(4)

PJM

1967

MEMORANDUM

RE:

(1) Bill No. 1: An Act to amend the revised Penal Law

S. 4412

Intro. A. 5947

Print A. 6380

Picks up '65 & 66: (1) qualified abolition of death penalty; (2) crim. usury; (3) narcotics; (4) obscenity

(2) Bill No. 2: An Act to amend the Code of Criminal Procedure

S. 4413

Intro. A. 5946

Print A. 6379

Conforms CCP to the revised P.L.: changes fall into 3 categories: (1) language changes & section reference changes (2) Temporary incorporation of a few subjects in the former P.L., not in the revised e.g., immunity (2447) & double jeop. (1938) (3) Repeal of certain offenses defined in CCP which are treated in R.P.L. (887: prostitution)

Most significance of #2: (1) Persistent fel. off (2) fines (3) Prob. & cond. dis

(3) Bill No. 3: An Act to amend various chapters of the consolidated and unconsolidated laws

S. 4414

Intro. A. 5948

Print A. 6381

Amends 48 chapters of the Con & Uncon Law to conform to revised P.L. (§§ references & lang. changes)

Most significant: the amendments to Correction Law (p. 104) a new Art 24 applicable only to sentences imposed under the revised P.L.

(4) Bill memo

(5) 1967 Report

Purpose of bills:

The above three bills have been prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code.

The purpose of Bill No. 1 is to amend certain sections of and to add a number of sections to the revised Penal Law, which becomes effective September 1, 1967.

The purpose of Bill No. 2 is to amend the Code of Criminal Procedure in order to accommodate it, temporarily, to the revised Penal Law.

The purpose of Bill No. 3 is to conform various provisions in the consolidated and unconsolidated laws to those of the revised Penal Law.

Summary of provisions of bills:

Bill No. 1

The following amendments are proposed to the revised Penal Law for the reasons assigned:

Section 10.00 (Bill§1): The proposed amendments to the definitions in this section, and the proposed addition of the definition of "traffic infraction" (subdivision 2), are

intended only to promote greater clarity and precision, without effecting any substantive changes.

Section 15.20(3) [Bill §2]: This proposed amendment is necessary in order to accommodate the provisions of proposed §235.22(2), dealing with the dissemination of indecent material to minors (see note to §§235.20-235.22, infra).

Sections 55.00 (Bill §3) and 55.10 (Bill §4): These proposed sections are intended only to clarify the sentencing structure, without substantive change.

Sections 60.00-60.30 (Bill §6): These proposed amendments are intended to clarify the provisions dealing with authorized disposition of offenders, primarily by distributing the material previously contained in six subdivisions of article sixty's single section into separate sections. The only material not found in such section is contained in proposed §60.15. This proposed section deals with the disposition of narcotic addicts, and its inclusion in the revised Penal Law is necessitated by the 1966 legislation creating the Narcotic Addiction Control Commission (Laws 1966, ch. 192). This legislation provides for the certification of narcotic addicts, convicted of certain offenses, to the care and custody of the said Commission.

Section 120.05(6) [Bill §7]: This proposed "felony-assault" crime, wherein "physical injury" is caused, is intended to be a lesser degree of the "felony-assault" provision in the first degree crime [§120.10(4)], which requires that "serious physical injury" be caused. It also encompasses the conduct proscribed by a new second degree assault crime added to former Penal Law §242(6) [Laws 1965, ch. 328] dealing with assaults with intent to collect a usurious loan. Specific inclusion of this type of assault is thereby obviated. Felonious sex crimes (defined in Art. 130) are specifically excluded because not to do so would permit conviction of second degree

assault based upon "physical injury" inflicted in the course of such crime without corroboration of the underlying sex crime, as would be required for a conviction upon a charge of such crime (§130.15). Note, however, that a conviction for first degree assault, predicated upon an underlying felonious sex crime, is permissible without corroboration, where "serious physical injury" is inflicted upon the victim.

Section 120.10(4) [Bill §8]: This proposed amendment is intended to parallel the language of this subdivision with that of §120.05(6) and §125.25(3). This subdivision applies to any underlying felony (cf. §120.05[6] which specifically excludes felonious sex crimes).

