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MEMORANDUM February 14, 2013

SUBJECT: CSSB 22(JUD) - Governor's Crime Bill
(Work Order No. 28-GS1587\U)

TO: Senator John Coghill
Chair of the Senate Judiciary Committee
Attn: Karen Lidster

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed the draft committee substitute you requested for SB 22, the governor's crime bill. I have made the changes you requested, along with a few editorial changes. I wanted to draw your attention to the following:

1. **Selected edits.** At page 2, line 21, the word "Senate" has been inserted before "letter of intent" because the letter was adopted by the Senate but not the House. At page 17, lines 12 - 16, section 34 has been altered by eliminating reference to divisions of the Department of Law not mentioned in the Alaska Statutes and referring to the divisions by their functions. At page 19, lines 9 - 10, "or child kidnapper" has been added to assure that both types of offenders are covered by the registration requirements of AS 12.63. Section 8 of the bill was rewritten as the original draft incorrectly had the third paragraph (now paragraph 2) applying only to the second paragraph and not the first as was intended.

2. ***Collins* issue.** One of the objectives of the bill is to overcome the holding in *State v. Collins*, 287 P.3d 791 (Alaska App. 2012). In *Collins*, the majority opinion interpreted the legislative history of 2006 changes to AS 12.55.155 that, among other things, raised the presumptive sentences for certain sex offenses, apparently on the belief that sex offenders have typically committed other sex offenses by the time they are caught, and have less potential for rehabilitation than the average offender. The court found that Collins did not fit the offender profile on which the legislation was based, a sentence within the presumptive range would be manifestly unjust, and the case should be referred to a three-judge panel under AS 12.55.165. *Id.* at 795 - 96. The bill addresses this holding in secs. 23 and 24 by eliminating from referral to a three-judge panel and from the three-judge panel's authority, cases where the defendant has prospects for rehabilitation that are less than extraordinary, and where the defendant does not have a history of undetected, undocumented, or unprosecuted offenses. The language seems sufficient to accomplish the purpose.

3. **Single subject concerns.** Sections 35 - 37 do not fit within the criminal law subject matter of the bill. Section 35 amends AS 47.10.086(c), which enumerates the circumstances when a court determining the placement of a child in need of aid need not consider whether reasonable efforts have been made to support the family. These circumstances, both in existing law and in the proposed amendments, do include a parent or guardian's convictions for certain crimes, but also include non-criminal conduct. Sections 36 - 37 add to the list of persons required to report child abuse under AS 47.17.020. There is a criminal penalty for failure to report, so arguably these sections impose criminal liability on two new groups. But neither of the statutes being amended involve changes to criminal law and procedure, a broad, but single, subject. *See Galbraith v. State*, 693 P.2d 880, 885 - 86 (Alaska App. 1985).

The single subject rule is the first sentence of article II, section 13 of the Constitution of the State of Alaska, requiring (with certain specified exceptions) that "[e]very bill shall be confined to one subject." The courts have given the requirement a liberal interpretation, adopting, in *Gellert v. State*, 522 P.2d 1120 (Alaska 1974), the position stated by the Minnesota Supreme Court in 1891:

> All that is necessary is that [the] act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

Id. at 1123, *quoting Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891). Five years after *Gellert*, the Alaska Supreme Court stated that the test

> . . . requires no more than that the various provisions of [a] single legislative enactment fairly relate to the same subject, or have a natural connection therewith. *Short v. State*, 600 P.2d 20, 24 (Alaska 1979).

The courts rarely strike legislation down for violation of the rule,[1] but a bill struck down on this ground is void. A person convicted of a newly enacted offense or sentenced under new provisions of AS 12 would have an incentive to make the challenge.

4. **Equal protection and due process.** Some provisions of the bill create classifications of offenders subject to different penalties, or different possibilities for prosecution, for very similar offenses. Differing classifications for similarly situated persons can under some circumstances, violate the right to the equal protection of the laws guaranteed under

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[1] At least not when the issue is not raised by the parties. *See Smith v. State*, 187 P.3d 511, 517 (Alaska App. 2008), in which the court noted, without expressing an opinion, that AS 12.55.127 was inserted into a bill retitled "An Act relating to nonindigenous fish and consecutive sentencing."

article I, section 1 of the Constitution of the State of Alaska. In *Williams v. State*, 151 P.3d 460, 464 (Alaska App. 2006), the Court summarized the test for applying equal protection analysis to legislation as follows:

> Article I, section 1 of the Alaska Constitution provides that all persons are "entitled to equal rights, opportunities, and protection under the law." In evaluating whether legislation violates this guarantee, we apply a flexible three-part test that is dependent on the importance of the rights involved:
>
> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by [the] challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
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> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated. [Footnotes omitted.]

