

SB

511

(9)

COMMITTEE REPORT

HOUSE

4/24/80

FURTHER: FINANCE

Date: _____

Mr. Speaker:

The Committee on JUDICIARY has had CSSB 511am

"An Act relating to the criminal laws of the state; and providing for an effective date."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

**MEMBERS SIGNING
DO PASS**

P. R. E. H. H. H. - D.P.

George Martin

Nels A. Anderson

**MEMBERS HAVING
OTHER RECOMMENDATIONS:**

Robert G. O'Brien

Carl ...

CHAIRMAN

Rep. Malone
(pls. bring this
with you - to
Judiciary on
Fri. May 16)

COMMENTARY AND SECTIONAL ANALYSIS
FOR THE 1980 AMENDMENTS TO
ALASKA'S REVISED CRIMINAL CODE

Thanks!
Sandra)

Committee Substitute for Senate Bill 511

SENATE JUDICIARY COMMITTEE

Senator Robert H. Ziegler, Sr., Chairman

Senator M. E. Dankworth, Vice Chairman

Senator Don Eennett

Senator H. D. Meland

Senator Bill Ray

If you have any questions about any of
the sections, please give me a call at
465-3429.

Larry Stern



INTRODUCTION

In 1978 the Alaska Legislature enacted a comprehensive revision of the state's criminal law. (Ch. 166 SLA 1978). The bill adopting the revised criminal code provided for an eighteen month delayed effective date and became law on January 1, 1980.

During this eighteen month period the code was reviewed in conjunction with a comprehensive training program to identify possible problem areas so that any necessary corrective amendments could be made during the 1980 legislative session. CSSB 511 contains a total of 40 amendments. Three categories of amendments are included.

The overwhelming majority of the amendments in the bill clarify particular provisions to more adequately reflect legislative intent. Included in this category are sections that correct drafting errors and oversights.

The second category includes two amendments, one to the homicide statutes and one to the assault statutes, which are designed to conform code provisions with decisions of the Supreme Court of Alaska announced simultaneously with or since adoption of the code.

The third category includes amendments which make substantive changes in the law. These amendments have been kept to a minimum and have only been made when particularly compelling reasons exist for the amendment.

The following material is a section by section analysis of the bill including a discussion of the effect of each amendment and why it is necessary. The analysis is organized in accordance with each chapter and article set out in the revised criminal code. Where no amendment has been made with respect to a particular chapter or article, a notation to that effect is included.

CHAPTER 16. PARTIES TO CRIME

No amendment proposed.

CHAPTER 31. ATTEMPT AND SOLICITATION

Section 1. AS 11.31.100. Attempt.

Section 2. AS 11.31.110. Solicitation.

Section 1 and section 2 of the bill contain identical amendments which provide that the Code's general attempt and solicitation statutes are to apply to unclassified crimes defined outside Title 11. Through an oversight, the Code's present attempt and solicitation statutes now only apply to crimes defined in Title 11 and classified crimes defined outside Title 11.

The amendments provide that the maximum penalty for an attempt or solicitation to commit a crime outside Title 11 will ordinarily be one-half the maximum punishment for the crime that is attempted or solicited. This penalty structure is identical to the punishment provided for attempts under the repealed attempt statute, AS 11.05.020.

CHAPTER 41. OFFENSES AGAINST THE PERSON

ARTICLE 1. HOMICIDE

Section 3. AS 11.41.115. Defenses to Murder.

This section constitutes a conforming amendment to subsection (e) of AS 11.41.115 and is discussed in conjunction with Section 40 of the bill which repeals AS 11.41.115(d).

ARTICLE 2. ASSAULT AND RECKLESS ENDANGERMENT.

Section 4. AS 11.41.210. Assault in the Second Degree.

This amendment makes two changes to the Assault in the Second Degree statute in order to conform those sections pertaining to assaults with a dangerous instrument to conduct included under the former law. Amended paragraph (1) covers the situation when a person intentionally causes physical injury by means of a dangerous instrument. Under the old law this conduct was the felony crime of Assault with a Dangerous Weapon, a felony. Under the new code, however, this conduct would only be included under Assault in the Third Degree, a misdemeanor, absent the presence of an intent to cause serious physical injury. The amendment closes this obvious gap in coverage.

The amendment also provides that Assault in the Second Degree under new paragraph (3) can be committed "recklessly", "knowingly" and "intentionally" (See AS 11.81.610(c)) instead of only "intentionally". The effect of this amendment is to restore what is commonly referred to as "ADW" (Assault with a Dangerous Weapon) to a general intent crime from a specific intent crime.

Providing specifically that an assault with a dangerous instrument is a general intent crime is consistent with Menard v. State, 578 F.2d 996 (Alaska 1978), a decision published by the Supreme Court during the final days of the legislature's consideration of the Code. In Menard, the court held that a "jury did not have to find any specific intent to do any particular kind or degree of harm to the victim in order to find [the defendant] guilty of assault with a dangerous weapon." Id. at 970. With the addition of the word "recklessly" the Code provision is consistent with the court's prior interpretation of the repealed "ADW" statute in Menard and would restore "ADW" to a general intent crime.

Section 5. AS 11.41.230(a)(1). Assault in the Third Degree.

Because of the general rule regarding proof of higher forms of culpable mental states in AS 11.81.610(c) (proof of a higher form of culpability establishes a lower form) this amendment deleting the unnecessary words "intentionally or" has been made.

ARTICLE 3. KIDNAPPING AND RELATED OFFENSES.

Section 6. AS 11.41.300(a)(1). Kidnapping

This amendment clarifies that "restraint" (defined in AS 11.41.370(3)) of a victim with intent to commit a

sexual assault is kidnapping. While such conduct is already generally covered under AS 11.41.300(a)(1)(E), it is preferable to specifically prohibit this particularly serious form of conduct in the kidnapping statute.

It should be noted that this amendment would not turn a restraint that was merely incidental to a sexual assault into kidnapping. For example, a defendant who forces a victim who is jogging along a bike path into woods a few feet from the bike path in order to commit a sexual assault has not committed kidnapping. The "restraint" of the victim was too closely related to the sexual assault, both in time and the degree of movement, to qualify as a separate crime. However, if the victim was forced into the defendant's car and then driven a block to a nearby deserted house and sexually assaulted, or sexually assaulted while his accomplice was driving the car, kidnapping has occurred. In this situation the restraint was specifically done to facilitate the commission of the felony and there was significant confinement or movement of the victim beyond that necessary to commit the sexual assault. (See generally Levshakoff v. State, 565 P.2d 504 (Alaska 1977)).

Section 7. AS 11.41.410. Sexual Assault in the First Degree.

Section 8. AS 11.41.440. Sexual Abuse of a Minor.

Section 7 amends the Sexual Assault in the First Degree statute to provide that causing or inducing a child

under 13 to engage in sexual penetration with another person (regardless of age) is prohibited in the same manner as actually engaging in sexual penetration with the child.

Similarly, section 8 amends the statute on Sexual Abuse of a Minor to cover causing or inducing children under 16 and 13 to engage in acts of sexual penetration and contact, respectively. Also prohibited is causing or inducing a child to engage in conduct described in paragraphs (2)-(6) of the Unlawful Exploitation of a Minor statute (AS 11.41.455(a)), even though no commercial purpose can be established. Paragraph (1) of AS 11.41.455(a), covering sexual penetration, is not included since this conduct has already been covered either in section 7 if the child is under 13, or under paragraphs (1) and (2) of section 8.

ARTICLE 5. ROBBERY.

No amendment proposed.

CHAPTER 46. OFFENSES AGAINST PROPERTY

ARTICLE 1. THEFT AND RELATED OFFENSES

Section 9. AS 11.46.210. Theft By Failure to Make Required
Disposition of Funds Received or Held.

This amendment makes no substantive change in this statute but conforms language in subsection (b) to the

Code's consolidated theft statute. The amendment clarifies that a person who engages in conduct described in AS 11.46.210 is prosecuted for "Theft" under AS 11.46.120-150 and not for "Theft by Failure to Make Required Disposition of Funds Received or Held" (See AS 11.46.110).

Section 10. AS 11.46.220. Concealment of Merchandise.

This amendment makes two changes to the Concealment of Merchandise statute. The first is a technical one and clarifies the intent element in language that more closely parallels the general theft provisions. See AS 11.46.100(1). While the definition of "intent to deprive" (AS 11.46.990(2)) is broad enough to include conduct included within the definition of "intent to appropriate" (AS 11.46.990(1)), it is preferable to closely parallel the general language of the theft statutes in the Concealment of Merchandise statute.

The second change is to provide that the concealment of any firearm, regardless of value, is a class C felony. This amendment is intended to conform the Concealment of Merchandise statute with the general theft statutes which provide that the theft of any firearm is a class C felony. See, AS 11.46.130(a)(2).

ARTICLE 2. BURGLARY AND CRIMINAL TRESPASS

Section 11. AS 11.46.320. Criminal Trespass in the First Degree.

This amendment clarifies that a trespass on land with intent to commit a crime is covered specifically as a class A misdemeanor. While this section of the trespass statute was intended by the legislature to only apply to trespasses on land, the term "real property" has traditionally included both land and buildings. (However, note the definition of "premises" in AS 11.81.900(b)(42) which treats "building" and "real property" as distinct categories). To avoid potential overlapping coverage with the Burglary in the Second Degree statute, which specifically covers an unlawful entry into a building with intent to commit a crime, this technical amendment is required.

ARTICLE 3. ARSON, CRIMINAL
MISCHIEF, AND RELATED OFFENSES

Section 12. AS 11.46.482. Criminal Mischief in the Second
Degree.

The legislature adopted an approach to "joyriding" that aggravates the misdemeanor crime to a felony when the vehicle taken was damaged or the owner incurred expenses in an amount of \$500 or more. As drafted, the statute seems to require that either \$500 in damage or \$500 in expenses result. The situation, for example, where the vehicle is damaged in an amount of \$300 and the owner incurs \$300 in rental expense would not appear to be a felony since even though the total loss was in excess of \$500, neither the damages or the expenses exceeded \$500. Although this particular

question was not specifically considered by the legislature in 1978, it would seem consistent with the overall statutory scheme to impose felony penalties under these circumstances. Additionally, this amendment clarifies that strict liability is imposed on the defendant as to the element of causing damage to the car or expenses for the owner and allows the element of damage to be satisfied by any damage to property of another and not only damage to the propelled vehicle. Thus, the defendant who takes a propelled vehicle of another and damages property of another in an amount exceeding \$500 with the vehicle commits a class C felony.

ARTICLE 4. FORGERY AND RELATED OFFENSES

No amendment proposed.

ARTICLE 5. BUSINESS AND COMMERCIAL OFFENSES

Section 13. AS 11.46.600. Scheme to Defraud.

Because of a drafting error, a scheme to obtain \$10,000 from one or more persons was made a class B felony regardless of whether criminal intent was present. This amendment corrects this problem by specifying the applicable intent requirement.

Section 14. AS 11.46.620. Misapplication of Property.

This amendment allows for the possibility of felony prosecution when the value of the property misapplied is \$500 or more. Currently, all cases involving the misapplication of property (usually by a fiduciary) are classified as class A misdemeanors regardless of whether the value of the property misapplied was \$25 or \$25,000. Because of the

possibility of significant pecuniary losses caused by misapplication of property, higher penalties should be authorized.

In providing for felony penalties when the property involved is \$500 or more, the statutory scheme is consistent with the penalty structure applicable to theft offenses.

CHAPTER 51. OFFENSES AGAINST THE FAMILY

Section 15. AS 11.51.130. Contributing to the Delinquency of a Minor.

