 P.2d 61 (1980); Helmer v. State, Sup. Ct. Op. No. 2191 (File No. 4383), 616 P.2d 884 (1980); Tuckfield v. State, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981); Edenshaw v. State, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981); Kompkoff v. State, Ct. App. Op. No. 015 (File No. 5324), 626 P.2d 1091 (1981); Williams v. State, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence for rape held excessive. — See Ahvik v. State, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980); Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981); Qualle v. State, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglary term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. Nix v. State, Ct. App. Op. No. 157 (File No. 5481), 651 P.2d 1093 (1982).

Sentence for rape too lenient. — See State v. Lancaster, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); State v. Wassilie, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); State v. Jensen, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See Shelton v. State, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).

Sentence for assault with intent to rape upheld. — See Fomin v. State, Sup. Ct. Op. No. 2214 (File No. 5013), 619 P.2d 718 (1980).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if the offender engages in

(1) sexual contact with another person without consent of that person; or

(2) sexual penetration with a person who the offender knows

(A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration; or

(B) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, Ct App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Evidence. — Where victim woke up in the early morning hours to find defendant in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jury could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial judge did not err in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. Johnson v. State, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).

Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. Howard v. State, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11.41.430. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983)

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NOTES TO DECISIONS

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.134 and former AS 11.41.410(a)(4).

For cases construing former rape statute, see AS 11.41.410, Notes to Decisions, analysis line II.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well being of its children may justify legislation that could properly be applied to adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Physical conduct punished under former statute. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); Smiloff v. State, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).

Former section prohibited fellatio. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Mitigating Factors. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year old daughter) was not a mitigating factor. Hodges v. State, Ct. App. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Sentence under former AS 11.15.134 upheld. — See Noble v. State, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1976); Buchanan v. State, Sup. Ct. Op. No. 1316 (File No. 2553), 554 P.2d 1153 (1976); Morgan v. State, Sup. Ct. Op. No. 1908 (File No. 4187), 598 P.2d 952 (1979); Baker v. State, Sup. Ct. Op. No. 1968 (File No. 4631), 602 P.2d 797 (1979); Alvarado v. State, Sup. Ct. Op. No. 2323 (File No. 5133), 626 P.2d 582 (1981).

Sentence for assault upheld. — In prosecution of defendant with no prior criminal record on two counts of first-degree sexual assault of his 12-year old daughter, sentence of two consecutive eight-year terms with five years suspended was not excessive. Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

In light of the substantial duration of defendant's sexual abuse of his stepdaughter (three years), his failure to learn from the earlier discovery of his prior offenses, his disregard of a court order that he avoid contact with the victim, and his total failure to take any meaningful step toward rehabilitation, 10-year sentence with four years suspended was not excessive for conviction of first-degree sexual assault. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence under AS 11.15.134 held excessive. — See Qualle v. State, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 120 years. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Applied in Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6).

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if, being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if, being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch [illegible] SLA 1978; am § [illegible]ch 102 SLA 1980; am § 3 ch 78 SLA 1983)

Effect of amendments. — The 1980 amendment rewrote subsection (a).

The 1983 amendment rewrote this section.

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

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Applied in Goulden v. State, Ct. App. Op. No. 201 (File No. 6465), 656 P.2d 1218 (1983).

Cited in Stores v. State, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980); Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Collateral references. — Civil liability for carnal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.

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

Parent or person in loco parentis, liability for rape of minor child, 19 ALR2d 460.

Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.410 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless

(1) the spouses were living apart; or

(2) the defendant caused physical injury to the victim.

(b) In a prosecution under AS 11.41.410 — 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978)

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. Hartwell v. State, Sup. Ct. Op. No. 391 (File No. 704), 423 P.2d 282 (1967), decided under former AS 11.40.110.

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality; or

(6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or magazine that depicts such conduct, the person," substituted "18 years" for "16 years" in two places, and added "the following actual or simulated conduct" to the end, all in the introductory paragraph; substituted "lewd" for "obscene" in paragraphs (2), (3) and (6); and deleted "female" preceding "breast" in paragraph

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Harold F. GREENWAY, Appellant,

v.

STATE of Alaska, Appellee.

No. 4754.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted in the Superior Court, Fourth Judicial District, Warren W. Taylor, J., of rape, and he appealed. The Supreme Court held that testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible.

Affirmed.

Matthews, J., filed concurring opinion in which Rabinowitz, C. J., concurred.

1. Rape ⇐48(1)

Testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible under special hearsay exception concerning complaints of victims in sex crimes.

2. Rape ⇐48(2)

Testimony from either victim or witnesses pertaining to details of victim's complaint is generally not admissible in criminal prosecution.

Dick L. Madson, Cowper & Madson, Fairbanks, for appellant.

Natalie K. Finn, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

PER CURIAM.

Harold Greenway was convicted of raping his thirteen year old stepdaughter. The rape occurred in July, 1978, on the banks of the Yukon River, near Greenway's summer fish camp. According to the victim, Greenway threatened to kill her if she told anyone about the rape and, as a result, she told no one other than her mother[1] until September, when she reported the rape to her school counselor. At trial the State, over Greenway's objections, presented testimony by the victim's mother and her school counselor concerning her complaints of rape. Greenway now contends that the trial court's failure to exclude this testimony as inadmissible hearsay constituted reversible error.[2]

The State contends that the statements in question were admissible under the special hearsay exception concerning complaints of the victim in sex crimes. We find this argument persuasive.

[1, 2] We recognized this exception in *Torres v. State*, 519 P.2d 788, 793 n.9 (Alaska 1974):

> [A]s Wharton points out, statements concerning the crime of rape or sexual assault, shortly after the commission of the act are admissible as a recognized exception to the hearsay rule:
>
> In a prosecution for a sex crime, such as rape or assault with intent to rape, it

1. There is conflicting testimony as to whether or not the victim actually told her mother of the rape. The victim testified that she told her mother of the rape about three days after the incident but the mother interpreted this conversation differently and denied that she knew of the rape until after the victim told her school counselor in September. A social worker also testified that she and the mother had discussed the victim's rape and that the mother had indicated that her daughter had told her of the rape shortly after the incident. The mother admitted to having several conversations with the social worker but again denied admitted knowledge of the rape prior to her daughter's report to the school counselor.

2. Appellant also claims as error the admission of the testimony of the victim that she had told her mother, best friend, social service worker and her school counselor about the rape. However, no objection was made to this testimony and, in fact, the appellant agreed that it should be admissible. Therefore, this claim of error was waived.

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may be shown by testimony of the prosecutrix or by that of some other witness, that the prosecutrix made complaint of the crime shortly after its commission. Such evidence tends obviously to indicate the truth of the charge and is corroborative thereof; conversely, evidence of the failure to make a prompt complaint casts doubt upon the truth of the claim that a crime had been committed.

2 F. Wharton, Criminal Evidence § 313, at 113–114 (13th ed. Charles E. Torcia 1972) (footnotes omitted).

See also 4 J. Wigmore, Evidence §§ 1134–36 (Chadbourn rev. ed. 1972) (discussing at length the justifications behind the exception). It is true that, other than the disputed complaint made to her mother approximately three days after the incident, the victim here did not complain of the rape until September, over a month after its commission. However, her delay is both explained and excused by Greenway's threats against her and her young age. *See, e. g., Hunt v. State*, 213 So.2d 664 (Ala.App.), *cert. denied*, 213 So.2d 666 (Ala. 1968) (delay of nine months does not bar admission of testimony, in light of, *inter alia*, defendant's threats to kill victim); *State v. Twyford*, 85 S.D. 522, 186 N.W.2d 545 (1971) (delay of over two months not reason to exclude testimony, since victim was only twelve years old).[3] We therefore conclude that the trial judge did not err in admitting the testimony of the rape victim's mother and her school counselor concerning her complaint of rape.[4]

The conviction is AFFIRMED.

