

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 17, 2017

1:35 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Kevin Meyer
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Mia Costello
Senator Pete Kelly

COMMITTEE CALENDAR

SENATE BILL NO. 54

"An Act relating to crime and criminal law; relating to violation of condition of release; relating to sex trafficking; relating to sentencing; relating to probation; relating to the pretrial services program; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JORDAN SHILLING, Staff
Senator John Coghill

POSITION STATEMENT: Provided a sectional summary for SB 54 on behalf of the sponsor.

JOHN SKIDMORE, Director
Criminal Division
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Commented on SB 54.

RENEE MCFARLAND, Attorney
Public Defender Agency

Anchorage, Alaska

POSITION STATEMENT: Commented on SB 54.

ACTION NARRATIVE

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CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:35 p.m. Present at the call to order were Senators Meyer, Wielechowski, and Chair Coghill.

SB 54-CRIME AND SENTENCING

CHAIR COGHILL announced the consideration of SB 54. Speaking as the sponsor, he explained that the bill contains the policy revisions recommended by the Alaska Criminal Justice Commission. He reviewed the contents of the packet and noted that John Skidmore and Renee McFarland were available online to answer questions.

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JORDAN SHILLING, Staff, Senate Judiciary Committee and Senator John Coghill, introduced SB 54 on behalf of the sponsor, starting with the following sectional summary:

Section 1

AS 11.56.757(a) - Violation of condition of release.

Changes the offense of violation of condition of release to a crime.

Section 2

AS 11.56.757(b) - Violation of condition of release.

Changes the offense of violation of condition of release to a crime (class B misdemeanor).

MR. SHILLING explained that in 2015 the Alaska Criminal Justice Commission ("Commission") recommended downgrading violations of conditions of release (VCOR) to an arrestable, detainable violation. That recommendation was enacted through Senate Bill 91, but implementation did not occur as the Commission intended. While the bill did include an arrest provision so that VCOR offenders could be arrested, some of those individuals were not held in jail because judges did not believe they had the authority to hold the defendant pending a bail review by the judge in the underlying case.

CHAIR COGHILL added that the Commission tried to follow data-driven practices and consider the need for rehabilitation, sufficiency of state resources, the effect of recidivism rates, and peer review metadata. The Commission also had to consider the need to confine offenders to maintain public safety, deterrence, and public condemnation.

MR. SHILLING said the Commission ultimately recommended returning violation of condition of release to a criminal offense. Section 1 is conforming and changes the term "offense" to "crime" because offense can include noncriminal behavior. Section 2 makes VCOR a class B misdemeanor instead of a violation that has a penalty of up to \$500.

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SENATOR WIELECHOWSKI asked if there are exceptions because there were good policy reasons for changing VCOR from a crime to a violation. "I wonder if there is a way to craft this so the [less] egregious ones are violations and the ones that are more egregious are class B misdemeanors."

MR. SHILLING said the Commission considered different approaches to resolving this problem, but ultimately settled on returning it to a criminal offense.

CHAIR COGHILL, speaking as sponsor, said he was open to suggestions that would give the court some flexibility in administering the punishment, including the misdemeanor when needed.

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SENATOR MEYER concurred with Senator Wielechowski that some flexibility is warranted.

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MR. SHILLING continued the sectional review.

Section 3

AS 11.66.130(a) - Sex trafficking in the third degree.

Distinguishes between people who are profiting and promoting a place of prostitution and people who are participating in a cooperative of independent sex workers and engaging in prostitution without receiving compensation or promoting prostitution.

Section 4

AS 11.66.135(a) - Sex trafficking in the fourth degree.

Distinguishes between a person engaging in conduct that institutes, aids, or facilitates prostitution, and a person who is also receiving compensation for prostitution services rendered by another.

MR. SHILLING explained that Sections 3 and 4 seek to ensure that sex workers cannot be prosecuted for sex trafficking if they are merely working together and not exploiting one another. This is the balance that House Bill 349 sought to strike last year. However, those provisions created an unintended loophole that could allow sex traffickers to avoid prosecution for lower degrees of sex trafficking. Those provisions are repealed in Section 15 of SB 54.

He noted that the Commission also recommended the legislature define the term "compensation" and the sponsor asked the Department of Law and the Public Defender to draft a definition.

CHAIR COGHILL said his office is still waiting on the definition.

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MR. SHILLING continued the sectional review.

Section 5

AS 12.55.125(e) - Sentences of imprisonment for felonies.

Increases the presumptive sentence for a class C felony that is a first felony conviction to up to 90 days imprisonment and up to 18 months suspended imprisonment.