The Alaska Bar Association Criminal Law Committee has noted that the code's contributing statute is overbroad because of the inclusion of the word "permits". This amendment strikes the word "permits" from paragraphs (1)-(4) of the statute and uses the uniform language "aids, induces, causes or encourages" in describing the acts sufficient to constitute the crime. Former paragraph (2) has been deleted since the conduct described is already covered under paragraph (1). Additionally, a new paragraph (4) has been added which covers aiding, inducing, causing or encouraging a child under 16 to absent himself from the lawful custody of a parent or from school. This conduct was included under the former contributing statute. See, AS 11.40.130 and AS 11.40.150(4). It should be noted, however, that the offense does not occur when the child has "just cause" to be absent from custody.

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 1. BRIBERY AND RELATED OFFENSES

No amendment proposed.

ARTICLE 2. PERJURY AND RELATED OFFENSES

No amendment proposed.

ARTICLE 3. ESCAPE AND RELATED OFFENSES

Section 16. AS 11.56.310. Escape in the Second Degree.

Section 17. AS 11.56.320. Escape in the Third Degree.

Section 18. AS 11.56.330. Escape in the Fourth Degree.

Section 19. AS 11.56.370. Permitting an Escape.

Sections 17 and 18 provide that if a person commits an Unlawful Evasion (failure to return to a correctional facility following temporary leave) and leaves or attempts to leave the state the crime is Escape in the Third Degree, a class C felony and not Escape in the Fourth Degree, a class A misdemeanor. The penalties for escape under the new code were intended to closely parallel the penalties for escape provided in former AS 11.30.095, the escape statute enacted in 1976. Because of an oversight in drafting, the penalty for the conduct described in AS 11.56.320(a)(2) was

reduced from a felony to a misdemeanor. This change is inconsistent with the remainder of the statutory scheme on escape which provides that an unlawful evasion without leaving the state is itself a class A misdemeanor.

Additionally, sections 16-19 replace the words on "a charge of" with the word "for". This amendment is required to make clear that escape and permitting an escape can occur when a person has been arrested for a crime, though not necessarily formally charged with a crime by way of complaint, indictment or information.

ARTICLE 4. OFFENSES RELATING
TO JUDICIAL AND OTHER PROCEEDINGS

No amendment proposed.

ARTICLE 5. OBSTRUCTION OF PUBLIC ADMINISTRATION

No amendment proposed.

CHAPTER 61. OFFENSES AGAINST PUBLIC ORDER

ARTICLE 1. RIOT, DISORDERLY
CONDUCT, AND RELATED OFFENSES

No amendment proposed.

ARTICLE 2. WEAPONS AND EXPLOSIVES

Sections 20 and 21. AS 11.61.210. Misconduct Involving
Weapons in the Second Degree.

Section 20 amendment provides that the standard for determining whether a person's possession of a firearm while intoxicated is unlawful is whether the defendant was "under the influence" and not whether he was "substantially impaired". Section 21 defines the term "substantially impaired" consistent with existing jury instructions. The "substantially impaired" language was included in the Commission's draft of the code because the statute applied to all deadly weapons (such as knives and explosives) and not only to firearms. Because of the expanded range of instruments covered by the statute, it was felt that the test for determining impairment should be made more restrictive. In the legislature the statute was amended to apply only to firearms. However, the standard for determining impairment was not specifically addressed.

The "under the influence" standard is identical to the test under the former statute, AS 11.55.070, and has the benefit of previously accepted jury instructions which define when a person is "under the influence". Additionally, the "substantially impaired" standard is not defined by the code.

Section 22. AS 11.61.220(b)(1). Misconduct Involving Weapons
in the Third Degree.

This amendment clarifies that a defendant has an affirmative defense to the carrying a concealed weapon prohibition of the weapons statute if he is in his dwelling or on land owned or leased by him which is appurtenant to his dwelling. As drafted, the defense applied when the defendant was in his dwelling or on "property" appurtenant to his dwelling. This amendment clarifies the provision consistent with the legislative intent expressed at the time the Code was enacted.

The proposed amendment makes it clear that the defense should only apply to situations where the person is in his back yard or on any other land owned or leased by him directly attached to his dwelling. Additionally, it avoids the possibility that a bar owner or other merchant will claim that possession of a concealed weapon while on business premises attached to his dwelling was authorized by this provision.

CHAPTER 66. OFFENSES AGAINST
PUBLIC HEALTH AND DECENCY

No amendment proposed.

CHAPTER 76. MISCELLANEOUS OFFENSES

No amendments proposed.

CHAPTER 81. GENERAL PROVISIONS

ARTICLE 1. GENERAL PURPOSES

No amendments proposed.

ARTICLE 2. APPLICABILITY OF CRIMINAL STATUTES

No amendments proposed.

ARTICLE 3. CLASSIFICATION OF OFFENSES

No amendments proposed.

ARTICLE 4. GENERAL PRINCIPLES OF JUSTIFICATION

Section 23. AS 11.81.300. Justification: Defense.

Because of the specification of AS 11.81.400(a)(2) as an affirmative defense (discussed in conjunction with sec. 23, infra) this conforming amendment is required.

Section 24. AS 11.81.400. Justification: Use of Force in
Resisting Arrest.

This amendment makes two changes to the statute describing when a person may resist an unlawful arrest. Subsection (c) makes the defense an affirmative one which the defendant must prove by a preponderance of the evidence. The defense provided for is one that should be appropriately made an affirmative defense consistent with other provisions of the code because it exists only as a matter of legislative policy and involves a matter that is subjectively in the possession of the defendant. Additionally, because this defense expands the current rule of law with respect to the circumstances when resistance is allowed, shifting the burden of proof on the issue is clearly permissible.

Subsection (d) provides that the issue of whether there was probable cause to arrest is a question of law that is to be determined by the court. While the current provision would undoubtedly be interpreted to include this provision consistent with other similar provisions in the criminal law, it is preferable to specifically set out this procedure.

ARTICLE 5. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

Section 25. AS 11.81.600. General Requirements of Culpability.

This amendment makes two changes regarding the

code's general rules on culpability. The first is to clarify the general rule concerning culpability and to make clear that, with certain specified exceptions, a culpable mental state must be proven for every crime. For example, to commit Burglary in the Second Degree the state must establish that the defendant entered or remained unlawfully in a building with intent to commit a crime. The culpable mental state in this case is the intent to commit a crime. If the state establishes a voluntary act by the defendant in entering or remaining in a building, and in addition shows he acted with the intent to commit a crime, the crime of Burglary in the Second Degree has been established.

The second change provides that culpability need not be established if a legislative intent to dispense with the culpability requirement appears. While the decision to eliminate the culpable mental state requirement must comport with constitutional due process guarantees, the courts should be specifically authorized to consider the legislature's intent (and most importantly, the commentary accompanying passage of the code) in determining whether the legislature intended to dispense with the culpability requirement.

Section 26. AS 11.81.620. Effect of Ignorance or Mistake
Upon Liability.

This amendment emphasizes that in order for a

defendant's mistake of fact to constitute a defense to a crime the mistake must be a reasonable one. While the reasonableness requirement is probably already included in this statute, this amendment is desirable to avoid potential litigation in the area.

ARTICLE 6. DEFINITIONS

Section 27. AS 11.81.900(b)(11). Definition of "dangerous instrument."

This amendment is required in order to make it specifically clear that all "deadly weapons" (including unloaded firearms) are "dangerous instruments" consistent with the legislative intent expressed with enactment of the code.

Section 28. AS 11.81.900(b)(12), Definition of "deadly force".

During the legislature's consideration of the justifiable use of force, the issue whether deadly force could be threatened in situations when its actual use would be improper was frequently discussed. Because of the possibility that such threats could tragically escalate a conflict, the legislature concluded that only peace officers making an arrest should have the authority to threaten deadly force in situations where the actual use of deadly force was not justified. See AS 11.81.370.

While making this specific change in AS 11.81.370 no corresponding change was made in the definition of "deadly force". While it can be argued that because of the express inclusion in AS 11.81.370 of the phrase "a peace officer may use nondeadly force and may threaten to use deadly force" nondeadly force does not include a threat of deadly force, the definition of deadly force appears to provide otherwise. This amendment provides that pointing a firearm in the direction of another person as well as intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument constitutes deadly force.

Section 29. AS 11.81.900(b)(21). Definition of "Firearm".

This amendment is included to correct a potential drafting oversight and clarifies that an inoperable firearm is included within the definition of firearm. While it would seem to be the case that inoperable firearms are already included within paragraph (B) of the current definition of firearm ("any weapon, whether loaded or unloaded, designed for discharging a shot capable of causing death or serious physical injury"), it is preferable to specifically state that inoperable firearms are included in order to avoid unnecessary issues being raised during trials.

Section 30 . AS 11.81.900(b)(49). Definition of "Serious
Physical Injury".

This amendment provides that serious injury to a body member as well as a body organ will specifically qualify as serious physical injury. This amendment is identical to the definition of "great bodily injury" appearing in the former aggravated assault statute, AS 11.15.225, which was enacted in 1976 and which the legislature intended to parallel in the definition of "serious physical injury". However, because of a drafting oversight, the word body member did not appear in the definition of "serious physical injury".

Section 31 . AS 12.25.180. When Peace Officer has Option to Take
Person Before Judge or Magistrate.

Though the criminal code provided for noncriminal offenses called violations (e.g., littering) it did not provide a specific enforcement mechanism for dealing with a suspect who has committed a violation. This amendment authorizes the use of citations and provides that a peace officer will ordinarily issue a suspect a citation for a violation consistent with the provisions in existing AS 12.25.190 -- AS 12.25.220. However, if the suspect refuses to identify himself or refuses to accept the citation, authority is given to the officer to bring the suspect directly before a judge or magistrate.

Section 32. AS 12. 30.025. Release in Cases Involving Domestic Violence.

This section of the bill adds a new provision to the bail statutes applicable to cases involving domestic violence. It is intended to emphasize to the court that in cases involving domestic violence certain conditions for release on a person's own recognizance, or conditions for release on bail, should be considered and applied as the court considers appropriate.

Section 33. AS 12.30.040. Release After Conviction.

This amendment makes conforming amendments in the statute prohibiting bail upon conviction for four specified crimes. The names of the four crimes have been changed to reflect the corresponding new names for the crimes under the Code.

Section 34. AS 12.55.015. Authorized Sentences.

AS 12.55.015(b) lists three circumstances when a judge is required to impose imprisonment in situations where a nonincarcerative alternative is not otherwise precluded. Because the presumptive sentencing scheme will usually require the imposition of some period of imprisonment for repeat felons, absent mitigating factors or extraordinary circumstances, this section is of particular importance in the sentencing of misdemeanants and first time felons.

The amendment changes paragraph (3) to more narrowly define the circumstances when imprisonment is required. The amendment addresses the specific concerns expressed by the Advisory Committee on Minority Judicial Sentencing Practices and eliminates the possibility that imprisonment will be required whenever a court on a single occasion in the past has imposed a sentence of lesser severity on the defendant. The amendment additionally conforms this provision to the underlying legislative intent that accompanied enactment of presumptive sentencing.

Section 35. AS 12.55.045. Restitution.

As presently drafted, the code requires that before a court may order restitution the victim of the crime must be notified. Several judges have criticized this provision as unduly burdensome since in many cases the location of the victim will not be known by the court. This amendment eliminates the necessity of notifying the victim every time restitution is ordered. While notification will occur as a matter of course in most cases, the failure to provide notification should not prevent the court from imposing a sentence of restitution.

Section 36. AS 12.55.155(c)(8). Modification of Aggravating Factor.

In response to a further suggestion by the Advisory Committee on Minority Judicial Sentencing Practices, this amendment more narrowly describes the aggravating factor that the defendant has a prior criminal history of assaultive behavior, including misdemeanor convictions.

