

SB

66

<TARGET><BILL>SB 66</BILL><SUBJECT>SB
66</SUBJECT><COMM>SFIN28</COMM></TARGET>

SENATE FINANCE COMMITTEE REPORT

DATE: 3/12/14

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Finance Committee considered SENATE BILL NO. 66

SB 66-IMITATION CONTROLLED SUBSTANCE

"An Act relating to imitation controlled substances; and providing for an effective date."

and recommends:

- be replaced with CS _____ (_____) Same Title New Title
 adopt previous CS SB 66 (JVD) Same Title New Title
 attached amendment(s)
 adopt _____ Letter of Intent
 further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
COR	LEG
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
COR			✓	

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
ADM			✓	2
ADM			✓	3
LAW		✓		4

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Annal Fairclough</i>	DUNLEAVY			✓	
<i>Annal Fairclough</i>	FAIRCLOUGH	✓			
<i>Cliff Bishop</i>	BISHOP	✓			
<i>Annal Kelly</i>	GUSON				✓
<i>Annal Kelly</i>	HOFFMAN	✓			
CO-CHAIR: <i>Annal Kelly</i>	KELLY			✓	
CO-CHAIR: <i>Annal Kelly</i>	MEYER	✓			

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: SB 66
Fiscal Note Number: _____
() Publish Date: _____

Identifier: SB066CS(JUD)-DOC-OC-03-28-14
Title: IMITATION CONTROLLED SUBSTANCE
Sponsor: EGAN
Requester: Senate Judiciary

Department: Department of Corrections
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

This note reflects the changes made in Senate Judiciary.

Prepared By:	April Wilkerson, Director	Phone:	(907)465-3460
Division:	Administrative Services - Department of Corrections	Date:	03/28/2014 05:30 PM
Approved By:	Leslie Houston, Deputy Commissioner	Date:	03/28/14
Agency:	Department of Corrections		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSSB 66(JUD)

Analysis

This bill broadens the imitation controlled substance laws to include any substance. Therefore, it would be illegal to represent any substance as a controlled substance.

This change will affect several statutes which range from class A misdemeanors to class B felonies. Class A misdemeanors are punishable by a term of imprisonment of not more than one year and class B felonies are punishable by a term of imprisonment of not more than 10 years. At the current daily cost of care, the Department could see an impact ranging from \$0.0 (no time served) to \$57,914.55 for a class A misdemeanor or \$0.0 (no time served) to \$579,145.5 for a class B felony for each offender convicted under this legislation.

The Department of Corrections anticipates minimal to no fiscal impact with passage of this legislation. At this time the department does not have information to quantify the number of potential offenders or length of sentence this legislation would create and will continue to monitor for future impacts.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: CSSB 66(JUD)
Fiscal Note Number: 2
(S) Publish Date: 3/12/14

Identifier: SB066-DOA-OPA-02-17-14
Title: IMITATION CONTROLLED SUBSTANCE
Sponsor: EGAN
Requester: Senate Judiciary

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
			FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable, initial version

Prepared By:	Richard Allen, Director	Phone:	(907)269-3504
Division:	Office of Public Advocacy	Date:	02/14/2014 04:51 PM
Approved By:	Curtis Thayer, Commissioner	Date:	02/17/14
Agency:	Department of Administration		

FISCAL NOTE ANALYSIS #2

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSSB 66(JUD)

Analysis

If enacted as filed SB066 would amend AS 11.73.099(3) by removing from that statute specific, identified imitation controlled substances and substitute in a descriptive definition.

Section 1 of the bill would eliminate the definition of specific, identified imitation controlled substances as contraband and substitute in a descriptive definition. Section 1 also makes a technical change to the statute by eliminating the capitalized word "REPRESENTATIONS" and substitutes in a lower case version of that same word.

Section 2 of the bill repeals AS 11.73.020. This statute makes it a criminal offense to possess certain, identified substances and salts with the intent to manufacture an imitation controlled substance.

