

**“IF YOU KNEW HIM LIKE I DID,
YOU’D HAVE SHOT HIM, TOO . . .”
A SURVEY OF ALASKA’S LAW OF
SELF-DEFENSE**

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Self-defense is one of the most powerful defense tools in Alaska’s criminal law. It has the potential for broad application, it involves numerous substantive and procedural nuances, and it implicates many of the fundamental policies of the criminal justice system. Moreover, Alaska’s law of self-defense has recently undergone major revisions, making a survey of its principles both important and timely. This Article seeks to provide a descriptive overview of the statutes, cases, and policies that form the framework of Alaska’s self-defense law. It is organized around the litigation process and describes the important aspects of a self-defense claim both before and during trial. Drawing on his experience in litigating self-defense cases in Alaska, the author offers practical summations and explanations that will help illuminate self-defense principles for prosecutors, defense attorneys, and judges alike.

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I. INTRODUCTION

Domestic violence and street crime prosecution are the bread-and-butter of any Alaska prosecutor's or public defender's office. Consequentially, self-defense principles haunt the Alaska criminal bar's daily practice. However, litigants and judges are often ill-prepared to contend with the unique substantive and evidentiary issues that every self-defense trial raises. This Article seeks to aid the criminal bar by providing a practical overview of Alaska's law of self-defense.

Part II discusses the statutory framework of self-defense, and Part III discusses several procedural aspects of the self-defense doctrine. Part IV addresses the most essential and commonly-litigated aspects of a self-defense claim. Part V provides an overview of the use of prior bad acts and reputation evidence, both for the defendant and the victim. Part VI examines four statutory justification defenses closely related to self-defense.

This survey is intended to be a practitioner's guide, and, as such, it provides commentary on recent legislative trends and includes citations to jury instructions and unpublished opinions.¹ Aside from a few practical suggestions, no normative argument is

1. The Alaska Court of Appeals has held that litigants may cite unpublished opinions for "whatever persuasive power" the opinion may hold, but not as binding precedent. *McCoy v. State*, 80 P.3d 757, 764 (Alaska Ct. App. 2002) (interpreting ALASKA R. APP. P. 214). The unpublished opinions discussed herein are offered in that light.

presented.² While this survey was originally written by a prosecutor for prosecutors, and retains a prosecutorial focus, there is much authority of use to defenders here. Thus, this survey is offered to the entire Alaska criminal bar prosecutors and defenders alike in the spirit that all our criminal jury work will benefit.

II. STATUTORY FRAMEWORK

In Alaska, self-defense is a justification defense, and as such it provides a complete defense to all crimes involving the use of force.³ Alaska's current self-defense statutes were enacted by the 1978 Alaska legislature.⁴ Since their effective date, Alaska's two basic self-defense statutes have been substantively amended only twice—in 2004 and 2006.⁵ The statutory framework establishes when the use of both non-deadly and deadly force is justified and also sets forward which party will have the burden of proof at trial.

A. The Use of Non-deadly Force

Alaska's self-defense statute provides that a defendant "is justified in using non-deadly force . . . to the extent the person reasonably believes that force is necessary for self-defense against what the person reasonably believes to be unlawful force" applied against him.⁶ However, a person may not use force if the defendant: (a) provoked the conflict with the intention of injuring the victim, (b) was engaged in mutual combat, (c) was the first aggressor, or (d) was using a deadly weapon or dangerous instrument to act in revenge or to further a felony objective.⁷ The first three restrictions (mutual combat, provocation, first aggressor) do not apply "if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but

2. Any opinions that are expressed in this Article are those of the author. This Article is not an expression of the policy of the Criminal Division of the State of Alaska, Department of Law.

3. See ALASKA STAT. §§ 11.81.330–.335 (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws; *see also* Savok v. State, No. A-5669, 1996 WL 33686458, at *3 (Alaska Ct. App. Feb. 21, 1996) ("self-defense [is] a complete defense to criminal responsibility . . .").

4. Act effective 1978, ch. 166, § 10, 1978 Alaska Sess. Laws (codified at ALASKA STAT. §§ 11.81.330–.335 (2004)).

5. Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws; Act effective July 1, 2004, ch. 124, § 17, 2004 Alaska Sess. Laws.

6. § 11.81.330(a).

7. *Id.*

the other person persists in continuing the incident by the use of unlawful force.”⁸

Alaska’s non-deadly self-defense statute includes ten important limitations. Five concepts are found in the statute’s first clause, and five are found in the second clause. The statute’s first clause includes the following limiting concepts: the use of *excessive* force, the threat of *unlawful* and *imminent* force, as well as *subjective* and *objective* necessity.⁹

For instance, the non-deadly force statute explicitly states that the defendant must be reacting to “unlawful force.”¹⁰ The requirement of an “imminent” threat is inherent in the statutory definition of “force.”¹¹ The statute’s “when and to the extent” clause implicitly embodies the concept that force may not be excessive.¹² However, the “reasonably believes” clause is the heart of the self-defense statute.¹³ This clause embodies two important tests: subjective and objective necessity.¹⁴ The subjective prong asks the jury to assess why the defendant believed he should use force against his victim.¹⁵ In other words, what was the defendant actually thinking? If the defendant used force because he thought it was necessary to avoid injury to himself, then the defendant may have a self-defense claim.¹⁶ On the other hand, if the defendant was motivated by anger, rage, jealousy, intoxication, or his own violent nature, then he may not.¹⁷

Next, the jury must assess whether the defendant’s conduct was objectively necessary. The objective standard is “whether a reasonable person would have acted in self-defense under the circumstances.”¹⁸ “[T]he law holds a defendant to a standard of

8. § 11.81.330(b).

9. § 11.81.330(a).

10. *Id.*

11. See ALASKA STAT. § 11.81.900(b)(27) (2005), amended by Act effective Sept. 14, 2006, ch. 73, § 6, 2006 Alaska Sess. Laws.

12. See § 11.81.330(a); see also *State v. Walker*, 887 P.2d 971, 978 (Alaska Ct. App. 1994).

13. This phrase is repeated twice in Alaska’s non-deadly force statute, see § 11.81.330(a), and once again in its deadly force statute, see § 11.81.335.

14. *Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984).

15. *Id.*

16. *Id.* at 1122.

17. See *Ambrose v. State*, No. A-5112, 1996 WL 341743, at *3 (Alaska Ct. App. May 22, 1996) (affirming the defendant’s conviction in a judge-tried case where the judge concluded that the defendant killed out of anger, not fear).

18. *Weston*, 682 P.2d at 1121.

fully reasonable conduct in the context of self-defense. . . .”¹⁹ If the defendant’s conduct does not fall within the range of conduct which the jury is prepared to justify, then the defendant may be convicted—no matter what his subjective motivation.²⁰ Thus, every self-defense trial asks the jury to place the “reasonable man” in the defendant’s shoes and to engage in an after-the-fact assessment of the reasonableness of his use of force.²¹

The statute’s second clause includes five important instances when a defendant may not claim self-defense.²² The first three are when the force was the product of mutual combat, when the defendant provoked the conflict with the intent to injure his victim, and when the defendant was the first aggressor.²³ The 2004 Alaska legislature provided a fourth exception: a person may not claim self-defense if the force used was the result of using a deadly weapon²⁴ or in commission of a felony criminal objective²⁵ or by a

19. *Savok v. State*, No. A-5669, 1996 WL 33686458, at *3 (Alaska Ct. App. Feb. 21, 1996) (describing self-defense as “a complete defense to criminal responsibility”).

20. *See Weston*, 682 P.2d at 1121.

21. *See id.*

22. ALASKA STAT. § 11.81.330(a) (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws. No Alaska case has addressed whether the jury must unanimously agree on which of these five propositions the prosecution has disproved beyond a reasonable doubt. However, there is persuasive authority suggesting that the jury need not do so. *See State v. James*, 698 P.2d 1161, 1165 (Alaska 1985). In *James*, the Alaska Supreme Court held that jurors need not reach unanimous agreement on the particular theory of the offense by which the defendant violated a criminal statute. *Id.* (“Alaska Rule of Criminal Procedure 31(a) should be interpreted to require only that a jury be unanimous in its conclusion that the defendant committed a single offense described in the statute.”). The court reasoned that “requiring semantic uniformity [would] encourage overcomplicated instructions and hung juries in cases in which the jurors actually agree upon the defendant’s guilt . . .” *Id.* It would follow that a jury need not unanimously agree on why a defendant’s self-defense claim fails.

23. §§ 11.81.330(a)(1)–(3).

24. The 2006 Alaska Legislature expanded this exclusion to include “dangerous instruments.” Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

25. The exception applies if the force was the result of “any felony criminal objective” of the person, whether the person acted alone or with others. § 11.81.330(a)(4)(A). The statute was drafted in this manner to avoid the problems associated with proving formal “gang” activity. *See* Bill Review Letter from Gregg D. Renkes, Attorney Gen. of Alaska, to Frank Murkowski, Governor of Alaska (June 10, 2004).

participant in a controlled substances offense.²⁶ The 2006 Alaska Legislature enacted a fifth exception: a person may not claim self-defense if deadly force was used in retaliation for perceived or actual conduct if the defendant (or the person on whose behalf the act was committed) has a violent reputation.²⁷ These legislative changes were intended to make it more difficult for gang members and drug dealers to claim self-defense.²⁸

B. The Use of Deadly Force

“Deadly force” is defined as any force that is used under circumstances in which the defendant knows or intends to create a substantial risk of causing serious physical injury.²⁹ It also includes any act that places someone in fear of such injury by means of a dangerous instrument.³⁰ Alaska’s self-defense statute provides that a person may not use deadly force unless he first satisfies the test for the use of non-deadly force.³¹ Next, the person may only use deadly force when and to the extent he reasonably believes it is necessary to defend himself against the threat of death, serious physical injury, kidnapping, sexual assault in the first or second degrees, sexual abuse of a minor in the first degree, or robbery in any degree.³² The deadly force statute also includes an important exception: the obligation to retreat.³³

C. The Burden of Proof

In Alaska, self-defense is classified as a justification “defense” that the prosecution must disprove beyond a reasonable doubt.³⁴ It is not an “affirmative defense.”³⁵ The difference is that a defendant must prove an affirmative defense by a preponderance of the

26. § 11.81.330(a)(4).

27. Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

28. Bill Review Letter from Susan Parkes, Deputy Attorney Gen. of Alaska, to Frank Murkowski, Governor of Alaska (May 9, 2006) [hereinafter Parkes-Murkowski Letter].

29. ALASKA STAT. § 11.81.900(b)(16) (2005), *amended by* Act effective Sept. 14, 2006, ch. 73, § 6, 2006 Alaska Sess. Laws.

30. *Id.*

31. ALASKA STAT. § 11.81.335(a) (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

32. *Id.* The 2006 amendment added sexual abuse of a minor in the first degree to this statute. Act effective Sept. 13, 2006, ch. 68, § 3, 2006 Alaska Sess. Laws.

33. § 11.81.335(b). *See also infra* Part IV.C.

34. ALASKA STAT. § 11.81.300 (1980).

35. *Id.*

evidence.³⁶ Because self-defense is a “defense,” once the defendant presents “some evidence” that places self-defense at issue, the burden falls upon the prosecution to *disprove* self-defense beyond a reasonable doubt.³⁷

Self-defense is a complete justification defense to all crimes that prohibit the use of force against another person.³⁸ Where the defendant is entitled to a self-defense instruction, the jury must be instructed that the prosecution bears the burden to disprove it.³⁹

Practitioners (and judges) occasionally flummox the burden of proof. For instance, in *Brown v. State*,⁴⁰ the court of appeals held that the trial judge committed plain error when, without objection, he instructed the jury that self-defense was an affirmative defense.⁴¹ This incorrect allocation of the burden of proof was not remedied by another jury instruction that properly, if confusingly, allocated the burden to the State.⁴²

In *Owens v. State*,⁴³ the defense attorney actually proposed a self-defense instruction that erroneously stated that self-defense

36. Compare ALASKA STAT. § 11.81.900(b)(2) (2005), *amended by* Act effective Sept. 14, 2006, ch. 73, § 6, 2006 Alaska Sess. Laws (defining an affirmative defense), *with* § 11.81.900(b)(19) (defining a non-affirmative defense).

37. §§ 11.81.900(b)(19)(A)–(B). In 2003, the administration unsuccessfully introduced legislation which would have made self-defense an affirmative defense. Bill History, http://www.legis.state.ak.us/basis/get_bill.asp?session=23&bill=SB170 (follow “full text” hyperlink; then follow “SB 170” hyperlink) (last visited Nov. 12, 2006).

38. ALASKA STAT. § 11.81.330(a) (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

39. *Brown v. State*, 698 P.2d 671, 674 (Alaska Ct. App. 1985). However, even if this explicit instruction is negligently omitted, a lawyer’s correct argument on this point may cure any defect in the instruction. *O’Brannon v. State*, 812 P.2d 222, 228–29 (Alaska Ct. App. 1991); *Allen v. State*, 51 P.3d 949, 959 (Alaska Ct. App. 2002) (holding a correct argument cured any subtle potential jury instruction error); *Hall v. State*, No. A-6283, 1998 WL 90885, at *6 (Alaska Ct. App. Mar. 4, 1998) (holding that, while the court’s jury instruction packet did not expressly state that self-defense was a complete defense, any error was cured by the lawyer’s correct summation); *Weaver v. State*, No. A-7177, 2000 WL 1350600, at *5 (Alaska Ct. App. Sept. 20, 2000) (holding the failure to include a specific instruction regarding the state’s burden to disprove was not plain error because the jury received a general instruction which stated that “the burden of proof was on the State and that the burden never shifted.”).

40. 698 P.2d 671 (Alaska Ct. App. 1985).

41. *Id.* at 673–75.

42. *Id.*

43. No. A-7952, 2002 WL 31831411 (Alaska Ct. App. Dec. 18, 2002).

was an affirmative defense.⁴⁴ The *Owens* trial judge gave the erroneous proposed defense instruction, but the *jurors* actually caught the error (another instruction in their jury packet correctly stated that the prosecution bore the burden of disproving self-defense beyond a reasonable doubt).⁴⁵ Reversal was averted because the trial judge clarified the point in response to a jury question, and because both attorneys properly allocated the burden during summation.⁴⁶

The judge may not instruct the jury that “the court has determined” that the defendant has successfully presented “some evidence” supporting a self-defense instruction.⁴⁷ The issue of “some evidence” is a legal matter for the court, and the judge should not instruct the jury about why the court is giving a self-defense instruction.⁴⁸ To do so would constitute an intrusion into the jury’s function and would be an instruction on an irrelevant matter.⁴⁹

III. PROCEDURAL ASPECTS OF THE SELF-DEFENSE INSTRUCTION

There are a number of procedural nuances to self-defense litigation. Three of the most important are: (1) whether or not the prosecutor must instruct the grand jury on the potential use of the defense, (2) sufficiency of the notice required to be provided by the defense to the prosecution, and (3) what instruction, if any, should be given if self-defense does not apply to the case.

A. Instructing the Grand Jury

Must a prosecutor instruct the grand jury on the potential for a self-defense claim? There are two answers: the *legal* answer and the *practical* answer. Legally, a prosecutor is not obligated to instruct the grand jury regarding a potential defense, except where

44. *Id.* at *2.

45. *Id.*

46. *Id.*; *but see* *Ambrose v. State*, No. A-5112, 1995 WL 17220777, at *3 (Alaska Ct. App. Apr. 26, 1995) (holding that remand was required because the judge made ambiguous comments that arguably and incorrectly shifted the burden to the defendant).

47. *Owens*, 2002 WL 31831411, at *3; *see* *Howell v. State*, 917 P.2d 1202, 1207 (Alaska Ct. App. 1996). *Howell* dealt with the “heat of passion” defense rather than self-defense, but the “some evidence” issues relating to jury instructions remain the same.

48. *Howell*, 917 P.2d at 1207.

49. *Id.*

such an instruction would “almost surely” result in the grand jury’s failure to indict.⁵⁰

Therefore, any error or omission in a grand jury instruction on this point is probably irrelevant. In *Smith v. State*,⁵¹ the prosecutor gave the grand jury an impromptu, and incomplete, explanation of the law of self-defense.⁵² The court of appeals concluded that this error did not require dismissal because the prosecution had no obligation to instruct the grand jury on self-defense at all.⁵³

The court of appeals further noted that it was not error for the prosecution to fail to introduce evidence which would have supported a self-defense claim.⁵⁴ In *Smith*, the defendant gave a post-arrest statement that he felt the victim “had a weapon of some sort.”⁵⁵ Because “self-defense was not properly a grand jury issue in this case,” the prosecution had no obligation to introduce this statement.⁵⁶

From a practical perspective, however, it may be advisable to bring the issue of self-defense before the grand jury. Alaska law provides that a prosecutor may argue his theory of the case before the grand jury, so long as that argument does not exceed the scope of permissible trial argument.⁵⁷ There are two reasons why a prosecutor should be completely open with the grand jury, read them the self-defense statutes, and then argue why those principles do not apply to the matter at hand. First, doing so would save the court from resolving a pre-trial motion. Second, if a prosecutor is unable to convince ten out of eighteen grand jurors that the case should be charged *with no opposing voice in the courtroom*, then

50. *Grant v. State*, 621 P.2d 1338, 1341 (Alaska Ct. App. 1981) (holding that Alaska law does not require a prosecutor to instruct the grand jury regarding a defense unless failure to consider the defense would “almost surely” have resulted in failure to indict); *see Delolli v. State*, No. A-8263, 2003 WL 22143282, at *4 (Alaska Ct. App. Sept. 17, 2003) (applying the *Grant* holding to self-defense cases); *see also Robles v. State*, No A-6208, 1998 WL 208814, at *2 (Alaska Ct. App. Apr. 29, 1998) (applying *Grant* and rejecting a challenge to the indictment based on the prosecutor’s failure to instruct the jury on the use of force to make a private person’s arrest); *cf. Gaona v. State*, 630 P.2d 534, 536–37 (Alaska Ct. App. 1981) (finding no plain error by the trial court because the case against the defendant was strong, even though the prosecutor discouraged the grand jury from considering self-defense and failed to instruct them on it).

