

ANCHORAGE, ALASKA
AR No. 2017-341, As Amended

**A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY URGING THE
ALASKA LEGISLATURE TO REPEAL SB91 PASSED IN 2016.**

WHEREAS, Senate Bill 91 (SB91) was signed into law on July 15, 2016, with the goal to reduce the prison population, invest in probation programs and drug/alcohol treatment, and to reduce spending;

WHEREAS, in written testimony opposing the bill, the Office of Victim's Rights, Anchorage Police Department Employees Association, Alaska Association of Chiefs of Police, Alaska Peace Officers Association, North Pole Police Department, Victims for Justice, Public Safety Employees Association, and Standing Together Against Rape criticized many aspects of SB91, including the weakening of punishments for violating conditions of release or probation, the lack of probation or treatment monitoring tools, and the extreme limit on sentences for first and possibly second-time misdemeanors, stating they were "unconscionable to jeopardize public safety" and would "place all Alaska citizens at risk;"

WHEREAS, in a written letter reviewing and analyzing SB91 to Governor Walker dated June 17, 2016 (attached), Attorney General Craig Richards indicated that "Senate Bill 91 limits the use of incarceration in all phases of the criminal justice process," limits pretrial incarceration and encourages the use of citations, and makes numerous changes to criminal statutes in Titles 11 and 28 which "predominantly reduce the levels of offense to decrease, if not eliminate jail, as a sanction of criminal conduct";

WHEREAS, SB 91 not only reduces many misdemeanor crimes to violations, such as failure to appear for a hearing in a criminal prosecution and violating conditions of release, but also reclassifies numerous felonies to misdemeanors, of which many would not see any jail time;

WHEREAS, SB91 made all thefts under \$250 Class B misdemeanors regardless of the number of prior convictions, raised the threshold for class C felony property crimes from \$750 to \$1000, and provides for the class C felony property crime threshold to rise with inflation (a provision in law which no other state in the country has). This latter provision appears to be in violation of the Alaska Constitution, Article II, Section 1, which vests the power to create and define criminal acts with the Alaska Legislature. Furthermore, the Alaska Legislature may delegate regulatory authority to the executive branch, but SB91 sets up the function of setting the class C felony property crime thresholds with the Alaska Judicial Council, which is not a part of the executive branch but rather is established under Article IV of the Alaska Constitution under the Judicial Branch. According to the Attorney General, this "means the public would have no opportunity to comment, nor would the

1 governor have an opportunity to review the report for faithful execution of the law”
2 and potentially violates the Constitution and the separation of powers doctrine;
3

4 **WHEREAS**, over the last year, it has become clear that SB91 makes it difficult or
5 impossible for law enforcement officers and prosecutors-which the State does not
6 have enough of to implement the law and has not funded a sufficient number of
7 positions-to protect the public from increasing crime from individuals who, before
8 SB91, would have been incarcerated for a prior crime or not released from
9 imprisonment as early as they were;
10

11 **WHEREAS**, the public has spoken at hearings and meetings, voicing overwhelming
12 support for a repeal of SB91 and dismay at the boldness of petty criminals who
13 exhibit little to no fear of apprehension by law enforcement or any meaningful
14 sentence for misdemeanor crimes;
15

16 **WHEREAS**, the reduced sentence terms for misdemeanor crimes and required
17 release instead of arrest after detainment for some crimes has resulted in a larger
18 number of recidivists in the community and potentially corresponds to the increase
19 in property crimes in Anchorage;
20

21 **WHEREAS**, an article published September 8, 2017 by Alaska Dispatch News, cited
22 the Alaska Department of Public Safety’s annual crime report showing that violent
23 and property crimes in the state increased in the preceding five years and in 2016
24 by an average of 19.5%, a trend that has not been reversed or lessened after
25 passage of SB91;
26

