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The Honorable Mike Shower
Senate State Affairs
Alaska State Capitol
Juneau, AK 99801

Re: *Legislative Legal Memo re. SB 32*

Dear Senator Shower:

You asked the Department of Law to respond to the Legislative Legal memo regarding SB 32 dated March 6, 2019. Our responses to each item in the March 6. 2019 memo are below.

1. Drafting Error

The memo from Legislative Legal notes that a drafting error in AS 12.55.125(d) was identified and corrected. We agree with this change.

2. Applicability

The memo from Legislative Legal indicates that AS 11.56.760(c) was added to the applicability section of the bill. We agree with this change.

3. Drafting Considerations

a. Electronic Monitoring and Escape

The memo from Legislative Legal notes that it is unclear whether the commissioner of the Department of Health and Social Services has the authority to place juveniles on electronic monitoring.

The Division of Juvenile Justice under the Department of Health and Social Services has used electronic monitoring as a least restrictive means for monitoring juveniles under its jurisdiction since 2003. The Division of Juvenile Justice has broad authority over juveniles under its jurisdiction. Under AS 47.12.120(d), when the court finds a juvenile to be delinquent, the juvenile is committed to the care and custody of the Division of Juvenile Justice, who "has the power to supervise the minor's actions." There are three types of dispositions available to the court if the court decides to find that

a juvenile is delinquent. Under AS 47.12.120(b)(2) the court may place the juvenile on probation, but the juvenile is released to their parents or guardians. This disposition is the least restrictive disposition available to the court.

Under AS 47.12.120(b)(3) the juvenile may be committed to the custody of the Division of Juvenile Justice, but the Division of Juvenile Justice has the authority to release the juvenile to the juvenile's parents or guardians or to place the juvenile in a foster home or any other suitable non-detention facility. [1]

AS 47.12.120(b)(1) is the most restrictive disposition in a juvenile proceeding. Under this provision, the court commits the juvenile to the custody of the Division of Juvenile Justice which then has the authority to place the juvenile in any placement setting it deems appropriate.[2] This includes a detention facility.

In short, when a juvenile is committed to the custody of the Division of Juvenile Justice, a relationship of legal custody exists. Therefore, unless the juvenile is committed to the juvenile's parents or guardian, the Division of Juvenile Justice is responsible for the care and control of the minor including where the juvenile lives and the duty to "protect, train, and discipline" the juvenile.[3] When a juvenile is committed to the Division of Juvenile Justice, the division has broad authority within the confines of AS 47.12.120 to place the juvenile on electronic monitoring when appropriate.

We are unclear as to why Legislative Legal believes that making tampering with electronic monitoring equipment while under official detention for a misdemeanor a class C felony but leaving removing oneself from official detention for a misdemeanor as a class A misdemeanor raises a due process issue. When viewed in totality, there are several places in the escape statutes that require a person to remove themselves from "official detention" *in addition to something else*. The additional element impacts the classification of the offense. For example, under current law, if a person is 1.) under official detention for a misdemeanor, and 2.) removes themselves from a secure correctional facility, that offense is escape in the second degree which is a class B felony. Similarly, under the language of SB 32, if a person is 1.) under official detention for a misdemeanor, and 2.) removes, tampers with, or disables an electronic monitoring device, that offense will be a class C felony. Simply removing oneself from official detention for

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[1] *See also B.F.L. v. State*, 233 P.3d 1118, 1119 (Alaska App. 2010).
[2] *See also Id.*
[3] AS 47.12.150.

a misdemeanor, *without anything more*, will remain a class A misdemeanor. In this way, different conduct is classified at different offense levels. Distinguishing criminal conduct in this way does not create a due process issue.

b. Terroristic Threatening

Legislative Legal notes that the terroristic threatening statute in the CS to SB 32 was not repealed and reenacted but was amended instead. We view this as a stylistic drafting change and do not take issue with that approach.

The memo also says that the "elements that make the offense "terroristic" are effectively removed" and that the amended statute "no longer requires some type of substance such as a radiological substance to be communicated in the threat." Specific substances, such as radiological substances are not *required* to be communicated in a threat under terroristic threatening in the second degree.[4] All that is required is that the person 1.) knowingly makes a false report that a circumstance dangerous to human life exists, and 2.) a person is placed in reasonable fear of physical injury, a building is caused to be evacuated, a serious public inconvenience is caused, *or* the report claims that a substance capable of causing serious physical injury has been sent or is present in a

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[4] *See* AS 11.56.810:

(a) A person commits the crime of terroristic threatening in the second degree if the person knowingly makes a false report that a circumstance

(1) dangerous to human life exists or is about to exist and

(A) a person is placed in reasonable fear of physical injury to any person;

(B) causes evacuation of a building, public place or area, business premises, or mode of public transportation;

(C) causes serious public inconvenience; or

(D) the report claims that a bacteriological, biological, chemical, or radiological substance that is capable of causing serious physical injury has been sent or is present in a building, public place or area, business premises, or mode of public transportation; or

(2) exists or is about to exist that is dangerous to the proper or safe functioning of an oil or gas pipeline or supporting facility, utility, or transportation or cargo facility; in this paragraph, "oil or gas pipeline or supporting facility" and "utility" have the meanings given in AS 11.46.495.