Sections 125.25, 125.30 and 125.35 (Bill §§9-11): The proposed amendments to these sections are necessitated by the enactment of the qualified abolition of the death penalty (Laws 1965, ch. 321). The language proposed to be added to §125.25(1)(b) is the counterpart of the second sentence of the preceding paragraph. It is intended to parallel the law in the situations encompassed within these two paragraphs.

Section 135.25 [Bill §12]: This proposed amendment designates kidnapping in the first degree as a class A felony. Previously, the punishment prescribed for this crime was set forth in §135.35. In view of the abolition of the death penalty as applied to kidnapping (Laws 1965, ch. 321), §135.35 and its companion, §135.40, are no longer applicable and are therefore repealed by Bill §13.

Section 140.00(2) [Bill §14]: This amendment proposes that the term "building" shall mean both the building as a whole and each separately secured or occupied unit thereof. The purpose of this amendment is to denominate as burglary certain conduct which is not presently covered. For example, an intruder enters apartment A of a multiple-apartment building solely to gain access to apartment B wherein he intends to commit

a crime. Under present law, the invasion of apartment A does not constitute burglary in any degree since the element of "intent to commit a crime therein" is missing. The proposed amendment remedies this situation.

Bill §§15 and 16 propose the addition of paragraph (c) to subdivision one of §140.25 (Burglary in the second degree) and of subdivision three to §140.30 (Burglary in the first degree). They are intended to bring into better balance the factors which aggravate the basic crime of burglary in the third degree. As they now stand, burglary in the second and first degrees contemplate two situations which aggravate the basic crime: Being armed with a deadly weapon; and causing physical injury. Realistically, the actual use or threatened use of a dangerous instrument by an intruder should be equated with situations of an intruder merely armed with a deadly weapon. It should be noted that this juxtaposition of aggravating factors already exists in the crime of robbery in the first degree (§160.15).

Section 145.00 (Bill §17): The simple equation of reckless conduct with intentional conduct introduces an imbalance which this proposed amendment seeks to cure by requiring that recklessness result in damage exceeding $250.

Section 150.15 (Bill §18): This proposed amendment is intended to make clear that an "occupied building" is one in which some person other than a participant in the act of arson is present.

Section 155.00(1) [Bill §19]: "Commodities of a public utility nature," presently specifically included under "property," actually fall within "article, substance or thing of value." It is proposed to shift the clause concerning the supplying of such commodities to the definition of "service." Thus, Bill §24 amends the definition of "service," in §165.10(1), to include expressly "the supplying of commodities of a public utility nature such as gas, electricity, steam and water."

Section 160.15(3) [Bill §22]: This proposed amendment is intended to clarify the section. See, also, the counterpart provisions for burglary [§140.25(1), Bill §15; §140.30(3), Bill §16].

Section 165.07 (Bill §23): This proposed section, dealing with the unlawful use of secret scientific material, is designed to cover a situation not within the scope of §155.30(3) since the subject of the theft is not "property" as that term is defined in §155.00(1). See United States v. Bottone, 1966, 365 F. 2d 389. Thus, for example, a person who steals the blueprints of a secret process, commits larceny. But one who surreptitiously makes a photographic copy of such blueprint, leaving the original in its proper place does not commit larceny because he is not stealing "property." To make this latter type of conduct subject to criminal sanction, §165.07 is proposed. As a necessary conforming change, it is proposed to transfer the definition of secret scientific material from §155.30(3) [Bill §21] to subdivision six of §155.00 (Bill §20).

Section 165.15(2)(5)(6) [Bill §25]: The proposed amendment to subdivision two states a presumption which, in a limited situation, was contained in former Penal Law §925. Without this presumption, a well-nigh insupportable burden is placed on the prosecution in this type of situation. At the same time, the existence of this presumption places no untoward burden on an accused who has a reasonable excuse for failing to pay for a service. The proposed amendments to subdivisions five and six are intended to meet the problem posed by public utilities which supply electric power. Meters and equipment, such as cables, which conduct electricity from the trunk line into each individual house often belong to the owner of the building, not to the utility company.

Section 190.35 (Bill §26): This section was intended to restate the provisions of former Penal Law §664. The

proposed amendment adds a provision which was inadvertently omitted from the original section.