27 **WHEREAS**, portions of SB91 creating “administrative parole” and other changes to
28 the parole system result in early release without a parole board hearing for all
29 misdemeanors and class B and C felonies that are not sex offenses or an offense
30 against a person, and are likely to result in more unrehabilitated recidivists
31 reentering the community in 2018;
32

33 **WHEREAS**, the State of Alaska has not met its commitment to use money saved
34 from reduced jail time to support new and expanded probation programs or
35 increased drug and alcohol treatment, and has in fact reduced its funding for alcohol
36 and drug treatment;
37

38 **WHEREAS**, the negative and detrimental effects of SB91 combined with the lack of
39 probation and treatment programs have contributed to serious public safety
40 problems in Anchorage and the rest of the State;
41

42 **WHEREAS**, the Alaska Legislature has proposed SB54 to address these concerns,
43 but the bill proposes piecemeal fixes to a few problems created or exacerbated by
44 SB91 and will not fundamentally fix SB91; and
45

46 **WHEREAS**, Senator Mia Costello, originally a co-sponsor for SB91 who also voted
47 for the passage of the bill, said in her constituent newsletter on October 5, 2017,
48 “we need to admit we got it wrong and repeal Senate Bill 91 and begin anew,” and
49 that “we really need to aim more for a full repeal and then look at the individual
50 pieces that need to be restored;” and

1
2 **WHEREAS**, a complete repeal of SB91 would better serve the citizens of Anchorage
3 and the State of Alaska and improve public safety, if such a repeal is followed by a
4 bill specific to increased sentences and parole duration for persons convicted of the
5 most heinous crimes; now, therefore,

6
7 **THE ANCHORAGE ASSEMBLY RESOLVES:**

8
9 **Section 1.** The Anchorage Assembly urges the Alaska Legislature to repeal
10 SB91 in its entirety.

11
12 **Section 2.** The Anchorage Assembly encourages the Alaska Legislature to
13 introduce and enact legislation similar to the provisions of SB91, and proposed
14 amendments, that were beneficial to deterrence and rehabilitation efforts of the
15 state, including:

- 16
17 A. Increased mandatory minimum sentences for murder and sex offenses.
18 B. Expanded victims' rights and notice requirements to victims.
19 C. Expanded arson definition to include vehicles that are on private property.
20 D. Mandatory drug rehabilitation while incarcerated.
21 **E. License/ID alcohol restrictions (redlines) added as an optional**
22 **condition of probation or parole.**

23
24 **Section 3.** This resolution shall be effective immediately upon passage and
25 approval.

26
27
28 PASSED AND APPROVED by the Anchorage Assembly this _____ day
29 of _____, 2017.

30
31
32
33
34 _____
Chair

35 ATTEST:

36
37
38 _____
39 Municipal Clerk



MUNICIPALITY OF ANCHORAGE
ASSEMBLY INFORMATION MEMORANDUM

No. AIM 125-2017

Meeting Date: October 10, 2017

From: ASSEMBLY MEMBER DEMBOSKI

**Subject: AR 2017-341 -- A RESOLUTION OF THE ANCHORAGE
MUNICIPAL ASSEMBLY URGING THE ALASKA LEGISLATURE
TO REPEAL SB91 PASSED IN 2016.**

A letter (File number: JU2016200423) from Attorney General, Craig W. Richards, to Governor Bill Walker on June 17, 2016, which analyzes the effects of SB91, is attached for the Assembly's information and review.

Prepared by: Assembly Counsel
Respectfully submitted: Amy Demboski, Assembly Member
District 2—Eagle River/Chugiak

June 17, 2016

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: SB 91: Omnibus Criminal Law and
Procedure; Corrections
Our file: JU2016200423

Dear Governor Walker:

At the request of your legislative director, we have reviewed the omnibus bill related to criminal law and procedure, HCS CSSSSB 91(FIN) am H.¹ Because the bill covers many aspects of criminal law and procedure, this letter provides an overview and then divides the bill into the following subject areas for a more detailed analysis:

- I. Provisions related to the criminal code.
- II. Provisions related to arrest, bail, and pretrial release.
- III. Provisions related to sentencing.
- IV. Provisions related to probation and parole.
- V. Victim rights.
- VI. Miscellaneous provisions.