Section 37. AS 12.55.155(c). Aggravating Factors Added.

This amendment adds four aggravating factors that a judge may consider in imposing a presumptive sentence. The first treats the presence of three or more prior felony convictions as an aggravating factor. This amendment is required since the Code recognizes that two or more prior felony convictions will place the defendant in the most serious category for purposes of presumptive sentencing. However, no provision specifically allows the judge to consider the fact that the defendant may have, for example, six prior felonies as opposed to only two. This amendment allows the judge to consider prior felonies beyond those necessary to place the defendant in the most serious category of presumptive sentencing as an aggravating factor.

The second and third additional factors are intended to be applicable in the sentencing of "white-collar" criminals. These include the fact that the defendant intended to obtain substantial gain under circumstances where the risk of prosecution and subsequent punishment were minimal and the fact that a defendant's crime was part of a continuing series of offenses in furtherance of an illegal business from which the defendant derives substantial income.

The fourth additional aggravating factor is applicable to crimes involving domestic violence. Its scope is restricted to crimes against the person (AS 11.41) directed against

a spouse, a former spouse or a member of the social unit comprised of those living together in the same dwelling as the defendant. Its addition reflects a legislative determination that crimes against the person involving domestic violence represent one of the more serious criminal justice problems in Alaska.

Section 38. AS 12.55.155(d). Mitigating Factor Added.

This section adds an additional factor that can be used to reduce a presumptive sentence. This mitigating factor allows the judge to consider that the aggregate harm caused by the defendant's criminal conduct, including his prior offenses, was consistently minor and inconsistent with a substantial period or imprisonment. One situation where this factor might be applicable is when the defendant has committed a number of felony property offenses, such as check forgeries, but they all involve relatively small amounts of money. This amendment is also proposed in response to the suggestions and recommendations of the Advisory Committee on Minority Judicial Sentencing Practices.

Section 39. AS 12.80.040. Violations and Infractions.

This amendment should be considered in conjunction with section 30 of the bill discussed supra. It allows peace officers to arrest a person for a violation or an infraction if the person refuses to identify himself or to accept a citation.

Section 40 . AS 28.35.135(a). Conforming Amendment to Motor
Vehicle Law.

AS 28.35.135(a) deals with false statements on forms required under Title 28. The penalty for this conduct has been classified as unsworn falsification, rather than perjury, since the statements referred to under AS 28.35.135(a) will include statements not made under oath.

Section 41. Repeal of AS 11.41.115(d), and 11.81.610(a).

This amendment repeals two provisions in the criminal code. The first is AS 11.41.115(d) which provides that an unreasonable but honest belief as to the circumstances giving rise to a defense of justification (e.g., self-defense) will mitigate what would otherwise be murder to manslaughter. This section was not recommended by the Criminal Code Revision Commission but was added by the legislature subsequent to a discussion during committee consideration that it correctly stated the applicable law in Alaska.

In a recent decision, Houston v. State, _____ P.2d _____, Op. No. 1970 (Nov. 16, 1979) the Alaska Supreme Court noted that the law in effect in Alaska at the time did not recognize the defense of unreasonable belief as to justification. The effect of the repeal of AS 11.41.115(d) is to make the

Code consistent with the law that existed prior to January 1, 1980 and to provide that only reasonable beliefs as to the right of justification will excuse what would otherwise be a murder. Note also that a conforming amendment has also been made in sec. 3 of the bill reflecting the elimination of AS 11.41.115(d).

The second amendment repeals AS 11.81.610 (a) which provides that the use of one culpable mental state in a statute rebutably presumes that the mental state applies to all elements of the crime. This rule is inappropriately broad and ignores the fact that, by definition, particular mental states only apply to particular elements of a crime. For example, "intentionally" only applies to elements of crimes that can be classified as "results" as opposed to "circumstances" or "conduct" to which the culpable mental "knowingly" applies. Because of the requirement set forth in Section 24 that ordinarily only one culpable mental state is required to be established for each crime, this section is superfluous and misleading.

C O D E R E V I S I O N

C O M M I S S I O N

SUPPLEMENT

TO

COMMISSION TRANSMITTAL STATEMENT AND
TENTATIVE DRAFT OF APRIL 18, 1979 ON TITLE 4 --
ALCOHOLIC BEVERAGES

- I. Sectional Cross-Reference Table
- II. Substantive Comparison of Revision with Present Law
- III. Policy Considerations for Legislature

I. SECTIONAL CROSS-REFERENCE TABLE

The following table provides a cross-reference from the sections of the tentative draft to the appropriate section numbers of AS 4, to facilitate a detailed comparison of the draft revision and the current law. (While the cross-referenced provisions relate as to subject matter, they should not be assumed to be identical in either scope or content.)

<u>Draft Revision</u>	<u>Alaska Statutes</u>
04.06.010 -----	04.05.010(a)
04.06.020 - 04.06.030 -----	New
04.06.040 -----	04.05.010(a)
04.06.050 -----	04.05.030(a), (b), (d), (e) and (f); 04.05.010(b)
04.06.060 -----	04.05.010(b); 04.15.030(b); 04.10.030; 04.05.050
04.06.070 -----	04.05.040
04.11.010 -----	04.10.010
04.11.020 -----	04.10.180
04.11.030 -----	04.10.170
04.11.040 -----	04.10.160; 04.10.230; 04.15. 020(e); 04.10.390
04.11.050 -----	04.10.210; 04.10.260; 04.10. 430(c)
04.11.060 -----	04.10.200
04.11.070 -----	04.10.270 - 04.10.280
04.11.080 -----	04.10.270; 04.10.300
04.11.090 -----	New
04.11.100 -----	04.10.440; 04.10.310
04.11.110 - 04.11.120 -----	New
04.11.130 -----	04.10.370
04.11.140 -----	04.10.020; 04.10.040; 04.10. 130; 04.10.410; 04.10.145 - 04.10.146
04.11.145* -----	04.10.140
04.11.150 -----	04.10.139
04.11.160 -----	04.10.320
04.11.170** -----	04.10.450; 04.10.040 - 04.10. 130; 04.10.145 - 04.10.146; 04.10.340
04.11.175* -----	04.10.450; 04.10.140
04.11.180 -----	04.10.280
04.11.190 -----	04.10.190; 04.10.330(b); 04. 10.420; 04.10.360
04.11.200 -----	04.10.190; 04.10.360
04.11.210 -----	04.10.360
04.11.220 -----	04.05.030(c); 04.10.300(a)
04.11.230 -----	04.10.350
04.11.240 -----	04.10.240; 04.10.220
04.11.250 -----	04.15.020(b); 04.15.100(b)

* See also the Alaska Administrative Code, at 15 AAC 20.220 - 15 AAC 20.250.

** See also 15 AAC 20.240 - 15 AAC 20.250.

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04.14.010 -----	04.10.430(a) - (c); 04.05.060
04.14.020 -----	04.10.430(d)
04.14.030 -----	04.10.300(b)
04.14.040 -----	04.15.110
04.14.050 - 04.14.060 -----	New
04.16.010 -----	04.10.290; 04.15.020(f)
04.16.020 -----	04.15.010
04.16.030 -----	04.15.020(c) and (g)
04.16.040 -----	04.15.020(a)
04.16.050 -----	04.15.020(a)
04.16.060 -----	04.15.020(a), (d) and (h); 04.15.060(e)
04.16.070 -----	04.15.080
04.16.080 -----	04.15.060
04.16.090 -----	04.15.065
04.16.100 -----	New
04.16.110 [100] -----	04.15.030
04.16.120 [110] -----	04.15.035
04.16.130 [110] -----	04.15.050
04.16.140 [120] -----	04.15.040
04.85.010 -----	04.15.070
04.85.020 -----	04.10.450
04.90.010 -----	04.15.100
04.90.020 -----	04.10.380
04.90.030 -----	New
04.90.040 -----	04.20.010; 04.15.050; 04.10.145; 04.10.300(f)
Deleted -----	04.10.150; 04.15.085; 04.15.090

II. SUBSTANTIVE COMPARISON OF REVISION WITH PRESENT LAW
(References are to chapter, article and section
headings appearing in the draft revision)

CHAPTER 6. ALCOHOLIC BEVERAGE CONTROL
AND DIRECTOR.

The ABC board is placed within the Department of Commerce and Economic Development, which now exercises administrative responsibility for some twenty-one regulatory bodies, rather than in the Department of Revenue as under present law. Commerce would seem the more appropriate administrative location, given the function of the board as a regulatory body.

Standard provisions for filling board vacancies and authorizing board per diem and travel are set out, in addition to provisions authorizing the board to elect officers and adopt rules for conduct of its business. A specific requirement provides for individual members' votes on motions before the board to be reflected in board minutes (Sec. 04.06.040(c)).

The board's present composition of five members with two industry representatives is left unchanged from present law, except to require that one member be from the public health and alcoholism treatment field. The board chairman is designated also as an ex-officio member of the Governor's Interdepartmental Coordinating Committee on Alcoholism.

The board's proposed role as an appeals body, to hear appeals on protests of the board director's decisions (a major change noted in the transmittal statement) is initially set out in this article (Sec. 04.06.050(5)). Under current law, the board may exercise initial decision-making authority on all aspects of licensing as well as all other matters of administration under Title 4. The role as appeals body is intended to expedite day-to-day decision making on alcoholic beverage control matters, without impairing rights of parties to board determination of a disputed matter.

Authority to appoint a board director is conferred on the board in the revision, subject to approval by the governor, (as required in art. III, sec. 26 of the state constitution.) Present law gives appointing authority directly to the governor, subject to legislative confirmation. (Under the state supreme court doctrine of Bradner v. Hammond, (553 P.2d 1 (1976)), legislative confirmation of an ABC board director by statute appears impermissible. Confirmation has apparently neither been offered nor required since the court decision, the requirement of current AS 04.05.010(b) notwithstanding).

Except for express authority conferred to regulate the furnishing of alcoholic beverages without charge by a licensee, the list of specific (but not exclusive) subjects with which the board may deal by regulation is streamlined but not intended to be substantively expanded from present law (Sec. 04.05.040).

CHAPTER 11. LICENSING.

ARTICLE 1. RESTRICTIONS.

Substantially the same prohibitions and restrictions on licenses and licensees are continued in this article from present law, with a few refinements:

- exemption of sales of alcoholic beverages under execution from licensing requirements is specifically extended to sales on enforcement of a security agreement, and a notice of intended sale is required to be furnished the ABC director (Sec. 04.11.010(b));
- serving of alcoholic beverages at office parties or other private gatherings where persons attending "chip in" for purchase of beverages is expressly exempt from licensing or special permit requirements, in accordance with the apparent intent of current law (Sec. 04.11.010(c));
- the current law's prohibition of any person's having a direct or indirect financial interest in a licensed business other than the person named on the license is expressly made inapplicable to percentage or graduated lease agreements approved by the ABC board director; these agreements, commonly executed now between licensees and their lessors for licensed premises, are apparently not intended to be prohibited under current law; also, management agreements, under which a license purchaser often manages licensed premises while awaiting approval of the license transfer, are also specifically exempt from the prohibition, and authority of the director is recognized to exempt other persons from the prohibition when necessary on a temporary, transitional basis (Sec. 04.11.020, 04.11.130);
- makes clear that wholesalers who extend inventory or other business credit to a tavern or package store licensee, when credit is limited to 90 days or less, are not taking a financial interest in a retail business (Sec. 04.11.040(b)); The 90 day period takes particular account of the needs of rural licensees, who must order large shipments of alcoholic beverages and presumably finance part of the cost of the shipment from the proceeds of sale of goods shipped.

