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# Alaska School Laws and Regulations Annotated

## Alaska Constitution

### The Constitution of the State of Alaska

Adopted by the Constitutional Convention  
February 5, 1956

Ratified by the People of Alaska  
April 24, 1956

Became Operative with the Formal  
Proclamation of Statehood  
January 3, 1959

#### Article VII

#### HEALTH, EDUCATION AND WELFARE

##### Section

##### 1. Public Education

**Sec. 1. Public Education.** The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

**Opinions of attorney general.** — There is neither constitutional nor statutory prohibition to the exercise of discretion by the commissioner of education, or by the respective school district authorities, in allowing secular and religious organizations to rent school buildings during nonschool hours. 1966 Op. Att’y Gen. No. 3.

This section would apply only in those cases where the school districts are providing a direct benefit to a religious or private institution by rental of school buildings during nonschool hours. 1966 Op. Att’y Gen. No. 3.

If the rate for religious groups renting a school building during nonschool hours is substantially lower than the rate for secular groups, the difference would be a gift of school property resulting in a “direct benefit” and would be an improper use of money raised by taxation. 1966 Op. Att’y Gen. No. 3.

Borough funds are clearly “public funds” within the meaning of these constitutional provisions. 1980 Op. Att’y Gen. No. 6.

Secondary education fund created by ordinance in a borough constituted an appropriation of public funds expended for direct benefit of a private education institution. 1980 Op. Att’y Gen. No. 6.

#### NOTES TO DECISIONS

**Intent of section.** — This section was intended to ensure that the legislature establish a system of education designed to serve

children of all racial backgrounds. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**This section guarantees all children of Alaska a right to public education.** *Breese v. Smith*, 501 P.2d 159 (Alaska 1972).

**Education is a matter of statewide concern.** *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

This section was designed to commit Alaska to the pursuit of public, not private education, without requiring absolute governmental indifference to any student choosing to be educated outside the public school system. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

**Section constitutes mandate for pervasive state authority in field of education.** — The constitutional mandate of this section for pervasive state authority in the field of education could not be more clear. First, the language is mandatory, not permissive. Second, this section not only requires that the legislature “establish” a school system but also gives to that body the continuing obligation to “maintain” the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority. *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

The Alaska Constitution, as interpreted by the supreme court, provides a clear mandate for pervasive state authority in the field of education. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

**Effect of delegating certain educational functions to local boards.** — That the legislature has seen fit to delegate certain educational functions to local boards in order that Alaska schools might be adapted to meet the varying conditions of different localities does not diminish constitutionally mandated state control over education under this section. *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

**History of public education in Alaska.** — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Provision for education of Alaskan children is governed in the first instance by this section,** which directs the legislature to establish and maintain a system of public schools. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**This section imposes a duty upon the state legislature.** *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**And it confers upon Alaska school age children a right to education.** *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Title 14 of the Alaska statutes has been enacted pursuant to this section.** *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**The reference to all children of the state** in this section seems to have been designed to elevate to constitutional status the consensus that Alaska’s pre-statehood dual system of education should be ended. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Uniformity in school system not required.** — Unlike most state constitutions, the Constitution of Alaska does not require uniformity in the school system. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

In this section, the Alaska Constitution appears to contemplate different types of educational opportunities including boarding, correspondence and other programs without requiring that all options be available to all students. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The contemplation in this section of some differences in the manner of providing education sanctions some disadvantages. So long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages present questions for the legislature. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The phrase “open to all” appears in lieu of the customary uniformity requirements. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The word “open” in this section is an integral part of a unitary phrase “open to all.” *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

Inclusion of the word “open” does not appear to impart a different meaning to the section than would “for all,” “available to all,” or “providing education to all.” *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

This section has no meaning with the word “open” deleted. Some word is needed to complete the thought of the section. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

The right to attend secondary schools in the students’ communities of residence is not mandated by the constitution, absent a valid equal protection claim. *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Notice of schools subject to closure.** — A five-day notice of which schools in a school district are subject to closure militates against appropriate preparation and poses serious obstacles to the presentation of persuasive, properly researched, and supported opposition to any closure plan. It also lessens the likelihood of a fair hearing before the school board and of the school board reaching a reasoned administrative decision. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

The importance of the educational and property interests involved in the closure of neighborhood schools in a school district requires adequate notice of the school board meeting at which the decision was made to close a specific school and five-day notice of the meeting is insufficient. *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67 (Alaska 1980).

**Ban on direct religious benefits.** — The Alaska Constitution is apparently unique in its express ban only on “direct” benefits. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

**Words “or indirect” not included in last sentence.** — The minutes of the constitutional convention reveal that the Committee on Health, Education and Welfare Provisions, in drafting the last sentence of this section, considered the words “direct” and “indirect” and felt that the words “or indirect” after the word “direct” should not be used for the reason that “they would reach out to infinity practically” and shut out the children in private schools from such free care as was being given by the state welfare department to all children. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

**Institutions covered by direct benefit clause.** — The direct benefit clause was meant to apply to all private educational institutions, including colleges and universities, as well as primary and secondary private educational institutions. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

**No distinction is made between “general funds” and “funds for the support of free schools.”** The proscription in this section is against the appropriation of “any public money.” *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

**Transportation of school children to nonpublic schools at public expense** would be in contravention of the state constitution. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

The delegates to the constitutional convention and the people who by their vote ratified the constitution left it to the supreme court to decide whether free transportation of children to nonpublic schools would constitute a “direct” benefit to the schools. If they had intended otherwise, the framers of the constitution would have followed the example set by the people of New York and New Jersey and settled the controversial issue by providing in the constitution itself for transportation of school children to nonpublic schools at state expense. *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), cert. denied, 368 U.S. 517, 82 S. Ct. 530, 7 L. Ed. 2d 522 (1962).