MR. SHILLING explained that under current law, an individual who is convicted of a class C felony, but has no prior felonies on their record, receives a presumptive sentence of up to 18 months of felony probation supervision. If an aggravator is proven the individual can be sentenced up to 5 years in prison. This provision was recommended by the Commission and enacted by Senate Bill 91. The intention was to allow these offenders to maintain social ties to the community while the supervision ensured that they were complying with their conditions.

Prosecutors and the public voiced concern with this provision and said there ought to be some active imprisonment, regardless of whether it was a first offense or not. Section 5 removes the provision that requires probation for first-time felony offenders and imposes 0 to 90 days of active imprisonment and a suspended period of imprisonment of up to 18 months.

CHAIR COGHILL encouraged members to read the Commission's Recommendation 5-2017.

SENATOR WIELECHOWSKI asked what the penalty is for a first-time DUI offense and if SB 54 changes it.

MR. SHILLING replied that is a class A misdemeanor and the penalty that is typically imposed is 3 days active imprisonment and 27 days suspended. However, the maximum jail time is 30 days.

SENATOR WIELECHOWSKI asked if Senate Bill 91 changed the penalty.

MR. SHILLING replied the number of days wasn't changed but Senate Bill 91 requires an individual with a first-time DUI to serve a minimum of 3 days on electronic monitoring with home confinement.

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SENATOR MEYER observed that SB 54 doesn't guarantee imprisonment for a defendant convicted of a first-time class C felony, but it could be up to 90 days.

MR. SHILLING agreed and noted that prior to passage of Senate Bill 91, the court could impose a penalty ranging from 0 days up to two years.

SENATOR MEYER highlighted that one example of a class C felony is somebody shooting at another person.

CHAIR COGHILL said the committee should probably talk about the range of C felony conduct. The bill generally follows the Commission's recommendation that 0 to 90 days imprisonment with additional suspended time would be enough to get the defendant into some corrective action.

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MR. SHILLING continued the sectional review.

Section 6

AS 12.55.125 - Sentences of imprisonment for felonies.

Requires the court to impose a term of probation for felony sex offenders.

MR. SHILLING explained that in 2015 the Commission recommended a limit of 5 years probation for a felony sex offender and 3 years probation for all other felony offenders. At the time, the required minimum for a felony sex offender was 15 years probation. That statute conflicted with Senate Bill 91 and it was repealed. When the bill moved to the House the probation term limit was increased to 15 years, but the mandatory minimum was not resurrected. While the Commission has not heard of a felony sex offender who has not had a term of probation imposed, it seemed prudent to require it in law so that couldn't happen. He suggested the committee could allow the provision in SB 54 to stand or determine other unique minimums for felony sex offenders.

CHAIR COGHILL summarized that SB 54 imposes mandatory probation, which would give both the Board of Parole and judges a lot of discretion.

MR. SHILLING added that Section 6 would allow from 1 day up to 15 years probation for a felony sex offender

Section 7

AS 12.55.135(a) - Sentences of imprisonment for misdemeanors.

A person convicted of an A misdemeanor may be sentenced up to 60 days if the defendant has one previous conviction for a similar offense.

MR. SHILLING explained that Section 7 addresses the Commission's recommendation regarding class A misdemeanors. Senate Bill 91 enacted a presumptive sentence of 0 to 30 days for most class A misdemeanors. Prosecutors voiced concern about the escalator, so the Commission recommended: 0 to 30 days for a first class A misdemeanor; 0 to 60 days for a second class A misdemeanor; and up to one year for a third class A misdemeanor. Assault, even the first time, and certain sex offenses are exceptions and those have sentences of up to 1 year.

Page 3, line 28, specifies that the aggravator to receive a sentence up to one year requires two or more convictions.

Page 4, lines 9-11, creates the 0-60 range for one previous conviction for a similar offense.

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Section 8

AS 12.55.135(b) - Sentences of imprisonment for misdemeanors.

A person convicted of violation of conditions of release may be sentenced to up to 5 days of imprisonment.

MR. SHILLING explained that Section 8 is a continuation of the Commission's recommendation regarding violation of the condition of release.

Section 9

AS 12.55.135(1) - Sentences of imprisonment for misdemeanors.

A person convicted of theft in the fourth degree (and similar offenses) may be sentenced up to 10 days of active imprisonment for third and subsequent convictions.

MR. SHILLING explained that Section 9 addresses two recommendations the Commission made regarding theft in the fourth degree. First, it explicitly says that a six-month term of probation can be imposed for first and second convictions of theft in the fourth degree. This is what Senate Bill 91 intended but the probation term limit was not included in that specific statute.