MATTHEWS, J., with whom RABINOWITZ, C. J., joins, concurs.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I agree with the Per Curiam opinion. Moreover, I believe that the questioned evidence was properly admitted under the recent fabrication exception[1] to the common law rule prohibiting the admission of prior consistent statements, for the following reasons.

Defense counsel in this case elicited testimony that the victim was generally unhappy living with her mother and stepfather before the rape, and that thereafter, in early September, her mother and stepfather were in a violent fight involving a gun during which the victim and her younger sister were forced to flee to a neighbor's house and the police were called. It was just a few days after this incident that the victim complained of the rape to her school counselor, which resulted in her being taken from the home of her mother and stepfather. Thus, while there was a general mo-

3. We realize that the list of hearsay exceptions found in our present Rule 803, Alaska R. Evid., does not include this exception. This omission, however, was more in the nature of an oversight on our part, and not a repudiation of *Torres*; we shall refer the question of whether the rules should be amended to include the exceptions noted in *Torres* to our standing committee on the Evidence Rules. In any event, Evidence Rule 803 was not in effect at the time of Greenway's trial, and so does not govern this appeal.

4. We find no merit to appellant's argument that the victim's testimony went beyond the "fact of the complaint" limitation which is part of the special hearsay exception concerning complaints of the victim in sex crimes. Appellant argues that it was error to allow the victim to testify that she had mentioned the location of the event and, impliedly, the perpetrator, to third persons. Testimony from either the victim or witnesses pertaining to "details" of the victim's complaint is generally not admissible. *See generally* 4 J. Wigmore, Evidence § 1136, at 306 (Chadbourn rev. ed. 1972). However, in her testimony the victim did not, in fact, state anything about the rape or the name of the perpetrator in her complaints to third persons. The victim's testimony was only to the effect that she had told third persons of the rape. She gave no details pertaining to her complaints and nothing else in the record indicates that either the victim or the witnesses gave such testimony.

1. This exception has been codified in the Alaska Rules of Evidence as Rule 801(d)(1)(B). It provides:

> A statement is not hearsay if
> (1) The declarant testifies at the trial or hearing and the statement is ...
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive ...

tive to fabricate which antedated the rape there was also a specific event which could have supplied a motive to fabricate which occurred after the victim complained of the rape to her mother but before she complained of the rape to the school counselor.

Where there are several events which supply a motive to fabricate, evidence of a statement consistent with the declarant's testimony which was made before the latest event, but after the others, may be admitted:

> Otherwise, it would never be proper to rehabilitate a witness by proof of prior consistent statements in cases where numerous impeaching circumstances were shown to exist at the time of the trial but where there may be found a theoretical possibility that the witness might have been motivated by one of them at the time of making the prior consistent statement.... The principle involved is that where the circumstances are such as to leave it reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.

United States v. Grunewald, 233 F.2d 556, 566 (2nd Cir. 1956), *rev'd on other grounds*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

Applying this rule to this case, the victim's complaint to her mother was admissible under the recent fabrication exception.

Walter John DALE, Appellant,

v.

STATE of Alaska, Appellee.

No. 4506.

Supreme Court of Alaska.

Nov. 7, 1980.

Defendant was convicted, on guilty plea, before the Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., of five counts of sale of cocaine and was sentenced to five concurrent five-year terms, and he appealed. The Supreme Court, Matthews, J., held that: (1) even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, and (2) trial judge was shown to have considered the possibility of defendant British citizen's deportation when sentence was determined, and judge's failure to articulate the role which such factor played in his decision was not error.

Affirmed.

Rabinowitz, C. J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1177

In proceeding in which defendant pled guilty to five counts of sale of cocaine, even if trial court had erred when, in determining sentence, it considered a previously dismissed indictment for possession of narcotics and an alleged uncharged cocaine sale for purpose of testing credibility of defendant's story that he had simply acted as a middleman and "good Samaritan" in supplying narcotics, the error would have been harmless, in view of the substantial, uncontradicted evidence suggesting that defendant was a "professional" cocaine dealer. AS 17.10.010.

2. Drugs and Narcotics ⇐133

On appeal from proceeding in which defendant British citizen pled guilty to five counts of sale of cocaine and was sentenced to five concurrent five-year terms, trial judge was shown to have considered the possibility of defendant's deportation when sentence was determined; judge's failure to articulate the role which such factor played in his decision was

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3. Aliens ⇐17

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Robert S. Spitz
Gruening, Anchora

Leonard M. Lin
Larry R. Weeks,
and Avrum M. Gr
for appellee.

Before RABINO
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MATTHEWS, J

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Rule 803. Hearsay Exceptions — Availability of Declarant Immaterial.

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. *See* Rule 602.

(1) and (2) Present Sense Impression—Excited Utterance. In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Subdivision (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-41 (1962).

The theory of Subdivision (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, at 135. Spontaneity is the key factor in each instance, though arrived at by some-

what different routes. Both are needed in order to avoid needless niggling.

While the theory of Subdivision (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L. Rev. 432 (1928), it finds support in cases without number. *See* cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). It is well grounded in Alaska case law. *See Torres v. State,* 519 P.2d 788, 792-93 (Alaska 1974); *Watson v. State,* 387 P.2d 289 (Alaska 1963). Since unexciting events are less likely to evoke comment, decisions involving Subdivision (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost,* 10 So.2d 83 (Fla. 1942); *Houston Oxygen Co. v. Davis,* S.W.2d 474 (Tex. 1942); and cases cited in McCormick (2d ed.) § 278, at 709-11. *See also Beech Aircraft Corp. v. Harvey,* 558 P.2d 879, 884 (Alaska 1976).

With respect to the time element, Subdivision (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Subdivision (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 243 (1961); McCormick (2d ed.) § 297, at 706-07.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. Never-

theless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick (2d ed.) § 299, at 705. Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland,* 174 N.E.2d 804 (Ill. 1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden,* 387 P.2d 874 (N.M. 1963); *Beck v. Dye,* 92 P.2d 1113 (Wash. 1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Subdivision (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Subdivision (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. *See* Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L. Rev. 204, 206-09 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code § 1240 (as to Subdivision (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

(3) Then Existing Mental, Emotional, or Physical Condition. Subdivision (3) is essentially a specialized application of Subdivision (1), presented separately to enhance its usefulness and accessibility.

The exclusion of "statements of memory or belief to prove that fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States,* 290 U.S. 96, 78 L.Ed. 196 (1933);

Maguire, The Hillmon Case: Thirty-three Years After, 38 Harv. L. Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U. Chi. L. Rev. 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon,* 145 U.S. 285, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed as applied to a declarant.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, indentification, or terms of a declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

The addition of the words "offered to prove his present condition or future action" limits the exception to avoid results like *People v. Alcalde,* 148 P.2d 627 (Cal. 1944). For the statements of one person as to his mental or emotional condition to be used against another, Subdivision (23) must be satisfied. This modifies the *Hillmon* rule.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission,* 119 N.E.2d 224 (Ill. 1954); New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus, a patient's statement that he was struck by an automobile would qualify but not his statment that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambu-

lance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

(5) Recorded Recollection. A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. *Cf.*, Reporter's Comment accompanying Rule 801(d)(1)(A). Hence, the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New

Jersey Rule 63(1)(b), and this has been the position of the federal courts.

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella,* 107 A. 279 (N.J. 1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

(6) **Business Records.** This exception continues in effect the business records exception to the hearsay rule previously found in Alaska R. Civ. P. 44(a)(1) and Alaska R. Crim. P. 26(e). While the language is slightly different, the basic thrust of the new rule is identical to the old.

