# LESSER-INCLUDED OFFENSES IN ALASKA: *STATE V. MINANO*

## I. INTRODUCTION

The lesser-included offense doctrine alters the decision making process of a jury. Ordinarily, a jury can consider only whether a defendant is guilty or not guilty of the specific crime for which he was indicted.[1] The lesser-included offense doctrine, however, provides a third option to juries convinced that a defendant is guilty of some crime but not necessarily the crime charged.[2] The jury can convict the defendant of a less serious, uncharged offense that has some of the elements of the more serious, charged offense. Properly used, the doctrine offers several benefits. First, juries are more likely to focus on disputed facts and render more deliberate opinions when they realize they have a choice of verdicts; second, fewer trials will result in hung juries;[3] third, fewer defendants will be acquitted when the prosecution has produced evidence that they have committed some crime;[4] and



1. Article I, section 8 of the Alaska Constitution provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." This provision is identical to the fifth amendment to the United States Constitution. Federal courts consider felonies to be "infamous crimes" within the meaning of the fifth amendment, because a felony conviction can result in incarceration for one year or more. Harvin v. United States, 445 F.2d 675, 677-78 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 943 (1980). Thus, grand jury indictment is required before an accused can be brought to trial. *Id.* ALASKA R. CRIM. P. 7(a) codifies this principle.

An indictment also satisfies the constitutional requirement that a defendant "be informed of the nature and cause of the accusation" against him. U.S. CONST. amend. VI; ALASKA CONST. art. I, § 11. *See* Russell v. United States, 376 U.S. 749, 763 (1962) (an indictment "contains the elements of the offense intended to be charged, and sufficiently apprises the defendent of what he must be prepared to meet"); *see also* Thomas v. State, 522 P.2d 528, 530 (Alaska 1974).

2. The doctrine of lesser-included offenses is an exception to the general rule that a defendant may be tried only on charges for which he was indicted. An indictment for a greater or more serious charge by definition provides notice to a defendant that he may be called to defend a lesser charge. Thus, a defendant is deemed to be on notice of any lesser-included offenses. Walker v. United States, 418 F.2d 1116, 1119 (D.C. Cir. 1969).

3. For a discussion of the use of lesser-included offense instructions to reduce hung juries see Note, *Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instructions,* 16 U. MICH. J.L. REF. 561 (1983).

4. Studies conducted with mock juries suggest that acquittals occur almost twice

fourth, a defendant's punishment will fit his crime more closely. Lesser-included offense instructions do, however, present some problems. Overuse of the doctrine could encourage unsound compromise verdicts, confuse juries by presenting them with too many unrelated alternatives and thereby produce irrational decisions, and impede the orderly administration of trials. For these reasons, it is critical that the courts adopt an appropriately tailored lesser-included offense doctrine. This task, however, is not easily accomplished. As one court has recognized, "[t]he doctrine of lesser included offenses is not without difficulty in any area of criminal law."[5]

The Alaska Supreme Court has recently readdressed the appropriateness of its standard for identifying lesser-included offenses. In *State v. Minano,*[6] the court explicitly rejected recent holdings of the Alaska Court of Appeals and the California Supreme Court that allowed the jury to be given instructions for related as well as lesser-included offenses.[7] Moreover, the *Minano* court reaffirmed the standard it had set out in *Elisovsky v. State*[8] by stating that the decision to instruct a jury on a lesser-included offense should be "viewed from the perspective of the facts charged in the indictment, in light of the evidence actually presented."[9] In so holding, the court appears to have overturned the more flexible evidence-based standard generally employed by the court of appeals after *Elisovsky.* The implications of the *Minano* court's decision, however, are not entirely clear because of some inconsistencies in the opinion and the uncertainty of the opinion's language.

This note first discusses the origins of and rationale for the lesser-included offense doctrine. Second, because Alaska law in this area draws in large part on the jurisprudence of other states, several of the standards used in the federal and state courts will be set out and the policy implications of those standards will be analyzed. Third, this note will trace the history of the doctrine in Alaska. This note then discusses the supreme court's decision in *Minano,* which rejected the related offense approach proposed by the court of appeals as a new

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as often when a jury does not have an alternative to the choice between guilt and innocence. *See* Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors,* 22 J. OF PERSONALITY AND SOC. PSYCHOLOGY 211, 214 (1972); B. SALES, THE TRIAL PROCESS 317-24 (1981).

5. Fuller v. United States, 407 F.2d 1199, 1228 (D.C. Cir. 1968) (en banc), *cert. denied,* 393 U.S. 1120 (1969).

6. 710 P.2d 1013 (Alaska 1985).

7. *Id.* at 1016; *see* Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984), *rev'd,* 710 P.2d 1013 (Alaska 1985); People v. Geiger, 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984).

8. 592 P.2d 1221 (Alaska 1979).

9. *Minano,* 710 P.2d at 1016 (citing *Elisovsky,* 592 P.2d at 1226).

standard for Alaska. The note next discusses the confusion resulting from the *Minano* court's failure to clearly identify the proper standard for Alaska courts to use in applying the lesser-included offense doctrine. Finally, this note recommends that the rules committee reviewing Alaska's rule on lesser-included offenses not alter the current rule so as to permit the related offense approach. Instead, either the rules committee or the Alaska Supreme Court should adopt the evidence approach as the standard to be applied by Alaska courts in the area of lesser-included offenses.

## II. THE LESSER-INCLUDED OFFENSE DOCTRINE IN THE UNITED STATES

At common law a jury was allowed, but not required, to convict the defendant of any lesser crime necessarily included in the crime charged and supported by the evidence at trial.[10] In 1872 Congress codified this doctrine as part of the rules governing federal criminal trials,[11] and many states have subsequently adopted similiar statutes.[12] The original rationale for lesser-included offense instructions was to "prevent the prosecution from failing where some element of the crime charged was not made out."[13] Later cases, however, recognized that defendants as well as prosecutors benefit from requesting such instructions.[14] The doctrine allows defendants access to the "mercy dispensing power" of the jury[15] by affording the jury an alternative to a guilty verdict on the greater offense when the evidence indicates that the defendant is guilty of some crime.[16] The lesser offense effectively be-

10. 2 M. HALE, PLEAS OF THE CROWN 301-02 (1847); 2 W. HAWKINS, PLEAS OF THE CROWN 1716-1721, at 439-440 (Glazebrook ed. 1973).

11. Act of June 1, 1872, ch. 255 § 9, 17 Stat. 197, 198 (current version at FED. R. CRIM. P. 31(c)).

12. *See, e.g.*, ALASKA R. CRIM. P. 31(c), set forth at text accompanying note 69.

13. Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967) (quoting People v. Mussender, 308 N.Y. 558, 562, 127 N.E.2d 551, 553 (1955)).

14. Beck v. Alabama, 447 U.S. 625, 633 (1980).

15. *Kelly*, 370 F.2d at 229; *see also* People v. Clemente, 285 A.D. 258, 264, 136 N.Y.S.2d 202, 207 (1954) (jury entitled to consider tender mercies to convict defendant of a lesser crime even when the evidence clearly warrants conviction of the greater crime).

16. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212 (1973) (emphasis in original).

comes part of the defense to the greater crime; the defendant argues that he did not commit crime X because he only committed crime Y.[17]

As defendants realized the advantages of the lesser-included offense doctrine, they began to seek constitutional support for a requirement that such instructions be given. Some commentators and state courts have reasoned that the doctrine is part of the defendant's sixth amendment right to have the jury determine all factual issues presented in his case.[18] Other cases have attempted to find a right to such instructions in the due process clause.[19] United States Supreme Court decisions, however, have failed to clarify whether a defendant may claim a constitutional right to receive lesser-included offense instructions.

