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

Re: SB 32 Questions

Dear Senator Shower:

On April 8, 2019 Mr. Almeida from your office sent us a list of questions regarding SB 32. Because the questions were drafted to the "A" version of SB 32, we have drafted our responses to the same version of the bill.

1.) DNA – Current Law and SB 32

Alaska Statute 44.41.035 requires certain individuals who are arrested or convicted of "qualifying offenses" to submit a DNA sample upon their *arrest* or *conviction*. The law requires a person who is "arrested for a crime against a person or a felony under AS 11 or AS 28.35 (felony DUI), or a law or ordinance with elements similar to a crime against a person or a felony under AS 11 or AS 28.35" to provide a DNA sample for inclusion into the state's DNA identification system. Alaska participates in the national DNA database system, the Combined DNA Index System (CODIS). Under Alaska law, failure to provide a DNA sample after being convicted of a qualifying offense is a class C felony. AS 11.56.760(c). However, failure to provide a DNA sample after arrest is currently not a criminal offense. Senate Bill 32 addresses this gap by making it a class A misdemeanor if a person refuses to provide a DNA sample after an arrest for a qualifying offense.

All 50 states participate in CODIS and all 50 states require DNA submissions from convicted felons. Thirty one states require a DNA submission from arrestees of a "qualifying offense." The United States Supreme Court has upheld the collection of DNA samples from arrestees charged with serious offenses. In *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court held that the Fourth Amendment allows the police to conduct routine administrative steps incident to arrest, including photographing, fingerprinting, and if appropriate, a DNA sample from an arrestee. The Supreme Court noted that the "intrusion of a cheek swab [*i.e.*, a buccal swab] to obtain a DNA sample is a minimal one." *See id*, at 466. It does not break the skin and

involves virtually no risk, trauma, or pain. The court viewed intrusion into an arrestee's privacy resulting from a DNA sample akin to other booking procedures like fingerprinting and photographing. The Court also noted that the Government's legitimate interest in collecting DNA samples from arrestees was great – such samples assist in solving past and future crimes and potentially exonerate the innocent.[1] *See id*, at 454-461. The Alaska Court of Appeals has upheld the constitutionality of Alaska's prior post-conviction DNA submission statute. *See Nason v. State*, 102 P.3d 962 (Alaska App. 2004) (upholding the constitutionality of an earlier version of AS 44.41.035(b)).

Further, CODIS has significant safeguards associated with the information included therein. The Federal Bureau of Investigation requires all state CODIS laboratories to comply with FBI Quality Assurance Standards (QAS). Only specific types of samples can be maintained and searched in CODIS, all state CODIS laboratories are subject to FBI audit, all data access and dissemination is limited, and all state CODIS laboratories must provide an expungement process. Finally, DNA profiles submitted to CODIS are intentionally separated from any underlying demographic data. Each DNA sample is assigned a bar coded number; the CODIS sample does not have personally identifiable information associated with it. If a DNA sample is 'matched' to crime scene evidence, the agency must contact the laboratory to obtain the personally identifying information of the submitting subject.

In Alaska, and upon request, a court will issue an order for the DNA sample to be expunged from the system if the qualifying conviction is reversed, charges are not filed by the prosecuting authority, if charges are subsequently dismissed, or the person is acquitted of the qualifying offense. AS 44.41.035(i). Expungement of a sample includes the DNA profile, the physical sample, and all associated personally identifiable information. Laboratory expungement procedures include removal of the DNA profile from CODIS and destruction of the physical sample. The personally identifiable information is locked in the Laboratory Information Management System (LIMS) such that its access is restricted to the CODIS administrator and