51. No. A-5390, 1995 WL 17221231 (Alaska Ct. App. Aug. 9, 1995).

52. *Id.* at *2.

53. *Id.*

54. *Id.*

55. *Id.* at *1.

56. *Id.* at *3.

57. *Gustafson v. State*, 854 P.2d 751, 759 (Alaska Ct. App. 1993).

the prosecutor could never hope to prevail at trial with a judge and a clever defense lawyer looking over his shoulder.

B. Notice

Alaska court rules provide that the defendant must give the prosecution notice of his intent to claim statutory defenses including self-defense no later than ten days prior to trial.⁵⁸ Failure to do so “shall entitle” the prosecution to a continuance, and the prosecutor could request preclusion of the defense.⁵⁹

A preclusion ruling is rarely given, and judges may be skeptical of a prosecutor’s last-minute request for preclusion.⁶⁰ Nonetheless, the defense’s failure to file formal notice of self-defense has important consequences. A formal claim of self-defense may change a prosecutor’s *voir dire*, proposed jury instructions, and construction of his case-in-chief. As discussed in Part V, admissibility of evidence establishing the past violent acts and violent reputation of either the victim or the defendant is an evidentiary issue that should be resolved prior to trial.

The court of appeals has mentioned defense failure to comply with Alaska Rule of Criminal Procedure 16(c)(5) on several occasions, but has never squarely affirmed a trial judge who relied on the rule’s “preclusion” clause. In *Rexford v. State*⁶¹ and *Barnett v. State*,⁶² trial judges refused requests for self-defense instructions, in part because of failure to provide pre-trial notice required by the rule.⁶³ However, neither the *Rexford* court nor the *Barnett* court affirmed the trial judge’s decision for this exclusive reason.⁶⁴

C. Instructing the Jury that Self-Defense Does Not Apply

If the court rules that self-defense does not apply to the case, the judge may be tempted to submit the case to the jury without mentioning a word about self-defense during jury instructions. The court of appeals, however, has stated that “in a case such as this

58. ALASKA R. CRIM. P. 16(c)(5).

59. *Id.*

60. See *Grady v. State*, No. A-6274, 1998 WL 208816, at *3 (Alaska Ct. App. Apr. 29, 1998) (allowing the defendant to claim self-defense, even though the defense provided Rule 16 notice *in the middle of the defendant’s testimony* rather than before trial).

61. No. A-8539, 2004 WL 2676430 (Alaska Ct. App. Nov. 24, 2004).

62. No. A-7785, 2003 WL 77061 (Alaska Ct. App. Jan. 8, 2003).

63. *Rexford*, 2004 WL 2676430, at *3; *Barnett*, 2003 WL 77061, at *2.

64. *Rexford*, 2004 WL 2676430, at *5; *Barnett*, 2003 WL 77061, at *2.

where self-defense is presented as a possible defense, there is a danger that the jury may consider its own understanding of what self-defense is in the absence of an instruction from the court. It seems preferable to have the jury correctly instructed.”⁶⁵

Therefore, in a case where self-defense may have been mentioned during *voir dire*, and where a judge concludes that no self-defense instruction is warranted (perhaps due to the defense’s failure to elicit “some evidence” of self-defense), the specter of nullification haunts the courtroom. If the judge does not instruct the jury that “self-defense does not apply to the case,” the jury may substitute “its own understanding” of what self-defense law is, and award the defendant the windfall of acquittal where he is not entitled to it. In the experience of the author, it is best for the judge to state affirmatively: “You are instructed as a matter of law that the principles relating to the lawful and justified use of self-defense do not apply to this case.”⁶⁶

Of course, some judges may be skeptical about instructing the jury on a defense that does *not* apply. The best response to such skepticism would emphasize three points. First, Alaska Rule of Criminal Procedure 30(b) requires the judge to instruct the jury on *all* matters necessary for the jury’s information regarding their verdict.⁶⁷ Second, while the judge, prosecutor, and defender know that self-defense doesn’t legally apply, there is no reason to assume that the jury understands that. Third, given the likely tenor of the defense attorney’s *voir dire*, and the likelihood that jurors form their opinion about self-defense issues from popular media, the jurors are not only predisposed to think about self-defense, but to do so in a legally erroneous way. Thus, it would be a miscarriage of justice if the jury were to substitute its own judgment of what self-defense might be, and then acquit on the basis of a defense that unknown to the jurors the judge has ruled did not apply. This type of nullification was the danger that the *Folger* court recognized.⁶⁸

Ample Alaska authority supports an instruction removing self-defense from the jury’s consideration.⁶⁹

65. *Folger v. State*, 648 P.2d 111, 114 n.3 (Alaska Ct. App. 1982).

66. The author offers this jury instruction based on his personal experience.

67. ALASKA R. CRIM. P. 30(b).

68. *Folger*, 648 P.2d at 114 n.3.

69. See *Gilbreath v. Municipality of Anchorage*, 773 P.2d 218, 224 (Alaska Ct. App. 1989) (“[W]here the trial court is not obligated to give an instruction on a defense, it is permissible to tell the jury in an instruction that the defense is not available; such an instruction does not violate the rule prohibiting directing a verdict against a criminal defendant.”); *Berge v. State*, No. A-7142, 2000 WL

IV. ESSENTIAL QUESTIONS ABOUT SELF-DEFENSE

Self-defense litigation poses a number of key questions, including: (1) whether the underlying crime is a “force” crime, (2) whether the defendant was the first aggressor, (3) whether the defendant had a duty to retreat, (4) whether the defendant has offered “some evidence” sufficient to merit a self-defense instruction, (5) whether the defendant faced an imminent threat, (6) whether the defendant feared unlawful force, (7) whether the defendant used excessive force, and (8) whether the defendant had a subjectively held, objectively reasonable belief in the necessity of force. Each of these questions will be discussed in turn.

A. Is this a “Force” Crime?

Self-defense justifies the use of “force.”⁷⁰ Therefore, self-defense is not a defense to any crime that does not criminalize the use of force. For instance, self-defense is not a defense to evidence tampering, burglary, false report or theft crimes. Other defenses, such as necessity, may apply to such crimes,⁷¹ but since these are affirmative defenses they carry different burdens of pleading and proof.⁷²

In light of the force crime requirement, the prosecutor’s initial charging decision is critical. A defendant may have a colorable self-defense claim to an assault, but self-defense would not be a defense, for example, to removing a weapon from a crime scene, wiping the blood off it, hiding it, or driving drunk away from the scene afterwards. None of the crimes implicated by that conduct⁷³ criminalize the use of “force.” Furthermore, where self-defense is litigated, but self-defense principles apply only to certain counts of the indictment, the jury should be specifically instructed that the

1058955, at *7–8 (Alaska Ct. App. Aug. 2, 2000) (affirming the trial court’s jury instruction that the jury was not to consider self-defense under *Gilbreath* because the defendant stated that he was not presenting a self-defense case).

70. ALASKA STAT. § 11.81.330(a) (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws (“A person is justified in using nondeadly force . . .”).

71. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(a), at 143 n.2 (2d ed. 2003) (discussing an example in which *B*, fleeing from *A*’s attack, steals *C*’s car: “It is doubtless true that *B* is justified in taking *C*’s car, so he is not guilty of larceny thereof, but his defense is necessity rather than self-defense.”).

72. *See supra* note 36 and accompanying text.

73. In this example the crimes would be tampering with physical evidence and driving while intoxicated.

doctrine of self-defense, if found, constitutes a defense to only *certain counts* of the indictment.⁷⁴

Self-defense only justifies the use of force against persons, not against objects.⁷⁵ In the colorful case of *McGee v. State*,⁷⁶ the court of appeals sided with this traditional view in dicta. McGee found his mother having sex with Wesley Alexander.⁷⁷ After an altercation, Alexander told McGee that he would “run [his] punk ass over.”⁷⁸ McGee went outside, found a shovel, and smashed out the windows of Alexander’s truck.⁷⁹ McGee was later charged with criminal mischief for damaging someone else’s property.⁸⁰

At trial, McGee testified that he damaged the truck in self-defense to prevent Alexander from attacking him.⁸¹ The trial judge ruled that self-defense was not a potential defense to the criminal mischief charge, but that necessity was.⁸² The court of appeals noted that, consistent with the traditional view, Alaska’s self-defense statute justifies use of force upon another person, but not upon an object.⁸³ The court decided the case on other grounds, however, affirming McGee’s conviction because he did not face an “imminent” threat of physical injury.⁸⁴

B. Was the Defendant the First Aggressor?

If undisputed evidence establishes that the defendant was the initial aggressor, the court may properly deny a self-defense instruction.⁸⁵ It is a “well-established rule of law” that an aggressor cannot claim self-defense unless he has begun an encounter with

74. See *Baker v. State*, No. A-5198, 1995 WL 17220761, at *3 n.3 (Alaska Ct. App. Apr. 5, 1995) (“Because the defense of self-defense relates to the fourth-degree assault charge, the court’s failure to instruct on self-defense could have had no effect on the jury’s verdict on the burglary charge.”); *Caldwell v. State*, No. A-3333, 1991 WL 11259199, at *3 n.2 (Alaska Ct. App. July 31, 1991) (holding that, while the trial court erred in denying the defendant’s self-defense claim to the charge of assault, the “self-defense claim has no bearing on the charge of criminal mischief”).

75. *McGee v. State*, 95 P.3d 945, 947 (Alaska Ct. App. 2004).

76. 95 P.3d 945 (Alaska Ct. App. 2004).

77. *Id.* at 946.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 946–47.

83. *Id.* at 947 (citing *LAFAVE*, *supra* note 71, at 143).

84. *Id.*

85. *Gray v. State*, 463 P.2d 897, 908 (Alaska 1970) (citing 4 WARREN ON HOMICIDE § 338 (perm. ed. 1938)).

non-deadly force but is met with deadly force, or if he has effectively withdrawn from the encounter and the initial “victim” continues the assault.⁸⁶

According to Judge Singleton, “[u]nder this court’s view, only the person who fires the first shot, strikes the first blow, or speaks the first insult can be deemed an initial aggressor”⁸⁷ The supreme court set forth the rationale for this rule in the following way:

We are satisfied that in a day of increasing resort to violence these are salutary rules indeed. The law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by a necessity not of his own making. It must not be so perverted as to justify a homicide which occurs in the course of a dispute provoked by the defendant at a time when he knows or ought reasonably to know that the encounter will result in mortal combat.

. . . .

. . . The law cannot give its sanction to the settling of disputes by the use of deadly weapons.⁸⁸

The identity of the initial aggressor usually presents a classic jury issue.⁸⁹ As such, a variety of cases are offered below to illustrate whether a defendant’s actions make him the first aggressor.⁹⁰

In its most obvious incarnation, individuals committing violent felonies are usually deemed to be the first aggressor.⁹¹ In *Rhames*

86. *Castillo v. State*, 614 P.2d 756, 766 (Alaska 1980).

87. *Klumb v. State*, 712 P.2d 909, 913 (Alaska Ct. App. 1986) (Singleton J., concurring and dissenting). Judge Singleton then criticized this rule as being unnecessarily narrow. *See id.*

88. *Bangs v. State*, 608 P.2d 1, 5 (Alaska 1980) (quoting *State v. Millett*, 273 A.2d 504, 510 (Me. 1971)).

89. *Brown v. State*, 698 P.2d 671, 673–74 (Alaska Ct. App. 1985).

90. Two important cases, *McMahan v. State*, 617 P.2d 494, 501–02 (Alaska 1980), and *Bangs v. State*, 608 P.2d 1, 5 (Alaska 1980), also bear on whether the defendant was the first aggressor. *See infra* Part IV.D.3.b.

91. *See, e.g., Loesche v. State*, 620 P.2d 646, 651 (Alaska 1980); *Krantz v. State*, No. A-1831, 1989 WL 1594942, at *1–4 (Alaska Ct. App. Apr. 26, 1989). *Krantz* was convicted of third-degree assault for entering an apartment and brandishing a shotgun at the occupants. *Krantz*, 1989 WL 1594942, at *1. *Krantz* testified that he had been previously threatened by a man named “Michael,” and he mistakenly thought that Michael lived in the apartment. *Id.* In fact, Michael did not live there and *Krantz*’s assault was aimed at two innocent bystanders. *Id.* The court of appeals rejected *Krantz*’s theory of self-defense because he had armed himself and openly brandished the shotgun upon entering the apartment. *Id.* at *3–4. The court of appeals distinguished *Klumb* and *Brown*, noting that neither *Klumb* nor *Brown* brandished his weapon until confronted. *Id.* at *4. “Nothing in *Klumb* or *Brown* suggests that an individual is entitled to openly carry

v. State,⁹² the court of appeals held that Rhames was not entitled to a self-defense instruction where he was clearly the first aggressor.⁹³ Rhames, upon hearing that his estranged wife Carrie had obtained a restraining order against him, drove to the apartment Carrie was visiting.⁹⁴ Upon seeing Rhames, Carrie retrieved a .22 caliber pistol and gave it to the apartment owner, Patrick.⁹⁵ While outside, Rhames retrieved a .38 caliber revolver and fired at the apartment.⁹⁶ He then broke into the apartment through the window, fired four more shots at Carrie and Patrick, and then struck Patrick repeatedly with the revolver when it failed, before finally escaping.⁹⁷ Rhames argued that he should have been provided with a jury instruction of self-defense because he conceivably could have seen Carrie hand Patrick the gun, making Rhames think he had to defend himself.⁹⁸ The court of appeals upheld the ruling of the superior court, finding that because Rhames was the initial aggressor, self-defense was not an available defense for his actions.⁹⁹

The defendant may be the first aggressor even if he is responding to the victim's somewhat confrontational act. In *Desjardins v. State*,¹⁰⁰ the defendant was driving a pickup truck and passed some hitchhikers without stopping.¹⁰¹ One of the hitchhikers kicked his truck, which prompted Desjardins to stop and pursue the hitchhikers on foot.¹⁰² An affray followed, and the victim was struck with an implement, resulting in a skull fracture and brain injury that caused death.¹⁰³ Police later found an iron rod in the back of the defendant's truck.¹⁰⁴ Desjardins testified that he struggled with the victim but denied striking him with the iron rod.¹⁰⁵ The trial court denied Desjardins's request for a self-defense

a firearm to a hostile confrontation in order to prospectively discourage assaultive conduct by a potential rival." *Id.* at *4.

92. 907 P.2d 21 (Alaska Ct. App. 1995).

93. *Id.* at 25–26.

94. *Id.* at 23.

95. *Id.*

96. *Id.*

97. *Id.* at 23–24.

98. *Id.* at 25.

99. *Id.* The court also reasoned that he unquestionably could have retreated. *Id.* at 26. See also *infra* Part IV.C.

100. 551 P.2d 181 (Alaska 1976).

101. *Id.* at 183.

102. *Id.*

103. *Id.* at 183–84.

104. *Id.* at 184.

105. *Id.*

instruction: “There is no indication that Desjardins acted in self-defense; [the victim] did not make an aggressive move toward him but instead fled, until he was knocked down.”¹⁰⁶ Because there was no evidence that the victim offered resistance, Desjardins was not entitled to a self-defense instruction.¹⁰⁷

Even where the defendant is reacting to racial taunts, he may still be the first aggressor. In *Logan v. State*,¹⁰⁸ the defendant, who was African-American, was on a team that lost a summer basketball game to several white men.¹⁰⁹ One of the victors taunted Logan with racial insults, such as “you guys got schooled by a bunch of white boys.”¹¹⁰ Logan punched the taunter in the face, making the first physical contact.¹¹¹ Another member of the white team, Sherburne, jumped in, grabbed Logan, and pulled him to the ground.¹¹² Bystanders broke up the fight and asked Logan to leave, but Logan instead retrieved a gun from his car.¹¹³ He returned to the group, pointed the gun at Sherburne, and asked him how it would feel to be shot.¹¹⁴ Then Sherburne’s friend, Waterson, rushed Logan and tried to tackle him.¹¹⁵ In the struggle, Logan shot Waterson twice, killing him.¹¹⁶ Logan argued self-defense at trial, but the trial judge ruled that Logan was not entitled to a self-defense instruction because Logan was the initial aggressor “under everyone’s version of [the] confrontation” and because he had not communicated his withdrawal from the encounter.¹¹⁷ The court of appeals affirmed.¹¹⁸

106. *Id.* at 189.

107. *Id.*

108. No. A-8447, 2004 WL 1837674 (Alaska Ct. App. Aug. 18, 2004).

109. *Id.* at *1.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at *3. See also ALASKA STAT. § 11.81.330(b) (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws. *Logan* is one of the few Alaska “withdrawal” opinions. The court of appeals surveyed sister state cases and noted that these cases have held that where the defendant points a gun at a victim and then lowers it, or backs off (as if to retreat) but keeps the gun trained on the victim, he has not “effectively communicated withdrawal” so as to be entitled to a self-defense instruction. *Logan*, 2004 WL 1837674, at *5. Another rare “withdrawal” case is *Robinson v. City & Borough of Juneau*, No. A-4171, 1992 WL 12153229 (Alaska Ct. App. July 22, 1992). Robinson was prosecuted for throwing a snowball at another man without provocation and then, a few minutes

On the other hand, even defendants who start out with illegal intent may be entitled to a self-defense instruction. In *Toomey v. State*,¹¹⁹ the defendant was thrown out of a bar, and then stole a car that was idling in the parking lot, went to his brother's house to retrieve a gun, and came back to the bar.¹²⁰ When he arrived in the parking lot, the car owner and two friends confronted Toomey, one of them brandishing a pool cue.¹²¹ Toomey pointed the gun at the man, told him to "hold it," jumped in the car, and drove away.¹²² He was arrested forty-five minutes later, asleep in a restaurant parking lot.¹²³ Toomey was charged with robbery, and he argued self-defense at trial.¹²⁴ The supreme court held that Toomey was entitled to have his jury instructed on self-defense because a reasonable juror could have concluded that Toomey had abandoned his illegal intent when he took the car for a second time.¹²⁵ The court reasoned that a juror could have concluded that Toomey felt reasonable fear of attack by the group.¹²⁶ Thus, a badly split supreme court (three-to-two, with three opinions from

later, punching him. *Id.* at *1. The victim was the fiancé of Robinson's former girlfriend. *Id.* At trial, Robinson argued that he had withdrawn from his unprovoked initial snowball assault and that he was entitled to punch the victim in self-defense after the victim aggressively rose to approach him. *Id.* The defense proposed an instruction on "withdrawal" which tracked the statutory language of section 11.81.330(b). *Id.* The trial judge denied the request. *Id.* Instead, the court instructed the jury that the defendant "was the initial aggressor," and was therefore disqualified from claiming self-defense at all. *Id.* The court of appeals reversed, citing *Folger v. State*, 648 P.2d 111 (Alaska Ct. App. 1982). *Robinson*, 1992 WL 12153229, at *2.

