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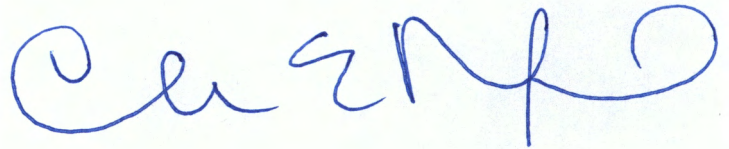Deliveries to: 129 6th St., Rm. 329

MEMORANDUM   March 1, 2019

SUBJECT: Release Procedures, Bail, and Pretrial Services
                   (CSSB 33(STA); Work Order No. 31-GS1030\M)

TO: Senator Mike Shower
                   Chairman of the Senate State Affairs Committee
                   Attn: Jake Almeida

FROM: Claire E. Radford
                   Legislative Counsel

Attached is the draft CS for SB 33 that you requested. This draft made some changes to the original bill drafted by the governor's office, which are detailed below, along with some additional drafting considerations.

1. **Release procedures: Due process issue.** AS 12.30.006(b) is amended in sec. 3 of this bill and provides for detaining a person for up to 48 hours if the person has been charged with an unclassified, class A, class B, or class C felony, or a criminal conviction or charge outside the state. Detaining a person based on any level of criminal conviction or charge outside the state raises a substantive due process issue. The Constitution of the State of Alaska and the United States Constitution protect substantive due process rights. Substantive due process protects the public from unreasonable and arbitrary government action. A person's right to substantive due process is violated if the person is subject to "a legislative enactment [that] has no reasonable relationship to a legitimate governmental purpose."[1] Equating a criminal conviction outside of the state, which could be for a low-level misdemeanor offense, with being charged with a felony in Alaska presents a substantive due process issue. Without some justification for the differential treatment of a person convicted or charged with a misdemeanor crime outside Alaska and a person charged in state with a felony for 48-hour detentions, there is a risk that a court would find this provision arbitrary and therefore a violation of substantive due process.

2. **Rebuttable presumption unconstitutional.** On October 5, 2018, the Alaska Court of Appeals issued a decision in *Hamburg v. State* which held that AS 12.30.011(d)(2), the bail statute that existed prior to the passage of ch. 36, SLA 2016 (SB 91), violated the constitutional provision entitling all defendants to bail before conviction by providing a rebuttable presumption against release on bail.[2] The changes made to the bail statutes in

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[1] *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974); *see also Church v. State*, 973 P.2d 1125, 1130 (Alaska 1999).

[2] 2018 WL 4844222.

SB 91, which took effect January 1, 2018, do not require a rebuttable presumption, but this bill reverts the bail statutes back to the unconstitutional presumption.

The pre-SB 91 version of AS 12.30.011(d)(2) contained a "rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the [defendant] or the safety of the victim, other persons, or the community" if the defendant was charged with certain listed offenses. The Court of Appeals determined that this provision violated art. I, sec. 11, Constitution of the State of Alaska, which entitles all criminal defendants to bail.[3] The Court of Appeals stated:

> [T]he court must presume that *no* conditions of bail will guarantee the defendant's appearance at future court proceedings and the safety of the victim and the public. In other words, the court must presume that the defendant cannot be released on bail.[4]

Section 7 of CSSB 33(STA) repeals and reenacts AS 12.30.011, including the pre-SB 91 presumption that the Court of Appeals held unconstitutional in *Hamburg*. A petition for appeal in this case was filed with the Alaska Supreme Court on October 16, 2018, but the petition has not yet been ruled on.[5]

As an alternative you could consider requiring a court to make specific findings and impose conditions that will ensure the defendant's appearance and the safety of the victim and the community when considering the release of a person charged with one of these crimes.

3. **Drafting changes.** AS 12.30.006(f) is amended in sec. 6 to remove the cross reference to the chapter establishing pretrial service officers (AS 33.07). AS 33.07, the pretrial services program, is repealed in this bill. Without this cross reference, it is unclear where pretrial service officers are established. Therefore, I have added a cross reference to AS 33.05.040(11).

AS 12.55.027(d) is repealed and reenacted in sec. 10 of the governor's bill. Repealing and reenacting a section should be used with restraint since it does not show changes that are

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[3] Article I, sec. 11, Constitution of the State of Alaska states in relevant part:

> The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[4] *Hamburg*, at *2 (emphasis in original).

[5] Case Number S17265.

being made to the law.[6] Here it does not appear that the changes to previous statute are so numerous that repeal and reenactment is necessary. Therefore, this section has been amended to show the changes to AS 12.55.027(d).

4.   Pretrial service duties of probation officers.   As you know, AS 33.16.190 authorizes parole and probation officers to share duties under AS 33.05 and AS 33.16. The pretrial services program is being repealed by the bill and bill sec. 20 removes "pretrial services" and a cross reference to AS 33.07 from the combined authorization of parole and probation officers, despite the fact that those same officers will be assigned duties as pretrial services officers under sec. 33.05.045 and AS 33.05.040(a)(11). AS 33.16.190, as amended, now refers to officers "appointed under AS 33.05.020(a)", which is limited to probation officers carrying out duties related to probation and does not authorize probation officers to perform pretrial services. In addition, the structure of sec. 33.05.045 confuses whether the pretrial services duties under paragraphs (2) and (3) are subject to a court order or a commissioner request for pretrial services and the other duties of a probation officer in AS 33.05.040 related to a "probationer," including record keeping functions.

The structure of sec. 33.05.045 leaves a disconnect between the appointment, a court order for pretrial services, and the authority to carry out the additional duties as a "pretrial services officer" in AS 33.05.045, which doesn't provide for an appointment as a pretrial services officer. I recommend that AS 33.16.190 be amended to include appointments as a pretrial services officer and to amend AS 12.30.011, sec. 33.05.045, and 33.16.040(a)(11) to provide for the authority by cross-reference to carry out the duties of pretrial service officers by court order. The duties in sec. 33.05.045 could instead be added to the probation officer duties under existing AS 33.05.040.

5. **Impairment of contracts.** This bill does not contain a delayed effective date in order to make the changes associated with the repeal of the pretrial services program. It may be that the repeal of the pretrial services program will result in job losses and raise a constitutional issue under the impairments of contract provision of the state and federal constitutions.[7]

6. The transition provision in bill sec. 27 has been rewritten. As previously drafted, the transition provided for court orders, "to remain in effect," which the legislature may not control Instead, the transition provide for ongoing pretrial services.

If I may be of further assistance, please advise.

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Attachment

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[6] *See The Manual of Legislative Drafting 2017*, p. 18

[7] Article I, sec. 10, U.S. Constitution; art. I, sec. 15, Constitution of the State of Alaska.