Overview

Senate Bill 91 limits the use of incarceration in all phases of the criminal justice process. Incarceration is initially limited by reclassifying certain criminal conduct to lower level offenses. For example, under current law most illegal drug possession is a class C felony. SB 91 reclassifies all drug possession, except possession of the “date rape drug,” as class A misdemeanors and mandates no active term of imprisonment for the first offense. SB 91 also increases the felony threshold for property crimes from \$750 to \$1,000 and mandates no active term of imprisonment for lower level property crimes under \$250. Additionally, SB 91 decriminalizes several misdemeanor offenses by classifying them as violations and limits prosecution of prostitution and sex trafficking in the third degree with new defenses or by redefining elements. All of these measures will limit the use of incarceration as a sanction by redefining the unlawful conduct encompassed by those offenses.

¹ In this letter, we will refer to HCS CSSB 91(FIN) am H as “SB 91” or “the bill.”

SB 91 also limits pretrial incarceration by encouraging peace officers to issue citations rather than arrest offenders. The bill expands the category offenses for which an officer may issue a citation and includes class C felonies in that category. SB 91 also makes the criteria for pretrial release less stringent and creates a pretrial services program to monitor defendants and help ensure they are complying with their release conditions. These measures reduce the use of incarceration after charging, but pretrial.

Senate Bill 91 also would decrease sentences for every type of crime other than homicides and sex offenses. For example, the presumptive sentence for a class C felony offense committed by a first-felony offender is reduced to a presumed probationary term, with no active term of imprisonment. The bill reduces the maximum length of probation for all offenses and creates mechanisms for early termination of the probation actually imposed. Additionally, SB 91 limits the use of incarceration as a sanction for probation violations by setting the maximum term of imprisonment for a defendant's first three "technical" violations.

SB 91 creates two new types of parole. The first, administrative parole, allows certain individuals to be automatically released instead of requiring them to apply for a review by the Parole Board. The second new type of parole is geriatric parole, which allows some prisoners who would not currently be eligible for discretionary parole to be released at the discretion of the Parole Board if they are at least 60 years of age and have served at least 10 years of their sentence. Similar to probation administration, SB 91 also creates mechanisms to allow for early termination of parole and limits the use of incarceration as a sanction for parole violations by limiting the amount of time a person can be incarcerated for the first three "technical" parole violations.

SB 91 also contains a number of miscellaneous provisions. It creates or expands victim rights by requiring that victims be given notice of hearings, plea agreements, and a defendant's release from prison or termination of parole. It expands eligibility for the medical professional position on the Violent Crimes Compensation Board to include a physician's assistant and advanced nurse practitioner. It instructs the Alaska Criminal Justice Commission to analyze statutes related to sex offenses, restitution, and driving offenses. It also sets up a mechanism to fund recidivism reduction programs using marijuana taxes. SB 91 also makes certain persons convicted of felony drug offenses eligible for food stamps, eases the process for obtaining a limited driver's license, and abolishes civil *in rem* forfeiture in lieu of criminal prosecution.

I. Provisions related to the criminal code (AS 11 and AS 28). July 1, 2016.

SB 91 makes several changes to criminal statutes effective July 1, 2016. Most changes will apply to offenses committed after the effective date, but some will apply to cases that are pending prosecution at the time of the effective date thus materially changing that pending prosecution. These changes predominantly reduce the level of offense to decrease, if not eliminate jail, as a sanction for criminal conduct.

A. Crimes reduced to violations.

SB 91 reduces seven crimes to violations. A violation is a noncriminal offense not punishable by incarceration. The most common sanction for a violation is a fine.

