

MEMORANDUM

STATE OF ALASKA

Department of Law

To: Alaska Criminal Justice Commission

Date: January 9, 2017

From: Departments of Law and Public Safety

Subject: Recommended Amendments

The Departments of Law and Public Safety ask the Commission to consider the recommendations outlined below which reflect the experience of and feedback from victims, victim advocates, law enforcement, prosecutors, judges, and the public at large. The first five recommendations are more substantive, while the second set of seven are more technical that address potential drafting errors, omissions, or provide clarification.

- 1.) Jail Time for Class C Felonies: SB 91 reduced the presumptive sentence for a first time class C felony to probation with a suspended term of 0-18 months. AS 12.55.125(e). This term applies to all class C felonies including assault in the third degree, sexual abuse of a minor in the third degree, sex trafficking in the third degree, stalking in the first degree, vehicle theft in the first degree, burglary in the second degree, etc. A person can now do more jail time for a misdemeanor than they can for a first time class C felony.

The current authorized sentence is also less than the sentences that were authorized before the legislation in 2005 that created presumptive ranges in response to the case *Blakely v. Washington*. At that time a first C felony could be sentenced up to just under 2 years – the presumptive term for a second C felony.

Recommendation: Amend AS 12.55.125(e) to a presumptive term of 0-18 months for first time class C felonies.

- 2.) Adjust The New Aggravator For Misdemeanors To Require Only One Prior Conviction Instead Of Two. SB 91 created a presumptive range for class A misdemeanors, which effectively capped the amount of time jail – both active and suspended - that can be imposed. This impacts probation for repeat DUI offenders, repeat offenders of domestic violence restraining orders, and repeat theft offenders among others. Section 91 enacted an aggravator when the offender has *two or more* prior convictions for similar conduct. See AS 12.55.135(a)(1)(C), but this leaves little discretion to judge to suspend jail time to enforce probation conditions on a second offense.

Recommendation: Amend the aggravator so it applies with only one prior conviction similar in nature. This gives the judge discretion to impose the amount of time called for in each individual case and to incentivize complying with conditions of probation.

- 3.) Re-enact Recidivist Statute For Low Level Theft Offenses: Section 93 of SB 91 limits the available sentence for a first theft conviction under \$250 to a fine and probation – no jail. Under the previous law such offenses could be sentenced up to 90 days in jail.

Also previously AS 11.46.140(a)(3) made a third theft of under \$250 within five years a higher-level crime. Section 179 repealed that recidivist provision for multiple thefts under \$250.

These changes emboldened criminals and they have become more brazen in committing thefts under \$250.

Recommendation: Re-enact AS 11.41.140(a)(3) to allow recidivist thefts to be prosecuted at a higher level.

- 4.) Sex Trafficking: Secs. 39 and 40 of SB 91 amend the crimes of sex trafficking in the third and fourth degrees. These amendments were not based on recommendations of the Commission, but are presumably intended to prevent the state from prosecuting cooperatives of independent sex workers working in the same location as a trafficking enterprise. However, the practical effect of Sections 39 and 40 will be to allow individuals to operate a place of prostitution if they claim that they themselves also practiced prostitution in that location because prosecutors will now have to show that the accused *induced or caused another person* to engage in prostitution, which is a much higher standard than the prior standard for sex trafficking in the third degree. If the person did not induce or cause, then prosecutors will have to prove that the person *never engaged in prostitution at that location*. This would be very difficult, if not impossible, to prove.

Recommendation: Add language to AS 11.66.130(a) and AS 11.66.135(a) clarifying that a person must engage in sex trafficking separately from acting as a prostitute receiving compensation for personally rendered services.

- 5.) Return Violations Of Conditions Of Release To A Misdemeanor. In 2000 violating one's conditions of release on bail was turned into a crime to address issues of enforcing bail conditions. SB 91 reduced this crime to a violation. Once again, problems exist with enforcing bail conditions, such as whether a person violating their conditions can be arrested or held until the court can review those conditions. While the court system has proposed adding language to bail orders, this solution has not been universally accepted by judges in the court system.

Recommendation: Make violating conditions of release a class B misdemeanor with a maximum of 10 days in jail.

The remaining seven recommendations address potential drafting errors, omissions, or provide clarification. None of these recommendations conflict with previous Commission recommendations.

- 1.) Add “Posting An Explicit Image of a Minor” To Exceptions To Misdemeanor Presumptive Sentencing Range. *Sending* an explicit image of a minor to another person (a B misdemeanor AS 11.61.116(c)(1)) has an enhanced penalty under SB 91 of up to 90 days. However, *posting* an explicit image of a minor *to a publically available website* is limited to 30 days (an A misdemeanor pursuant to AS 11.61.116(c)(2)). Posting an explicit image of a minor to the internet is a more serious conduct than merely sending it to another individual. The sentencing scheme for these offenses appears to be inconsistent; this was not a recommendation of the Commission.

Recommendation: Add posting an explicit image of a minor to AS 12.55.135(a)(1)(F) to provide consistency and logic to the sentencing scheme.

