

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

January 30, 2017

1:34 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Mia Costello
Senator Kevin Meyer
Senator Pete Kelly
Senator Bill Wielechowski

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

PRESENTATION: ALASKA CRIMINAL JUSTICE COMMISSION 2017
RECOMMENDATIONS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

GREGORY RAZO, Chair
Alaska Criminal Justice Commission and
Vice President, Cook Inlet Region Incorporated (CIRI)
Anchorage, Alaska

POSITION STATEMENT: Presented recommendations from the Alaska Criminal Justice Commission to change Senate Bill 91.

BARBARA DUNHAM, Project Attorney
Alaska Criminal Justice Commission
Anchorage, Alaska

POSITION STATEMENT: Participated in the discussion and explanation of the recommendations from the Alaska Criminal Justice Commission to change Senate Bill 91.

SUZANNE DIPIETRO, Executive Director
Alaska Judicial Council

Anchorage, Alaska

POSITION STATEMENT: Participated in the discussion and explanation of the recommendations from the Alaska Criminal Justice Commission to change Senate Bill 91.

ACTION NARRATIVE

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CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:34 p.m. Present at the call to order were Senators Costello, Wielechowski, Meyer and Chair Coghill.

**Presentation: Alaska Criminal Justice Commission 2017
Recommendations**

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CHAIR COGHILL announced the business before the committee is to hear about the recommendations the Alaska Criminal Justice Commission ("Commission") made for 2017. Today the chair of the Commission will relay the pros and cons of each of the 14 recommendations. He asked members to be mindful that the recommendations include substantive policy calls as well as technical changes. At the end of the meeting the committee would discuss the path forward.

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GREGORY RAZO, Chair, Alaska Criminal Justice Commission, stated that he works as Vice Chair at CIRI [Cook Inlet Region Incorporated]. He reported that the recommendations to change Senate Bill 91 are the result of discussions at the January 19 and January 27, 2017 meetings. The Commission tried to take as much public comment as possible. Public comment as well as testimony from law enforcement, prosecutors and the Court System served to frame the recommendations. He emphasized that every person that testified and each commissioner placed great emphasis on public safety.

He reminded the committee that the Commission was created in 2014 and the legislature directed it to make recommendations based on: the need to rehabilitate the offender; the sufficiency of state resources to administer the criminal justice system; the effect of state laws and practices on the rate of recidivism; and peer-reviewed and data-driven research. He relayed that the Commission was fortunate to be able to utilize the resources of the PEW Trust to collect and analyze data.

MR. RAZO said that when the Commission formed, it agreed to forward only recommendations that were backed by data and were evidence-based. In 2015, the legislature gave further direction to the Commission to forward recommendations that would either 1) avert all future prison growth; 2) avert all future prison growth and reduce the current prison population by 15 percent; or 3) avert all future prison growth and reduce the current prison population by 25 percent. He said that those focusing factors became part of the process that ultimately resulted in Senate Bill 91 that passed in 2016.

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SENATOR KELLY joined the committee.

MR. RAZO relayed that as part of Senate Bill 91, the legislature tasked the Commission with monitoring the efficacy of the reforms using data collected from certain state agencies. However, because the bill was enacted in July 2016 and parts of the bill will not go into effect until January 2018, the Commission does not currently have enough data to assess whether Senate Bill 91 is achieving its intended outcomes. Thus, the Commission's recommendations are not based on data-driven research and they are not based on the data that the legislature instructed the Commission to collect and analyze. Importantly, the recommendations are not expected to reduce the prison population, reduce recidivism, or reduce the criminal justice system's usage of state resources.

He explained that the Commission's 14 recommendations are based on feedback from members of law enforcement, prosecutors, and the public. He pointed out that this feedback reflects other factors the Commission was directed to consider in making recommendations. These important factors are found in state law and they include: 1) the need for confinement; 2) the effect of deterrents; and 3) the need for community condemnation.

MR. RAZO said the Commission recognizes that the factors it has been tasked to consider often work in tension. He relayed that while it is difficult to focus on these factors at the same time, the commissioners have a tremendous amount of experience and it is that experience that helps inform the recommendations. He added, "I dare say that that experience is as important as the huge amount of public testimony that we heard over various concerns." He cautioned that not all the recommendations received unanimous support. The recommendations that did not

receive unanimous support include an explanation of the concerns of the commissioners who did not support the recommendation.