Section 3 of the bill provides for an effective date.

If enacted as filed, the bill may impact the operations of the Office of the Public Advocacy (OPA). It is not possible to predict with certainty whether the new definition of imitation controlled substances in the bill, if it became law, would result in more or less arrests and prosecutions for that offense. It is possible that the new, descriptive definition, since it is broader in scope than the existing definitions, might result in more arrests and prosecutions. OPA would absorb any increase to caseloads resulting from the change to the statute and therefore, OPA submits a zero fiscal note.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: CSSB 66(JUD)
Fiscal Note Number: 3
(S) Publish Date: 3/12/14

Identifier: SB066-DOA-PDA-02-17-14
Title: IMITATION CONTROLLED SUBSTANCE
Sponsor: EGAN
Requester: Senate Judiciary

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates					
			FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None								
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time								
Part-time								
Temporary								

Change in Revenues								
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: <u>Quinlan Steiner</u>	Phone: <u>(907)334-4414</u>
Division: <u>Public Defender Agency</u>	Date: <u>02/14/2014 12:00 PM</u>
Approved By: <u>Deputy Commisisoner Curtis Thayer</u>	Date: <u>02/17/14</u>
Agency: <u>Department of Administration</u>	

FISCAL NOTE ANALYSIS #3

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSSB 66(JUD)

Analysis

SB 66 broadens the definition of "imitation controlled substances" by removing the specific list of substances from the definition permitting any substance to be labeled an "imitation controlled substance."

The Public Defender Agency cannot reliably predict how many new cases may be charged as a result of broadening the definition of "imitation controlled substance" nor whether those charged would be appointed a public defender. The agency, therefore, submits a zero fiscal note.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: CSSB 66(JUD)
Fiscal Note Number: 4
(S) Publish Date: 3/12/14

Identifier: SB066-LAW-CRIM-02-18-14
Title: IMITATION CONTROLLED SUBSTANCE
Sponsor: EGAN
Requester: (S) JUDICIARY

Department: Department of Law
Appropriation: Criminal Division
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
			FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services	***		***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	0.0	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	0.0	***	***	***	***	***

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version, not applicable.

Prepared By: <u>Loretta Withington, Division Operations Manager</u>	Phone: <u>(907)465-5427</u>
Division: <u>Department of Law</u>	Date: <u>02/19/2014 10:18 AM</u>
Approved By: <u>Michael C. Geraghty, Attorney General</u>	Date: <u>02/19/14</u>
Agency: <u>Department of Law</u>	

FISCAL NOTE ANALYSIS #4

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSSB 66(JUD)

Analysis

Senate Bill 66 amends the definition of "imitation controlled substance" in AS 11.73, which prohibits certain conduct in relation to imitation controlled substances. It eliminates the requirement that the substance have some form of substance such as ephedrine or procaine in order to be considered an imitation controlled substance.

This legislation changes the definition of an imitation controlled substance. Presently the definition is limited to 18 substances generally sold in pill or capsule form for legitimate wellness purposes. These pills are then sold as speed or some other controlled substance medication. The bill expands the number of substances to anything represented as a controlled substance and gives sheetrock powder and salt as examples. In other words the universe of material that can become imitation controlled substances is expanded from 18 substances to an infinite number of substances. The bill changes the present offense from distributing a pill claiming that the pill is a controlled substance to one where selling ground up plants as marijuana becomes a crime. Under the present law the following table shows the number of cases referred by police for prosecution and the number of cases actually prosecuted.

Referred:

2008—5
2009—7
2010—3
2011—0
2012—4

Convicted:

2008--1
2009--0
2010--1
2011--1
2012--1

We do not have a methodology for determining the increased number of cases which will be referred to us. We do know that SB 66 will increase the amount of conduct that would be criminal. For example the person who buys oregano at the grocery store with the intent to sell it as marijuana has not committed a crime yet but under this bill will have committed a C felony offense of possessing an imitation controlled substance. This is a major change in the imitation controlled substance law which will increase our work.

