THE STATE of ALASKA
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The Honorable Mike Shower
Senate State Affairs
Alaska State Capitol
Juneau, AK 99801

Re: *Legislative Legal Memo re SB 33*

Dear Senator Shower:

You asked the Department of Law to respond to the Legislative Legal memo regarding SB 33 dated March 1, 2019. Our responses to each item in the March 1. 2019 memo below.

1. Release Procedures

The March 1, 2019 memo from Legislative Legal states "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." *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough* offers the following explanation of substantive due process:

> Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. The constitutional guarantee of substantive due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy.
>
> A court's inquiry into arbitrariness begins with the presumption that the action of the legislature is proper. The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a

> heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification.

Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974) (footnotes omitted); *see also Dunn v. Municipality of Anchorage*, 100 P.3d 905, 908 (Alaska App. 2004) (quoting *Concerned Citizens of South Kenai Peninsula* and applying this analysis in a criminal case).

Here, the legislature could easily articulate a legitimate public policy for allowing a 48-hour hold in order to investigate out-of-state criminal history. Out-of-state criminal history reports from the National Crime Information Center typically do not provide complete information about a defendant's prior convictions or pending charges. These reports also almost never provide any factual information about out-of-state offenses. There are many cases in which such factual information could have great bearing on whether a defendant poses a risk to the victim or the community. For instance, the court should be able to consider whether a defendant charged with a domestic violence offense has prior convictions from out-of-state which involve the same victim. Additionally, the identity of prior victims is not typically evident from a criminal history report. Depending on the jurisdiction in which the defendant committed the prior offense(s), ascertaining that information might require a short delay to track down factual information from individual local law enforcement agencies or courts.

Additionally, in *Church v. State, Dep't of Revenue*, 973 P.2d 1125 (Alaska 1999) the supreme court explained: "The standard for establishing a substantive due process violation is rigorous. A due process claim will only stand if the state's actions 'are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.'" *Church*, 973 P.2d at 1130 (quoting *Application of Obermeyer*, 717 P.2d 382, 386-87 (Alaska 1986) (citation omitted)). It is unlikely that a court would find that a short delay to ascertain out-of-state history would "shock the universal sense of justice." *Id.*

The Alaska Supreme Court did not find a substantive due process violation in either *Concerned Citizens of South Kenai Peninsula* or *Church*.

The court of appeals has also addressed substantive due process in the context of bail statutes in *Stiegele v. State*, 685 P.2d 1255 (Alaska App. 1984). Stielege was convicted of second-degree murder, an unclassified felony, based on a drunk-driving related homicide. *Stiegele*, 685 P.2d at 1256. After the verdict, he sought bail release pending appeal, but could not be released because the version of AS 12.30.040 in effect at the time prohibited release of anyone convicted of an unclassified or class A felony. *Id.*

at 1257. Stiegele raised a constitutional challenge to the statute, arguing that it denied him his constitutional rights to substantive due process and equal protection. *Id.* The court of appeals rejected these arguments, noting that "We are satisfied that the average member of the class comprised of those convicted of unclassified felonies and class A felonies will serve a longer sentence and therefore present a greater risk of flight than the average offender convicted of a class B felony or a lesser offense. In addition, it would not have been unreasonable for the legislature to conclude that the average unclassified or class A offender is more dangerous than the average class B or C offender." *Id.* at 1258. *Cf. Griffith v. State*, 641 P.2d 228, (Alaska App. 1982) (finding that an earlier version of the statute violated equal protection because the statute prohibited bail for specific crimes, *e.g.*, first-degree murder, kidnapping, first-degree robbery, etc., but allowed bail for other arguably equally serious crimes, including second-degree murder).

Similarly, in the context of SB 33, courts would likely find that a person who has prior convictions or pending criminal charges in another state presents "a greater risk of flight" than the average offender who either has no prior criminal history, or whose criminal history occurred entirely within the state of Alaska. *Stiegele*, 685 P.2d at 1258.

2. Rebuttable Presumption—Bail

The March 1, 2019 memo cites to *Hamburg v. State* which held that the version of AS 12.30.011(d)(2) which was in effect prior to the passage of ch. 36, SLA 2016 (SB 91) was unconstitutional. *See* 2018 WL 4844222. The memo asserts that "this bill reverts the bail statutes back to the unconstitutional presumption." It does not.