118. The court also reasoned that Logan was not entitled to a self-defense instruction because Waterson's use of force was "lawful." *Logan*, 2004 WL 1837674, at *6. Because Logan had committed a felony assault upon Sherburne (pointing the gun at him), Waterson was authorized to use force against Logan to keep him from leaving. *Id.*; see also ALASKA STAT. § 11.81.390 (1978) (allowing the use of force to make a private person's arrest). Therefore, Logan did not reasonably perceive the use of "unlawful" force against him, as required by section 11.81.330(a). *Logan*, 2004 WL 12153229, at *6.

119. 581 P.2d 1124 (Alaska 1978).

120. *Id.* at 1125.

121. *Id.* at 1125–26.

122. *Id.* at 1126.

123. *Id.*

124. *Id.*

125. *Id.* at 1127.

126. *Id.* at 1126.

five judges) held that even car thieves may be entitled to assert self-defense.¹²⁷

C. Did the Defendant Have a Duty to Retreat?

Alaska's deadly force statute requires individuals to retreat in certain circumstances.¹²⁸ Before the 2006 amendment, only peace officers and the owners of premises were exempt from the duty to retreat.¹²⁹ Others were required to retreat only if they could do so with "complete safety" to themselves and to others.¹³⁰ In 2006, the Alaska legislature expanded the exemption, including all residents of the premises where the force was used, the owner's or resident's

127. *Id.* at 1124. *Toomey's* outcome would almost certainly have been different under the current statute. *Toomey* would now be disqualified from a self-defense instruction because he used a deadly weapon to further his felony criminal objective (felony vehicle theft). See ALASKA STAT. § 11.81.330(a)(4)(A) (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws. *Toomey* is one of the relatively few Alaska self-defense cases where the result has been changed by the 2004 and 2006 legislative reforms. *Caldwell v. State*, No. A-3333, 1991 WL 11259199 (Alaska Ct. App. July 31, 1991), is another case in which the defendant would have been denied a self-defense instruction under post-2004 Alaska law. *Caldwell* attacked the man who owned the storage lot from which he stole an ATV. *Id.* at *1. *Caldwell's* theft would constitute felony vehicle theft under post-1996 Alaska law. See ALASKA STAT. § 11.46.360(a)(1) (2001). Accordingly, *Caldwell* would now be precluded from asserting self-defense by section 11.81.330(a)(4)(A).

128. ALASKA STAT. § 11.81.335(b) (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws. In *Rhames v. State*, 907 P.2d 21 (Alaska Ct. App. 1995), the court also based its refusal to grant a self-defense instruction on the defendant's failure to retreat: "Even assuming that Rhames looked through the window and saw Patrick holding the .22 pistol, the fact remains that Rhames proceeded to break into the apartment. Rhames suggests no reason why he could not have avoided the encounter by simply refraining from breaking into the apartment and, instead, driving away." *Id.* at 26.

129. See § 11.81.335(b).

130. *Id.* For an example of a pre-2006 result that has been changed by the amendment, see *Stapleton v. State*, 696 P.2d 180 (Alaska Ct. App. 1985). In *Stapleton*, the defendant shot a hotel desk clerk in the office area of a hotel where he was a long-term tenant. *Id.* at 181. While *Stapleton* was a resident of the hotel, he did not "own or lease" the office area itself. *Id.* at 184. Therefore, the court held that the jury was properly instructed that he had a duty to retreat before resorting to deadly force. *Id.* Under Alaska's post-2006 statute, however, *Stapleton* would have had no duty to retreat. See S.B. 200, 24th Leg., 2d Sess. (Alaska 2006) (enacted) (residents have no duty to retreat).

guests or agents, and all employees in the building where they work.¹³¹

Several jury instructions can be gleaned from one of the most interesting of Alaska's duty-to-retreat cases, *Halton v. State*.¹³² Halton and his victim, Rogers, had been antagonists for about a year, harassing each other on various occasions.¹³³ Halton decided to arm himself with a handgun, and purposely sought out Rogers.¹³⁴ During the confrontation, Rogers shot at Halton, missed, and ran away.¹³⁵ Halton chased Rogers and returned fire, and Rogers's gun jammed when he attempted to shoot at Halton again.¹³⁶ Halton then shot Rogers a second time from long-distance, and once Halton caught up with him, the two men wrestled.¹³⁷ Eventually, Halton stood over Rogers and shot him a final time.¹³⁸ Rogers died from the gunshot wounds.¹³⁹

131. S.B. 200, 24th Leg., 2d Sess. (Alaska 2006) (enacted). The 2006 amendment dealt with what was referred to as the "castle doctrine"—as in "a man should be able to defend his castle." See Parkes-Murkowski Letter, *supra* note 28. Of course, existing Alaska law provided, and continues to provide, a separate statutory justification defense to those in control of premises who use force to defend themselves against burglary and criminal trespasses. ALASKA STAT. § 11.81.350(c) (1978), amended by Act effective Sept. 13, 2006, ch. 68, §§ 5–6, 2006 Alaska Sess. Laws. The 2006 legislation amended this statute only by expressly adding "guests" to persons who claim the benefit of the statute, yet the legislature watered down the "duty to retreat" clause by expanding the list of persons exempted. S.B. 200, 24th Leg., 2d Sess. (Alaska 2006) (enacted). This 2006 legislative amendment was sponsored by the National Rifle Association. See Parkes-Murkowski Letter, *supra* note 28. Although this election-year legislation was probably intended to vindicate the rights of lawful gun owners, some members of the Alaska legal community have already noted the possibility of unintended consequences, as seen in an *Anchorage Daily News* editorial: "Indeed, the more liberal self-defense proposal is welcome news for criminal defense attorneys. Informed of the general thrust of the bill, Anchorage criminal defense attorney Rex Lamont Butler said, half-jokingly, 'That's huge. When can they sign it? . . . I'm not sure about the wisdom of it, but it certainly is going to make it easier as a criminal defense attorney to defend certain cases.'" Editorial, *Fire Away if Threatened*, ANCHORAGE DAILY NEWS, Jan. 9, 2006, at B4.

132. No. A-6379, 1998 WL 208815 (Alaska Ct. App. Apr. 29, 1998).

133. *Id.* at *1.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at *2.

In response to an interesting series of questions posed by the jury members,¹⁴⁰ the trial judge instructed the jury:

A person may not use deadly force if he knows that he can with complete safety as to himself and others avoid the necessity of doing so by retreating.¹⁴¹

Even if he has been shot at[,] a person may not use deadly force if he knows that he can retreat with complete safety to himself.

He can pursue the shooter if he chooses[,] but [he] may not do so using or threatening the use of deadly force

When pursuit is allowed, the mere carrying of a handgun while in pursuit is not prohibited. However, the use or threatened use of a handgun is deadly force and [is] not permitted unless the circumstances ripen into a self-defense situation as defined in the instructions.

Please keep in mind that the duty to retreat and self-defense instructions and related definitions are all interconnected.¹⁴²

The court of appeals approved of these instructions, concluding that “[a] person can not automatically use deadly force while pursuing someone who has shot at them. If they do shoot at their fleeing assailant, the shooting must be supported by a reasonable fear of imminent serious harm, and there must not have been an obvious avenue of safe retreat.”¹⁴³

D. Has the Defense Offered “Some Evidence?”

A defendant must present “some evidence” on each element of self-defense.¹⁴⁴ Whether the defense has offered “some evidence” sufficient to support a jury instruction for self-defense is a matter for the trial judge.¹⁴⁵ The Alaska Supreme Court has defined “some evidence” as “evidence in light of which a reasonable juror could have entertained a reasonable doubt” as to the element in question.¹⁴⁶

140. *See id.*

141. *Id.* n.2.

142. *Id.* at *2.

143. *Id.* at *4.

144. *Ha v. State*, 892 P.2d 184, 190 (Alaska Ct. App. 1995).

145. *See id.* (“[A] trial judge’s obligation to instruct the jury on self-defense arises only if there is some evidence tending to prove each element of the defense.” (emphasis added)); *Folger v. State*, 648 P.2d 111, 113–14 (Alaska Ct. App. 1982) (holding that the trial judge erred in determining that there was not enough evidence for the self-defense issue to go to the jury).

146. *LaLonde v. State*, 614 P.2d 808, 810 (Alaska 1980). *LaLonde* dealt with the issue of heat of passion, not self-defense, but the Alaska Court of Appeals later cited this language approvingly in a self-defense case. *See Folger*, 648 P.2d at 113.

I. “Some Evidence” Generally. Alaska law is well-settled that the issue of “some evidence” is viewed in the light most favorable to the defendant and without regard to the incredibility or implausibility of the defense evidence.¹⁴⁷ As Judge Coats wrote, “even a weak or implausible self-defense claim is a question for the jury.”¹⁴⁸

When assessing the sufficiency of “some evidence,” the credibility of the defense evidence is generally an issue for the jury, not the trial judge.¹⁴⁹ Once the defendant places self-defense fairly in play by satisfying the “some evidence” test, the trial judge may not deny the defendant a jury trial by concluding that he does not believe his witnesses.¹⁵⁰

This point has been frequently litigated in Alaska. In *Lamont v. State*,¹⁵¹ for example, an intoxicated defendant pulled a gun on a village public safety officer following closely behind the defendant.¹⁵² The defendant requested, but was denied, a self-defense instruction at trial.¹⁵³ The court of appeals reversed the trial court’s ruling on the self-defense instruction, holding that even the implausible testimony of the defendant, standing alone, was sufficient to ground a self-defense claim.¹⁵⁴

147. See *Howell v. State*, 917 P.2d 1202, 1207 (Alaska Ct. App. 1996) (“In applying the some evidence test [to the heat of passion defense], neither the credibility of conflicting witnesses nor the plausibility of the accused’s version is considered. So long as some evidence is presented to support the defense, matters of credibility are properly left for the jury.” (quoting *LaPierre v. State*, 734 P.2d 997, 1000 (Alaska Ct. App. 1987))); *Christie v. State*, 580 P.2d 310, 314–15 (Alaska 1978) (“The judgment of the trial judge as to the sufficiency of the evidence is entitled to great weight on appeal, but, since the defendant’s burden is merely to raise the issue, any real doubt should be resolved in his favor.” (quoting *McDonald v. United States*, 312 F.2d 847, 849 (D.C. Cir. 1962))).

148. *Folger*, 648 P.2d at 113.

149. *Paul v. State*, 655 P.2d 772, 776 (Alaska Ct. App. 1982) (“[T]he court is not called upon to determine the credibility or strength of the evidence or the weight to be given to testimony.” (citation omitted)).

150. See *id.*

151. 934 P.2d 774 (Alaska Ct. App. 1997).

152. *Id.* at 776.

153. *Id.* at 776–77.

154. *Id.* at 778–79; see also *Paul*, 655 P.2d at 775–76 (“The burden to produce some evidence of self-defense is not, however, a heavy one A jury question will be presented and an instruction required if the evidence, when viewed in the light most favorable to the accused, might arguably lead a juror to entertain a reasonable doubt as to the defendant’s guilt.”).

2. “Some Evidence” May Not Be Based on Sheer Speculation. While it is true that the defendant’s “some evidence” burden is not heavy, it is equally true that it may not be based on sheer speculation and must satisfy all elements of the statutory defense.¹⁵⁵ For instance, in *Hilbish v. State*,¹⁵⁶ the female murder defendant argued that the following circumstances supported her request for instructions on self-defense and heat of passion: that the victim was a male, that he was larger and stronger than she, that he was angry with her due to her affair with another man, that the two had argued shortly before the murder, that he had threatened her in the days before his death, and that his blood was spattered about the house.¹⁵⁷ Although she did not testify,¹⁵⁸ the defendant argued that these circumstances grounded the inference of a struggle sufficient to entitle her to a self-defense instruction.¹⁵⁹ The trial court denied the self-defense instruction, and the court of appeals affirmed, because Hilbish presented no evidence of the actual use or threat of deadly force against her, and no evidence that she had acted based upon a reasonable belief in her necessity to use deadly force.¹⁶⁰ The court of appeals concluded:

[T]he state was under no obligation to assume the burden of disproving self-defense until there was some evidence affirmatively suggesting that what might have happened actually did happen

. . . Allowing the jury to consider self-defense . . . could only have invited speculation as to possibilities that find no reasonable support in the evidence¹⁶¹

Although the lack of evidence supporting the defendant’s claim is the key consideration, it is also significant to note that the court of appeals seems more likely to affirm the denial of a self-defense instruction if the defendant did not actually testify about why he used force.¹⁶²

3. *Cases Where the Defendant was Erroneously Denied a Self-Defense Instruction.* Although cases like *Hilbish* demonstrate that

155. See *Hamilton v. State*, 59 P.3d 760, 771 (Alaska Ct. App. 2002).

156. 891 P.2d 841 (Alaska Ct. App. 1995).

157. *Id.* at 851–52.

158. Interview with trial prosecutor (Aug. 21, 2006).

159. *Hilbish*, 891 P.2d at 851.

160. *Id.*

161. *Id.* at 852.

162. See, e.g., *id.*; *Hamilton v. State*, 59 P.3d 760, 770 (Alaska Ct. App. 2002); *Frank v. State*, No. A-7914, 2003 WL 1987850, at *1 (Alaska Ct. App. Apr. 30, 2003) (affirming the trial court’s denial of a self-defense instruction in a murder trial where the defendant did not testify).

sheer speculation is insufficient to satisfy the “some evidence” test, this threshold is a relatively low standard, as the following cases illustrate. These cases also show that, as a practical matter, a defendant who declines to testify may not provide sufficient evidence to support a self-defense instruction (because a testifying defendant is more likely to satisfy the “some evidence” test by providing direct evidence of his subjective motivation to use force).¹⁶³

a. Generally. Only a very small quantum of evidence is required to create a question of fact for the jury.¹⁶⁴ In *Folger v. State*,¹⁶⁵ the defendant testified that he believed he was going to be robbed by the physically larger victim, so he took out his knife to scare, not stab, the victim (not knowing whether the victim had a weapon).¹⁶⁶ The court of appeals held that this testimony was sufficient to entitle the defendant to a self-defense jury instruction, since the “some evidence” test only requires “more than a scintilla.”¹⁶⁷ To this end, the court explained that “[i]t is obvious why a trial judge would be less than impressed with Folger’s explanation for his use of a dangerous weapon. However, Folger was entitled to a trial by a jury and a jury should have been instructed on his self-defense claim.”¹⁶⁸

The *Folger* court relied heavily on *Christie v. State*.¹⁶⁹ Although *Christie* was an insanity-defense case, practitioners should be mindful of the court’s language because *Folger* is a frequently-cited “some evidence” case:

The subject matter being what it is, there can be no sharp quantitative or qualitative definition of “some evidence.” Certainly it means more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal. The judgment of the trial judge as to the sufficiency of the evidence is entitled to great weight on appeal, but, since the defendant’s burden is

163. A prosecutor must be mindful that comment on a defendant’s pre-arrest silence carries the risk of plain-error reversal. See *Hamilton*, 59 P.3d at 768–69 (approving the trial judge’s instruction to the jury that it was not permitted to make an adverse determination about the defendant’s failure to testify); see also *Silvernail v. State*, 777 P.2d 1169, 1175 (Alaska Ct. App. 1989) (reserving the issue of whether questions about pre-*Miranda* silence are constitutionally permissible).

164. See *Paul v. State*, 655 P.2d 772, 775–76 (Alaska Ct. App. 1982).

165. 648 P.2d 111 (Alaska Ct. App. 1982).

166. *Id.*

167. *Id.* at 113 (quoting *Christie v. State*, 580 P.2d 310, 314–15 (Alaska 1978)).

168. *Id.* at 113–14.

169. 580 P.2d 310 (Alaska 1978).

merely to raise the issue, any real doubt should be resolved in his favor.¹⁷⁰

Although the courts themselves sometimes disagree as to the precise standard,¹⁷¹ almost any evidence that transcends “sheer speculation” will qualify.¹⁷²

b. A “Some Evidence” Dilemma. The “some evidence” standard has been applied differently, and perhaps inconsistently, in the specific instance where the defendant provokes an argument, leaves, and returns armed with a deadly weapon.

In *Bangs v. State*,¹⁷³ the defendant Bangs started a verbal altercation with a neighbor, Troyer.¹⁷⁴ The argument got out of hand, and Troyer ended up choking Bangs and screaming, “Don’t be fucking with me, I’m a killer”¹⁷⁵ Bangs left, armed himself with a gun, returned to confront Troyer, and pointed the weapon at Troyer.¹⁷⁶ Troyer jumped down from the bed of a dump truck and lunged at Bangs, and Bangs fired, killing Troyer.¹⁷⁷ Bangs testified that he fired because he felt Troyer would overpower and kill

170. *Id.* at 314–15 (quoting *McDonald v. United States*, 312 F.2d 847, 849 (D.C. Cir. 1962)) (footnotes omitted).

