Alaska sex offense law: What has changed

Barbara Dunham

What is a sex offense? The answer is not as straightforward as it might seem. Legally speaking, there are several ways to define a sex offense:

- A section of the Alaska Statutes is labelled "Sex Offenses," which includes offenses such as sexual assault and sexual abuse of a minor (see AS 11.41.410-470). However, this section does not include every offense that is sexual in nature.
- A broader definition includes all offenses that incur a sex offense sentence, which typically involves a longer prison term than a comparable non-sex offense. This definition includes offenses from various sections of Alaska's criminal code.
- The broadest legal definition, which includes even more offenses, is the category of offenses that require registration as a sex offender in Alaska.

However, there are still some offenses that do not fall under any of the above definitions, yet nonetheless would be considered sex offenses in the court of public opinion. Legislators cannot always predict what criminal conduct future offenders might engage in, which creates "loopholes" in the sex offense laws. The case of Justin Schneider exemplifies this.

The Schneider Fix

Last fall, the sentencing of defendant Justin Schneider provoked outrage in Alaska and drew national attention. According to the police affidavit accompanying the complaint, Schneider offered a woman a ride, tackled her, told her he wanted to kill her, and strangled her to the point of unconsciousness; when the woman regained consciousness, she realized that Schneider had masturbated on her (Boots, 2018; Wang, 2018).

Schneider was charged with assault, kidnapping and harassment (for subjecting another person to contact with semen). None of these charges was a registrable sex offense under Alaska law. He pleaded guilty to a charge of second-degree assault and agreed to undergo sex offender treatment as part of the plea deal, although he did not plead guilty to a "sex offense" under any of the definitions described above. Because he was granted credit for time spent on electronic monitoring, Schneider was able to walk out of the courtroom after his sentencing without serving any additional prison time (Boots, 2018).

Alaska's legislators introduced several bills in this year's legislative session that aimed to fix the perceived loopholes revealed by this case. Ultimately HB 14, sponsored by Rep. John Lincoln (D-40, Kotzebue), became the "Schneider fix" that passed both chambers of the legislature. Governor Dunleavy signed the bill into law on July 19, 2019.

The legislature also addressed sex offenses with HB 49, an omnibus criminal justice bill that the governor signed into law on July 8, 2019. Many legislators regarded HB 49 as the bill that would "repeal and replace" SB 91, the criminal justice reform bill passed in 2016 (Brooks, 2019). In fact, HB 49 goes beyond repealing and replacing SB 91; it adds new criminal offenses and makes some existing offenses (including sex offenses) tougher by allowing conduct to be charged at a higher level.

Crimes and defenses

Among other things, HB 14 added "knowingly causing the victim to come into contact with semen" to the definition of "sexual contact." This addition means that the act of masturbating on someone without that person's consent may now be charged as second-degree sexual assault, a Class B felony. Additionally, the act of masturbating on someone who is mentally incapable, incapacitated, or unaware that the sexual act is being committed may now be charged with third-degree sexual assault, a Class C felony. Both crimes are registrable sex offenses and are sentenced as sex offenses. This means that beginning on July 20, 2019 (new laws become effective the day after the bill is signed), anyone who engages in the same conduct as Justin Schneider could be charged with and convicted of a sex crime, and be required to register as a sex offender.

Another topic of much discussion in the 31st legislative session was the marriage defense. This statutory provision, found in AS 11.41.432, allows defendants to claim their marriage to the victim as a defense to certain charges of sexual assault. This defense would typically apply in cases where the victim was mentally incapable, incapacitated, or unaware that the sexual act was being committed, or where the victim was in some form of state custody or supervision and the defendant was an employee of the state. (Sexual penetration or contact without consent is sexual assault regardless of whether the defendant and victim were legally married. Per AS 11.41.170(8), "without consent means that a person (A) with or without resisting, is coerced by the use of force against a person or property or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or (B) is incapacitated as a result of an act of the defendant.")

The legislature addressed this topic with HB 49. Under this bill, marriage remains a defense to some offenses involving a staff member and a person who is in the custody of the state, so long as the person consented to the sexual act. Marriage is now an affirmative defense to first-, second- and third-degree sexual assault in cases involving sexual penetration or contact with a person who is mentally incapable, so long as the person consented to the act while capable of understanding the nature and consequences of the defendant's conduct. If the defendant cannot provide evidence that the victim gave this kind of knowing consent, the defendant cannot assert the marriage defense.

HB 49 also makes changes or additions to other sex offense statutes, such as second- and third- degree sexual assault, unlawful exploitation of a minor, and indecent viewing or photography (see sidebar). These changes and additions generally make it easier for prosecutors to charge conduct as a sex offense or to charge conduct at a higher level of classification.

Sentencing

Most sex offenses in Alaska are felonies, for which sentencing is determined using Alaska's presumptive sentencing scheme. The statutes render a presumptive range of sentences for a given crime according to the defendant's criminal history. For example, second-degree sexual assault carries a sentence range of five to 15 years for first-time felony offenders. A defendant's sentence is often determined by a plea agreement, since only about 12 percent of felony sex offense cases go to trial (Alaska Criminal Justice

Commission, 2019). Plea agreements may include an exact sentence or may set out a range within which the judge will sentence the defendant.

