

HB

130

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 130 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the crime of theft and conceal-
7 ment of merchandise; and providing for an effective
8 date."

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

10 * Section 1. AS 11.46.120(a) is amended to read:

11 (a) A person commits the crime of theft in the first degree if
12 the person commits theft as defined in AS 11.46.100 and

13 [(1)] the value of the property or services is \$25,000 or
14 more [; OR

15 (2) THE VALUE OF THE PROPERTY OR SERVICES IS \$500 OR MORE
16 BUT LESS THAN \$25,000 AND WITHIN THE PRECEDING FIVE YEARS THE PERSON
17 HAS BEEN CONVICTED AND SENTENCED ON TWO OR MORE SEPARATE OCCASIONS IN
18 THIS OR ANOTHER JURISDICTION OF A CRIME SET OUT IN (1) OF THIS SUB-
19 SECTION OR AS 11.46.130(a)(1) - (3) OR AN OFFENSE UNDER ANOTHER LAW OR
20 ORDINANCE WITH SIMILAR ELEMENTS].

21 * Sec. 2. AS 11.46.130(a) is amended to read:

22 (a) A person commits the crime of theft in the second degree if
23 the person commits theft as defined in AS 11.46.100 and

24 (1) the value of the property or services is \$500 or more
25 but less than \$25,000;

26 (2) the property is a firearm or explosive;

27 (3) the property is taken from the person of another; or

28 (4) the value of the property is \$50 or more but less than
29 \$500 and within the preceding five years the person has been convicted

1 and sentenced on two or more separate occasions in this or another
2 jurisdiction of

3 (A) AS 11.46.120, or an offense under another law or
4 ordinance with similar elements;

5 (B) a crime set out in [(1) - (3) OF] this subsection
6 or an offense under another law or ordinance with similar ele-
7 ments; [OR]

8 (C) AS 11.46.140(a)(1) or (2), or an offense under
9 another law or ordinance with similar elements; or

10 (D) AS 11.46.220(c)(1) or (c)(2)(A), or an offense
11 under another law or ordinance with similar elements.

12 * Sec. 3. AS 11.46.140(a) is amended to read:

13 (a) A person commits the crime of theft in the third degree if
14 the person commits theft as defined in AS 11.46.100 and

15 (1) the value of the property or services is \$50 or more
16 but less than \$500;

17 (2) the property is a credit card; or

18 (3) the value of the property is less than \$50 and within
19 the past five years the person has been convicted and sentenced on two
20 or more separate occasions in this or another jurisdiction of theft or
21 concealment of merchandise, or an offense under another law or ordi-
22 nance with similar elements.

23 * Sec. 4. AS 11.46.220(c) is amended to read:

24 (c) Concealment of merchandise is

25 (1) a class C felony if

26 (A) the merchandise is a firearm;

27 (B) the value of the merchandise is \$500 or more; or

28 (C) the value of the merchandise is \$50 or more but
29 less than \$500 and within the preceding five years the person has

1 been convicted and sentenced on two or more separate occasions in
2 this or another jurisdiction of the offense of

3 (i) concealment of merchandise under this para-
4 graph or (2)(A) of this subsection, [THAT HAS A VALUE OF
5 \$50 OR MORE] or an offense under another law or ordinance
6 with similar elements; or

7 (ii) AS 11.46.120, 11.46.130, or 11.46.140(a)(1)
8 or (a)(2), or an offense under another law or ordinance with
9 similar elements;

10 (2) a class A misdemeanor if

11 (A) the value of the merchandise is \$50 or more but
12 less than \$500; or

13 (B) the value of the merchandise is less than \$50 and
14 within the preceding five years the person has been convicted and
15 sentenced on two or more separate occasions of the offense of
16 concealment of merchandise or theft in any degree, or an offense
17 under another law or ordinance with similar elements;

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

20 * Sec. 5. AS 11.46.295 is amended to read:

21 Sec. 11.46.295. PRIOR CONVICTIONS. For purposes of considering
22 prior convictions in prosecuting a crime of theft under AS 11.46.-
23 130(a)(4) [AS 11.46.120(a)(2), 11.46.130(a)(4),] or 11.46.140(a)(3),
24 or in prosecuting the crime of concealment of merchandise under
25 AS 11.46.220(c), a conviction for an offense under another law or
26 ordinance with similar elements is a conviction of an offense having
27 elements similar to those of an offense defined as such under Alaska
28 law at the time the offense was committed.

