

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 10, 2014

SUBJECT: Bill relating to illicit synthetic drugs
(Work Order No. 28-LS1242\A)

TO: Senator Kevin Meyer
Attn: Edra Morledge

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed a draft bill that would prohibit the sale of certain synthetic drugs. You asked for a bill based on an Anchorage ordinance (which in turn is based on a Bangor, Maine ordinance) that allows for the ticketing of establishments that sell products containing synthetic drugs labeled as other products, such as "bath salts" or "spice," designed to mimic certain stimulants and marijuana.

Drafting issues. Controlled substances are excluded from the definition of "illicit synthetic drugs" in this version of the bill. The street names of the products listed in the ordinances have been retained, although they are likely to rapidly become outdated, and do not indicate the substances they contain and I would recommend eliminating them. There could be some difficulty with penalizing substances without specifically identifying them, whether in the ordinance or in this draft. *See, e.g., Crutchfield v. State*, 627 P.2d 196, 200 - 201 (Alaska 1980) (conviction for driving while under the influence of a prescription drug overturned where drug was not listed in regulations that was simply referred to as "of composition substantially similar" to listed drugs); *State v. Erickson*, 574 P.2d 1, 20 - 21 (Alaska 1978) (court suggested that "of composition substantially similar" language could not be used to indict for possession or sale of a substance that was not listed); *Casey v. State*, 505 P.2d 285, 286 n. 2 (Alaska 1973) (court suggested that term "having physiologically similar effects" may be unconstitutionally vague). However, both the bill and the ordinance are designed to address the distribution of items essentially because of how they are marketed, rather than because of their specific chemical composition, and hopefully this will aid in avoiding the problem of vagueness.

Penalties and related matters. The draft bill provides the penalty you requested. As noted, the definition of "synthetic drug" and excludes controlled substances. This should avoid interference with the enforcement of criminal statutes that impose differing penalties for possession, possession with intent to distribute, distribution, and manufacture of controlled substances, depending on the relative threat that the substance poses to individual and public health. The ordinance that you provided contemplates that the products it prohibits may contain synthetic marijuana or stimulants. These substances are currently classified as schedule IIIA (AS11.71.160(f)) and IIA drugs

Senator Kevin Meyer

February 10, 2014

Page 2

(AS 11.71.150(e)(11) - (15)) respectively. Manufacture or delivery of either can, under some circumstances, qualify as misconduct involving a controlled substance in the third degree, a class B felony. AS 11.71.030. If a new statute classified distribution of these substances as a violation, the maximum penalty would be a fine. This significant difference in punishment for similar misconduct raises constitutional issues. A court will, as a matter of due process and equal protection, evaluate whether offenses and their accompanying sentences are proportional to each other, that is, whether greater punishment is imposed for less blameworthy conduct. In *Pruett v. State*, 742 P.2d 257, 263 (Alaska App. 1987) the Alaska Court of Appeals considered two statutes, one that imposed a five-year presumptive sentence for manslaughter (recklessly killing a victim) and one that imposed a seven-year sentence for first degree assault (recklessly injuring, but not killing a victim). The court found that the legislature could not have intended a five-year presumptive term for killing a victim but a seven-year presumptive sentence for injuring the victim, and determined that the lower presumptive sentence should apply to a defendant charged with assault. See also *Smith v. State*, 28 P.3d 323, 329 - 30 (Alaska App. 2001). If a person selling a synthetic product were charged with a violation for distributing a product because it contained, for example, cathinone (an ingredient of some bath salts), the person might well argue that the lesser offense applies. To avoid this problem, we have, as noted above, defined illicit synthetic drugs to *exclude* controlled substances.

Federal preemption. Given that the mislabeling of both prescription and nonprescription drugs is a matter comprehensively regulated by the federal Food and Drug Administration, the question arises of whether, under the Supremacy Clause of the United States Constitution, federal law preempts state regulation in this area. This might be an issue if the distributors of a product had complied with federal law regarding the labelling of drugs and the state sought to impose conflicting labelling requirements. *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. ___, 133 S.Ct. 2466, 186 L.Ed. 2d 607 (2013) (drug company could not comply with state law without violating federal law regarding the required contents of the label; state law struck down). However, if the products in question do not comply with the federal drug labelling law, it may be that no conflict will arise.

Relationship to imitation drug laws. AS 11.73 prohibits the delivery of substances containing certain listed chemical compounds designed and marketed to lead a person to believe that the substance is a controlled substance or has the same effect as a controlled substance. All of the offenses in AS 11.73 are felonies. There is likely to be some overlap between AS 11.73 and the proposed statute with respect to the product involved. Hopefully maintaining the focus on labelling in the civil statute will avoid the due process and equal protection problems discussed above.

If I can be of further assistance, please advise.

KJS:lem

14-023.lem

Enclosure