SB

511

COMMITTEE REPORT

SENATE

FURTHER:

3/6/80

Date: 4/17/80

Mr. President:

The Committee on JUDICIARY has had SB 511

relating to criminal laws of the state

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 SB 511 [X] same title [ ] new title

and recommends CSSB 511 Do Pass with the Judiciary Committee Amendments

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

60 (Rev. 12/78)

SENATE AMENDMENT

BY The Senate Judiciary Committee

To: Amend SENATE BILL No. CSSB511

To: _____ HOUSE BILL No. _____

PAGE: 10 LINE: 4

after the word "material" add "or the use of drugs."

[illegible] the [illegible] after the word "material"

SENATE AMENDMENT

BY The Senate Judiciary Committee

To: Amend SENATE BILL No. CSSB 511

To: _____ HOUSE BILL No. _____

PAGE: 1 LINE: 4

Delete the period [.] after the word "alcohol"

After the word "alcohol" add " or the use of drugs"

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

POUCH KC – STATE CAPITOL
JUNEAU, ALASKA 99811

March 11, 1980

The Honorable Robert H. Ziegler, Sr.
Chairman, Senate Judiciary Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: Senate Bill 511

Dear Senator Ziegler:

Attached is a copy of the letter which we have sent to judges, bar associations and other interested individuals along with copies of the referenced bill requesting that comments be forwarded to your committee by April 1. I've also attached a copy of the distribution list for the letter. If you notice anyone we may have inadvertently omitted, please let us know.

Also attached are ten copies of a draft commentary for the bill which explains it section by section in much the same way as the original commentary to the code. I've asked Barry to assume responsibility for committee presentations on the bill. I will, of course, be available myself on relatively short notice should you think it advisable. Many thanks for your assistance.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Dan Hickey
Daniel W. Hickey
Chief Prosecutor

DWH:gm

Enclosures

03-C7LH

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

POUCH KC – STATE CAPITOL
JUNEAU, ALASKA 99811

March 7, 1980

SB 511, "An Act relating to the criminal laws of the state" was introduced in the Senate on March 5, 1980, by the Senate Judiciary Committee. The Act makes 39 amendments to the revised criminal code which became effective January 1, 1980. The overwhelming majority of the amendments clear up drafting errors and unintended gaps in coverage in the code which were identified through the training sessions we recently conducted. The number of substantive changes have been kept to a minimum. The bill also reflects suggestions for amendments requested by a number of individual judges and the Advisory Committee on Minority Judicial Sentencing Practices.

Though the bill currently indicates referrals to the Senate State Affairs and Judiciary committees, it is our understanding that the State Affairs referral will be waived and the bill will only be considered in Senate Judiciary. Senator Robert H. Ziegler, Sr. the chairman of the Senate Judiciary Committee, has informed us that he plans to hold hearings on the bill in early April. He has asked us to request that you review the bill and foward any comments you might have about any of its provisions to him at Pouch V, State Capitol, Juneau, Alaska 99811 by April 1.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Daniel W. Hickey
Daniel W. Hickey
Chief Prosecutor

DWH:sl:BJS

03-C7LH

DISTRIBUTION LIST OF SB 511

Alaska Supreme Court Justices
Alaska Superior Court Judges
Alaska District Court Judges
Public Defender Agency
District Attorneys
Alaska Judicial Council
Alaska Bar Association
Anchorage Bar Association
Fairbanks Bar Association
Juneau Bar Association
Kenai Bar Association
Ketchikan Bar Association
Kodiak Bar Association
Nome Bar Association
Sitka Bar Association

DRAFT

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

Senate Bill 511

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. SB 511 contains a total of 39 amendments. Three categories of amendments are included.

The overwhelming majority of the amendments proposed 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 been proposed through this bill only 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 felt to be necessary. The analysis is organized in accordance with each chapter and article set out in the revised criminal code. Where no amendment has been proposed 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 39 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 proposed 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 P.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 additio. of the word "recklessly" the Code provision would be 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 amend 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 particu ar

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.

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. Additionally, a new paragraph (5) has been added which covers aiding, inducing, causing or encouraging a child under 16 to absent himself from the lawful custody of his parents or from school. This conduct was included under the former contributing statute. See, AS 11.40.130 and AS 11.40.130(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

Section 20. AS 11.61.210. Misconduct Involving Weapons in the Second Degree.

