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MEMORANDUM April 11, 2016

SUBJECT: Military Code of Justice
(CSHB 126(JUD) am; Work Order No. 29-LS0473\F.A)

TO: Senator Bill Stoltze
Attn: Daniel George

FROM: Megan A. Wallace
Legislative Counsel MAW

You requested an opinion outlining any outstanding issues, as previously identified in my memorandum dated January 14, 2016, to Representative Gabrielle LeDoux, which is available on BASIS relating to the above-referenced bill. You have also asked for an opinion on the grand jury and jury constitutional issues raised in the memorandums you provided from Mr. Matthew Prieksat and the Department of Law. This opinion is being provided to you on an expedited basis, per your request.

As it relates to the concerns addressed in my memorandum dated January 14, 2016, to Representative Gabrielle LeDoux, it is my opinion that the issues identified in item nos. 2, 3, 4, 5, 6, 7, 8, and 9 remain in Work Order No. 29-LS0473\F.A.

The memorandums you provided from Mr. Matthew Prieksat and the Department of Law raise several constitutional issues with the above-referenced bill related to the provisions governing grand jury, unanimous verdict, and juror requirements. Lacking sufficient time to fully analyze the issues raised in both documents, this opinion is necessarily limited to an overview of the questions raised by the unsupported and definitive statement at page two of the letter from the Department of Law that the grand jury and jury requirements of the Constitution of the State of Alaska do not apply. Those issues have not been fully resolved by an Alaska Court and it is not clear to me that the Alaska Supreme Court will find that "the grand jury and jury requirements of the Alaska Constitution do not apply," as further discussed below.

Art. I, sec. 8, cl. 16 of the United States Constitution empowers Congress to "provide for . . . disciplining" and the authority "of training the militia according to the discipline prescribed by Congress." Currently, Congress prescribes the types of courts-martial and generally requires them to follow federal forms and procedures:

> In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army

> and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts. Punishments shall be as provided by the laws of the respective States . . . .

32 U.S.C. 326.[1]

However, at present federal law does not impose the model code or its provisions as a mandate. A state must comply with the state and federal constitutions.[2] It does not seem likely that a state will be able to invoke certain "military exceptions" to settled constitutional protections for criminal defendants including the right to a trial by jury.[3]

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[1] A state statute that conflicts with federal law enacted under art. I, sec. 8, cl. 16 can be overturned as unconstitutional -- when it has prescribed a process or punishment, a conflicting state punishment will be overturned. *State ex rel. Games-Neely v. Sanders*, 575 S.E.2d 320, 324 - 25 (2002) (state statute providing mandatory jail time for "missing movement" invalidated under art. I, sec. 8, cl. 16 because 32 U.S.C. 327 - 330 in effect at the time the case was decided had specific sentencing limitations and did not authorize a mandatory jail term). Federal law preempts state action given "the supremacy of federal powers in military affairs." *Perpich v. Department of Defense*, 496 U.S. 334, 350 - 52 (1990) (a governor may not veto the federalization of a state's national guard; rights reserved to state under art. I, sec. 8, cls. 15 and 16 are subordinate).

[2] In a discharge case filed by an officer in the organized state militia challenging his termination from the militia on the grounds that his right to due process had been violated, the Alaska Supreme Court rejected the state's arguments that state courts lacked jurisdiction over the case -- which the court held was in fact a supremacy clause argument, that the officer's claims were preempted by federal law. *Bowen, supra,* 953 P.2d at 893 - 94. (*DMVA v. Bowen*), 953 P.2d 888, 893 - 94 (Alaska 1998). The Court noted:

> While the federal government might have acted to regulate comprehensively the administration of the AGR program in the Alaska Air National Guard, it has not done so. Examination of two federal laws shows this. First, 32 U.S.C. § 324(b) allows termination of a National Guard officer "as provided by the laws of the State." Congress has chosen to affirm, rather than abridge, the states' role in terminating officers of their National Guards. This is clear recognition that state law may provide additional termination requirements.

Id. at 894 - 95.