29 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

ENHANCED CLASSIFICATION OF REPEAT THEFT OFFENSES

Comparison of Existing Law, HB 130, and CSIB 130

EXISTING STATUTE

HB 130

CSIB 130

AS 11.46.220 - Concealment of Merchandise (A misdemeanor)

Enhance Charge from B misdemeanor to A misdemeanor

IF

this offense is concealment of merchandise (B misdemeanor)

AND

the defendant has 2 prior convictions for:

No	Theft 1st (B felony)	Yes	Yes
No	Theft 2d (C felony)	Yes	Yes
No	Theft 3d (A misd.)	Yes	Yes
No	Theft 4th (B misd.)	Yes	Yes
Yes	Con. mer. (C felony)	Yes	Yes
Yes	Con. mer. (A misd.)	Yes	Yes
Yes	Con. mer. (B misd.)	Yes	Yes

AS 11.46.220 - Concealment of Merchandise (C felony)

Enhance Charge from A misdemeanor to C felony

IF

this offense is concealment of merchandise (A misdemeanor)

AND

the defendant has 2 prior convictions for:

No	Theft 1st (B felony)	Yes	Yes
No	Theft 2d (C felony)	Yes	Yes
	Theft 3d (A misd.)		
No	- >\$50/<\$500	Yes	Yes
No	- credit card	Yes	Yes
No	- 3 B misd. theft	Yes	No
Yes	Con. mer. (C felony)	Yes	Yes
	Con. mer. (A misd.)		
Yes	- >50/\$500	Yes	Yes
Yes	- 3 B misd. theft	Yes	No

AS 11.46.140 - Theft 3d (A misdemeanor)
Enhance Charge from B misdemeanor to A misdemeanor
IF
this offense is theft 4th (B misdemeanor)
AND
the defendant has 2 prior convictions for:

Yes	Theft 1st (B felony)	Yes	Yes
Yes	Theft 2d (C felony)	Yes	Yes
Yes	Theft 3d (A misd.)	Yes	Yes
Yes	Theft 4th (B misd.)	Yes	Yes
No	Con. mer. (C felony)	Yes	Yes
No	Con. mer. (A misd.)	Yes	Yes
No	Con. mer. (B misd.)	Yes	Yes

AS 11.46.130 - Theft 2d (C felony)
Enhance Charge from A misdemeanor to C felony
IF
this offense is theft 3d (A misdemeanor)
AND
the defendant has 2 prior convictions for:

No	Theft 1st (B felony)	Yes	Yes
Yes	Theft 2d (C felony)	Yes	Yes
	Theft 3d (A misd.)		
Yes	- >\$50/<\$500	Yes	Yes
Yes	- credit card	Yes	Yes
No	- 3 B misd. theft	Yes	No
No	Con. mer. (C felony)	Yes	Yes
	Con. mer. (A misd.)		
No	- >\$50/<\$500	Yes	Yes
No	- 3 B misd. theft	Yes	No

*AS 11.46.120 - Theft 1st (B felony)
 Enhance Charge from C felony to B felony
 IF
 this offense is theft 2d (C felony)
 AND
 the defendant has 2 prior convictions for:*

Yes	Theft 1st (B felony)	Yes	No
Yes	Theft 2d (C felony)	Yes	No
No	Con. mer. (C felony)	Yes	No

1 1 1

PROPOSED AMENDMENTS TO THEFT IN THE FIRST DEGREE

Sec. 11.46.120. THEFT IN THE FIRST DEGREE. (a) A person commits the crime of theft in the first degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$25,000 or more; or

(2) the value of the property or services is \$500 or more but less than \$25,000 [AND WITHIN THE PRECEDING FIVE YEARS THE PERSON HAS BEEN CONVICTED AND SENTENCED ON TWO OR MORE SEPARATE OCCASIONS IN THIS OR ANOTHER JURISDICTION OF A CRIME SET OUT IN (1) OF THIS SUBSECTION OR AS 11.46.130(A) (1) - (3) OR AN OFFENSE UNDER ANOTHER LAW OR ORDINANCE WITH SIMILAR ELEMENTS].

(b) Theft in the first degree is a class B felony.

Unlike HB130, this amendment repeals the change made last year that enhances a Class C felony theft offense to a Class B felony theft offense, if the offender has prior felony theft convictions. Since presumptive sentencing has the effect of enhancing the penalty, it is unnecessary, and unduly harsh, to also enhance the classification of the offense.