**Tuition grant program held unconstitutional.** — Alaska’s

tuition grant program, in art. 9 of AS 14.40, which awarded Alaska residents attending private colleges in Alaska an amount generally equal to the difference between the tuition charged by the student’s private college and the tuition charged by a public college in the same area, not to exceed \$2,500.00 annually, and which required the student to apply the entire amount of the grant towards his or her tuition, was in its effect a direct benefit to private educational institutions and therefore violated this section. *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

Since the class primarily benefitted by the tuition grant program in art. 9 of AS 14.40 consisted only of private colleges and their students, the public funds expended under former AS 14.40.776 constituted nothing less than a subsidy of the education received by the student at his or her private college, and the tuition grant program violated the final sentence of this section, prohibiting the payment of money from public funds “for the direct benefit of any religious or other private educational institution.” *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979).

**Home rule borough requiring centralized accounting.** — A home rule borough may not require its school system to participate in centralized accounting without the statutorily required approval of the school board. *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971).

**Issues subject to collective bargaining between teachers’ associations and school districts and boroughs.** — See *Kenai Peninsula Borough Sch. Dist. v. Kenai Peninsula Educ. Ass’n*, 572 P.2d 416 (Alaska 1977).

**Comparison of Alaska provision with those in other states.** — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Analytic distinction between arguments under this section and equal protection arguments.** — See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975).

**Borough was not acting as an agent of the state in furnishing transportation of pupils.** *Kenai Peninsula Borough v. State*, 532 P.2d 1019 (Alaska 1975).

While the state did supervise the school transportation service insofar as it related to the funding provided by it and also had certain regulations in effect pertaining to the over-all safety of the transportation system, the actual control of the transportation services was undertaken by the borough which, on its own behalf, entered into the contract with a school bus owner to furnish transportation service for specified routes. *Kenai Peninsula Borough v. State*, 532 P.2d 1019 (Alaska 1975).

**Former Alaska State-Operated School System was state agency.** — Regardless of whether it were deemed a new principal department or a subordinate agency within the Department of Education, the former Alaska State-Operated School System was an agency of the state within the meaning of Civ. R. 4(d)(7) and (8), which require a summons and complaint in this case to be served upon the attorney general or his designee, and within the meaning of Civ. R. 12(a), which allows a state agency 40 days after service within which to answer the complaint. *Alaska State-Operated Sch. Sys. v. Mueller*, 536 P.2d 99 (Alaska 1975). For present provisions as to education in the unorganized borough, see AS 14.08.011 et seq. — Ed. note.

In the exercise of the powers conferred upon it by the legislature, the former Alaska State-Operated School System was performing the clearly governmental function of furnishing education to the children of Alaska in the unorganized borough. *Alaska State-Operated Sch. Sys. v. Mueller*, 536 P.2d 99 (Alaska 1975).

**Quoted** in *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968); *Jefferson v. State*, 527 P.2d 37 (Alaska 1974); *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391 (Alaska 1997).

**Stated** in *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975); *D.R.C. v. State*, 646 P.2d 252 (Alaska Ct. App. 1982).

**Cited** in *Tobeluk v. Lind*, 589 P.2d 873 (Alaska 1979).

# Alaska Statutes

## Title 11

### Criminal Law.

#### Chapter 41

#### Offenses Against the Person.

##### Article 4

##### SEXUAL OFFENSES.

###### Section

- 410. Sexual assault in the first degree
- 420. Sexual assault in the second degree
- 425. Sexual assault in the third degree
- 427. Sexual assault in the fourth degree
- 432. Defenses
- 434. Sexual abuse of a minor in the first degree
- 436. Sexual abuse of a minor in the second degree
- 438. Sexual abuse of a minor in the third degree
- 440. Sexual abuse of a minor in the fourth degree
- 445. General provisions
- 450. Incest
- 455. Unlawful exploitation of a minor
- 458. Indecent exposure in the first degree
- 460. Indecent exposure in the second degree
- 468. Forfeiture of property used in sexual offense
- 470. Definitions

**Cross references.** — For provisions concerning evidence and procedure in certain sexual offense cases, see AS 12.45.045 and 12.45.046. For authority of court to order a defendant to submit to a blood test when sexual penetration is an element of the offense, see AS 18.15.300.

###### NOTES TO DECISIONS

**Origin.** — The Alaska Revised Code provisions defining sexual offenses are based on a proposed Michigan Code. *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983).

**Prohibiting suspended sentence.** — The prohibition against the granting of a suspended imposition of sentence applies to persons convicted of an attempt to commit one of the sexual offenses defined in the criminal code. *Mack v. State*, 900 P.2d 1202 (Alaska Ct. App. 1995).

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

**Collateral references.** — 41 Am. Jur. 2d, Incest, §§ 1, 7-21; 65 Am. Jur. 2d, Rape, § 1 et seq.; 70 Am. Jur. 2d, Sodomy, § 1 et seq. 42 C.J.S., Incest, §§ 2-7; 43 C.J.S., Infants, §§ 96, 97; 75 C.J.S., Rape, § 1 et seq.; 81 C.J.S., Sodomy, § 1 et seq.

Anthony Morosco, *The Prosecution and Defense of Sex Crimes* (Matthew Bender).

Entrapment to commit offense of sodomy, 52 ALR2d 1194.

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; 24 ALR4th 105.

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.

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

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

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

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

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

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases. 6 ALR4th 1066.

Entrapment defense in sex offense prosecutions, 12 ALR4th 413.

Validity of sodomy statute, 20 ALR4th 1009.

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

Necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Admissibility of expert testimony on rape trauma syndrome, 42 ALR4th 879.

Mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of or in the course of medical treatment, 65 ALR4th 1064.

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

**Sec. 11.41.410. Sexual assault in the first degree.** (a) An offender commits the crime of sexual assault in the first degree if

(1) the offender engages in sexual penetration with another person without consent of that person;

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am § 5 ch 79 SLA 1992; am § 3 ch 30 SLA 1996; am § 1 ch 61 SLA 1996)

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

**Editor's notes.** — From May 16 through September 9, 1996,

“the Department of Administration under AS 47.33 or by the Department of Health and Social Services” appeared where “the state” now appears in (a)(3)(B)(ii).

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

For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

#### NOTES TO DECISIONS

- I. General Consideration.
- II. Former Law.
  - A. Generally.
  - B. Age of Consent.
  - C. Procedure.

