

LEGAL SERVICES

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MEMORANDUM

March 19, 2014

SUBJECT: CSHB 362(): Issues raised by requested changes
(Work Order No. 28-LS1538\U)

TO: Representative Charisse Millett
Attn: Akis Gialopsos

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed a new version of the above bill. As you requested, it mirrors the provisions of CSSB 173(JUD). I do want to bring to your attention a couple of issues raised by the changes to the bill.

1. Adding possession to the conduct the bill prohibits. First, adding possession to the conduct prohibited by proposed AS 17.21.010 may implicate an individual's privacy interests. The definition of synthetic drugs in the bill excludes controlled substances. It is considered a violation of the right to privacy guaranteed by art. I, sec. 22 of the Constitution of the State of Alaska, to penalize the possession in the home of small amounts of marijuana, which is a controlled substance. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Prohibiting possession of a small amount¹ of a noncontrolled substance in the home may be seen by a court as a greater violation of privacy than that addressed in *Ravin*.

There are also circumstances where an offense under proposed AS 17.21.010 may overlap with the existing provisions of AS 11.73.010, which prohibit possession of an imitation controlled substance with intent to deliver. The definition of synthetic drug is different than the definition of imitation drug, but it is possible that an imitation drug, which must contain a listed substance, might be the same as an illicit synthetic drug if both are mislabeled (a feature of both the imitation controlled substance definition and the illicit synthetic substance offense) and the synthetic drug has an additive under AS 17.21.010(b)(2)(F) (in the "U" version) that contains one of the substances listed in AS 11.73.099(3). Violation of AS 11.73.010 is a felony. Violation of AS 17.21.010 is a violation punishable by only a fine. This significant difference in punishment for similar misconduct raises constitutional issues. A court will, as a matter of due process and equal protection, evaluate whether offenses and their accompanying sentences are

¹ Small enough to avoid an inference of an intent to sell.

proportional to each other, that is, whether greater punishment is imposed for less blameworthy conduct.²

2. Wording of penalty provision. I have copied a change to the penalty provision into CSHB 362(). Originally it was:

(c) A person who violates AS 17.21.010 is guilty of a violation and, upon conviction, may be punished as provided in AS 12.55.

Now it is:

(c) A person who violates AS 17.21.010 is guilty of a violation and, upon conviction, is punishable by a fine of not more than \$500.

The former is better because it will change as the penalty for violations changes without the necessity of a major effort to seek out individual statutes that are intended, as this one is, to provide the same penalty as is provided in AS 12.55.³ Apparently there is some concern that the mention of AS 12.55, the criminal sentencing statute, might suggest that a person is entitled to appointed counsel. In my opinion, the \$500 fine does not trigger the right to counsel.⁴ This is the preferred drafting convention and is used in numerous places throughout the Alaska Statutes.

² In *Pruett v. State*, 742 P.2d 257, 263 (Alaska App. 1987) the Alaska Court of Appeals considered two statutes, one that imposed a five-year presumptive sentence for manslaughter (recklessly killing a victim) and one that imposed a seven-year sentence for first degree assault (recklessly injuring, but not killing a victim). The court found that the legislature could not have intended a five-year presumptive term for killing a victim but a seven-year presumptive sentence for injuring the victim, and determined that the lower presumptive sentence should apply to a defendant charged with assault. *See also Smith v. State*, 28 P.3d 323, 329 - 30 (Alaska App. 2001).

³ AS 12.55 provides the sentencing structure for offenses committed in Alaska. Offenses, consisting of crimes and noncriminal violations, are processed in the criminal justice system and governed by this chapter. A specific penalty should only be included if one intends a punishment that is different than those provided in AS 12.55

⁴ In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970), the court defined "criminal prosecution" as that term is used in art. I of the Constitution the State of Alaska, as including (1) offenses for which a direct penalty may be incarceration, (2) offenses which may result in the loss of a valuable license, and (3) offenses for which the fine imposed is heavy enough to indicate criminality, because such a fine could be taken as a gauge of the ethical and social judgments of the community. A \$500 fine does not meet this threshold. I am unaware of a case where a person has been provided counsel at public expense when being sentenced under AS 12.55 for a violation, that did not involve or implicate in the future, a loss of a valuable license.

Representative Charisse Millett

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If I may be of further assistance, please advise.

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Enclosure