M E M O R A N D U M

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AN ACT to amend the penal law as enacted by chapter ten hundred thirty of the laws of nineteen hundred sixty-five, as amended by chapters ten hundred thirty-seven, ten hundred thirty-eight, ten hundred thirty-nine, ten hundred forty-six and ten hundred forty-seven of said laws of nineteen hundred sixty-five, in relation to incorporating therein certain amendments to conform to acts of the legislature of the years nineteen hundred sixty-five and nineteen hundred sixty-six which amended or repealed certain provisions of the former penal law, and to making certain other amendments thereto generally

Purpose of bill:

In 1965, a Revised Penal Law, bearing an effective date of September 1, 1967, was adopted. Amendments of and additions to this new law, proposed by this bill, are in some instances necessary and, in others, 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 saving 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 companion bills recommended by this Commission, 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 its staff, and from criticism and suggestions received from other agencies and groups.

The amendments proposed by this bill fall into two general categories: those which propose merely formal changes; and those which contain substantive changes. In the interest of brevity, the merely formal changes are listed - with no further explanation - in Group I of the summary of provisions which follows. Those proposed amendments which constitute changes in substance are discussed individually, and more fully, in Group II.

Summary of provisions of bill:

GROUP I

The following sections of the Revised Penal Law are proposed to be amended solely to promote greater clarity, precision and simplification. These amendments are not intended to effect any substantive changes: §§ 10.00, 20.00, 20.05 (1), 30.05 (1), 55.00, 55.10, 100.10, 100.15, 110.00, 110.05, 110.10, 115.05, 115.10, 120.05 (5) 125.05 (2) and (3), 125.45, 125.55, 125.60, 130.25 through 130.50, 135.65 (1), 145.20, 150.10 (2), 150.15, 155.30 (3) (4) (5), 155.40, 160.15, 170.00 (4), 170.10, 180.00, 180.05, 180.25, 180.45, 200.00, 200.10, 200.45, 200.50, 205.50 through 205.65, 215.50 (6), 225.05 through 225.30, 240.10, 240.25 (1), 255.10, 255.15, 255.17, 255.20, 255.30, 260.10 (1).

GROUP II

The following amendments are proposed for the reasons assigned, as follows:

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).

Section 35.05 (2) [Bill §6]: this proposed amendment is intended to avoid the anomalous situation of a police officer being guilty of a crime when, in the line of duty, he engages in certain conduct proscribed by the Penal Law: for example, when he seizes policy slips from a "numbers collector," or when, as an undercover agent, he purchases heroin from a narcotics "pusher."

It should be noted that the former Penal Law (§975) covered this situation with respect to policy slips.

Sections 60.00-60.30 (Bill §10): this proposed amendments is 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 Commission.

Sections 105.00, 105.05, 105.10 and 105.15 (Bill §§ 13-16, respectively): the proposed amendments to these sections in paragraphs (a) and (b) thereof are intended to clarify the definition of the crime. Paragraph (c) in each section specifically designates as an element of the crime, the commission of an overt act in furtherance of the conspiracy. Previously, §105.20 required allegation and proof of an overt act, without expressly designating it as an element. Thus, proposed paragraph (c) of each section obviates the necessity for §105.20, which is therefore repealed by Bill §17. Proposed §105.30 (Bill §18) merely restates for purposes of added clarity the "no defense" provisions of previous §105.30.

Section 120.05 (6) [Bill §25]: this proposed "felony-assault" provision, 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 §26]: 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 §§ 28-30): 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 130.18 (Bill §35): the two subdivisions of this proposed section merely collect in one place two provisions covered in other sections. Subdivision one constitutes the crime of consensual sodomy under a new label, but without substantive change. To denominate this crime "consensual sodomy" implies that it cannot constitute a degree of a sodomy situation which is non-consensual in nature. Such implication is not intended and is misleading. Since this crime is shifted to subdivision one of this section, §130.38 (consensual sodomy) is accordingly repealed (Bill §40).