171. *See, e.g., Weston v. State*, 682 P.2d 1119 (Alaska 1984). In *Weston*, the defendant and the sixty year-old male victim engaged in an argument over money to pay for alcohol at the victim’s home. *Id.* at 1120. Weston testified that the victim pulled a knife on him and, in the struggle that ensued, Weston eventually gained control of the knife and slashed the victim’s throat, killing him. *Id.* Weston requested a self-defense instruction, which the trial judge denied. *Id.* at 1121. The supreme court reversed, holding that the defendant’s testimony provided “some evidence” regarding both the subjective (he must have believed force was necessary) and objective (the belief must have been reasonable) self-defense test. *Id.* at 1122. The court noted that the victim was intoxicated (with a blood alcohol level of 0.269 percent), had attacked the defendant with a knife, and had access to guns nearby in the room during the struggle. *Id.* Justice Compton’s vigorous dissent pointed out that Weston had control of the knife and could have secured possession of the firearms or could have dragged “him [the victim] *across the street* to the police station.” *Id.* at 1124 (Compton, J., dissenting).

172. *See, e.g., Paul v. State*, 655 P.2d 772 (Alaska Ct. App. 1982) (“The burden to produce some evidence of self-defense is not, however, a heavy one; this standard is satisfied when self-defense has fairly been called into issue.”); *Cano v. Municipality of Anchorage*, No. A-8441, 2004 WL 1737591, at *2 (Alaska Ct. App. Aug. 4, 2004) (“[T]his burden [to produce evidence in support of a self-defense claim] is not a heavy one.”) (citations omitted).

173. 608 P.2d 1 (Alaska 1980).

174. *Id.* at 2.

175. *Id.*

176. *Id.*

177. *Id.* at 2–3.

him.¹⁷⁸ Bangs's trial defense counsel requested an instruction that Bangs was not required to retreat, which the trial court denied.¹⁷⁹ The supreme court affirmed, ruling that failure to give the requested "no-duty-to-retreat" instruction was not error, because Bangs was not even entitled to a self-defense instruction.¹⁸⁰ The court explained that "[t]he law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by necessity not of his own making."¹⁸¹ Bangs, however, had set into motion the events that led to the crime, and was therefore not entitled to claim self-defense.¹⁸²

In a similar case, *McMahan v. State*,¹⁸³ the defendant had lived with his former girlfriend.¹⁸⁴ A few days after an argument which resulted in McMahan moving out, the girlfriend introduced him to her new boyfriend, the victim.¹⁸⁵ The victim told McMahan to stay away, and told McMahan that he "[had] a new rifle and I wouldn't want to use it . . . on you."¹⁸⁶ McMahan left and armed himself before returning to his former girlfriend's apartment, later claiming that "[it would] be foolish to go back up there if I wasn't able to defend myself."¹⁸⁷ After returning to the apartment and kicking open the door, McMahan shot and killed the victim.¹⁸⁸ He later testified that the victim "came at him with a knife."¹⁸⁹ The supreme court held that McMahan was not entitled to a self-defense instruction.¹⁹⁰ Following the reasoning from *Bangs*, the court explained that "when a defendant has a prior grievance with the deceased and takes a deadly weapon to an encounter with the deceased, the defendant should be deemed to have provoked the violence which resulted in the death," and thus be precluded from bringing a self-defense instruction.¹⁹¹

178. *Id.* at 3.

179. *Id.* at 5.

180. *Id.*

181. *Id.* (quoting *State v. Millett*, 273 A.2d 504, 510 (Me. 1971)).

182. *Id.*

183. 617 P.2d 494 (Alaska 1980).

184. *Id.* at 501.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 495.

189. *Id.* at 501.

190. *Id.* at 501–02.

191. *Id.* at 502.

Bangs and *McMahan* stand in sharp contrast with two later court of appeals decisions. In *Brown v. State*,¹⁹² the defendant argued with the victim, who the defendant found at his wife's home.¹⁹³ Brown and the victim both left the home, but Brown armed himself with a .22 caliber rifle and sought out the victim, allegedly intending only to talk to him.¹⁹⁴ Brown testified that during the course of the conversation the victim leveled a .44 magnum at him.¹⁹⁵ Brown testified that he fired at the victim just before the victim fired at him.¹⁹⁶ The court of appeals held that even weak self-defense cases satisfy the "some evidence" test, and that the factual implausibility of the claim is a matter for the jury.¹⁹⁷ Unlike *Bangs*, the court explained, the evidence here suggested that Brown merely wanted to talk to the victim, not harm him. To this end, the crucial inquiry is not "whether [the defendant] was armed when he went to meet [the victim]; rather, it is whether his assault occurred 'in the course of a dispute provoked by the defendant at a time when he knew or ought reasonably to have known that the encounter would result in mortal combat.'"¹⁹⁸

Likewise, in *Klumb v. State*,¹⁹⁹ the defendant had an ongoing financial dispute with the victim.²⁰⁰ He armed himself with a handgun, because he considered the victim to be potentially dangerous, and sought out the victim to "get this thing talked out."²⁰¹ According to Klumb's testimony, he confronted the victim in his home and the victim pulled out a gun from his waistband.²⁰² Klumb fired, "not aiming at anything," but striking the victim in the skull.²⁰³ He then fired again to "stop his 'nervous twitching.'"²⁰⁴ The court of appeals reasoned that the trial judge erroneously relied upon *McMahan*, holding that Klumb was entitled to a self-

192. 698 P.2d 671 (Alaska Ct. App. 1985).

193. *Id.* at 672.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 674.

198. *Id.* (quoting *State v. Millett*, 273 A.2d 504, 510 (Me. 1971)) (alterations in original).

199. 712 P.2d 909 (Alaska Ct. App. 1986).

200. *Id.* at 910.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

defense instruction because Klumb could not reasonably have concluded that arming himself would result in mortal combat.²⁰⁵

It is very difficult to reconcile *Bangs*, *Brown*, *McMahan*, and *Klumb*. In each of these four cases, a defendant engaged in a confrontation, went away, armed himself, and returned to continue the dispute. *Bangs* and *McMahan* hold that the defendant had forfeited his right to self-defense. *Klumb* and *Brown* hold the contrary. The dilemma is highlighted by Judge Singleton in his *Klumb* dissent and concurrence, criticizing the *Klumb* majority for “ignor[ing] inconvenient precedents of the Alaska Supreme Court.”²⁰⁶ The cases are only reconcilable to the extent that *Bangs* did not testify that his victim confronted him with a weapon, while *Klumb* did. While *McMahan* was arguably confronted with deadly force (the knife), he was also clearly the first aggressor, had invaded another person’s apartment, and unquestionably had a duty to retreat. *Brown*, like *Klumb*, testified that he was confronted with a deadly weapon and “won the draw.”²⁰⁷

E. Did the Defendant Face an “Imminent” Threat?

Alaska’s self-defense statute requires that one must reasonably act to defend oneself (or another) against “force.”²⁰⁸ Alaska’s statutory definition of “force” requires that the threat of bodily impact be “imminent.”²⁰⁹ Therefore, if the defendant’s proffer does not include a showing of an imminent threat, his request for a self-defense instruction will be denied.

For example, in *Grandberry-Williams v. State*,²¹⁰ the defendant accelerated his car and spun his wheels in a crowded Anchorage parking lot at bar-closing time, throwing up stones from the pavement.²¹¹ The victim ran after the defendant’s vehicle to tell him to stop spinning his wheels, and after an exchange of words, *Grandberry-Williams* “sucker punched” him, dropping him to the pavement.²¹² The prosecution called a third-party witness who testified that the victim made no aggressive movement toward

205. *Id.* at 911–12.

206. *Id.* at 913 (Singleton, J., concurring and dissenting).

207. *See Brown v. State*, 698 P.2d 671, 672 (Alaska Ct. App. 1985).

208. ALASKA STAT. § 11.81.330 (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

209. *See* ALASKA STAT. § 11.81.900(b)(27) (2005), amended by Act effective Sept. 14, 2006, ch. 73, § 6, 2006 Alaska Sess. Laws.

210. No. A-8384, 2004 WL 178950 (Alaska Ct. App. Jan. 28, 2004). The author was the trial prosecutor.

211. *Id.* at *1.

212. *Id.*

Grandberry-Williams.²¹³ Grandberry-Williams did not testify.²¹⁴ The court of appeals affirmed the trial court's refusal to instruct on self-defense, ruling that mere verbal confrontation about aggressive driving in a bar parking lot did not amount to an "imminent threat of use of force" against him.²¹⁵

1. Preemptive Strikes. A defendant may not engage in a preemptive strike against an anticipated opponent, even if the opponent has threatened death or violence against the defendant in the past.²¹⁶ *Ha v. State*²¹⁷ is the leading Alaska "preemptive strike" case. Ha and Buu were Dillingham fishermen who had fought on the night before the fatal shooting (Buu had inflicted a head injury on Ha and had threatened to kill him).²¹⁸ The next day, twelve to thirteen hours after the fight, Ha armed himself with a rifle, stalked Buu, and shot him thirteen times, hitting him in the back at least seven times.²¹⁹

The defense attorney argued that the victim was a member of a Vietnamese crime family and that "A threat from Buu . . . was as good . . . as a kiss on [the] cheek by a . . . Mafia godfather."²²⁰ The defense requested a self-defense instruction, but the trial judge denied the request, holding that Ha faced no "imminent" threat.²²¹ The judge correctly reasoned that the concept of imminence was woven into the statutory definition of "force."²²²

The court of appeals held that Alaska law does not permit preemptive strikes. There was no showing of "imminent" harm to Ha because "[a] defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense"²²³ Because there was no "imminent" threat to Ha, his conviction was affirmed.²²⁴

213. *Id.*

214. *Id.* at *5.

215. *Id.*

216. *See Ha v. State*, 892 P.2d 184, 194 (Alaska Ct. App. 1995).

217. *Id.*

218. *Id.* at 186–87.

219. *Id.*

220. *Id.* at 188 (alteration and third omission in original).

221. *Id.*

222. *Id.* (citing ALASKA STAT. § 11.81.900(b)(27) (2005), amended by Act effective Sept. 14, 2006, ch. 73, § 6, 2006 Alaska Sess. Laws (defining "force")).

223. *Id.* at 194. The court also noted that "'inevitable' harm is not the same as 'imminent' harm." *Id.* at 191 (finding that harm is inevitable, as opposed to imminent, if it is likely to occur at some time after, rather than during, the confrontation).

224. *Id.* at 196.

Thus, even if a defendant *actually* and *reasonably* believes that, sooner or later, his enemy will choose an opportune moment to attack and kill him, the law does not allow the defendant to seek out and kill his enemy. The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent.²²⁵

2. *"Battered Spouse" Cases.* The requirement of immediacy has important application in "battered spouse" cases. Thirteen years before *Ha*, the court of appeals posited (in dicta) that Alaska law would not support a "battered woman" defense where a domestic violence victim killed her abuser in a preemptive strike.²²⁶ Typically, these cases involve a battered and fearful wife who kills her husband in his sleep. Despite ample evidence that such a killing was motivated by real and urgent fear, such a self-defense claim would properly be denied because as long as the husband is sleeping there is no immediate threat of harm.²²⁷

The key to the analysis of such "battered spouse" cases is the degree to which the defense can establish a present and immediate threat at the time the fatal blow was delivered. Resolution of this threshold question will carry portentous evidentiary consequences. For instance, where a defendant kills her batterer without an immediate threat of harm (in his sleep, for instance), the defense's request for a self-defense instruction would be squarely barred.²²⁸ With self-defense precluded from the jury's consideration, the jury will never hear about the specific acts that grounded the defendant's fear—no matter how persuasive or grievous those acts may be.²²⁹ Nor would the jury hear reputation evidence

225. *Id.* at 194; *see also* *Paul v. State*, 655 P.2d 772, 778 n.8 (Alaska Ct. App. 1982); *McGee v. State*, 95 P.3d 945, 947 (Alaska Ct. App. 2004) (affirming the denial of a self-defense instruction based on the lack of evidence of imminent threat).

226. *Paul*, 655 P.2d at 778 n.8.

227. *Id.*

228. *See Ha*, 892 P.2d at 194; *Paul*, 655 P.2d at 778 n.8.

229. *See Loesche v. State*, 620 P.2d 646, 651 (Alaska 1980) (holding testimony of the victim's prior acts of violence was inadmissible because there was insufficient evidence justifying a self-defense instruction). In *Deacon v. State*, No. A-4399, 1993 WL 13156808 (Alaska Ct. App. June 23, 1993), the court of appeals held that, where the defendant did not testify, called no witnesses, and offered evidence that the victim had assaulted the defendant on several prior occasions as the only support for his self-defense claim, the evidence was properly excluded. *Id.* at *1–2. This statement—that reputation evidence is inadmissible if the defendant is not entitled to a self-defense instruction—is still valid, but *Deacon* is

establishing the victim's derogatory reputation for violence.²³⁰ Such issues could only be heard at sentencing, which is cold comfort for the defense.²³¹

On the other hand, where a battered spouse establishes a colorable claim of a present and imminent threat at the time the fatal blow was delivered perhaps where the defendant testifies that the victim approached aggressively the defense would be able to distinguish *Ha*, *Hilbish*, and *Hamilton*. With self-defense fairly in play, the torrent of derogatory evidence establishing the decedent as a batterer would be admissible and may be placed before the jury.

F. Did the Defendant Fear "Unlawful" Force?

To claim self-defense, the defendant must be reacting to "unlawful" force.²³² A person has no privilege to resist a lawful arrest carried out with non-excessive force.²³³ In *Gray v. State*,²³⁴

a good example of pre-1996 appellate confusion about the purposes for which a victim's prior specific acts are admissible. After 1996, a victim's prior specific acts are admissible only where the defendant admits to the charged assault, where the defendant knew of the prior act, and where they are used to prove that the defendant's use of force was reasonable. See *infra* Part V.B.2. The *Deacon* court noted that the defendant sought to admit the prior specific-act evidence to prove the identity of the initial aggressor, 1993 WL 13156808, at *1, a position inconsistent with post-1996 Alaska case law, see *infra* Part V.B.2.

230. See *Norris v. State*, 857 P.2d 349, 351–52 (Alaska Ct. App. 1993) (finding evidence of the victim's reputation for violence was irrelevant and properly excluded where the defendant presented no evidence of self-defense); *Rexford v. State*, No. A-8539, 2004 WL 2676430, at *2–3 (Alaska Ct. App. Nov. 24, 2004) (excluding evidence of the victim's prior violent acts because the defendant was not entitled to a self-defense instruction).

231. See ALASKA STAT. §§ 12.55.155(d)(3), (16) (2005) (allowing a sentence to be mitigated if the defendant committed the offense under "duress, coercion, threat, or compulsion insufficient to constitute a complete defense" or if the assault or homicide was committed "in response to domestic violence").

232. ALASKA STAT. § 11.81.330(a) (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

233. *Jurco v. State*, 825 P.2d 909, 913–15 (Alaska Ct. App. 1992). The court discussed the legislature's 1982 repeal of the statute authorizing resistance to unlawful arrests:

Under *Miller*, citizens having good reason to believe they were being unlawfully arrested were nevertheless obliged to submit peaceably to a deprivation of their personal liberty and await their day in court. . . . [T]he Alaska legislature briefly reinstated the common law rule that allowed such battles between officers and private citizens who disputed the legality of an arrest. Soon, however, the legislature re-established the rule and policies announced in *Miller*. . . . It follows that *Jurco* was

Gray shot and killed a police officer who tried to arrest him as he escaped from an armed robbery.²³⁵ Gray requested a self-defense instruction from the trial court, but this request was refused.²³⁶ The supreme court affirmed the denial, holding “that appellants provoked the difficulty by committing the armed robbery. Authority clearly supports . . . and indicates that a person who provokes a difficulty thereby forfeits his right to self-defense.”²³⁷

Whether or not the victim’s use of force was “lawful” appears to be a legal issue for the court, not a factual one for the jury.²³⁸ If the court determines that the victim’s use of force was “lawful,” it may properly deny a self-defense instruction and remove the issue from jury consideration.²³⁹

G. Did the Defendant Use Excessive Force?

Because defendants are permitted to use force only “when and to the extent” necessary, a defendant’s use of force may become excessive at some point during an assault. For instance, while the first shot may have been fired in self-defense, the tenth shot may not have been. In *State v. Walker*,²⁴⁰ the defendant was confronted by a hostile group at a party.²⁴¹ He stabbed one man once in the arm, and another man three times—once in the neck, and twice in the chest.²⁴² The first victim had his bicep severed, and the second victim suffered a collapsed lung.²⁴³ The jury acquitted the defendant of the first stabbing, but convicted him of the second.²⁴⁴ The court of appeals held that the verdicts were not inconsistent because the jury could have concluded that the degree of force against the first man was reasonable, whereas the degree of force

not entitled to forcibly resist the State Troopers’ efforts to seize his truck

Id.

234. 463 P.2d 897 (Alaska 1970).

235. *Id.* at 900.

236. *Id.* at 907.

237. *Id.* at 908.

238. *See, e.g.*, Logan v. State, No. A-8477, 2004 WL 1837674, at *8 (Alaska Ct. App. Aug. 18, 2004).

239. *See id.* at *8–9 (finding the defendant did not reasonably fear “unlawful” force, and thus could not claim self-defense, where the defendant was the first aggressor and the opponent’s use of force against him was “lawful”).

240. 887 P.2d 971 (Alaska Ct. App. 1994).

241. *Id.* at 976.

