

# LEGAL SERVICES

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## MEMORANDUM

February 6, 2013

**SUBJECT:** Imitation Controlled Substances Bill  
(Work Order No. 28-LS0427\A)

**TO:** Senator Dennis Egan  
Attn: Keegan O'Brien

**FROM:** Kathleen Strasbaugh  
Legislative Counsel

Please find enclosed a draft of the bill you requested. The bill, if enacted, would eliminate from the definition of "imitation controlled substances" in AS 11.73.099(3) the requirement that a substance contain a pharmacologically active component.

In your request, you indicated an interest in resolving potential difficulties in interpreting AS 11.73.099(3) that were raised in *Morrow v. State*, 704 P. 2d 226 (Alaska App. 1985), a case in which the defendant challenged the constitutionality of the statute on the grounds of vagueness and overbreadth, that is, because it gave inadequate notice of the prohibited conduct and could reach conduct that was constitutionally protected (e.g. speech) or was not intended to be criminalized.

In *Morrow*, the defendant argued that the statute could penalize conduct the statute was not intended to cover. To illustrate this point, she posed a hypothetical case ". . . where someone, without any intent to deceive, gives caffeine diet pills, which are available as non-prescription medicine, to someone indicating that the pills are 'as effective for weight loss as any prescription medicine.'" 704 P.2d at 231 - 32. In *Morrow*, the state recognized that the statute could have been construed to reach conduct like that described by the defendant, but it was unlikely that the legislature intended to prohibit such conduct when it enacted the statute:

As AS 11.73.099(3) now reads in part, an "imitation controlled substance" is a substance containing specific chemical components which "by dosage unit appearance . . . or by representations would lead a reasonable person to believe that the substance is a controlled substance." [*Emphasis provided.*] The state asks us to read the "or" in AS 11.73.099(3) as "and" in construing the statute. The state argues that as so construed, the statute would not reach innocent behavior.

704 P.2d at 232. The Alaska Court of Appeals upheld the statute, finding that the conduct of the defendant in offering an imitation substance as a controlled substance was intended to be covered by the statute. 704 P.2d at 233. The court noted that the statute

could be construed to avoid the potential problems of vagueness and overbreadth, and that offering imitation drugs as controlled substances was not a protected activity. 704 P.2d at 232 - 33.<sup>1</sup>

The legislature substituted "and" for "or" in a bill enacted a few years after *Morrow*, thus resolving issues raised by the wording of the statute. *See* § 11, ch. 76, SLA 1990.

The Court of Appeals mentioned in a footnote another scenario in which the statute's language might be overbroad:

It appears to us that it may be argued that certain other conduct falls within the statute. An example of conduct which might fall within the statute would be a person who delivers an imitation drug honestly believing that the imitation drug is a controlled substance. However, the case before us does not present this question . . .

704 P.2d at 232 n. 1.

It is not clear that the proposed amendment will resolve the problem created by either hypothetical, as a person might still offer a caffeine pill as a weight loss remedy, or deliver an imitation controlled substance the person believes is a controlled substance. The amendment will meet another objective you identified, to eliminate the need for proof that the substance contains particular chemicals.

In drafting the bill, I assumed that you would want to repeal AS 11.73.020, which makes it an offense to possess the substances listed in AS 11.73.099(3) with the intent to manufacture imitation controlled substances, since the presence of those substances is no longer an element of the offense.

#### Substantive Due Process and Equal Protection

The offenses set out in AS 11.73 are felonies.<sup>2</sup> The bill would eliminate the requirement that the imitation controlled substance contain a pharmacologically active substance. Thus a person who sells, for example, sugar pills, as controlled substances could face felony charges. A felony sentence might be challenged under these circumstances as sufficiently unfair, arbitrary, or disproportionate to the offense to constitute a violation of the right to substantive due process, where an arguably equivalent offense involving actual illegal controlled substances draws lesser penalties. *See, for example,*

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<sup>1</sup> The court did remand the case to the trial court for further proceedings in light of its ruling. *Id.*

<sup>2</sup> Manufacture or delivery of an imitation controlled substance and advertising to promote the delivery of an imitation controlled substance are class C felonies. AS 11.73.010 and 11.73.040. Delivery of an imitation controlled substance by a person over 19 to a person under 19 and at least three years younger than the person is a class B felony. AS 11.73.030.

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AS 11.71.050 (manufacture, delivery, or possession with the intent to manufacture or deliver marijuana; a class A misdemeanor).

Alaska's appellate courts will not require that a crime be strictly proportioned to the offense. In *Green v. State*, 390 P.2d 433 (1964), the Alaska Supreme Court turned aside Green's challenge to his sentence for second degree murder, which he based on the fact that some minimum sentences for first degree murder were less than for second degree murder. The court's determined that the sentences were different, but went on to state that for a sentence to violate the due process clauses to the state and federal constitutions (and the prohibition against cruel and unusual punishment), it must be so grossly disproportionate to the offense that it shocks the conscience. 390 P.2d. at 435. However, it has since been noted that under federal constitutional law, Alaska courts must now evaluate whether the sentence is proportionate to the crime, even though proportionality is not mentioned in the Alaska Constitution. *Dancer v. State*, 715 P.2d 1174, 1181 n. 6 (Alaska App. 1986), citing *Solem v. Helm*, 463 U.S. 277 (1983).

A sentence that does not shock the conscience might nonetheless be struck down if it is disproportionate to a lesser sentence for similar conduct. 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. In two cases the court struck down the greater offense, 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 subject to a seven-year presumptive sentence, but the presumptive term for manslaughter was just five years. The Alaska Court of Appeals noted that legislature could not have intended a five-year presumptive term for manslaughter for those that recklessly murder their victim and seven-year presumptive term for first degree assault for those that recklessly injure their victim. It ordered that Pruet and others coming after him were only subject to the five-year presumptive term. See also *Smith v. State*, 28 P.3d 323, 329 - 330 (Alaska App. 2001). This analysis may or may not be applied to a sentence under AS 11.73. However, I wanted to let you know about the issue.

#### Effect of the Amendment on Juvenile Offenders

You asked whether the bill would, if enacted, have an effective on juveniles in delinquency proceedings, particularly whether it would place a juvenile at risk for an automatic waiver to adult court. The bill would not make a juvenile subject to automatic waiver because the offenses in AS 11.73 do not trigger the automatic waiver under AS 47.12.030. Under AS 47.12.100, a court may waive juvenile jurisdiction if the juvenile is not amenable to treatment. It is possible that repeat offenses or felony offenses could raise questions regarding amenability to treatment, but that may be said of many offenses, not only those set out in AS 11.73.

Please let me know if I can be of further assistance in this matter.

KJS:ljw

13-067.ljw

Enclosure