If SB 66 results in a minimal annual increase in cases, it would not have a substantial fiscal impact on the department. If SB 66 results in an increase of 400 cases, it would be equivalent to the case load for one attorney and would cause fiscal impact. The department does not know the extent of the problem and hence the number of cases that will be submitted for prosecution is unknown. Therefore, the Department of Law cannot accurately determine the fiscal impact of SB 66 at this time.

CS FOR SENATE BILL NO. 66(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 3/12/14

Referred: Finance

Sponsor(s): SENATOR EGAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to imitation controlled substances; and providing for an effective
2 date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 11.73.010(b) is amended to read:

5 (b) Except as provided in AS 11.73.030, a person who violates this section
6 commits a

7 (1) class A misdemeanor; or

8 (2) class C felony if, within the preceding 10 years, the person has
9 been convicted two or more times of a crime under AS 11.71 or this chapter, or a
10 law or ordinance of another jurisdiction with elements similar to a crime under
11 AS 11.71 or this chapter.

12 * **Sec. 2.** AS 11.73.030(b) is amended to read:

13 (b) A person who violates this section commits a

14 (1) class C felony; or

1 **(2) class B felony if, within the preceding 10 years, the person has**
 2 **been convicted two or more times of a crime under AS 11.71 or this chapter, or a**
 3 **law or ordinance of another jurisdiction with elements similar to a crime under**
 4 **AS 11.71 or this chapter.**

5 * Sec. 3. AS 11.73.040(b) is amended to read:

6 (b) A person who violates this section commits a

7 **(1) class A misdemeanor; or**

8 **(2) class C felony if, within the preceding 10 years, the person has**
 9 **been convicted two or more times of a crime under AS 11.71 or this chapter, or a**
 10 **law or ordinance of another jurisdiction with elements similar to a crime under**
 11 **AS 11.71 or this chapter.**

12 * Sec. 4. AS 11.73.099(3) is amended to read:

13 (3) "imitation controlled substance" means a substance
 14 [CONTAINING EPHEDRINE, EPHEDRINE SULFATE, PSEUDOEPHEDRINE,
 15 PSEUDOEPHEDRINE HYDROCHLORIDE, PHENYLPROPANOLAMINE,
 16 CAFFEINE, THEOPHYLLINE, LIDOCAINE, PROCAINE, TETRACAINE,
 17 DYCLONINE, ACETAMINOPHEN, SALICYLAMIDE, DOXYLAMINE,
 18 DIPHENHYDRAMINE, PHENIRAMINE, CHLORPHENIRAMINE, OR
 19 PYRILAMINE, OR THEIR SALTS,] that is not a controlled substance [,] and that, by
 20 dosage unit appearance (including color, shape, size, and markings) and by
 21 representations, would lead a reasonable person to believe that the substance is a
 22 controlled substance; the term "**representations,**" ["REPRESENTATIONS",] as used
 23 in this paragraph, includes

24 (A) statements made by an owner or by anyone else in control
 25 of the substance concerning the nature of the substance [,] or its use or effect;

26 (B) statements made to the recipient that the substance may be
 27 resold for inordinate profit;

28 (C) whether the substance is packaged in a manner normally
 29 used for controlled substances;

30 (D) evasive tactics or actions used by the owner or person in
 31 control of the substance to avoid detection by law enforcement authorities;

1 (E) the storage, packaging, presentation, display of, or
2 reference to a controlled substance with, near, or in connection with the
3 activity involving the imitation controlled substance;

4 * **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 **APPLICABILITY.** This Act applies to offenses committed on or after the effective
7 date of this Act. References to previous convictions in AS 11.73.010, 11.73.030, and
8 11.73.040, as amended by secs. 1 - 3 of this Act, include convictions occurring before, on, or
9 after the effective date of this Act.