In *Beck v. Alabama,*[20] the Court declared unconstitutional a state statute that prohibited lesser-included offense instructions in capital cases.[21] The Court reasoned that restricting a jury's options may increase the risk of an unwarranted conviction and introduce irrelevant considerations into the fact-finding process.[22] Although its reasoning would seem to apply to all criminal cases, the Court noted significant differences between capital and other criminal cases and reiterated a statement first made in *Keeble v. United States*[23] that it had "never held that a defendant is entitled to a lesser-included offense instruction as a matter of due process."[24]

The failure of the Supreme Court to clearly articulate its rationale for granting the defendant a lesser-included offense instruction in *Beck* has caused confusion among other state and federal courts as to the exact nature of the doctrine. For example, some state courts have employed the reasoning of *Beck* to conclude that the fundamental fairness mandate of due process grants defendants a right to both lesser-included and related offense instructions in all criminal cases.[25]

Without a clear constitutional foundation or a consistent policy rationale, the lesser-included offense doctrine has spawned a multiplicity of definitions and applications in both the state and federal courts.

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17. *See* Larson v. United States, 296 F.2d 80, 81 (10th Cir. 1961) (failure to give lesser-included offense instruction supported by evidence is reversible error because it "withdraws from the jury a measure of defense to which the defendant is entitled").

18. *See* Comment, *The Lesser Included Offense Doctrine: Problems with Its Use,* 3 LAND & WATER L. REV. 587, 591 (1968); *see also* People v. Chamblis, 395 Mich. 408, 420-21, 236 N.W.2d 473, 479 (1975).

19. George, *Lesser Included Offenses in Michigan,* 1975 DET. C.L. REV. 35, 39.

20. 447 U.S. 625 (1980).

21. *Id.* at 627.

22. *Id.* at 642-43.

23. 412 U.S. 205, 213 (1973).

24. *Beck,* 447 U.S. at 37.

25. *See, e.g.,* People v. Geiger, 35 Cal. 3d 510, 518-20, 674 P.2d 1303, 1306-08, 199 Cal. Rptr. 45, 48-50 (1984).

The most prominent of the approaches used to evaluate the propriety of lesser-included offense instructions are the "strict statutory approach," the "pleadings approach," and certain more lenient factual standards.[26]

## A. The Strict Statutory Approach

The strict statutory approach is the most restrictive method used to identify potential lesser-included offenses. This test compares the statutory definition of two offenses.[27] If "the [statutory] elements of the lesser offense are identical to part of the elements of the greater offense," then a lesser-included offense instruction may be appropriate.[28] In comparing the elements of the crimes, a court must ignore the evidence produced at trial even if such evidence proves that in the course of allegedly committing the greater offense this particular defendant must have committed a lesser crime. The appropriate inquiry is whether the defendant could *ever* commit the greater crime without also committing the lesser.[29] For example, a court applying this standard would never find careless use of firearms to be a lesser-included offense of assault with a dangerous weapon because it is possible to commit assault with a weapon other than a firearm.[30]

The strict statutory approach is advocated by both state and federal courts that adhere closely to the common law conception of the

26. Irrespective of the standard used to identify potential lesser-included offenses, a lesser-included offense must satisfy two additional requirements before it may be given as an instruction to the jury. First, the record must contain sufficient evidence of the lesser crime to allow a jury to convict the defendant of that crime. *See, e.g.*, Hopper v. Evans, 456 U.S. 605, 610 (1982). In other words, a lesser-included offense instruction would not be appropriate if the accused's only defense to the crime charged consisted of a challenge to the evidence identifying the perpetrator, so that either the defendant is guilty of the crime charged or he is not guilty at all. *See* Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983). This requirement ensures that a jury does not engage in undue compromise by convicting the defendant of a lesser crime even though the evidence does not support conviction on that charge, merely because it could not agree as to guilt or innocence of the greater charge. *See Hopper*, 456 U.S. at 611.

Second, there must be a factual dispute as to an element required to establish commission of the greater offense but not to establish commission of the lesser. *See* Sansone v. United States, 380 U.S. 343, 350 (1965). To show a sufficient factual dispute the record must contain "some evidence" that could lead a reasonable jury to determine that the necessary element has not been proved. *See* Nathaniel v. State, 668 P.2d 851, 854 (Alaska Ct. App. 1983). This evidentiary standard requires "more than a scintilla [of evidence] but less than that which would compel reasonable doubt as a matter of law." *Id.* at 855.

27. *See* Virgin Islands v. Parrilla, 550 F.2d 879, 881 (3d Cir. 1977).

28. United States v. Iron Shell, 633 F.2d 77, 88 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

29. Virgin Islands v. Aquino, 378 F.2d 540, 554 (3d Cir. 1967).

30. Elisovsky v. State, 592 P.2d 1221, 1225 (Alaska 1979).

role of lesser-included offenses. Because the purpose of the common law rule was to aid the prosecution, courts adhering to this conception of the rule would allow a defendant to request a lesser-included offense instruction only when a prosecutor could also invoke the doctrine.[31] This requirement of mutuality significantly limits the number of lesser-included offenses for which the defendant can argue because the prosecution is constitutionally limited to offenses of which the defendant has notice by way of the indictment.[32]

The limited use of lesser-included offense instructions allowed by the strict statutory standard is also most consistent with the literal language of most federal and state criminal rules[33] codifying the common law. These rules require a lesser offense to be "necessarily included" in the greater offense before a court can offer an instruction.

The advantages of the strict statutory approach derive from its simple application.[34] The pure strict statutory approach does not depend in any way on the facts determined at trial, so that state courts need only categorize the relationship of two offenses, and then apply that relationship in all subsequent cases. All defendants then charged with the offense in question will receive identical rights to lesser-included offense instructions. Thus, a major virtue of the strict statutory approach is that it clearly places both defendants and prosecutors on notice of any lesser-included offense instructions that a court might possibly give. Additionally, this standard promotes orderly trials because it encourages parties to develop the case at hand rather than encouraging them "to manipulate the proof to accommodate as wide a range of conclusions as possible."[35]

Unfortunately, the strict statutory approach's strengths are also the source of its weaknesses. Its simplistic analysis and inflexibility prevent a jury from adapting the punishment of a criminal to the crime actually committed as established by the facts at trial. This defi-

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31. *Kelly,* 370 F.2d at 229. (The purpose of the 1872 statute that created federal Rule 31(c) was to aid the prosecution; therefore, any right the defendant has cannot extend beyond the right of the prosecutor to invoke the doctrine.).

32. A defendant is constitutionally entitled to have notice of the charges against him. *See supra* note 1.

33. Rule 31(c) of the Federal Rules of Criminal Procedure codified the common law and is the foundation for most state rules. The rule provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

34. *See* United States v. Johnson, 637 F.2d 1224, 1238 (9th Cir. 1980) ("the mechanical comparison of statutory elements . . . may be appealing in its promise of certainty and intellectual purity").

35. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense,* 50 BROOKLYN L. REV. 191, 201 (1984); *see also* Virgin Islands v. Smith, 558 F.2d 691, 695-96 (3d Cir. 1977), *cert. denied,* 434 U.S. 957 (1977).

ciency has become more significant in recent years because of the increasing number of statutes that can be applied to a single criminal act. Some jurisdictions seeking a more realistic matching of the offenses on which a jury is instructed and the facts of a case have abandoned the strict statutory approach.