The background of this exception is set forth in the Advisory Committee's Note accompany Federal Rule 803(6). The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, are acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz,* 170 N.E. 517 (N.Y. 1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. Subdivision (6) has been drafted to eliminate the confusion caused by Federal Rule 803(6), which could be read to read to abolish the business duty concept although the legislative history plainly indicates that no such thing was intended.

Entries in form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. In the state courts, the trend favors admissibility. In order to make clear its adherence to the latter postion, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman,* 318 U.S. 109 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on

records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate.

The lower court had concluded that the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer,* 129 F.2d 976, 991 (2d Cir. 1942). Other courts also have focused on a motive to misrepresent, although many business records are potentially self-serving. The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness." *See generally Patrick v. Sedwick,* 391 P.2d 453, 458-59 (Alaska 1964); *Commercial Union Companies v. Smallwood,* 550 P.2d 1261 (Alaska 1976).

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.

(7) **Absence of Records.** Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, supra, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick (2d ed.) § 307; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence 63(14). This Rule supersedes Alaska R. Civ. P. 44(a)(2) and Alaska R. Crim. P. 26(e); it provides for identical results.

(8) **Public Records and Reports.** "The reliability and trustworthiness of official documents and also the desire to keep

officials from having to testify personally in every instance have generally been established as the policies underlying this hearsay exception." *Webster v. State,* 528 P.2d 1179, 1181 (Alaska 1974). The exception was recognized in Alaska R. Civ. P. 44(b) and Alaska R. Crim. P. 26(e), which are superseded by this rule.

Subdivision (8) follows Maine Rule 803(8), rather than its federal counterpart. The Maine rule is clearer, easier to apply, and avoids some of the confrontation problems presented by the Federal Rule. *See generally, United States v. Smith,* 521 F.2d 957 (D.C. Cir. 1975). It recognizes that government records that are compiled for purposes other than presentation on the government's behalf at trial are generally reliable (part (a)), but that reliability is substantially diminished when the government stands to gain an edge in litigation through the introduction of a record or report it has prepared (parts (b)(ii) & (iii)). Similarly, the rule differentiates factual findings made by the government in the process of carrying out public responsibilities, which are presumed to be reliable, from factual findings resulting from a special investigation of a particular complaint, case or incident, which are not within this exception, since there is no reason to believe that the government would itself rely on its findings outside the litigation context (part (b)(iv)). Finally, investigative reports by police and law enforcement personnel are excluded because they are often unreliable. *See Menard v. Acevedo,* 418 P.2d 766 (Alaska 1966).

While this rule may appear, at first blush anyway, to be at odds with *Webster v. State, supra,* that case would be decided the same way under these rules. Presumably the breathalyzer test would be admissible as a business record under Subdivision (6) *Menard v. Acevedo, supra,* is in accord with this Subdivision.

More leeway is provided for admission of public reports involving factual findings in civil cases than criminal cases. In this way deference is paid the confrontation clause. But records and reports not involving investigations into particular events and findings of fact are admissible under this Subdivision even in criminal cases.

There is no doubt that Subdivision (8) differs from former Alaska R. Civ. P. 44(b), but the goals of both rules are similar. When Subdivisions (6) and (8) of the rules are read together, it should be apparent that the admissibility of official records is not unduly circumscribed by the rule.

The notice requirement, formally found in Alaska R. Civ. P. 44(b)(2) is carried forward, but the authentication provisions of Alaska R. Civ. P. 44(b)(4) & (5) and the regulation of copies under Alaska R. Civ. P. 44(b)(6) & (c) are eliminated as these subjects are covered by Articles IX and X of these rules.

(9) **Records of Vital Statistics.** Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment, Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281. It is consistent with the previous exception and may overlap with it in some instances.

(10) **Absence of Public Record or Entry.** The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Subdivision (7) with respect to regularly conducted business activities, is here extended to public records of the kind mentioned in Subdivisions (8) and (9). 5 Wigmore § 1633(6), at 519. Some harmless duplication no doubt exists with Subdivision (7). This continues in effect the policy of former Alaska R. Civ. P. 44(b)(3).

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry; *e.g., People v. Love,* 142 N.E. 204 (Ill. 1923) (certificate of Secretary of State admitted to show failure to file documents required by Securities Law); as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

(11) **Records of Religious Organizations.** Records of ac-

tivities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, at 371, and Subdivision (6) would be applicable. However, both the business record doctrine and Subdivision (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 142 N.E. 478 (Ill. 1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the likelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. *See* California Evidence Code § 1315 and Comment.

(12) **Marriage, Baptismal, and Similar Certificates.** The principle of proof by certification is recognized as to public officials in Subdivisions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. *See* 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials (*see*, Rule 902) is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, *see*, Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

(13) **Family Records.** Records of family history kept in family bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with California Evidence Code § 1312. In approving the Federal Rule counterpart to Alaska Rule 803(13), the House of Representatives' Judiciary Committee approved this rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11). This is a sensible approach to the Subdivision and accurately discribes the purpose of the Alaska rule. *See also,* Annot., 39 A.L.R. 372 (1924).

(14) **Records of Documents Affecting an Interest in Property.** The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. *See* AS 34.15.260. *See also,* AS 34.15.300 and AS 35.25.060. *See generally* Hearsay Under the Proposed Federal Rules: A Discretionary Approach, 15 Wayne L. Rev. 1077, 1172-73 (1968).

(15) **Statements in Documents Affecting an Interest in Property.** Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the

recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. Although there is authority restricting this exception to ancient documents, there is no good reason to so limit it. It should not be surprising, however, to see that in practical application the document will most often be an ancient one. *See* Uniform Rule 63(29), Comment. The fact that the Alaska Rule and Federal Rule 803(15) are identical removes any question whether the Federal Rule violates the policy of *Erie* recognized in other Federal Rules (*e.g.*, 301, 501, 601). *See* K. Redden and S. Saltzburg, Federal Rules of Evidence Manual 334 (2d ed. 1977).

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

(16) Statements in Ancient Documents. Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. 7 Wigmore § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. *But see* 5 Wigmore § 1573, at 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick (2d ed.) § 323, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. Nebraska followed the usual common law view in defining ancient documents as those in existence more than 30 years. Most other states that have adopted rules based on the federal model agree with the federal provision reducing the number of years to 20. Subdivision (16) also reduces the num-

ber of years on the theory that twenty years should be sufficient to counteract fraud.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," *see* California Evidence Code § 1331.

(17) **Market Reports, Commercial Publications.** Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. 6 Wigmore §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, *see* Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market." This rule is consistent with AS 45.05.240.

(18) **Learned Treatises.** Commentators have generally favored the admissibility of learned treatises; *see* McCormick 2d ed.) 321; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692. *See also* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc). But the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this po-

sition may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the United States Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla. App. 1967), *cert. denied*, 201 So.2d 556 (Fla. 1968); *Darling v. Charleston Memorial Community Hospital*, 211 N.E.2d 253 (Ill. 1965); *Dabroe v. Rhodes Co.*, 392 P.2d 317 (Wash. 1964).

Nebraska did not adopt such a provision in its rules, but other states following the Federal model did.

(19), (20), and (21) Reputation Concerning Personal or Family History—Reputation Concerning Boundaries or General History—Reputation as to Character. Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons

having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, at 444, and *see also,* § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Subdivision (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. 5 Wigmore § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions *see,* Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Subdivision (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick (2d ed.) § 324. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, McCormick (2d ed.) § 324, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the con-

troversy with respect to which it is offered. For similar provisions *see*, Uniform Rule 63(27)(a), (*o*); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Subdivision (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick (2d ed.) §§ 44, 186. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

(22) Judgment as to Personal, Family, or General History, or Boundaries. A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *See City of London v. Clerke,* Carth. 181, 90 Eng. Rep. 710 (K.B. 1691); *Neill v. Duke of Devonshire,* 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and subdivision (22) goes no further, not even including character.

