THE STATE of ALASKA
GOVERNOR BILL WALKER

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The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: Crimes, Sentencing, Probation, and Parole: HCS CSSB 54(FIN) am H
Our file: JU2017200760

Dear Governor Walker:

At the request of your legislative director, we have reviewed HCS CSSB 54(FIN) am H.[1] The bill relates to criminal law and sentencing; for clarity we have organized our review into the following subject areas for a more detailed analysis:

I. Offenses
II. Bail
III. Sentencing
IV. Probation and parole
V. Miscellaneous.

I. Offenses (*immediate effective date, applicable to conduct occurring on or after the effective date of the bill*).

This bill would make several changes to certain elements of offenses or the classification of offenses already in existence. The bill also criminalizes certain conduct by adding two new substances to the list of controlled substances.

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[1] In this letter, we will refer to HCS CSSB 54(FIN) am H as "Senate Bill 54" or "the bill."

A. Theft.

The bill would lower the threshold for felony property crimes under AS 11.46 from $1,000 to $750. The bill also lowers the mental state for criminal mischief in the fifth degree[2] from "knowingly" to "criminal negligence."[3] Fifth-degree criminal mischief occurs when the offender is a passenger in a stolen vehicle (*i.e.*, joyriding). The reduction in the mental state will likely hold more offenders accountable who participate in vehicle theft operations, but who are not the person who has actually taken the vehicle.

B. Sex Trafficking.

Last year's omnibus crime bill, Senate Bill 91 (Ch. 36, SLA 2016), created circumstances in the law which allowed a person to operate a place of prostitution and avoid prosecution for sex trafficking if the person also practiced prostitution themselves in that location unless they induce or cause another person to engage in prostitution. Legislative history suggests that these earlier provisions were enacted to prevent the state from prosecuting cooperatives of independent sex workers working in the same location.

Senate Bill 54 would amend the sex trafficking statutes to focus the statutes on individuals who receive compensation for prostitution services rendered by another while specifically excluding situations in which a person receives payment for "reasonably apportioned shared expenses." [4] Thus, Senate Bill 54 would codify the original legislative intent while at the same time ensuring that those who profit off of sex workers are held accountable for their conduct.

C. Drugs.

The bill adds two new substances to the list of controlled substances. The synthetic opioid U-47700 (known as "pink") is added as a schedule IA controlled substance and Tramadol is added as a schedule IVA controlled substance. The addition of these substances criminalizes the illicit distribution and possession of these substances.

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[2] Bill sec. 12, amending AS 11.46.486(a) (3).

[3] Under current law, a person acts with "criminal negligence" "when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation [that, for example, a vehicle was a stolen vehicle]." (AS 11.81.900(a)(4))

[4] Bill sec. 23, amending AS 11.66.150.

D. Violating Conditions of Release.

The bill (sec. 19) would return the offense of violation of condition of release to a misdemeanor. Last year's omnibus crime bill, Senate Bill 91 (Ch. 36, SLA 2016), reduced the offense of violation of conditions of release to a violation punishable by only a fine. The 2016 change created confusion in the court system and law enforcement agencies over the ability to arrest and hold a person who violated their conditions of bail. Returning this offense to a misdemeanor, punishable by up to five days of imprisonment, clarifies the mechanism for judges and law enforcement alike that a person may be arrested and held until bail is set on the new offense. This will allow the person's conduct to be addressed immediately while allowing a bail hearing in the underlying case to be set at a later date.

E. Driving Without a Valid License.

Senate Bill 54 reduces the offense of driving without a valid license (sec. 42) from a misdemeanor to an infraction punishable by up to a $300 fine under AS 28.90.010.

II. Bail *(effective January 1, 2018, applicable to offenses committed on or after the effective date).*

The bill would make various changes to the bail statutes and responsibilities of the pretrial services program established within the Department of Corrections. The provisions related to sober release and risk assessments are effective January 1, 2018. If the bill is signed after that date, they will be effective at 12:01 a.m. the day after the bill is signed.[5]

A. Sober Release.

Section 27 of the bill would amend AS 12.30.011 to direct that if the Alaska Supreme Court establishes a schedule of bail amounts or conditions of release for misdemeanor offenses, the schedule must include a condition that the correctional facility shall conduct a chemical breath test of an individual in custody who is arrested and intoxicated and either (1) detain that person until the person's breath has less than .08 grams of alcohol for each 210 liters of breath; or (2) release the person to another person who is willing and able to provide care for the individual.