Section 190.40 (Bill §27): This proposed amendment restates the substance of former Penal Law §2401, which was added by Laws 1965, ch. 328.

Section 190.45 (Bill §28): This proposed amendment restates the substance of former Penal Law §2403, which was added by Laws 1965, ch. 328.

Section 215.50(6) [Bill §29]: This proposed amendment is necessitated by the repeal of Article 18-B of the Judiciary Law, dealing with "blue ribbon" juries (See, Laws 1965, ch. 778).

Section 220.00 (Bill §30): The proposed amendments to this section are necessitated by recent legislation dealing with hallucinogenic, despressant and stimulant drugs (See, Laws 1965, chs. 323, 332.).

Section 225.00(8) [Bill §31]: This proposed amendment is designed to avoid an interpretation of the term "slot machine" to include a machine which, at random, dispenses items of merchandise of varying size, color or shape, but which items are all of equivalent value.

Section 235.00(1) [Bill §32]: The proposed amendment to this subdivision amplifies the definition of "obscene." See, Ginzburg v. United States, 1966, 86 S. Ct. 942.

Sections 235.20, 235.21 and 235.22 [Bill §§34-36]: These proposed sections are derived from former Penal Law §484-h, enacted by Laws 1965, ch. 327. Revised Penal Law §§235.20, 235.25 and 235.30 are proposed to be repealed (Bill §33). Former Penal Law §484-i, enacted by Laws 1965, ch. 372, deals with the same subject matter as §484-h. The latter section, by careful detailing of the proscribed conduct, furnished clearer guidelines than the more general standards in §484-i. See, People v. Tannenbaum, 1966, 18 N.Y. 2d 268.

Sections 240.05, 240.06 and 240.08 (Bill §§37-39): These proposed amendments restructure the crime of riot. Under the single degree crime, no differentiation could be made

between relatively minor situations which, technically, would constitute riotous behavior and major incidents with great potential for harm. Nor was specific provision made for dealing with conduct preliminary to a probable riot. Therefore, two degrees of the crime are proposed: (1) the lower degree, a misdemeanor, is the previous single degree crime and involves as few as five persons; and (2) the higher degree, a felony, involves at least eleven persons and requires a resulting injury to person or property. Also added is the crime of "Inciting to riot," since the conduct here proscribed may not meet the requirements for the commission of the offense of criminal solicitation.

Section 240.10 (Bill §40): This proposed amendment is intended to clarify the crime of unlawful assembly, particularly in view of the proposed amendments to the crime of riot (See, Bill §§37-39).

Section 240.25(1) [Bill §41]: This proposed amendment fills a gap in the present harassment provision, which requires an actual touching for the offense to be committed. An attempt or a threat to strike, shove or kick should also constitute commission of the offense.

Section 240.35(5) [Bill §47]: This proposed amendment incorporates a change made to former Penal Law §722-b by Laws 1966, ch. 464.

Section 255.30 (Bill §43): This proposed amendment restores the corroboration requirement for conviction of the crime of adultery (see former Penal Law §103), which crime was added to the revised Penal Law by Laws 1965, ch. 1037.

Section 260.10(1) [Bill §44]: This proposed amendment is intended to amplify the conduct which constitutes endangering the welfare of a child.

Section 260.15 (Bill §45): This proposed deletion of the exception clause is predicated on the argument that it is irrelevant to a defense on a charge of endangering a child's health, that the defendant violated a health regulation aimed at protecting the public. If, in fact, such

regulation was violated, he may be prosecuted therefor and this section would be no defense to such prosecution. The substance of the clause proposed to be deleted is contained in former Penal Law §495. However, that section was cast in terms of a statement of principle, not as an affirmative defense. In that context it may have been relevant.

Section 265.00(1) [Bill §46]: This proposed amendment incorporates a change made to former Penal Law §1896(10) by Laws 1965, ch. 283.

Section 265.20(a)(1)(a) [Bill §47]: This proposed amendment incorporates a change made to former Penal Law §1900 (a)(1)(a) by Laws 1965, ch. 194.

Section 270.00(3) [Bill §48]: This proposed amendment incorporates a change made to former Penal Law §1894-a(6) by Laws 1965, ch. 272.