- surety bonds in the amount of \$2500 required under present law of beverage dispensary licensees are not continued as a requirement; the requirement seems to have little practical significance and apparently has rarely if ever been relied on in enforcement of the control laws;
- references to federal internal revenue strip stamps required on packages sold at wholesale or retail are not continued; the federal requirement may undergo review and the subject is considered most appropriately left to treatment by regulation at the state level.

ARTICLE 2. POPULATION LIMITATIONS, PUBLIC NOTICE, PROTEST AND CONSENT.

The population limitations on licensing (quotas) continue unaltered from present law. In the case of licenses issued outside a city or unified municipality, the revision makes present practice explicit, that is, in computation of population within a five-mile radius of premises proposed to be licensed, the population of the area of a city or unified municipality within the five-mile radius is excluded (Sec. 04.11.050(1)). The source of population figures to be relied on in determining quotas is anticipated under the revision to be established by regulation.

Tourist facility licenses are continued as an exception to quota requirements, but a 10-room minimum guest accommodation is set for a facility to qualify, and, once granted a license, the facility is then included in subsequent quota computations for the particular type of license issued (Sec. 04.11.050(b) - (c)).

The public notice requirements for new license or license transfer applications are continued in the revision as under existing law, with some minor refinements to facilitate administration. The present option under statute to require paid notice of an applicant is applied to license transfers as well as new license applications (Sec. 04.11.060(b)).

The special requirements of present law calling for public consent to new licenses or license transfers in rural areas are continued; again, to facilitate administration, present law requiring consent petitions to be signed by a designated number of adult bona fide residents is changed, so as to require signatures of the same number of qualified voters (Sec. 04.11.100). (The requirements for public consent by petition, it might be noted, apply under both the present law and the revision to the outside-city areas of organized boroughs, as well as to unorganized borough areas outside cities. Their application to outside-city areas of organized boroughs had been challenged in a superior court action in 1977 but were sustained (Trussel v. Brown, Superior Ct., 4th Jud. Dist., No 76-1384, 1977)).

As to protest of license applications, within a municipality the governing body continues to be the vehicle of protest for premises within the municipality (Sec. 04.11.070), but protest may also be made directly by a municipal resident or any other person directly to the ABC board director (Sec. 04.11.080), an option which seems uncertain under present law. Outside a municipality, protest provisions are also broadened to permit protest to the director by any person, and protest is not restricted to persons residing within a certain distance of premises as under present law. The broadened requirement is intended to simplify administration. However, the special requirement of a 1977 law calling for an election in village areas where a protest is made by 35 percent of residents within a certain distance of premises is retained in the revision, and the effect of the election as apparently contemplated under present law is spelled out (namely, the election is on the question of whether the area concerned should go "dry" (Sec. 04.14.030).

The protest provisions of the revision also are intended to clarify and simplify the manner in which protests are made and resolved. A simple informal due process hearing is provided for initially to resolve any protest properly made, whether made by a municipality or individual person (Sec. 04.11.080). The requirement of present law for an initial formal hearing under the state Administrative Procedure Act upon municipal protest is not continued.

Any party to the initial hearing may appeal the director's decision to the ABC board and at that point the more formal APA hearing is accorded the municipality or other party appealing (Sec. 04.11.090). Under present law, only the municipality's right to hearing, i.e., a formal APA hearing, is mandatory upon protest. Hearings on individual person's protests are discretionary with the board.

To further simplify administration, formal application for renewal of licenses is not required in the revision; rather, renewal is automatic upon payment of the license fee and filing of an affidavit relative to any convictions for violations of law by a renewal applicant (Sec. 04.11.230). Nothing in the simplified renewal process precludes a protest or other challenge to a licensee's continuing right to operate, which could be initiated as under present law by a protest, complaint or other facts communicated to the director, and a hearing if disciplinary action is proposed. However, the formal procedure under present law, for renewal applications to be transmitted to local governing bodies and an APA hearing held upon protest of renewal, is not continued.

As under present law, public notice of renewals, such as by public posting or newspaper advertisement, is not required. The 1976 amendment to the current law noted above calling for an election in certain village areas upon objection of 35 percent of residents to licensing is continued in the case of renewals, as an exception to the procedure for automatic renewal.

ARTICLE 3. LICENSE AND
CERTIFICATE TO OPERATE.

The major substantive change in the licensing provisions of the revised draft, as pointed out in the transmittal statement, recognizes the practical distinction between a license as a valuable property right, often representing a large financial investment by its holder, and the privilege to operate a license as a matter to be carefully regulated in the best interests of the state. For this purpose, issuance of a license under the revision is to be accompanied by issuance of a certificate to operate (Sec. 04.11.120).

The certificate to operate in effect takes on the characteristics of a license under current law, as a privilege to operate a business which may be granted, renewed, transferred, suspended or revoked. The license itself is distinguished in the revision as a separate qualified personal property right which may be used as any other property, except that (1) transfer of the license continues subject to application to the ABC board director, to insure that a license transferee is as qualified as a new licensee and that transfer of location also conforms to requirements under the proposed code, and (2) attachment and execution upon licenses is authorized only "to the extent otherwise permitted by law" (Sec. 04.11.110). [The policy of current law exempting liquor licenses from execution (AS 09.35.087) appears to be to prohibit one general creditor from being allowed to place himself in a preferred position over other general creditors of a licensee; see C.Y. Incorporated v. Brown, 547 P.2d 1274 (1978). In a separate measure prepared by the Code Revision Commission and introduced into the current legislature as HB 56, the exemption of present law is continued to protect the license from legal process to collect an unsecured debt (except for bankruptcy proceedings). It does not encompass security interests in licenses created contractually under the state's codification of Article 9 of the Uniform Commercial Code (AS 45.05.690 - 45.05.794) to secure payment or performance of an obligation, and the revision does not bar creation of such security interests in the license as would occur, for example, when a license purchaser executes a written consent to transfer the license to the vendor as security in the event of default on payment of the purchase price. The state supreme court recently held that the right to petition the ABC board for license transfer can qualify as a security interest. See Queen of the North, Inc., v. LeGrue, 582 P.2d 144 (1978).]

With the qualifications noted, the license is intended to be treated as other personal property; the use of the license however, remains subject to regulation under the police powers of the state. As an example of the application of this concept, if a certificate to operate under a license is suspended or revoked, the license can still be the subject of an application for transfer to another party, who then can apply for a certificate to operate a business under the license.

While the distinction between licenses as property and certificates to operate is not traditional in statutes of the states relating to alcoholic beverage control, it is submitted as a practical and equitable means of balancing a licensee's right in the considerable investment

in his license with the state's power of regulating the alcoholic beverage business in the public interest. (The distinction is, moreover, far from novel; parallels might be found, for example, in limited entry permits, which are essentially freely transferable and irrevocable, and regulation of use of the permits through the required fishing license, or even more familiarly, the right to own or dispose of a motor vehicle and the privilege to operate the vehicle.)

Only the holder of a license under the revision may qualify for a certificate to operate. As a technical point, it should be noted that the use of the term "license" in the revision includes certificates to operate, except where the latter term is expressly used in the context of a provision (Sec. 04.11.120(b)). [In this regard, a drafting correction should be noted at page 37, line 16 of the draft; the term "license" should read "licensee's certificate to operate". At page 37, line 18, "license" should read "certificate to operate".] However, interim certificates for a limited time period are authorized in a few cases for transitional purposes, mainly the operation of licensed premises under a management agreement by a license purchaser, or the interim operation of premises of a deceased licensee (Sec. 04.11.130).

ARTICLE 4. CLASSIFICATION OF LICENSES.

The revised article on types of licenses retains and streamlines existing classifications of licenses and clarifies the apparent intent of existing law. In addition, a few limited changes in existing law are made, primarily as follows:

- holders of recreational site licenses are authorized to sell hot-spiced wine at the site of a recreational event, in addition to beer (Sec. 04.11.140(1)(G));
- in-flight catering licenses are authorized for sale of alcoholic beverages to certificated domestic and international air carriers;
- special permits, currently authorized only by regulation under AS 4, are expressly provided for in the proposed statute (Sec. 04.11.140(1)(I) and Sec. 04.11.145); the current special events permit is broadened to authorize sale of wine as well as beer by political and charitable organizations, as well as fraternal, civic or patriotic organizations (Sec. 04.11.145(a));
- community liquor licenses, currently authorizing beverage dispensary and retail package store licenses to first and second class cities, are authorized without the necessity of a local option election prohibiting sale of alcoholic beverages other than by the city or under a tourist facility license. In current administrative interpretation, the two references in AS 4 to community

liquor licenses (namely, AS 04.10.139 and 04.10.430(c)) are apparently construed to require such an election, but the statutes appear also to support the meaning as clarified in the revision. In addition, the restriction of eligibility of cities under current law to cities not having a private beverage dispensary or retail package store license in effect within the municipal boundaries before June 1, 1970 is not retained.

ARTICLE 5. FEES AND TERMS.

No change is made in license and permit fees or duration. As discussed above, licenses for which annual fees are not timely paid are not forfeited as under current law but instead lapse and may be reinstated within a three-year period upon payment of the accrued fees plus a penalty payment.

ARTICLE 6. APPLICATIONS.

Rather than stipulate by statute specific contents of a license application, as under current law, the revision vests the ABC board director with discretion to prescribe contents of an application (Sec. 04.11.190). The current requirement of law that a beverage dispensary or retail package store licensee be a one-year resident is not continued because of its doubtful constitutionality.

The revised article also sets out statutory criteria for determining whether or not a license and operating certificate issuance or transfer is in the best interests of the public (Sec. 04.11.210). Current law, while establishing objective criteria such as quotas for licenses and restrictions on who may hold a license or interest in licensed premises, provides little in the way of policy direction on the more subjective criteria of licensing. The proposed section is intended to define the criteria to provide some degree of specificity on this basic licensing consideration.

ARTICLE 7. RENEWALS, TRANSFERS, SUSPENSIONS, REVOCATIONS.

As discussed above, license and operating certificate renewals are provided for in the revision without the necessity of formal application as if for a new license. The current requirement of law that licenses must be exercised or active for at least 30 days during the year preceding renewal is not retained in the revision (Sec. 04.11.230(d)); the apparent intent of the requirement, to discourage monopolistic practice, is understood to be within the scope of the anti-monopoly provisions of AS 45.52.

The revision alters the requirement of current law that applications for transfers of licenses may not be approved unless all debts and taxes owed by the transferor to a creditor of the business are paid or satisfactory arrangements for payment made; rather, an affidavit of the transferor stating the amount of debts and taxes owed and identifying the creditors is required, and notice is to be provided any creditor or taxing authority of the application and the amount owed (Sec. 04.11.190(c)). While simplifying the transfer process and avoiding an ABC role of debt collecting, the modified requirement is considered an adequate balancing of the licensee's interest in transferring freely with the need for protection of creditors.

As indicated above, suspensions and revocations under the proposed code are intended to apply only to certificates to operate (the license being distinguished as a personal property right). Grounds for certificate suspension and revocation are expressly set forth in the revision (Sec. 04.11.250) and are intended to specify grounds which appear fairly implied but are not stated in current law; they are based in part on current regulations in effect under existing law.

CHAPTER 14. LOCAL OPTION.

The current provision of law authorizing elections on sale of intoxicating liquors within cities, AS 04.10.430, has been completely redrafted to answer a number of questions on meaning and application of the provision as amended over the years (Sec. 04.14.010). The current law implies that at least two questions may be the subject of a local option election, namely, whether the city should be "wet" or "dry", and, if not "dry", whether sale should be permitted only under a community liquor license of the kind authorized first and second class cities under other provisions of current law. This effect is spelled out in the revision.