B. The Pleadings Approach

Attempting to alleviate some of the inflexibility of the strict statutory approach, many state courts[36] expanded the lesser-included offense doctrine to allow an examination of the facts in the indictment. If some but not all of those facts would, if established, constitute a lesser offense, an instruction on such offense is appropriate.[37] As articulated by the Connecticut Supreme Court in *State v. Brown,*[38] the pleadings approach retains the "necessary inclusion" requirement. "The test . . . is whether it is possible to commit the greater offense in the manner *alleged in the information or bill of particulars,* without having first committed the lesser. If it is possible, then the lesser violation is not an included crime."[39]

The pleadings approach attempts to take an intermediate position between the strict statutory approach and the more lenient factual approaches discussed below.[40] It resembles the statutory approach by providing both the prosecutor and the defendant with notice of potential lesser-included offenses. The parties are operating from a closed set of facts specified in the indictment, and consequently both parties can fairly assess all of the possible implications of proving different portions of the indictment's facts at trial. The parties can thus be deemed to have notice of potential lesser-included offenses. Moreover, neither party gains any undue advantage because all potential lesser-included offenses are fixed in advance of trial. As with the strict statutory approach, neither party is encouraged to engage in unfocused and speculative argument at trial. In sum, the pleadings approach retains many of the advantages of the strict statutory approach while at the same time refocusing the court's attention on the facts of the case.

36. No federal courts have adopted the pleadings approach. Although the Seventh Circuit endorsed its application in one case, United States v. Stavros, 597 F.2d 108 (7th Cir. 1979), it subsequently has adopted a modified evidence approach. United States v. Cova, 755 F.2d 595, 597 (7th Cir. 1985).

37. *In re* Maricopa County, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974); *see also,* Nye v. State, 256 Ind. 219, 267 N.E.2d 842 (1971).

38. 163 Conn. 52, 301 A.2d 547 (1972), *overruled on other grounds by* State v. Whistnant, 179 Conn. 576, 427 A.2d 414 (1984).

39. *Id.* at 61-62, 301 A.2d at 552 (emphasis added).

40. *Johnson,* 637 F.2d at 1238 (citing *Stavros,* 597 F.2d at 112) ("An intermediate position of sorts appears to have been adopted by the Seventh Circuit in which the primary focus is on the facts alleged in the indictment.").

The pleadings approach is, however, vulnerable to several criticisms. First, its results might not differ significantly from those of the strict statutory approach. Most jurisdictions have abandoned requirements that the indictment set out the circumstances of the offense and the theories of the prosecution as to how it was committed.[41] Using the indictment more to provide the defendant with notice of the crime against which he must defend himself than to state the facts suggesting the defendant's involvement, most jurisdictions generally hold that an indictment is sufficiently detailed if it sets forth the offense in its statutory language.[42] Thus, in most jurisdictions the distinctions between the statutory elements approach and the pleadings approach have lost their significance.

Second, the pleadings approach places the availability of lesser-included offense instructions forever under the effective control of the prosecutor because he has the power to limit such instructions by drafting the indictment more generally.[43] Third, even if the prosecutor does not intend to limit the availability of lesser-included offense instructions, the availability of such instructions will still depend on the arbitrary fact of a particular prosecutor's general or specific drafting style, thus making instructions available to some defendants but denying them to others charged with the same crime.[44]

### C. The Lenient Factual Approaches

Recognizing the artificial focus of both the statutory elements and pleadings approaches, some jurisdictions have expanded their tests to allow lesser-included offense instructions when the elements of the lesser offense are established by the evidence at trial, even though all such elements are not included in the statutory definition of the greater offense or in the indictment. The standards set forth by these

41. *See* Cowan v. State, 140 Neb. 847, 2 N.W.2d 111 (1942) (indictment need not set out detailed particulars of crime as required by common law); Thomas v. State, 522 P.2d 528, 530-31 (Alaska 1974); Williams v. State, 648 P.2d 603, 605-06 (Alaska Ct. App. 1982).

42. *See, e.g.,* Adkins v. State, 389 P.2d 915, 916 (Alaska 1964) ("it is enough to allege the offense substantially in the language of the statute"); People v. Docherty, 178 Cal. App. 2d 33, 39, 2 Cal. Rptr. 722, 725 (1960).

43. *Johnson,* 637 P.2d at 1239 ("Indeed if we restricted ourselves to an examination of the indictment alone, the prosecution would have the power to limit the defendant's entitlement to such instructions at the very outset of the proceedings.")

44. *See* Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis for Practitioners,* 5 CONN. L. REV. 255, 264-66 (1972) (discussing two cases with similiar facts but different conclusions on the question of lesser-included offense instructions because of differing degrees of specificity in the indictment); *see also* Brief for Petitioner at 15 n.3, Minano v. State, 710 P.2d 1013 (Alaska 1985) (state argues that under the pleadings approach lesser-included offense instruction is determined "by the drafting style of the prosecuting attorney who presented the case at grand jury").

jurisdictions can be divided into two classes: the evidence approach, advocated by several state courts,[45] and the related offense approach, originally advocated by three federal circuits.[46]

1. *The Evidence Approach.* Courts using the evidence approach expressly retain the requirement that an offense be necessarily included in the offense charged but interpret this to mean that *on the facts of the case* it would be impossible for the defendant to have committed the crime charged without also committing the lesser crime.[47] An Iowa case illustrates the application of this standard. In *State v. Hawkins*[48] the defendant was charged with larceny of a motor vehicle. Evidence produced at trial showed that the defendant had taken the car of another and was observed driving the vehicle.[49] On this evidence, the court determined that operating a motor vehicle without consent was a lesser-included offense of larceny of a motor vehicle.[50] This result could be reached only under the evidence approach. Courts employing the strict statutory test would not allow such an instruction because a vehicle may be taken by means other than driving.[51] Moreover, courts following the pleadings approach would also invalidate such an instruction if the indictment had not specifically alleged that the defendant drove the car away.[52]

Because the appropriateness of any lesser-included offense instructions is determined at the close of the evidence, a potential problem with the evidence approach is its inability to provide the defendant with sufficient notice of the lesser offense.[53] To alleviate this problem, some courts allow only the defendant to request instructions on of-

45. *See, e.g.,* People v. Dace, 104 Ill. 2d 96, 470 N.E.2d 993 (1984); State v. Hawkins, 203 N.W.2d 555 (Iowa 1973); People v. Cionek, 43 A.D.2d 256, 351 N.Y.S.2d 177 (1974); Anderson v. State, 255 So. 2d 550 (Fla. Dist. Ct. App. 1971).

46. *See* United States v. Pino, 606 F.2d 908, 910-17 (10th Cir. 1978); United States v. Stolarz, 550 F.2d 488 (9th Cir. 1977); United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971).

47. *See, e.g.,* People v. Dace, 104 Ill. 2d 96, 470 N.E.2d 933 (1984); People v. Cionek, 43 A.D.2d 256, 351 N.Y.S.2d 177 (1974).

48. 203 N.W.2d 555 (Iowa 1973).

49. *Id.* at 556.

50. *Id.* at 557-58.

51. *See supra* text accompanying notes 27-35.

52. *See supra* text accompanying notes 36-40. While the *Hawkins* court did not explicitly address the issue of the specificity required in the indictment, it expressly overruled its decision in State v. Everett, 157 N.W.2d 144 (Iowa 1968). *Hawkins,* 203 N.W.2d at 557. The *Everett* court had concluded that if the indictment did not specify that a defendant drove the automobile away, operating a motor vehicle without consent would not be a lesser-included offense of larceny of a motor vehicle. *Everett,* 157 N.W.2d at 148.