242. *Id.*

243. *Id.*

244. *Id.*

against the second was excessive.²⁴⁵ The court discussed limits upon the actual use of force, distinguishing between pointing a gun, firing a warning shot in the air, and then actually shooting to kill: “Even though a person faces a threat of imminent death or serious physical injury, so that he or she is legally entitled to use deadly force in self-defense, the law still requires that the force used be no greater than necessary to avert the danger.”²⁴⁶

When faced with an excessive force scenario, a court could find useful language in Justice Matthews’ *Weston* opinion and Judge Mannheimer’s *Walker* opinion, and from these two could craft a useful “excessive force” instruction. One could correctly cite both cases for the following proposition:

A defendant’s claim of self-defense requires that the defendant must have actually believed the degree of force used was necessary, and this belief must be objectively reasonable.²⁴⁷ A basic tenet of the doctrine of self-defense is that use of deadly force is unreasonable if non-deadly force is obviously sufficient to avert the threatened harm.²⁴⁸ Even in circumstances when a person is permitted to use deadly force in self-defense, that person may still not be authorized to employ all-out deadly force because such extreme force is not necessary to avert the danger.²⁴⁹

H. Did the Defendant Have a Subjectively Held, Objectively Reasonable Belief in the Necessity of Using Force?

A defendant may use force only to the extent that he reasonably believes that force is necessary to defend himself against what he reasonably believes is unlawful force.²⁵⁰ Assuming the defense has met the “some evidence” threshold, prosecutors must sustain a burden that defense lawyers seldom bear: proof of multiple negative propositions beyond a reasonable doubt. Nonetheless, a defendant’s actions sometimes provide strong evidence that he, in fact, held no sincere, subjective belief in the necessity of using force. The prosecutor should also be aware of how objective reasonableness plays out in cases of mental illness and intoxication.

245. *Id.* at 978.

246. *Id.*

247. *Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984).

248. *Id.* at 1124 (Compton, J., dissenting).

249. *Walker*, 887 P.2d at 978.

250. *See* ALASKA STAT. §§ 11.81.330(a), .335(a) (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

1. *Actions that Undermine a Defendant's Claim to Have a Subjective Belief in the Necessity of Using Force.* The prosecutor inevitably must rely upon circumstantial evidence to prove that a defendant did not subjectively believe in the necessity of his use of force.²⁵¹ Two types of circumstantial evidence may undermine a defendant's claim to have held this belief: (1) when the defendant ran from the scene, and (2) when the defendant lied afterward.

a. *The Defendant Ran from the Scene.* Flight from the scene of a shooting has been held admissible as inconsistent with self-defense and probative of consciousness of guilt.²⁵² Such evidence is admissible notwithstanding the fact that there were other possible explanations for the defendant's flight.²⁵³ Alternative explanations are a matter of the evidence's weight, not its admissibility.²⁵⁴

This principle is aptly—if theatrically—summed up in *Rexford v. State*,²⁵⁵ a case in which the defendant fled the scene. The prosecutor paraphrased the Bible, saying that “*the guilty flees when no man pursueth; the righteous stand as bold as a lion.*”²⁵⁶ The court of appeals held that this argument was not prosecutorial misconduct, and did not interject the prosecutor's personal opinion about the defendant's guilt.²⁵⁷

b. *The Defendant Lied.* Alaska courts frequently admit evidence of a false-exculpatory statement as circumstantial evidence of guilt, even where there are benign alternative explanations.²⁵⁸ Circumstantial evidence of guilt is doubly relevant

251. Alaska's pattern jury instructions provide, “State of mind may be proved by circumstantial evidence. It rarely can be established by any other means.” Alaska Pattern Jury Instruction 1.44 (Criminal), *quoted in* Sivertsen v. State, 981 P.2d 564, 566 n.10 (Alaska 1999).

252. *Dyer v. State*, 666 P.2d 438, 448–49 (Alaska Ct. App. 1983) (“Dyer's flight and elaborate attempts to evade the authorities could be interpreted as evidence that he had not shot in self-defense and to show his consciousness of guilt.”).

253. *Id.* at 449.

254. *Id.*; *see also* *Roberts v. State*, 453 P.2d 898, 905–06 nn.27–28 (Alaska 1969) (holding that the defendant's flight, efforts to avoid arrest, and possession of a firearm unrelated to the offense were all relevant and admissible “under the general doctrine which permits a full showing as to flight”).

255. No. A-8539, 2004 WL 2676430 (Alaska Ct. App. Nov. 24, 2004).

256. *Id.* at *11–12 (citing *Proverbs* 28:1).

257. *Id.* at *12.

258. *See* *Sakeagak v. State*, 952 P.2d 278, 283 (Alaska Ct. App. 1998) (affirming the admission of false exculpatory statements as circumstantial evidence of the defendant's consciousness of guilt); *Bloomstrand v. State*, 656 P.2d 584, 590 (Alaska Ct. App. 1982) (holding that a jury instruction charging the jury with

in a self-defense case, where subjective belief in one's justified actions is an essential element of the defense.²⁵⁹ Thus, a prosecutor should be entitled to argue that the defendant did not subjectively believe that his use of force was justified if the defendant lied to investigators or civilians (this often takes the form of denying that he was at the crime scene).

A prosecutor must be mindful that commenting on a defendant's pre-arrest silence carries the risk of plain-error reversal.²⁶⁰ However, where a defendant makes a statement to police, does not claim self-defense, and then testifies differently at trial, he may be properly questioned about his failure to claim self-defense when interviewed by police.²⁶¹

2. Reasonableness in Cases of Mental Illness and Intoxication.

The law assesses the "reasonableness" of a defendant's actions in light of a person whose mental abilities are not impaired by mental illness or brain damage.²⁶² In other words, there is no such thing as a "reasonable" paranoid schizophrenic. The court of appeals has affirmed the following jury instruction: "When these instructions use the term 'reasonable person' or 'reasonably believe'[] they mean a reasonable, mentally healthy person whose thinking is not influenced by mental difficulties that skew or affect his ability to

determining whether the defendant exhibited signs of consciousness of guilt, to be done by comparing prior statements made by the defendant and the fact that he did not make these statements during the trial while testifying, was a valid jury instruction).

259. See ALASKA STAT. §§ 11.81.330, .335 (2004), amended by Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

260. See generally *Silvernail v. State*, 777 P.2d 1169 (Alaska Ct. App. 1989). *Silvernail* held that the prosecutor's questioning of the defendant about his failure to claim duress during his initial conversation with police had little probative value and was unduly prejudicial, thus violating Alaska Rule of Evidence 403. *Id.* at 1174–75. It should be noted that the *Silvernail* court specifically reserved the question of whether questions about pre-*Miranda* silence are constitutionally permissible. *Id.* at 1175.

261. See *Joseph v. State*, No. A-9055, 2006 WL 1360945, at *22–23 (Alaska Ct. App. May 17, 2006) (holding that questioning about pre-trial statements was not an improper comment on the defendant's right to silence because the defendant had chosen to break his silence, and the prosecution had the right to question him about his inconsistent statements).

262. *Ha v. State*, 892 P.2d 184, 195–96 (Alaska Ct. App. 1995).

form reasonable thought processes or to act in a reasonable fashion.”²⁶³

Because participants in street crime assaults are often under the influence of alcohol or street drugs, defendants who claim self-defense at trial were often themselves under the influence of intoxicants at the time of the charged event. Regardless, Alaska’s self-defense statute holds defendants to the standard of a sober, reasonable person. In *Nygren v. State*,²⁶⁴ the defendant, while drunk, stabbed her husband.²⁶⁵ On appeal, she argued that a breathalyzer result, which measured her blood alcohol content (0.210% at the time of her arrest) should not have been admitted.²⁶⁶ The supreme court stated that self-defense requires that “the circumstances be such that a reasonable person would believe that she was in imminent danger of death or great bodily injury. The focus here is on the circumstances as they would appear to a reasonable person. The intoxication of the appellant is not germane to that question.”²⁶⁷

Thus, the jury instruction for mental illness from *Ha* may logically be adapted for defendants who were intoxicated: “When these instructions use the term ‘reasonable person’ or ‘reasonably believe,’ they mean a reasonable, sober, mentally healthy person whose thinking is not influenced by alcohol or intoxicating drugs that skew or affect the ability to form reasonable thought processes or to act in a reasonable fashion.”²⁶⁸ This inferential step is bolstered by the fact that intoxication is generally voluntary while mental illness is not, so a stringent reasonable person standard is more likely to be upheld and applied where the defendant voluntarily incapacitated himself.

V. THE USE OF PRIOR ACTS AND REPUTATION EVIDENCE

Evidence of reputation and specific prior acts—of both the defendant and the victim—can be especially powerful in the minds of a jury. Such evidence can suggest that a person was generally peaceful or combative, or had specific reason to be fearful in a situation that ultimately lead to the claim of self-defense.

263. *Id.* at 197. The court of appeals took care to mention that, when the trial judge inquired about the drafting of the instruction, the prosecutor boldly stated, “I wrote it last night.” *Id.*

264. 616 P.2d 20 (Alaska 1980).

265. *Id.* at 21–22.

266. *Id.* at 22.

267. *Id.*

268. *See Ha*, 892 P.2d at 197.

Therefore, an understanding of the rules for admitting prior bad acts and reputation evidence is essential to the criminal bar.

A. The Defendant's Prior Acts and Reputation

Four reasons for admitting evidence of the defendant's prior acts and reputation often arise in self-defense trials. These are: (1) to establish combative attitude near the time of the offense, (2) to show motive or intent after self-defense has been raised, (3) in cases of domestic violence assaults, and (4) to counter the defendant's claimed reputation for peacefulness.

1. The Defendant's Prior Acts are Admissible to Show Combative Attitude Near the Time of the Charged Offense. Many cases have held that the defendant's prior acts are relevant to show he was combative *near the time of the offense*.²⁶⁹ For instance, *Lerchenstein v. State*²⁷⁰ concluded that the trial judge "did not abuse his discretion in admitting other evidence concerning Lerchenstein's angry and combative behavior immediately prior to the shooting incident."²⁷¹ The court reasoned:

In order to establish that Lerchenstein did not act in self-defense, the state was entitled to rely on evidence indicating that, at the time of the shooting, [Lerchenstein] was angry, emotionally agitated, and extremely combative—in other words, that he was not acting reasonably Since this evidence had specific relevance beyond its mere tendency to establish a propensity toward violence, its admission was not categorically precluded by Evidence Rule 404(b).²⁷²

269. See, e.g., *Seek v. State*, No. A-6098, 1998 WL 80112, at *8–9 (Alaska Ct. App. Feb. 25, 1998) (holding that the defendant's prior threatening statement was properly admitted under Rule 404(b)(1) to prove his state of mind at the time of the shooting); see also *Pitt v. State*, No. 6292, 1997 WL 796503, at *2–4 (Alaska Ct. App. Dec. 24, 1997) (holding that the court properly admitted evidence of the defendant's aggressive demeanor in the emergency room following a fatal stabbing because the evidence was relevant to his state of mind at the time he claimed to have acted in self-defense).

270. 697 P.2d 312 (Alaska Ct. App. 1985), *aff'd per curiam*, 726 P.2d 546 (Alaska 1986).

271. *Id.* at 319.

272. *Id.* at 317–18. *Lerchenstein* is occasionally cited as authority to exclude "prior bad acts" evidence under Alaska Rule of Evidence 404(b)(1) on the grounds that other bad acts evidence is inherently prejudicial and presumptively inadmissible. However, this aspect of *Lerchenstein*—arguably, its core holding—was specifically overruled by the 1991 Alaska Legislature when it amended Rule 404(b). See Act effective Sept. 24, 1991, ch. 79, § 1(c), 1991 Alaska Sess. Laws.

Another interesting example is *Abuhl v. State*.²⁷³ Abuhl had an argument with his victim about the victim's cat, Gizmo.²⁷⁴ The argument resulted in the victim striking Abuhl with a bat.²⁷⁵ The next day, Abuhl fatally stabbed this victim, and tried to microwave Gizmo (the cat survived).²⁷⁶ Abuhl was charged with murder and animal cruelty.²⁷⁷ Abuhl pled to the animal cruelty charge, but defended the murder charge by arguing self-defense and heat of passion.²⁷⁸ He then argued that evidence about Gizmo was irrelevant.²⁷⁹ The trial judge admitted evidence, including photos, of the harm to Gizmo.²⁸⁰ The court of appeals affirmed, noting that the evidence refuted Abuhl's claim that he acted out of temporary passion and proved his motive (anger about the cat, rather than self-preservation).²⁸¹

2. *The Defendant's Prior Acts are Admissible to Show Motive or Intent After Self-Defense Has Been Raised.* A classic case illustrating this point is *Brown v. Municipality*.²⁸² Brown was charged with shooting a dog.²⁸³ The *Brown* court held that evidence that the defendant pursued and fatally shot a dog ten months before the charged incident was admissible to prove his motive (hatred of dogs) and the utter implausibility of the self-defense claim.²⁸⁴ The case centered on whether Brown believed it was necessary to shoot the dog and if that belief was reasonable.²⁸⁵ The court reasoned that evidence of the prior shooting was probative of Brown's motive or state of mind (to show that Brown acted out of hatred of dogs rather than fear).²⁸⁶ The evidence was also probative of Brown's intent (it showed "the implausibility of Brown's claim that the dog lunged at him" and "establish[ed] that his fears, if they existed at all, were unreasonable").²⁸⁷ Evidence of

273. No. A-8534, 2004 WL 2020346 (Alaska Ct. App. Sept. 8, 2004).

274. *Id.* at *2.

275. *Id.*

276. *Id.* at *3–4.

277. *Id.* at *4.

278. *Id.*

279. *Id.* at *5.

280. *Id.* at *5–6.

281. *Id.* at *6–7.

282. 915 P.2d 654 (Alaska Ct. App. 1996).

283. *Id.* at 655.

284. *Id.* at 656.

285. *Id.*

286. *Id.*

287. *Id.*

the prior incidents was therefore admissible.²⁸⁸ This aspect of *Brown* is consistent with prior Alaska cases.²⁸⁹

On the other hand, *Bass v. State*²⁹⁰ demonstrates that such admissibility is not unlimited. Bass stabbed a man named Foss following an argument about gas money.²⁹¹ Foss' friend Powers angrily approached Bass, grabbed Bass' cigarette from his mouth, and demanded money.²⁹² Bass pushed Powers back.²⁹³ Foss joined the affray and punched Bass.²⁹⁴ Bass pulled a folding buck knife and stabbed Foss in the heart, killing him.²⁹⁵ At trial, Bass argued self-defense.²⁹⁶ The prosecution offered six prior assaultive episodes to rebut Bass' self-defense claim, and the trial judge allowed the prosecution to introduce the fact that Bass had been convicted of misdemeanor assault five years before the fatal stabbing.²⁹⁷ The prosecution offered no facts about the prior event.²⁹⁸ Once the court allowed the prosecution to admit the assault conviction, the parties reached a stipulation which was read to the jury (omitting the facts of the prior case).²⁹⁹ The court of

288. *Id.* at 657; *see also* Adkinson v. State, 611 P.2d 528 (Alaska 1980) (holding that evidence of hostile confrontations at shotgun-point with trespassers upon remote property was admissible to rebut accident and self-defense themes). *See generally* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 5:04, at 8 (1984; rev. 1995); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5242, at 487–88 (1978).

289. *See, e.g.*, Sheakley v. State, 644 P.2d 864, 873–75 (Alaska Ct. App. 1982) (finding the introduction of previous eye-gouging incidents admissible); Halberg v. State, No. A-3733, 1993 WL 13156720 (Alaska Ct. App. Apr. 28, 1993) (holding that evidence of a wife's jealousy was properly admitted to rebut her battered woman's syndrome defense).

290. No. A-6669, 1999 WL 11052 (Alaska Ct. App. Jan. 13, 1999).

291. *Id.* at *1.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at *2.

297. *Id.* at *1.

298. *Id.*

299. *Id.* The technique of offering only the bare fact of conviction, and not developing the underlying facts, is not sound practice. The fact of judicial conviction, when viewed in the Rule 403 context, is the most prejudicial and least enlightening probative aspect of a prior criminal event. This point is illuminated by *Calapp v. State*, 959 P.2d 385, 387 (Alaska Ct. App. 1998). Calapp was prosecuted for second-degree theft after he pawned stolen jewelry. The most significant issue at trial was whether Calapp had recklessly disregarded the fact that the pawned jewelry was stolen. To rebut Calapp's claim of mistake or accident, the trial judge allowed the State to present evidence that Calapp had

appeals held that this was error because it constituted evidence of prior bad acts barred by Alaska Rule of Evidence 404(a)(2).³⁰⁰ The court found that the convictions had been used to rebut Bass' self-defense claim, whereas Rules 404(a)(2) and 405 limited the parties to using reputation and opinion evidence not specific acts as the sole method of proving the character of the assailant.³⁰¹

3. *Domestic Violence Assaults are Generally Admissible.* In domestic violence prosecutions, evidence of prior specific acts of domestic violence is generally admissible to disprove a claim of self-defense.³⁰² One of the most important cases in this regard is *Ayagarak v. State*,³⁰³ in which the defendant was charged and tried for assaulting his wife.³⁰⁴ The court held that his three prior assaults against his wife were admissible to rebut his claim of self-defense and to show the nature of their relationship.³⁰⁵ *Ayagarak* is tremendously important for prosecutors because the court held that admissibility of prior bad acts is governed by the minimal

previously been convicted of theft and forgery. The prosecution did not offer the facts of the previous cases, merely the bare fact of conviction. A split court of appeals held that evidence of the convictions was improperly admitted because the fact of conviction, standing alone, told the jury little or nothing about Calapp's knowledge that the jewelry was stolen. *Id.* at 388. *Bass* was decided as a Rule 404(b)(2) case. In light of *Allen*, the *Bass* court's holding is obviously correct—specific acts are inadmissible on direct examination under Rule 404(a)(2). Yet, if the *Bass* prosecution had been able to establish that the facts of the prior assaultive events were somewhat similar to the Foss stabbing, it could have relied on *Adkinson* and *Brown* to make a far more persuasive offer under Rule 404(b)(1).