10 * **Sec. 6.** AS 11.73.020 is repealed.

11 * **Sec. 7.** This Act takes effect July 1, 2014.



SENATOR DENNIS EGAN

Senate Bill 66 – Imitation Controlled Substances

Sponsor Statement

The drug commonly known as “spice” is sold over the counter in head shops and other retail outlets in Alaska. It’s a chemical sprayed onto herbs, or “synthetic marijuana.” Despite being sold as potpourri and incense, the substance is intended for human consumption to get users high. Spice is often cheaper and easier to get than marijuana.

In 2012, the Alaska Legislature passed a law making “synthetic cocaine” —often sold as bath salts—illegal by adding cathinone, methcathinone, and other substances commonly found in it to the Schedule IIA of illegal drugs.

The current definition of imitation controlled substances lists chemicals a substance must contain in order to be illegal. The problem is the makers of the drug are changing the chemical composition of the drug constantly in order to stay ahead of the law. State law is lagging behind, making it difficult for police to make arrests and prosecutors to enforce penalties for the sale and possession of spice.

Senate Bill 66 changes the definition of an imitation controlled substance to more generally make illegal any substance made to look like an already illegal drug. By omitting specific chemicals from the definition, the change makes illegal a substance “that, by dosage unit appearance (including color, shape, size, and markings) and by representations, would lead a reasonable person to believe that the substance is a controlled substance.”

-----ALASKA SENATE-----

STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-4947 • FAX (907) 465-2108
SENATOR.DENNIS.EGAN@AKLEG.GOV



SENATOR DENNIS EGAN

CSSB 66
Sectional Analysis

Section 1: Reduces the penalty for a first time offense of manufacture or delivery of an imitation controlled substance from a class C felony to a class A misdemeanor. For repeat offenses— involving either real or imitation controlled substances —the crime is a C felony.

Section 2: Reduces the penalty for a first time offense of delivery of an imitation controlled substance to a minor from a class B felony to a class C felony. For repeat offenses— involving either real or imitation controlled substances—the crime is a B felony.

Section 3: Reduces the penalty for a first time offense of advertisement to promote the delivery of an imitation controlled substance from a class C felony to a class A misdemeanor. For repeat offenses— involving either real or imitation controlled substances—the crime is a C felony.

Section 4: Eliminates the requirement that a substance contain a pharmacologically active component from the definition of “imitation controlled substances”.

Section 5: Makes the bill applicable to offenses committed on or after the effective date. Previous convictions or repeat offenses as amended by secs. 1-3 of the Act include convictions occurring before, on, or after the effective date.

Section 6: Repeals AS 11.73.020 possession of substance with intent to manufacture. The presence of those substances is no longer an element of imitation controlled substances.

Section 7: Establishes an effective date of July 1, 2014.

-----ALASKA SENATE-----

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SENATOR DENNIS EGAN

CSSB66 Explanation of Changes

The CS reduces the penalties for violations under the imitation controlled substance law. As introduced, possession of oregano with intent to sell it as a drug carries a greater penalty – a class C felony—than possession of marijuana – a class A misdemeanor.

The CS reduces penalties for all crimes under Chapter 73:

Section 010. Manufacture or delivery of an imitation controlled substance – reduced from class C felony to class A misdemeanor.

Section 030. Delivery of an imitation controlled substance to a minor – reduced from a class B felony to a class C felony.

Section 040. Advertisement to promote the delivery of an imitation controlled substance – reduced from a class C felony to a class A misdemeanor.

It adds a section on applicability.

Changes the effective date to July 1, 2014 from July 1, 2013.

ALASKA SENATE

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SENATOR DENNIS EGAN

Questions & Answers on SB66 in S JUD

Q: By removing specific drugs from the definition, is there anything that falls off the table as far as some of the more harmful drugs (ephedrine, acetaminophen, etc.)?

