LEGAL SERVICES

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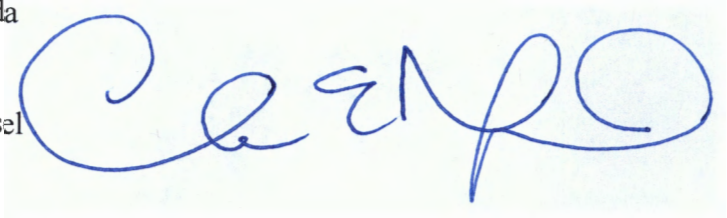
MEMORANDUM March 6, 2019

SUBJECT: Drafting Considerations (CSSB 32(STA);
Work Order No. 31-GS1029\U)

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 32 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. **Drafting error.** AS 12.55.125(d) was missing "two to four years" as the lead-in under (d)(2)(B). This appears to be a drafting error as without a definite presumptive range this provision does not make grammatical sense. This range has been added based on pre SB 91 language.[1] Please let me know if this range is inconsistent with your intent.

2. **Applicability.** AS 11.56.760(c) was not included in the applicability section. This appears to be an oversight and it has been added to sec. 52(a).

3. **Drafting considerations.** AS 11.56.310(a) and AS 11.56.320(a) add a reference to the commissioner of health and social services so that it is a crime to remove oneself from the place designated by the commissioner of corrections or health and social services while on electronic monitoring. It is my understanding that this change was made to include juvenile cases in this statute. The juvenile detention statutes are unclear as to whether the commissioner of health and social services is authorized to release individuals on electronic monitoring. Additionally, the changes made to AS 11.56.310(a) and AS 11.56.320(a) mean that if a prisoner tampers with their electronic monitor on a misdemeanor charge, the punishment is a class C felony, but if the same prisoner escapes from "official detention" (other than a correctional facility) the prisoner receives a class A misdemeanor. This difference does not seem in line with the seriousness of the individual crimes as it equates escape from detention in a correctional facility with tampering with an electronic monitor. This may result in sentences that are not proportionate if two people are charged with different offenses for similar conduct (escape) and one crime carries a more severe penalty than the other, violating a person's due process rights.

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[1] Ch. 36, SLA 2016. For ease of reference, we refer to the bill as "SB 91."

The punishment under AS 11.56.760 was previously divided into two subsections, (c) and (d) respectively. These sections were be combined into subsection (c) in this draft.

AS 11.56.810(a) was repealed and reenacted in the governor's bill. Repealing and reenacting a section should be used with restraint since it does not show changes that are being made to the law.[2] 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 11.56.810(a). By removing the lead-in phrase "dangerous to human life exists or is about to exist," the new crime of terroristic threatening in the second degree overlaps with the assault crimes. With this change to terroristic threatening, the elements that make the offense "terroristic" in nature are effectively removed. The statute now no longer requires some type of substance such as a radiological substance to be communicated in the threat. For example, if person A hears person B say he is going to blow up a building and person A reports it, person A could be charged with this offense because that would be "communicating a threat." However it is unclear how this situation is "terroristic" in nature as it now seems to apply to any threat which could affect a number of people. That in and of itself does not seem "terroristic" by definition. The crime also used to require that to commit the crime, the person has to knowingly make a false report. Now, the crime applies whether the report is true or false, and could potentially cover the same conduct as the first degree offense. Keep in mind that if the same conduct gives rise to two offenses, there is a risk that only the lower penalty can be imposed.

The addition in bill sec. 11.71.040(a)(3)(G) penalizes possession of 25 or more plants of the genus cannabis. There is no exemption for licensed marijuana establishments. While the lawful operation of marijuana-related facilities statute, AS 17.38.070, specifically states, "[n]otwithstanding any other provision of law" it is likely a court would interpret the addition of AS 11.71.040(a)(3)(G) as controlling. When the court construes a statute, the "court presumes that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous."[3] The Alaska Supreme Court has held that "if two statutes conflict, then the later in time controls over the earlier."[4] In order to avoid this conflict, I would recommend specifically exempting marijuana facilities authorized under AS 17.38.070 from the changes in sec. 11.71.040(a)(3)(G).