Section 9 also provides up to 10 days active imprisonment for a third conviction of theft in the fourth degree. He noted that this differs from the Commission's recommendation in 2016, which provided five days suspended imprisonment for a third and subsequent conviction of theft in the fourth degree.

CHAIR COGHILL suggested the members look at the Commission's Recommendations 2-2017 and 9-2017 as well as a list of these misdemeanors for context.

MR. SHILLING highlighted for the members that this section could be clarified in a future committee substitute.

CHAIR COGHILL agreed.

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MR. SHILLING continued the sectional review.

Section 10

AS 12.63.100(6) - Definitions.

Updates the definition of "sex offense" to conform to amendments to sex trafficking in the third and fourth degrees.

Section 11

AS 18.67.101 - Incidents and offenses to which this chapter applies.

Updating the offenses for which the Violent Crimes Compensation Board may order payment of compensation to conform to amendments to sex trafficking in the third and fourth degrees.

MR. SHILLING said Sections 10 and 11 are conforming sections related to sex trafficking.

Section 12

AS 29.25.070(g) - Penalties.

Clarifies that limitations of municipal authority to impose punishments does not apply to non-criminal offenses.

MR. SHILLING said Section 12 is a recommendation from the Commission and a priority of the Municipality of Anchorage. Although not intended, this provision was interpreted to apply to noncriminal offenses. Replacing the terms "offense" and "law" with "crime" will allow a municipality to have its own unique punishments for infractions and violations.

SENATOR MEYER asked if a municipality could impose a higher penalty than the state for a DUI offense.

MR. SHILLING said a municipality could not impose a longer term of imprisonment, but it could be open to interpretation whether the fine could be higher. He noted there is also a discussion about forfeiture and impoundment of vehicles. For example, the Municipality of Anchorage ordinance impounds an individual's vehicle for first time DUI, whereas state law doesn't impose that penalty until a second DUI.

He suggested the committee may want to further define "punishment" to clarify the way a municipality would respond to non-jail punishments such as fines and vehicle impoundment.

CHAIR COGHILL said he's open to discussion on the matter, but he hasn't seen language he's willing to put in the bill.

SENATOR MEYER asked if the Municipality of Anchorage has a choice of charging an individual under state law versus local law and if the state picks up the court costs if they charge under state law.

CHAIR COGHILL asked Mr. Skidmore to address the question.

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JOHN SKIDMORE, Director, Criminal Division, Department of Law (DOL), Anchorage, Alaska, said the arresting agency has the discretion to refer the case to the municipal prosecutor or the state prosecutors. When the case is referred to either agency, that agency would screen the case under the appropriate authorizing legislation. For the state that is a state statute and for a municipality that is the municipal code. Neither agency can screen out a case and force the other to take it, but an agency could decline to prosecute, and the other agency could pick up the case.

SENATOR MEYER said his concern is about potential cost shifting. "If APD picks up somebody for DUI and then they decide to use the state law for that case, then does the cost automatically shift to the state versus the municipality?"

MR. SKIDMORE replied costs could be shifted, and that has always been a possibility. If a case is referred to the state as opposed to the municipality, the state bears the cost of the prosecution and incarceration that might follow. Similarly, if a case is referred to the municipality, the municipality bears the cost of the prosecution and subsequent incarceration.

CHAIR COGHILL offered his understanding that the [Municipality of Anchorage] prosecutes misdemeanors but not felonies.

MR. SKIDMORE said both Anchorage and Juneau have enacted municipal codes that allow prosecution of misdemeanors, but municipalities do not prosecute felony conduct. That is left to the State of Alaska unless the charges are under federal law.

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SENATOR MEYER offered his understanding that driving under the influence is a class A misdemeanor.

CHAIR COGHILL added that the third DUI is a felony offense.

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MR. SHILLING clarified that the third DUI in 10 years becomes a felony.

He continued the sectional review.

Section 13

AS 33.07.010 - Pretrial services program; establishment.

Limits the assessment of pretrial risk to defendants brought into custody, or any defendant if requested by prosecution.

MR. SHILLING explained that when Senate Bill 91's pretrial provisions go into effect January 1, 2018, the Department of Corrections (DOC) will be required to conduct a pretrial risk assessment on all defendants, regardless of whether they are in custody. Because the purpose of the assessment is to inform judges and pretrial services officers in making a release decision, the DOC argued that it was unreasonable to require an assessment for defendants who were not in custody. The Commission agreed and recommended that pretrial risk assessments be limited to defendants in custody and any defendant for which the prosecution requests an assessment.