CHAIR COGHILL welcomed Senator Kelly to the meeting.

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MR. RAZO turned to the recommendations, starting with **Recommendation 14-2017: Enact the following technical corrections to SB 91.** He said he would not belabor each of the technical corrections, but could report that they received unanimous support from the Commission and were consensus based. He explained the meaning of consensus based in the context of the Commission.

CHAIR COGHILL agreed that the members individually could review the recommended technical corrections. He relayed his expectation to draft those corrections in a separate bill.

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MR. RAZO presented **Recommendation 1-2017: Return VCOR to Misdemeanor Status.** He summarized that Senate Bill 91 enacted the Commission's recommendation to downgrade the crime of Violation of Conditions of Release (VCOR) to a non-criminal violation, punishable by a fine. This change created an unintended consequence. He deferred to Ms. Dunham for an explanation.

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BARBARA DUNHAM, Project Attorney, Alaska Criminal Justice Commission, stated that the recommendation is to return violations of conditions of release to a class B misdemeanor, punishable by up to 5 days in jail. She explained that Senate Bill 91 included an arrest provision so defendants who violate their conditions of release could be arrested and held until the judge in their underlying case could review bail. The problem that has arisen is that some people who were arrested were released as soon as they were brought to jail.

CHAIR COGHILL summarized that this requirement is to hold a person who has violated their condition of release until a bail schedule hearing.

MR. RAZO agreed. He relayed that the Commission discussion on January 19, included a long description of the perfect storm of factors that made the VCOR unworkable. The Alaska Court System initiated a new bail schedule for misdemeanors, and magistrates were told in many cases to OR (own recognizance) release certain

people. Then Senate Bill 91 passed at about the same time that significant cuts were made in prosecutor and law enforcement personnel, so those resources were in short supply. This combination of factors accounted for a lot of the public criticism of the new VCOR statute.

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SENATOR WIELECHOWSKI cautioned against making reactionary changes. He said that to make sure any changes are evidence based, it would be helpful to know: 1) the number of people that would be impacted by the change; 2) the success that other states or communities have had with these changes; and 3) the cost to implement each recommendation.

CHAIR COGHILL pointed out that the Commission said the recommendations are not based on data-driven research. Once a bill is drafted, the agencies will be given an opportunity to comment and, most probably, answer those questions. He asked Mr. Razo if he wanted to comment or move on to the next recommendation.

MR. RAZO said the commissioners have those same questions and will use evidence that is available to see if there is a statistical correlation between Senate Bill 91 and what is happening in communities statewide.

He opined that Recommendation 1 has the potential to be significant with respect to having people spend more days in jail.

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MR. RAZO presented **Recommendation 2-2017: Increase penalties for repeat Theft 4 offenders**. He noted that this, too, has the potential to be significant with respect to having people spend more days in jail. This recommendation targets recidivist theft in the fourth degree ("Theft 4") offenders. He deferred further explanation to Ms. Dunham.

MS DUNHAM explained that Theft 4 is a class B misdemeanor that penalizes the theft of items or services valued at \$250 or less. Senate Bill 91 limited the penalties for first and second convictions of this offense and eliminated jail time for a third or subsequent conviction. The Commission heard a lot of testimony about this provision that people who commit three or more lower-level theft crimes should receive an escalating penalty.

The Commission considered two proposals one of which was to reenact the recidivist provision and return the third and subsequent offense to a class A misdemeanor. The Commission ultimately decided to recommend that for third-time Theft 4 offenders, the offense should remain a class B misdemeanor, but punishable by up to 10 days in jail.

The debate centered on what is the appropriate approach for dealing with people who have chronic addictions, homelessness, and mental health issues. Some commissioners were concerned about the potential for criminalizing those issues without treating the underlying causes. Everyone on the Commission did agree that these offenders should not be left to cycle through the criminal justice system. Further solutions are needed, including more options to treat mental illness, addiction, and chronic homelessness. This recommendation was to increase the consequences for Theft 4 and address what is widely perceived as a growing theft problem.

CHAIR COGHILL opined that this may be a tool to get pretrial risk assessments.