In addition to marijuana facilities, the addition of sec. 11.71.040(a)(3)(G) also would include industrial hemp. Industrial hemp is defined in AS 03.05.100 as "all parts and varieties of the plant Cannabis sativa L. containing not more than 0.3 percent delta-9-tetrahydrocannabinol." Since industrial hemp is of the genus cannabis, the limit on the

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[2] *See The Manual of Legislative Drafting* (2017 ed.), p. 18.

[3] *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011).

[4] *Id.* (citing *Allen v. Alaska Oil and Gas Conservation Com'n*, 147 P.3d 664 (Alaska 2006).

number of plants permissible under AS 11.71.040(a)(3)(G) also applies. In order to avoid this conflict, a specific exemption for industrial hemp should be added.

Sec. 12.55.135(q), a new subsection, states that a court may not impose a sentence of imprisonment or suspended imprisonment for possession of marijuana in violation of AS 11.71.060 if the defendant alleges and the court finds, among other things, that the defendant possessed the marijuana for the defendant's personal use within the defendant's permanent or temporary residence. In this subsection, a "permanent or temporary residence" does not include vehicles or tents. This definition may have an unintended effect where indigent people are charged at a higher rate for this offense than other demographic populations. Additionally, under AS 17.38.020, it is legal for a person 21 and over to possess marijuana in a vehicle.

AS 28.35.032(o) is amended by sec. 45 of this bill and repeals language that was added by SB 91. Prior to SB 91 there was a 24-hour community service requirement for a person sentenced under (g)(1)(A) of that section. The governor's bill did not include that provision in this bill. Please let me know if you would like me to include this 24-hour community service requirement.

AS 47.30.907 is amended by the governor's bill to add a new reporting requirement for the Department of Public Safety. This requirement requires the Department of Public Safety to report all involuntary commitment orders, orders of relief from a disability, or an adjudication of mental illness or mental incompetence grant by the superior court issued on or after October 1, 1981. This report is due on December 31, 2019. As a one-time report this requirement has been moved to uncodified law pursuant to the *Manual of Legislative Drafting* (2017 ed.).

In addition, this reporting requirement raises a due process issue for people who were committed prior to 2014. Under the Brady Handgun Violence Prevention Act it is illegal to sell or dispose of a firearm or ammunition to an individual who "has been adjudicated as a mental defective or has been committed to any mental institution."[5] The Brady Act was enacted on November 30, 1993, but AS 47.30.907 did not take effect until October 8, 2014. A person who was committed prior to 2014 may allege that they would have appealed their commitment if they had known that they could lose their right to possess a firearm as a result, during the time there was no state reporting requirement in place. This creates a potential due process issue if information about people committed prior to 2014 is now included as part of this report, which will result in the loss of a constitutional right to bear arms years or perhaps decades after institutional care.

Court Rule 6(r) of the Alaska Rules of Criminal Procedure is also amended by the governor's bill. This expands the scope of admissible hearsay evidence regarding prior convictions that is received through the Alaska Public Safety Information Network or from other government agencies that may be presented to the grand jury. The proposed amendment to Court Rule 6(r) could be construed as a court rule change that would require a two-thirds vote in order to pass the measure under art. IV, sec. 15 of the

[5] 18 U.S.C. § 922.

Constitution of the State of Alaska, which reads:

> Section 15. Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is (1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements; (2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or (3) a rule of administration which is protected from legislative modification based on principles of separation of powers.[6]

Whether the measure creates a substantive court rule change, requiring no special voting requirements, or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by courts. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.[7]

The expansion of Rule 6(r) does not appear to be an area of internal court administration but appears to be a substantive change to court rules that can be changed by the legislature with a majority vote. However, while this change appears to be substantive, the court may determine that this is a practice and procedure change and ignore this provision if it passed without a two-thirds vote.[8]

If I may be of further assistance, please advise.

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Attachment

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[6] *See Manual of Legislative Drafting*, p. 48 - 51 for a general discussion of these categories.

[7] *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

[8] *See Galbraith v. State*, 693 P.2d 880, 884 n.5 (Alaska App. 1985) (stating that where statutes enacted by the legislature without a 2/3 vote conflict with existing court rules, the existing court rules control).