This 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". The "substantially impaired" language was included in the Commission's draft of the code because the statute applied to all deadly weapons (such as knifes 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 21. 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. The proposed 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 22. 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 23. 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 24. 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 25. 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 26. 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 27. 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 28. 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 29. 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 30. 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 31. 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 32. 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 33. 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 34. 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 35. AS 12.55.155(c). Aggravating Factors Added.

This amendment adds three 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 proposed 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 futherance of an illegal business from which the defendant derives substantial income.

Section 36. 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 37. 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 38. 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 39. 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.

April 17, 1980

To: All Members of the Senate

From: Senate Judiciary Committee

Re: CSSB 511.

Attached are the explanatory comments relating to CSSB 511 which will probably be scheduled for floor action next week.

As you recall, the new criminal code passed the legislature in 1978, and became effective January 1, 1980.

The committee substitute for SB 511 reflects three categories of changes to the criminal code:

1. Clarifying provisions to reflect more adequately legislative intent and correcting drafting errors and oversights;

2. Conforming the code to decisions of the Supreme Court of Alaska announced simultaneously with or since adoption of the code; and

3. Substantively changing the law. These amendments have been kept to a minimum.

The bill has been approved by various organizations of the criminal justice system and I suggest, if you have any questions prior to floor action, you contact Dan Hickey, Chief Prosecutor, Department of Law, Barry Stern, Assistant Attorney General, Criminal Division, Senator Bill Ray or myself, and we will try to answer them.

Robert H. Ziegler, Sr.,
Chairman

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

POUCH KC – STATE CAPITOL
JUNEAU, ALASKA 99811

April 16, 1980

The Honorable Thomas E. Schulz
Superior Court Judge
First Judicial District
415 Main Street
Ketchikan, Alaska 99901

Re: SB 511 (Criminal Code Amendments)

Dear Judge Schulz:

Senator Ziegler recently provided me with a copy of the letter you sent to him commenting on SB 511. Because the Department of Law has worked closely with Senator Ziegler on this bill, I wanted to take the liberty of briefly responding to the four points raised in your letter.

Your first comment concerned the statute on Misapplication of Property. As you pointed out, the proposed amendment raises the penalty for the crime from a class A misdemeanor to a class C felony when more than $500 is involved. This amendment has been recommended for two reasons. First, some of the conduct covered by the offense was previously treated as embezzlement and was classified as a felony when the amount involved was in excess of $100. Second, the conduct covered by the statute will most frequently involve the misapplication of significant sums of money by fiduciaries such as accountants and lawyers who are required to exercise a high degree of care in their handling of property entrusted to them by others. In reviewing this provision since initial adoption of the code, I have come to believe that it was misclassified. Given the fact that the statute involves fiduciary relationships and potential defendants in whom society places considerable trust, it seems appropriate for it to correspond with the overall approach to theft taken in the code.

Your second comment concerned potential overlapping coverage between the "Contributing" statute and the statute pertaining to Sexual Abuse of a Minor. While the misdemeanor contributing statute prohibits sexual contact by a defendant

19 or older with children between the ages of 13 and 16, the sexual abuse of a minor provision prohibits sexual penetration with children between the ages of 13 and 16 and sexual contact with children under 13. Thus, the statutes are not inconsistent since contributing covers only sexual contact with children between the ages of 13 and 16 while the sexual abuse statute applies to penetration with children within that age group. The overall statutory scheme, however, does tend to be confusing since the sexual abuse statute also applies to acts of sexual contact -- but only with respect to children under 13.

With respect to the proposed deletion of the requirement in the Title 12 provision pertaining to restitution that the court notify a victim before restitution could be ordered, I share your view that ordinarily restitution should not be settled absent consultation with the victim. However, as presently drafted, the code requires that before a court may order restitution the victim must be notified. The amendment was included in the bill at the specific request of a number of Anchorage judges who were afraid that the failure to notify a victim could expose a sentence of restitution to attack on appeal. For example, assume that when a defendant charged with criminal mischief is sentenced the owner of the property is out of the state, cannot be reached and there is no indication in the record that he was consulted concerning whether he wished restitution be ordered. While notification will occur as a matter of course in most cases, a failure or inability to contact the victim should not prevent the court from imposing a sentence involving restitution.