Subdivision two of this proposed section incorporates without change subdivision three of §130.20. The latter subdivision is therefore repealed (Bill §36). The effect of transferring this provision to this section is to reduce the offense from a class A to a class B misdemeanor. The only other

change in §130.20 is the change of the title of the offense to sexual misconduct in the first degree.

As a result of splitting the crime of sexual misconduct into two degrees, the appropriate conforming change is made in §130.05(1) [Bill §34].

Section 135.25 [Bill §44]: 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, §135.35 and its companion, §135.40, are no longer applicable and are therefore repealed by Bill §45.

Section 140.00(2) [Bill §47]: One amendment to this subdivision 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 burglarly 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. Appropriate conforming amendments are made to each degree of burglary (Bill §§48-50).

The other proposed amendment to this subdivision, relating to roofs, fire escapes and similar appendages, is intended to state the realistic proposition that these "appendages" in fact constitute part of the building.

The addition of paragraph (c) of subdivision one of §140.25 and of subdivision three of §140.30 (Bill §§ 49,50), is intended to cover a fact situation often present in burglary and which should constitute a higher degree of the basic crime. See §160.15 (3).

Proposed §140.31 (Bill §51) creates a presumption which is necessary in almost every case where the perpetrator is not apprehended in the course of the commission of the crime. See also proposed §160.16 (Bill §61).

Section 145.00 (Bill §52): 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 155.00(1) [Bill §56]: "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," See §165.10(1) [Bill §63].

Section 165.07 (Bill §62): this proposed section 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.

As a necessary conforming change, it is proposed to transfer the definition of secret scientific material from §155.30(3) [Bill §58] to subdivision six of §155.00 (Bill §57).

Section 165.15(2)(5)(6) [Bill §64]: 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 165.16 (Bill §65): this proposed section is designed to furnish law enforcement officials with effective means of combatting the serious and growing problem of unathorized use of credit cards. Generally these cards are stolen ones but proof of that fact is, to all intents and purposes, impossible to obtain. Goods and services are procured by use of these cards but, again, proof is almost impossible to obtain. When a person has in his possession a credit card which he knows he has no right to have or to use, it is realistic to presume - as this provision does - that the possessor intends to use it unlawfully. In view of the burgeoning use of stolen credit cards, with the resulting losses running into the many millions of dollars, felony treatment of this crime seems indicated.

Section 190.35 (Bill §72): 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 §73): this proposed amendment restates the substance of former Penal Law §2401, which was added by Laws 1965, ch. 328.

Section 190.45 (Bill §74): this proposed amendment restates the substance of former Penal Law §2403.

Section 205.70 (Bill §83): An element of the crime of hindering prosecution is the fact that the actor knew or believed that the one on whose behalf he engaged in the specified obstructive conduct, committed or was being sought for the commission of a crime. Proof of this state of mind is, as a practical matter, virtually impossible. It is therefore both logical and necessary for the law to presume - subject, of course, to rebuttal - that the actor knew or believed that such was the situation.

Section 220.00 (Bill §85): the proposed amendments to this section are necessitated by recent legislation dealing with hallucinogenic, depressant and stimulant drugs. See Laws 1965, chs. 323, 332.

Section 225.00(4)(7)(8)(10) [Bill §86]: the proposed amendments to subdivisions 4, 7 and 10 are intended to clarify these provisions, without substantive change. The proposed amendment to subdivision 8 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 §93]: 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 §§ 95-97]: 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 §94). 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, furnishes 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 §§ 98-100): 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 240.35(5) [Bill §103]: this proposed amendment incorporates a change made to former Penal Law §722-b by Laws 1966, ch. 464.

Section 260.15 (Bill §110): 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(10) [Bill §111]: 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 §112]: 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 §113]: 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 §114]: 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 §116, 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 proposed companion bills 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 this and the proposed companion bills.