Chemicals used to manufacture illicit drugs are still illegal. See: 11.71.210 Purchase or receipt of restricted amounts of certain listed chemicals:

“A person commits the crime of purchase or receipt of restricted amounts of certain listed chemicals if the person purchases or receives more than six grams of the following listed chemical, its salts, isomers, or salts of isomers within any 30-day period:

- 1) Ephedrine under AS 11.71.200 (listed chemicals)
- 2) Pseudoephedrine
- 3) Phenylpropanolamine”

Violation of 11.71.210 is a class C felony

Q: Could defense bring up “mens rea,” criminal intent? Sen. Dyson asked whether a defendant could successfully claim, “I wasn’t aimed on getting ‘em hooked, just getting their money.”

An intent to addict the buyer is not now, nor would it become an element of the crimes this bill affects.

Under AS 11.81.600 and .610 Alaska courts assume the culpable mental state for conduct is “knowingly” unless a lower standard is specified in the statute.

After conversations with the Department of Law, the sponsor is comfortable with the mental state necessary to prove the offense under the language in the proposed committee substitute.

Q: How often does this occur?

In CY 12, the Court System had three cases filed with at least one charge of AS 11.73.010.

In CY 13, there was one case.

Anecdotally, Juneau Police Detective Lee Phelps has been involved in over 100 controlled buys in 2 ½ years. He was dealt fake drugs three times. In these cases it is seldom worth prosecuting someone who is normally a drug dealer for a fraudulent sale.

-----ALASKA SENATE-----

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 6, 2013

SUBJECT: Imitation Controlled Substances Bill
(Work Order No. 28-LS0427A)

TO: Senator Dennis Egan
Attn: Keegan O'Brien

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed a draft of the bill you requested. The bill, if enacted, would eliminate from the definition of "imitation controlled substances" in AS 11.73.099(3) the requirement that a substance contain a pharmacologically active component.

In your request, you indicated an interest in resolving potential difficulties in interpreting AS 11.73.099(3) that were raised in *Morrow v. State*, 704 P. 2d 226 (Alaska App. 1985), a case in which the defendant challenged the constitutionality of the statute on the grounds of vagueness and overbreadth, that is, because it gave inadequate notice of the prohibited conduct and could reach conduct that was constitutionally protected (e.g. speech) or was not intended to be criminalized.

In *Morrow*, the defendant argued that the statute could penalize conduct the statute was not intended to cover. To illustrate this point, she posed a hypothetical case ". . . where someone, without any intent to deceive, gives caffeine diet pills, which are available as non-prescription medicine, to someone indicating that the pills are 'as effective for weight loss as any prescription medicine.'" 704 P.2d at 231 - 32. In *Morrow*, the state recognized that the statute could have been construed to reach conduct like that described by the defendant, but it was unlikely that the legislature intended to prohibit such conduct when it enacted the statute:

As AS 11.73.099(3) now reads in part, an "imitation controlled substance" is a substance containing specific chemical components which "by dosage unit appearance . . . or by representations would lead a reasonable person to believe that the substance is a controlled substance." [*Emphasis provided.*] The state asks us to read the "or" in AS 11.73.099(3) as "and" in construing the statute. The state argues that as so construed, the statute would not reach innocent behavior.

704 P.2d at 232. The Alaska Court of Appeals upheld the statute, finding that the conduct of the defendant in offering an imitation substance as a controlled substance was intended to be covered by the statute. 704 P.2d at 233. The court noted that the statute

could be construed to avoid the potential problems of vagueness and overbreadth, and that offering imitation drugs as controlled substances was not a protected activity. 704 P.2d at 232 - 33.¹

The legislature substituted "and" for "or" in a bill enacted a few years after *Morrow*, thus resolving issues raised by the wording of the statute. See § 11, ch. 76, SLA 1990.