53. For a discussion of the defendant's right to notice of the charges against him *see supra* note 1.

fenses not fairly implied from the indictment.[54] The defendant's request does not violate his constitutional right to notice of the offenses charged because the defendant waives his right to notice by requesting such instructions.[55]

2. *The Related Offense Approach.* As originally conceived, the related offense approach was not intended as an alternative to the evidence approach but rather as an alternative to the strict statutory and pleadings approaches. Premised explicitly on the assumption that a defendant has a broader right to lesser-included offense instructions than does the prosecutor,[56] the related offense doctrine grants a defendant instructions on offenses that, *although not included in the offense charged,* are inherently related to that offense. Offenses are inherently related when they "relate to the protection of the same interests" and they are "so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."[57]

The language of this approach is seemingly very broad, and consequently its outermost parameters are unclear because it has never been applied in a situation that would not also have satisfied the evidence approach.[58] Potential differences between the approaches, however, can be anticipated.[59] The evidence approach requires that any elements of the lesser offense that are not identical to the statutory elements of the greater offense be uncontested and clearly established by the evidence presented at trial. If the evidence does not conclusively establish the additional element, it would be *possible* for the de-

54. *See, e.g.,* Anderson v. State, 255 So. 2d 550 (Fla. Dist. Ct. App. 1971).

55. *Id.* at 555.

56. *Whitaker,* 447 F.2d at 321.

57. *Id.* at 319. The California Supreme Court has a similiar definition of the relationship required for "closely related" offenses. According to that court, an offense is closely related when evidence establishing it is "relevant to and admitted for the purpose of establishing whether the defendant is guilty of the charged offense." People v. Geiger, 35 Cal. 3d 510, 531, 674 P.2d 1303, 1316, 199 Cal. Rptr. 45, 58 (1984).

58. In *Whitaker* the court concluded that unlawful entry was a lesser-included offense in the crime of burglary when the evidence clearly established unlawful entry. 447 F.2d at 319. *See also Johnson,* 637 F.2d at 1234-35 (assault with a dangerous weapon is a lesser-included offense of assault resulting in serious bodily injury where evidence at trial conclusively established that defendant used an axe to inflict the injury); *Pino,* 606 F.2d at 916-17 (careless operation of a motor vehicle was a lesser-included offense of involuntary manslaughter when evidence of defendant's operation of a motor vehicle, collision, and victim's death were all established at trial); *Geiger,* 35 Cal. 3d at 516-17, 674 P.2d at 1315-16, 199 Cal. Rptr. at 57-58 (vandalism was chargeable as a lesser offense when defendant had been indicted for burglary and it was undisputed that defendant had broken a shop window).

59. *See infra* text accompanying notes 97-110.

fendant to have committed the greater offense without also having committed the lesser. Thus, the greater offense would not neccessarily include the lesser offense, rendering an instruction on the lesser offense inappropriate. The related offense approach has no requirement that the lesser offense be necessarily included within the greater offense and accordingly seems to permit instructions whenever the evidence presented might support the additional elements of the lesser offense.

Although the related offense doctrine generally increases the number of offenses on which a jury may be instructed, its requirement that the offenses relate to the protection of the same interests may operate to exclude instructions on what might otherwise be classified as lesser-included offenses. In *State v. Gopher,*[60] the evidence presented by the state clearly established that the defendant had committed the offense of resisting arrest, but a question existed as to whether the defendant had intended to cause physical injury and could be convicted of the charged crime of assault.[61] The state argued that the court should apply the inherent relationship test and that under that test no instruction should be granted because the offenses were designed to protect different societal interests. Punishment of assault protects the safety of police officers while laws criminalizing the resisting of arrest protect society's interest in orderly arrests.[62] The Montana Supreme Court found, however, that the important relationship between the offenses was their factual relationship in the case at hand, not the relationship of the statutes defining the elements of the offenses. The court then applied the traditional evidence approach analysis to allow an instruction on the lesser-included offense of resisting arrest.[63]

In addition to the related offense approach's somewhat artificial focus on the interests protected by the statutes, the approach could upset the operation of the lesser-included offense doctrine. Typically, committing a lesser offense is an integral step in any commission of the greater offense.[64] If a jury believes that a defendant has committed any crime, it can first find him guilty of the lesser charge and then focus on whether the prosecutor has proved the additional, disputed fact necessary to convict the defendant of the greater crime. Under the related offense doctrine, the jury cannot consider the lesser and greater crimes at the same time because the lesser crime has additional, disputed elements that are not required for conviction of the greater offense.[65] Without the building block relationship between of-

60. 633 P.2d 1195 (Mont. 1981).
61. *Id.* at 1197.
62. *Id.*
63. *Id.*
64. Larson v. United States, 296 F.2d 80, 81 (10th Cir. 1961).
65. In holding that an instruction requiring the jury to unanimously agree on the greater crime before it considers the lesser-included offense did not contravene the

fenses, the potential for jury confusion and irrational verdicts is manifest.[66]

The implications and efficacy of the related offense approach and of the other lesser-included offense standards are significant because Alaska has employed each of these four standards at some point in time. The analysis of the benefits and drawbacks of each standard, then, lays the groundwork for an analysis of the appropriate lesser-included offense standard for the Alaska courts.

## III. EVOLUTION OF ALASKA'S APPROACH TO LESSER-INCLUDED OFFENSES

Rule 31(c) of the Alaska Rules of Criminal Procedure, which governs lesser-included offense instructions,[67] derives from the common law.[68] It provides in pertinent part, "The defendant may be found guilty of an offense necessarily included in the offense charged."[69] Although the language of the Alaska rule, like that of the federal rule,[70] suggests that its use is discretionary, the Alaska Supreme Court has intimated that such instructions are part of the defendant's constitutional right to have a jury determine all questions of fact, even those relating to the degree of an offense.[71] Failure to grant a party a lesser-included offense instruction when properly requested constitutes reversible error.[72]

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rationale for giving lesser-included offense instructions, the Alaska Court of Appeals, in Dresnek v. State, 697 P.2d 1059 (Alaska Ct. App. 1985) (petition for hearing granted), stated:

> [A] lesser-included offense by definition is included in the greater offense. Consequently, a jury cannot consider the elements of the greater offense without simultaneously considering the elements of the lesser-included offense. . . . We recognize, however, that Alaska has adopted the cognate approach to lesser-included offenses and that cases could arise in which the relationship between the greater and the lesser-included offenses might be less clear. Marker v. State, 692 P.2d 977 (Alaska Ct. App. 1984); Minano v. State, 690 P.2d 28 (Alaska Ct. App. 1984). In the instant case, we find nothing obscure or potentially confusing in the relationship between the various offenses and no circumstances to indicate that the instructions misled the jury.

*Dresnek*, 697 P.2d at 1062-63.

66. *See id.*

67. ALASKA R. CRIM. P. 31(c).

68. Elisovsky v. State, 592 P.2d 1221, 1225 (Alaska 1979).

69. ALASKA R. CRIM. P. 31(c).

70. Alaska's rule is substantially identical to FED. R. CRIM. P. 31(c), set forth *supra* at note 33. *See also supra* text accompanying notes 10-24 for a discussion of the federal right to lesser-included offense instructions.

71. Christie v. State, 580 P.2d 310, 318 n.24 (Alaska 1978) (quoting Gallegos v. People, 136 Colo. 321, 323-24, 316 P.2d 884, 885 (1957)).

72. *See, e.g., Elisovsky*, 592 P.2d at 1226; Nathaniel v. State, 668 P.2d 851, 856 (Alaska 1983).