Your final concern involved the proposed addition as an aggravating factor the fact that a defendant has "three or more" prior felony convictions since three felony convictions were required to trigger a presumptive sentence. Actually, the most serious form of presumptive sentence applies when a defendant has two or more prior felony convictions and so this change is appropriate.

As you pointed out in your letter, most of the changes in the bill involved minor housekeeping matters. Many of these are technical points that we identified in putting together the law enforcement training program on the code. I appreciate your taking the time to review the bill and

forward your comments to the Senate Judiciary Committee. If you have any additional questions about the bill, please let me know.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: _____
Daniel W. Hickey
Chief Prosecutor

DWH:gm

cc: The Honorable Robert H. Ziegler, Sr.
Chairman,
Senate Judiciary Committee

Alaska State Legislature
House

JUNEAU, ALASKA

MESSAGE TO THE SENATE DATE May 28, 1980

MR. PRESIDENT:

The House has passed CSSB 511am (criminal laws of the state: eff date) with the following amendment:

HCS CSSB 511 (same title)

and it is transmitted herewith for consideration.

Chief Clerk of the House

BILL ANALYSIS

ASSIGNMENT DATE_____

UNASSIGNED_____

DEPARTMENT	SPONSOR (PRINCIPAL)	BILL NO.
Public Safety		SB 511

DEPARTMENT POSITION

Support

DIVISION DIRECTOR	DATE	COMMISSIONER	DATE
Col. Anderson	3/18/80	bfc for William R. Nix	3/18/80

GOVERNOR'S OFFICE USE

☐ POSITION NOTED ☐ POSITION APPROVED ☐ POSITION DISAPPROVED

BY: DATE:

SUMMARY

(1) RELATED BILLS (SIMILAR OR CONFLICTING)
(2) OTHER AGENCIES AFFECTED BY BILL

(2) a. ORGANIZATIONAL SUPPORT FOR BILL		(2) b. ORGANIZATIONAL OPPOSITION TO BILL

(3) PROGRAM EFFECTS OF BILL

(4) FISCAL IMPACT: ☒ NONE ☐ FISCAL ANALYSIS ATTACHED

(5) AMENDMENTS PROPOSED:

(6) COMMENTS:

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 particuarly 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 desireable.

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

Brian Shortell
Public Defender

BS:mb

HOUSE UNIT TAKES UP CRIMINAL CODE BILL

Heavy Lobbying Is Anticipated As 14-year Effort to Rewrite Law Enters Yet Another Phase

By ROBERT PEAR
Special to The New York Times

WASHINGTON, April 20 — A 14-year effort to rewrite Federal criminal laws will enter a new phase this week as the House Judiciary Committee begins to debate and amend the legislation.

When the panel meets Wednesday, members will have before them a 461-page bill known as the Criminal Code Revision Act of 1980, which was approved last month by the subcommittee on criminal justice. Business and labor groups, prosecutors, defense attorneys and civil libertarians will all be lobbying for or against particular features of the bill, which attempts to rearrange the present hodgepodge of criminal laws into a coherent format.

Parallel legislation, sponsored by Senator Edward M. Kennedy, was approved in December by the Senate Judiciary Committee, of which Mr. Kennedy is chairman.

The Justice Department, having closely followed the evolution of the Senate bill, strongly prefers it over the House version. The American Civil Liberties Union, on the other hand, opposes the Senate bill and prefers the proposal developed by the House subcommittee, whose chairman is Representative Robert F. Drinan, like Mr. Kennedy a Massachusetts Democrat.

Commission Created in 1966

Congress created a commission to propose changes in the criminal laws in 1966, and legislators say that the code appears to have a better chance of passage this year than at any time since then. Other recent efforts to revise the code have failed, in part because of concern about the effect on civil liberties.

The Senate, having approved one version of the criminal code by a vote of 72 to 15 in January 1978, would probably endorse a similar bill this year, according to Senate aides.

Mr. Kennedy has an agreement with Senator Strom Thurmond, the ranking Republican on the Judiciary Committee, to keep the bill free of controversial amendments when it comes up for debate by the full Senate. So lobbyists intend to focus their efforts on the House bill, which differs from the Senate version in several important respects.

The House bill, in a departure from longstanding Federal practice, would permit lawyers to accompany witnesses appearing before a Federal grand jury. The American Bar Association and the Civil Liberties Union favor such a change; the Justice Department vehemently opposes it, saying that lawyers could transform the grand jury sessions into adversary proceedings.