(23) Other Exceptions. Whether or not to include a general section like this divided the United States Congress during its consideration of the Federal Rules of Evidence. At first the House Committee on the Judiciary deleted draft rules [803(24) and 804 (b)(5)] intended to allow courts flexibility in creating hearsay exceptions to fit particular cases. Such rules were viewed "as injecting too much uncertainty into the law of evi-

dence and impairing the ability of practitioners to prepare for trial." The Senate Committee on the Judiciary believed

> that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The Senate Committee "intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances." Thus, it modified the rule proposed by the Advisory Committee and approved by the United States Supreme Court to narrow the exception. House and Senate Conferences finally agreed on the Senate's approach but added a provision that a party intending to request the Court to use a statement under this subdivision must notify, sufficiently in advance of trial to allow for a fair contest on the issue of whether the statement should be used, any adverse party of the intent as well as of the particulars of the statement.

Some states that adopted rules based on the federal model rejected any residual exception (*e.g.*, Maine and Nebraska), or modified the Federal Rule (*e.g.*, Nevada and New Mexico). Alaska Rule 803(23) copies the Federal Rule in the belief that the Senate Judiciary Committee was correct in concluding that the specific exceptions provided for in Rule 803, "while they reflect the most typical and well recognized exceptions to the hearsay rule may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence made clear that it should be heard and considered by the trier of fact." *Cf., Beech Aircraft Corp. v. Harvey,* 558 P.2d 879 (Alaska 1976). The intent of the rule is that it should be used sparingly. It has been cited with favor in *Alaska Airlines, Inc. v. Sweat,* 584 P.2d 54 (Alaska 1978).

Note on Omission—Omitted from this rule is an exception for judgments of previous conviction. *See* Federal Rule 803 (22). Since guilty pleas and statements in connection therewith are admissible under Rule 801(d)(2)(a), unless banned under Rule 410, the only reason to include an exception for judgments of previous conviction is to permit a finding of one

trier of fact to come before another. If a judgment of guilty in a criminal case, which follows proof beyond a reasonable doubt, is to have impact in subsequent cases, the impact should be by way of collateral estoppel, not by admitting the previous judgment. The judgment tells the second trier of fact nothing; that trier will either disregard it or defer to it, neither of which tactic is intended by the Federal Rule. There are strong arguments to the effect that facts once proved beyond a reasonable doubt should be binding in subsequent proceedings, especially subsequent civil proceedings. But such a rule is beyond the scope of rules of evidence. The only argument in favor of the Federal Rule is that it might be unconstitutional to attempt to invoke the doctrine of collateral estoppel against a defendant in subsequent criminal cases and Federal Rule 803(22) is an attempt to use a prior finding in *some* way. But the fact remains that the trier of fact in the second case cannot know how to use the first finding. There is no reason to adopt a rule that can only confuse the trial process. In *Scott v. Robinson*, 583 P.2d 188 (Alaska 1978), the Supreme Court held that a conviction in a criminal case would be conclusive in a subsequent civil case as to the facts necessarily decided in the criminal case under certain circumstances, to wit: the prior conviction was for a serious criminal offense, the defendant had a full and fair hearing, and the issue on which the prior judgment is offered was necessarily decided in the previous trial.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
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MEMORANDUM February 29, 1984

SUBJECT: Hearsay evidence in prosecutions for sexual abuse of a minor (HB 565)

TO: Representative Barbara Lacher

FROM: Keith B. Levy KBL
Legislative Counsel

You have requested an analysis of the practical and legal implications of HB 565, relating to hearsay evidence in prosecutions for sexual abuse of a minor. The bill allows the introduction of certain kinds of hearsay evidence in limited sexual abuse prosecutions. Since this evidence would probably not be admissible under the present Rules of Evidence, adopted by the Alaska Supreme Court, the bill has the effect of amending those rules and must be passed by a two-thirds vote. The bill, by allowing hearsay evidence to be admitted in criminal prosecutions, raises the issue of the defendant's right to confront the witnesses against him or her, under the state and federal constitutions.

Analysis of the bill

HB 565 is based on Washington Criminal Code sec. 9A.44.120. I have been informed by the Department of Law that the Washington statute has been challenged a number of times and upheld in the trial courts, but it has yet to be ruled on by the state's highest court. Therefore the Washington law is of little help in determining the validity of HB 565.

In prosecutions for sexual abuse of a minor in any degree, HB 565 allows the prosecutor to introduce "hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child" if certain criteria are met (AS 12.45.049). Before the hearsay

evidence may be introduced, the court must determine that the circumstances of the child's statement indicate its reliability, and the child must either testify at the proceeding, or be unavailable as a witness. If the evidence is admitted on the basis that the child is unavailable, there must be some further evidence introduced to corroborate the child's statement. "Unavailability" is not defined in the bill, although Rule of Evidence 804 does define unavailability for certain exceptions to the hearsay rule. It may be advisable to adopt that definition in the bill to clarify what is intended.

Existing Rules of Evidence provide that hearsay is inadmissible, but provide for certain exceptions (Rules of Evidence 803 and 804). The apparent purpose of the bill is to make it easier to prosecute sexual abuse cases by allowing in evidence that the jury would otherwise not be permitted to consider. For example, under present law, if a child tells a teacher that the child's parent is sexually abusing the child, but the child refuses or is emotionally unable to repeat the story at the parent's sexual abuse trial, the teacher would not be permitted to repeat the child's story at the trial because it would be hearsay and does not fall under one of the existing exceptions. The bill would allow the teacher to testify if (1) the court determines that the child's statement appears reliable, and (2) the child either testifies (on some other matter) or is unavailable and there is some further evidence that the child's statement is true.

The right to confrontation

The sixth amendment to the United States Constitution and Article I, sec. 11 of the Alaska Constitution both provide that a defendant in a criminal trial may not be denied the right "to be confronted with the witnesses against him." HB 565 is in potential conflict with this constitutional right because it permits the statements of a child to be used against a criminal defendant without giving the defendant the opportunity to cross-examine the child.

The Alaska Supreme Court has summarized the right to confrontation as follows:

> This right of confrontation protects two vital interests of the defendant. First, it guarantees him the opportunity to cross-examine the witnesses against him so as to test their sincerity, memory, ability to

> perceive and relate, and the factual basis of their statements. Second, it enables the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom. (Footnotes ommitted).

Lemon v. State, 514 P.2d 1151, 1153 (Alaska 1973). The Court in Lemon analyzed the United States Supreme Court decisions on the right to confrontation as it relates to the introduction of hearsay evidence and concluded that

> ...while the demeanor interest of the right of confrontation is not a crucial element, the right to effective cross-examination is essential unless the testimony falls within certain established exceptions to the hearsay rule. (Footnote ommitted).

Lemon, supra, at 1154. The Court ruled that Lemon had been denied the right of confrontation because of the admission of a hearsay statement against him that did not fall within the established exceptions to the hearsay rule.

HB 56[illegible]oes contain certain protections for the defendant, but th[illegible] may not be enough to survive a constitutional challenge. Since the bill permits the prosecution to use hearsay evidence that does not fall within one of the established exceptions to the hearsay rule against the defendant, the Lemon case seems to prohibit it. Even if the criteria for the admission of the hearsay evidence contained in the bill are met, a court could still find that the defendant has been denied the right to confrontation. Although the question is an open one, there is a strong possibility that the bill could be found unconstitutional if challenged.

KBL:ojb
J4/022

INTENT OF LEGISLATION

HB 565 - "An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor; and amending Rules 803 and 804, Alaska Rules of Evidence."