The Alaska Court of Appeals has held that Article I, sec. 11 of the Alaska Constitution guarantees a person the right to "reasonable conditions of bail release." *Id.* at 1. The prior version of AS 12.30.011(d)(2) required the court to presume that *no* conditions of bail will guarantee the defendant's appearance or the safety of the victim or the community. It read:

> (d) In making a finding regarding the release of a person under this chapter,
> (2) *there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the victim, other persons, or the community*, if the person is
> (A) charged with an unclassified felony, a class A felony, a sexual felony, or a felony under AS 28.35.030 or 28.35.032;
> (B) charged with a felony crime against a person under AS 11.41, was previously convicted of a felony crime against a person under

> AS 11.41 in this state or a similar offense in another jurisdiction, and less than five years have elapsed between the date of the person's unconditional discharge on the immediately preceding offense and the commission of the present offense;
> (C) charged with a felony offense committed while the person was on release under this chapter for a charge or conviction of another offense;
> (D) charged with a crime involving domestic violence, and has been convicted in the previous five years of a crime involving domestic violence in this state or a similar offense in another jurisdiction;
> (E) arrested in connection with an accusation that the person committed a felony outside the state or is a fugitive from justice from another jurisdiction, and the court is considering release under AS 12.70. (Emphasis added).

The revised version of AS 12.30.011 in SB 33 reads:

> (d) In making a finding regarding the release of a person under this chapter,
> (2) *there is a rebuttable presumption that there is a substantial risk that the person will not appear and the person poses a danger to the victim, other persons, or the community*, if the person is
> (A) charged with an unclassified felony, a class A felony, a sexual felony, or a felony under AS 28.35.030 or 28.35.032;
> (B) charged with a felony crime against a person under AS 11.41, was previously convicted of a felony crime against a person under AS 11.41 in this state or a similar offense in another jurisdiction, and less than five years have elapsed between the date of the person's unconditional discharge on the immediately preceding offense and the commission of the present offense;
> (C) charged with a felony offense committed while the person was on release under this chapter for a charge or conviction of another offense;
> (D) charged with a crime involving domestic violence, and has been convicted in the previous five years of a crime involving domestic violence in this state or a similar offense in another jurisdiction;
> (E) arrested in connection with an accusation that the person committed a felony outside the state or is a fugitive from justice from another jurisdiction, and the court is considering release under AS 12.70. (Emphasis added).

The previous version of AS 12.30.011(d)(2) was held unconstitutional because it could be interpreted to authorize the court to hold a person without bail (*i.e.* the court must presume that the defendant cannot be released on bail). The language proposed in SB 33 merely directs the court to determine that there is a substantial risk that the defendant will not appear and poses a risk to the victim or the community. It does *not* authorize the court to hold a defendant without bail. To be clear, bail should be set. But it should be set with the risks associated with defendants who are charged with the listed offenses in mind.

3. Drafting Changes—Repeal and Reenact

The March 1, 2019 memo notes that AS 12.55.027(d) has been amended rather than repealed and reenacted. The Department of Law views this as a stylistic drafting approach and expresses no opinion as to whether AS 12.55.027(d) should be amended, as opposed to a repeal and reenactment.

4. Pretrial Services and Probation Officers

The memo suggests that there is a disconnect between the appointment of pretrial services officers, a court order for a pretrial services officer to supervise a defendant, and the authority in Title 33 for a pretrial services officer to carry out the additional duties of a pretrial services officer. The memo recommends adding the duties outline in new AS 33.05.045 in sec. 19 of the "M" version of SB 33 to AS 33.05.040.

If the committee believes that this will clarify that the duties of pretrial services officers are being added to the duties of probation officers, the Department of Law takes no issue with such an amendment.

5. Impairment of Contracts

The memo asserts that the elimination of the pretrial services program may result in job losses, which would raise a constitutional impairment of contracts issue.

The Alaska Supreme Court has instructed that in determining whether a law violates the state or federal contracts clause, there is a two-part analysis: (1) Does the change in state law operate as a substantial impairment of a contractual relationship? (2) If there is a substantial impairment, is the impairment reasonable and necessary to serve a legitimate public purpose? (*See Hageland Aviation Svcs. v. Harms*, 210 P. 3d 444,451 (2009)). Under the first prong, a court would not likely find that the proposed law in SB 33 operates as a substantial impairment to the probation officers' contractual relationship with the state. Probation officers are currently acting as pretrial officers and may experience a change in their assigned duties, however, it is anticipated that most will

not lose their jobs. Further, the probation officers' contractual benefits are not being targeted.

Even if a possible contract impairment claim advances beyond the first prong, the claim must also survive the second prong of the contract impairment test. Under the second prong of the test, a court would scrutinize whether the retroactive law is reasonable and necessary to serve an important public purpose. Under the proposed law in SB 33, any impairment is incidental to the overall goal of the bill, which is to increase efficiencies in the criminal justice system. Any perceived impairment clearly serves a legitimate public purpose—*i.e.*, a more effective and effective criminal justice system.

6. Transition Language

The memo outlines the rewrite of the transition language at the end of the bill.

The Department of Law does not take issue with the rewrite of the transition language.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: 
Robert E. Henderson
Deputy Attorney General

cc: Governor's Legislative Office