The Senate bill would continue current practice. At present, witnesses appearing before a grand jury may consult their attorneys, but counsel must remain outside the grand jury room.

The House bill would permit a defendant to appeal a sentence on the ground that it is too severe or "clearly unreasonable." The Justice Department wants to have a similar right of appeal when it considers a sentence too lenient. The Senate bill would give both the Government and defendants the right of appeal. Under present law, neither side can appeal except in rare cases.

The Senate bill would abolishe parole. The House bill would retain parole for study and evaluation for five years, after which Congress would decide on changes in the sentencing system. The Justice Department favors the Senate approach, believing that parole adds to inequities and disparities in sentencing.

Supporters of the Senate bill maintain that it would be tougher on white-collar crime than the House version. The Senate measure would create a new crime known as "endangerment" and increase the penalties for violations of health, safety and environmental laws committed in a particularly egregious way — when someone knowingly places another person in "imminent danger of death or serious bodily injury." The Justice Department would like to see this feature of the Senate bill accepted in the House.

Business Objects

Business representatives view this section as the most objectionable in the code. James P. Carty, vice president of the National Association of Manufacturers, said the "endangerment" section "goes way beyond anything we think is necessary." He said that the language was so broad and ambiguous that a corporate officer often would not known whether he was violating it.

A major unresolved question facing the House Judiciary Committee is the extent to which the Federal extortion law should apply to conduct arising from a labor dispute. Unions strongly favor the current situation: As interpreted by the Supreme Court, the law does not apply to the conduct of persons engaged in bona fide strikes that lead to property damage or personal injury.

The Senate bill would allow unions, employees and employers to be prosecuted for extortion in limited circumstances, when, for example, there is "clear proof" that certain acts were intended to cause death or "severe bodily injury."

Massachusetts Townspeople Use A Human Chain to Move Library

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AMENDMENTS MADE BY SENATE JUDICIARY COMMITTEE TO SB 511

(All page references are to CSSB 511)

Criminal Mischief in the Second Degree

Page 4, line 10: Words "or any other property of another" added. Damage to any property of another (not only the vehicle) in an amount of $500 or more as a result of the taking of the vehicle raises the offense to a class C felony.

Contributing to the Delinquency of a Minor

Page 5, lines 10-11: Paragraph (2) deleted since conduct described is already included in paragraph (1).

Page 5, line 18: Words "a parent" replaces "his parents" to make the statute sex-neutral.

Misconduct Involving Weapons in the Second Degree

Page 6, lines 19-24: Definition of "under the influence" added to statute prohibiting possession of firearm while under the influence of intoxicating liquor or drug.

Definition of "Dangerous Instrument"

Page 8, line 5: Word "or" substituted for word "and" in definition of dangerous instrument to correct drafting error.

Release Before Trial in Cases Involving Domestic Violence

Page 9, line 23 - page 10, line 8: New section added to provide court guidance in imposing conditions for release on bail in cases involving domestic violence.

Aggravating Factors

Page 11, lines 10-13: Fact that offense was a crime involving domestic violence added to list of aggravating factors.

S. Judiciary
SB 511

SENATE
JOURNAL SUPPLEMENT

5/29/80 Thursday No. 44

HCS
CS B
511

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

House Committee Substitute for
Committee Substitute for Senate Bill 511

SENATE JUDICIARY COMMITTEE

Senator Robert H. Ziegler, Sr., Chairman
Senator M. E. Dankworth, Vice Chairman
Senator Don Bennett
Senator H. D. Meland
Senator Bill Ray

HCS
CSSB
511

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 GAINST THE PERSON

ARTICLE 1. HOMICIDE

Section 3. AS 11.41.115. Defenses to Murder.

HCS
CSSB
511

This section constitutes a conforming amendment to subsection (e) of AS 11.41.115 and is discussed in conjunction with Section 44 of the bill which repeals AS 11.41.115(d).

ARTICLE 2. ASSAULT AND RECKLESS ENDANGERMENT.

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

This amendment makes two changes to the Assault in the Second Degree statute to conform the 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 Fourth Degree, a misdemeanor, absent the presence of an intent to cause serious physical injury. The amendment closes this obvious gap in coverage by requiring that the defendant only intend to cause physical injury.