#### I. GENERAL CONSIDERATION.

**History of first-degree sexual assault statute.** — See Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

**Constitutionality.** — In order to prove a violation of AS 11.41.410(a)(1), the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim’s lack of consent. Construed in this way, the statute does not punish harmless conduct and is neither vague nor overbroad. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Construing the Revised Code and the concurrent amendments governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the penalty provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

**Convictions for two separate offenses did not constitute double jeopardy.** — Where evidence showed that defendant had slightly penetrated the victim’s vagina one evening and forced her to perform fellatio on him the next morning, the two acts were sufficiently distinct, for double jeopardy purposes, to support convictions for two separate offenses. Kepley v. State, 791 P.2d 1020 (Alaska Ct. App. 1990).

**Basis for initiating prosecution.** — Reliance by the criminal division of the Department of Law on a report of sexual abuse for purposes of initiating prosecution is not prohibited by AS 47.17.025. Strehl v. State, 722 P.2d 226 (Alaska Ct. App. 1986).

**Paragraph (a)(1) is akin to the common law definition of rape.** Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff’d on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

**Mental state required under paragraph (a)(1).** — Lack of consent is a “surrounding circumstance” which requires a complementary mental state as well as conduct to constitute a crime. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

No specific mental state is mentioned in paragraph (a)(1) of this section governing the surrounding circumstance of “consent”; therefore, the state must prove that the defendant acted “recklessly” regarding his putative victim’s lack of consent. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

**Attempted sexual assault in the first degree and sexual assault in the second degree are closely related,** since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

**Merger of sexual assault and sexual abuse convictions.** — Defendant’s convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual penetration with a child could not properly support separate sentences and convictions for both offenses. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

**Sexual assault and kidnapping are sufficiently distinct to warrant separate sentences** without violation of double jeopardy, even when the assault and kidnapping are part of a single

continuous transaction. Wilson v. State, 670 P.2d 1149 (Alaska Ct. App. 1983).

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

**Constitutionality of conviction for similar offense.** — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

**Requirement for conviction of attempt.** — At the very least, a defendant must have formed a specific intent to engage in sexual penetration in order to be convicted of attempted first-degree sexual assault. Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983).

**Withdrawal of consent after penetration.** — Alaska’s sexual assault statutes do not limit “sexual penetration” to the moment of initial penetration, and nothing in the legislative history supports the argument that once a person is sexually penetrated with consent, that consent cannot be withdrawn. McGill v. State, 18 P.3d 77 (Alaska Ct. App. 2001).

**Confessions.** — Statement of confession made by a defendant arrested for two counts of first-degree sexual assault, AS 11.41.410(a)(1), and two counts of second-degree sexual abuse of a minor, AS 11.41.436, was taken involuntarily. Police promised the defendant that the statement would be “off the record”; court erred in admitting the statement at trial. Jones v. State, 65 P.3d 903 (Alaska Ct. App. 2003).

**Evidence of prior sexual assaults** by a defendant on similarly situated victims does not become admissible any time the defendant concedes sexual intercourse and argues that the complaining witness consented. Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988).

**Admission of excited utterances.** — Where a child’s statement was made immediately after she was discovered by her mother and moments after she had been sexually assaulted by her father and the statement itself addressed the circumstances of the assault, such statements qualified as excited utterances under the hearsay exception. Drumbarger v. State, 716 P.2d 6 (Alaska Ct. App. 1986).

**Evidence of victim’s prior sexual relations.** — Where the state offers medical evidence that the prosecutrix has a ruptured hymen, probably due to sexual intercourse, it is permissible for the defendant to show that she had had sexual relations with others, thereby accounting for the condition of her hymen. Oswald v. State, 715 P.2d 276 (Alaska Ct. App. 1986), overruled on other grounds, Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

**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, 656 P.2d 1209 (Alaska Ct. App. 1982).

**Reliability of witness identification.** — Based on the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation, witness’s identification of the defendant was reliable. Carter v. State, Ct. App. Op. No. 4233 (File No. A-7085), P.2d (Alaska Ct. App. 2000).

**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, 664 P.2d 621 (Alaska Ct. App. 1983).

**Erroneous jury instruction on consent.** — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim’s lack of consent. Laseter v. State, 684 P.2d 139 (Alaska Ct. App. 1984).

An instruction stating in part, that “It is a defense to a charge of sexual assault in the first degree that the defendant entertained a

reasonable and good faith belief based upon the totality of the circumstances that the female person voluntarily consented to engage in sexual intercourse. If from all the evidence you have a reasonable doubt whether the defendant reasonably and in good faith believed she voluntarily consented to engage in sexual intercourse, you must give the defendant the benefit of that doubt and acquit him of said charges," is erroneous because it suggests that the culpable mental state is negligence, but the state must show that the defendant acted recklessly in determining whether the alleged victim consented to the sexual activity, and defendant's conviction was reversed although another instruction and the prosecutor's argument gave the correct standard. *Ervin v. State*, 761 P.2d 124 (Alaska Ct. App. 1988).

Defendant's conviction for sexual assault in the first degree was reversed where jury instructions did not include the necessary element of reckless disregard of the victim's lack of consent to sexual intercourse. *Pitka v. State*, 995 P.2d 677 (Alaska Ct. App. 2000).

**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*, 653 P.2d 1052 (Alaska Ct. App. 1982).

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

**Fair trial denied.** — In prosecution for sexual assault in the first degree, failure to instruct the jury properly regarding defendant's appreciation of the risk of the victim's nonconsent, when combined with the court's error in admitting testimony regarding a previous, unrelated sexual encounter, served to deny defendant a fair trial. *Pletnikoff v. State*, 719 P.2d 1039 (Alaska Ct. App. 1986).

**Conditions of probation.** — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18 years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. *Nitz v. State*, 745 P.2d 1379 (Alaska Ct. App. 1987).

**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 paragraph (a)(1) of this section. *Juneby v. State*, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

**Conviction affirmed.** — See *McCarlo v. State*, 677 P.2d 1268 (Alaska Ct. App. 1984); *Hines v. State*, 703 P.2d 1175 (Alaska Ct. App. 1985); *Braaten v. State*, 705 P.2d 1311 (Alaska Ct. App. 1985); *State v. Gilbert*, 925 P.2d 1324 (Alaska 1996).

