

# LEGAL SERVICES

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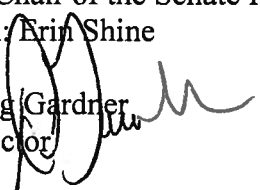
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Juneau, Alaska 99801-1182  
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## MEMORANDUM

March 6, 2015

**SUBJECT:** Non-Applicability Sections in AS 11

**TO:** Senator Anna MacKinnon  
Co-Chair of the Senate Finance Committee  
Attn: Erin Shine

**FROM:** Doug Gardner   
Director

You asked for an expedited memorandum providing examples of other statutes in the criminal code where the legislature has used applicability sections (sometimes referred to as non-applicability sections) regarding statute drafting related to the recent marijuana initiative.

An applicability provision in our criminal law provides notice that the particular criminal statute or statutes referred to *do not apply to certain persons, conduct, or circumstances*. The use by the legislature of an applicability section is significant. An applicability provision differs *substantially* from a justification,<sup>1</sup> a defense,<sup>2</sup> or an affirmative defense<sup>3</sup> as, in my opinion, it affects whether the prosecution can even be brought. It is, in effect, jurisdictional.

Without going into a substantial discussion about the differences between justifications, defenses, or affirmative defenses, the point that I want to convey to you is that applicability sections are used less frequently in the criminal code, and are reserved by the legislature for specific situations where the legislature has made the decision that a case should not be brought against a person based upon the person's status or other special circumstances, and who is otherwise engaging in conduct that would be a crime. Using an applicability section in the context of certain conduct made legal by Ballot Measure Two, provides a jurisdictional bar to an action being brought against a person acting in conformity with the initiative. Accordingly, use of an applicability section in this context should be viewed as the legislature giving the maximum protection to

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<sup>1</sup> See AS 11.81.300 - 11.81.450.

<sup>2</sup> See AS 11.81.900(b)(18).

<sup>3</sup> See AS 11.81.900(b)(2).

persons acting in conformity with the initiative, by providing a jurisdictional bar against criminal prosecution.

An example of an applicability section is AS 11.61.210; misconduct involving weapons in the fourth degree. The italicized and bolded portion of the statute is an applicability section that allows a peace officer to engage in conduct, such as possessing a deadly weapon, typically a firearm on school grounds, even though the officer's conduct would be an offense under AS 11.61.210 but for the applicability section:

Sec. 11.61.210. Misconduct involving weapons in the fourth degree.

(a) A person commits the crime of misconduct involving weapons in the fourth degree if the person

(1) possesses on the person, or in the interior of a vehicle in which the person is present, a firearm when the person's physical or mental condition is impaired as a result of the introduction of an intoxicating liquor or a controlled substance into the person's body in circumstances other than described in AS 11.61.200(a)(7);

(2) discharges a firearm from, on, or across a highway;

(3) discharges a firearm with reckless disregard for a risk of damage to property or a risk of physical injury to a person under circumstances other than those described in AS 11.61.195(a)(3)(A);

(4) manufactures, possesses, transports, sells, or transfers metal knuckles;

(5) sells or transfers a switchblade or a gravity knife to a person under 18 years of age without the prior written consent of the person's parent or guardian;

(6) knowingly sells a firearm or a defensive weapon to a person under 18 years of age;

(7) other than a preschool, elementary, junior high, or secondary school student, knowingly possesses a deadly weapon or a defensive weapon, without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer, within the buildings of, on the grounds of, or on the school parking lot of a public or private preschool, elementary, junior high, or secondary school, on a school bus while being transported to or from school or a school-sponsored event, or while participating in a school-sponsored event, except that a person 21 years of age or older may possess

(A) a deadly weapon, other than a loaded firearm, in the trunk of a motor vehicle or encased in a closed container in a motor vehicle;

(B) a defensive weapon;

(C) an unloaded firearm if the person is traversing school premises in a rural area for the purpose of entering public or private land that is open to hunting and the school board with jurisdiction over the school premises has elected to have this exemption apply to the school premises; in this subparagraph, "rural" means a community with a population of

5,500 or less that is not connected by road or rail to Anchorage or Fairbanks or with a population of 1,500 or less that is connected by road or rail to Anchorage or Fairbanks; or

(8) being a preschool, elementary, junior high, or secondary school student, knowingly possesses a deadly weapon or a defensive weapon, within the buildings of, on the grounds of, or on the school parking lot of a public or private preschool, elementary, junior high, or secondary school, on a school bus while being transported to or from school or a school-sponsored event, or while participating in a school-sponsored event, except that a student may possess a deadly weapon, other than a firearm as defined under 18 U.S.C. 921, or a defensive weapon if the student has obtained the prior permission of the chief administrative officer of the school or district or the designee of the chief administrative officer for the possession.

(b) ~~{[]Repealed, Sec. 4 ch 63 SLA 1990{[]}~~.

***(c) The provisions of (a)(7) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.***

(d) Misconduct involving weapons in the fourth degree is a class A misdemeanor.

(Emphasis added).

Below are representative examples of the offenses that use the format of non-applicability sections, which make a criminal offense inapplicable to certain persons engaging in conduct that would otherwise constitute an offense:

- AS 11.41.180 (homicide of an unborn child; offenses not applicable to acts of a physician performing lawful abortion);
- AS 11.56.825 and 11.56.830 (impersonating a public servant; offenses not applicable to a law enforcement officer acting in the scope of duty);
- AS 11.61.123 and 11.61.127 (indecent viewing or photography and possession of child pornography; offenses not applicable to a law enforcement officer acting in scope of duty);
- AS 11.61.140 (cruelty to animals; offense does not apply to generally accepted dog mushing practices);
- AS 11.61.200 and 11.61.210 (misconduct weapons offenses; offenses do not apply to certain persons previously convicted of a felony who have been unconditionally discharged for 10 years, and law enforcement officers).

Please advise if you have questions.

DDG:lnd  
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