[1] Since the advent of forensic DNA testing, over 330 individuals have been exonerated of crimes they did not commit. For example, according to dnasaves.com (a website dedicated to informing policymakers of the importance of post-arrest DNA collection, "Robert Gonzalez was jailed for over two years for the rape and murder of eleven year old Victoria Sandoval before Israel Diaz was arrested for an unrelated burglary in Albuquerque, NM. Under "Katie's Law" in New Mexico, those arrested for felonies are required to provide a DNA sample. Diaz' DNA matched to the crime scene DNA for Victoria Sandoval's rape and murder. As a result of this match Robert Gonzalez was subsequently exonerated. Diaz has since been convicted of Sandoval's rape and murder." *See* http://www.dnasaves.org/exonerate-the-innocent/, last visited April 15, 2019.

alternate administrator for the purposes of proof of expungement only. The procedures also require the laboratory to notify the requestor (*i.e.*, the arrestee) once expungement is completed. The State Crime Lab accomplishes this by sending a letter to the requestor. Physical destruction of the sample is witnessed by a second DNA analyst and restriction of the record is verified by a second individual.

CODIS and the DNA information it contains is confidential and may only be used for official purposes. AS 44.41.035(f). Misuse of the DNA information is also a criminal offense. Under federal law, the unauthorized disclosure of DNA information is subject to up to a $250,000 fine and one year in jail. Under Alaska law, the unlawful use of DNA samples is a class C felony offense. AS 11.56.762.

2.) Involuntary Commitments and Information Sharing After October 1, 1981

Senate Bill 32 uses October 1, 1981 forward as the period for which the court system is required to transmit information about involuntary commitments to the Department of Public Safety since October 1, 1981 is when Alaska law began allowing the court to involuntary commit a person if the person had been adjudicated mentally ill or mentally incompetent. This change allows the court system to share mental adjudication information with the Department of Public Safety for inclusion into the Federal Bureau of Investigation's National Instant Check System to prevent the sale by licensed firearm dealers to persons who cannot legally possess firearms.

The National Instant Background Check System (NICS) was established by the Brady Handgun Violence Prevention Act of 1993. It is a system that requires a federal firearms licensee to check the eligibility under federal law of a potential purchaser of a firearm to possess a firearm. A person who has been adjudicated as mentally defective or who has been admitted to a mental institution is a "prohibited person" under the Brady Handgun Violence Prevention Act. In other words, under federal law, a person who has been involuntarily committed after a court proceeding may not legally possess a firearm.

For individuals who have been formally adjudicated, only the fact that the individual is a prohibited person is submitted to NICS; the underlying diagnoses, treatment records, or other identifiable health information are not provided to or maintained in the NICS. Presently, only *current* information regarding the adjudication of mental illness or incompetency is available to the NICS. However, section 49 of SB 32 would allow the Court System to share *historical* information with the Department of Public Safety for inclusion to NICS.

3.) Section 32: How was the threshold for 1A and 2A drug possession determined? How did the Department determine the threshold to show personal use versus intent to distribute?

The thresholds were initially proposed by the Alaska Criminal Justice Commission and later amended by the Alaska Legislature. The changes to the drug laws were based on the conclusion that over the past 10 years, post-conviction admissions to prison for drug offenses had grown by 35 percent and that felony drug offenders were spending longer in jail than they were ten years ago. Also, it was assumed that since most drug offenders were not apprehended, longer prison terms provided little deterrent effect. The changes to the drug statutes were designed to reduce the sentences of drug offenders.

4.) Sentencing factors for drug offenses.

a. <u>How is the impact on the community and the street value of the drug evaluated by the court? Are there equal protection issues? Are people in rural areas sentenced differently than in urban areas? Did this exist pre and/or post SB 91?</u>

Prior to the passage of SB 91, the law distinguished between low- and high-level *dealers* through the application of aggravating and mitigating factors. An aggravating factor applies when a large quantity of controlled substance is involved, and a mitigating factor applies when a small quantity of controlled substance is involved. These factors allow the court to depart upwards or downwards from the felony presumptive-range sentence that would be imposed absent an aggravating or mitigating factor. Whether a quantity is determined to be large or small is a question of fact. In order to evaluate whether a quantity is large or small the court looks at several variables:

> "Within any class of controlled substance, what constitutes an unusually small or large quantity may vary from case to case, depending on variables such as the precise nature of the substance and the form in which it is possessed, the relative purity of the substance, its commercial value at the time of the offense, and the relative availability or scarcity of the substance in the community where the crime is committed. Variations may also occur over time: what amounted to a typical controlled substance transaction ten years ago might be an exceptional one today. These variables do not lend themselves to an inflexible rule of general application, and they render it both undesirable and wholly impractical to treat the question of what constitutes a "large" or "small" quantity . . . as an abstract question of law. The question must instead be resolved by the sentencing court as a factual matter, based on the totality of the evidence in the case and on the court's discretion, as informed by the totality of its experience."

See Knight v. State, 855 P.2d 1347, 1349-50 (Alaska Ct. App. 1993).

SB 91 changed this analysis. The quantity became the primary factor for determining the sentence to be imposed because the quantity controls the level of offense when distributing a schedule IA, IIA, or IIIA controlled substance. The purity and commercial value have little

impact since the distribution amount determined if an offense was a class C or B felony offense. For example, if a person trafficked in one gram or less of a schedule IA controlled substance currently law classifies the offense as a class C felony regardless of the surrounding circumstances. Senate Bill 32 reverts the last to its pre-2016 state: trafficking of any amount of schedule IA controlled substance would be classified as a class A felony.

Similarly, current law makes the distribution of more than 2.5 grams of a schedule IIA and IIIA controlled substance a class B felony, while distribution of a lesser amount is a class C felony. Once again the purity or commercial value have little impact. Senate Bill 32 would return the distribution of any amount of a schedule IIA and IIIA controlled substance to a class B felony.

b. SB 32 returns the distribution of any amount of heroin to a class A felony offense subject to a presumptive term of 5-8 years. However, can't the court find a large amount aggravator and depart from the presumptive range?

As described earlier, eliminating the threshold amount to determine the level of drug offense allows the court to consider all of the factors in determining the severity or seriousness of the drug offense. For example, assume the following hypothetical: a person is found to be trafficking heroin in Anchorage. At the time of his arrest, he only has .9 grams of heroin in his possession. But law enforcement also finds the individual with a scale, a series of empty bindles, a gun, and a significant amount of cash (*i.e.*, $15k in small bills). Also assume that law enforcement finds that the vehicle the individual was driving has secret compartments for transporting large amounts of drugs. This individual can only be charged with a "C" felony because he was only trafficking under one gram of heroin. On the other hand, assume law enforcement finds the same person with 1.5 grams. Given the larger amount, the individual would be charged with a B felony since he was trafficking in an amount greater than 1.0 grams. The difference of a half of a gram does not change the dangerousness of the individual or the impact the drug trafficking has on the community.

5.) Section 22: How many people have violated their conditions of release because of failure to appear both before and since SB 91?

The phrase "failure to appear" includes both those individuals who have been charged with the crime of failure to appear and those who have not shown up to court and a warrant has issued for their arrest. The Department does not have data on the number of people who have violated conditions of release by not showing up to court triggering the issuance of a warrant. However, we do have data on the number of people charged with the *crime* of failure to appear:

2014 – 212
2015 – 156
2016 – 141
2017 – 71
2018 – 65

6.) Section 55: Is there a risk to the presumption of innocence if a prior conviction is presented as evidence to a grand jury when a prior conviction is an element of the offense?

No. When evidence of a prior conviction is introduced at grand jury, the grand jury is instructed that it may only rely on the evidence for purposes of proving the predicate offense element. Section 55 merely changes the manner in which the evidence is presented; it does not allow for otherwise new (or inadmissible) evidence to be presented. Section 55 is designed to allow the system to operate more efficiently. This section does not affect the substantive rights of the accused.

Please let us know if we can be of any further assistance as you consider SB 32.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: 
Robert E. Henderson
Deputy Attorney General

cc: Governor's Legislative Office