This legislation will allow hearsay evidence of statements made by children under the age of 10 relating to sexual abuse of that child if:

1) The court determines that the circumstances indicate the statement would be reliable, and

2) The child either testifies in person or, if the child is unavailable as a witness, there is additional evidence to corroborate the statement.

We have been advised by troopers that they have videotapes of children 2½ or 3 years old where the sexual abuse is articulated clearly. However, they are unable to proceed with the grand jury indictment because these very young children often block out the experience before they are questioned in court. The sworn statement of the professional who interviewed the child, along with the videotapes, would be admissable under this act.

~~Current Version~~

Levy
3/23/84

Original sponsors: Lacher, Phillips,
Flood, et al

2nd CS

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement that is not otherwise admissible made by a child under the age of 10 who is the alleged victim of the offense describing the conduct establishing the offense may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the proponent of the statement informs the adverse party of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the adverse party a fair opportunity to respond to the statement.

(b) In this section,

(1) "unavailable" means the child

(A) has a lack of memory of the subject matter of the statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means;

(2) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 2. AS 12.45.049, added by sec. 1 of this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by adding an exception to the hearsay rule for hearsay evidence of certain statements made by certain victims of certain sexual offenses.

Keith Levy

To CSHB 565 (HESS)

Line 13, Page 1

after"statement,"insert "which is not otherwise admissable"

Line 24, Page 1

substitute "proponent of the statement" for "prosecutor"

Line 24, Page 1

substitute "adverse party" for "defendant"

Line 26, Page 1

substitute "adverse party" for "defendant"

Line 8 and Line 15, Page 2

substitute "proponent of the child's statement" for "prosecutor"

1st Committee Substitute Levy 3/1/84

Original sponsors: Lacher, Phillips, Flood, et al

BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement made by a child under the age of 10 who is the alleged victim of the offense describing the conduct establishing the offense may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the prosecutor informs the defendant of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the defendant a fair opportunity to respond to the statement.

(b) In this section,

(1) "unavailable" means the child

(A) has a lack of memory of the subject matter of the statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the prosecutor has been unable to procure the child's attendance by reasonable means;

(2) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the prosecutor to prevent the child from attending or testifying.

* Sec. 2. AS 12.45.049, added by sec. 1 of this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by adding an exception to the hearsay rule for hearsay evidence of certain statements made by certain victims of certain sexual offenses.

Levy
3/30/84

Original sponsors: Lacher, Phillips, Flood, et al

IN THE HOUSE BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 565 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for certain sexual offenses; and amending Rules 803 and 804, Alaska Rules of Evidence, and Rule 6(r), Alaska Rules of Criminal Procedure."

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

* Section 1. AS 12.40 is amended by adding a new section to read:

Sec. 12.40.110. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the grand jury proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the

statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 2. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL OFFENSES. (a) In a prosecution for an offense under AS 11.41.410 - 11.41.440 or 11.41.455, hearsay evidence of a statement, not otherwise admissible, made by a child under the age of 10 who is the victim of the offense describing the conduct establishing the offense may be admitted into evidence at trial if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability;

(2) the child

(A) testifies at the trial; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement; and

(3) the proponent of the statement informs the adverse party of the intention to offer the statement and the contents of the statement sufficiently before the proceedings to give the adverse

party a fair opportunity to respond to the statement.

(b) In this section,

(1) "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion;

(2) "unavailable" means the child

(A) has a lack of memory of the subject matter of the statement being offered;

(B) is unable to attend or testify at the hearing because of death or then existing physical or mental illness or infirmity;

(C) is declared incompetent to testify by the judge; or

(D) is absent from the hearing and the proponent of the statement has been unable to procure the child's attendance by reasonable means.

(c) A child is not unavailable under this section if the unavailability is due to the procurement or wrongdoing of the proponent of the statement to prevent the child from attending or testifying.

* Sec. 3. AS 12.40.110, added by sec. 1 of this Act, has the effect of amending Rule 6(r), Alaska Rules of Criminal Procedure, by making certain hearsay evidence admissible in grand jury proceedings for certain sexual offenses without requiring compelling justification.

* Sec. 4. AS 12.45.049, added by sec. 2 of this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by allowing admission at trial of hearsay evidence of certain statements made by certain victims of certain sexual offenses.

Introduced: 2/1/84
Referred: Health, Education &
Social Services and Judiciary

IN THE HOUSE BY LACHER, PHILLIPS AND FLOOD

HOUSE BILL NO. 565

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to hearsay evidence in prosecutions for sexual abuse of a minor; and amending Rules 803 and 804, Alaska Rules of Evidence."

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

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.049. HEARSAY EVIDENCE IN PROSECUTIONS FOR SEXUAL ABUSE OF A MINOR. In a prosecution for the crime of sexual abuse of a minor in any degree, hearsay evidence of a statement made by a child under the age of 10 describing an act of sexual contact with the child may be admitted into evidence if

(1) the court determines in a hearing outside the presence of the jury that the circumstances of the statement indicate its reliability; and

(2) the child

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is additional evidence introduced to corroborate the statement.

* Sec. 2. AS 12.45.049, added by this Act, has the effect of amending Rules 803 and 804, Alaska Rules of Evidence, by adding hearsay evidence of certain statements made by a certain victim of sexual abuse of a minor to the list of exceptions to the hearsay rule.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


HB
774

COMMITTEE REPORT

HOUSE

(7)

FURTHER: FINANCE

2/8/85

Date: Feb 25 1985

The Committee on HEALTH, EDUCATION AND SOCIAL SERVICES has had CS HB 74

"An Act relating to participation of former BIA school administrators in the Teachers' Retirement System."

under consideration and recommends:

[V] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

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

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note [ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS

Mike Thompson

Robin L. Taylor

David W. Thorsen

Joyce A. Thorsen

MEMBERS HAVING OTHER RECOMMENDATIONS:

Mike Thompson

CHAIRMAN

Bethel, Alaska 99559
December 26, 1984

The Honorable Max Gruenberg
Alaska House of Representatives
Co-Chairman of the House, Health, Education and Social Services Committee
Pouch V
Juneau, Alaska 99801

Dear Mr. Gruenberg:

I have spent eight years teaching and six years administrati.. for the Bureau of Indian Affairs in Alaska. I have just discovered that the six years I spent administrating schools that serve Alaska students can not be transferred to the State Teacher Retirement System (TRS). This is due to an apparent oversite on the part of the statute writers for the TRS. Under the definition of "outside service" (14.25.220(25)) (copy enclosed) years not only taught in the Lower 48 may be brought into TRS but also years spent as a **certificated person in a full-time position requiring a teaching certificate as a condition of employment...** In other words any certificated principal, vice-principal, or sup rintendent from the Lower 48 may bring a certain number of those years into TRS with him. In the same statutes (14.25.220(8)) (copy enclosed) the definition for "BIA Service" is service as a teacher in a school operated by the Bureau of Indian Affairs. Nothing is mentioned about administrative service being counted for TRS purposes. The State then will allow someone who was an administrator in Miami, L.A. or any other place Outside to bring in those years and not an administrator who has been serving rural Alaskan students. It seems reasonable that the definition for "BIA Service" should also include years spent as a **certificated administrator serving Alaskan students through the Bureau of Indian Affairs.**

Any help you can give in getting the definition for "BIA Service" changed to include administrative time would be greatly appreciated.

Steve Ronnekamp
Box 1247
Bethel, Alaska 99559
543-2748 wk.

CC J.K. Humphreys, Director Alaska Teachers' Retirement System

Cover of book where information was obtained

ALASKA TEACHERS' RETIREMENT SYSTEM

Including
GROUP HEALTH AND LIFE INSURANCE

STATUTES

July 1, 1982

Effect of amendments. — The 1980 amendment rewrote the section.