The Alaska Supreme Court has consistently held that for an offense to be "necessarily included" in the offense charged, it must be "impossible to commit the greater [offense] without first having committed the lesser."[73] Early decisions interpreted this mandate to require the strict statutory elements analysis.[74] This supposedly simple approach, however, failed to achieve one of its chief goals — judicial economy. Its blind focus on the statutory elements of the offenses encouraged prosecutors to stretch statutory language so as to create additional elements in the lesser offenses that would bar application of the lesser-included offense doctrine.[75]

In *Christie v. State*[76] the supreme court adopted a different definition of necessarily included offenses. The state argued in *Christie* that careless use of a firearm could not be a lesser-included offense of shooting, stabbing, or cutting with intent to kill because it was possible to commit the greater crime by cutting or stabbing, thereby not committing the lesser crime.[77] The court rejected this traditional statutory elements argument stating, "The fact that there may be alternate means of meeting the requirements of the greater statute is irrelevant to the determination that, *by the facts charged in the indictment,* the lesser crime is necessarily included in the greater."[78] The court thus appeared to be moving toward the pleadings approach.

Elaborating on this standard a year later in *Elisovsky v. State,*[79] the supreme court found support for the standard in a literal reading of Alaska Rule of Criminal Procedure 31(c), which "refers to 'the offense charged,' not the statute under which the offense is charged."[80] The court labeled its new approach the "cognate approach" and emphasized that the approach focused "closely on the facts charged in the indictment to determine whether the defendant had actual notice of possible lesser-included offenses."[81] Although the *Elisovsky* opinion seems to be a classic statement of the pleadings approach, later courts have interpreted the opinion as more of a statement of policy direction

73. *Elisovsky,* 592 P.2d at 1225; *see also Christie,* 580 P.2d at 317; Jennings v. State, 404 P.2d 652, 655 (Alaska 1965); Mahle v. State, 392 P.2d 19, 21 n.6 (Alaska 1964).

74. *See Jennings,* 404 P.2d at 655; *Mahle,* 392 P.2d at 20-21.

75. For example, in Rivett v. State, 578 P.2d 946, 947-48 (Alaska 1978), the supreme court rejected the state's argument that being unarmed is an element of misdemeanor assault and battery. This offense, therefore, could not be included in the greater offense of assault with a dangerous weapon. If it was an element of the lesser offense, the state would have to prove it beyond a reasonable doubt.

76. 580 P.2d 310 (Alaska 1978).

77. *Id.* at 320 n.35.

78. *Id.* (emphasis added).

79. 592 P.2d 1221 (Alaska 1979).

80. *Id.* at 1225.

81. *Id.* at 1226.

than an articulation of a standard.[82] Part of the resultant confusion stemmed from using the label "cognate approach." Other authorities have used this term to refer to the pleadings approach, the evidence approach, and even the related offense approach.[83]

The uncertainty surrounding the *Elisovsky* opinion is evidenced by the fact that the court of appeals has cited *Elisovsky* to support conflicting approaches. In *Nathaniel v. State,*[84] the court of appeals interpreted *Elisovsky* to prescribe the evidence approach. In *Nathaniel,* the state, intending to prove first degree sexual assault, introduced evidence that the victim had been physically injured to show that she had not consented to the defendant's sexual advances.[85] Because the state presented this evidence of physical injury, the court found fourth degree assault to be a lesser-included offense of the charged crime — first degree sexual assault — as proven at trial.[86] The court made its determination without mentioning whether the indictment specified that the victim had been physically injured. The direction of the court's inquiry away from the indictment and toward the evidence adduced at trial is more clearly demonstrated in the court of appeals' *Minano* decision.

> Under the cognate approach the court must examine *the evidence that the state relied on* as well as the statutory elements of the offense to determine whether, *in the context of the case,* it would be possible for the jury to find that the accused had committed the greater offense but not the lesser offense.[87]

After *Elisovsky,* the Alaska Supreme Court also seemed to endorse the evidence interpretation, stating in *Tuckfield v. State*[88] that "the governing principle is whether the facts in evidence demonstrate one could have committed the greater offense without also having committed the offense of lesser magnitude."[89] The supreme court de-

82. *See infra* text accompanying notes 84-90. *See also* Brief for Petitioner at 19, State v. Minano, 710 P.2d 1013 (Alaska 1985); Brief of Respondent Lord at 6, State v. Minano, 710 P.2d 1013 (Alaska 1985).

83. *See* Note, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts,* 84 DICK. L. REV. 125, 127-28 (1979) (cognate theory is alternative term for the pleadings approach); People v. Chamblis, 395 Mich. 408, 418-19, 236 N.W.2d 473, 478 (1975) (using the cognate label in relation to approach combining elements of evidence and related offense standards).

Moreover, although the *Elisovsky* court set out the requirements for a pleadings approach and cited appropriate authority, it also referred to United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971), which advocates the related offense approach.

84. 668 P.2d 851 (Alaska Ct. App. 1983).

85. *Id.* at 854.

86. *Id.* at 854 n.2.

87. Minano v. State, 690 P.2d 28, 31 (Alaska Ct. App. 1984) (emphasis added), *rev'd,* 710 P.2d 1013 (Alaska 1985).

88. 621 P.2d 1350 (Alaska 1981).

89. *Id.* at 1352.

cision in *Tuckfield,* however, cannot be read as a definitive acceptance of the evidence approach because the offense of assault with intent to commit rape would be a lesser-included offense of the crime of rape even under the restrictive statutory elements approach.[90]

In a recent series of cases, the court of appeals attempted to expand the lesser-included offense doctrine even further by abandoning the requirement of necessary inclusion and allowing instructions on closely related offenses.[91] Citing the related offense test first set out in *United States v. Whitaker,*[92] the court asserted that an instruction on a lesser offense is appropriate when "the lesser offense is inherently related to the offense charged, so that proof of the greater would ordinarily — but not invariably — entail proof of the lesser."[93] The court noted that this expansion of the doctrine to include related offenses was consistent with, and might even be required by, the policies of reasonableness and fairness on which the lesser-included offense doctrine is premised.[94] Moreover, the court has cited with approval the due process reasoning of the California Supreme Court in *People v. Geiger:*[95]

> In doubtful situations, however, the determinative factor should be whether the option to convict a defendant of a related offense is reasonably necessary to insure that the jury is afforded the opportunity to decide all material issues presented by the evidence in accord with the defendant's theory of the case, where denial of that opportunity might undermine the reasonable doubt standard.[96]

## IV. *STATE V. MINANO*

### A. Decision by the Court of Appeals — Testing the Parameters of the Inherent Relationship Approach

The first court of appeals case to suggest the related offense standard was *Minano v. State.*[97] The defendants in *Minano* were charged with robbery[98] and assault in the second degree[99] and a jury convicted them of both offenses. They appealed their convictions on the grounds

90. *Id.*

91. Reynolds v. State, 706 P.2d 708 (Alaska Ct. App. 1985); Alley v. State, 704 P.2d 233 (Alaska Ct. App. 1985); Marker v. State, 692 P.2d 977 (Alaska Ct. App. 1984); Minano v. State, 690 P.2d 28, 33 (Alaska Ct. App. 1984), *rev'd,* 710 P.2d 1013 (Alaska 1985).

92. 447 F.2d at 321.

93. *Marker,* 692 P.2d at 983.

94. *Id.* at 983.

95. 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984).

96. *Marker,* 692 P.2d at 983.

97. 690 P.2d 28 (Alaska Ct. App. 1984), *rev'd,* 710 P.2d 1013 (Alaska 1985).

98. ALASKA STAT. § 11.41.510 (1983).

99. *Id.* § 11.41.210.

that they were entitled to lesser-included offense instructions on the crimes of theft in the second degree[100] and criminal mischief in the third degree (joyriding).[101] Additionally, they argued that assault in the second degree is a lesser-included offense of robbery so that conviction of both offenses was improper.[102] The court of appeals reversed the decision of the trial court, concluding that under the evidence approach joyriding was necessarily included in the offense of robbery, thus entitling the defendants to an instruction on the lesser offense.[103] Although the court grounded its reversal on the trial court's failure to instruct the jury on the joyriding offense, the court went on to discuss the propriety of a theft instruction because it believed this issue was likely to arise on retrial.[104] At this point the court began to explore the parameters of the lesser-included offense doctrine.