HB 14 expands the rights of victims of sex offenses during plea agreements. Before entering into a plea agreement, the prosecutor must now confer with the victim of any sex offense requiring registration. This provision previously applied only to felonies and to crimes involving domestic violence. HB 14 adds misdemeanor sex offenses to the list of offenses requiring victim input. HB 14 also requires the prosecutor to ask whether the victim agrees with the proposed plea agreement and to formally record the victim's position. The bill allows a court to reschedule a sentencing hearing to give prosecutors additional time to comply with these requirements.

Also per HB 14, anyone convicted of a sex offense cannot receive credit for any time spent on electronic monitoring or in treatment before sentencing. This change was made in reaction to the Schneider case. Schneider was sentenced to two years in prison (the maximum for a first-time offender sentenced to a single Class B felony charge), with one year suspended and one year of "active" prison time. Yet the law at the time also allowed Schneider to receive credit for a year spent on electronic monitoring before his sentence was imposed, meaning that he was able to leave prison the day he was sentenced (Boots, 2018).

HB 49 also addresses victim rights at sentencing in cases involving a sex offense. It ensures there is a presumption that the final judgment will include an order that the defendant will have no contact with the victim until the defendant is unconditionally discharged from probation and parole, unless the court finds on the record that contact between the victim and defendant is necessary. The bill also requires the Department of Corrections to set up a notification system so that once that order expires, the victim can receive information on how to seek a civil protective order.

Supervision and registry

Most people convicted of a sex offense will spend time in prison. Once released from prison, most will have to spend time on probation and parole, and most will have to register as a sex offender.

Any sentence for a felony sex offense must include a minimum period of probation with a minimum suspended prison term. Once released from prison, if a probationer violates a condition of probation or commits a new crime, the court can order the probationer to serve some of the suspended time in prison. Prior to the enactment of HB 49, the maximum probation term for a sex offense was 15 years (with minimum probation terms ranging from five to 15 years depending on the crime). HB 49 raised the maximum probation term for sex offenders to 25 years.

Alaska's legislators frequently discussed the sex offender registry while working on HB 49. In particular, they discussed a recent appellate opinion which held that a person who is required to register in another state based on an offense that is not a registrable sex offense in Alaska need not register in Alaska. Some legislators were concerned that people required to register in other states would be encouraged to move to Alaska to avoid registration. HB 49 addresses this concern by requiring anyone who has to register in another state to also register in Alaska, regardless of whether the offense in the original state would be a registrable offense in Alaska. HB 49 includes language specifically stating that it is the legislature's intent to overturn the controversial appellate opinion with this change.

Conclusion

HB 14 and HB 49 will make a number of significant changes to the law. This article does not address every change, and only discusses the laws as they apply in the majority of cases; each law has its exceptions. For more detail, consult the applicable bills or statutes. Generally speaking, however, now that these bills are signed into law, prosecutors have more tools at their disposal to prosecute sex offenses, victims of sex offenses will have a greater say in the plea negotiation process, and more people will be required to register as a sex offender in Alaska.

Find full citations on page 9.

Barbara Dunham is the project attorney for the Alaska Criminal Justice Commission.

HB 49's additional changes

In addition to those described above, HB 49 also makes the following changes to sex offense statutes:

- AS 11.41.438. Third-degree sexual abuse of a minor: Amends statute so that if the victim is at least six years younger than the offender, the offense is punishable as a felony sex offense; otherwise, the offense remains punishable like other Class C felonies. (See AS 11.41.438.)
- AS 11.41.452. Enticement of a minor: Amends statute so that this crime, which was formerly "online enticement of a minor" is now "enticement of a minor." Use of the internet is no longer an element of the crime.
- AS 11.42.455(c). Unlawful exploitation of a minor: Increases the classification of this crime so that it is an unclassified (formerly Class A) felony if the person has been previously convicted of a similar crime or the minor victim is under age 13; otherwise the crime is a Class A (formerly Class B) felony.
- AS 11.41.458. First-degree indecent exposure: Amends this crime to include indecent exposure to persons age 16 and older (it previously applied only to exposure to persons under age 16). The crime becomes a Class B felony if the exposure is to someone under age 16; the crime is a Class C felony if the exposure is to someone age 16 or older.
- AS 11.61.120(a). Second-degree harassment: Adds repeatedly sending, publishing, or distributing photos or film of the genitals of any person to this offense.
- AS 11.61.123. Indecent viewing or photography: Adds viewing of a person (no photograph necessary) to the offense. Makes this offense a Class B felony if the defendant produces a picture of a minor; a Class C felony if the defendant views a minor or views a picture of a minor or produces a picture of an adult; and a Class A misdemeanor if the defendant views an adult or views a picture of an adult.
- AS 11.61.124. Solicitation or production of an indecent picture of a minor: Adds a new statute prohibiting solicitation or production of a picture of a person who is under 16 and at least four years younger than the defendant.

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