The current law's prohibiting in case of a "dry" vote, further license issuance in the city "for a period of one year" (AS 04.10.430(a)) seems to be so ambiguous as to intended effect that it is not retained, but the provision under current law for extraterritorial effect of a "dry" vote, so as to prohibit new beverage dispensary or package store licenses within five miles of the city, is continued. Should the option of a community liquor license rather than "dry" status be elected, no extraterritorial effect appears intended under present law or is provided for in the redraft.

Unlike the current law, the exclusion of all licenses within the city having elected the community liquor license option carries no exception for tourist facility licenses and extends to renewals and transfers of existing licenses as well as new licenses (the only category affected under present law), but licenses issued before September 10, 1972 -- the effective date of the current law authorizing local option election for community licenses -- remains unaffected.

Current law calling for a mandatory local option election in a city in which there are no licensed premises before a license may be issued is continued and is intended to prohibit sale under either a permit or license if the majority vote is "dry", the same effect as under current law (Sec. 04.14020)).

The one provision of current law which now has the effect of authorizing local option election on the question of "wet" or "dry" (but not community license) status in unincorporated areas of the state, upon a 35 percent protest of license issuance, renewal or transfer, as noted above, is also retained and the effect of the election expressly spelled out and made consistent with the effect of a "dry" or subsequent "wet" vote within a city (Sec. 04.14.030).

Sales in an area in violation of a "dry" ban continue to be penalized as a misdemeanor (Sec. 04.14.040(a)). (The term "class A misdemeanor" is used in the revision to conform to classifications of penalties taking effect January 1, 1980 under ch. 166 SLA 1978, the criminal code revision.) The revised section makes clear that mail or telephone orders originating from a "dry" area to a package store in an area not prohibiting sale do not per se constitute a violation (Sec. 04.14.040(b)).

Provisions specifically authorizing seizure of conveyances utilized in connection with illegally-sold alcoholic beverages and specifying the conditions of seizure are added to current law (Secs. 04.14.040 - 04.14.060), essentially as they appear in pending proposed alcoholic beverage control legislation introduced at the request of the Governor (HB 219 of the current Legislature).

The local option elections authorized in this article, while obviously principally intended as an alcoholic beverage regulatory means for rural areas, continue in the revision, as under current law, to be applicable within any city of the state, regardless of population or location. A 35 percent petition of municipal voters continues prerequisite to any local option election.

CHAPTER 16. REGULATION OF SALES AND DISTRIBUTION.

ARTICLE 1. OPERATION OF PREMISES.

The present prohibition of law on serving intoxicated persons is changed so as to proscribe serving "visibly intoxicated" persons, largely to facilitate enforcement as a practical matter (Sec. 04.16.050). In addition, the present restriction of law on permitting intoxicated persons to remain on licensed premises is modified so as to permit an intoxicated person to remain in order to avoid unreasonable risk of bodily harm to the person (Sec. 04.16.050).

The present law's restriction on credit sales of alcoholic beverages at retail (AS 04.15.085) is not retained in the revision. In prohibiting sales on credit (i.e., other than by cash or credit card) only to lodgers at a lodging place which has a licensed premises, the present law appears discriminatory and seemingly inconsistent with common practice. (The lifting of the restriction against credit sales in the revision should not be confused with restrictions on credit applicable to licensee selling alcoholic beverages on a wholesale basis under the revision. Credit on inventory to retailers, as indicated above (Sec. 04.11.040(b), is specifically authorized for up to 90 days only).

Another provision of current law not continued in the redraft is the "B-Girl" provision, AS 04.15.090. The existing statute has been held unconstitutional as overbroad discrimination in a 1973 state superior court decision (Dawn v. State, Superior Ct., 4th Jud. Dist., Cr. No. 72-140), and its enforceability in current form seems dubious. An enforceable provision adequate to deal with the problem area and free of constitutional problems is the subject of proposed ABC board regulations currently being promulgated and would seem a feasible subject for treatment by regulation under the revision also. (CSHB 47 am, repealing the current "B-Girl" statute was adopted in the House during the first session of the current Legislature, it might be noted.)

ARTICLE 2. MINORS.

The main revision effort with respect to current Title 4 provisions concerning minors has been to improve the organization of the existing law. A limited number of substantive refinements have been made. One makes clear that consumption of an alcoholic beverage by a person under 19 is unlawful (Sec. 04.16.070(b)). Under present law, the offense is specified only by regulation (15 AAC 20.100(b); the validity of the regulation became the subject of a state supreme court suit, resolved in favor of the state, (Michael v. State of Alaska, 583 P.2d 852 (1978)).

The exemption under present law of parents and others from the prohibition on furnishing to minors is extended to furnishing between spouses and is specifically confined in application to furnishing in nonpublic places. The exemption is qualified so as not to bar prosecution for contributing to the delinquency of a minor if furnishing can be shown to have contributed to the delinquency (Sec. 04.16.070(e)(2)).

The revision clarifies the present law relating to signed statements of persons on licensed premises when their age as 19 or over is questioned to require the signed statement only if adequate identification is not otherwise shown (Sec. 04.16.070(e), the apparent intent of current law. It also provides for treatment of minors as adults if arrested for a violation and specifically authorizes protective custody under AS 47.37.170 as an alternative to arrest in cases where the minor detained is intoxicated or incapacitated by alcohol (Sec. 04.16.100).

ARTICLE 3. DISTRIBUTION.

To the knowledge requirement imputed to licensees under current law, i.e., that the person from whom they purchase alcoholic beverages on a wholesale basis is properly licensed, the revision adds a similar requirement for the person selling on a wholesale basis as to purchasers from him (Sec. 04.16.120).

The article also specifies that shipments of alcoholic beverages into and within the state for sale other than to licensees are contraband, with exceptions for mail and telephone orders, as authorized in the revision at Sec. 04.14.040(b) and other exceptions as determined necessary by board regulation (Sec. 04.16.110). Current law specifically declares to be contraband only shipments into the state for sale other than to a licensee, but application of the concept to such shipments within the state seems implicit in the current law. The present exemption of alcohol used for religious, industrial, pharmaceutical or medical purposes from the provision is continued, in the definitions article of the revision (Sec. 04.90.040(2)).

CHAPTER 85. MISCELLANEOUS PROVISIONS.

The broad grant of authority to municipalities under present law to adopt alcoholic beverage control ordinances consistent with the state law is retained, with an additional requirement that the ordinances not impede implementation of the policy of the state law (Sec. 04.85.010). The additional provision is intended to insure that the statewide policy set forth in the proposed title is paramount to local enactments, which, strictly speaking, may be "consistent with" but not otherwise comport with the state policy.

Not continued in the revision is a provision of current law enacted in 1976, which authorizes in "dry" municipalities ordinances making sale a misdemeanor "whether the sale is made pursuant to license or otherwise" (AS 04.15.070). The revision provides for the phasing out of sale operations upon a "dry" vote; in addition, municipal authority already granted in the section to regulate consistently with state law would seem adequate for making sale in violation of local option a local as well as a state offense.

It might be noted that the exercise of municipal regulatory power by organized boroughs, both under the proposed code and current law, is assumed to be subject to the restrictions under AS 29 on borough acquisition of areawide borough powers and powers exercised by boroughs in the area outside cities only.

[A drafting oversight, omitting present law intended to be included in the revision should be corrected in this chapter of the tentative draft, as follows. At page 37, between lines 3 and 4, insert:

"Sec. 04.85.020. REFUNDS TO MUNICIPALITIES. The amount of license fees, excluding wholesale license fees, collected under AS 04.11.170 within a city, borough area outside a city, or unified municipality shall be refunded semi-annually to the city, borough

or unified municipality. However, if the director determines the local government fails to exercise its power to enforce actively federal and state laws and regulations and local ordinances governing the manufacture, barter, sale and possession of alcoholic beverages within the municipality, the commissioner or revenue may deny a refund under this section until the director determines enforcement is actively resumed."

The provision derives from AS 04.10.450.]

CHAPTER 90. GENERAL PROVISIONS.

The informal hearing and the appeals procedure for licensing set out earlier in the revision (Sec. 04.11.090) is applied in this chapter to all actions of the director. Under current law, the Administrative Procedure Act governs all proceedings under Title 4 (AS 04.05.030(f)). Summary suspension of the operating authority of premises is expressly authorized for up to seven days, however, without a right of hearing or appeal (Sec. 04.90.020(b)).

The chapter specifically designates ABC enforcement officers as peace officers and indicates their particular powers as enforcement officers (Sec. 04.90.030).

The definitions section of the chapter incorporates the existing Title 4 definition of "alcoholic beverages" with two modifications; first, alcoholic beverages used for religious, industrial, pharmaceutical or medical purposes, as defined by ABC board regulations, are excluded and, second, any nonliquid substance having alcoholic content and intended for human consumption, i.e., "powdered alcohol", is included within the definition (Sec. 04.90.040(2)). With regard to the latter, it is recognized that the question of permitting any use of the relatively new substance, "powdered alcohol", is currently under legislative scrutiny, and the inclusion of this form of alcoholic beverage within the definition is intended only to insure that it is subject to control should it not be prohibited entirely or separately regulated through other legislation.

"Transfers" as used in the proposed code is defined to include both transfers of location and ownership (unless the context of a provision requires otherwise), and in addition, a transfer of ownership is defined to include replacing one named licensee with another or addition to a license of another named licensee; deletion of a named licensee would not itself be regarded as a transfer of ownership, requiring a formal application for transfer (Sec. 04.90.040(21)).

"Municipality" is defined in the chapter to encompass both home rule and general law municipalities (Sec. 04.90.040(12)), an application not expressly stated in the current law but probably effective under current judicial interpretation of the applicability of state statutes to home rule local governments.

[As a technical refinement, at page 69, between lines 15 and 16 of the tentative draft, a definition of "director" as the "board director" should be inserted.]

III. POLICY CONSIDERATIONS FOR THE LEGISLATURE

As indicated in its transmittal statement, the commission has been working towards an essentially technical revision of Title 4, with the primary effort being to improve the organization and content of the current law without altering its underlying policies. Nonetheless, in the course of its research effort described in the transmittal statement, the commission has identified policy areas which it believes the Legislature should give particular attention to in developing and maintaining a modern and effective alcoholic beverage control law.

The commission is not recommending changes in present policies necessarily but rather that the policy concerns be reviewed by the Legislature.

Initially, some fairly specific concerns are briefly outlined, and, then, a fundamental policy concern noted. The specific concerns relate to:

A. Administration

1. Composition of the ABC board, specifically the requirement by law that two of the five board members be selected from the retail alcoholic beverage industry. The state is apparently alone in requiring industry membership. The state's recent "sunset" review of the ABC recommends reduction of required industry membership to one member (see "A Performance Review of the Alcoholic Beverage Control Board", Division of Legislative Audit, State of Alaska, November 3, 1978, p. 8).

2. Board regulatory authority, in terms of the broad statutory discretion conferred on the ABC board to regulate the industry "in the public interest". An alternative approach is to exercise control more by statutory means, with board rulemaking authority limited to designated subjects. Broad regulatory authority, however, is typical of almost all states utilizing boards as the control agency.

B. Licensing

1. The quota system of licensing, in terms of an evaluation of the validity of the traditional reasons advanced for limiting the number of licenses on a population basis, i.e., the encouragement of moderation and high standards of operation through protection from injurious competition. (A commission research report specifically explores this question). An equitable means of phasing out quotas so as not to penalize licensees who

have had to pay substantial prices for their licenses as a direct result of existing quota restrictions should be part of any consideration of eliminating quotas. Whether, under a continued quota system, some license types in addition to tourist facility licenses might be exempt is another concern.