1. Failure to appear (secs. 26 - 28). July 1, 2016.

Under current law, when a person knowingly fails to appear for a hearing in a criminal prosecution, then that person commits the crime of failure to appear (FTA) (AS 11.56.730). The severity of the FTA is based on the level of the offense charged in the underlying case for which the person failed to appear. If the underlying offense is a felony, then the FTA is a class C felony. If the underlying offense is a misdemeanor, or the person is a material witness in a criminal case, then the FTA is a class A misdemeanor.

SB 91 amends FTA by creating a new violation-level offense, punishable by a fine of up to \$1,000, that applies when a defendant contacts the court within 30 days after failing to appear. This essentially creates a 30-day grace period except when a defendant fails to appear with the intent to avoid prosecution in the underlying case or fails to appear for more than 30 days. Then FTA will be a class A misdemeanor or class C felony, depending on the class of the underlying offense.

2. Violating conditions of release (secs. 29 - 30). July 1, 2016.

Under current law, a defendant who violates conditions of release may be charged with a crime (AS 11.56.757). Violating conditions of release (VCOR) is currently a class A misdemeanor if the defendant's underlying charge is a felony and a class B misdemeanor if the defendant's underlying charge is a misdemeanor.

SB 91 will eliminate this distinction and reduce all VCOR offenses to violations similar to a traffic offense, with no jail time and a fine not to exceed \$1,000.

3. Promoting an exhibition of fighting animals (sec. 33). July 1, 2016.

A subsection of promoting an exhibition of fighting animals criminalizes attendance at an exhibition of fighting animals. Under current law, a first offense is a violation, with a fine not to exceed \$500, a second offense is a class B misdemeanor, and a third offense is a class A misdemeanor.

SB 91 reduces a second offense to a violation, with a fine not to exceed \$1,000. A third, and subsequent, offense would remain a class A misdemeanor.

4. Obstruction of highways (secs. 34 - 35). July 1, 2016.

A person commits the offense of obstruction of highways if they knowingly place, drop, or permit to drop a substance on to a highway that creates a substantial risk of physical injury to

others using the highway, or if they render a highway impassable or passable only with unreasonable risk or hazard (AS 11.61.150).

SB 91 reduces this offense from a class B misdemeanor to a violation with a fine of not more than \$1,000.

5. Disregard of a highway obstruction (sec. 17). July 1, 2016.

A person commits the offense of Disregard of a Highway Obstruction when they drive through, over, or around an obstruction erected by the Department of Transportation and Public Facilities or if they open the obstruction (AS 11.46.460).

SB 91 reduces this offense from a class B misdemeanor to a violation with a fine of not more than \$1,000.

6. Gambling (sec. 41). July 1, 2016.

A person commits the offense of gambling if they engage in gambling other than a social game (AS 11.66.200). Under current law the first offense is a violation, and second, and subsequent, offenses are B misdemeanors.

Under SB 91 a second and subsequent offenses would be reduced to violations, with a fine not to exceed \$1,000.

7. Driving while license suspended (DWLS) (secs. 104 - 105). July 1, 2016.

Under current law, a person commits DWLS (a class A misdemeanor) by driving after their license has been suspended or revoked or by driving in violation of the terms of a limited license. The penalties are based on (1) whether the defendant has prior DWLS convictions and (2) the underlying basis for the suspension or revocation, e.g., DUI, points, etc. There are different mandatory minimum penalties for DWLS based on different reasons for the suspension or revocation.

SB 91 alters the sentencing structure in three ways for DWLS based on a DUI conviction. First, the mandatory minimum is lowered by eliminating the 10 days of active jail time. Second, another part of the mandatory minimum under current law, the \$500 fine and 80 hours of community work service, is also eliminated. Third, the basis for an increased penalty is changed from counting the number of DUIs to counting the number of previous DWLS convictions based on a DUI suspension.