PROPOSED AMENDMENTS TO THEFT IN THE SECOND DEGREE

Sec. 11.46.130. THEFT IN THE SECOND DEGREE. (a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$500 or more but less than \$25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another; or

(4) the value of the property is \$50 or more but less than \$500 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) AS 11.46.120 or an offense under another law or ordinance with similar elements;

(B) a crime set out in [(1) - (3) OF] this subsection or an offense under another law or ordinance with similar elements; [OR]

(C) AS 11.46.140(a)(1) or (2) or an offense under another law or ordinance with similar elements; or

(D) AS 11.46.220(c)(1) or (2)(A) or an offense under another law or ordinance with similar elements.

(b) Theft in the second degree is a class C felony.

Under current law, if a person with two prior C felony or A misd. theft offenses commits an A misd. theft offense, the charge is enhanced to a C felony. The amendment adds B felony theft, C felony conc/merch, and A misd. conc/merch offenses as triggers for enhanced charges, since all are the equivalent or more serious than A misd. theft offenses. The amendment differs from HB130 in that enhancement is not triggered by theft and conc/merch convictions that were A misdemeanors solely as a result of enhancement under this statute.

PROPOSED AMENDMENTS TO THEFT IN THE THIRD DEGREE

Sec. 11.46.140. THEFT IN THE THIRD DEGREE. (a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$50 or more but less than \$500;

(2) the property is a credit card; or

(3) the value of the property is less than \$50 and within the past five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise in any degree, or an offense under another law or ordinance with similar elements.

(b) Theft in the third degree is a class A misdemeanor.

Under current law, if a person with two prior theft offenses commits a B misd. theft offense, the charge is enhanced to an A misdemeanor. The amendment adds conc/merchandise offenses as triggers for enhanced charges, since conc/merchandise is a theft offense. The proposed amendment is the same as HB130.

Sec. 11.46.150. THEFT IN THE FOURTH DEGREE. (a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than \$50.

(b) Theft in the fourth degree is a class B misdemeanor.

PROPOSED AMENDMENTS TO FELONY CONCEALMENT OF MERCHANDISE

Sec. 11.46.220. CONCEALMENT OF MERCHANDISE. (a) A person commits the crime of concealment of merchandise if without authority the person knowingly conceals on or about the person the merchandise of a commercial establishment, not purchased by the person, while still upon the premises of the commercial establishment, with intent to deprive the owner of the merchandise or with intent to appropriate the merchandise.

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

(c) Concealment of merchandise is (1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is \$500 or more; or

(C) the value of the merchandise is \$50 or more but less than \$500 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of the offense of

(i) concealment of merchandise under AS 11.46.220(c)(1) or (2)(A) [THAT HAS A VALUE OF \$50 OR MORE] or an offense under another law or ordinance with similar elements;

(ii) AS 11.46.120 or an offense under another law or ordinance with similar elements;

(iii) AS 11.46.130 or an offense under another law or ordinance with similar elements; or

(iv) AS 11.46.140(a)(1) or (2) or an offense under another law or ordinance with similar elements.

Under current law, if a person with two prior C felony or A misd. conc/merch convictions commits an A misd. conc/merch, the charge is enhanced to a C felony. The amendment adds B felony, C felony, and A misd. theft convictions as triggers for enhanced charges, since all are either the equivalent or more serious than C felony or A misd. conc/merch offenses. The amendment differs from HB130 in that enhancement is not triggered by theft and conc/merch convictions that were A misdemeanors solely as a result of enhancement under this statute.

PROPOSED AMENDMENTS TO MISDEMEANOR CONCEALMENT OF MERCHANDISE

(2) a class A misdemeanor if

(A) the value of the merchandise is \$50 or more but less than \$500; or

(B) the value of the merchandise is less than \$50 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;

Under current law, if a person with two prior conc/merch offenses (C felony, A misd. or B. misd.) commits a B misd. conc/merch offense, the charge is enhanced to an A misdemeanor. The amendment allows theft offenses to also trigger enhanced charges, since such offenses are more serious or the equivalent of conc/merch. The proposed amendment is the same as HB130.

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

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

MMX

STEVE COWPER, GOVERNOR

REPLY TO

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

February 27, 1989

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 310
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

The Honorable Peter Goll
The Honorable Max Gruenberg
Alaska State Representatives
P.O. Box V
Juneau, Alaska 99811

Dear Representatives Goll and Gruenberg:

Both of you have expressed concern about HB 130, which is designed to cure certain constitutional problems with the existing theft statutes. The problems were created by passage of CSHB 461(Jud) last year.

As a result of our conversations, I developed the attached CS to HB 130 that, hopefully, addresses and resolves your most serious concerns. At the same time, the CS retains the enhanced classification scheme for misdemeanor theft offenses that I understand was Rep. Cotten's intended purpose in seeking passage of CSHB461(Jud).