2. Particular license-type considerations, namely, the contemporary relevance of limiting sales to beer and wine under some licenses (e.g., restaurant, pub licenses), prohibiting package goods sales under beverage dispensary licenses, and prohibiting alcoholic beverage sales in grocery outlets, might be evaluated.

3. Municipal participation in the licensing process. There appears to be considerable concern at the local level with the effectiveness of the current law, which limits municipal participation in the licensing process to a right of protest and hearing. Alternatives have been suggested which range from making the municipal recommendation for license approval or disapproval binding upon the state control agency unless arbitrary (at one time the law in the state) to dispensing with municipal participation entirely. Generally, a stronger role in municipal license approval appears to be favored at the local level. The subject appears to be of widespread concern, and legislative reexamination of this aspect of the current law seems especially indicated.

C. Local Option

1. Authorizing local option election choices in addition to the choices under present law, i.e., "wet", "dry" or community license status. In particular, authorizing communities which change from "wet" to "dry" status to further limit the number and types of outlets permitted by quota has been urged (most notably in a formal city council resolution conveyed to the commission; Resolution #250, 1978, Bethel City Council). Other options which have also been proposed are limited and unlimited community licenses (HB 219 of the current Legislature), and election to permit only sales of beer and wine.

2. Authorizing local option elections in unincorporated areas, e.g., outside-city areas of election precincts in the unorganized borough; under current law (retained in the revision), a very limited right of local option outside incorporated areas is authorized within two miles of village boundaries, and then only upon protest of a issuance, renewal or transfer within the village (Sec. 04. ~~14~~. 030(a) discussed above).

3. Authorizing compensation to communities voting "dry" for loss of alcoholic beverage sales tax revenues. A fear of economic loss from prohibiting alcoholic beverage sales appears to be a key and perhaps inappropriate consideration of local option elections under present law.

D. Enforcement

1. Improving the enforcement function. Enforcement of the ABC laws and regulations appears to be a particular problem area under the existing control system, with no immediate solution apparent. It has been proposed that ABC enforcement responsibilities with respect to the 1300 outlets within the state be transferred from the ABC board to a special unit within the Department of Public Safety. This recommendation is made in the "sunset" report noted above (at pp. 15-16 of the report, with a dissenting view of the Department of Revenue set out at pp. 43(a) - 43(c), and comment of the ABC board chairman at pp. 44(a) - 44(b)).

One evident need is coordination of enforcement activities among the ABC and state and local police agencies, an objective which presumably could be at least partially attained through training programs and uniform enforcement procedures. These might be a starting point for legislative examination of policy options to strengthen enforcement efforts.

2. Alcoholic beverage control in rural areas. Of all the concerns presented to the commission in the course of its research, none have been more forcefully and intensely presented than concern for finding methods to control alcohol abuse in rural areas of the state, particularly through control of bootlegging. Stiffer, i.e., felony, penalties for at least aggravated cases of sales of alcoholic beverages in areas where a local option election has made sales illegal, confiscation of vehicles used for bootlegging purposes (express authority for that purpose is conferred in the revision, as noted above) and increased enforcement efforts seem to be the main control techniques advanced to deal with bootlegging.

Additional approaches to control bootlegging, together with other proposals relating to bush area alcohol problems, are offered in HB 219 of the current Legislature. In a research report the commission has organized as a checklist possible policy alternatives coming to its attention on the concern. Without endorsing or recommending particular solutions, attention is called to this obvious policy area needing legislative scrutiny. It should also be noted that the Criminal Justice Center of the University of Alaska has been reviewing the subject of alcoholic beverage control in rural areas of the state and presumably will offer substantive proposals in its project report.

3. Possible specific enforcement aids, particularly:

a. Reducing hours of sale -- There is some evidence within the state that local action to move up tavern and package store closing hours from 5:00 a.m. to 2:00 a.m. weekdays has reduced police problems. Requiring package stores to close shortly before taverns is another alternative of possible practical benefit.

b. Raising minimum drinking ages -- Nationally, several states which initially had lowered drinking ages have recently raised them, partly in response to increases in alcohol-related auto accidents occurring concurrently with the lowered drinking age (whether raising the minimum results in a decrease of the accident rate has apparently not been established).

c. Restricting the advertising of alcoholic beverages -- This is a subject under current review by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, as to the 40-year old regulations covering national advertising of alcoholic beverages, and it is also a subject treated in HB 219 of the current Legislature (with the effect of permitting in-state advertising by manufacturers and wholesalers only). Restricting advertising is a key point of proposals by health and alcoholism officials to discourage excessive consumption.

d. Providing legislatively for rehabilitation of persons convicted of offenses as a result of alcohol problems, as an alternative permitted sentence -- Presently, the threat of jail or a fine precedes a defendant's consent to treatment; direct authority to impose the requirement of treatment, in place of a fine or imprisonment, might be considered. (A provision to this effect exists in the law now, as to rehabilitation of some drug offenders; see AS 17.12.120. It was also proposed as to alcohol-related offenses in SB 551 of the Tenth Legislature).

These approaches, again, are not being recommended but rather special attention is called to them as possible aids, to reduce enforcement problems within the state, which seem to merit further study.

4. Liability or immunity from liability in tort of third persons serving intoxicated persons, a subject under current legislative consideration (CSSB 115 (Rules)).

A number of "scope limitations" on commission policy concerns should be noted here: (1) alcoholic beverage taxation and pricing policies -- such as rates of state and local taxation, and "resale price maintenance" through price posting and price affirmation -- were not included within the scope of the commission's research effort on Title 4 and are thus not referred to as possible policy concerns, (2) in commission deliberations, occasion has not yet been taken to communicate directly with representatives of the wholesale industry, and their concerns thus may not be reflected in the review above, and (3) while the commission is cognizant of the fact that a regulatory board is not the control agency in a number of the 32 "open license" states, (as distinguished from the 18 "control" states having a monopoly, or "state-stores" system of control at the wholesale or retail level), the commission has presumed the state ABC board as the regulatory agency.

Finally, one overriding policy concern remains to be identified:

The relationship of laws restricting access to alcoholic beverages and alcohol-related problems in society. While much attention has been devoted nationally to prevention and treatment of alcoholism and alcohol abuse, surprisingly little in the way of factual data seems to have been formulated nationally on the basic question of whether laws restricting legal access to alcohol help significantly to reduce alcohol-related problems. The basic thrust of a modern state regulatory policy would seem to depend on an assessment of that question.

There appear to be two distinct schools of thought on the subject. One, supported by alcoholism and health authorities, appears to hold that there is a clear relationship between overall alcohol consumption and the level of alcohol problems in society, and that restricting access through legal means is one way to discourage or reduce consumption and thereby lessen alcohol problems.

The rationale of reducing per capita consumption extends not only to direct means of lessening access (such as minimum drinking ages and restrictions on hours and conditions of sale), but also to restrictions on advertising, to maintaining a reasonably constant relationship between the price of alcohol and levels of disposable income (e.g., increasing price according to increase of per capita disposable income), and to other means forming a "constellation" of public policy efforts rendering alcohol a less accepted and significant aspect of our culture. Under this rationale the relevant question in governing alcoholic beverage manufacture and distribution would be whether a proposed regulatory measure would contribute to higher consumption levels and therefore an increase in alcohol-related problems and the costs resulting from them.

The contrary school of thought, supported and encouraged by the industry in large part apparently, holds that liberal or strict alcoholic beverage control laws have little effect on patterns of consumption and that attempts to control access to alcohol through legal means are not effective. Encouraging a healthy attitude towards drinking, that is, moderation, rather than controlling availability, is urged as the appropriate public policy goal.

Perhaps the obvious disagreement on this fundamental question, and the research only beginning now to emerge to resolve it, helps explain the absence of any proposed "model law" of alcoholic beverage control and, as well, the differences in regulatory practices among the states. In any case, the commission has compiled research material from within and outside the state on this

question, as well as other materials. A workbook has been maintained of in-state survey responses (with many specific suggestions), proposed legislation, checklists of policy alternatives, and commission research memoranda. Recorded and indexed commission deliberations have also been maintained, and other information compiled which should be of assistance in any current legislative evaluation of the underlying policy of Title 4. As indicated, the commission views the policy concerns identified in this supplement as the prerogative of the Legislature to decide.

As also indicated in the transmittal statement accompanying its tentative draft of Title 4, while the commission has not yet taken final action, it plans no further action on AS 4 until receiving further direction from the Legislature.

C O D E R E V I S I O N C O M M I S S I O N

TENTATIVE DRAFT OF REVISION OF TITLE 4

(April 18, 1979)

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CODE REVISION COMMISSION

ERRATA SHEET

To accompany tentative draft of revision of Title 4

(submitted April 18, 1979)

<u>Page</u>	<u>Line</u>	<u>Delete</u>	<u>Insert</u>
1	18	"wholesale"	<u>wholesaler</u>
2	15	"lease"	<u>least</u>
4	23	"and"	
5	12	"otherwise"	
6	9	"or"	after "issued": (comma) ,
6	18, 22	"(a)"	(d)
10	26		after "perty": <u>subject to this title</u>
11	5		after "title": <u>excluding sec. 11 of this chapter</u>
22	21		after "010": <u>and AS 04.14.030</u>
22	22	"reinststed"	<u>reinstated</u>
23	24	"or otherwise revoked"	
24	12	"this chapter"	<u>(a) and (b) of this section and sec. 200 of this chapter and AS 04.14</u>
25	1	"and"	
25	7	(period) "."	(semicolon) ;
27	14		after "fee": <u>and irrespective of the type of license he holds</u>
28	28	"order"	<u>orders</u>
30	19	"and certificate to operate"	
31	21		after "except": <u>alcoholic</u>
31	25		after "person.": <u>(b)</u>
31	29	"(b)"	(c)
32	4	"No"	after "(a)": <u>Except as provided in (b) of this section, no</u>
32	25	"deliver"	<u>furnish</u>
33	18	(first) "or"	(comma) ,
33	18, 23		after "serving": <u>or furnishing</u>
35	12	"Sec. 04.16.100"	<u>Sec. 04.16.110</u>
	17	"Sec. 04.16.110"	<u>Sec. 04.16.120</u>
35	23	(semicolon) ";"	(comma) ,
36	4	"Sec. 04.16.110"	<u>Sec. 04.16.130</u>
36	11	"Sec. 04.16.120"	<u>Sec. 04.16.140</u>
36	20	(period) "." following	
		"CHAPTER"	
36	21	"ELECTIONS"	RESTRICTIONS
37	13		add: AS 04.85.010(a)
37	16	"license"	<u>licensee's certificate to operate</u>
37	18, 19, 21	"license"	<u>certificate to operate</u>
37	25	(comma) ","	
38	4		after "section": , <u>and AS 04.11.130(d)(2)</u>
38	5	' license"	
42	3		after "licenses": <u>or permits</u>

STATE OF ALASKA

PUBLIC DEFENDER AGENCY

*copies members
(written original)*

JAY S. HAMMOND, GOVERNOR

716 W. 4th Avenue, Suite 500
Anchorage, Alaska 99501
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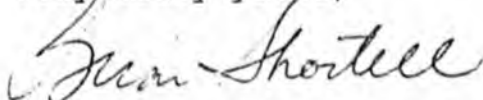
April 25, 1980

Rep. Charles H. Parr,
Chairman
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Representative Parr:

Enclosed are copies of previous correspondence to Senator Robert H. Ziegler regarding Senate Bill 511. As I understand it, this bill has passed the Senate and is now in your committee. As I told Senator Ziegler, I don't want you to think my comments are a comprehensive analysis of the modifications, but I think it important that the Judiciary Committee realize that these proposed revisions are not all just corrections of drafting errors. Some of them pertain to substantive issues and deserve serious policy review by the committee.