SB 91 alters DWLS based on all reasons other than a DUI by reducing them from a class A misdemeanor with a mandatory minimum jail sentence to an infraction similar to any other traffic ticket with no jail. This creates an anomalous result in the statutory scheme since driving without a valid license (AS 28.15.011, AS 28.90.010) remains a higher level offense as a class A misdemeanor than driving with a suspended license.

B. Added crimes.

1. Arson (sec. 16). July 1, 2016.

Current law defines arson in the third degree (a class C felony) as damaging a motor vehicle by fire, but only if the vehicle is on public property (AS 11.46.420). SB 91 expands the definition to include a vehicle that was on private property.

C. Felonies reduced to misdemeanors.

Felony crimes are those for which the maximum sentence is over one year. SB 91 amends various statutes so that conduct currently classified as felony conduct will now be misdemeanor conduct.

1. Property crimes (secs. 6 - 15 and 18 - 23). July 1, 2016.

Current law generally divides property crimes into four degrees based on the value of the property involved and on the defendant's criminal history for committing similar offenses (*see generally* AS 11.46). The thresholds for the levels of the offense are as follows: under \$250 (B misdemeanor), \$250 - \$750 (A misdemeanor), \$750 - \$25,000 (C felony), and more than \$25,000 (B felony).

SB 91 alters this scheme in three ways. First, it repeals recidivist punishment² for thefts under \$250. SB 91 would make all thefts under \$250 B misdemeanors regardless of the number of prior convictions. Second, SB 91 raises the threshold for a class C felony property crime from \$750 to \$1,000. Third, SB 91 provides for an automatic increase of the \$250 and \$1,000 thresholds (but not the \$25,000 threshold) based on inflation. SB 91 directs the Alaska Judicial Council to release a report "based on a formula provided by the Department of Labor and Workforce Development, reflecting the change in the Consumer Price Index for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor." The Judicial Council will then release a similar report every five years.

It is unclear when or how the new inflation adjusted threshold levels for property crimes take effect. SB 91 does not specify when the new thresholds take effect. Instead, sec. 24 provides that when "making a finding related to the degree or classification of a crime under this chapter, a court shall refer to the most recent" thresholds issued by the Judicial Council. However, it is not clear what part of the criminal process constitutes a court "making a finding related to the degree or classification." Making the finding at the time of arraignment makes the most sense, but SB 91 does not specify.

² Recidivist theft statutes make a third theft within five years punishable at one level higher than as otherwise defined. Thus the third theft in five years under current law would be punishable as an A misdemeanor instead of a B misdemeanor.

No other state in the country has a similar provision of law that adjusts the value threshold of property crimes for inflation. Criminal justice stakeholders will need to carefully implement this change to avoid constitutional issues and provide “adequate notice of the conduct that is prohibited.” *Larson v. State*, 564 P.2d 365 (Alaska 1977). Without a clear way to determine what the thresholds actually are at any given time, a court may find that the law does not provide adequate notice of how a given form of conduct actually violates the law. The stakeholders have until July 1, 2020, to determine how to implement this provision since that will be when the first report adjusting the threshold is due.

Having the judicial branch adjust the property crime thresholds also may raise two separation of powers issues. First, the power to create and define criminal acts is vested in the legislature. Alaska Const., art. II, sec. 1. The legislature retains the authority to delegate regulatory authority in appropriate circumstances. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960). However, that delegation must be given to executive branch. The inflation-adjustment in SB 91 would be performed by the Alaska Judicial Council, which is not part of the executive branch, but rather is an independent body created by art. IV of the constitution, which established the judicial branch. The second potential issue is that the report by the council is not subject to AS 44.62 (the Administrative Procedures Act), which means that the public would have no opportunity to comment, nor would the governor have an opportunity to review the report for faithful execution of the law.