**Sentence upheld.** — See *Reynolds v. State*, 664 P.2d 621 (Alaska Ct. App. 1983); *Hasslen v. State*, 667 P.2d 732 (Alaska Ct. App. 1983); *S.M. v. State*, 671 P.2d 894 (Alaska Ct. App. 1983); *Cordes v. State*, 676 P.2d 611 (Alaska Ct. App. 1984); *Goenett v. State*, 695 P.2d 243 (Alaska Ct. App. 1985); *Dymenstein v. State*, 720 P.2d 42 (Alaska Ct. App. 1986); *Bartholomew v. State*, 720 P.2d 54 (Alaska Ct. App. 1986); *Soper v. State*, 731 P.2d 587 (Alaska Ct. App. 1987); *Contreras v. State*, 767 P.2d 1169 (Alaska Ct. App. 1989); *Fagan v. State*, 779 P.2d 1258 (Alaska Ct. App. 1989); *Yearty v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

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. *Juneby v. State*, 641 P.2d 823 (Alaska Ct. App. 1982), modified and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Sentence of 20 years for kidnapping and 10 years for first-degree

sexual assault, the sexual assault sentence being made consecutive to the kidnapping sentence, was not excessive. *Wilson v. State*, 670 P.2d 1149 (Alaska Ct. App. 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*, 666 P.2d 1047 (Alaska Ct. App. 1983).

Sentence of 10 years with four years suspended for one count of sexual assault in the first degree was not clearly mistaken. *Atkinson v. State*, 699 P.2d 881 (Alaska Ct. App. 1985), discussing and distinguishing, *State v. Morris*, 680 P.2d 1190 (Alaska Ct. App. 1984).

Ten-year sentence for first-degree sexual assault was not excessive. *Flink v. State*, 683 P.2d 725 (Alaska Ct. App. 1984).

Where defendant with no prior felony convictions was convicted of three counts of sexual assault in the first degree, an unclassified felony, and one count of attempted sexual assault in the first degree, a class A felony, the many separate incidents of sexual assault, defendant's multiple victims, his use of a dangerous instrument, and his willingness to injure his victims with that instrument, established that he was a particularly dangerous offender who had to be isolated for a substantial period of time to protect the public, and the composite sentence imposed of 37 years with 12 years suspended was not clearly mistaken. *Goolsby v. State*, 739 P.2d 788 (Alaska Ct. App. 1987).

Where defendant was convicted of kidnapping, assault in the first degree, and sexual assault in the first degree, and sentenced to 12 years for the kidnapping, seven years for the first-degree assault, and 10 years for the first-degree sexual assault, concurrently, and defendant thus received a total sentence of 12 years to serve, with no right of parole, it was held on the state's appeal that the sentence was not clearly mistaken. *Garrison v. State*, 762 P.2d 465 (Alaska Ct. App. 1988).

Given the persistence of defendant's criminality, the proximity in time of his multiple offenses, the extreme and increasing seriousness of his sex crimes, and the lack of any clear prospects for his deterrence or rehabilitation, the remote possibility of some future change in defendant's behavior did not justify the substantial risk of exposing future victims to the same crimes that defendant committed on three occasions, and the virtual lifetime sentence imposed was justifiably calculated to assure that defendant would have no future opportunity to commit similar crimes. *Ross v. State*, 877 P.2d 777 (Alaska Ct. App. 1994).

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

**Conviction reversed.** — Defendant's sexual assault conviction was reversed where he raised the defense of consent and Alaska Evid. R. 404(b)(3) allowed the state to call a witness to testify that defendant had previously had nonconsensual sex with her, but the superior court wrongly denied defendant's request that the jury be told that another jury had acquitted him of sexually assaulting the testifying witness. *Hess v. State*, 20 P.3d 1121 (Alaska 2001).

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

**Remand for resentencing.** — See *Howell v. State*, 758 P.2d 103 (Alaska Ct. App. 1988); *Hamilton v. State*, 771 P.2d 1358 (Alaska Ct. App. 1989).

**Conviction and sentence upheld.** — See *Contreras v. State*, 675 P.2d 654 (Alaska Ct. App. 1984); *Pickens v. State*, 675 P.2d 665 (Alaska Ct. App. 1984); *Depp v. State*, 686 P.2d 712 (Alaska Ct. App. 1984).

**Applied in Nukapigak v. State**, 645 P.2d 215 (Alaska Ct. App. 1982); *Seymore v. State*, 655 P.2d 786 (Alaska Ct. App. 1982); *Howard v. State*, 664 P.2d 603 (Alaska Ct. App. 1983); *Barry v. State*, 675 P.2d 1292 (Alaska Ct. App. 1984); *Fox v. State*, 685 P.2d 1267 (Alaska Ct. App. 1984); *Totemoff v. State*, 739 P.2d 769 (Alaska Ct. App. 1987); *Covington v. State*, 747 P.2d 550 (Alaska Ct. App.

1987); *Hamilton v. State*, 771 P.2d 1358 (Alaska Ct. App. 1989); *Russell v. State*, 934 P.2d 1335 (Alaska Ct. App. 1997).

**Quoted** in *Harris v. State*, 790 P.2d 1379 (Alaska Ct. App. 1990); *Marcy v. State*, 823 P.2d 660 (Alaska Ct. App. 1991).

**Stated** in *Born v. State*, 633 P.2d 1021 (Alaska Ct. App. 1981); *Tazruk v. State*, 655 P.2d 788 (Alaska Ct. App. 1982); *Peetook v. State*, 655 P.2d 1308 (Alaska Ct. App. 1982).

