The defendant is charged with [ murder in the [first] [second] degree for [intentionally causing the death of another person] [intending to cause serious physical injury or knowing that [his] [her] conduct was substantially certain to cause death or serious physical injury to another person, the defendant caused the death of another person] ] [attempted murder in the first degree]. It is a defense to [this theory of murder in the [first] [second] degree] [attempted murder in the first degree] that the defendant acted in a heat of passion.

If you find that the state has proved the elements of the crime of [ murder in the [first] [second] degree *under that theory* ] [attempted murder in the first degree], you must then decide whether the defendant acted in a heat of passion before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation from the intended victim.

The state has the burden of disproving heat of passion beyond a reasonable doubt. To prove that the defendant did not act in the heat of passion, the state must prove beyond a reasonable doubt one or more of the following elements:

(1) the defendant did not act in a heat of passion; or

(2) the defendant had a reasonable opportunity for [his] [her] passion to cool before using the force that resulted in the death of another person; or

(3) the defendant’s heat of passion did not result from serious provocation by the intended victim.

If you find that the state has not proved beyond a reasonable doubt that the defendant did not act in the heat of passion, then you must find the defendant not guilty of [ murder in the [first] [second] degree ] [attempted murder in the first degree] and find [him] [her] guilty of [manslaughter] [attempted manslaughter].

# **USE NOTE**

This instruction may be given only for prosecutions of first-degree murder under AS 11.41.100(a)(1)(A) (intentionally causing the death of another person) , second-degree murder under AS 11.41.110(a)(1) (causing the death of another person while intending to cause serious physical injury or knowing that defendant’s conduct was substantially certain to cause death or serious physical injury to another person), or attempted murder in the first degree.

This instruction must be followed by Pattern Instruction 11.41.115(a) #2, which defines "passion," "serious provocation," and "intended victim."

For a discussion of what qualified as a heat of passion see *Howell v. State*, 917 P.2d 1202 (Alaska App. 1996); *Ha v. State*, 892 P.2d 184 (Alaska App. 1995); *Hilbish v. State*, 891 P.2d 841, 851-2 (Alaska App. 1995); *LaPierre v. State*, 734 P.2d 997 (Alaska App. 1987)

The defense of heat of passion is also available in prosecutions for attempted murder. *Dandova v. State*, 72 P.3d 325, 332 (Alaska Ct. App. 2003)