There are two main differences between the proposed CS and HB 130:

1. In the CS, repeat Class C felony theft offenses may not be enhanced to Class B felonies. Since presumptive sentencing has the effect of enhancing the penalty, it is unnecessary, and unduly harsh, to also enhance the classification of the offense.

2. In the CS, theft and concealment of merchandise offenses that are Class A misdemeanors solely as a result of classification enhancement may not be used to enhance subsequent offenses to Class C felonies.

Attached you will find a draft CS to HB 130, a section-by-section analysis of the proposed changes, and a chart which compares existing law, HB 130 and the proposed CS to HB 130.

I will be glad to meet with you at any time to discuss any questions or comments you have about this proposal.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:



Laurie H. Otto
Assistant Attorney General

cc: Bob Evans
John Salemi
Brant McGee

Attachments

LHO:me-12

1 convicted and sentenced on two or more separate occasions in this
2 or another jurisdiction of

3 (A) AS 11.46.120 or an offense under another law
4 or ordinance with similar elements;

5 (B) a crime set out in [(1) - (3) OF] this
6 subsection or an offense under another law or ordinance with
7 similar elements; [OR]

8 (C) AS 11.46.140(a)(1) or (2) or an offense under
9 another law or ordinance with similar elements; or

10 (D) AS 11.46.220(c)(1) or (2)(A) or an offense
11 under another law or ordinance with similar elements.

12 * Sec. 3. AS 11.46.140(a) is amended to read:

13 (a) A person commits the crime of theft in the third degree
14 if the person commits theft as defined in AS 11.46.100 and

15 (1) the value of the property or services is \$50 or more
16 but less than \$500;

17 (2) the property is a credit card; or

18 (3) the value of the property is less than \$50 and within
19 the past five years the person has been convicted and sentenced on
20 two or more separate occasions in this or another jurisdiction of
21 theft or concealment of merchandise in any degree, or an offense
22 under another law or ordinance with similar elements.

23 * Sec. 4. AS 11.46.220(c) is amended to read:

24 (c) Concealment of merchandise is (1) a class C felony if

25 (A) the merchandise is a firearm;

1 (B) the value of the merchandise is \$500 or more;

2 or

3 (C) the value of the merchandise is \$50 or more but
4 less than \$500 and within the preceding five years the person has
5 been convicted and sentenced on two or more separate occasions in
6 this or another jurisdiction of the offense of

7 (i) concealment of merchandise under AS
8 11.46.220(c)(1) or (2)(A) [THAT HAS A VALUE OF \$50 OR MORE] or an
9 offense under another law or ordinance with similar elements;

10 (ii) AS 11.46.120 or an offense under another
11 law or ordinance with similar elements;

12 (iii) AS 11.46.130 or an offense under another
13 law or ordinance with similar elements; or

14 (iv) AS 11.46.140(a)(1) or (2) or an offense
15 under another law or ordinance with similar elements.

16 (2) a class A misdemeanor if

17 (A) the value of the merchandise is \$50 or more but
18 less than \$500; or

19 (B) the value of the merchandise is less than \$50
20 and within the preceding five years the person has been convicted
21 and sentenced on two or more separate occasions of the offense of
22 concealment of merchandise or theft in any degree, or an offense
23 under another law or ordinance with similar elements;

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

26 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

COMPARISON OF THEFT AND CONCEALMENT OF MERCHANDISE STATUTES

CONCEALMENT OF MERCHANDISE

(a) A person commits the crime of concealment of merchandise if without authority the person knowingly conceals on or about the person the merchandise of a commercial establishment, not purchased by the person, while still upon the premises of the commercial establishment, with intent to deprive the owner of the merchandise or with intent to appropriate the merchandise.

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

(c) Concealment of merchandise is (1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is \$500 or more; or

(C) the value of the merchandise is \$50 or more but less than \$500 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of the offense of concealment of merchandise that has a value of \$50 or more or an offense under another law or ordinance with similar elements;

THEFT

A person commits theft if

(1) with intent to deprive another of property or to appropriate property of another to oneself or a third person, the person obtains the property of another;

Theft in the second degree is a class C felony ... if

(1) the value of the property or services is \$500 or more but less than \$25,000;

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another; or

(4) the value of the property is \$50 or more but less than \$500 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of a crime set out in (1) - (3) of this subsection or AS 11.46.140(a)(1) or (2) or an offense under another law or ordinance with similar elements.