**Cited** in *Stores v. State*, 625 P.2d 820 (Alaska 1980); *State v. Doe*, 647 P.2d 1107 (Alaska Ct. App. 1982); *Koganaluk v. State*, 655 P.2d 339 (Alaska Ct. App. 1982); *Ecker v. State*, 656 P.2d 577 (Alaska Ct. App. 1982); *Erhart v. State*, 656 P.2d 1199 (Alaska Ct. App. 1982); *Nukapigak v. State*, 663 P.2d 943 (Alaska 1983); *Parker v. State*, 667 P.2d 1272 (Alaska Ct. App. 1983); *G.D. v. State*, 681 P.2d 366 (Alaska Ct. App. 1984); *State v. R.H.*, 683 P.2d 269 (Alaska Ct. App. 1984); *Brower v. State*, 683 P.2d 290 (Alaska Ct. App. 1984); *State v. Price*, 715 P.2d 1183 (Alaska Ct. App. 1986); *D.G. v. State*, 754 P.2d 1128 (Alaska Ct. App. 1988); *Gabrieloff v. State*, 758 P.2d 128 (Alaska Ct. App. 1988); *Charliaga v. State*, 758 P.2d 135 (Alaska Ct. App. 1988); *Robison v. State*, 763 P.2d 1357 (Alaska Ct. App. 1988); *Sledge v. State*, 763 P.2d 1364 (Alaska Ct. App. 1988); *Kankanton v. State*, 765 P.2d 101 (Alaska Ct. App. 1988); *Hilburn v. State*, 765 P.2d 1382 (Alaska Ct. App. 1988); *Fowler v. State*, 766 P.2d 588 (Alaska Ct. App. 1988); *Parker v. State*, 779 P.2d 1245 (Alaska Ct. App. 1989); *Cook v. State*, 792 P.2d 682 (Alaska Ct. App. 1990); *Capwell v. State*, 823 P.2d 1250 (Alaska Ct. App. 1991); *Kolkman v. State*, 857 P.2d 1202 (Alaska Ct. App. 1993); *Toney v. Fairbanks N. Star Borough Sch. Dist.*, 881 P.2d 1112 (Alaska 1994); *Johnson v. State*, 889 P.2d 1076 (Alaska Ct. App. 1995); *Wardlow v. State*, 2 P.3d 1238 (Alaska Ct. App. 2000); *Harmon v. State*, 11 P.3d 393 (Alaska Ct. App. 2000); *Tall v. State*, 25 P.3d 704 (Alaska Ct. App. 2001).

## II. FORMER LAW.

### A. Generally.

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

**Forcible rape ranks among the most serious crimes.** *Newsom v. State*, 533 P.2d 904 (Alaska 1975); *State v. Lancaster*, 550 P.2d 1257 (Alaska 1976); *State v. Wassilie*, 578 P.2d 971 (Alaska 1978); *Ahvik v. State*, 613 P.2d 1252 (Alaska 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*, 501 P.2d 772 (Alaska 1972); *Torres v. State*, 521 P.2d 386 (Alaska 1974); *Ames v. State*, 533 P.2d 246 (Alaska 1975), modified on rehearing on other grounds, 537 P.2d 1116 (Alaska 1975); *Newsom v. State*, 533 P.2d 904 (Alaska 1975); *State v. Lancaster*, 550 P.2d 1257 (Alaska 1976); *Bordewick v. State*, 569 P.2d 184 (Alaska 1977); *State v. Wassilie*, 578 P.2d 971 (Alaska 1978).

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

**Criminal intent was required for conviction of statutory rape.** — See *State v. Guest*, 583 P.2d 836 (Alaska 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*, 583 P.2d 836 (Alaska 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*, 652 P.2d 88 (Alaska 1982).

**Categories constituted same offense.** — All of the categories contained within the definition of sexual assault in the first degree under former paragraphs (a)(1) through (a)(4) of this section, constituted the same offense for legal purposes. *Juneby v. State*, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

**And none was more serious than others.** — Nothing contained in the statutory language of this section or the legislative history of the provision suggested 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, was 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*, 641 P.2d 823 (Alaska Ct.

App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

**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*, 583 P.2d 836 (Alaska 1978); *Tookak v. State*, 648 P.2d 1018 (Alaska Ct. App. 1982).

The offense of an assault with intent to commit rape is a lesser included offense to rape. *Tuckfield v. State*, 621 P.2d 1350 (Alaska 1981).

Given testimony that defendant was extremely intoxicated, the jury could have acquitted him of attempted sexual assault in the first degree but convicted him of fourth-degree assault, and therefore it was error not to grant defendant's request for a simple assault instruction. *Baden v. State*, 667 P.2d 1275 (Alaska Ct. App. 1983).

Since some evidence existed that might have justified the jury in finding defendant guilty of fourth-degree assault, but not guilty of first-degree sexual assault, the trial court's failure to give a lesser-included offense instruction on fourth-degree assault required that defendant's convictions be reversed. *Nathaniel v. State*, 668 P.2d 851 (Alaska Ct. App. 1983).

Since the victim was not temporarily incapable of appraising the nature of her conduct, nor was she physically unable to express unwillingness to act, the trial court did not err in failing to instruct on third-degree sexual assault. *Wilson v. State*, 670 P.2d 1149 (Alaska Ct. App. 1983).

**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*, 608 P.2d 19 (Alaska 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*, 562 P.2d 348 (Alaska 1977).

### B. Age of Consent.

**Female under age of consent is in law incapable of consent.** — The crime of rape is committed upon a female under the age of consent with or without her consent since she is in law incapable of consent. *Torres v. State*, 521 P.2d 386 (Alaska 1974).

**Thus, it is not necessary to establish her consent as an essential element of the crime.** *Torres v. State*, 521 P.2d 386 (Alaska 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*, 583 P.2d 836 (Alaska 1978).

The charge of statutory rape was legally unsupported 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*, 583 P.2d 836 (Alaska 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*, 583 P.2d 836 (Alaska 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*, 583 P.2d 836 (Alaska 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*, 525 P.2d 1092 (Alaska 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*, 565 P.2d 492 (Alaska 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 charged had been separately tried. *Nix v. State*, 653 P.2d 1093 (Alaska Ct. App. 1982).

**Character evidence.** — See *Freeman v. State*, 486 P.2d 967 (Alaska 1971).

**Questioning victim’s credibility.** — While a defendant could properly seek to question the victim’s credibility, the established rule is that this may be done by extrinsic evidence on a collateral matter. *Moss v. State*, 620 P.2d 674 (Alaska 1980).

**Corroboration of prosecutrix’s testimony.** — No corroboration of the prosecutrix’s testimony is necessary in statutory rape cases. *Burke v. State*, 624 P.2d 1240 (Alaska 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*, 624 P.2d 1240 (Alaska 1980).