The Court of Appeals mentioned in a footnote another scenario in which the statute's language might be overbroad:

It appears to us that it may be argued that certain other conduct falls within the statute. An example of conduct which might fall within the statute would be a person who delivers an imitation drug honestly believing that the imitation drug is a controlled substance. However, the case before us does not present this question . . .

704 P.2d at 232 n. 1.

It is not clear that the proposed amendment will resolve the problem created by either hypothetical, as a person might still offer a caffeine pill as a weight loss remedy, or deliver an imitation controlled substance the person believes is a controlled substance. The amendment will meet another objective you identified, to eliminate the need for proof that the substance contains particular chemicals.

In drafting the bill, I assumed that you would want to repeal AS 11.73.020, which makes it an offense to possess the substances listed in AS 11.73.099(3) with the intent to manufacture imitation controlled substances, since the presence of those substances is no longer an element of the offense.

Substantive Due Process and Equal Protection

The offenses set out in AS 11.73 are felonies.² The bill would eliminate the requirement that the imitation controlled substance contain a pharmacologically active substance. Thus a person who sells, for example, sugar pills, as controlled substances could face felony charges. A felony sentence might be challenged under these circumstances as sufficiently unfair, arbitrary, or disproportionate to the offense to constitute a violation of the right to substantive due process, where an arguably equivalent offense involving actual illegal controlled substances draws lesser penalties. See, for example,

¹ The court did remand the case to the trial court for further proceedings in light of its ruling. *Id.*

² Manufacture or delivery of an imitation controlled substance and advertising to promote the delivery of an imitation controlled substance are class C felonies. AS 11.73.010 and 11.73.040. Delivery of an imitation controlled substance by a person over 19 to a person under 19 and at least three years younger than the person is a class B felony. AS 11.73.030.

Senator Dennis Egan
February 6, 2013
Page 3

AS 11.71.050 (manufacture, delivery, or possession with the intent to manufacture or deliver marijuana; a class A misdemeanor).

Alaska's appellate courts will not require that a crime be strictly proportioned to the offense. In *Green v. State*, 390 P.2d 433 (1964), the Alaska Supreme Court turned aside Green's challenge to his sentence for second degree murder, which he based on the fact that some minimum sentences for first degree murder were less than for second degree murder. The court's determined that the sentences were different, but went on to state that for a sentence to violate the due process clauses to the state and federal constitutions (and the prohibition against cruel and unusual punishment), it must be so grossly disproportionate to the offense that it shocks the conscience. 390 P.2d. at 435. However, it has since been noted that under federal constitutional law, Alaska courts must now evaluate whether the sentence is proportionate to the crime, even though proportionality is not mentioned in the Alaska Constitution. *Dancer v. State*, 715 P.2d 1174, 1181 n. 6 (Alaska App. 1986), citing *Solem v. Helm*, 463 U.S. 277 (1983).

A sentence that does not shock the conscience might nonetheless be struck down if it is disproportionate to a lesser sentence for similar conduct. The Alaska Court of Appeals has examined claims that punishments required by statute for lesser offenses were greater than that required by statute for greater offenses. In two cases the court struck down the greater offense, apparently on due process grounds. In *Pruett v. State*, 742 P.2d 257 (Alaska App. 1987), the defendant was convicted of first degree assault and subject to a seven-year presumptive sentence, but the presumptive term for manslaughter was just five years. The Alaska Court of Appeals noted that legislature could not have intended a five-year presumptive term for manslaughter for those that recklessly murder their victim and seven-year presumptive term for first degree assault for those that recklessly injure their victim. It ordered that Pruet and others coming after him were only subject to the five-year presumptive term. See also *Smith v. State*, 28 P.3d 323, 329 - 330 (Alaska App. 2001). This analysis may or may not be applied to a sentence under AS 11.73. However, I wanted to let you know about the issue.