2. Misconduct involving a controlled substance (drug offenses) (secs. 42 - 49).
July 1, 2016.

Alaska law contains a comprehensive scheme of misconduct involving a controlled substance (MICS) offenses, ranging from unclassified felonies to class B misdemeanors, addressing illegal drugs.

MICS 1 (AS 11.71.010), an unclassified felony under current law, criminalizes (1) the delivery of schedule IA, IIA, or IIIA drugs to certain minors and (2) engaging in an ongoing criminal enterprise. Schedule IA, IIA, and IIIA drugs include such drugs as heroin, cocaine, and zolazepam (AS 11.71.140 - 11.71.160).

MICS 2, a class A felony under current law, criminalizes (1) the manufacture and delivery of any amount of schedule IA drugs, (2) the manufacture of methamphetamines, and (3) possession of certain chemicals used in the manufacture of methamphetamine or immediate precursors of methamphetamine (AS 11.71.020).

MICS 3, a class B felony under current law, criminalizes (1) the manufacture and delivery of any amount of schedule IIA and IIIA drugs, (2) the delivery of any amount of schedule IVA or VA, or VIA drugs to certain minors, and (3) the possession of any amount of schedule IA and IIA drugs near a school or youth center (AS 11.71.030).

MICS 4, a class C felony under current law, criminalizes (1) the possession of any amount of schedule IA and most IIA drugs, regardless of the location, (2) possession of varying

amounts of some schedule IIIA, IVA, VA, VIA drugs, (3) keeping or maintaining a place used for keeping or distributing controlled substances that would be classified as a felony offense. Schedule IVA drugs include benzodiazepines commonly found in anti-anxiety medications. (AS 11.71.170) Schedule VA drugs include anabolic steroids (AS 11.71.180. Schedule VIA includes marijuana and spice (AS 11.71.190).

MICS 5, a class A misdemeanor under current law, criminalizes possession of smaller amounts of schedule IIIA, IVA, VA drugs (AS 11.71.050).

Finally, MICS 6, a class B misdemeanor under current law, criminalizes possession of less than one ounce of a schedule VIA drug and six grams or less of spice (AS 11.71.060).

SB 91 makes several changes to these laws. Except for the most serious conduct (MICS 1), the bill reduces the level of offense for most other conduct. For example the possession of schedule IA (other than GHB, the “date rape” drug), IIA, and IIIA drugs is reduced from a class C felony to a class A misdemeanor.

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

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

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

SB 91 changes this analysis. The quantity becomes the primary factor for determining the sentence to be imposed because the quantity will control the level of offense when distributing a

schedule IA, IIA, or IIIA controlled substance. The purity and commercial value in that place at that time all have no impact since SB 91 lowers distribution of one gram or 25 tablets, ampules, or syrettes or more of a schedule IA controlled substance to a class B felony. Quantities lower than that amount will be reduced further to a class C felony. Under current law the distribution of a schedule IA controlled substance is a class A felony.

For schedule IIA and IIIA controlled substances, SB 91 makes similar changes, although it uses a different quantity amount. Distribution of more than 2.5 grams or 50 tablets, ampules, or syrettes would be a class B felony, while distribution of a lesser amount will be reduced to a class C felony. Once again the purity, commercial value in that place, at that time have no impact since SB 91 codifies the threshold based on quantity alone.

The manufacture of methamphetamine or possession of substances used to manufacture methamphetamine with the intent to manufacture methamphetamine will be reduced from a class A felony to a class B felony.

The aggravating factor for a large quantity and the mitigating factor for a small quantity still exist, but will now be applied to the two levels of distribution based on weight of the drugs created by SB 91.

3. Prostitution and Sex Trafficking (secs. 37 - 40). *Applies to all cases pending trial or appeal on July 1, 2016.*

In 2012, the Alaska legislature amended the then-existing statutory scheme criminalizing prostitution-related offenses.

Prostitution (AS 11.66.100) criminalizes both the buyer's offer to engage in sex for a fee and the seller's engaging in sex in return for a fee. Prostitution is a class B misdemeanor.