Section 14

AS 34.03.360(10) - Definitions.

Updates the definition of "illegal activity involving a place of prostitution" to conform to amendments to sex trafficking in the third and fourth degrees.

MR. SHILLING explained that the definitions in Section 14 conform to the sex trafficking changes and accommodate the renumbering in Section 3.

Section 15

Repealed statutes

Repeals duplicative felony DUI sentencing provisions and certain sex trafficking statutes.

MR. SHILLING explained that [AS 11.66.130(b) and AS 11.66.135(b); and AS 12.55.125(e)(4)(B), AS 12.55.125(e)(4)(C), and AS 12.55.125(e)(4)(D)] are repealed. They relate to the inadvertent loophole created regarding sex trafficking he mentioned earlier, and the Commission's recommendation that all felony DUI sentencing provisions be in one location. With passage of Senate Bill 91, felony DUI sentencing statutes are found in both Title 11 and Title 28. SB 54 repeals them from Title 11 and they remain in Title 28.

Section 16

Uncodified law

This section contains applicability provisions.

Section 17

Effective date

Section 13 takes effect January 1, 2018.

MR. SHILLING explained that Section 13 addresses the pretrial risk assessment and those provisions do not go into effect until January 1, 2018.

Section 18

Effective date

Other than section 17, this bill takes effect immediately.

CHAIR COGHILL highlighted that violation of condition of release, class C felonies, theft in the fourth degree, and the municipal penalty are the four large questions the bill seeks to answer. The sex trafficking issue isn't a Commission recommendation, but it was inserted as part of Senate Bill 91 and it needs attention to ensure the intent is clear.

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SENATOR MEYER said he continues to have concern about the class C felonies and the ability to separate violent and nonviolent conduct. He expressed interest in treating violent conduct more harshly than the nonviolent and observed that the bill "isn't quite there yet."

CHAIR COGHILL suggested he read the record from the Alaska Criminal Justice Commission where the Department of Law discussed separating violent and nonviolent behavior. They also

talked about a broader penalty range, and that might be something to consider. He emphasized that he didn't want to bump against the next felony level and lose the benefit of changing behavior, but he is open to the discussion.

SENATOR MEYER said his other concern is the class B misdemeanor to address the rise in thievery. He asked for clarification of Sections 7 and 9.

CHAIR COGHILL said Section 7 deals with class A misdemeanors and the aggravator that could be added. The class B misdemeanors, theft in the fourth degree, are addressed in Section 9.

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MR. SHILLING clarified that robbery and burglary are felonies. Section 9 deals with theft in the fourth degree and things that are similar such as removal of ID marks, unlawful possession, issuing a bad check, and criminal simulation. The bill envisions up to 10 days of active imprisonment for a third conviction of theft of items valued under \$250

SENATOR MEYER asked what the penalty is for breaking into a house and stealing \$500 worth of jewelry.

MR. SHILLING explained that burglary and robbery are felonies. Theft of property between \$250 and \$1,000, without committing either a burglary or robbery, is a class A misdemeanor.

CHAIR COGHILL suggested Mr. Skidmore also answer the question.

MR. SKIDMORE said Mr. Shilling answered the question correctly. If a person breaks into a home with intent to steal, that is burglary in the first degree, which is a class B felony. Stealing property off another person through force or threat is considered a robbery. Theft of property under \$250 is a class B misdemeanor and is called theft in the fourth degree. Theft of property between \$250 and \$1,000 would be a class A misdemeanor and is called theft in the third degree.

SENATOR MEYER asked if breaking into an electronics store versus a home is still considered a robbery.

MR. SKIDMORE answered no. Breaking into a building other than a residence is burglary in the second degree, a class C felony. Taking an electronic device out of someone's purse or pocket is not a robbery because it is not done through force. That is theft and the degree depends on the value of the item.

SENATOR MEYER asked how the device is valued.

MR. SKIDMORE replied AS 11.46.980 says the value of the property is market value at the time and place of the crime, unless otherwise specified. If the market value cannot be determined, the replacement cost of the property after the crime is used.

SENATOR MEYER commented on the frustration that people have about increased thefts, the opioid epidemic, and police frustrations with Senate Bill 91.

CHAIR COGHILL talked about the need to restore confidence of the public, police, and prosecutors and the need to have tools available.

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SENATOR MEYER noted that the committee had not received a fiscal note and that increased enforcement will cost more.

CHAIR COGHILL clarified that Senate Bill 91 was intended to save criminal activity and divert any savings to programs. "If we save Alaska from more crime that will save us money as a safer society."