- 2.) Re-enact Mandatory Probation for Sex Offenders: Repealing AS 12.55.125(o) was proposed to resolve a conflict between that section of law and a proposed section in an early version of SB 91. The final version of the bill resolved the earlier conflict with AS 12.55.125(o), but still repealed subsection (o). The full repeal of AS 12.55.125(o) means that a person can receive a sentence on a sex offense and not be required to serve a period of probation. This is a significant flaw since Alaska’s sex offender treatment program is what is called a “containment model.” Probation is required for that containment model to work. The elimination of *required* probation leaves a significant hole in Alaska’s strategy for addressing sex offenses. Since the testimony on SB 91 clearly indicates that the legislature did not intend to change sentences for sex offenses, it is likely that they did not intend to allow a sex offender to receive a sentence with no probationary period. This was not a recommendation of the Commission

Recommendation: Renact AS 12.55.125(o).

- 3.) Inconsistent Probation Terms for Theft in the Fourth Degree: SB 91 adjusts the probation terms for all offenses. The maximum probation term for a person convicted of most misdemeanor offenses is one year. However, for a person convicted of Theft in the Fourth Degree two or more times, the maximum probation term is six months. Therefore, on a person’s **first** conviction for Theft in the Fourth Degree they can receive a maximum probation term of **one year**, however, on their **third** conviction they can only receive a probation term of **six months**.

Recommendation: Amend the probation terms for Theft in the Fourth Degree to be consistent.

- 4.) Driving without a Valid License: SB 91 changed driving on a suspended license to a violation in most cases. However, driving without a valid license (arguably, less serious conduct than driving on a suspended license) continues to be a misdemeanor.

Recommendation: Amend the crime of driving without a valid license to be consistent with the changes made for driving with a suspended/revoked license.

- 5.) Clarifying Sentencing Terms for Felony DUI: The changes to the sentencing ranges in felony DUI's appears to create a presumptive term which may be imposed. There is a difference between a mandatory minimum term and a presumptive range. A mandatory minimum term is the minimum that must be imposed upon conviction. A presumptive range means that a sentence usually falls within that range unless an aggravator or mitigator is found. Locating these concepts in different titles of the statutes has created some confusion.

Recommendation: Move the sentencing provisions related to DUI presumptive ranges to the same section of the statutes in which the mandatory minimums are located to ensure clarity.

- 6.) Inconsistency with Shock Incarceration for Suspended Imposition of Sentence: AS 12.55.086 allows a court to impose jail time as a condition of probation when issuing a Suspended Imposition of Sentence (SIS). This is often termed as "shock incarceration." The reference to shock incarceration has been deleted in AS 12.55.125(e). However, AS 12.55.086 has not been repealed. It is unclear whether the legislature intends for the court to continue to have the ability to impose shock incarceration for people with an SIS.

Recommendation: Clarify the court's ability to impose shock incarceration.

- 7.) Align Discretion Of Bail And Pretrial Services Officers To Make Recommendations With Judge Discretion To Impose Bail: S.B. 91 limits the discretion of both judges and pretrial services officers with regard to bail. Some of those limitations are inconsistent. SB 91 requires pretrial services officers to recommend that a person be released on their own recognizance depending on the defendant's risk and level of offense. The table¹ below illustrates when pretrial services officer is required by law under SB 91 to recommend an OR release – even if they think a higher bail is appropriate under the circumstances.

¹ The tables are from *Practitioner Guide to SB 91* by the Alaska Criminal Justice Commission.

	Misdemeanors [exceptions ²]	Class C felonies [exceptions ³]	DUI/refusal	FTA/VCOR	Other
Low-risk	OR recommended	OR recommended	OR recommended	OR presumptively recommended	OR presumptively recommended
Mod-risk	OR recommended	OR recommended	OR recommended	OR presumptively recommended	SB authorized
High-risk	OR recommended	OR recommended	OR presumptively recommended	SB authorized	SB authorized

Conversely, judges have the discretion to impose bail in five of those eight circumstances, as illustrated in the table below.

	Misdemeanors	Class C felonies	DUI/refusal	FTA/VCOR	Other
Low-risk	Mandatory OR	Mandatory OR	Presumptive OR	Presumptive OR	Presumptive OR
Mod-risk	Mandatory OR	Presumptive OR	Presumptive OR	Presumptive OR	SB Authorized
High-risk	Presumptive OR	Presumptive OR	Presumptive OR	SB Authorized	SB Authorized

This inconsistency was not recommended by the Commission and is illogical.

Recommendation: Align the discretion for pre-trial services officers to make release recommendations in AS 33.07.030(c) and (d) (SB 91 Section 117) with the discretion judges have in setting bail found in AS 12.30.011 (SB 91 Section 59).

2 Exceptions for both pretrial service officers and judges: Domestic violence offenses, person offenses, failure to appear, or violation of a release condition.

3 Exceptions for both pretrial service officers and judges: Domestic violence offenses, person offenses, or failure to appear.