**Evidence of prior misconduct.** — See *Freeman v. State*, 486 P.2d 967 (Alaska 1971).

**Evidence of prior sexual offenses.** — See *Freeman v. State*, 486 P.2d 967 (Alaska 1971).

**Determining age from appearances.** — See *Torres v. State*, 521 P.2d 386 (Alaska 1974).

**Admission of defendant’s driver’s license into evidence to establish his age** was harmless beyond a reasonable doubt. *Torres v. State*, 521 P.2d 386 (Alaska 1974).

**Psychiatric testimony.** — See *Freeman v. State*, 486 P.2d 967 (Alaska 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*, 486 P.2d 967 (Alaska 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*, 626 P.2d 1060 (Alaska 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).

**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 testi-

mony of the female person named in the indictment with caution. *Burke v. State*, 624 P.2d 1240 (Alaska 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*, 652 P.2d 88 (Alaska 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).

**Conviction for rape upheld.** — See *Kvasnikoff v. State*, 674 P.2d 302 (Alaska Ct. App. 1983).

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).

Conviction of attempted sexual assault in the first degree under this section as it read before the 1983 amendment and AS 11.31.100 was affirmed. Sexual charges based on nonconsensual genital intercourse do not require proof of a specific sexual intent; and plain error was not established though the prosecutor’s expressions which might have been construed as a personal opinion of the guilt of the defendant or an argument relating to a defendant’s need for treatment were improper and uninvited. *Potts v. State*, 712 P.2d 385 (Alaska Ct. App. 1985).

**Conviction reversed.** — Convictions for lewd and lascivious acts toward children under former AS 11.15.134(a) and for rape under former AS 11.15.120(a) were reversed where evidence admitted concerning alleged assaults on victims other than those in the case at hand was improper propensity evidence; neither intent nor identity were at issue, and the acts did not constitute an admissible common scheme or plan or prove facts in dispute. *Bolden v. State*, 720 P.2d 957 (Alaska Ct. App. 1986).

Convictions under former AS 11.15.134, former AS 11.41.410(a)(4) and former AS 11.41.440(a)(2) were reversed where extensive evidence of prior consistent statements was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. *Nitz v. State*, 720 P.2d 55 (Alaska Ct. App. 1986).

**Sentencing.** — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of Donlun v. State, 527 P.2d 472 (Alaska 1974), was not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by “any term of years.” *Edenshaw v. State*, 631 P.2d 506 (Alaska Ct. App. 1981).

**What must be reflected in sentence for forcible rape.** — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. *Newsom v. State*, 533 P.2d 904 (Alaska 1975).

**Sentence for rape upheld.** — See *Gordon v. State*, 501 P.2d 772 (Alaska 1972); *Torres v. State*, 521 P.2d 386 (Alaska 1974); *Newsom v. State*, 533 P.2d 904 (Alaska 1975); *Ames v. State*, 533 P.2d 246 (Alaska 1975), modified on rehearing, 537 P.2d 1116 (Alaska 1975); *Coleman v. State*, 553 P.2d 40 (Alaska 1976); *Nukapigak v. State*, 562 P.2d 697 (Alaska 1977), aff’d on rehearing, 576 P.2d 982 (Alaska 1978); *Bordewick v. State*, 569 P.2d 184 (Alaska 1977); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *Alexander v. State*, 578 P.2d 591 (Alaska 1978); *State v. Wassilie*, 578 P.2d 971 (Alaska 1978); *Moore v. State*, 597 P.2d 975 (Alaska 1979); *Wagner v. State*, 598 P.2d 936 (Alaska 1979); *Wikstrom v. State*, 603 P.2d 908 (Alaska 1979); *Tate v. State*, 606 P.2d 1 (Alaska 1980); *Mallott v. State*, 608 P.2d 737 (Alaska 1980); *Cochrane v. State*, 611 P.2d 61 (Alaska 1980); *Alexander v. State*, 611 P.2d 469 (Alaska 1980); *Helmer v. State*, 616 P.2d 884 (Alaska 1980); *Tuckfield v. State*, 621 P.2d 1350 (Alaska 1981); *Edenshaw v. State*, 631 P.2d 506 (Alaska Ct. App. 1981); *Kompkoff v. State*, 626 P.2d 1091 (Alaska Ct. App. 1981); *Williams v. State*, 652 P.2d 478 (Alaska Ct. App. 1982); *Smith*

v. State, 691 P.2d 293 (Alaska Ct. App. 1984); Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987).

**Conviction and sentence for rape upheld.** — See Morgan v. State, 673 P.2d 897 (Alaska Ct. App. 1983).

**Sentence for rape too lenient.** — See State v. Lancaster, 550 P.2d 1257 (Alaska 1976); State v. Wassilie, 578 P.2d 971 (Alaska 1978); State v. Jensen, 650 P.2d 422 (Alaska Ct. App. 1982).

**Sentence for rape held excessive.** — See Ahvik v. State, 613 P.2d 1252 (Alaska 1980); Hintz v. State, 627 P.2d 207 (Alaska 1981); Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglar term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. Nix v. State, 653 P.2d 1093 (Alaska Ct. App. 1982).

Unsuspected 20-year term for three counts of first-degree sexual assault, imposed under AS 11.41.410 as it read before the 1982 amendment to the section and AS 12.55.125(c), on a first offender with a lengthy history of sexually assaultive conduct committed against his stepdaughters was clearly mistaken. The sentencing record did not justify the assumption that the defendant was destined to fail at rehabilitation that appeared to have been central in the decision on sentencing. There was no indication that the defendant ever resorted to violence or threats of violence, no physical injury resulted from the assaults, and the emotional and psychological injuries suffered by the victims were probably somewhat less than usual in such cases; the fact that the assaultive conduct was repeated over an extended period of time, while a significant aggravating factor, did not justify treating the defendant as a worst offender and imposing a maximum sentence. Polly v. State, 706 P.2d 700 (Alaska Ct. App. 1985).

**Sentence for attempted rape upheld.** — See Shelton v. State, 611 P.2d 24 (Alaska 1980) (decided under former AS 11.15.130).