[3] The "military exception" is a federal doctrine. Under it, among other things, a defendant in a court-martial is not entitled to a jury trial under the Sixth Amendment. The doctrine is built on the military exception to the grand jury requirement expressly

This seems especially so in light of the fact that many servicemembers will be serving part time, not subject to military jurisdiction for most of their daily lives. A state undertaking to adopt the model code is acting under color of state law, and is likely to be required to comply with the state and federal constitutions, even if it adopts federal law and procedure verbatim.[4]

Courts-martial procedure does provide many of the constitutional safeguards afforded criminal defendants in civilian courts.[5] Further, a court-martial may be held for conduct

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provided in the Fifth Amendment, but is generally explained as judicial deference to Congress in enacting laws governing the military, (the "make rules" clause of art. I, sec. 8, cl. 14) and the need of the military to maintain order and discipline. *Solorio v. U.S.*, 483 U.S. 435, 439 - 41, 447 - 49 (1987) (court-martial had jurisdiction to try sexual abuse charges committed off base because of defendant's status as a servicemember; overruled prior requirement that a crime must be service-connected to be tried in a court-martial). The exception has been criticized as inadequate to support the deprivation of constitutional rights even for members of the regular armed forces. Stephen I. Vladek, "Military Courts and Article III," 103 Georgetown Law Journal, 2015, Forthcoming. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419342). *See also* Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice?," 1975 Mil. L. Rev. 171 (September, 1975).

Some states apparently follow the federal lead with respect to the military exception. *State v. Davis*, 2010 WL 4278277 at 5 - 6 (La. Ct. App. November 1, 2010) (unreported). However, the Alaska Supreme Court has rejected such deference with respect to constitutionally guaranteed due process, at least in a civil matter. *Bowen, id.* at 896 (finding that a determination whether a state agency had violated the rights of a state employee was not a matter "of military expertise or one which causes interference with a military mission").

[4] *See Gilliam v. Miller*, 973 F.2d 760, 763 - 64 (9th Cir. 1992) (Oregon adjutant general acting under color of a state statute when he terminated National Guard members for failing to meet federal training standards adopted by the Oregon legislature for Oregon guard members).

[5] In commentary to the model code, the drafters suggest that because the court-martial is a statutory court, some state constitutional protections may not apply. Model Code, Annotations to Article 52. The United States Supreme Court has held that the Sixth Amendment guarantee of the right to counsel does not apply to summary courts-martial in light of the opportunity to object (which carries with it the risk that higher penalties may be imposed in a general or special court martial), and that the Fifth Amendment guarantee of due process does not require the advice of counsel to assist in articulating defense or mitigating circumstances; the Court noted that Congress's determination not to provide for a summary court-martial was entitled to deference under art. I, sec. 8. *Middendorf v. Henry*, 425 U.S. 25, 34, 43 and 46 - 47 (1976) (enlisted

that is not criminal, or a purely disciplinary purpose.[6] And some conduct must be addressed during a military mission, or to protect the safety of others. However, for some cases, the provisions of the model code incorporated in this draft or in the code to be adopted into regulation, may implicate the rights of state militia members under the state and federal constitutions who are tried by a court-martial for offenses for which a jail term is a possibility.

Grand Jury; Fifth Amendment of the U.S. Constitution and art. 1, sec. 8 of the Constitution of the State of Alaska. Both the state and federal constitutions require a grand jury indictment for a serious crime, but contain exceptions for the armed forces.[7]

Marines who agreed to summary courts-martial for unauthorized absences that resulted in sentences of confinement to a summary court-martial could not object to the results). It is not clear whether an Alaska court will agree.

[6] The purpose of nonjudicial punishment has been held to be noncriminal in nature:

> As noted, "[n]onjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction." Thus, a primary purpose of NJP is to maintain military order, a purpose distinct from those underlying traditional criminal punishment.
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> Indeed, military "discipline is not achieved exclusively or even primarily through use or threat of the military criminal law process, the court-martial." "Commanders use a combination of tools to maintain discipline, including leadership by example, training, corrective measures, administrative actions authorized by applicable regulations, and NJP. . . ."

United States v. Reveles, 660 F.3d 1138, 1145 (9th Cir. 2011) (citations omitted).