(2) a class A misdemeanor
if

(A) the value of the
merchandise is \$50 or more but
less than \$500; or

(B) the value of the
merchandise is less than \$50 and
within the preceding five years
the person has been convicted
and sentenced on two or more
separate occasions of the
offense of concealment of
merchandise in any degree or an
offense under another law or
ordinance with similar elements;

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

Theft in the third degree
is a class A misdemeanor

(1) the value of the
property or services is \$50 or
more but less than \$500;

(2) the property is
a credit card; or

(3) the value of the
property is less than \$50 and
within the past five years the
person has been convicted and
sentenced on two or more
separate occasions in this or
another jurisdiction of theft
or an offense under another law
or ordinance with similar
elements.

Theft in the fourth degree
is a class B misdemeanor if
the value of the property or
services is less than \$50.

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to penalties for repeat theft offenses..."
 Sponsor: Rules Committee
 Requestor: _____

Agency Affected: Department of Corrections
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Susan E. Knighton
 Susan E. Knighton, Director

Prepared by: _____ Phone: 465-3376
 Division: Administrative Services Date: 2-13-89

Susan Humphrey-Barnett
 Approved by _____ Date: 2-13-89
 Agency: Department of Corrections

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

CRIMINAL DIVISION CENTRAL OFFICE
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PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
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1031 WEST 4TH AVENUE, SUITE 318
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PHONE: (907) 279-7424

March 14, 1989

The Honorable Max Gruenberg
Alaska State Representative
P.O. Box V
Juneau, Alaska 99811

Dear Representative Gruenberg:

The Governor introduced HB 130 to correct problems in the theft statutes that were unintentionally created last year by passage of CSHB461(Jud). Andy Hemenway of your staff requested that we summarize the history of this issue for your review.

Last session, members of the Anchorage Police Department expressed their frustration with the low penalties imposed on defendants convicted of misdemeanor thefts, even where a defendant had a significant record of theft convictions. During testimony before the Senate Judiciary Committee last year, an aide to Representative Cotton explained the problem as follows:

HB 461 was introduced at the request of the Anchorage Police Department Employees Association. Misdemeanors aren't covered by presumptive sentencing, and a study of the Anchorage Police Department has pointed out that current penalties are not a sufficient deterrent to the repeat offender.

Testimony was given in support of the bill by an Anchorage police officer who stated that he had been investigating misdemeanor thefts for over a year, and had discovered that the same people were being repeatedly arrested for theft. The officer felt this was because the penalties were inadequate and suggested that enhancing the classification for repeat theft offenses would work to deter thefts because "the statute for second offense joyriding seems to be an appropriate and effective penalty." Under the joyriding statute, a first offense is an A misdemeanor, and a subsequent offense is a C felony.

The legislature responded to the concerns raised by the Anchorage police and unanimously passed CSHB461(Jud). Unfortunately, the statute contained a number of internal contradictions that were not discovered during the committee hearings. After passage, the Department of Law carefully examined the statute and discovered that a person with a more serious criminal history of theft may be charged and sentenced more leniently than someone who had committed less serious thefts.

For instance, under AS 11.46.130(a)(4), a person can be convicted of second degree theft (C felony), if the person commits third degree theft and has two prior convictions for third degree theft (A misdemeanor). But, an offender who commits the exact same A misdemeanor theft offense and has two prior convictions for first degree theft (B felony) may not be convicted of second degree theft. This disparate treatment of offenders who commit the same crime raises serious equal protection concerns.

The aggravated concealment of merchandise provisions are also problematic. The statute aggravates a third misdemeanor concealment of merchandise to a felony. However, a person with a worse history of theft who then commits the exact same concealment offense is guilty only of a misdemeanor. For example, a person previously convicted of a felony theft of jewelry (that is, someone who completes the theft offenses) can only be charged with a misdemeanor for a subsequent misdemeanor concealment charge. However, a more inept thief who is repeatedly caught before getting the property out of the store is liable for felony penalties. This scheme may very well be unconstitutional as a violation of equal protection (treating similarly situated persons differently) or due process (being somewhat irrational).

As introduced, HB 130 corrects the equal protection and due process problems by creating a rational and consistent structure for aggravating theft offenses. However, it did not address two additional problems with the law that had been identified by the Department of Law and the Public Defender Agency. The problems relate to the effect of the legislation on offenses that are subject to presumptive sentencing and a provision that allows for a double enhancement. Since both you and Representative Goll independently raised these additional concerns, we prepared a CS that addresses all problems with last year's legislation.