Sec. 14.25.210. Penalty for false statements. A person who wilfully or knowingly makes a false statement, or falsifies or permits to be falsified any record of the retirement system, is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $500 or by imprisonment for not more than six months, or by both, and forfeits all rights under this chapter. (§ 20 ch 145 SLA 1955)

Sec. 14.25.220. Definitions. In this chapter, unless the context requires otherwise,

(1) "active member" means a member who is employed by an employer, is receiving compensation on a full-time or part-time basis and is making contributions to the system, or a member making contributions under AS 14.20.330 or 14.20.345;

(2) "actuarial adjustment" means equality in value of the aggregate expected payments under two different forms of pension payments, considering expected mortality and interest earnings on the basis of tables adopted from time to time by the board;

(3) "administrator" means the person appointed by the commissioner of administration under AS 14.25.015;

(4) "annuitant" means a retired member or a disabled member who is receiving a benefit under this system;

(5) "average base salary" means the result obtained by dividing the sum of the member's three highest years' base salary by three, or if a member does not have three years base salary, then by dividing the sum of all base salaries by the number of years of base salary; the base salary for a year in which credit is granted for disability totaling more than one-third of a year may not be used in the computation of the average base salary; the base salary in a school year for which the member receives compensation for less than two-thirds of a year may not be used in the computation of the average base salary; if compensation is received for more than two-thirds of a year, the full base salary for that school year shall be used in the computation of the average base salary;

(6) "base salary"

(A) means the total remuneration payable under contract for a full year of membership service, including addenda to the contract;

(B) has the same meaning as "compensation" under AS 39.35.680(8) when applied to a state legislator who elects membership under AS 14.25.040(b);

(7) "beneficiary" means a person designated by a member to receive benefits that may be due from the system upon the member's death;

(17) "full-time teacher" means a teacher occupying a position requiring teaching on a regular basis for the normal work period per day or week at a teaching assignment, excluding teaching as an assistant or graduate assistant or teaching on a substitute, temporary, or per diem basis;

(18) "inactive teacher or member" means a member who is terminated and who has not received a refund from the system or a member who is on leave of absence and who is not making contributions under AS 14.20.345;

(19) "member contribution account" means the total maintained by the system of the member's mandatory contributions, indebtedness principal and interest contributions, interest credited to each of those accounts, and adjustments to the account in accordance with AS 14.25.170;

(20) "membership service" means

(A) full or part-time service as a teacher in a public school in the Territory or State of Alaska, or both, under the supervision and control of the Territorial Board of Education or the Department of Education or the school board of a city, regional educational attendance area, or borough school district;

(B) full-time or part-time teaching at the University of Alaska or a full-time administrative position at the University of Alaska which requires academic standing and which has been approved for inclusion in the system by the administrator;

(C) any period during which the teacher receives a disability benefit under this system or is on an approved sabbatical leave granted in accordance with AS 14.20.310; or

(D) continuous service as a state legislator when performed by a state legislator who elects membership under AS 14.25.040(b), subject to the requirements of AS 14.25.040(c);

(21) "military service" means active duty in the armed forces of the United States;

(22) "nonpublic school" means a school established by an agency other than a state which is primarily supported by other than public funds, and operation of whose program rests with other than publicly elected or appointed officials, and is state approved or accredited;

(23) "non-vested member" means an active or inactive member who does not meet the requirements of a vested member or deferred vested member;

(24) "normal retirement" means retirement under AS 14.25.110(a);

(25) "outside service" means service

(A) as a certificated full-time elementary or secondary teacher or a certificated person in a full-time position requiring a teaching certificate as a condition of employment in an out-of-state public school

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

Effect of amendments. — The 1980 amendment rewrote the section.

Sec. 14.25.210. Penalty for false statements. A person who wilfully or knowingly makes a false statement, or falsifies or permits to be falsified any record of the retirement system, is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $500 or by imprisonment for not more than six months, or by both, and forfeits all rights under this chapter. (§ 20 ch 145 SLA 1955)

Sec. 14.25.220. Definitions. In this chapter, unless the context requires otherwise,

(1) "active member" means a member who is employed by an employer, is receiving compensation on a full-time or part-time basis and is making contributions to the system, or a member making contributions under AS 14.20.330 or 14.20.345;

(2) "actuarial adjustment" means equality in value of the aggregate expected payments under two different forms of pension payments, considering expected mortality and interest earnings on the basis of tables adopted from time to time by the board;

(3) "administrator" means the person appointed by the commissioner of administration under AS 14.25.015;

(4) "annuitant" means a retired member or a disabled member who is receiving a benefit under this system;

(5) "average base salary" means the result obtained by dividing the sum of the member's three highest years' base salary by three, or if a member does not have three years base salary, then by dividing the sum of all base salaries by the number of years of base salary; the base salary for a year in which credit is granted for disability totaling more than one-third of a year may not be used in the computation of the average base salary; the base salary in a school year for which the member receives compensation for less than two-thirds of a year may not be used in the computation of the average base salary; if compensation is received for more than two-thirds of a year, the full base salary for that school year shall be used in the computation of the average base salary;

(6) "base salary"

(A) means the total remuneration payable under contract for a full year of membership service, including addenda to the contract;

(B) has the same meaning as "compensation" under AS 39.35.680(8) when applied to a state legislator who elects membership under AS 14.25.040(b);

(7) "beneficiary" means a person designated by a member to receive benefits that may be due from the system upon the member's death;

(8) "BIA service" means service, including partial years, as a teacher in a school operated by the Bureau of Indian Affairs in Alaska;

(9) "compensation" means the total remuneration paid under contract to a member for services rendered during a school year, including cost-of-living differentials, payments for leave that is actually used by the member, the amount by which the member's wages are reduced under AS 39.30.150(c), and the amount deferred under an employer-sponsored deferred compensation plan or the tax shelter annuity plan approved by the Department of Education, but does not include retirement benefits, welfare benefits, per diem, expense allowances, workers' compensation payments, or payments for leave not used by the member, whether those leave payments are scheduled payments, lump-sum payments, donations, or cash-ins; for purposes of AS 14.25.050, compensation paid includes any payment made after June 30 of a school year for services rendered before the end of the school year;

(10) "credited service" means all membership service as provided in (20) of this section, territorial employment as defined in (41) of this section, plus outside, military, and Alaska BIA service, with outside and military service limited to 10 years except under the conditions set out in AS 14.25.100;

(11) "deferred vested member" means an inactive member who meets the service requirements of a vested member;

(12) "dependent child" means an unmarried child of a member, including an adopted child, who is dependent upon the member for support and who is either (A) less than 19 years old, or (B) less than 23 years old and registered at and attending on a full-time basis an accredited educational or technical institution recognized by the Department of Education; the age limits set out in this paragraph do not apply to a child who is totally and permanently disabled;

(13) "disabled member" means a member who is terminated, who has not received a refund from the system, and who is receiving a disability benefit from the system;

(14) "early retirement" means retirement under AS 14.25.110(b);

(15) "employer" means a public school district, the Board of Regents of the University of Alaska, the Department of Education, the National Education Association of Alaska, the Regional Resource Centers or the state legislature with respect to a state legislator who elects membership under AS 14.25.040(b);

(16) "former member" means a member who is terminated and who received a total refund of the balance of the mandatory contribution account, or who has requested in writing a refund of the balance of the mandatory contribution account;

(17) "full-time teacher" means a teacher occupying a position requiring teaching on a regular basis for the normal work period per day or week at a teaching assignment, excluding teaching as an assistant or graduate assistant or teaching on a substitute, temporary, or per diem basis;

(18) "inactive teacher or member" means a member who is terminated and who has not received a refund from the system or a member who is on leave of absence and who is not making contributions under AS 14.20.345;