MR. RAZO said it is important for the committee to realize that the reinvestment money that was directed to prevention and treatment has just begun to hit the streets. The money that was directed to the Department of Corrections has been used for training and development of the various tools that are expected to come from the bill, but they have yet to be deployed. "It's difficult to make recommendations that are evidence based when the full effect of Senate Bill 91 has not hit the streets."

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MR. RAZO presented **Recommendation 5-2017: Enact a 0-90 day presumptive sentencing range for first-time Class C Felonies.** He described this as the most significant factor to potentially place people in jail. He explained that a fundamental principle of Senate Bill 91 was that a person is more likely to not reoffend if they are given probation for a first-time felony offense. A person who is placed in jail for even a small period for a nonviolent offense is more likely to commit additional crimes.

He read the following into the record:

SB 91 provides that Class C Felonies are punishable by a suspended term of 0-18 months for first-felony offenders. This means that a first-time felony

offender convicted of a Class C Felony is presumed to receive a probationary sentence that would include some amount of suspended time. A person receiving a probationary sentence with suspended time does not spend any time in jail up front, but is subject to jail time if they violate conditions of probation.

The purpose of this provision was to provide community supervision for first-time offenders to (1) allow the offender to maintain pro-social ties to the community and (2) ensure that the offender would comply with conditions of probation such as remaining sober, not committing new crimes, and paying fines and restitution to victims. If the offender failed with these conditions, that offender could be made to serve part or all the suspended time in jail.

The Commission heard numerous concerns about this provision. Prosecutors felt that some violent Class C Felonies warranted jail time for a first-time offense, and were concerned that there was not enough of an incentive to encourage these offenders to get into treatment. Members of law enforcement were frustrated that this provision was overbroad and did not provide for an offender's immediate incarceration if the offender posed a danger to the community. Members of the community were offended by this provision and felt that it did not express community condemnation strongly enough.

Prosecutors and law enforcement preferred a provision that would allow a judge discretion in sentencing and would provide for immediate incarceration if necessary. They thought that while there were some cases where a probationary term was warranted for a first-time offender, the judge should be able to impose jail time in some instances, particularly cases involving violence.

The Commission therefore recommends that Class C Felonies carry a presumptive jail term of 0-90 days for first-felony offenders.

MR. RAZO deferred further explanation to Ms. Dunham.

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SENATOR COSTELLO asked if anything in Senate Bill 91 would prevent a police officer from arresting a person at the time that they committed a felony.

MS. DUNHAM said nothing in the bill prevents an officer from arresting a person who has committed a class C felony if there is probable cause. However, the officer does have the discretion to issue a citation instead of making an arrest.

SENATOR COSTELLO summarized that it's up to the discretion of the police officer and that will be the case until the pretrial regulations go into effect.

MR. RAZO agreed.

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MS. DUNHAM said this provision was of particular concern and the subject of considerable debate. Several proposals were put forward to increase the penalties for first-time felony offenders who committed a class C felony, but the Commission ultimately recommended a presumptive jail term of 0-90 days. This range would allow a judge to still impose no jail time and a probation sentence with a suspended term if he/she thought it was warranted. She reminded the committee that class C felonies cover a wide range of conduct, some that the public would consider fairly serious and some not serious at all.

MR. RAZO added that one of the proposals was to separate violent and nonviolent felonies into different sections of the code and provide a more severe penalty for the violent crimes. That proposal did not pass.

CHAIR COGHILL said the committee will take that into consideration.

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SENATOR MEYER asked for examples of both violent and nonviolent class C felonies.

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SUZANNE DIPIETRO, Executive Director, Alaska Judicial Council stated that assault in the third degree is a violent felony.

MR. RAZO added that examples are threatening a person with a deadly weapon and causing serious physical injury. An example of a nonviolent class C felony is theft of more than \$1,000.

SENATOR MEYER said he's heard frustrations about this, too, and from his perspective, 90 days jail time doesn't sound like much of a deterrent for somebody who threatens a person with a deadly weapon.

CHAIR COGHILL said the two areas that are getting quite a bit of attention are repeated fourth degree assault or class B misdemeanors, and class C felonies. He recalled that the Commission thought probation accountability would be better than sitting in jail watching TV, but it turned out that the incentive to follow through on their probation was diminished.