Very truly yours,



Brian Shortell,
Public Defender

Enclosure

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

PUBLIC DEFENDER AGENCY

716 W. 4th Avenue, Suite 500
Anchorage, Alaska 99501
Phone: (907) 279-7541 ..

April 14, 1980

Senator Robert H. Ziegler, Sr.
Pouch V
State Capitol
Juneau, AK 99811

Re: SB 511

Dear Senator Ziegler:

I received a copy of SB 511 with a cover letter from Daniel Hickey, Chief Prosecutor, during the month of March. I have looked over the modifications to the new Criminal Code and have some comments to make about them. I hope you will not think that I have examined these provisions exhaustively, but I have circulated them to the various public defender offices around the state and asked for comments. When I receive them, I will certainly pass any relevant criticism or suggestions on to you.

For my own part, I would direct your attention to Section 11.46.220, which makes it a felony to shoplift a firearm. It seems to me that this statute will not do much to protect the public, and it threatens to make felons out of a class who do not need this kind of stigma. Presumably, the intent of the statutory modification is to provide protection for the public by making the penalties for theft of dangerous weapons so stringent that the class of people who might ordinarily shoplift them would be deterred. However, it is my experience that most shoplifters are young and are not the type of people who will pursue a life of crime. They are also frequently fascinated with firearms, not because they want to shoot someone, but because they, like many other Alaskans, are hunting or target practice enthusiasts. Thus, if the statute is modified to make a felony of what has traditionally been a misdemeanor, the class of people the legislature will be penalizing is not one we traditionally think of punishing as felons.

I have some other problems with the concealment of merchandise statute as it would be modified by Section 11.46.220. Addition of the vague phrase, "or with intent to appropriate the merchandise" merely dilutes traditional larceny requirement.

With regard to AS 11.41.440(a), I would ask that the legislature consider carefully the reasons why it would want to add the broad, "aids, induces, causes, or encourages" language to a statute which deals with the problem of sexual abuse of minors in a concise way. I am particularly bothered by the words "aids" and "encourages", which encompass a whole lot of behavior the legislature may not really want to punish by a term of imprisonment of up to five (5) years.

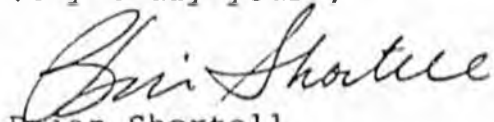
I would also urge deletion of the modifications to AS 11.51.130(b)(3) and (5). I think the reasons are obvious -- these statutory modifications are overbroad and really reach beyond the limits of reasonable criminal statutes.

The same type of criticism as has been made above in regard to other statutes may be applied to the proposed modifications in AS 11.81.620(b). The definition of factual mistake, I submit, does not need the language of reasonableness attached to it. Of course, this modification would give prosecutors more room to argue, but that does not necessarily make it desirable.

My final comment is directed at the proposed change to AS 11.81.900(b)(12). It does seem to be overkill to define the term "deadly force" as encompassing the pointing of a firearm and intentionally placing another person in fear of imminent serious physical injury. I would urge that the definition not be expanded.

I hope you will not take these comments as an exhaustive analysis of the proposed modifications to the criminal code. However, I hope you and the Judiciary Committee will take them into consideration when you decide whether or not SB 511 should pass in its current form.

Very truly yours,



Brian Shortell
Public Defender

BS:mb



Alaska State Legislature

House of Representatives

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

TO: Legislative Affairs Agency

FROM: Margaret W. Berck, Staff

DATE: May 19, 1980

RE: Request for HCS for SB 511.

Please provide the House Judiciary Committee with a CS in final version form that incorporates the Committee's intent as expressed in the attached mark-up.

Original sponsor: Judiciary Committee

Offered: 4/18/80
Referred: Rules

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 511 am

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 ELEVENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the criminal laws of the state; and
7 providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 11.31.100 is amended by adding a new subsection to read:

10 (e) If the crime attempted is an unclassified crime described in a
11 state law which is not part of this title and no provision for punishment
12 of an attempt to commit the crime is specified, the punishment for the
13 attempt is imprisonment for a term of not more than half the maximum
14 period prescribed as punishment for the unclassified crime, or a fine of
15 not more than half the amount of the maximum fine prescribed as punish-
16 ment for the unclassified crime, or both. If the crime attempted is
17 punishable by an indeterminate or life term, the attempt is a class A
18 felony.

19 * Sec. 2. AS 11.31.110 is amended by adding a new subsection to read:

20 (d) If the crime solicited is an unclassified crime described in a
21 state law which is not part of this title and no provision for punishment
22 of a solicitation to commit the crime is specified, the punishment for
23 the solicitation is imprisonment for a term of not more than half the
24 maximum period prescribed as punishment for the unclassified crime, or a
25 fine of not more than half the maximum fine prescribed as punishment for
26 the unclassified crime, or both. If the crime solicited is punishable
27 by an indeterminate or life term, the solicitation is a class A felony.

28 * Sec. 3. AS 11.41.115(e) is amended to read:

29 (e) Nothing in (a) or [,] (b) [, OR (d)] of this section precludes

5
→ sec. 4. AS 11.41.220 is amended by adding a new section to read:

Sec. 11.41.220. ASSAULT IN THE THIRD DEGREE (a) A person commits the crime of assault in the third degree if he recklessly places another person in fear of imminent serious physical injury by means of a dangerous instrument.
(b) Assault in the third degree is a class C felony.

1 a prosecution for or conviction of manslaughter or any other crime not
2 specifically precluded.

3 * Sec. 4. AS 11.41.210(a) is repealed and re-enacted to read:

4 (a) A person commits the crime of assault in the second degree if

5 (1) with intent to cause physical injury to another person,
6 he causes physical injury to any person by means of a dangerous instru-
7 ment;

8 (2) with intent to cause physical injury to another person,
9 he causes serious physical injury to any person; or

10 (3) he recklessly places another person in fear of imminent
11 serious physical injury by means of a dangerous instrument; or

12 (4) he recklessly causes serious physical injury to another
13 person by means of a dangerous instrument.

14 * Sec. 6. AS 11.41.230(~~is~~) is amended to read: - Add insert "A" - (blue page)

15 (1) he INTENTIONALLY OR recklessly causes physical injury
16 to another person;

17 * Sec. 7. AS 11.41.300(a)(1)(C) is amended to read:

18 (C) inflict physical injury upon him or sexually as-
19 sault him or place him or a third person in apprehension that any
20 person will be subjected to serious physical injury or sexual as-
21 sault;

22 * Sec. 8. AS 11.41.410(a)(3) is amended to read:

23 (3) being 16 years of age or older, he engages in sexual
24 penetration with another person under 13 years of age or aids, induces,
25 causes or encourages a person under 13 years of age to engage in sex-
26 ual penetration with another person; or

27 * Sec. 9. AS 11.41.440(a) is amended to read:

28 (a) A person commits the crime of sexual abuse of a minor if,
29 being 16 years of age or older, he [ENGAGES IN]

1 (1) engages in sexual penetration with a person who is under
2 16 years of age but 13 years of age or older or aids, induces, causes
3 or encourages a person under 16 years of age but 13 years of age or
4 older to engage in sexual penetration with another person; [OR]

5 (2) engages in sexual contact with a person who is under 13
6 years of age or aids, induces, causes or encourages a person under
7 13 years of age to engage in sexual contact with another person; or

8 (3) aids, induces, causes or encourages a person who is un-
9 der 16 years of age to engage in conduct described in AS 11.41.455(a)-
10 (2) - (6).

11 * Sec. 10. AS 11.46.210(b) is amended to read:

12 (b) It is not a defense to a prosecution based on theft by fail-
13 ure to make required disposition of funds received or held [UNDER THIS
14 SECTION] that it may be impossible to identify particular property as
15 belonging to the victim at the time of the defendant's failure to make
16 the required payment or disposition.

17 * Sec. 11. AS 11.46.220 is amended to read:

18 Sec. 11.46.220. CONCEALMENT OF MERCHANDISE. (a) A person commits
19 the crime of concealment of merchandise if without authority he know-
20 ingly conceals on or about his person the merchandise of a commercial
21 establishment, not purchased by the person, while still upon the premises
22 of the commercial establishment, with intent to deprive the owner of the
23 merchandise or with intent to appropriate the merchandise.

24 (b) Merchandise found concealed upon or about the person which has
25 not been purchased by the person is prima facie evidence of a knowing
26 concealment.

27 (c) Concealment of merchandise is

28 (1) a class C felony if the merchandise is a firearm or the
29 value of the merchandise is \$500 or more;

1 (2) a class A misdemeanor if the value of the merchandise is
2 \$50 or more but less than \$500;

3 (3) a class B misdemeanor if the value of the merchandise is
4 less than \$50.

5 * Sec. 12. AS 11.46.320(a)(1) is amended to read:

6 (1) on land [REAL PROPERTY] with intent to commit a crime on
7 the land [THAT REAL PROPERTY]; or

8 * Sec. 13. AS 11.46.482(a)(4) is amended to read:

9 (4) he drives, tows away, or takes the propelled vehicle of
10 another and the vehicle or any other property of another is damaged or
11 the owner incurs reasonable expenses as a result of the loss of use of
12 the vehicle in a total amount of \$500 or more [DAMAGES THE VEHICLE IN AN
13 AMOUNT OF \$500 OR MORE OR CAUSES THE OWNER TO INCUR REASONABLE EXPENSES
14 OF \$500 OR MORE AS A RESULT OF THE LOSS OF USE OF THE VEHICLE].

15 * Sec. 14. AS 11.46.600 is repealed and re-enacted to read:

16 Sec. 11.46.600. SCHEME TO DEFRAUD. (a) A person commits the
17 crime of scheme to defraud if he engages in conduct constituting a
18 scheme

19 (1) to defraud five or more persons or to obtain property or
20 services from five or more persons by false or fraudulent pretense, rep-
21 resentation, or promise and obtains property or services in accordance
22 with the scheme; or

23 (2) to defraud one or more persons of \$10,000 or to obtain
24 \$10,000 or more from one or more persons by false or fraudulent pretense,
25 representation, or promise and obtains property or services in accor-
26 dance with the scheme.

27 (b) Scheme to defraud is a class B felony.

28 * Sec. 15. AS 11.46.620(d) is repealed and re-enacted to read:

29 (d) Misapplication of property is

1 (1) a class C felony if the value of the property misapplied
2 is \$500 or more;

3 (2) a class A misdemeanor if the value of the property mis-
4 applied is less than \$500.

5 * Sec. 16. AS 11.51.130(a) is amended to read:

6 (a) A person commits the crime of contributing to the delinquency
7 of a minor if, being 19 years of age or older, he

8 (1) aids, induces, causes, or encourages [PERMITS] a child
9 under 18 years of age to do any act prohibited by state law;

10 (2) [INDUCES, CAUSES, OR PERMITS A CHILD UNDER 18 YEARS OF
11 AGE TO PARTICIPATE IN UNLAWFUL GAMBLING;]

12 (3) aids, induces, causes, or encourages [PERMITS] a child
13 under 18 years of age to enter or remain in a building where the unlawful
14 sale of a drug occurs; or *↳ the same room in*

15 (4) engages in sexual contact with a child under 16 years of
16 age but 13 years of age or older; or

17 (5) aids, induces, causes, or encourages a child under 16
18 years of age to be absent from the custody of a parent, guardian, or cus-
19 todian or from school, without just cause.