(19) "member contribution account" means the total maintained by the system of the member's mandatory contributions, indebtedness principal and interest contributions, interest credited to each of those accounts, and adjustments to the account in accordance with AS 14.25.170;

(20) "membership service" means

(A) full or part-time service as a teacher in a public school in the Territory or State of Alaska, or both, under the supervision and control of the Territorial Board of Education or the Department of Education or the school board of a city, regional educational attendance area, or borough school district;

(B) full-time or part-time teaching at the University of Alaska or a full-time administrative position at the University of Alaska which requires academic standing and which has been approved for inclusion in the system by the administrator;

(C) any period during which the teacher receives a disability benefit under this system or is on an approved sabbatical leave granted in accordance with AS 14.20.310; or

(D) continuous service as a state legislator when performed by a state legislator who elects membership under AS 14.25.040(b), subject to the requirements of AS 14.25.040(c);

(21) "military service" means active duty in the armed forces of the United States;

(22) "nonpublic school" means a school established by an agency other than a state which is primarily supported by other than public funds, and operation of whose program rests with other than publicly elected or appointed officials, and is state approved or accredited;

(23) "non-vested member" means an active or inactive member who does not meet the requirements of a vested member or deferred vested member;

(24) "normal retirement" means retirement under AS 14.25.110(a);

(25) "outside service" means service

(A) as a certificated full-time elementary or secondary teacher or a certificated person in a full-time position requiring a teaching certificate as a condition of employment in an out-of-state public school

within the United States, or in a school outside the United States supported by funds of the United States;

(B) as a certificated full-time elementary or secondary teacher or a certificated person in a full-time position requiring a teaching certificate as a condition of employment in an approved or accredited nonpublic school within the United States, or in a school outside the United States supported by funds of the United States;

(C) in a full-time position requiring academic standing in an out-of-state institution of higher learning accredited by a nationally recognized accrediting agency as listed in the Education Directory — Colleges and Universities by the National Center for Education Statistics;

(D) as a full-time teacher in an approved or accredited nonpublic institution of higher learning in Alaska;

(26) "part-time teacher" means a teacher occupying a position requiring teaching on a regular basis for at least 50 percent of the normal workweek at a teaching assignment, excluding teaching as an assistant or graduate assistant, or teaching on a substitute, temporary, or per diem basis;

(27) "permanent disability" means a physical or mental condition which, in the judgment of the administrator, based upon medical reports and other evidence satisfactory to the administrator, presumably prevents a member from satisfactorily performing the member's usual duties for the member's employer or the duties of another position or job which an employer makes available for which the member is qualified by training or education;

(28) "prescribed rate of interest" means the rate of interest used for computing employer contributions, for preparing actuarial tables used by the system, for crediting interest to members' contributions, and for charging interest on members' indebtedness accounts;

(29) "public school" means a school operated by publicly elected or appointed school officials in which the program and activities are under the control of those officials and which is supported by public funds;

(30) "retired teacher or member" means a member who is terminated, who has not received a refund from the system, and who is receiving a benefit, other than disability, from the system;

(31) "retirement" means that period of time from the first day of the month following

(A) the date of termination; and

(B) application for retirement in which a person is appointed to receive a retirement benefit, other than a disability benefit;

(32) "retirement benefit" means the annuity received by a retired member from the system;

4.15 State Certification. All professional employees shall be required to obtain appropriate state certification in the state where employed. If official documentation of such certification is not received by contract renewal time, the contract shall not be renewed. Such non-renewal is not grievable or appealable.

If the employee can demonstrate that he/she requested state certification within 30 days of appointment but has not received any response from the state, a copy of the documentation shall suffice for one contract renewal. Certification shall be required for any subsequent contract renewal.

4.16 Suitability Disqualifications. Employees in education positions will be assigned the task of helping to shape the lives and futures of Indian students. An applicant will be disqualified on a suitability basis when serious question is raised in reference to his/her character, reputation and fitness. An applicant may be denied appointment for the following reasons:

A. Removal from employment for delinquency or misconduct;

B. Criminal, infamous, dishonest, immoral or notoriously disgraceful conduct;

C. Membership in an organization having as its objective the overthrow of the Constitutional government of the U.S. by force or violence and when membership is with the specific intent of furthering that objective.

D. Intentional false statements, deception or fraud in examination or appointment;

E. Refusal to furnish testimony as required by §5.3 of rule V;

F. Habitual use of drugs, (including alcholic beverages) affecting job performance;

G. Any legal or other disqualification which makes the person unfit for the service.

In making suitability determinations, the following factors will be taken into account; (1) the kind of position involved; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the applicant at the time of the conduct; (6) contributing social or environmental conditions; and (7) the absence or presence of rehabilitation or efforts toward rehabilitation. Elimination of an applicant from employment consideration on suitability grounds requires a determination by the Agency Superintendent for Education that the applicant's conduct may interfere with his ability to function in the position or the Agency's ability to discharge its duties and responsibilities. An objection will document the existence of a rational and direct relationship between the conduct of the applicant and nature of the work involved in the position.

APPENDIX A - PROCESSING CONTRACTS

.1 Recruitment and appointment functions. Responsibilities of Education Management included in the recruitment and appointment functions for personnel actions are:

A. Applicant Lists

(1) Accepting applications;

(2) Rating applications: The Education Position Categories and Qualifications Handbook contains the minimum standards used when filling positions established as Education positions. Professional educators (Teachers, Guidance Counselors, etc.,) must have appropriate state certification;

(3) Establishing lists according to job category and according to Indian preference;

(4) Notifying applicant if qualified or not qualified. If applicant is not qualified, the application will be so noted and returned;

(5) Referring qualified applicant to job holding office for review by selecting official and for consultation with the School Board;

(6) Notification of selection: Selectees will be notified by letter and supplied a new-employee package. This package will consist of the following:

(a) Copy of Contract. The contract, with addendum for Provisional Appointments when required, will be signed and returned within fifteen (15) days of the date on the notification letter.

(b) Employee Handbook. This handbook will cover such items as:

i. Contract Renewal

ii. Working Conditions

iii. Employee Benefits

iv. Employee Rights

v. General Information

(7) Providing a pre-employment package to selectees. The package will consist of the following:

(a) Copy of Standard Form 85, National Agency Check Investigation Forms (NACI) to be completed in draft form prior to the effective date of the appointment.

(b) Standard Form 78, Certificate of Medical Examination, to be completed by selectee's medical doctor and returned to appointing office for review and approval prior to entry on duty.

POSITION CATEGORIZATION

1. POLICY.

Educators employed under the contract provisions of P.L. 93-638 will be paid on an hourly rate basis, computed on the basis of the relative value of the position and the education and experience of the individual contract employee. As a minimum, the professional educator qualification standards (teacher, guidance counselor, principal, etc.) will be equivalent to those requirements established by the appropriate certification authorities of the state in which the facility is located or the Bureau standard shown, whichever is [illegible].

2. INSTRUCTIONS TO USERS.

The specific position categories and qualification standard to be used will depend on the duties of the position involved. Each standard has a general description of the duties and levels of responsibility of the position listed at the top of the standards.

3. CATEGORIES OF POSITIONS.

Current existing position descriptions will be converted to the contract categories personnel system and will not change from one classification in relation to contract positions. A title conversion to an identified education position title will not constitute a change in position description and will not require reclassification. Categorization of positions will be the responsibility of the school supervisor and the Agency Superintendent for Education or the Area Education Programs Administrator (for off-reservation boarding school supervisors.) All positions presently classified will not be reviewed when the position converts or is changed to the contract system. It has been administratively determined that a change in position title does not constitute reason for reclassification of the position if there are no substantial changes in the duties and responsibilities of the position.