300. *Bass*, 1999 WL 11052, at *3.

301. *Id.* However, the court found that this error was harmless because the prosecution did not place emphasis on the prior assault during summation. *Id.* at *3–4. The court of appeals did not resolve the State's claim on appeal that Bass's prior conviction and his other assaultive events may have been admissible for alternative, non-propensity reasons, such as demonstrating his state of mind, disproving the reasonableness of a self-defense claim, and to show that Bass was aware of his own tendency to use excessive force in confrontational situations. *See id.*

302. *See Heaps v. State*, 30 P.2d 109, 109 (Alaska Ct. App. 2001) (“As an earlier episode of domestic violence, the August incident was admissible under Evidence Rule 404(b)(4) to prove that Heaps was the aggressor in November.”); *see also Akaran v. State*, No. A-8690, 2005 WL 1026992, at *5–7 (Alaska Ct. App. May 4, 2005) (affirming admission of two prior assaults on the same victim to rebut a self-defense claim).

303. No. A-8066, 2003 WL 1922623 (Alaska Ct. App. Apr. 23, 2003).

304. *Id.* at *1.

305. *Id.* at *6.

“conditional relevance” threshold of Alaska Rule of Evidence 104(b).³⁰⁶ The court specifically rejected a claim that “other acts” evidence must be proven by the standard of clear and convincing evidence.³⁰⁷

*Plyler v. State*³⁰⁸ is another example. In *Plyler*, the court held that evidence of specific violent conduct in a prior relationship was sufficiently similar and related to the present case, a homicide stemming from a love triangle, to justify admission of the defendant’s prior bizarre and violent behavior under Rule 404(b)(1).³⁰⁹ Despite the fact that this relationship occurred six to eight years prior to the charged murder, there were significant similarities between the relationships: “Plyler’s actions within the [first] love triangle relationship evidenced a jealous and inflammatory reaction to the situation. The evidence tended to establish the state’s theory that Plyler reacted in the same manner in his relationship with Faye and Peter Nicely.”³¹⁰

4. *Countering the Defendant’s Reputation for Peacefulness.* Where a defendant offers testimony of his own good character, the state is allowed to rebut that testimony by introducing contradictory character evidence. In *Salud v. State*,³¹¹ the defendant, a Kodiak labor leader, testified that he shot and killed another labor organizer during an argument in which the victim pulled a .45 handgun on him.³¹² The defendant affirmatively offered testimony that he was “a nice guy,” “a good man,” and was “liked by the people.”³¹³ However, the trial court permitted the state to rebut his testimony by calling the Kodiak police chief, who testified that the defendant had a reputation in Kodiak as being a violent person.³¹⁴ The court of appeals affirmed this use of character evidence.³¹⁵

In *Fuzzard v. State*,³¹⁶ the defendant stabbed two men after a barroom brawl.³¹⁷ He was charged with attempted murder and

306. *Id.* at *4 (citing *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988)).

307. *Id.*

308. No. A-6654, 1999 WL 189660 (Alaska Ct. App. Apr. 7, 1999).

309. *Id.* at *3. Although evidence of prior unrelated assaults was improper, it did not require reversal due to the overwhelming evidence of guilt. *Id.*

310. *Id.*

311. 630 P.2d 1008 (Alaska Ct. App. 1981).

312. *Id.* at 1010.

313. *Id.* at 1010–11.

314. *Id.* at 1010.

315. *Id.* at 1011.

316. No. A-8023, 2003 WL 21981931 (Alaska Ct. App. Aug. 20, 2003).

assault.³¹⁸ He argued self-defense at trial.³¹⁹ The prosecutor offered evidence from a man with whom Fuzzard shared a jail cell for two weeks, ten months after the attack, that Fuzzard was “really violent” and that his temper “explodes rapidly.”³²⁰ Fuzzard’s cellmate also testified that Fuzzard was reputed to be violent.³²¹ The court of appeals affirmed admission of this testimony, specifically ruling that “reputation testimony” could be formed after the violent event because a person’s character for violence is “more or less permanent” and unlikely to change over time.³²²

B. The Victim’s Prior Acts and Reputation

Prosecutors take their victims in self-defense cases as they find them. In other words, in street crime prosecution, a defense investigation will often uncover derogatory victim evidence. This is especially true given modern, online computerized court record databases. May a defendant who claims self-defense throw dirt on the victim? The answer, up to a point, is yes.

The basic principle governing the introduction of evidence regarding the victim’s prior bad acts and reputation in self-defense cases is as follows:

When a defendant argues self-defense, he can introduce evidence of his state of mind to show that he used reasonable force. Because the testimony is relevant to show the defendant’s state of mind, he can introduce evidence of any specific incidents of violence on the part of the victim of which he was aware to show that he acted reasonably in self-defense. The defendant can also admit evidence of a victim’s character for violence as circumstantial evidence to show that the victim was probably the first aggressor. But to show the victim’s character for violence, the defendant cannot introduce specific acts; the defendant is limited to reputation and opinion evidence in establishing the victim’s character for violence.³²³

The court of appeals and the supreme court have stated that this principle only applies to cases “where the defendant admits killing or assaulting the victim and puts the issue of self-defense fairly into

317. *Id.* at *1.

318. *Id.*

319. *Id.*

320. *Id.* at *2.

321. *Id.*

322. *Id.* (citing 5 WIGMORE ON EVIDENCE § 1618, at 595 (Tillers rev. 1983)).

323. Northcott v. State, No. A-7057, 2001 WL 1042868, at *6 (Alaska Ct. App. Sept. 12, 2001); see also McCracken v. State, 914 P.2d 893, 898–99 (Alaska Ct. App. 1996).

question.”³²⁴ Evidence of the victim’s bad character is not relevant where the defendant claims accident³²⁵ or an alibi.³²⁶

Derogatory victim evidence falls into two categories: (1) derogatory reputation-opinion evidence, and (2) specific violent acts of which the defendant was aware at the time of the offense. Each category of evidence is offered for very specific and very different reasons. Each will be discussed in turn, with specific emphasis on the two leading cases in each area: *Allen v. State*³²⁷ and *McCracken v. State*.³²⁸ *Allen* and *McCracken* are companion cases, and it is impossible to understand Alaska’s self-defense law without reading both of them closely.

It should also be noted that before 1996, when the *McCracken* court clarified the point, there was much confusion regarding the scope of admissible derogatory-victim evidence.³²⁹ Most of the

324. *Loesche v. State*, 620 P.2d 646, 650 (Alaska 1980); see *Amarok v. State*, 671 P.2d 882, 883 (Alaska Ct. App. 1983) (stating that the principle applies where “the defendant admits the assault, but raises self defense”). A trial judge should exercise discretion under Evidence Rule 611(a) (regarding court control over the order of evidence presentation) to restrict evidence of a victim’s specific violent acts or violent reputation until such time as the defendant concedes his identity as the assailant before the jury. See *Forrest v. State*, No. A-3952, 1993 WL 13156497, at *3 (Alaska Ct. App. 1993) (affirming the refusal to admit testimony of a victim’s prior specific threat against the defendant until the defendant testified).

325. *Byrd v. State*, 626 P.2d 1057, 1058 (Alaska 1980); cf. *Gottschalk v. State*, 881 P.2d 1139, 1143 (Alaska Ct. App. 1994) (noting that evidence of a victim’s violent character may be admissible if a defendant raises a *combined claim* of self-defense and accident). Of course, a jury would probably view a combined claim of self-defense and accident with some skepticism because self-defense contemplates deliberate, reasoned behavior with the intentional goal of self-preservation. A prosecutor confronted with a combined claim of self-defense and accident would be expected to argue to the jury that people very rarely defend themselves “by accident.”

326. *Marrone v. State*, 359 P.2d 969, 984 (Alaska 1961).

327. 945 P.2d 1233 (Alaska Ct. App. 1997).

328. 914 P.2d 893 (Alaska Ct. App. 1996).

329. For instance, in *Seek v. State*, No. A-6098, 1998 WL 80112, at *6 (Alaska Ct. App. Feb. 25, 1998), the trial court’s decision came before *Allen*, and the court of appeals decision was handed down afterward. *Seek* not only describes the confusion with great efficacy, but also demonstrates that trial judges before 1996 recognized and were troubled by the *Amarok* imprecision. See *id.* The trial judge even earned high praise from Judge Mannheimer for his handling of the issue; he “demonstrated the highest qualities of a trial judge” by following “his duty to apply the law as announced by the appellate court, even though he was convinced that the appellate court was wrong.” *Id.* at *6 n.3.

confusion is owed to *Amarok* and its progeny.³³⁰ As a result, many cases decided before 1996 are no longer good law with respect to at least part of their holdings.³³¹ However, other parts of these cases do remain valid.³³² Some confusion also remains from the blurring of reputation and specific-act evidence that was commonplace before the Alaska Rules of Evidence were codified. Some aspects of these early cases were also overruled by the 1996-97 clarifications.³³³ Other aspects remain good law.³³⁴ Given both

330. *See generally* *Amarok v. State*, 671 P.2d 882, 883–84 (Alaska Ct. App. 1983) (containing imprecise language regarding the purpose for which specific conduct is admissible and imprecise analysis of which of the victim’s prior bad acts the defendant had knowledge).

331. *E.g.*, *Gottschalk v. State*, 881 P.2d 1139, 1145 (Alaska Ct. App. 1994) (holding that the lower court erred in refusing to admit evidence of specific instances of the victim’s conduct while drunk); *Noble v. State*, No. A-3841, 1992 WL 12153197, at *2 (Alaska Ct. App. July 15, 1992) (positing that evidence of an assault was admissible to prove the identity of the initial aggressor); *Frank v. State*, No. A-2995, 1989 WL 1595168, at *1–2 (Alaska Ct. App. Sept. 27, 1989) (stating that evidence of prior specific acts was admissible to prove the identity of the initial aggressor); *see also* *Williamson v. State*, 692 P.2d 965, 971–73 (Alaska Ct. App. 1984) (holding that the exclusion of testimony regarding the victim’s prior attempt at rape—of which the defendant was unaware—was erroneous because it would have corroborated the defendant’s testimony). To the extent any pre-1996 cases seem to support the admissibility of the opponent’s past specific acts of which the defendant was unaware, they are no longer valid in the wake of *McCracken* and *Allen*.

332. *E.g.*, *Gottschalk*, 881 P.2d at 1145 (holding that the trial court committed error when it excluded reputation evidence as circumstantial evidence of the identity of the initial aggressor); *Noble*, 1992 WL 12153197, at *2 (holding that where the defendant denied being the attacker, evidence of the victim’s violent past attacks were not relevant); *Frank*, 1989 WL 1595168, at *2 (stating that prior specific-act evidence was admissible to prove the reasonableness of the defendant’s use of force on the charged occasion).

333. *E.g.*, *Byrd v. State*, 626 P.2d 1057, 1058 (Alaska 1980) (holding specific-act evidence may have been admissible to prove the identity of the initial aggressor); *Keith v. State*, 612 P.2d 977, 984 (Alaska 1980) (holding that the exclusion of a journal which likely contained the victim’s admissions of specific violent acts—admissions of which the defendant was unaware—was erroneous). These aspects of *Byrd* and *Keith* are no longer good law in the wake of *McCracken* and *Allen*. *Keith* also held that a defendant who claims self-defense may introduce evidence of the victim’s violent character without exposing his own character to scrutiny. *See Keith*, 612 P.2d at 985 n.23. The 1994 Alaska Legislature changed this by amending ALASKA R. EVID. 404(a)(2). *See* Act effective July 17, 1994, ch. 116, § 2, 1994 Alaska Sess. Laws. *Allen* recognized this new result. *Allen*, 945 P.2d at 1236.

sources of confusion, prosecutors and defenders alike should exercise great care when citing to opinions pre-dating *Allen* and *McCracken*.

1. *Derogatory Reputation Evidence.* Where a defendant argues self-defense and asserts (as he must) that the victim was the initial aggressor, the prosecution may introduce evidence that establishes the victim's character for peacefulness or the defendant's character for violence.³³⁵ The defendant may do the same, introducing evidence of his own peaceful character or the victim's character for violence.³³⁶ However, on direct examination, this form of evidence is limited to the witness's opinion of the other person's *reputation* for violence or peacefulness—*specific incidents* are admissible only on cross-examination.³³⁷ However, the defendant is not entitled to present evidence of a victim's reputation for violence until the defendant satisfies the "some evidence" test³³⁸ and concedes his identity as the assailant before the jury.³³⁹

Derogatory reputation evidence is offered for a purpose usually squarely barred by the evidence rules: to prove that the actor behaved in conformance with a character trait for peacefulness or violence.³⁴⁰ In the self-defense context, evidence of a victim's reputation for violence or the defendant's reputation for peacefulness is admissible as circumstantial proof of the identity of the initial aggressor.³⁴¹ When attempting to determine the identity of the initial aggressor, it does not matter whether the defendant was aware of the other person's reputation for violence or peacefulness.³⁴² In other words, a defendant charged with assaulting a stranger may introduce derogatory opinion evidence to

334. *E.g.*, *Byrd*, 626 P.2d at 1059 (affirming the exclusion of the victim's prior robbery and knifepoint threat because the defendant was unaware they had occurred).

335. ALASKA R. EVID. 404(a)(2).

336. *Id.*

337. ALASKA R. EVID. 405(a).

338. *Norris v. State*, 857 P.2d 349, 352–53 (Alaska Ct. App. 1993).

339. *Loesche v. State*, 620 P.2d 646, 650 (Alaska 1980); *Amarok v. State*, 671 P.2d 882, 883 (Alaska Ct. App. 1983).

340. *McCracken v. State*, 914 P.2d 893, 898 (Alaska Ct. App. 1996).

341. *Allen v. State*, 945 P.2d 1233, 1239 (Alaska Ct. App. 1997). Derogatory reputation evidence is not admissible to prove the reasonableness of the defendant's use of force, but specific-act evidence is. *McCracken*, 914 P.2d at 898.

342. *McCracken*, 914 P.2d at 898 (noting that "[the] defendant's [prior] knowledge of the [victim's character] is immaterial" (alteration in original) (quoting *Amarok v. State*, 671 P.2d 882, 883–84 (Alaska Ct. App. 1983))).

establish that his adversary had a reputation for violence among the people who knew him.³⁴³ This is true because the purpose of this evidence “is to circumstantially prove a question of historical fact: was the victim the initial aggressor during the encounter between the defendant and the victim?”³⁴⁴

In practice, the issue is most commonly raised where the defendant seeks to call a defense witness who will testify that he knows the victim and that the victim is reputed to be violent. This testimony, coming from a witness who may have no firsthand knowledge of the events at hand, may be admissible but carries only slight probative value.³⁴⁵

On direct examination, derogatory reputation evidence is limited to the witness’s opinion of the actor’s reputation for violence or peacefulness.³⁴⁶ Inquiry into specific acts is only permitted on cross-examination.³⁴⁷ But in the self-defense context, where the witness holds a derogatory opinion of the victim’s character and is also very likely aware of the victim’s specific bad acts, only the most reckless prosecutor would inquire about specifics on cross-examination.³⁴⁸

A useful example is *Earl v. State*.³⁴⁹ In *Earl*, the defendant stabbed his roommate, Ricker, with a pair of scissors and a knife, killing him.³⁵⁰ At Earl’s first trial, his attorney argued that the killing was done in self-defense, but Earl did not testify.³⁵¹ The conviction was reversed because of improper introduction of a prior assault conviction.³⁵² In his second trial, Earl testified that Ricker punched him without provocation and came at him with a knife.³⁵³ Earl testified that there was a struggle, and he grabbed the

343. See ALASKA R. EVID. 405(a).

344. *McCracken*, 914 P.2d at 898.

345. *Galauska v. State*, 527 P.2d 459, 467 n.14 (Alaska 1974).

346. *Allen*, 945 P.2d at 1239 (“Evidence Rules 404(a)(2) and 405 allow only reputation and opinion evidence to prove the character of the defendant or the victim.”).

347. *Id.*; see also ALASKA R. EVID. 405(b).

348. In practice, the defense attorney’s direct examination of a derogatory opinion witness (testifying to the victim’s violent reputation) should be very brief. Likewise, a cautious prosecutor should emphasize this witness’s lack of personal knowledge about the case at hand and avoid inquiry into specifics, as any such inquiry would probably just elicit damaging facts.

349. No. A-7385, 2002 WL 531097 (Alaska Ct. App. Apr. 10, 2002).

350. *Id.* at *1.

351. *Id.* at *2.

352. *Id.*

353. *Id.*

knife and stabbed Ricker.³⁵⁴ Earl defended his second trial on grounds of heat of passion rather than self-defense.³⁵⁵

In support of this defense, Earl offered the testimony of a psychiatrist, who testified that Ricker was a paranoid schizophrenic who was more likely than others to become violent after drinking alcohol or using drugs.³⁵⁶ The trial judge ruled that this testimony opened the door for the prosecution to present seven reputation witnesses.³⁵⁷ Two witnesses testified that Earl was a characteristically violent man and five testified that Ricker had a reputation for peacefulness.³⁵⁸ The trial judge ruled that the issue was governed by Rule 404(a)(2) and admitted the testimony.³⁵⁹

The court of appeals held that Rule 404(a)(2) was not restricted to self-defense cases.³⁶⁰ By claiming that Ricker was the first aggressor, even in the heat of passion context, Earl opened the door for opinion and reputation testimony, circumstantially establishing the identity of the initial aggressor.³⁶¹

a. Allen. *Allen v. State*³⁶² is the leading Alaska case on the admissibility of reputation evidence for the purpose of establishing the identity of the initial aggressor. In *Allen*, the defendant was charged with murder for the stabbing death of Labat.³⁶³ Allen alleged that Labat had come to his apartment and threatened him.³⁶⁴ Believing his life to be in danger, Allen armed himself with a kitchen knife, pursued Labat, and ultimately stabbed him to death.³⁶⁵ Allen was charged with first-degree murder and claimed self-defense.³⁶⁶

At trial, the judge allowed the prosecution to present evidence of two specific instances of Allen's past violence to undermine his self-defense claim.³⁶⁷ The prosecution offered evidence that Allen had been convicted of an assault seven years before the Labat

354. *Id.*

355. *Id.*

356. *Id.* at *7.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at *8.