The level of scrutiny a court would apply where the liberty interests of a criminal defendant are implicated is likely at the higher end of the scale, requiring that the fit between means and ends must be close.

The Alaska Court of Appeals has also expressed its concerns about differential penalties for conduct that is similar or less blameworthy in due process. The Alaska Court of Appeals has examined claims that punishments required by statute for lesser offenses were greater than that required by statute for greater offenses. The court struck down the greater punishment apparently on due process grounds. In *Pruett v. State*, 742 P.2d 257 (Alaska App. 1987), the defendant was convicted of first degree assault and the trial court found that Pruett was subject to a seven-year presumptive term. The presumptive term for manslaughter was just five years. The Court of Appeals noted that the legislature could not have intended a five-year presumptive term for those that recklessly murder their victim (manslaughter) and a seven-year presumptive term for those that recklessly injure their victim (assault in the first degree). Accordingly, the court ordered that Pruett

and others coming after Pruett were only subject to the five-year presumptive term. *See also Smith v. State*, 28 P.3d 323, 329 - 330 (Alaska App. 2001).

Turning to specific provisions of the bill, the provisions cited below may raise these issues.

> **Page 6, lines 25 - 27:** Section 9 of the bill permits the forfeiture of the property of a person offering money for sexual activity, but not the person offering the sexual activity for money.
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> **Page 7, lines 11 - 13:** In sec. 10, newly added AS 12.10.010(a)(8) removes the statute of limitations for sex trafficking involving a person under 20. Given that the age of majority is 18, the rationale for treating those who victimize those under 20 more harshly than those over 20 is not clear. (This is also an issue in the existing AS 11.66.110 and 11.66.130.)
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> **Page 7, line 18 - 20:** Also in sec. 10, new provisions of AS 12.10.010(b)(1) provide a ten year statute of limitations for sexual assault in the third degree by probation and parole officers under proposed AS 11.41.425(a)(5) and 11.41.425(a)(6). However, under existing AS 12.10.010(a)(4), there is no statute of limitations for guardians of 18 or 19 year olds in the custody of the Department of Health and Social Services, peace officers, and correctional officers, charged under AS 11.41.425(a)(2) - (4). It is not clear why this distinction might be warranted.

If any of these provisions is challenged, the court would likely look for a legislative record that supports a close fit between the classification and the legislature's objective. If a court cannot identify a close fit between the means and end, the court could find that the provisions violate the equal protection clause of the Alaska Constitution. If a court finds that a greater penalty or harsher treatment for similar or lesser conduct is not proportionate, it may find that a penalty provision violates a person's substantive due process rights.

5. **Applicability provisions, page 22, lines 26 - 27:** Sections 2 and 10 of the bill increase the limitations period for bringing certain actions. The bill only applies these provisions to offenses occurring on or after the effective date of the bill. The committee could choose to apply these provisions to offenses occurring before the effective date if the limitations period for those has not expired as of the effective date of the bill.

6. **Page 4, lines 16 - 30 and page 5, line 25 - 31:** The definitions set out in secs. 4 and 6 of the bill should probably be moved to AS 11.41.470, where the other definition section for AS 11.41.410 - 11.41.470 is located. In accordance with the *Manual of Legislative Drafting*, if a definition is only used once, it should be placed in the bill section in which it is used. If used in more than one section, it should be placed in a definitions section.

7. **Page 12, lines 3 - 9:** The crimes listed in sec. 21 of the bill might better be added to AS 12.55.127(c), where other individual crimes and special sentencing requirements are listed.

8. **Page 14, lines 6 - 15:** AS 18.65.865(b), which provides for protective orders for victims of stalking and sexual assault, should be amended in the same manner as section 26 of the bill.

9. **Page 10, lines 13 - 21 and page 22, lines 17 - 23:** Bill section 17 provides the attorney general with the authority to seek an immediate interlocutory appeal in certain situations and bill section 43 provides a corresponding court rule amendment providing that the appeal shall be dealt with in an expedited manner. It appears, but is not clear, that this section might also amend other appellate rules, such as Rule 402.

If I may be of further assistance, please advise.

KJS:plm:ljw
13-028.plm

Enclosure