As is explained in more detail in the attachments to our letter of February 27, 1989, the CS eliminates those statutory provisions that went beyond the stated purpose of the sponsor and supporters of last year's legislation. As reflected in the committee minutes, the intent of the bill was to increase the penalties for misdemeanor theft offense, similar to the enhancement that is imposed for repeat joyriding offenses. It is very easy to retain the provisions that accomplish this result and, at the same

The Honorable Max Gruenberg

March 14, 1989

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time, eliminate the provisions relating to presumptive sentencing and double enhancement that the criminal justice agencies, and apparently the two co-chairs of this year's Judiciary Committee, found to be objectionable.

We appreciate the opportunity to explain CSHB 130, and hope this corrective legislation can be expeditiously considered by the Judiciary Committee.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 

Laurie H. Otto

Assistant Attorney General

cc: ✓ The Honorable Peter Goll
Bob Evans

LHO:me-26

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-2090
PHONE: (907) 279-7541

February 13, 1989

Representative Max F. Gruenberg, Jr.
P.O. Box V
Juneau, Alaska 99811

RE: HB 130 - "An Act relating to penalties for repeat theft offenses"

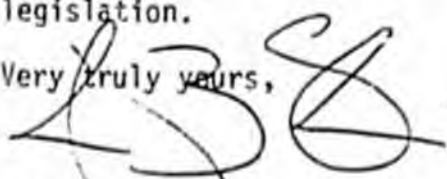
Dear Representative Gruenberg:

Thank you for the opportunity to comment on the above-referenced proposed legislation. This proposal is identical to a draft bill submitted for comment by the Office of the Governor in December of 1988. As the attached commentary prepared by me on December 19, 1988 indicates, this statutory scheme has serious flaws of a constitutional dimension which the proposed amendment will not cure. In the attached commentary you will find hypothetical examples which point out the inequities of present law. The proposed changes to that law submitted through HB 132 do not cure these flaws.

Although an extreme remedy, I believe that the present law needs to be scrapped through the repeal process. Short of that, a much more exhaustive revision of the law must be undertaken than is contemplated by HB 132.

Thank you again for this opportunity to provide our perspective on proposed legislation.

Very truly yours,


John B. Salemi
Acting Public Defender

JBS:sh
Attachment

In 1988 CS HB 461 was signed into law, amending the theft and concealment of merchandise statutes. The 1988 amendments allowed for the prosecution of a higher crime and increased penalty provisions for an offender who has a certain number of prior theft convictions within five years prior to the present offense. Without going into detail how these amendments trigger this differential treatment of repeat theft offenders, the amendments have created serious inequities which are not addressed in these draft amendments under consideration.

The theft statutes, even with the changes now proposed, are constitutionally flawed. The constitutional issues are best understood by looking at the specific application of these laws hypothetically. Following are three examples of the inequity of the statutes:

Hypothetical No. 1 - Mr. Smith commits the crime of theft in the second degree by appropriating property worth \$600 in value. Theft in the second degree is a class C felony having a presumptive term of zero to five years. Mr. Smith has two prior felonies involving felony concealment of merchandise (AS 11.46.220). These felonies occurred within the five year period immediately preceding the instant offense. As a result of these prior felonies, the theft second becomes theft first under AS 11.46.120(a)(2). As a person convicted of a B felony, with two prior theft felonies, Mr. Smith will receive a presumptive jail term of six years.

Hypothetical No. 2 - Mr. Smith again commits the same offense of theft in the second degree. He has two prior felonies, only this time one of them is felony concealment of merchandise and the other is criminally negligent homicide (also a C felony which involved Mr. Smith causing the death of another human being). Because only one of the prior convictions involves theft, even though they both occurred within the same five year period, AS 11.46.120(a)(2) is not controlling. This theft in the second degree is not "bumped up" to a B felony. It remains a C felony. With these two prior felony offenses, Mr. Smith is only subject to a presumptive three year jail term.

Hypothetical No. 3 - Mr. Smith commits attempted sexual abuse of a minor in the second degree, a C felony with a zero to five sentencing range. He has two felony concealment of merchandise priors within the five years immediately preceding his commission of the sex offense. Because the offense for which he is now to be sentenced is not a theft, even though he has two prior felony theft convictions within five years, he is only subject to C felony treatment and a presumptive three year term.

One could make a strong argument that Mr. Smith's legal situation in Hypothetical No. 1 is such where he should receive less punishment than in Hypotheticals Nos. 2 or 3. Under Hypothetical No. 2, Mr. Smith has a prior felony conviction involving the killing of another human being. Hypothetical No. 1 involves three felony theft offenses. But in Hypothetical No. 1, Mr. Smith will receive double the presumptive jail time as he would in Hypothetical No. 2.