[7] The Fifth Amendment provides:

> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger*; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

Both provisions refer to the exception in connection with a time of war or public danger. Federal case law does not seem to apply "when in actual service in time of war or public danger" as a modifier of the land and naval forces provision; however, it does modify the militia provision.[8] The state provision is clearly tied to periods of war and public danger, which suggests that a felony level charge may not withstand a challenge unless it occurs during a military operation that meets the condition. It is worth noting, though, that the model code has a relatively thorough investigatory process in which, unlike a grand jury proceeding, the defendant can be represented, present evidence, and examine witnesses. Model Code, Article 32.

Right to jury trial: Sixth Amendment to the United States Constitution; art. I, sec.11, Constitution of the State of Alaska. A general or special court-martial is like a jury trial in that the finder of fact composed of a group of servicemembers, subject to

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Art. I, sec. 8 provides:

> SECTION 8. Grand Jury. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases *arising in the armed forces in time of war or public danger.* Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended. [Emphasis added.]

[8] *Johnson v. Sayre*, 158 U.S. 114 - 15 (1895). However, this likely refers to the militia when in federal service:

> This provision is intended "to prevent persons not subject to the military law from being held to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury," the words "when in actual service," etc., referring to the militia and not to "land or naval forces," because, as said by Mr. Justice Gray, "All persons in the military or naval service of the United States are subject to the military law, the members of the Regular Army and Navy at all times -- the militia so long as they are in such service." *Johnson* v. *Sayre,* 158 U. S., 109, 114. And a reason for referring the clause "when in actual service in time of war or public danger" to the militia and not to the Army or Navy is said to be found in the fact "that it is only at those times that the militia are under the jurisdiction and control of the General Government," while the Army and Navy of the United States are always in the service of the Government.

Alabama Great S. R. Co. v. United States, 49 Ct. Cl. 522, 534 - 35 (1914).

challenge by the parties, who hear the facts and determine guilt. Model Code, Articles 25 and 41. However, the members are selected by the convening authority, Model Code, Article 25(f). Under federal law, the right to a jury trial under the Sixth Amendment does not apply to courts-martial.[9] Under art. I, sec. 11 of the Constitution of the State of Alaska, a defendant subject to criminal prosecution is entitled to the unanimous verdict of a jury.[10] While some offenses under the model code may not be considered criminal

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[9] *Reid v. Covert*, 354 U.S. 1, 35 - 40 and notes 44 and 68 (1957) (case concerned limitations on ability of military courts to try civilians; noting that in contrast military justice was substantially different, that military courts did not provide the right to a jury trial at common law, and that the application of the bill of rights was uncertain). At least one state court has observed that a member of a state militia is not entitled to a jury trial under the state constitution because it was unavailable in a military court at common law. *Application of Palacio*, 238 Cal.App.2d 545, 551 (1965) (dicta) (petitioner released because not afforded opportunity to demand a special or general court-martial before confined after summary court-martial.) *See also Miller v. Rockefeller*, 327 F.Supp. 542, 547, n. 5 (S.D.N.Y. 1971).

[10] Art. I, sec. 11 provides:

> SECTION 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public *trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record.* 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.

(Emphasis supplied.) In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) the Alaska Supreme Court held that the right to a jury trial to any criminal prosecution of an offense that includes:

> a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.
>
> Excluded from the requirement of jury trial are such relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be

prosecutions, the prosecution of a violation of state law or regulation that has incarceration as a potential result is likely governed by art. I, sec. 1, Constitution of the State of Alaska.

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considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment.

Id. at 402 - 03. The revocation of a valuable license is subject to trial by jury if the court, rather than an administrative agency is required to revoke a license on conviction of certain offenses. *State v. District Court*, 927 P.2d 1295, 1296 - 97 (Alaska Ct. App. 1996). A unanimous jury is constitutionally required. *Khan v. State*, 278 P. 3d 893, (Alaska 2012); *Andres v. United States,* 333 U.S. 740, 748-49 (1948). The model code language has been altered to provide for a unanimous verdict. Sec. 26.05.505.