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SENATOR WIELECHOWSKI reviewed the field manual for crime and asked if breaking into a house is burglary in the first degree, a class A felony

MR. SKIDMORE answered yes; burglary in the first degree is when someone enters or remains unlawfully in a residence with the intent to commit a crime. Burglary in the second degree is when someone enters and remains unlawfully in a building other than a dwelling.

SENATOR WIELECHOWSKI asked if breaking into a shed and taking something would be burglary in the second degree; and if stealing someone's boat and trailer would also be theft.

MR. SKIDMORE explained that a boat is considered a motor vehicle and that type of theft is automatically a felony, whereas stealing a bicycle would be theft and the degree would depend on the value of the property. He noted that earlier he read that governing statute to Senator Meyer. Addressing the question of breaking into a shed, he read AS 11.81.900(b)(5) and determined a shed does not meet the definition of a building, therefore

that would not be a burglary. It would be theft and the degree would be determined by the value of the property stolen.

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SENATOR WIELECHOWSKI stated agreement with Senator Meyer that the theft issue is enormous. He asked how Alaska's penalties for theft compare to other states. "I wonder if there's maybe a few things where we just want to tick up the penalty a little bit, so we just stop what I'm seeing as really an epidemic in this area."

CHAIR COGHILL said the intention is to increase penalties to the point that there is accountability with the capacity for diversion. He asked Mr. Skidmore how a case is analyzed and eventually leads to plea bargaining.

MR. SKIDMORE explained that when a case is referred to the Department of Law, it is screened to determine whether it has sufficient evidence to meet the elements of a particular crime. Thereafter, it is a question of whether there are resources to carry out the prosecution.

CHAIR COGHILL asked if the degree of theft increases if the property that is stolen is required for a person's livelihood.

MR. SKIDMORE answered no; the statute does not describe that element. The statute talks primarily about the value of the property although the crime can be elevated for things like an access device or a firearm.

SENATOR WIELECHOWSKI asked if people are committing the same crimes over and over; and his sense of what can be done to break this cycle of escalating thefts.

MR. SKIDMORE replied you're asking the million-dollar question and there isn't a simple answer. He confirmed that the same people frequently do come back and commit the same crimes. This is borne out in his personal experience and the recidivism data. He opined that it will be a case by case and defendant by defendant analysis to determine what sanction is appropriate. In large part that is why discretion is built into the criminal justice system.

CHAIR COGHILL said that was part of the debate as the Commission looked at how to hold people accountable and give the opportunity for diversion.

SENATOR MEYER noted the opioid epidemic in Alaska and expressed his belief that a lot of the murders are a result of drug activity. He said he supports treatment to get people off addictive drugs, but realizes that only works if the person wants the help. He expressed interest in hearing from the Department of Corrections regarding drug treatment options and the prevalence of drugs in prison.

CHAIR COGHILL said DOC will be available at a future meeting to address these questions.

SENATOR MEYER said there is no silver bullet but looking for ways to stop the revolving door is one option.

CHAIR COGHILL highlighted that many of the programs and community support services established in Senate Bill 91 are just starting. "We still have to hold people accountable, give opportunity to change where they can, and when they won't change we have to hold them accountable at a higher level."

He asked Ms. McFarland if she had any comments.

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RENEE MCFARLAND, Attorney, Public Defender Agency, Anchorage, Alaska, clarified that whether theft from a shed constitutes burglary or not depends on the nature of the shed. The closer it approximates a building the more likely it qualifies as a building and therefore would qualify as burglary in the second degree. She said this is often a factual question for juries to consider.

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MR. SHILLING, following up on Senator Wielechowski's question about what works to reduce crime, highlighted that the Commission relied heavily on the large body of research about the things that don't work when it made its recommendations last year. One of the findings of that research was that longer prison stays do not reduce the likelihood of committing crimes in the future.

He reminded the committee that the Commission made it clear that the 2017 recommendations are not based on a large body of research. They are in response to other factors such as community condemnation and retribution. He also reminded the committee that the justice reinvestment initiative is about spending less money on things that don't work and aren't supported by research and investing any savings in things that

do reduce crime such as substance abuse treatment, violence prevention, and pretrial services.

CHAIR COGHILL added that the Department of Corrections looked at the current programs and found that over 80 percent were effective, based on the justice reinvestment review.

SENATOR WIELECHOWSKI said he's concerned about the small group of people that, for whatever reason, can't be rehabilitated. "What do we do with those people?"

CHAIR COGHILL said starting this time next year there will be pretrial risk assessments but that's not now, so we'll keep looking.

[SB 54 was held in committee.]

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There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 2:45 p.m.