Section 400.00(6), (9) [Bill §49]: These proposed amendments incorporate changes made to former Penal Law §1903(6), (9) by Laws 1966, chapters 146, 788.

Section 500.00, proposed to be repealed by Bill §51, contained savings clauses the purpose of which was to preserve in the revised Penal Law amendments to the former Penal Law enacted at the 1965 legislative session. Since this proposed bill, and Bill No. 3 (discussed below), make the necessary changes in the revised Penal Law and other chapters of the Consolidated Laws to effectuate the purpose of these savings clauses, this section is no longer necessary. It should be noted that although no comparable savings clauses were enacted at the 1966 legislative session to cover amendments made to the former Penal Law at that session, the substance of such amendments has also been incorporated in Bill No. 1 and Bill No. 3.

Bill No. 2

Inasmuch as the purpose of Bill No. 2 is to accommodate the Code of Criminal Procedure to the revised Penal Law, the vast majority of amendments proposed in this bill are only of a formal nature. Such formal amendments fall into four categories:

1. Language changes, to conform to terms as defined in the revised Penal Law. For example, under the former Penal Law the term "crime" is used as the generic description for any act that subjects a person to a penal sanction; but it is inaccurate because it includes non-criminal offenses. The revised Penal Law employs the term "offense" to describe any statutory breach for which a penal sanction may be imposed. An offense may be either a "violation" (a non-criminal offense) or a "crime" (a misdemeanor or a felony). In many provisions of the Code the term "crime" is used. In order to conform these provisions to the new system for classifying offenses, appropriate changes are proposed in Bill No. 2 (see, e.g., Bill §§5,6,62,80).

2. Changing section references and designation of offenses to conform to the revised Penal Law. For example, Code of Criminal Procedure §813-a refers to "an ex parte order for eavesdropping as defined in Penal Law §738." Bill §86 amends this reference to " an ex parte order for wiretapping or mechanical overhearing of a conversation as defined in Penal Law §250.00."

3. Temporary incorporation of three subjects contained in the former Penal Law but which are not included in the revised Penal Law, i.e., double jeopardy [Bill §4; former Penal Law §§28,32,33, 1938]; jail time records [Bill §104; former Penal Law §2193(1)]; and immunity [Bill §78; former Penal Law §§2446,2447]. These subjects will ultimately be dealt with in the proposed Criminal Procedure Law, but for the interim period, it is proposed to place them in the Code of Criminal Procedure as indicated.

4. Repeal of certain provisions of the Code of Criminal Procedure which define offenses, the substance of which are dealt with in the revised Penal Law and therefore are no longer necessary. For example, revised Penal Law §230.00 defines the offense of prostitution. Since Code of Criminal Procedure

§887(4) deals with the same subject matter, it is proposed to repeal it (Bill §90).

The most significant changes proposed in the Code of Criminal Procedure deal with the sentencing of persons convicted of offenses. Since the revised Penal Law effects sweeping changes in the sentencing structure, these changes must be reflected in the Code of Criminal Procedure. Thus, a number of provisions in the Code should be repealed because they deal with sentencing concepts which are not included in the revised Penal Law, e.g., Code provisions dealing with suspension of sentence (see Bill §59). On the other hand, a number of new sentencing concepts must be implemented in the Code, e.g., determination whether defendant should be sentenced as a persistent felony offender (see Bill §60).

Bill No. 3

This bill proposes amendments to 48 bodies of law in order to conform them to the revised Penal Law. Except for amendments proposed to the Correction Law, as noted below, the amendments herein are formal in nature and are intended to accomplish the following results:

1. Chapters 1031 and 1047 of the Laws of 1965 transferred hundreds of sections from the former Penal Law to various other chapters. At the 1965 and 1966 legislative sessions 20 of these sections were amended in the Penal Law without corresponding amendments in the bodies of law to which they had been transferred. Since the former Penal Law becomes ineffective on September 1, 1967, these amendments would be lost. Therefore, appropriate changes are made in this bill to the transferred sections in order to preserve the recent amendments. The bill note identifies these amendments in "Appendix A."