**Sentence for assault with intent to rape upheld.** — See Fomin v. State, 619 P.2d 718 (Alaska 1980).

**Sentence for attempted sexual assault and burglary held excessive.** — See Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985) (decided under section as it read before 1982 amendment).

**Collateral references.** — Defense of mistake of fact as to victim's consent in rape prosecution. 102 ALR5th 447.

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

(1) the offender engages in sexual contact with another person without consent of that person;

(2) the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state;

(3) the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

or

(4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79 SLA 1992; am § 4 ch 30 SLA 1996; am § 2 ch 61 SLA 1996)

**Editor's notes.** — From May 16 through September 9, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social Services" appeared where "the state" now appears in (a)(2)(B)(ii).

**Legislative history reports.** — For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

#### NOTES TO DECISIONS

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

**Constitutionality.** — Where man was convicted of second-degree sexual assault under paragraph (a)(3) for engaging in sexual penetration with a woman who was so intoxicated that she was either incapacitated or unaware of the sexual penetration, the court of appeals held that the definition of second-degree sexual assault did not violate the single subject clause of the Alaska Constitution and was not unconstitutionally vague. Ragsdale v. State, 23 P.3d 653 (Alaska Ct. App. 2001).

**Attempted sexual assault in the first degree and sexual assault in the second degree are closely related,** since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

**Construction.** — The statutory language in this section is not so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope; the trial court did not err in rejecting defendant's claim of vagueness and overbreadth. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

**Constitutionality of conviction where original charge was under AS 11.41.410.** — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

**Attempt to commit sexual assault** is a crime under Alaska law and requires that defendant, intending to engage in sexual contact with another person without regard to that person's lack of consent, take a substantial step toward accomplishing this goal. Guertin v. State, 854 P.2d 1130 (Alaska Ct. App. 1993).

**Mentally incapable.** — To appreciate the nature and consequences of engaging in an act of sexual penetration, the victim must have the capacity to understand the full range of ordinary and foreseeable social, medical, and practical consequences that the act entails. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

To prove that defendant knew of victim's incapacity, the state was not required to demonstrate absolute certainty on defendant's part; there was substantial circumstantial evidence in the trial record to support an inference that defendant acted with awareness of a substantial probability that victim was mentally incapable. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

Where the state presented no expert testimony to prove that victim was "mentally incapable" but instead, relied on the testimony of victim's mother and on the jury's ability to observe the manner in which victim spoke and acted, both when she testified at trial and during a videotaped pretrial police interview which was introduced at trial, defendant's argument that, absent expert testimony, there was insufficient evidence to support a finding that victim was "mentally incapable" was unpersuasive; victim's personal appearance before the jury and her videotaped pretrial interview with the police provided compelling evidence of her incapacity. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

**Health care workers.** — When the state's case for second

degree sexual assault is based on the allegation that a conscious patient was subjected to touching that exceeded the bounds of legitimate treatment, the state must also prove that the health care worker knew that there was at least a substantial probability that the patient was unaware that the touching exceeded the bounds of legitimate treatment. *Ritter v. State*, 16 P.3d 191 (Alaska Ct. App. 2001).

The evidence presented to the grand jury was sufficient to support the massage therapist/health care worker's indictment on six counts of second-degree sexual assault under (a)(4), under the theory that the massage therapist engaged in sexual contact with patients who he knew were unaware that sexual contact was occurring. *Ritter v. State*, 16 P.3d 191 (Alaska Ct. App. 2001).

**Incapacitated.** — A sleeping person can be "incapacitated" within the meaning of AS 11.41.470(2). *King v. State*, 978 P.2d 1278 (Alaska Ct. App. 1999).

**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 defendant's actions constituted second-degree sexual assault despite victim's momentary acquiescence in defendant's fondling her breast. *Nicholson v. State*, 656 P.2d 1209 (Alaska Ct. App. 1982).

Exclusion of expert testimony regarding problems in evaluating the accuracy of eyewitness testimony was reversible error, where the case turned on the testimony of a single witness — the victim, the excluded testimony was central to the defense, and it could not be said that its exclusion did not appreciably affect the jury's verdict. *Skamarocius v. State*, 731 P.2d 63 (Alaska Ct. App. 1987).

**Crime committed before sex offender registration law effective.** — Where defendant was convicted of second-degree sexual assault, a crime he committed before the sex offender registration law took effect, he could not pursue his claim of a violation of the ex post facto clause in applying that law on appeal since the application thereof had no effect on the validity of his conviction. *Bobby v. State*, 950 P.2d 135 (Alaska Ct. App. 1997).

**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*, 665 P.2d 566 (Alaska Ct. App. 1983).

The trial judge did not err in failing to give an instruction on assault in the fourth degree as a lesser included offense to the two counts of sexual assault in the second degree where any assault occurred after the consensual sexual contact. *Reischman v. State*, 746 P.2d 912 (Alaska Ct. App. 1987).

For sufficiency of instructions on incapacity of victim, see *Dexter v. State*, 672 P.2d 144 (Alaska Ct. App. 1983) (decided under former AS 11.41.430).

Instruction on attempted second-degree sexual assault correctly informed jury that the state had to prove that defendant intended to engage in sexual contact with the victim. *Guertin v. State*, 854 P.2d 1130 (Alaska Ct. App. 1993).

**Instructions.** — Instruction regarding defendant's awareness of victim's lack of consent to sexual contact held erroneous. *Reischman v. State*, 746 P.2d 912 (Alaska Ct. App. 1987).

**Lesser included offense.** — Assault in the fourth degree is a lesser included offense of first or second-degree sexual assault in which the defendant claims that sexual contact was consensual, and there is some evidence to show that the defendant assaulted the victim. *Reischman v. State*, 746 P.2d 912 (Alaska Ct. App. 1987).

**Conviction reversed because of insufficient evidence.** — See *Brower v. State*, 728 P.2d 645 (Alaska Ct. App. 1986); *Lamont v. State*, 934 P.2d 774 (Alaska Ct. App. 1997).

**Sentence upheld.** — See *Goodman v. State*, 756 P.2d 918 (Alaska Ct. App. 1988).

Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. *Howard v. State*, 664 P.2d 603 (Alaska Ct. App. 1983).