Under Alaska law, the crimes of robbery and theft have different intent requirements. Theft requires that a defendant intend to permanently deprive another of property.[105] First degree robbery, on the other hand, has no such requirement.[106] It requires instead that a defendant use force with "the intent to prevent or overcome resistance to the taking of the property."[107] As the court of appeals appropriately noted:

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100. *Id.* § 11.46.130(a)(1).

101. *Id.* § 11.46.484(a)(2).

102. *Minano,* 690 P.2d at 30. The state conceded error on this point; assault is necessarily included in the offense of robbery. *Id.* at 33.

103. *Id.* at 31. The offense of joyriding consists of the unauthorized taking of an automobile. ALASKA STAT. § 11.46.484(a)(2) (1983). The elements of the crime of robbery may be satisfied by the perpetrator's attempt at taking property. *Id.* § 11.41.510. Because the state had proven that a cab was taken, the defendants in *Minano* could not possibly have committed the robbery without committing joyriding.

104. *Minano,* 690 P.2d at 32. In most jurisdictions theft is indisputably an element of robbery because of the statutory definition of robbery; thus, a lesser-included offense instruction is appropriate even under the strict statutory approach. For example, in Pennsylvania, "a person is guilty of robbery if, *in the course of committing a theft,*" he inflicts or threatens bodily injury. 18 PA. CONS. STAT. ANN. § 3701(a)(1) (Purdon 1983) (emphasis added); *see also* Note, *supra* note 83, at 125 n.3.

105. The Alaska theft provision, ALASKA STAT. § 11.46.100(1) (1983), requires proof of an "intent to deprive another of property or to appropriate property of another to oneself or a third person" to support a conviction. ALASKA STAT. § 11.46.990(1)-(2) (1982), defines "appropriate" and "deprive" to describe the taking of property permanently, for an extended period of time, or "under such circumstances that the major portion of its economic value or benefit is lost."

106. Nell v. State, 642 P.2d 1361, 1365 (Alaska Ct. App. 1982).

107. ALASKA STAT. §§ 11.41.500(a), 510(d)(1) (1983).

> In light of these differences in intent and in light of the fact that the taking in this case involved an automobile, it would in theory have been possible to convict of robbery and acquit of theft. It is conceivable that the jury could have found that Minano and Lord intended to take the cab but did not intend to deprive [the cab driver] of it or appropriate it from him in a permanent sense.[108]

Because the crime of theft was not necessarily included in the greater crime of robbery, the court of appeals could not, consistent with the evidence approach, classify theft as a lesser-included offense of robbery on the facts of this case. The court of appeals recognized that "theft may not technically be a lesser-included offense of robbery;" nevertheless, it held that the two offenses were "closely related" and that upon retrial an instruction on theft in the second degree would be appropriate.[109] This holding is clearly consistent with the related offense approach and inconsistent with the evidence approach. Although the court of appeals actually employed the related offense approach in *Minano,* it did not clearly identify that approach as the standard it felt Alaska courts should adopt. *Minano's* significance stemmed from later court of appeals opinions that characterized its holding as an adoption of the traditional related offense approach.[110]

### B. Decision by the Alaska Supreme Court — Rejection of the Related Offense Approach

The Alaska Supreme Court granted a petition for hearing to determine whether a defendant can request instructions on offenses related to but not necessarily included in the crime charged.[111] In rejecting the court of appeals' adoption of the related offense approach, the supreme court stated:

> [Alaska Rule of Criminal Procedure 31(c)] requires that the lesser offense must be one "necessarily included in the offense charged." Whether the lesser offense is necessarily included is to be viewed from the perspective of the facts charged in the indictment, in light of the evidence actually presented.
>
> In the present case, Minano and Lord may be guilty of the offense charged in the indictment, robbery of Illguth by taking the cab, without being guilty of the offense of theft. This would be the case if the defendants did not intend to keep the cab either permanently or for an extended period of time. Thus, the requirement of Criminal Rule 31(c) that a lesser offense be one that is necessarily included in the greater has not been met.[112]

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108. *Minano,* 690 P.2d at 33.

109. *Id.*

110. *E.g., Reynolds,* 706 P.2d at 710; *Alley,* 704 P.2d at 236; *Marker,* 692 P.2d at 983.

111. Minano v. State, 710 P.2d 1013 (Alaska 1985).

112. *Id.* at 1016 (citations omitted).

This passage represents the full extent of the court's analysis of the lesser-included offense issue. The court reached its conclusion solely through an interpretation of Alaska Rule of Criminal Procedure 31(c) and did not consider whether the Alaska Constitution required instructions on related offenses:[113]

> In reaching this decision we recognize that there may be good reasons on both sides of the question of whether to amend Criminal Rule 31(c) so that it extends to lesser related offenses. However, the rule as it stands does not reach this far and it must be followed unless and until it is changed.[114]

The Alaska Supreme Court in *Minano* correctly rejected the related offense doctrine. Its opinion leaves some doubts, however, regarding the current Alaska standard. It is not clear after *Minano* whether Alaska intends to follow the pleadings approach or the evidence approach. Alaska needs a clear, definitive standard that will guide the trial courts and advance the policies underlying the lesser-included offense doctrine.

## V. AFTER *MINANO:* CONFUSION IN THE LESSER-INCLUDED OFFENSE DOCTRINE

After the supreme court's 1979 opinion in *Elisovsky* and before the court of appeals' *Minano* opinion and its progeny, the majority of decisions interpreted *Elisovsky* as prescribing the evidence approach.[115] In addition to rejecting the related offense approach, the supreme court's opinion in *Minano* appears to have revised its application of the evidence standard. The court articulated the standard for lesser-included offenses as follows: "Whether the lesser offense is necessarily included is to be *viewed from the perspective of the facts charged in the indictment,* in light of the evidence actually presented."[116] This articulation suggests that the court is returning to the pleadings approach. The phrase "in light of the evidence actually presented" seems to refer to the second requirement of lesser-included offenses — that they be supported by some evidence in the record — and not to the standard for identifying lesser-included offenses.[117]

The language of *Minano* suggests that the pleadings approach is not being applied in its traditional manner. The court's use of the phrase, "viewed from the *perspective* of the facts charged in the indict-

113. The court of appeals intimated in *Marker* that Alaska should follow California's reasoning that the defendant's due process rights entitle him to instructions on related offenses. *See supra* text accompanying note 96. This issue was not argued to or addressed by the Alaska Supreme Court.

114. *Minano,* 710 P.2d at 1016 (citations omitted).

115. *See supra* text accompanying notes 84-90.

116. *Minano,* 710 P.2d at 1013.

117. *See supra* note 26.

ment," suggests that the court will not require prosecutors to specifically plead all essential elements in the indictment for the greater offense if such facts are fairly implied from the indictment. Indeed, if the court was applying the traditional pleadings approach, it would have objected to theft as a lesser-included offense on the additional ground that Minano's and Lord's indictment failed to specify the value of the property taken.[118] When value effects the degree of an offense, as it does in Alaska's theft statute, it must be specifically and carefully pleaded or the indictment is deemed to constitute ineffective notice of the crime the defendant must defend.[119] The court's failure to mention the value of property, an issue briefed and argued by both parties,[120] as a reason for rejecting the theft instruction confuses the question of what approach the court was actually applying.

The standard articulated in *Minano* resembles neither the traditional pleadings approach nor the traditional evidence approach. Without a clear standard, Alaska trial courts will have no guidance concerning the appropriateness of lesser-included offense instructions, and defendants and prosecutors will be unable to ascertain the precise charges with respect to which they must prepare their arguments.