When one compares Hypothetical No. 3 with Hypothetical No. 1, one might make the argument that someone who is convicted of felony theft and has two prior felony theft convictions should receive a sentence less than someone who has two prior felony convictions and now commits a sex offense. Nevertheless, Mr. Smith in Hypothetical No. 1 again will receive twice the presumptive jail term (six years) as he would under Hypothetical No. 3 (presumptive three year term applies).

It is likely that criminal defendants to whom these statutes apply will end up in lengthy litigation regarding the inequitable treatment they are receiving under current law. People who are similarly situated can conceivably receive very different sentences. Those people who have committed offenses of a less serious nature will receive harsher sentences than those accused of more serious crimes. Without going into exhaustive treatment of the constitutional issues, it is likely that litigation will center on questions of due process (fundamental fairness) and equal protection under the law.

It must be remembered that in 1980 a wholesale revision of the criminal code occurred. One of the main purposes of this revision was to achieve consistency in treatment of offenders, especially as it related to the sentences they receive. This kind of "tinkering" we are seeing within the theft statutory framework creates anomalies in the law and defeats the objective

of consistency in sentencing. The real remedy is not to try to fix something that is seriously flawed, but instead to repeal the 1988 amendments to the theft statutes.

OTHER CONCERNS

The final concern the Public Defender Agency has with the proposed amendments involves the use of misdemeanor concealment of merchandise convictions to bootstrap present prosecutions to the felony level. Given diminishing state resources and the expense of incarcerating people for extended periods of time, this seems an impractical approach to treatment of theft offenders. Additionally, it seems on its face rather harsh. Persons convicted of concealment of merchandise already face up to a maximum of one year in prison. That seems punishment enough for thefts involving moderate amounts of money or property.

HB 130
Don't distribute
Test out in file

January 31, 1989

Hayden Kaden
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Hayden:

A Governor's bill was recently introduced that corrects problems with the theft bill that passed last year. The bill has an immediate effective date because it corrects a problem that we believe makes the theft sentencing statute unconstitutional as it is currently written.

We would very much appreciate any assistance you can provide in scheduling this bill at the earliest possible opportunity. The bill number is HB130. If you have any questions please give me a call.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: 

Laurie H. Otto

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

CO
1/30/89

January 30, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill regarding penalties for repeat theft offenses.

This bill corrects a number of inequities in the law governing repeat theft offenses, which passed the legislature last year as CSHB 461(Jud) and was signed into law as ch. 133, SLA 1988. For example, under that current law, a person previously convicted twice of misdemeanor concealment of merchandise, who is again charged with concealment of merchandise, is treated much more harshly than if the person had previously been convicted twice of felony theft. Similarly, a person convicted twice of misdemeanor theft, who is again charged with theft, is treated much more harshly than if the person had previously been convicted twice of felony concealment of merchandise.

In order to justify the increased penalties provided by ch. 133, SLA 1988, the law must be fairly and equitably structured. The attached bill provides that structure.

I urge your favorable action on this bill

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over the word "Sincerely,".

Steve Cowper
Governor

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Department of Law
 Title: "An Act relating to penalties for repeat theft offenders." BRU: Prosecution
 Sponsor: Rules Committee Components: All
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

This bill makes needed correction to the increased penalty provisions for repeat theft offenders, which passed the legislature last year as CSHB 461 (Jud). Because the changes proposed in the bill are remedial in nature, the bill will not have a fiscal impact on the Department of Law.

Prepared by: Richard L. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: November 16, 1988
 Approved by Commissioner: Richard L. Pegues /FON/
 Approved by Commissioner: Grace Berg Squaible, Atty. General Date: November 16, 1988
 Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to penalties for repeat theft offenses."
 Sponsor: Rules Committee
 Requestor: Governor

Agency Affected: Dept. of Administration
 BRU: Public Defender Agency

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

~~See Appendix A and B.~~

38

Prepared by: John Salemi, Act. Public Defender Phone: 279-7541
 Division: Public Defender Agency Date: Dec. 19, 1988

Approved by Commissioner: John M. Andrew Date: 12/22/88
 Agency: Administration

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Administration
 Title: "An Act relating to penalties for repeat theft offenses." BRU: Office of Public Advocacy
 Sponsor: Rules Committee Components: _____
 Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate Phone: 274-1684
 Division: Office of Public Advocacy Date: Dec. 22, 1988

Approved by Commissioner: John Andrews Date: 12/22/88
 Agency: Department of Administration

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

SELECT - QUERY
00001 ALL BTL = HB0461

HB0461 . DOCUMENT# 11 OF 31

CHAMBER = H
SOURCE = HJR
DATE = 040588
YEAR = 84
BILL = HB0461

DOCUMENT TEXT
HJR042688HB0461
CSHB 461(JUD)

REPRESENTATIVE DAVIS MOVED AND ASKED UNANIMOUS CONSENT THAT THE RECONSIDERATION OF CSHB 461(JUD) BE TAKEN UP AT THIS TIME. THERE BEING NO OBJECTION, IT WAS SO ORDERED.