There was no error in trial court's rejection of two mitigating factors proposed by defendant: that his conduct was among the least serious included in the definition of sexual assault in the second degree, and that the harm caused by his criminal conduct was consistently minor and did not warrant the imposition of a substantial period of incarceration; defendant's sentence of an adjusted presumptive term of seven years with two years suspended and three years' probation was not clearly mistaken.

*Jackson v. State*, 890 P.2d 587 (Alaska Ct. App. 1995).

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

**Sentence held clearly mistaken.** — Sentence of eight years with one year suspended for a first offender convicted of assault in the second degree was clearly mistaken. *Benboe v. State*, 698 P.2d 1230 (Alaska Ct. App. 1985).

**Trial court exceeded scope of sentencing powers** by ordering defendant to attend a sexual offender rehabilitation program while incarcerated, where the order was set out as a separate provision of the written judgment and not as a condition of probation, and any failure to abide by the order could not have served as a predicate for a finding of criminal contempt. *Benboe v. State*, 738 P.2d 356 (Alaska Ct. App. 1987); *Cavanaugh v. State*, 754 P.2d 757 (Alaska Ct. App. 1988).

**Separate sentences for incest and second-degree assault.** — Where the two statutes required proof of different conduct and the social interests to be vindicated or protected by each statute were different, separate sentences on defendant's convictions for incest and second-degree sexual assault did not violate double jeopardy. *Harmon v. State*, 11 P.3d 393 (Alaska Ct. App. 2000).

**Applied** in *Jonas v. State*, 773 P.2d 960 (Alaska Ct. App. 1989).

**Stated** in *State v. Williams*, 855 P.2d 1337 (Alaska Ct. App. 1993).

**Cited** in *Stores v. State*, 625 P.2d 820 (Alaska 1980); *Bolhouse v. State*, 687 P.2d 1166 (Alaska Ct. App. 1984); *James v. State*, 739 P.2d 1314 (Alaska Ct. App. 1987); *James v. State*, 754 P.2d 1336 (Alaska Ct. App. 1988); *Ross v. State*, 877 P.2d 777 (Alaska Ct. App. 1994); *Johnson v. State*, 889 P.2d 1076 (Alaska Ct. App. 1995); *Howarth v. State*, Pub. Defender Agency, 925 P.2d 1330 (Alaska 1996); *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001).

**Sec. 11.41.425. Sexual assault in the third degree.** (a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; am § 9 ch 4 SLA 1990; am § 7 ch 79 SLA 1992; am § 1 ch 33 SLA 2000)

**Effect of amendments.** — The 2000 amendment, effective August 9, 2000, in subsection (a) added the present paragraph (1) designation, redesignated former paragraphs (1)-(3) as subparagraphs (1)(A)-(1)(C), and added paragraphs (2) and (3).

**Legislative history reports.** — For governor's transmittal letter concerning the amendment of subsection (a) by § 1, ch. 33, SLA 2000 (HB 99), see 1999 House Journal 256.

#### NOTES TO DECISIONS

**Cited** in *Herreid v. State*, 69 P.3d 507 (Alaska Ct. App. 2003).

**Sec. 11.41.427. Sexual assault in the fourth degree.** (a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.

(b) Sexual assault in the fourth degree is a class A misdemeanor. (§ 2 ch 33 SLA 2000)

**Legislative history reports.** — For governor's transmittal letter concerning the enactment of this section by § 2, ch. 33, SLA 2000 (HB 99), see 1999 House Journal 256.

*Sec. 11.41.430. Sexual assault in the third degree. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]*

**Sec. 11.41.432. Defenses.** (a) It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

(1) mentally incapable; or

(2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant. (§ 4 ch 96 SLA 1988; am § 27 ch 50 SLA 1989)

**Legislative history reports.** — For an analysis of the 1989 amendment to this section, see Senate-House Joint Journal Supplement No. 10, May 5, 1989, p. 5, under "Sec. 27."

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

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

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 151 SLA 1990)

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

For legislative letter of intent in connection with the amendment of subsection (a) by § 1, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

#### NOTES TO DECISIONS

**Annotator's notes.** — Some of the cases cited in the notes below were decided under former AS 11.15.134. Some were also decided under former AS 11.41.410(a)(4), which provided that a person 18 years of age or older who engaged in sexual penetration with another person under 18 years of age who was entrusted to his care by authority of law or was his child committed sexual assault in the first degree.

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

**State's authority to control sexual conduct of children.** — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

**As to constitutionality of former statute** making lewd and lascivious acts toward children a crime, see *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

**Physical conduct punished under former statute.** — See *Anderson v. State*, 562 P.2d 351 (Alaska 1977); *Smiloff v. State*, 579 P.2d 28 (Alaska 1978).

**Former section prohibited fellatio.** — See *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

**Specific intent is no longer an element** of sexual abuse of a minor. *Bogges v. State*, 783 P.2d 1173 (Alaska Ct. App. 1989).

**Consent is not at issue.** — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. *Anderson v. State*, 562 P.2d 351 (Alaska 1977).

**Intrusion into genitals.** — Cunnilingus and fellatio do not require an intrusion into the genitals. *Murray v. State*, 770 P.2d 1131 (Alaska Ct. App. 1989).

**Joinder with second-degree offense count.** — Because defendant was contemplating a defense of accident or inadvertence to second-degree sexual abuse charges, the court did not abuse its discretion in ordering continued joinder of the two counts of second-degree sexual abuse and one count of sexual abuse of a minor in the first degree. *Petersen v. State*, 838 P.2d 812 (Alaska Ct. App. 1992).

**Similar out-of-state statutes.** — The elements of the California statute under which the defendant was convicted for lewd or lascivious acts upon a child were not sufficiently similar to the Alaska offense of attempted sexual abuse of a minor in the first degree to qualify as a prior felony for presumptive sentencing purposes. *Scroggins v. State*, 951 P.2d 442 (Alaska Ct. App. 1998).

**Testimony by victim via closed-circuit television.** — The superior court did not violate the defendant's right to confrontation by permitting the minor alleged to have been abused to testify via one-way closed-circuit television from a room adjacent to the courtroom, pursuant to AS 12.45.046. *Reutter v. State*, 886 P.2d 1298 (Alaska Ct. App. 1994).