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SENATOR WIELECHOWSKI said it would be helpful to get some evidence on how this has worked in Alaska and other states. "If the penalties we have in the bill work and people are getting rehabilitated, that's something I would want to know. By the same token, if it's not working and people are getting off and committing other crimes, then I certainly want to know that as well."

CHAIR COGHILL said it will be difficult to get evidence from other states. These recommendations are based on testimony from the public and law enforcement.

MR. RAZO said it's important for the committee to understand the presumptive sentencing process in Alaska. For all class C felonies, the maximum sentence is 5 years in jail. The presumptive range is 0-90 days, but if the prosecutor proves by clear and convincing evidence that the case is aggravated, he/she can request the judge sentence the offender outside the presumptive range. He highlighted that there are 23 aggravators.

CHAIR COGHILL said this goes to the point made earlier about the Department of Law's [reduced] resources for prosecutions and the implementation of Senate Bill 91.

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MR. RAZO presented **Recommendation 3-2017: Allow municipalities to set different non-incarceration punishments for non-criminal offenses that have state equivalents.** He noted that this recommendation passed unanimously. It basically says that Senate Bill 91 has no impact on a city's list of violations. But if state and municipal crimes are equivalent, they must have equivalent punishments.

CHAIR COGHILL said this recommendation came from municipalities.

MR. RAZO said the Commission is doing its best to ensure that interested stakeholders are kept in the loop regarding all these recommendations.

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MR. RAZO presented **Recommendation 4-2017: Revise the sex trafficking statute.** He deferred the explanation to Ms. Dunham.

MS. DUNHAM clarified that the provisions in Senate Bill 91 that changed the sex trafficking statutes were not based on a recommendation from the Commission. However, as implemented it was hindering prosecutions of people who were committing sex trafficking. This change would still allow prosecution of people who are committing sex trafficking, but would not affect people who are engaged in the sex trade and are simply sharing resources.

CHAIR COGHILL cited testimony from the Department of Law about the ability to hide as a sex trafficker under the current writing of the law. He described the recommendation as straightforward.

MR. RAZO commented that there was considerable testimony from sex workers.

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MR. RAZO presented **Recommendation 6-2017: Enact an aggravator for class A misdemeanors for defendants who have a prior conviction for similar conduct.** He explained that Senate Bill 91 enacted a presumptive sentence range of 0-30 days for most class A Misdemeanors. The sentence could be increased for certain cases including those where the defendant has two or more criminal convictions for similar conduct. The latter is an aggravator and this recommendation is to make it an aggravator if the defendant has one prior conviction for similar conduct.

MR. RAZO presented **Recommendation 7-2017: Clarify that ASAP is available for minor consuming alcohol.** He explained that the Alcohol Safety Action Program monitors misdemeanor DUI and Refusal cases. In 2015, the Commission recommended that the program either receive more funding or be restricted to just DUI and Refusal offenders. Following this direction, Senate Bill 91 limited ASAP to offenders who have been convicted of DUI and Refusal offenses. That same year, Senate Bill 165 passed and changed Minor Consuming Alcohol from a crime to a violation. The bill also specified that the fine for this violation could be

reduced if the defendant attended and completed ASAP. As currently written, provisions in these two laws are in conflict.

MR. RAZO presented **Recommendation 8-2017: Enact a provision requiring mandatory probation for sex offenders.** He described it as an oversight that Senate Bill 91 eliminated the provision requiring sex offenders to serve a period of probation.

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MS. DUNHAM said the Commission did not hear any evidence that sex offenders were getting through a loophole, but wanted the legislature to decide where in the statute to enact this provision

MR. RAZO presented **Recommendation 9-2017: Clarify the length of probation allowed for theft in the fourth degree.** He deferred explanation to Ms. Dunham.

MS. DUNHAM explained that Senate Bill 91 provides that a third Theft 4 conviction is punishable by up to 5 days of suspended jail time and 6 months of probation. However, probation for a first or second Theft 4 conviction is not addressed. She noted that Theft 4 is a class B misdemeanor and generally carries a maximum probation term of 1 year. The Commission believes that a probationary term is appropriate and requests the legislature clarify what probation should be for first and second Theft 4 offenses.

CHAIR COGHILL said the committee will debate the matter and the bill will provide clarification.