## VI. A RECOMMENDATION FOR ALASKA: CONTINUED PROSCRIPTION OF THE RELATED OFFENSE APPROACH AND ADOPTION OF THE EVIDENCE APPROACH

The Alaska Rules Committee is currently considering whether Alaska Rule of Criminal Procedure 31(c) should be expanded to allow jury instructions on related offenses.[121] If the committee rejects the related offense doctrine and retains the necessary inclusion requirement of the current rule, the Alaska courts must clarify the standard for identifying such necessarily included offenses. The modified pleadings approach adopted by the supreme court in *Minano* is unclear and does not achieve the goal of the lesser-included offense doctrine which seeks a close match of the crime for which a defendant is convicted and his illegal conduct. The evidence approach is superior to the pleadings approach because it allows instructions on lesser-included offenses established by the evidence at trial and is not limited to in-

118. This argument was made by the state to both the court of appeals, *Minano,* 690 P.2d at 32, and the supreme court, Brief for Petitioner at 36, Minano v. State, 710 P.2d 1013 (Alaska 1985).

119. State v. Criss, 125 W. Va. 225, 23 S.E.2d 613 (1942).

120. Brief for Petitioner at 36, Minano v. State, 710 P.2d 1013 (Alaska 1985); Brief for Respondent Lord at 10-11, Minano v. State, 710 P.2d 1013 (Alaska 1985). Moreover, the indictment did not even specify that property was taken. Rather, it was framed in the statutory language of "taking or attempted taking" of property.

121. Telephone interview with William Cotton, Court Rules Attorney (March 29, 1986).

structions on those offenses indicated by the vague, untested factual account in the indictment.

A. Deficiencies of the Related Offense Approach

A close examination of the related offense approach as applied by the court of appeals in *Minano* illustrates the difficulties inherent in that approach. These difficulties strongly suggest that Alaska should retain the "necessary inclusion" requirement of Alaska Rule of Criminal Procedure 31(c). First, the related offense approach as applied in *Minano* expands the lesser-included offense doctrine beyond the bounds of its usefulness. In fairness, none of the courts adopting the related offense standard have confronted a situation like that in *Minano* where a lesser crime contained an intent element that required an equal level of culpability with the greater crime, yet the actions intended differed in the two offenses.[122] Although *Minano* is the first related offense case to address this issue, the similar culpability/different actions distinction highlights an important difference between the evidence and related offense approaches. Almost by definition, crimes that involve intent elements which are equally culpable yet which involve different objectives could not satisfy the requirement of necessary inclusion. If the lesser offense has a specific intent requirement different from that of the greater crime, it would always be possible for the defendant to have committed the greater crime without also committing the lesser. Nevertheless, the related offense approach would apply to permit a lesser-included offense instruction in such situations. This result is contrary to the purposes of the lesser-included offense doctrine which was not intended to apply to crimes with lesser punishments but equal culpability.

Second, the related offense approach increases the potential for confusing a jury. Once again, the *Minano* case illustrates this shortcoming. If the trial court in *Minano* was allowed to give an instruction on theft, the jury would have been required to determine a factual issue that was not litigated by the parties — whether the defendants

122. In *Minano,* the court of appeals suggested that the California courts had dealt with a similiar dilemma and had concluded that vandalism was a related offense to the crime of burglary. *Minano,* 690 P.2d at 33 n.7 (interpreting People v. Geiger, 35 Cal.3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984)). A closer examination of California's statutes, however, reveals the error of the Alaska Court of Appeals. The California Penal Code defines vandalism as malicious damage of property. CAL. PENAL CODE § 594(a) (West Supp. 1986). Malicious is defined as involving the intent "to vex, annoy, or injure another person, or an intent to do a wrongful act." *Id.* § 7.4 (West 1970). California courts have interpreted malice as requiring only a general and not a specific intent to harm. People v. Bohmer, 46 Cal. App. 3d 185, 120 Cal. Rptr. 136 (Dist. Ct. App. 1975), *cert. denied,* 423 U.S. 990 (1975). Vandalism, therefore, does not require a greater or a different criminal intent from the crime of burglary.

intended to permanently deprive the cab driver of his cab. During the *Minano* trial, the defendants introduced substantial evidence of mental defects and alcohol dependency to support the argument that they were not capable of the advance planning required to commit assault *for the purpose of* taking the cab.[123] The prosecutor rebutted the evidence of diminished capacity by introducing evidence indicating that the defendants were capable of deciding to hit the cab driver and drive off in the cab.[124] The prosecutor did not attempt to prove and would have had a more difficult task proving that the defendants intended to permanently deprive the cab driver of his cab. This would entail demonstrating that the defendants "were capable of forming an intent as to the ultimate disposition of the cab several days later."[125] Although some circumstantial evidence was presented from which the jury could find an intent to permanently deprive the cab driver of the cab,[126] the jury's ability to reach a conclusion on this issue would require it to weigh the circumstantial evidence against the evidence of lack of capability without the guidance of arguments by counsel.

In addition to increasing the potential for jury confusion, focusing the jury's attention on this circumstantial evidence would divert it from consideration of the issues crucial to the prosecution's argument on the greater crime. Although in *Minano* the prosecution had offered additional evidence concerning the related offense, in general, the related offense doctrine provides incentives to defendants to focus the jury's attention on the lesser offenses. Defendants are encouraged to offer as wide a range of evidence as possible and to engage in speculative arguments about the conclusions such evidence warrants. The effort necessary to restrain defendants from converting the trial into a wide-ranging inquiry into every possible offense the defendant may have committed would significantly burden trial courts.

Moreover, the requirement that both the greater and the lesser offenses relate to the protection of the same interests, which is supposed to limit potential misuse of the related offense doctrine, also suffers from practical difficulties that greatly diminish its usefulness.[127] To determine whether two offenses protect the same interests, courts have looked for similar statutory language[128] and a close relationship

123. Brief for Petitioner at 36-37, Minano v. State, 710 P.2d 1013 (Alaska 1985).

124. *Id.* at 37.

125. *Id.*

126. *Minano,* 690 P.2d at 33.

127. United States v. Whitaker, 447 F.2d 314, 319 (D.C. Cir. 1971) ("In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser crime that could arguably be made out from any evidence that happened to be introduced at trial.").

128. *See* United States v. Stolarz, 550 F.2d 488, 492 (9th Cir. 1977) (court will look

of the offenses in the criminal code.[129] At first glance, this requirement seems helpful, but *Minano* illustrates that in reality it is extremely difficult to apply and may lead to arbitrary results.

If the *Minano* court of appeals decision was implictly stating that robbery and theft protect the same interests,[130] it would be difficult to reconcile *Minano* with court of appeals decisions both prior to and subsequent to *Minano.* In *Nell v. State,*[131] the court indicated that in Alaska the criminalization of theft and of robbery do not protect the same interests: "From the face of the statute it is clear that the legislature, in passing this robbery statute, intended to emphasize the fact that robbery is a crime against the person and deemphasize the theft aspects of the offense."[132] The opinion further noted that "[r]obbery is placed in the criminal code with other offenses against the person, rather than placed with other property offenses."[133]

Moreover, in *Reynolds v. State,*[134] a case decided subsequent to *Minano,* the state's evidence "consisted almost entirely of proof establishing his guilt of theft: that he was in possession of property recently stolen in the burglary."[135] A real question remained as to whether the defendant committed the entry necessary for the charged crime of burglary. Thus, the facts of *Reynolds* present a classic case for allowing a lesser-included offense instruction. A jury convinced that Reynolds committed the theft would be likely to convict him of burglary even though it was not convinced beyond a reasonable doubt that he committed the entry. Indeed, under the evidence approach a lesser-included offense instruction would be allowed in this case because any commission of burglary under the facts of this case necessarily included a theft.[136]

Under the related offense test, however, the appropriateness of a lesser-included offense instruction is less clear. Like robbery, the gra-

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at "similar language . . . [and] the close relationship of the two offenses in the text of the statute").