2. At the 1965 and 1966 legislative sessions 16 provisions were added to the former Penal Law. Most of these have been assimilated into the revised Penal Law by proposed Bill No. 1. However, some of these provisions, the Commission recommends,

should be transferred to other, more appropriate bodies of law, e.g., section 438-b, dealing with cigarette package labeling, was added to the former Penal Law by chapter 470 of the Laws of 1965. It is proposed to transfer this section to the General Business Law as section 399 (see Bill §39). "Appendix B" of the bill note lists all such former Penal Law sections recommended for transfer.

3. As indicated in the summary of provisions of Bill No. 2, the provisions of the former Penal Law dealing with immunity (former Penal Law §§2446 and 2447) have been temporarily transposed to the Code of Criminal Procedure, wherein former Penal Law §2447 becomes Code of Criminal Procedure §619-c. At present, there are thirty-two references to former Penal Law §2447 scattered throughout the consolidated and unconsolidated laws. This bill, therefore, proposes to amend each of these references to read "section six hundred nineteen-c of the code of criminal procedure." "Appendix C" of the bill note lists all of these amendments.

4. A search of all the consolidated and unconsolidated laws has revealed 70 cross references to the former Penal Law which require amendment in order to conform them to the revised Penal Law, e.g., CPLR §4506, which refers to a violation of former Penal Law §738 is amended to refer to revised Penal Law §250.05 (see Bill §14). "Appendix D" of the bill note lists all of these conforming amendments.

In addition to the foregoing four types of formal amendments, this bill also includes a number of amendments to the Correction Law, which are necessitated by the new sentencing structure of the revised Penal Law. Thus, Bill §47 proposes the addition of a new Article 24 to the Correction Law, entitled "Provisions Applicable to Sentences Imposed Under the Revised Penal Law," which spells out the correctional procedures required to implement the new sentencing structure.

Justification for bills:

Bill No. 1

Amendments of and additions to the revised Penal Law, proposed by this bill, are in most instances necessary and, in a few, advisable.

The necessary amendments are occasioned by the passage, in 1965 and 1966 - either contemporaneously with or subsequent to the enactment of the revised Penal Law - of amendments to the then existing Penal Law. Such 1965 amendments were, by virtue of savings clauses, included by reference in the revised Penal Law. Because of this mandate and also because the 1965 and 1966 amendments represent the most recent desires of the Legislature in the area of criminal law, such amendments either have been physically incorporated in this bill or are slated for incorporation, by Bill No. 3, in other appropriate chapters of the Consolidated Laws.

The amendments which have been incorporated in this bill do not, generally, appear herein in the same language as enacted. While retaining the substance, the language of these provisions has been altered to mesh with the form, structure and style of the revised Penal Law.

The "advisable" amendments result from self-critical re-examination of its work by the Commission and from criticism and suggestions received from other agencies and groups.

Bill No. 2

The Code of Criminal Procedure, under its proposed new title, "Criminal Procedure Law," is, at the moment, undergoing a complete revision by this Commission. It is expected that such revision will be presented to the Legislature at its 1968 session. However, on September 1, 1967, the revised Penal Law goes into effect. Since the Code of Criminal Procedure is the prine instrumentality for the administration of the Penal Law, and since the existing Code is geared to the former Penal Law, it is necessary to make

certain changes in the Code to accommodate it to the revised Penal Law during the period before adoption of a new Criminal Procedure Law. These proposed amendments, as described in the preceeding part of this memorandum, constitute only such changes as are required to mesh the provisions of the revised Penal Law with those of the Code of Criminal Procedure.

It must be emphasized that the sole purpose of this bill is to implement a smooth transition to the revised Penal Law and it should be viewed only as a temporary expedient until enactment of a new, comprehensive Criminal Procedure Law.

Bill No. 3

The revision of the Penal Law, like a pebble dropped in a quiet pool, causes ripples to spread to many other bodies of New York law. To a greater or lesser degree, provisions in 48 chapters of the consolidated and unconsolidated laws will, on September 1, 1967, become affected by the Penal Law revision. To ignore these provisions would, in some instances, create substantial legal problems. Therefore, this bill addresses itself to the task of conforming and harmonizing these affected provisions to the revised Penal Law.

Possible objections to bills:

None known.