The Agency Superintendent for Education or the Area Education Programs Administrator (for off-reservation boarding schools) will determine the proper categorization of new and revised positions. The school supervisor will forward suggested adjustments of position descriptions according to the needs of the local education program to the Agency Superintendent for Education or the Area Education Programs Administrator (with respect to off-reservation boarding schools). Such changes will be reviewed and approved by the Agency Superintendent for Education or the Area Education Programs Administrator (with respect to off-reservation boarding schools) for categorization purposes before being placed into effect.

Form 5-6233, Categories of Duties for Determining Pay of Education Positions initial page of each position description, replacing the CF-8.

A completed copy of the position description will be distributed to the following:

1. employee
2. supervisor
3. [illegible]
4. official personnel [illegible]

C. An increase in the qualification level of the employee does not automatically entitle the employee to advance to another pay level, unless he/she is assigned to a position of greater difficulty and responsibility as reflected by the position description and category of responsibility.

8. CERTIFICATION REQUIREMENTS.

All professional educators must meet and maintain the certification standards for their position in the state where the position is located. If the state does not have certification requirement for a particular position, the qualification standard in this BIAM supplement will apply as the minimum standard for qualification for the job. If the state has a certification requirement for a position which is higher than the standard in this manual, the state certification standard is the minimum qualification requirement. If the state has a certification standard for position which is lower than the standard required by this manual, the standard in this manual is the minimum qualification standard required for the job. Emergency and provisional state certification will be accepted for all positions in meeting state standards as long as the certificate is valid.

9. PROVISIONAL APPOINTMENT.

When a vacancy exists for which no available qualified applicant can be found who meets the full performance level of a position, the following procedures may be used in filling the position:

A. Applicants who will require the least amount of time to become fully qualified will be rated as the best qualified applicant.

B. The incumbent will be required to make satisfactory progress toward certification requirements and/or BIA qualification standards . A memorandum of agreement will be attached to the employee contract listing the conditions of the appointment and the requirements placed upon the incumbent relative to eligibility for issuance of a new contract each consecutive year.

C. The incumbent will be paid at a rate of pay based upon eduction positions with comparible qualifications as that held by the incumbent until the incumbent becomes fully qualified for the position held.

D. The selected incumbent will not be replaced with a better qualified applicant unless they fail to make satisfactory progress toward full qualification standards or it is demonstrated that the program is suffering because of the lack of a qualified person. Removal before the incumbent meets full qualification standards is not grievable or appealable.

10. AWARDING INCREMENTS FOR EDUCATION.

Increments will be awarded employees in accordance with 62 BIAM 11.5. Examples: (1) a selected employee for an Education Aid position will receive one (1) increment for having a high school certificate even though a high school education is required to meet basic qualifications; (2) a selected employee will receive increments for related masters degree at the GS level although a Masters Degree is a minimum education requirement for GS-11 positions.

§31e.18 Certification.

(a) All Bureau educators shall be required to obtain and hold valid certificates established for their positions by the appropriate licensing and certification authorities of the State in which the positions are located within one year from the publication date of this Part unless the Director approves a written justification from the Agency superintendent for Education for extending the time limit.

(b) Cultural traditional leader positions in bilingual and/or bi-cultural programs may have this requirement waived by the appropriate school board.

§31e.19 Student enrollment.

The Agency Superintendent for Education, with the advice and consent of the agency school board, shall implement a mandatory student enrollment policy and procedure for schools under his/her jurisdiction which will include, but not be limited to, the following:

(a) An eligibility criteria;

(b) School enrollment boundaries; and

(c) A standard application form.

§31e.20 Student attendance policy.

Each school shall have a written student attendance policy in compliance with the statutes of the State in which the school is located. However, for those enrolled students who are members of a Tribe having an attendance code, that Tribal Code shall take precedence for such students.

§31e.21 School year.

The length of the school year shall be, for all levels, no less than one hundred eighty (180) student instructional days.

§31e.22 School day.

Students shall be in school directed instructional activities, exclusive of lunch, in accordance with the following minimum clock hours:

Level	Hours Day
Kindergarten	3.0
Grades one to six	5.0
Junior high or middle school	5.5
High school	6.0

(b) Provide a base for special programs for exceptional children, coordinated with the required medical, dental, psychological, and social services as well as with parent education;

(c) Bilingual and multicultural education coordinated with parent education; and

(d) Educational programs for parents and the community which extend their role as educators of their children; as partners in the schooling experiences; and as decision makers and participants in the management of the early childhood pre-kindergarten program.

§31e.76 Accreditation.

Each pre-kindergarten program shall have official and current credentials which comply with not less than other like Federal (e.g., Headstart) and State agencies and tribal governments toward assurance of optimal educational opportunities based on the total development needs of the children.

§31e.77 Certification.

All pre-kindergarten educators shall be required to hold a valid certification in early childhood education by the appropriate licensing and certification authorities in the State, including Federal programs (e.g., Headstart, Child Development Associate).

§31e.78 Staff.

Each pre-kindergarten program shall have qualified staff with appropriate education and experience in the services provided in adequate numbers to meet program standards and assure effective delivery of comprehensive services.

§31e.79 School year.

The length of the school year shall be no less than one hundred and four (104) student instructional days.

§31e.80 School day.

Students shall be in directed instructional activities appropriate to their individual development level, exclusive of lunch, for a minimum of three clock hours daily.

§31e.81 Staffing patterns and ratios.

(a) Staffing patterns for each pre-kindergarten programs shall, at a minimum, meet applicable State or Tribal accreditation requirements.

(b) The size of the pre-kindergarten class for 3-4 year olds shall not exceed 15 students.

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 74
Title: "...Participation of Former BIA School Administrators..."
Sponsor: Gruenberg
Requestor: Hurley
Date of Request: 1/30/85

FISCAL DETAIL
Agency Affected: University of Alaska
Department of Education
Program Category Affected: IRS

BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

Operating	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
100 Personal Svcs						
100 Rtmnt & Bnfts		12.4	13.4	14.5	15.6	16.9
200 Travel						
300 Contractual						
400 Supplies						
500 Equipment						
600 Land & Struct						
700 Grants, Claims						
700 TRS Match		72.2	78.0	84.2	91.0	98.2
TOTAL OPERATING	-0-	84.6	91.4	98.7	106.6	115.1
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		84.6	91.4	98.7	106.6	115.1
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	84.6	91.4	98.7	106.6	115.1
POSITIONS:	-0-	-0-	-0-	-0-	-0-	-0-
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared By: J.K. Humphreys, Director J.K. Humphreys FHR Phone: 465-4470
Division: Retirement & Benefits Date: 1/31/85

Approved by Commissioner: Lisa Rudd Date: 2/4/85
Agency: Department of Administration

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

Rev. 7/1/84

House Bill 74
Fiscal Note Analysis
Prepared by Division of Retirement & Benefits
Department of Administration

January 31, 1985

Analysis:

This fiscal note is based on the assumption that "school administrator" will be interpreted to mean "BIA professional educator". We recommend amending the bill to read "professional educator", instead of "school administrator" because that term is more consistent with the intent, as we understand it, and BIA terminology.

Passage of this bill would allow those former BIA employees acting in such a capacity to claim that service in the Teachers' Retirement System (TRS) by December 31, 1985. The BIA administrative office has advised us that this would involve approximately 20 people having an average of 6½ years of qualified service.

This bill would result in an estimated .0347% increase in the TRS Employer contribution rate. The FY 86 TRS State Match estimated payroll is $416,297,654.00.

The estimated costs to school districts are as follows:

FY 86	FY 87	FY 88	FY 89	FY 90
$59.8	$64.6	$70.8	$76.5	$82.6

The present value of the cost of this bill is $1,300,000.00; this would produce a .15% decrease in the TRS funding ratio.