THE FOLLOWING IS AGAIN BEFORE THE HOUSE IN THIRD READING:

CS FOR HOUSE BILL NO. 461 (JUDICIARY)
"AN ACT INCREASING THE PENALTIES FOR REPEAT CONVICTIONS FOR THE CRIMES OF THEFT AND CONCEALMENT OF MERCHANDISE."

THE QUESTION TO BE RECONSIDERED: "SHALL CSHB 461(JUD) PASS THE HOUSE?" THE ROLL WAS TAKEN WITH THE FOLLOWING RESULT:

CSHB 461(JUD) RECONSIDERATION

YEAS: 37 ADAMS, BARNES, BOUCHER, BOYER,
BROWN, CATO, COLLINS, CUTTEN,
DAVIS, DONLEY, ELLIS, FRANK,
FURNACE, GRUENBERG, GRUSSENDORF,
HANLEY, HERRMANN, HUDSON, KOPONEN,
LARSON, MARTIN, MENARD, MILLER,
NAVARRE, PEARCE, PETTYJOHN,
PHILLIPS, POURCHOT, RIEGER,
SHULTZ, SPRINGER, SUND,
SWACKHAMMER, TAYLOR, ULMER,
WALLIS, ZAWACKI

NAYS: 0

EXCUSED: 0

ABSENT: 3 DAVIDSON, GOLL, HOFFMAN *> on first vote: all 3
voted for CSHB461 (Jud.)*

AND SO, CSHB 461(JUD) PASSED THE HOUSE ON RECONSIDERATION AND WAS REFERRED TO THE CHIEF CLERK FOR ENGROSSMENT.

END OF DOCUMENT

SELECT - QUERY
00001 ALL BILL = HB0461

HB0461 . . . DOCUMENT# 12 OF 31

CHAMBER = S
SOURCE = SJRN
DATE = 050780
YEAR = 05
BILL = HB0461

DOCUMENT TEXT
SJRN050780HB0461
HB 461

CS FOR HOUSE BILL NO. 461 (JUDICIARY) "AN ACT INCREASING THE PENALTIES FOR REPEAT CONVICTIONS FOR THE CRIMES OF THEFT AND CONCEALMENT OF MERCHANDISE" WHICH HAD BEEN PLACED AT THE BOTTOM OF THE CALENDAR WAS BEFORE THE SENATE IN SECOND READING.

SENATOR ELIASON MOVED AND ASKED UNANIMOUS CONSENT THAT CS FOR HOUSE BILL NO. 461 (JUDICIARY) BE ADVANCED TO THIRD READING AND PLACED ON FINAL PASSAGE. WITHOUT OBJECTION, IT WAS SO ORDERED.

CS FOR HOUSE BILL NO. 461 (JUDICIARY) WAS READ THE THIRD TIME.

THE QUESTION BEING: SHALL CS FOR HOUSE BILL NO. 461 (JUDICIARY) "AN ACT INCREASING THE PENALTIES FOR REPEAT CONVICTIONS FOR THE CRIMES OF THEFT AND CONCEALMENT OF MERCHANDISE" PASS THE SENATE? THE ROLL WAS TAKEN WITH THE FOLLOWING RESULT:

CSHB 461 JUD 3RD

YEAS: 20 ABOOD, BINKLEY, COGHILL, DUNCAN,
ELIASON, FAHRENKAMP, FAIKS,
FANNING, FISCHER, HALFORD,
HENSLEY, JONES, JOSEPHSON, KELLY,
KERTTULA, RODEY, STURGULEWSKI,
SZYMANSKI, UEHLING, ZHAROFF

NAYS: 0

AND SO, CS FOR HOUSE BILL NO. 461 (JUDICIARY) PASSED THE SENATE.

CS FOR HOUSE BILL NO. 461 (JUDICIARY) WAS SIGNED BY THE PRESIDENT AND SECRETARY AND RETURNED TO THE HOUSE.

END OF DOCUMENT