Effect of the Amendment on Juvenile Offenders

You asked whether the bill would, if enacted, have an effective on juveniles in delinquency proceedings, particularly whether it would place a juvenile at risk for an automatic waiver to adult court. The bill would not make a juvenile subject to automatic waiver because the offenses in AS 11.73 do not trigger the automatic waiver under AS 47.12.030. Under AS 47.12.100, a court may waive juvenile jurisdiction if the juvenile is not amenable to treatment. It is possible that repeat offenses or felony offenses could raise questions regarding amenability to treatment, but that may be said of many offenses, not only those set out in AS 11.73.

Please let me know if I can be of further assistance in this matter.

KJS:ljw
13-067.ljw

Enclosure



February 4, 2014

The Honorable Dennis Egan
Alaska State Senate
State Capitol, Rm 9
120 4th Street, Mail Stop: 3100
Juneau AK 99801-1182

Dear Senator Egan:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing Senate Bill 66, "An Act relating to imitation controlled substances; and providing for an effective date."

The APOA Board of Directors recently reviewed this proposed legislation and continues to unanimously support this bill in its current form. We appreciate your efforts to clarify the intent of the statute with this change.

Please contact the APOA office in Anchorage at 277-0515, if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

A handwritten signature in black ink that reads "BE Johnson".

Brad Johnson
State President



Alaska Association of Chiefs of Police

March 4, 2014

The Honorable Dennis Egan
Alaska Senate
State Capitol Room 9
Juneau AK, 99801
Email: Senator.Dennis.Egan@akleg.gov

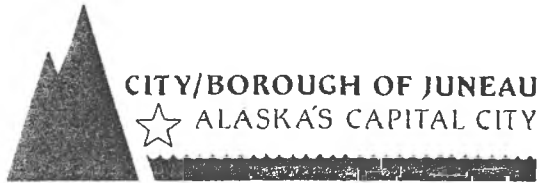
Dear Senator Egan,

In my capacity as President of the Alaska Association of Chiefs of Police, I am writing to express our enthusiastic support of Senate Bill 66: "An Act relating to imitation controlled substances; and providing for an effective date." Our Association is comprised of more than 100 law enforcement executives from all across Alaska, and we feel this is an important piece of legislation that will greatly benefit the apprehension and prosecution of drug offenders. Illicit drugs are a scourge on society. By closing a loophole that has let clever criminals avoid being charged, this legislation will have a profound effect on drug interdiction efforts throughout the state. Thank you for introducing this important piece of legislation.

We would be pleased to work with your staff to insure that SB 66 is passed, and encourage you to contact our Executive Director, Kalie Klaysmat, by email at kalie.klaysmat@aacop.org should there be some way we can be of assistance in that regard. Thank you for your dedication to the people of Alaska and your support of the law enforcement community in particular.

Sincerely,

Chief Tom Clemons, President



OFFICE OF THE MAYOR

Telephone: (907) 586-5240; Facsimile: (907) 586-5385
Mayor@ci.juneau.ak.us

February 20, 2014

Senator Dennis Egan
State Capitol, Room 9
Juneau, Alaska 99801

Representative Cathy Munoz
State Capitol, Room 421
Juneau, Alaska 99801

RE: Support for Senate Bill 66

Dear Senator Egan and Representative Munoz:

The City and Borough of Juneau believes the current definition of an imitation controlled substance is too restrictive. If Senate Bill 66 is approved, it will aid law enforcement officers by removing a current loophole in Alaska which benefits those who traffic in illegal controlled substances.

The CBJ supports the passage of SB66; and does not believe it would infringe on citizens constitutional rights. Most states in the U.S. already use a definition of imitation controlled substances that is less restrictive than Alaska's. Those states have not suffered successful constitutional challenges. This includes California, which, like Alaska, is under the jurisdiction of the 9th Circuit Court of the United States Court of Appeals.

Let's help law enforcement by passing SB66.

Sincerely,

A handwritten signature in cursive script, appearing to read "Merrill Sanford", is written in black ink.

Merrill Sanford
Mayor