During legislative hearings, a representative of the Alaska court system testified that this provision may be void because the bill does not include a provision to amend a

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[5] AS 01.10.070.

court rule.[6] Under the Alaska Constitution, the Alaska Supreme Court "shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts."[7] The legislature may change court system rules of practice and procedure by a "two-thirds vote of the members elected to each house."[8] However, where a provision of law does not conflict with current court rules, it is not necessary for the legislature to amend court rules with a two-thirds vote.[9] While a direct conflict between a statute and a court rule may require a direct court rule amendment,[10] where a statute serves to indirectly amend a court rule and the legislature fails to adopt a court rule change, both the statute and the court rule remain valid.[11] In the event of a conflict, the court rule may control (further, the court system may choose to amend the court rule to reconcile with a conflicting statutory provision). Here, we do not believe that sec. 27 of the bill directly conflicts with current court rules; therefore, we do not believe this provision is likely to be found to have no effect.

As noted above, sec. 27 of Senate Bill 54 requires the Alaska Supreme Court to include a provision related to the creation of a misdemeanor bail schedule. This is a procedural matter. The applicable court rule – Rule 41, Rules of Criminal Procedure – generally cites to AS 12.30.006 – 12.30.080. Criminal Rule 41(d) also specifies what *must* be contained in any bail schedule. Because section 27 of Senate Bill 54 directs a provision to be added to the bail schedule and Criminal Rule 41 also provides what must be in the bail schedule, sec. 27 has an indirect effect on Criminal Rule 41. In our view, since the courts draw their authority from both statute and court rules, we believe sec. 27 of Senate Bill 54 can be read harmoniously with Criminal Rule 41(d). The court may look to both sec. 27 of Senate Bill 54 and Criminal Rule 41 for direction on what conditions will be made a part of any bail schedule.

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6 Testimony by Nancy Meade, before the Senate Finance Committee, November 10, 2017, at 10:18:01 a.m.

7 Art. IV, sec. 15, Constitution of the State of Alaska.

8 *Id.*

9 *Stiegele v. State*, 685 P.2d 1255, 1259 (Alaska App. 1984).

10 *See, Mund v. State,* 325 P.3d 535 (Alaska App. 2014) (to resolve a conflicting procedural court rule and statute; the court of appeals invalidated the statutory subsection in conflict with the procedural court rule).

11 *Galbraith v. State*, 693 P.2d 880, fn. 5 (Alaska App. 1985), see also *Manual of Legislative Drafting,* Legislative Affairs Agency, p. 50 (2017); http://akleg.gov/docs/pdf/DraftingManual.pdf.

B. Release Pending Sentencing.

Alaska Statute 12.30.040 requires an offender to be remanded to jail when convicted of certain crimes, including an unclassified felony, class A felony, sexual felony, class B felony if the person has been previously convicted of a similar offense, or a felony crime against a person and the defendant has been found to be guilty but mentally ill. The bill would amend AS 12.55.027 (sec. 29) to clarify that remand is required and cannot be satisfied by release on electronic monitoring under AS 12.55.027.

C. Risk Assessment.

Starting January 1, 2018, Senate Bill 91 (Ch. 36, SLA 2016) requires all defendants to undergo a pretrial risk assessment, which will assist judges in establishing bail and release conditions. Senate Bill 54 narrows the group of persons to be assessed to only those offenders who are detained in custody (who are not released on their own recognizance or who post bail per the bail schedule) or for whom the prosecution requests an assessment. Therefore, if a person is released prior to arraignment, the Department of Corrections will not prepare a pretrial risk assessment unless the prosecution requests it.

III. Sentencing *(Immediate effective date, applicable to conduct occurring on or after the effective date).*

The bill would also make a number of changes to both the felony and misdemeanor sentencing laws.

A. Class C Felonies.

The bill would change the presumptive sentencing ranges for class C felonies. For a first felony offense the range is changed from a probationary sentence to a term of 0 - 2 years of jail. For a second felony offense, the class C felony range is changed from 1 - 3 years to 1 - 4 years. The range for a third class C felony offense remains unchanged. Further, the bill would not change the presumptive sentencing ranges for class B felony offenses. Under current law, the range for a first felony offender convicted of a class B felony offense is also 0 - 2 years. Second felony offenders convicted of a class B felony offense face a sentencing range of 2 - 5 years. Thus, under the changes found in Senate Bill 54, the sentencing range for a first time class C and class B felony offense would be the same. It is likely that an affected offender will challenge the legality of this sentencing framework. However, such a change is both well within the Legislature's prerogative and is likely constitutionally sound if challenged.