20 * Sec. 17. AS 11.56.310(a)(1)(B) is amended to read:

21 (B) official detention for [ON A CHARGE OF] a felony or
22 for extradition; or

23 * Sec. 18. AS 11.56.320 is repealed and re-enacted to read:

24 Sec. 11.56.320. ESCAPE IN THE THIRD DEGREE. (a) A person commits
25 the crime of escape in the third degree if he

26 (1) removes himself from official detention during any lawful
27 movement or activity incident to confinement within a correctional
28 facility for a misdemeanor; or

29 (2) violates AS 11.56.340 or 11.56.350 and leaves or attempts

→ * Sec. 24 AS 11.66.230(a) is amended to read

(a) A person commits the crime of possession of gambling records in the first degree if, with knowledge of its contents or character, he possesses a gambling record ~~used~~ used or intended to be ~~used~~ [OF A KIND COMMONLY] used in the operation or promotion of an unlawful gambling enterprise.

1 to leave the state.

2 (b) Escape in the third degree is a class C felony.

3 * Sec. 19. AS 11.56.330(a) is amended to read:

4 (a) A person commits the crime of escape in the fourth degree if,
5 without lawful authority, he removes himself from official detention for
6 [ON A CHARGE OF] a misdemeanor [OR IF HE VIOLATES AS 11.56.340 OR 11.56.-
7 350 AND LEAVES OR ATTEMPTS TO LEAVE THE STATE].

8 * Sec. 20. AS 11.56.370(a) is amended to read:

9 (a) A public servant who is required by law to have charge of a
10 person arrested for, charged with or convicted of a crime commits the
11 crime of permitting an escape if with criminal negligence he permits a
12 person under official detention to escape.

13 * Sec. 21. AS 11.61.210(a)(1) is amended to read:

14 (1) possesses on his person a firearm while under the in-
15 fluence [HIS PHYSICAL OR MENTAL CONDITION IS SUBSTANTIALLY IMPAIRED AS A
16 RESULT OF THE INTRODUCTION] of an intoxicating liquor or drug [INTO HIS
17 BODY];

18 * Sec. 22. AS 11.61.210 is amended by adding a new subsection to read:

19 (c) For purposes of (a)(1) of this section, a person is under the
20 influence of an intoxicating liquor or drug when, as a result of the
21 introduction of an intoxicating liquor or drug into his body, his physi-
22 cal or mental abilities are impaired so that he no longer has the ability
23 to possess a firearm with the caution characteristic of a sober person
24 of ordinary prudence under the same or similar circumstances.

25 * Sec. 23. AS 11.61.220(b)(1) is amended to read:

26 (1) in his dwelling or on land owned or leased by him [PRO-
27 PERTY] appurtenant to his dwelling; or

28 * Sec. 24. AS 11.81.300 is repealed and re-enacted to read:

29 Sec. 11.81.300. JUSTIFICATION; DEFENSE. Except as otherwise

1 specified in this title, justification as provided in AS 11.81.320 -
2 11.81.430 is a defense.

3 * Sec. ²⁶~~25~~. AS 11.81.400 is amended by adding new subsections to read:

4 (c) The exception in (a)(2) of this section is an affirmative
5 defense to a prosecution for an offense arising out of the use of force
6 in resisting an arrest under the circumstances specified.

7 (d) In this section, "unlawful" means that there was no probable
8 cause to arrest. The issue whether there was probable cause to arrest,
9 when an affirmative defense is raised under (c) of this section, is a
10 question of law to be established by the court sitting without a jury.

11 * Sec. ²⁷~~28~~. AS 11.81.600(b) is repealed and re-enacted to read:

12 (b) A person is not guilty of an offense unless he acts with a
13 culpable mental state, except that no culpable mental state must be
14 proved

15 (1) if the description of the offense does not specify a cul-
16 pable mental state and the offense is

17 (A) a violation; or

18 (B) designated as one of "strict liability"; or

19 (2) if a legislative intent to dispense with the culpable
20 mental state requirement is present.

21 * Sec. ~~28~~. AS 11.81.620(b) is amended to read:

22 (b) A person is not relieved of criminal liability for conduct
23 because he engages in the conduct under a mistaken belief of fact,
24 unless

25 (1) the factual mistake is a reasonable one that negates the
26 culpable mental state required for the commission of the offense;

27 (2) the provision of law defining the offense or a related
28 provision of law expressly provides that the factual mistake constitutes
29 a defense or exemption; or

→ * Sec. 33. AS 12.25.030(b) is amended to read:

(b) In addition to the authority granted under (a) of this section, a peace officer without a warrant may arrest a person when he has reasonable cause for believing that the person has committed assault in the third degree under AS 11.41.230(a)(1) against a member of the person's household.

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(3) the factual mistake is a reasonable one [OF A KIND] that supports a defense of justification as provided in AS 11.81.320 - 11.81.430.

* Sec. ~~28~~²⁹. AS 11.81.900(b)(11) is amended to read:

(11) "dangerous instrument" means any deadly weapon or anything which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury [, "DANGEROUS INSTRUMENT" INCLUDES "DEADLY WEAPON"];

* Sec. ~~29~~³⁰. AS 11.81.900(b)(12) is amended to read:

(12) "deadly force" means force which the person uses with the intent of causing, or uses under circumstances which he knows create a substantial risk of causing, death or serious physical injury; "deadly force" includes intentionally discharging or pointing a firearm in the direction of another person or in the direction in which another person is believed to be and intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument;

* Sec. ~~30~~³¹. AS 11.81.900(b)(21) is repealed and re-enacted to read:

(21) "firearm" means a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury;

* Sec. ~~31~~³². AS 11.81.900(b)(49) is amended to read:

(49) "serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of a body member or [BODILY] organ, or physical injury which unlawfully terminates a pregnancy;

* Sec. ~~32~~³³. AS 12.25.180 is amended to read:

Sec. 12.25.180. WHEN PEACE OFFICER HAS OPTION TO TAKE PERSON

1 BEFORE JUDGE OR MAGISTRATE. (a) When a person is stopped or contacted
2 by a peace officer for the commission of a misdemeanor [OR AN INFRAC-
3 TION] or the violation of a municipal ordinance, he may, in the discre-
4 tion of the contacting peace officer, be issued a citation instead of
5 being taken before a judge or magistrate under AS 12.25.150, unless

6 (1) the person does not furnish satisfactory evidence of
7 identity;

8 (2) the contacting officer has reasonable and probable cause
9 to believe the person is a danger to himself or others;

10 (3) the crime for which the person is contacted is one invol-
11 ving violence or harm to another person or to property; or

12 (4) the person asks to be taken before a judge or magistrate
13 under AS 12.25.150.

14 (b) When a person is stopped or contacted by a peace officer
15 for the commission of an infraction or a violation, he shall be issued
16 a citation instead of being taken before a judge or magistrate under
17 AS 12.25.150, unless

18 (1) the person does not furnish satisfactory evidence of
19 identity; or

20 (2) the person refuses to accept the citation or to give his
21 written promise to appear as provided for under AS 12.25.190(c).

22 * Sec. 37. AS 12.30 is amended by adding a new section to read:

23 Sec. 12.30.025. RELEASE BEFORE TRIAL IN CASES INVOLVING DOMESTIC
24 VIOLENCE. (a) In determining the conditions of release under AS 12.30.-
25 020 in cases involving domestic violence, the court shall consider the
26 following conditions and impose one or more conditions it considers
27 reasonably necessary to protect the alleged victim of the domestic
28 violence, including ordering the defendant

29 (1) not to subject the victim to further domestic violence;

1 (2) to vacate the home of the victim;
2 (3) not to contact the victim other than through counsel;
3 (4) to engage in personal or family counseling;
4 (5) to refrain from the consumption of alcohol or the use of
5 drugs.

6 (b) As used in this section, "domestic violence" means a crime
7 specified in AS 11.41 committed against a spouse, a former spouse, or a
8 member of the social unit comprised of those living together in the same
9 dwelling as the defendant.

10 * Sec. 35. AS 12.30.040(b) is amended to read:

11 (b) Notwithstanding the provisions of (a) of this section, if the
12 offense a person has been convicted of is murder in the first degree,
13 robbery in the first degree, kidnapping, or sexual assault in the first
14 degree under AS 11.41.410(a)(1) [FIRST DEGREE MURDER, ARMED ROBBERY, KID-
15 NAPPING, OR RAPE (AS DEFINED IN AS 11.15.130)], he may not be released on
16 bail either before sentencing or pending appeal.

17 * Sec. 36. AS 12.55.015(b)(3) is amended to read:

18 (3) sentences [A SENTENCE] of lesser severity have been re-
19 peatedly [HAS BEEN] imposed for substantially similar offenses in the
20 past and have proven ineffective in deterring the defendant from further
21 criminal conduct.

22 * Sec. 37. AS 12.55.045(b) is amended to read:

23 (b) [BEFORE THE COURT MAY SENTENCE A DEFENDANT TO A PROGRAM OF
24 RESTITUTION, THE VICTIM MUST BE GIVEN NOTICE THAT RESTITUTION MAY BE
25 ORDERED.] An order of restitution under this section does not limit any
26 civil liability of the defendant arising from his conduct.

27 * Sec. 38. AS 12.55.155(c)(8) is amended to read:

28 (8) the defendant has a criminal history consisting of prior
29 convictions for offenses, including misdemeanors, that involved aggra-

1 vised or repeated instances of assaultive behavior [ONE OR MORE CONVICTI-
2 TIONS FOR MISDEMEANORS HAVING ASSAULT AS A NECESSARY ELEMENT];

- 3 * Sec. 39. AS 12.55.155(c) is amended by adding new paragraphs to read:
4 (15) the defendant has three or more prior felony convictions;
5 (16) the defendant's criminal conduct was designed to obtain
6 substantial pecuniary gain and the risk of prosecution and punishment
7 for the conduct is slight;
8 (17) the offense was one of a continuing series of criminal
9 offenses committed in furtherance of illegal business activities from
10 which the defendant derives a major portion of his income;
11 (18) the offense was a crime specified in AS 11.41 and was
12 committed against a spouse, a former spouse, or a member of the social
13 unit comprised of those living together in the same dwelling as the
14 defendant.

- 15 * Sec. 40. AS 12.55.155(d) is amended by adding a new paragraph to read:
16 (13) the facts surrounding the commission of the offense and
17 any previous offenses by the defendant establish that the harm caused by
18 the defendant's conduct is consistently minor and inconsistent with the
19 imposition of a substantial period of imprisonment.

- 20 * Sec. 41. AS 12.80 is amended by adding a new section to read:
21 Sec. 12.80.040. VIOLATIONS AND INFRACTIONS. Except as provided in
22 AS 11.81.900(b)(55) and AS 28.35.230(d), all laws of the state relating
23 to misdemeanors apply to violations and infractions, including the powers
24 of peace officers, the jurisdiction of courts and the periods for com-
25 mencing actions and for bringing a case to trial.

- 26 * Sec. 42. AS 28.35.135(a) is amended to read:
27 (a) No person may knowingly make a false affidavit, statement, or
28 representation, or affirm falsely with respect to a matter or fact
29 required to be set out under this title, nor may the person use a name

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other than his true name. A person convicted of violating this section is guilty of unsworn falsification [PERJURY] and is punishable as prescribed by law.

* Sec. 43. AS 11.41.115(d) and AS 11.81.610(a) are repealed.

* Sec. 44. This Act takes effect immediately in accordance with AS 01.10.

070(c).

Insert "A"

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Sec. 11.41.230. ASSAULT IN THE [THIRD] DEGREE. (a) A person commits the crime of assault in the [third] degree if

(1) he [intentionally or] recklessly causes physical injury to another person;

(2) with criminal negligence he causes physical injury to another person by means of a dangerous instrument; or

(3) by words or other conduct he intentionally places another person in fear of imminent physical injury.

(b) Assault in the [third] degree is a class A misdemeanor.

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