361. *Id.* at *7–8.

362. 945 P.2d 1233 (Alaska Ct. App. 1997).

363. *Id.* at 1235.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

stabbing and that he had attacked a woman with a sword a year before the stabbing.³⁶⁸

The court of appeals reversed Allen's conviction because this evidence was improperly admitted.³⁶⁹ The court held that where a party offers evidence of a person's character under Rule 404(a)(2) to prove the identity of the initial aggressor, the party is limited by Rule 405(a) to offering only opinion and reputation evidence on direct examination: "[I]n criminal cases involving claims of self-defense, Evidence Rules 404(a)(2) and 405 allow only reputation and opinion evidence to prove the character of the defendant or the victim."³⁷⁰ This is the case except on cross-examination, during which Rule 405(a) allows evidence of a person's specific acts.³⁷¹

The Rules of Evidence impose such limits because the character of the actor is not an "essential element" of the claim of self-defense.³⁷² A jury might conclude that Allen was characteristically violent and that Labat was characteristically peaceful, but acquit Allen based on the facts of the stabbing anyway. Alternatively, a jury could conclude that Allen was characteristically violent, but believe that he acted in self-defense.³⁷³ Therefore, neither Allen's character nor Labat's character was an "essential element" of the defense.³⁷⁴ The court concluded that evidence of specific conduct was only admissible on cross-examination.³⁷⁵

b. The Victim's Reputation for Peacefulness. Under Rule 404(a)(2), the prosecution may present reputation and opinion evidence, establishing the victim's peaceful character and rebutting the defendant's "evidence that the victim was the first aggressor."³⁷⁶ Some defendants have argued that the wording of the rule implies that such prosecution evidence is admissible only after the defense

368. *Id.*

369. *Id.* at 1243.

370. *Id.* at 1239.

371. *Id.*

372. *Id.* at 1240.

373. *Id.*

374. *Id.* See ALASKA R. EVID. 405(b) ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct.").

375. *Allen*, 945 P.2d at 1239. Judge Mannheimer criticized the *Amarok* court for implying that specific-act testimony was admissible to prove the identity of the initial aggressor. *Id.* at 1241–43. He explained that, "as occasionally happens when courts make pronouncements about matters that are not at issue, we misdescribed this area of the law." *Id.* at 1241.

376. ALASKA R. EVID. 404(a)(2).

presents its case-in-chief.³⁷⁷ However, the court of appeals has rejected this claim, holding that the trial judge retains considerable discretion under Alaska Rule of Evidence 611(a) to control order of proof.³⁷⁸ The court of appeals has specifically affirmed admission of evidence of the victim's peaceful character in the prosecution's case-in-chief.³⁷⁹

Before 1994, Rule 404(a)(2) allowed a defendant in a homicide case to introduce evidence of the victim's character for violence without allowing the prosecution to introduce similar evidence against the accused.³⁸⁰ The prosecution was limited to rebutting the defendant's evidence that the victim was the first aggressor by establishing the victim's character trait for peacefulness.³⁸¹ In 1994, the Alaska Legislature amended this aspect of Rule 404(a)(2).³⁸² In its "findings and purpose" section, the legislature stated that "in cases of domestic violence and other violent crimes in which the defendant claims that the victim was the initial aggressor, an amendment is necessary to permit the prosecutor to rebut this claim by introducing evidence of the defendant's own past violence."³⁸³

2. *Prior Specific Bad Acts of Which the Defendant was Aware.* Admissibility of a victim's specific bad acts is an entirely different matter. Such evidence is offered to prove that the defendant's use of force was reasonable because the defendant was aware of ominous, derogatory facts about his opponent's history.³⁸⁴ In other words, the defendant's argument is: "*If you knew him like I did, you'd have shot him, too. And you would have made that first shot count. . .*"

The defendant is permitted to introduce evidence of specific prior bad acts of which he was aware before the assault to prove that they instilled in him a reasonable fear that: (1) he was about to be attacked, and (2) he reasonably thought that the degree of force

377. *Herman v. State*, No. A-7240, 2000 WL 968238, at *3 (Alaska Ct. App. July 12, 2000).

378. *Id.*; see also *Am. Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1339-40 (Alaska 1982).

379. *Herman*, 2000 WL 968238, at *3.

380. See Act effective July 17, 1994, ch. 116, § 2, 1994 Alaska Sess. Laws (current version at ALASKA R. EVID. 404(a)(2)).

381. See *Keith v. State*, 612 P.2d 977, 984-86 (Alaska 1980).

382. Act effective July 17, 1994, ch. 116, § 2, 1994 Alaska Sess. Laws.

383. § 1.

384. *McCracken v. State*, 914 P.2d 893, 898 (Alaska Ct. App. 1996).

he used was necessary.³⁸⁵ However, specific-act evidence is not admissible to prove the identity of the initial aggressor.³⁸⁶ This is true because, under Rules 404(b)(1) and 405(a), evidence of a person's specific acts of violence is inadmissible to prove his character for violence.³⁸⁷

Obviously, the relevance of specific-act evidence depends on the defendant's subjective awareness of the victim's specific past conduct. If the defendant was not aware of the victim's specific acts, those acts could not have affected his decision.³⁸⁸

When a defendant testifies that he is aware of the prior specific bad act, an obvious hearsay issue arises: how did the defendant become aware of the specific act? In all probability, the defendant was aware of the act because he was told. Indeed, in street crime prosecution, testimony that the "word on the street" was that the victim had committed a particular violent act will probably implicate multiple layers of hearsay-within-hearsay.

Nonetheless, the prosecutor's hearsay objection should be overruled. "When . . . a defendant offers evidence that he or she had previously heard other people speak of the victim's violent acts, this evidence is not 'hearsay;' its relevance is not for the truth of the matters asserted, but rather the effect of these utterances upon the hearer"³⁸⁹

The defendant does not necessarily have to take the stand and personally testify about his subjective awareness of the victim's prior bad act. A defendant could, in theory, call a third-party witness to testify that he was present when the defendant was told by another person of the specific bad act. He could also call a third-party witness to testify that before the confrontation, the defendant himself explained why he was afraid of the victim. None of this testimony would be susceptible to a hearsay objection

385. *Id.* ("[T]he primary relevance of this [specific-act] evidence is to prove the defendant's state of mind when he or she used deadly force against the victim—in particular, the reasonableness of the defendant's fear that the victim was about to attack with deadly force.")

386. *See* *Zuboff v. State*, No. A-8692, 2006 Alas. App. LEXIS 189, at *44-56 (Alaska Ct. App. Nov. 1, 2006) (noting that the trial judge was "probably" correct when precluding the defense attorney from arguing that the victim's prior specific violent acts could constitute proof of the identity of the initial aggressor). The author was the trial prosecutor.

387. *Id.*

388. *See* *Byrd v. State*, 626 P.2d 1057, 1059 (Alaska 1980) ("The reason is obvious: one cannot be fearful because of events about which one knows nothing.")

389. *McCracken*, 914 P.2d at 899.

because it would not be offered for its truth, but rather to prove the defendant's awareness of his victim's prior violent acts.³⁹⁰

a. McCracken. *McCracken v. State* is the leading Alaska case on the admissibility of specific-act evidence to establish the defendant's reasonable use of force.³⁹¹ In *McCracken*, the defendant was charged with the murder of Ritchie, his roommate.³⁹² Ritchie lived with and provided assistance to McCracken, who was a paraplegic.³⁹³ After an argument about money and housekeeping, McCracken hid a gun beside his leg in his wheelchair.³⁹⁴ The two men began to argue again, at which point McCracken pulled out the gun and shot Ritchie.³⁹⁵

McCracken took the stand and testified that he shot Ritchie because he thought Ritchie was about to attack him.³⁹⁶ McCracken wanted to testify about Ritchie's violent acts that he had personally observed, as well as other acts that he did not personally observe, but of which he claimed to be aware.³⁹⁷ The trial judge ruled that McCracken could testify about his own observations as well as about Ritchie's violent reputation.³⁹⁸ However, the trial judge ruled that McCracken could not testify to any violent acts about which McCracken had been told by Ritchie or others.³⁹⁹

Subsequently, the court of appeals held that this ruling was an error.⁴⁰⁰ The court explained that where a defendant claims to be aware of specific violent acts in his opponent's past, this is not "character evidence."⁴⁰¹ Rather, it is offered to show that the defendant's resort to force was reasonable.⁴⁰² Because evidence of the victim's past violence is offered to prove the effect on the listener (the defendant), and not to prove the truth of whether or not the victim actually committed the past assault, it is not hearsay.⁴⁰³

390. *See id.*

391. *Id.* at 897–99.

392. *Id.* at 895.

393. *Id.* at 894.

394. *Id.* at 895.

395. *Id.*

396. *Id.* at 897.

397. *Id.*

398. *Id.*

399. *Id.* at 897–98.

400. *Id.* at 898.

401. *Id.*

402. *Id.*

403. *Id.* at 899.

The court of appeals explained that the evidence should not be excluded as hearsay because “[e]vidence that Ritchie had previously told McCracken about his past acts of violence and evidence that other people had previously told McCracken about Ritchie’s violent propensities were just as relevant to the reasonableness of McCracken’s fear as incidents of Ritchie’s violent behavior that McCracken had personally observed.”⁴⁰⁴ Because the trial judge excluded McCracken’s “most forceful” evidence supporting his contention that his use of deadly force was reasonable, the court reversed McCracken’s conviction.⁴⁰⁵

b. Inadmissible Evidence. Self-defense litigation will trigger admissibility of reputation and specific-act evidence that would probably be inadmissible in other criminal trials. Still, there are three broad categories of evidence that is inadmissible even in the self-defense context: (1) specific acts of which the defendant was unaware, (2) non-violent prior bad acts, and (3) extrinsic specific-act evidence offered to impeach a Rule 405 reputation witness.

1) Acts of Which the Defendant was Unaware. A defendant’s right to admit evidence of his opponent’s specific violent acts is broad, but not limitless. The first requirement is that the defendant be aware of the specific act. “[O]ne cannot be fearful because of events about which one knows nothing.”⁴⁰⁶ Several cases illustrate this principle.⁴⁰⁷

In *Grandberry-Williams v. State*,⁴⁰⁸ as discussed above in Part IV.E, the defendant spun his wheels in a crowded Anchorage parking lot at closing time, throwing up stones.⁴⁰⁹ The victim ran after the defendant’s vehicle to tell the defendant to stop spinning his wheels.⁴¹⁰ The defendant got out of his car and spoke briefly with the victim.⁴¹¹ As the victim turned away, the defendant punched him, dropping him to the pavement.⁴¹² The victim did not

404. *Id.*

405. *Id.*

406. *Byrd v. State*, 626 P.2d 1057, 1059 (Alaska 1980).

407. *See, e.g., Cytanovich v. State*, No. A-6287, 1998 WL 80110, at *3 (Alaska Ct. App. Feb. 25, 1998) (affirming exclusion of specific prior violent acts of which the defendant was unaware).

408. No. A-8384, 2004 WL 178950 (Alaska Ct. App. Jan. 28, 2004).

409. *Id.* at *1.

410. *Id.*

411. *Id.*

412. *Id.*

fight back, but the defendant kicked him in the face several times.⁴¹³ The trial judge refused to admit evidence of the victim's history of bar fights because the defendant was unaware of those prior specific incidents.⁴¹⁴ The court of appeals affirmed, citing *Allen* and Rule 405(a): "Rule 405(a) prevents a party presenting a self-defense claim from offering evidence of specific acts of violence by the victim to prove the victim's character for violence unless the defendant knew of those particular acts."⁴¹⁵

Where evidence of the opponent's prior violent acts is admissible, courts have suggested that the defendant may not offer more detail than he actually knew. In *Seek v. State*,⁴¹⁶ the defendant called third-party witnesses to testify in detail about the victim's prior assaultive conduct.⁴¹⁷ Three witnesses gave detailed descriptions of these prior incidents, but "[i]t appear[ed] unlikely that Seek could have been aware of all of these details; during his own testimony, Seek never claimed more than a general knowledge that the incidents had occurred."⁴¹⁸ Thus, the court of appeals criticized the admission, saying, "By presenting these three witnesses, Seek arguably got to present more evidence against Christiansen than he was entitled to. . . ." ⁴¹⁹

2) *Non-Violent Prior Bad Acts.* Even if a defendant's reputation for violence is admissible, his reputation for committing *non-violent* crimes is not. Although the distinction between violent and non-violent acts is often clear, confusion can arise in cases involving drug offenses. *Jackson v. State*,⁴²⁰ for instance, suggests that past instances of selling cocaine do not constitute violent

413. *Id.*

414. *Id.* at *4.

415. *Id.*; see also *Rexford v. State*, No. A-8539, 2004 WL 2676430 (Alaska Ct. App. Nov. 24, 2004) (excluding evidence of the victim's prior assault conviction, history of fights, and a conviction for breaking a prior boyfriend's car window because the defendant was unaware of those prior acts); *Johnson v. State*, No. A-7401, 2004 WL 1886468 (Alaska Ct. App. Aug. 25, 2004) (refusing to introduce a photograph of a rifle inside the victim's cabin as evidence that the victim was reaching for a gun because the defendant had not seen the gun, nor had he seen the victim with any gun for nine years).

416. No. A-6098, 1998 WL 80112 (Alaska Ct. App. Feb. 25, 1998).

417. *Id.* at *7. A prosecutor faced with derogatory victim evidence should rely upon *Byrd* and *Seek*, and therefore should request a pre-trial ruling precluding defense evidence from exceeding the scope of the defendant's actual knowledge.

418. *Id.* n.4.

419. *Id.*

420. 750 P.2d 821 (Alaska Ct. App. 1988).

acts.⁴²¹ In *Jackson*, the self-defense issue was raised in an ineffective assistance of counsel context.⁴²² Jackson was convicted of murder following a shooting at an after-hours club.⁴²³ Jackson asserted that his counsel was ineffective, in part for failing to present evidence that the victim had a “reputation as a cocaine dealer.”⁴²⁴ The trial judge excluded this evidence, and the ruling was affirmed because whether the defendant was a cocaine dealer was not “relevant to any issue at trial.”⁴²⁵

3) *Extrinsic Specific-Act Evidence Offered to Impeach a Rule 405 Reputation Witness*. If a party calls a reputation witness to testify that a participant in the assault is peaceful or violent, the opposing party may attempt to impeach the witness on cross examination by inquiring about specific incidents of the victim’s conduct.⁴²⁶ However, “the rule does not provide any basis for allowing *independent* proof of specific incidents.”⁴²⁷ In other words, when cross examination regarding specific acts under *Allen* is unproductive (and the defendant is subjectively unaware of the specific act), the lawyer may be stuck with the answer he receives because the trial court retains significant discretion under Rule 403 to exclude extrinsic evidence.⁴²⁸

421. *Id.* at 826.

422. *Id.* at 823.

423. *Id.*

424. *Id.* at 826.

425. *Id.* The *Jackson* court further held that any evidence about the victim’s violent character would not have been admissible to prove the defendant’s state of mind. *Id.* It would have been admissible to prove, circumstantially, who may have been the first aggressor. *Id.* The court concluded, given other evidence presented on this point, that Jackson’s attorney was not ineffective for deciding not to present this cumulative evidence. *Id.*

426. ALASKA R. EVID. 405(a) (“In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation in any community or group in which the individual habitually associated or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.”).

427. *Earl v. State*, No. A-7385, 2002 WL 531097, at *9 (Alaska Ct. App. Apr. 10, 2002) (emphasis added). In *Earl*, the defendant sought to cross-examine a woman who testified that the stabbing victim had a peaceful character. *Id.* at *7–8. The woman had reportedly claimed that the victim had previously assaulted her. *Id.* at *8. On cross-examination, the woman denied the assault had occurred, and Earl sought to introduce evidence from two witnesses that she had previously claimed the assault had occurred. *Id.* The judge excluded the evidence, and the court of appeals affirmed. *Id.* at *8–10.

428. *See id.* at *8–10.

c. Cases Excluding the Victim's Prior Bad Acts Outside the Self-Defense Context. The following cases are *not* self-defense cases, but rather are “other suspect” cases in which the defendant claimed a third party was responsible for the crime. They are useful to illustrate proper exclusion of derogatory-victim evidence under Alaska Rule of Evidence 404(b)(1).

Rule 404(b)(1) excludes evidence of specific acts where the only purpose of the proof is to demonstrate that the victim acted in conformance with a derogatory character trait. In *Malloy v. State*,⁴²⁹ a murder prosecution, the defense pointed the finger at Rundle, the purported “real killer.”⁴³⁰ Malloy was charged with a particularly cruel knife killing.⁴³¹ The defense offered evidence that Rundle had assaulted her own son and the family dog in the past with knives.⁴³² The trial court excluded the evidence, and the court of appeals affirmed the ruling.⁴³³ “[T]he only apparent relevance of this evidence was to show that Rundle was an assaultive and cruel person who liked to inflict wounds with knives. Thus, the evidence was barred by Rule 404(b).”⁴³⁴

Mere repetition of the same class of crime is also not sufficient. In *Jordan v. State*,⁴³⁵ the defendant was on trial for felony criminal mischief.⁴³⁶ The defense sought to show, but the court excluded, evidence that the stolen vehicle passengers who gave police statements identifying Jordan as the driver themselves had prior joyriding convictions which would have rendered them subject to enhanced sentencing had they “truthfully” admitted their own guilt.⁴³⁷ The court of appeals affirmed, as “‘more is demanded than the mere repeated commission of crimes of the same class, such as burglaries or thefts.’ The bare evidence of Caldwell’s prior joyriding conviction—all that Jordan offered in

429. 1 P.3d 1266 (Alaska Ct. App. 2000), *rev'd on other grounds*, 46 P.3d 949 (Alaska 2002) (involving a sentencing issue). The author was the trial prosecutor.