Neither the Alaska Constitution nor the United States Constitution requires strict proportionality of minimum sentences. *See Green v. State,* 390 P.2d 433, 435 (Alaska 1964). The Alaska Supreme Court has expressly declined to hold that, a sentencing scheme where a higher level offense may conceivably be sentenced to a lower term of

incarceration than a lower level offense, constitutes an infliction of cruel and unusual punishment or an infringement of the due process clause in any respect. *Id.* It is well established that it is the legislature, and not the judiciary, that determines the punishment for a particular offense. *See Alex v. State,* 484 P.2d 677, 685 (Alaska 1971). For this reason, "generally speaking, a criminal defendant cannot challenge the legislature's assessment of the proper penalty range for a particular offense." *State v. Morgan,* 111 P.3d 360, 365 (Alaska App. 2005). "The comparative gravity of offenses and their classification and resultant punishment is for legislative determination." *Alexie v. State,* 229 P.3d 217, 219, 221 (Alaska App. 2010). Thus while it would have been preferable to avoid litigation over this issue, the statute will likely survive any constitutional challenge.

B. Special Circumstances.

Additionally, the bill would increase the sentencing range for a first time class A felony when the conduct is directed at a first responder from 5-9 to 7-11 years.[12]

C. Theft in the Fourth Degree.

Next, the bill would create a new graduated sentencing structure for theft in the fourth degree; theft of property valued at less than $250. Upon a person's first conviction, a court is authorized to sentence a person to a period of incarceration of up to 5 days. Upon the second conviction, the person may be sentenced to a period of incarceration of up to 10 days, and upon the third conviction, the person may be sentenced up to 15 days. Upon the person's fourth conviction, the offense is upgraded to a class A misdemeanor (theft in the third degree), which under most circumstances will be punishable by up to 30 days of imprisonment.

D. Community Work Service for Criminal Mischief.

The bill creates a mandatory 25 hours of community work service as a part of their sentence for a person convicted of criminal mischief in any degree.

E. Lookback Periods for Misdemeanors.

Because certain sections of Senate Bill 91 (Ch. 36, SLA 2016) established enhanced penalties for misdemeanors based on prior convictions, the legislature added a five year lookback period for misdemeanors in Senate Bill 54. Therefore, when counting prior convictions for the purpose of enhancing a penalty for a misdemeanor, a prior conviction may not be counted if a period of five years has elapsed between the person's

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[12] A first responder would include a "uniformed or otherwise clearly identified peace officer, firefighter, correctional employee, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense." (AS 12.55.125(c))

unconditional discharge of the prior offense and the commission of the new offense. If the offense immediately preceding the new offense is an unclassified or class A felony and qualifies as an applicable prior conviction, the court may go beyond the five years and count the prior convictions regardless of how old they are.

F. Authority of the Commissioner to Return Person to Correctional Facility *(Immediate effective date).*

In 2016, Senate Bill 91(Ch. 36, SLA 2016) required a person to serve their period of imprisonment for a first conviction of driving while under the influence on electronic monitoring or, if electronic monitoring is not available, at a private residence by other means determined by the commissioner of corrections. Section 64 of Senate Bill 54 would clarify that even though the person is statutorily required to serve their sentence outside of a correctional facility, this does not create a liberty interest. If the person violates the terms and conditions of the imprisonment at a private residence, the commissioner of corrections has the authority to return the person to a correctional facility.

IV. Probation and Parole.

A. Early Termination *(Immediate effective date, probation ordered for offenses committed on or after the effective date).*

Under current law, probation officers are required to recommend early termination of probation when a person has been on probation for one year for most class C felony offenses, successfully completed all treatment programs, has not violated any conditions of probation, and is currently in compliance with all conditions of probation. The court may not terminate probation unless the victim has been given an opportunity to be heard and the court has considered any input from the victim. The bill before you, Senate Bill 54, would change the period in which the probation officer must recommend early termination from one year to 18 months for these class C felony convictions. All other conditions mentioned above remain the same.