The second change made by the amendment is to eliminate former paragraph (2) which covered intentionally placing another person in fear of imminent serious physical

HCS
CSSB
511

injury by means of a dangerous instrument. This conduct is now included within the new crime of Assault in the Third Degree, discussed below.

Section 5. AS 11.41.220. Assault in the Third Degree.

This amendment adds a new degree of assault to the criminal code. The conduct is classified as a C felony, and covers recklessly placing another person in fear of imminent serious physical injury by means of a dangerous instrument. By using the culpable mental state of "recklessly" the statute allows proof of the crime if the state can establish that the conduct was committed either "recklessly", "knowingly" or "intentionally". (See AS 11.81.610(c) proof of a higher form of culpability then required in the statute establishes the crime). 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 P.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

HCS
CSSB
511

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 6. AS 11.41.230. Assault in the Fourth 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" from paragraph (1) has been made. The name of the crime has been changed to Assault in the Fourth Degree to reflect the addition of the new crime of Assault in the Third Degree discussed in section 5.

ARTICLE 3. KIDNAPPING AND RELATED OFFENSES.

Section 7. 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.

HCS
CSSB
511

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 8. AS 11.41.410. Sexual Assault in the First Degree.
Section 9. AS 11.41.440. Sexual Abuse of a Minor.

Section 8 amends the Sexual Assault in the First Degree statute to provide that causing, aiding, inducing or encouraging 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 9 amends the statute on Sexual Abuse of a Minor to cover causing, encouraging or inducing children under 16 and 13 to engage in acts of sexual penetration and contact, respectively. Also prohibited is aiding, causing, encouraging 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 8 if the child is under 13, or under paragraphs (1) and (2) of section 9.

In describing the acts sufficient to sustain a conviction under these sections (aids, induces, causes, or encourages) the section parallels identical language used in the contributing statute. Though broadly described, the prohibited conduct is not intended to cover speech or conduct protected by the First Amendment.

ARTICLE 5. ROBBERY

No amendment proposed.

CHAPTER 46. OFFENSES AGAINST PROPERTY

ARTICLE 1. THEFT AND RELATED OFFENSES

HCS
CSSB
511

Section 10. 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 11. 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 11.46.110(a)(2).

ARTICLE 2. BURGLARY AND CRIMINAL TRESPASS

Section 12. 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 13. 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 14. 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 15. 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 16. 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). Paragraph (3) has been amended to require that the minor be in the same room in a building where a drug sale occurs. This amendment eliminates the possibility that a person could be charged under the statute when he has no knowledge that the sale is occurring. 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 to be persistently absent 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. In requiring that the child be "repeatedly absent" from school the statute eliminates the possibility that a person could be charged when he encourages a minor to be absent from school on a single occasion, or on several occasions over an extended period of time.

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 17. AS 11.56.310. Escape in the Second Degree.

Section 18. AS 11.56.320. Escape in the Third Degree.

Section 19. AS 11.56.330. Escape in the Fourth Degree.

Section 20. AS 11.56.370. Permitting an Escape.

Sections 18 and 19 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 17-20 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.

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511

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 21 and 22. AS 11.61.210. Misconduct Involving Weapons in the Second Degree.

Section 21 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 22 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 knifes 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.

Section 23. 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.

Section 24. AS 11.66.230(a). Possession of Gambling Records in the First Degree.

By requiring that the gambling record actually be used or intended for use in an unlawful gambling enterprise, this amendment eliminates the possibility of a prosecution when a document is not used or intended for use in prohibited activity.

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 25. 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. 26, infra) this conforming amendment is required.

Section 26. 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 cour . 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 27. 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 in a particular statute.

Section 28. 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 29. 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.

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511

Section 30. 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 31. 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 32. 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 33. AS 12.25.030(b). Arrest Authority.

This technical amendment is necessary in light of the amendment made in section 6.

HCS
CSSB
511

Section 34. 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 35. 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 36. 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 37. 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 38. 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 39. 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 40. 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 futherance 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.

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511

Section 41. 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 42. AS 12.80.040. Violations and Infractions.

This amendment should be considered in conjunction with section 34 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 43. 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 44. 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. 1 of the bill reflecting the elimination of AS 11.41.115(d).

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511

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 AS 11.81.600(b) (Section 27) that ordinarily only one culpable mental state is required to be established for each crime, this section is superfluous and misleading.