(b) Terrorist threatening in the second degree is a class C felony.

building or other public place. While a dangerous substance can be part of the false report under the current law, it is not a required element of the offense.

Additionally, the Legislative Legal memo gives a hypothetical in which a person hears another person communicate a threat and reports it. The memo asserts that the person who reports the threat could be charged under the proposed amended terroristic threatening statute. This fact pattern does not take into account that the new crime of terroristic threatening requires the person to communicate a threat "*to commit a crime against a person*" or the required mental state in order to effectuate the offense. First, the threat must be "to commit the crime" against a person. Thus, if a person is merely reporting an earlier threat, that reporter would not be threating to commit a crime, but instead would be reporting that *another person* was threatening to commit a crime.[5] The reporter would not be committing a criminal act. Further, to commit the new crime of terroristic threatening the threat has to be communicated "knowingly" with "reckless disregard" of placing another person in fear. Both of these mental states are criminal mental states defined in AS 11.81.900. Again, the mere reporting of a threat will not rise to the level of criminal conduct. A person merely reporting an earlier threat would not be acting with reckless disregard – i.e., the person would not be consciously disregarding a substantial and unjustifiable risk that the report of the threat would cause fear.[6] Finally, the court of appeals has held that "a court is obliged to avoid construing statutes in a way that leads to patently absurd results or to defeat the obvious legislative purpose behind the statute."[7] If a court interpreted the terroristic threatening statute in a way to criminalize the reporting of that crime it would defeat the legislative purpose of the statute and would contravene the rules of statutory construction.

The Legislative Legal memo also asserts that there is significant overlap between terroristic threatening in the first degree and the proposed amended terroristic threatening in the second degree. We do not see the overlap. Terroristic threatening in the first degree requires a person to "knowingly *send or deliver* bacteriological, biological, chemical, or radiological substance or an imitation bacteriological, biological, chemical, or radiological substance and, as a result", place a person in reasonable fear of physical

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[5] It should be noted that if the person reports a falsehood, the reporter may be guilty of knowingly making a false report to a police officer that a crime is about to occur. *See* AS 11.56.800(a)(2).

[6] AS 11.81.900(3).

[7] *Thiessen v. State*, 844 P.2d 1137 (Alaska App. 1993).

injury, cause the evacuation of a building or other public area, or cause a serious public inconvenience.[8] Terroristic threatening in the first degree requires much more than the communication of a threat. It requires that the person actually "send or deliver" a substance which then results in a particular circumstance. The requirement that the person actively send or deliver a specific substance rather than just communicate a threat, as is required in the proposed terroristic threatening in the second degree statute in SB 32, sufficiently distinguishes the two offenses from one another, and, therefore, the rule of lenity will not apply.

c. Drug Offenses

The Legislative Legal memo also outlines a concern with potentially criminalizing legal marijuana use under AS 17.38. The memo asserts that even though AS 17.38 contains the language "notwithstanding any other provision of law"[9] a court would likely interpret the changes made in SB 32 as controlling because the changes in SB 32 would be "later in time."[10] The memo cites to *Nelson v. Municipality of Anchorage*, which cites to *Allen v. Alaska Oil and Gas Conservation* in which the court stated that when two statues conflict the "later in time controls over the earlier."[11] However, the court in *Allen*, also stated that "two potentially conflicting statutes…must be interpreted with a view toward reconciling the conflict and producing a 'harmonious whole.'"[12] Further, the court in *Allen* went on to say, "the specific controls over the general" and "at every step, however, the legislative intent is key."[13]

The goal of statutory construction is to effectuate the legislature's intent. Courts will interpret statutes "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[14] "When interpreting statutes ... seemingly conflicting provisions must be harmonized unless such interpretation would be at odds with statutory purpose."[15] When applying the rules of

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[8] AS 11.56.807.
[9] AS 17.38.020.
[10] *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011) (citing *Allen v. Alaska Oil and Gas Conservation Com'n*, 147 P.3d 664, 668 (Alaska 2006).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 205, 206 *(Alaska 2014).*
[15] *Davis Wright Tremaine LLP v. State, Dept. of Administration*, 324 P.3d 293, 299 (Alaska 2014).

statutory construction, no actual conflict between legal personal use of marijuana and the legal marijuana industry under AS 17.38 exists. First, the language in AS 17.38.020 which states "notwithstanding any other provision of law" requires that provision of law to control despite what other provisions of law may say. Second, as noted above, the provisions of law that are specific to marijuana possession and regulated distribution will control over more general provisions. Therefore, the provisions of AS 17.38, which specifically address marijuana use and possession will control over more general criminal provisions of law. Third, because AS 17.38 actually legalizes personal use and the regulated sale of marijuana, the rule of lenity will require any ambiguities in the law to be resolved against the government. The rule of lenity requires that when a statute is reasonably susceptible to more than one meaning, that statute should be interpreted to provide the most lenient penalty.[16] Therefore, the penalties in AS 11.71/AS 12 must yield to the lesser penalty, or lack thereof, proscribed in AS 17.38.