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MR. RAZO presented **Recommendation 10-2017: Require victim notification only if practical.** He explained that Senate Bill 91 requires the court at the time of sentencing to provide the victim with information about the defendant's sentence and potential release. The difficulty is that the Court System does not have victim information, so it would not have a way to supply this information if the victim was not present at sentencing or did not want to participate or be informed. The recommendation to insert the words "if practical" in the statute would correct this problem.

CHAIR COGHILL said that makes sense and the committee will debate whether the definition of "practical" is too loose. "We want to push the limit to where the victim is notified if at all possible in every way we can."

MR. RAZO presented **Recommendation 11-2017: Felony DUI sentencing provisions should be in one statute.** He explained that driving under the influence is a Title 28 offense and the sentencing provisions are in Title 12 so the consequence for DUI is not found where you would expect to find it.

MS. DUNHAM clarified that there are penalty provisions [for DUI and Refusal] in both Title 12 and Title 28 and the Commission recommends there be just one penalty provision, in either Title 12 or Title 28.

CHAIR COGHILL summarized, "So in charging and sentencing you go to one code for both the charge and the penalty. Mr. Razo agreed.

MR. RAZO presented **Recommendation 12-2017: Clarify who will be assessed by pre-trial services.** He relayed that this recommendation came from the Department of Corrections (DOC), and it relates to the pretrial services program that has yet to go into effect. Senate Bill 91 directs the DOC commissioner to administer this program that will provide: a pretrial risk assessment for all defendants, recommendations to the court concerning pretrial release decisions, and supervision of defendants released while awaiting trial as ordered by the court. The concern centers on the fact that all defendants are subject to the pretrial risk assessment. He deferred further explanation to Ms. DiPietro.

MS. DIPIETRO added that the idea of a pretrial risk assessment is to help the judge and attorneys decide what type of pretrial release from imprisonment would be appropriate. But not all defendants go to jail pretrial; some will be issued a citation and a summons to appear before the court at a later date. The Department of Corrections argued that defendants who are not taking up jail beds pretrial do not need a risk assessment. Also, providing assessments for people who are not in jail would add considerably to the use of resources and the workload for the department.

She said the Commission wanted to be sure that the prosecutor could request a pretrial risk assessment for a particular defendant if he/she saw the need. This clarifies for DOC the scope of people to whom it needs to provide the pretrial risk assessment.

CHAIR COGHILL said he likes that the prosecutor may request a risk assessment.

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MS. DUNHAM presented **Recommendation 13-2017: Fix a drafting error regarding victim notification.** She explained that a provision in Senate Bill 91 requires a victim to be provided notice for a release on administrative parole for certain offenders, but those offenders are not eligible for administrative parole. This is a technical drafting error and the provision should be deleted.

CHAIR COGHILL said the Commission's explanation makes it clear that if a defendant is not eligible for administrative parole, that language should be deleted. "We'll clean that up in the bill."

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MR. RAZO advised that that was the last recommendation.

CHAIR COGHILL summarized the three main issues: 1) the escalating nature of class B misdemeanors; 2) the potential for jail time for class C felonies; and 3) violations of conditions of release. He thanked the commission members for the time and effort they had contributed over the last year. "You have done a yeoman's job." He asked Mr. Razo if he had concluding comments.

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MR. RAZO offered his perspective. He opined that the success of Senate Bill 91 hinges on the implementation and necessary training of troopers, municipal police officers, prosecutors, judges, defense lawyers and others associated with the criminal justice system. Resources are tight and there is only so much the part-time volunteer commissioners and two staff members can do. He lauded the Court System for doing an excellent job in explaining the law when their resources are equally scarce.

He reminded the committee that this was the justice reinvestment initiative, and the reinvestment is just beginning. The services that need to be provided to these people have yet to be implemented. If the necessary programs and services aren't implemented, the results are inevitable.

CHAIR COGHILL thanked Mr. Razo, Ms. Dunham, and Ms. DiPietro for their quick, concise work. He stated his intention to draft two bills, one technical and one policy related. He requested members think about whether one or both bills should be

sponsored by the Senate Judiciary Committee. He concluded, "Public condemnation has played a huge part in this, but I think Senator Wielechowski you're right. We need to keep it balanced against what we can demonstrate by whatever research we can find, but we cannot ignore the public who feels so violated."

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There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 2:44 p.m.