B. Mandatory Probation for Sex Offenders *(Immediate effective date for offenses committed on or after effective date).*

In an apparent oversight, Senate Bill 91(Ch. 36, SLA 2016) eliminated the statutory provision requiring sex offenders to serve a period of probation. Here, Senate Bill 54 would reinstate mandatory probation for sex offenders by establishing a period of probation of 15 years for an unclassified felony, 10 years for a class A or class B felony, and five years for a class C felony. These are the same terms of probation that were in existence prior to the enactment of Senate Bill 91(Ch. 36, SLA 2016).

C. Earned Compliance Credits for Sex Offenders and DV Offenders *(Immediate effective date, for offenses committed on or after the effective date).*

Previously, Senate Bill 91 (Ch. 36, SLA 2016) created a new method for early discharge from probation or parole by reducing the period of probation or parole by 30 days for every 30-day period that the person goes without violating a probation condition. This program has become known as the "earned compliance credit program". Here, Senate Bill 54 would require a person convicted of a sex offense or a crime involving domestic violence to complete all treatment programs before being discharged from probation or parole due to the accrual of earned compliance credits.

D. Administrative Parole Repealed.

In 2016, a new parole procedure referred to as "administrative parole" was enacted through Senate Bill 91 (Ch. 36, SLA 2016). Administrative parole eliminated both the requirement for an inmate to apply for discretionary parole and the review conducted by the parole board. Instead, it automatically granted parole for offenders convicted of misdemeanors, class B, and class C felonies that are not sex offenses or offenses against a person under AS 11.41. Before administrative parole could be granted the inmate had to have served at least one-fourth of the active jail sentenced imposed and met the requirements of their case plan. Senate Bill 54 repeals administrative parole. An inmate remains eligible for discretionary parole as allowed by law.

E. Timing of Discretionary Parole Hearings.

In 2016, Senate Bill 91(Ch. 36, SLA 2016) established guidelines as to how often the parole board should schedule subsequent hearings after an initial denial of an offender's discretionary parole application. Prior to this provision, the parole board had discretion in scheduling additional discretionary parole hearings as necessary, and had a policy that no discretionary parole applicant could be prohibited from reapplying for discretionary parole for a period of more than ten years. This bill would eliminate the language suggesting that the parole board hold hearings every two years after an initial denial thereby restoring discretion in scheduling additional discretionary parole hearings to the parole board.

F. Alcohol Safety Action Program (ASAP).

The ASAP is designed to provide substance abuse screening, referrals, and monitoring of persons convicted of a misdemeanor involving alcohol. However, Senate Bill 91 (Ch. 36, SLA 2016) limited ASAP referrals to only those convicted of driving under the influence, refusal to take a breath test, and for a minor consuming alcohol, but altered the type of screenings to use a "validated risk tool" and structure the level of monitoring to the level of re-offense determined by the risk tool. Here, Senate Bill 54

would leave the use of the risk tool in place but expand the program to include persons charged or convicted of a misdemeanor involving the use of alcohol or a controlled substance.

The expansion of the program will likely require additional funding. To that end, the legislature has made this provision conditioned upon an appropriation that is 50 percent greater than the appropriation the program received in fiscal year 2018. If that condition is met, this section will be effective on July 1, 2018.

V. Miscellaneous Provisions.

A. Probation and Parole Caseloads *(Immediate effective date).*

The bill would establish an average caseload for probation and parole officers of 75 except in temporary and extraordinary circumstances approved by the commissioner. It is unclear what the practical effect of this provision will be as it is an entirely new concept for probation and parole officers.

B. Studies, Training and Alaska Criminal Justice Commission Membership.

The bill would require the Alaska Criminal Justice Commission, Department of Corrections, and the University of Alaska Justice Center to work together on studying risk factors related to criminal activity, the prevention of crime, and improving crime prevention strategies. This section is effective immediately, but must be implemented by June 30, 2019.

The bill also includes intent language requesting that the Alaska Criminal Justice Commission to work with the Department of Public Safety and other law enforcement agencies to conduct informational sessions which include information on crime trends, the costs to the correctional system, and successful criminal justice reforms. This section is effective immediately.

In addition to the above provisions, Senate Bill 54 gives the commissioner of the Department of Health and Social Services a seat on the Alaska Criminal Justice Commission. The commissioner will be a nonvoting member. This section is also effective immediately.

Our review of HCS CSSB 54(FIN) am H has not identified any additional constitutional or legal concerns, except as noted above. However, the bill is complex and contains varying effective dates; therefore there may be questions about implementation issues not yet apparent. We expect that those issues, if any, will be resolvable.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By:

Robert Henderson
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