Despite the above, if the legislature would like to add language to AS 11.71 clarifying that the criminal code does not apply to conduct that falls within the parameters of AS 17.38, we recommend amending sections 32, 34, and 35, by deleting the reference to AS 17.30 in subsection (a) and replace it with "except as provided in AS 03.05 and AS 17". This will create an exemption for all legal uses of marijuana including industrial hemp under AS 03.05, both medical (AS 17.37) and recreational (AS 17.38). It will also maintain the current exemption in the statutes for licensed pharmacists (AS 17.30).

d. Sentencing Provision for Marijuana Possession (AS 12.55.135(q))

The Legislative Legal memo again notes a potential conflict between legal marijuana possession under AS 17.38.020 and the sentencing provision for marijuana possession under AS 12.55.135(q). For the above reasons, we do not read this conflict into the law but interpret the two statutes harmoniously.

While this sentencing provision was in law prior to the passage of SB 91[17] and coexisted with AS 17.38.020, upon further review, we believe that this provision should be removed from SB 32. This provision of law attempts to codify *Ravin v. State*, 537 P.2d 494 (Alaska 1975). However, it is poorly worded and largely unnecessary as *Ravin*

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[16] *Grant v. State*, 379 P.3d 993 (Alaska App. 2016). However, note, even the rule of lenity only applies if after employing the normal rules of statutory construction, the legislature's intent cannot be determined or is ambiguous. *Grant* at 995-996.

[17] Ch. 36, SLA 2016.

is the established law in Alaska. The wording of this section will likely result in more confusion than utility and, therefore, it should be removed.

e. Driving Under the Influence and Community Work Service

The memo from Legislative Legal notes that prior to SB 91 there was a requirement that a person be sentenced to 24 hours of community work service as part of their sentence for a first time conviction for refusal to submit to a chemical test under AS 28.35.031. This requirement was also a part of the sentence for a person convicted of a first driving while under the influence under AS 28.35.030. In other words, the requirement for 24 hours of community work service to be a part of the sentence for both offenses was in the law prior to SB 91 but is not included in SB 32. Whether to reenact this provision of law is a policy call for the legislature. The administration takes no position on it at this time.

f. Involuntary Commitment

The memo from Legislative Legal indicates that the requirement that the court system report all involuntary commitment orders issued before October 1, 1981 to the Department of Public Safety by December 31, 2019 has been put into uncodified law since this is a one-time reporting requirement. We agree with this change.

The memo also says that the reporting requirement raises a due process issue for those who were involuntarily committed prior to October 8, 2014, when the reporting requirement under current law became effective. The memo goes on to say that the amendment in SB 32 will result in the loss of a constitutional right long after the person was involuntarily committed. This is incorrect.

The Brady Handgun Violence Prevention Act was enacted in 1993 and required a background check on those who attempt to purchase firearms from a licensed dealer.[18] Federal law prohibits the transfer of a firearm to a person who has been involuntarily committed.[19] Alaska enacted AS 47.30.907 in 2014. AS 47.30.907 brought Alaska closer to being in compliance with the Brady Handgun Violence Prevention Act by requiring that information about persons who have been involuntarily committed be transferred to the Department of Public Safety for inclusion in the National Instant Criminal Background Check System. The enactment of AS 47.30.907 *did not* alter the constitutional rights of a prohibited person to possess a firearm. Federal law under the

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[18] 18 U.S.C.A. sec. 922.
[19] *Id.*

Brady Handgun Violence Prevention Act already prohibited that person from possessing a firearm.[20] The Brady Handgun Violence Prevention Act makes the possession of a firearm today illegal based on past conduct. This concept is used throughout the criminal code. For example, Alaska's statute which prohibits felons from possessing firearms prohibits a person who has been convicted of a felony from possessing a firearm which is capable from being concealed on one's person.[21] This statute prohibits the possession of such a firearm today because of the person's past conduct.

AS 47.320.907 requires the transfer of information so that the Brady Handgun Violence Prevention Act may be better implemented. Therefore, the amendment in SB 32 does not alter a person's constitutional rights and does not raise a due process issue.

g. Court Rule Change for Criminal Rule 6(r)

Although unclear, it appears as Legislative Legal is alerting the legislature of the possibility that the court system could ignore the proposed change to Criminal Rule 6(r) in SB 32 even if that section received a two-thirds vote. We believe this is a slight risk if one at all. The bill, as drafted, contains the requirement for a two-thirds vote. If the court system decides not to implement the amendment contained in Criminal Rule 6 in SB 32 despite that change receiving a two-thirds vote, the administration will assess what additional steps should be taken.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
Robert E. Henderson
Deputy Attorney General

cc: Governor's Legislative Office

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[20] *Id.* at (d).

[21] AS 11.61.200.