430. *Id.* at 1279.

431. *Id.* at 1269.

432. *Id.* at 1278.

433. *Id.* at 1278–79.

434. *Id.* at 1279; *see also* *Smithart v. State*, 988 P.2d 583, 590 n.35 (Alaska 1999) (excluding evidence that a third party “other suspect” had engaged in a consensual affair with a fifteen year-old girl a year before the defendant was charged with the murder of another teenage girl).

435. 895 P.2d 994 (Alaska Ct. App. 1995).

436. *Id.* at 996.

437. *Id.* at 997.

this case—was not relevant to the issue of identity apart from its tendency to prove propensity.”⁴³⁸

Superficial similarities between two events are insufficient to trigger admissibility. For instance, in *Adams v. State*,⁴³⁹ the defendant was charged with the murder of a man who was tied up, struck on the head, and shot.⁴⁴⁰ The defendant wanted to introduce evidence that the informant who fingered him, who had a prior conviction for robbery, was the real killer.⁴⁴¹ In that case, the “other suspect” struck the victim on the head.⁴⁴² The court ruled that the similarity between the two crimes was insufficient to “constitute a ‘signature crime.’”⁴⁴³

3. *Procedural Issues Common to Both Types of Derogatory-Victim Evidence.* Regardless of which type of derogatory-victim evidence the defense offers, the court should exercise reasonable control over its order and presentation.⁴⁴⁴ The court of appeals has affirmed a trial judge who limited the defense counsel’s inquiry about the victim’s prior violent acts to a pre-approved list of leading questions.⁴⁴⁵ Trial judges should follow this practice and “script” such questions outside the presence of the jury. This is essential because a witness, if asked whether he has an opinion about the victim’s reputation for violence, is likely to volunteer a specific bad act of which the defendant was unaware. Thus, the court should instruct the witness about the permissible limits of his answer outside of the jury’s presence.

Neither specific-act nor derogatory reputation evidence is admissible until the defendant satisfies the “some evidence” test before the jury.⁴⁴⁶ Because both prior specific-act and derogatory reputation evidence carry the potential for extended testimony about events distant in time from the charged assault, a prosecutor should file a pre-trial motion *in limine* and seek a pre-trial hearing

438. *Id.* at 999 (quoting VAUGH C. BALL ET AL., MCCORMICK ON EVIDENCE § 190, at 449 (Edward W. Cleary ed., 2d ed. 1972) (footnotes omitted)).

439. 704 P.2d 794 (Alaska Ct. App. 1985).

440. *Id.* at 795, 798.

441. *Id.* at 798.

442. *Id.*

443. *Id.*

444. ALASKA R. EVID. 611(a) (court control over mode and order of evidence presentation).

445. *Heaps v. State*, 30 P.3d 109, 111–12 (Alaska Ct. App. 2001).

446. *See Norris v. State*, 857 P.2d 349, 352–53 (Alaska Ct. App. 1993).

to obtain a court order excluding such evidence until the defense satisfies the “some evidence” test before the jury.⁴⁴⁷

Finally, both types of evidence (derogatory reputation and specific-act) are susceptible to exclusion under Rule 403.⁴⁴⁸

VI. STATUTORY JUSTIFICATION DEFENSES CLOSELY RELATED TO SELF-DEFENSE

Four statutory justification defenses are closely related to self-defense. They are: (1) the defense of third persons, (2) the use of force to terminate a burglary, (3) the use of force against police officers, and (4) the use of force to make an arrest.

447. An example of a case in which the trial judge refused to admit testimony of a victim’s prior specific threat against the defendant until the defendant testified in support of his self-defense claim, and the court of appeals affirmed, is *Forrest v. State*, No. A-3952, 1993 WL 13156497, at *3 (Alaska Ct. App. Jan. 13, 1993). On the other hand, it is not difficult to locate instances where a defendant was allowed to introduce derogatory victim-reputation and specific bad act evidence, but the court ultimately ruled that the defendant was not entitled to a self-defense instruction. See *Norris*, 857 P.2d at 352 (excluding reputation evidence but allowing the defendant to introduce evidence of the victim’s prior specific bad acts even though he presented no evidence of self-defense); *Loesche v. State*, 620 P.2d 646, 650–51 (Alaska 1980) (permitting derogatory reputation evidence about the victim, while excluding some specific-act testimony, where the defendant was not entitled to a self-defense instruction). Both *Norris* and *Loesche* are curious cases, for if the defendant was not entitled to a self-defense instruction, the court never should have admitted either specific-act or derogatory opinion evidence at all.

Writing for the 1996 *McCracken* court, Judge Mannheimer explained the danger of erroneous admission of derogatory-victim evidence:

The superior court was empowered to place reasonable limitations on *McCracken*’s presentation of evidence on this point. A parade of witnesses all asserting that the victim was a violent or vicious person might well lead the jurors to reach the conclusion that the victim was unworthy of the law’s protection, persuading them to base their verdict on emotion rather than the law.

McCracken v. State, 914 P.2d 893, 899 (Alaska Ct. App. 1996). The first “reasonable limitation” should be one of timing: the court should make a threshold finding that the defendant will be entitled to a self-defense instruction based on evidence presented to the jury before permitting introduction of derogatory-victim evidence. ALASKA R. EVID. 611(a)(1)–(2) (stating the court may exercise control over the order of witnesses and presentation of evidence to ensure ascertainment of the truth and to avoid needless consumption of time).

448. Alaska Rule of Evidence 403 permits the exclusion of concededly relevant evidence on the grounds of prejudice, confusion, or waste of time. *Heaps*, 30 P.3d at 112; *McCracken*, 914 P.2d at 899 (regarding “reasonable limitations”).

A. Defense of Third Persons

Alaska law provides that a person may be justified in using force to defend a third person.⁴⁴⁹ When a defendant claims this defense, he may use force “when, under the circumstances as [he] reasonably believes them to be, the third person would be justified” in using that degree of force.⁴⁵⁰ This defense is subject to the same threshold “some evidence” test as would be a defendant’s claim of personal self-defense.⁴⁵¹

In *David v. State*,⁴⁵² the trial judge denied a requested defense-of-others jury instruction.⁴⁵³ The defendant testified that he believed it was necessary to kick his uncle when he saw him chasing his six-year old daughter.⁴⁵⁴ “I thought he was going to do something toward my daughter. He was chasing her and she was pretty scared.”⁴⁵⁵ David presented evidence that his uncle had chased his daughter earlier in the day and that the girl was running from the uncle.⁴⁵⁶ The child testified she was scared.⁴⁵⁷ The trial judge concluded that there was no evidence from which a juror could conclude that harm to the child was possible.⁴⁵⁸ The court of appeals disagreed, and reversed David’s conviction.⁴⁵⁹

B. The Use of Force to Terminate a Burglary

Alaska law provides that a person may use non-deadly force to terminate a criminal trespass and may use deadly force to terminate a burglary in an occupied building.⁴⁶⁰ The statute imposes no “duty to retreat” upon defendants claiming justification under this statute. The 1978 statute provided this justification defense only to “persons in control” of premises and their agents,⁴⁶¹

449. ALASKA STAT. § 11.81.340 (1978), *amended by* Act effective Sept. 13, 2006, ch. 68, § 4, 2006 Alaska Sess. Laws.

450. *Id.*

451. *See supra* Part IV.D.

452. 698 P.2d 1233 (Alaska Ct. App. 1985).

453. *Id.* at 1235–36.

454. *Id.* at 1234–35.

455. *Id.*

456. *Id.* at 1234.

457. *Id.* at 1235.

458. *Id.* at 1236.

459. *Id.*

460. ALASKA STAT. § 11.81.350(c) (1978), *amended by* Act effective Sept. 13, 2006, ch. 68, §§ 5–6, 2006 Alaska Sess. Laws.

461. Act effective 1978, ch. 166, § 10, 1978 Alaska Sess. Laws (codified at ALASKA STAT. §§ 11.81.330–335 (2004)).

but the 2006 legislature expanded this justification defense to their guests.⁴⁶²

Some defense attorneys have sought to expand the definition of “building,” with intriguing results. In *Delolli v. State*,⁴⁶³ the defendant was working as a taxi cab driver.⁴⁶⁴ A pedestrian asked him to deliver a package, but Delolli refused.⁴⁶⁵ The two argued and, according to Delolli’s version of events, the man reached through the open driver’s window of the cab, as if to grab Delolli.⁴⁶⁶ Delolli opened the door and pushed him away.⁴⁶⁷ The pedestrian fell back.⁴⁶⁸ Delolli got back into his cab and tried to drive away.⁴⁶⁹ As he drove past, the man kicked the cab door sharply.⁴⁷⁰ Delolli stopped the cab, grabbed a sawed-off baseball bat, approached the man, and struck him in the head.⁴⁷¹ At trial, Delolli testified that he acted in self-defense.⁴⁷² He also argued that his use of force was justified to terminate a burglary.⁴⁷³

Delolli argued, interestingly, that a vehicle adapted for use as a place of business (such as a taxi cab) was a “building” within the meaning of section 11.81.900, and therefore the victim’s reaching through the open window of the cab was a “burglary.”⁴⁷⁴ The trial court instructed the jury on self-defense but denied the instruction on use of force to terminate a burglary.⁴⁷⁵ The court of appeals appeared to agree that Delolli’s interpretation of the definition of “building” was correct.⁴⁷⁶ However, because the assault occurred outside the cab and after the victim’s “unlawful burglary” was over, Delolli was not entitled to an instruction on the use of force to terminate a burglary.⁴⁷⁷

462. Act effective Sept. 13, 2006, ch. 68, § 5, 2006 Alaska Sess. Laws.

463. No. A-8263, 2003 WL 22143282 (Alaska Ct. App. Sept. 17, 2003). The author was the trial prosecutor.

464. *Id.* at *1.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at *5.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at *7–8.

In *Palmer v. State*,⁴⁷⁸ Palmer argued with, and then struggled with, a man who had entered his trailer.⁴⁷⁹ He eventually stabbed the man.⁴⁸⁰ At trial, he argued that the struggle acted as an implied termination of the victim's license to be present in the trailer, and that his use of deadly force to terminate a burglary in an occupied dwelling was therefore authorized by section 11.81.350(c)(2).⁴⁸¹ His use of deadly force may not have been authorized by section 11.81.335 because the victim was unarmed, and death or serious physical injury was unlikely.⁴⁸² The court side-stepped the issue, holding that there was no evidence that the defendant directed the victim to leave the premises, that the victim had threatened the defendant, or that the victim attempted to injure the defendant.⁴⁸³ However, the court called the defense theory a "novel argument."⁴⁸⁴ The court also found it significant that the defendant did not testify.⁴⁸⁵

C. The Use of Force Against Police Officers

Defendants charged with assault upon a police officer or resisting arrest occasionally argue some variant of a self-defense theme. A citizen may not use force to resist an arrest by a police officer unless the officer uses excessive force or is unrecognizable as an officer.⁴⁸⁶ Nor may a citizen use force to resist a pat-down or a lawful investigative stop.⁴⁸⁷ Finally, a citizen may not resist an officer's intrusion into his home to seize property pursuant to court order, even if there is some reason to believe that that the court decree was issued illegally.⁴⁸⁸

In rare cases, such as *Barnett v. State*,⁴⁸⁹ a defendant will argue that he acted in self-defense against the arresting officer because he

478. 770 P.2d 296 (Alaska Ct. App. 1989).

479. *Id.* at 297.

480. *Id.*

481. *Id.*

482. *See id.* at 298.

483. *Id.*

484. *Id.*

485. *Id.*

486. *Miller v. State*, 462 P.2d 421, 427 n.4 (Alaska 1969).

487. *Melson v. Municipality of Anchorage*, 60 P.3d 199, 202 (Alaska Ct. App. 2002).

488. *Jurco v. State*, 825 P.2d 909, 913-14 (Alaska Ct. App. 1992); *Napageak v. State*, 729 P.2d 893, 895 (Alaska Ct. App. 1986).

489. No. A-7785, 2003 WL 77061 (Alaska Ct. App. Jan. 8, 2003). The author was the trial prosecutor.

feared physical harm, *even though he knew the arrest was lawful*.⁴⁹⁰ Regardless, “generalized fear that excessive force might be used against him,” coupled with reluctance to be held accountable for his crimes, is insufficient to trigger a self-defense jury instruction.⁴⁹¹

The defendant in *Barnett* was caught by a high school security guard stealing car stereos in a high school parking lot.⁴⁹² As the plain-clothes guard approached aggressively, Barnett jumped in his car.⁴⁹³ The guard stood in front of the car, and smacked his hand on the hood, causing an almost-imperceptible dent.⁴⁹⁴ Barnett accelerated directly at the guard, throwing him up and over the car and then to the ground before speeding away.⁴⁹⁵ The court of appeals held that Barnett was not entitled to use force to resist a non-excessive force arrest.⁴⁹⁶ “It was only after Judge Souter granted the State’s request to give an instruction that a person had a right to use nondeadly force to make an arrest that Barnett suggested that he had a right to use self-defense to avoid Nolan’s possible use of excessive force on him.”⁴⁹⁷ The court of appeals affirmed the trial judge’s refusal to instruct the jury on self-defense.⁴⁹⁸

Even in cases where a defendant shows that the force used to make an arrest is excessive, the reasonableness of the officer’s decision to initiate the arrest is not material.⁴⁹⁹ In these cases, prosecutors should request, by pre-trial motion, that the court instruct the jury that the police stop was “lawful.” The prosecutor should simultaneously file a pre-trial motion to preclude a self-defense instruction.

490. *Id.* at *1–2.

491. *Id.* at *2 (“We fail to see that this generalized fear, with nothing more, could justify Barnett’s use of a dangerous instrument to resist the arrest.”).

492. *Id.* at *1.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* at *2.

497. *Id.*

498. *Id.* at *2–3.

499. *Jackson v. State*, No. A-4382, 1993 WL 13156694, at *5 n.1 (Alaska Ct. App. May 26, 1993) (“Under these cases [*Miller v. State*, 462 P.2d 421 (Alaska 1969); *Jurco v. State*, 825 P.2d 909 (Alaska Ct. App. 1992); *Carson v. State*, 736 P.2d 356 (Alaska Ct. App. 1987)], use of force to resist the arrest might have been justified if Jackson established that [Trooper] Jimerfield unreasonably used deadly force in making the arrest. To the extent Jackson’s defense might have been predicated on a claim of unreasonable use of deadly force by Jimerfield, however, the reasonableness of Jimerfield’s initial decision to initiate the arrest would simply be immaterial.”).

D. The Use of Force to Make an Arrest

Very rarely, defendants may argue that they used force to make a “citizen’s” arrest. This implicates a different justification defense.⁵⁰⁰ There is a crucial distinction between this justification defense and personal self-defense. Self-defense requires proof that the defendant faced imminent assault.⁵⁰¹ For a citizen’s arrest, however, a person may be entitled to use force to make an arrest for a crime that has already concluded, where no threat of imminent harm exists.⁵⁰²

In *Barton v. State*,⁵⁰³ the defendant was attacked by assailants in his home.⁵⁰⁴ He obtained a handgun and his assailants fled.⁵⁰⁵ He fired a shot at them as they did so, striking one.⁵⁰⁶ The grand jury indicted the assailants and Barton in the same indictment.⁵⁰⁷ At trial, Barton testified that he shot at the assailants to prevent them from getting a gun of their own and returning to continue the assault.⁵⁰⁸ The trial judge instructed the jury on self-defense, but denied a request to instruct the jury on the use of force to make a citizen’s arrest.⁵⁰⁹ The court of appeals affirmed because Barton testified that he shot the men to terminate the attack, not to make an arrest.⁵¹⁰ Therefore, he was not entitled to an instruction on the law of private arrest.⁵¹¹ However, the court noted, “[e]ven without the defendant’s testimony, the facts of a case may support a reasonable inference that the defendant’s purpose in using force was to effect an arrest or terminate an escape. If so, then the defendant is entitled to a jury instruction on this defense.”⁵¹²

VII. CONCLUSION

Self-defense is a powerful tool in the hands of the criminal defense lawyer. It offers a complete justification for all crimes which prohibit the use of “force” whether the charged offense is

500. ALASKA STAT. § 11.81.390 (1978).

501. ALASKA STAT. § 11.81.330 (2004), *amended by* Act effective Sept. 13, 2006, ch. 68, § 2, 2006 Alaska Sess. Laws.

502. § 11.81.390.

503. No. A-6971, 1999 WL 189360 (Alaska Ct. App. Apr. 7, 1999).

504. *Id.* at *1.

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* at *1–2.

511. *Id.*

512. *Id.* at *2.

misdemeanor assault or first-degree murder. Prosecutors face the daunting task of disproving self-defense beyond a reasonable doubt. Often, a legitimate defense threat of an extended case which “puts the victim on trial” may compel a prosecutor to resolve a close case with a favorable plea offer.

Every self-defense trial compels both the judge and the advocates to navigate a complex series of statutes, evidentiary concepts, and jury instructions. Adding to this complexity, both the Alaska legislature and the appellate courts have shifted the self-defense landscape several times in the past decade. Therefore, when presiding over assault prosecutions where self-defense concepts are litigated, trial judges should enforce Alaska’s self-defense notice and pleading requirements. Defense attorneys should aggressively pursue a course of pre-trial investigation to uncover derogatory victim reputation and specific-act evidence. Prosecutors should force a pre-trial hearing regarding the scope of the defense case by vigorous filing of pre-trial motions *in limine*. Finally, both the bench and bar should be familiar with the concepts discussed and the case law surveyed in this Article.