129. *See id.;* State v. Kupau, 620 P.2d 250, 254 (Hawaii 1980).

130. *See* Minano, 690 P.2d at 33.

131. 642 P.2d 1361 (Alaska Ct. App. 1982). *See also* Hawthorne v. State, 501 P.2d 155, 157 n.6 (Alaska 1972) (recognizing but not evaluating the argument that the gravamen of robbery and theft are different).

132. *Id.* at 1366.

133. *Id.* at 1365 n.6.

134. 706 P.2d 708 (Alaska Ct. App. 1985).

135. *Id.* at 710.

136. In People v. Dace, 104 Ill. 2d 96, 103, 470 N.E.2d 993, 996 (1984), the court applied the evidence approach to allow theft as a lesser-included offense of burglary when theft was established by the evidence at trial. *See also supra* text accompanying notes 60-63 for a discussion of the related offense approach as being underinclusive as well as overinclusive.

vamen of burglary is not the theft.[137] It is the breaking and entering. Even though the offenses of burglary and theft are placed in the same chapter of the criminal code, offenses against property, it can be persuasively argued that the nature of the property protected, real property instead of personal property, is sufficiently different to distinguish between the societal interests at stake.

If the court of appeals had accepted the above analysis, it would have been forced to conclude that its same interest analysis in *Minano* was incorrect, if the *Minano* opinion is properly read as concluding that the offenses of theft and robbery protect the same societal interests. Instead, the *Reynolds* court further confused its same interest analysis by relying on the fact that the offenses of theft and burglary have not merged.[138] It concluded that because separate sentences could be imposed for both crimes, their basic social purpose must be too different to permit the lesser-included offense doctrine to operate.[139] The difficulties in applying the same interest test, which is an integral part of the related offense approach, further highlight the deficiencies of that approach.

In sum, the court of appeals' opinions in *Minano* and its progeny demonstrate that the related offense doctrine is very vague and difficult for appellate courts as well as trial courts to apply. Moreover, even if correctly applied, the doctrine produces undesirable results. The related offense approach often confronts juries with a large number of alternative charges, some of which contain issues that the parties have not litigated. Additionally, the related offense doctrine removes the traditional building block relationship between lesser and greater offenses and allows instructions when offenses have a some-

137. Some courts have concluded that an analysis of the gravamen of the offenses is not relevant in deciding which offenses may be included in the charged offense. In Anderson v. State, 255 So. 2d 550 (Fla. Dist. Ct. App. 1971), the Florida district court noted that breaking and entering with intent to commit grand larceny and breaking and entering with intent to commit wiretapping have the same gravamen — breaking and entering. *Id.* at 555. The court found little factual relationship between the offenses, however, and asserted that introducing evidence of wiretapping in a larceny prosecution would "unjustly prejudice the state." *Id.*

138. *Reynolds,* 706 P.2d at 711.

139. *Id.* This reference to merger is irrelevant to the question of whether a lesser-included offense instruction should be granted. In United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980), the Ninth Circuit argued persuasively that the policies giving rise to the lesser-included offense doctrine and double jeopardy differ sufficiently to justify different results on any given set of facts. "The critical concern located at the core of the Double Jeopardy Clause is that a person should have to stand but once before the power and resources of the state, accused of an offense." *Id.* at 1240 (citing Gresen v. United States, 355 U.S. 184, 187-88 (1957)). The concern of the lesser-included offense doctrine is that the jury should have an alternative to the harsh choice between guilt or innocence if such alternatives are comprehensible to the jury and supported by the evidence.

what attenuated connection. Finally, the doctrine diverts the jury's attention from the original charge and thereby impedes resolution of the primary issue.

B. Recommendation: Adoption of the Evidence Approach

The standard announced by the Alaska Supreme Court in *Minano,* a modified pleadings approach, is unclear and unworkable. Because Alaska now emphasizes simplicity in pleading,[140] indictments have become shorter and more generally drafted.[141] Thus, a pleadings analysis in Alaska would yield results similar to the strict statutory approach — a very restricted list of lesser-included offenses.

The main advantage of the pleadings approach, as recognized by the supreme court in *Elisovsky,*[142] is that it provides defendants with adequate notice of the charges against which they must defend themselves.[143] This advantage can be retained by requiring the pleadings analysis for prosecutors making requests yet allowing a broader standard when defendants make such requests. Alaska has never distinguished between the ability of the prosecutor and the defendant to invoke the doctrine, but the distinction is easily defensible. A defendant's liberty interest suggests the need for significant protection, and the prosecutor is not harmed by appropriately granted lesser-included offense instructions. The prosecutor still is guaranteed full jury consideration of the crime originally charged and is able to fulfill his duty of protecting society if the jury convicts the defendant of a lesser offense that more closely matches the defendant's conduct.

The evidence approach allows more realistic grants of lesser-included offense instructions requested by the defendant because it focuses on the facts of each individual case. The evidence approach thus furthers the underlying policy of lesser-included offense instructions to grant alternatives to juries faced with the harsh choices of guilt or innocence. It does not, however, allow defendants to offer juries a "shopping list of alternatives"[144] which could confuse them and burden the court system. The standard of "necessary inclusion" can be

140. *See* Peterson v. State, 562 P.2d 1350, 1367 (Alaska 1977) (role of indictment to give notice to defendant is viewed less strictly in Alaska because of free availability of grand jury transcripts); *see also* Christian v. State, 513 P.2d 664, 664-67 (Alaska 1973).

141. *See supra* text accompanying notes 41-42.

142. Elisovsky v. State, 592 P.2d 1220, 1226 (Alaska 1979) ("This approach focuses closely on the facts charged in the indictment to determine *whether the defendant had actual notice* of possible lesser included offenses.")(emphasis added).

143. *See supra* note 1 for a discussion of a defendant's constitutional right to notice of the charges against him.

144. People v. Geiger, 35 Cal. 3d 510, 514, 674 P.2d 1303, 1304, 199 Cal. Rptr. 45, 46 (1984).

clearly comprehended and applied by the trial courts and the building block relationship of the two offenses sets a framework for jury analysis.

## VII. CONCLUSION

The Alaska Supreme Court's opinion in *State v. Minano* halted the historical progression of Alaska's lesser-included offense doctrine. The related offense approach rejected by the supreme court contains vague, uncertain criteria of little guidance to trial courts struggling to implement it. Additionally, focusing the jury's attention on the relationship of the interests protected by certain offenses rather than on the factual relationship of the offenses requires the jury to decide issues not litigated by the parties and removes the building block framework that typically highlights areas of factual dispute. The result of instructions on related offenses is more likely to be irrational, inconsistent jury opinions than the deliberate opinions the doctrine was intended to promote.

Along with rejecting the related offense doctrine, the *Minano* court revised the evidence approach being applied by Alaska courts. The modified pleadings approach it articulated is somewhat unclear. The approach does not specify whether all the essential facts of the lesser offense must be specifically pleaded in the indictment for the greater offense or if it is sufficient that such facts are fairly implied from the indictment. Moreover, the modified pleadings approach severely restricts the number of potential lesser-included offenses. No persuasive reason exists for applying it to requests by defendants.

The evidence approach is a better standard for the Alaska courts to apply to lesser-included offense instructions requested by defendants. Because the evidence approach focuses on the facts as established at trial and not on whether such facts happened to be included in the indictment, it results in a closer match between the defendant's illegal conduct and the crime for which he is convicted.

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