, the defendant in this case, has been charged with the crime of theft by failure to make required disposition of funds received or held.

To prove that the defendant committed this crime, the state must prove beyond a reasonable doubt each of the following elements:

(1) the defendant obtained [property from anyone] [personal services from an employee];

(2) the [property was] [services were] obtained [upon an agreement] [subject to a known legal obligation] to make specified payment or other disposition to a third person;

(3) the defendant exercised control over the [property] [services] as defendant's own;

(4) the defendant failed to make the required payment or disposition; [and]

[(5) the value of the [property] [services] was $250 or more.]

[(5) the property was an access device.]

[(5) the value of the [property] [services] was less than $250; and

(6) within the past five years, the defendant has been convicted and sentenced for theft or concealment of merchandise on two or more separate occasions in this or another jurisdiction.]

[It is not a defense that it may be impossible to identify particular property as belonging to the victim at the time of the defendant's failure to make the required payment or disposition.]

[If you find that the defendant was a fiduciary, officer, or employee of a government or financial institution, then you may, but do not have to, infer that:

(1) the defendant exercised control over the [property] [services] as the defendant’s own if [the defendant failed to pay or account upon lawful demand] [an audit revealed a shortage or falsification of accounts]; and

(2) the defendant knew the defendant’s relevant legal obligations.]

# USE NOTE

The following terms are defined in other instructions:

"access device" – 11.81.900(b)

"financial institution" – 11.46.990

"knowingly" – 11.81.900(a)

"obtain" – 11.46.990

"property" – 11.81.900(b)

"services" - 11.81.900(b)

For determination of value, see AS 11.46.980.

The invalidity of impossibility to identify funds as a defense under AS 11.46.210(b) may be a question of law about which the jury need not be informed.

Alaska Statute 11.46.295 provides that for purposes of considering prior convictions in prosecuting certain subsections of the theft or concealment of merchandise statutes, "a conviction for an offense under law or ordinance with similar elements" is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed.

Unless the parties stipulate to prior convictions, the state must prove them as essential elements to the jury. See Morgan v. State, 661 P.2d 1102 (Alaska App. 1983); Wortham v. State, 689 P.2d 1133 (Alaska App. 1984); and Azzarella v. State, 703 P.2d 1182 (Alaska App. 1985).

Bifurcation of the trial to separate issues regarding prior convictions is required unless the trial judge determines that evidence concerning the prior convictions is otherwise relevant and satisfies Evidence Rule 403. Ostlund v. State, 51 P.3d 938 (Alaska App. 2002).

Source note: The last paragraph of this instruction is based on Alaska Evid. R. 303(a) and (b).

Theft in the Third Degree is defined as theft of property worth less than $750 but more than $250 (except for recidivists); however, any value over $250 will suffice. (For recidivists, any value will suffice.) *See* AS 11.81.615.