Sex trafficking in the first degree under AS 11.66.110 defines two offenses. First, a person commits an unclassified felony if the person causes or induces a person under 20 years of age to engage in the practice of prostitution. Second, a person commits a class A felony if the person (1) causes someone in that person's legal custody to engage in the practice of prostitution or (2) uses force to induce or cause a person to engage in the practice of prostitution.

Sex trafficking in the second degree (AS 11.66.120), a class B felony, criminalizes (1) managing, supervising, controlling, or owning a prostitution enterprise other than a "place of prostitution," (2) procuring or soliciting a patron for a prostitute, or (3) facilitating sex tourism.

Sex trafficking in the third degree (AS 11.66.130), a class C felony, criminalizes (1) managing, supervising, controlling or owning a place "of prostitution," (2) inducing or causing an individual 20 years of age or older to engage in prostitution, (3) profiting from a prostitution enterprise, or (4) engaging in any conduct that "institutes, aids, or facilitates" a prostitution enterprise.

Sex trafficking in the fourth degree (AS 11.66.135), a class A misdemeanor, criminalizes any conduct instituting, aiding, or facilitating a prostitution enterprise that not included with the definition of felony sex trafficking in the third degree.

a. Bar to prosecution of prostitution for victim or witness of violent crime (sec. 36).

SB 91 bars prostitution prosecution when the person witnessed any one of 26 enumerated offenses³ and where the evidence of prostitution was obtained as a result of the person reporting a violent crime to law enforcement and the person cooperated with law enforcement.

Legislative intent suggests that this change in the law is designed to encourage those engaged in prostitution to cooperate with law enforcement in the prosecution of violent crime.

b. No sex trafficking of one's self (secs. 37 - 38).

SB 91 amends both first degree and third degree sex trafficking to ensure that a person may not be prosecuted for trafficking themselves, as opposed to trafficking third persons.⁴ (We are not aware that this has ever happened and nor do we believe could happen under either current law or SB 91.)

c. Allowing prostitutes to work together (secs. 39 - 40).

Sections 39 and 40 of SB 91 amend sex trafficking in the third and fourth degree under AS 11.66.130 and AS 11.66.135. Section 39 adds a paragraph to sex trafficking in the third degree which reads "a person does not act with the *intent to promote prostitution* . . . if the person (1) engages in prostitution . . . in a location even if that location is shared with another person; and (2) has not induced or caused another person in that location to engage in prostitution." (Emphasis added.) Section 40 adds a paragraph to sex trafficking in the fourth degree which reads "a person does not *institute, aid, or facilitate prostitution* if the person (1) engages in prostitution . . . in a location even if that location is shared with another person; and (2) has not induced or caused another person in that location to engage in prostitution." (Emphasis added.) These added paragraphs are presumably intended to prevent the state from prosecuting cooperatives of independent sex workers working in the same location as a trafficking enterprise. However, the practical effect of these amendments may be to allow an individual to operate a trafficking enterprise when they claim that they themselves also practiced prostitution in the same location.

³ Those crimes are murder, manslaughter, criminally negligent homicide, assault, sexual abuse of a minor, robbery, extortion, coercion, distribution and possession of child pornography, and sex trafficking.

⁴ Comments from Representative LeDoux, at 2:27:37 p.m., Hearing on HB 205 before the House Judiciary Comm. 29th Leg., 2d Sess. (April 6, 2016).

The sections apply to all cases pending prosecution or pending appeal. Changing to the elements to a crime for which a person has been convicted and then making that change retroactive may result in some increased litigation for cases with a conviction, but pending appeal.

II. Provisions related to arrest, bail, and pretrial release.

A. Arrest.

1. Decrease time to first appearance (secs. 50 and 98). *January 1, 2018.*

In 2010, the legislature amended AS 12.25.150 to more closely reflect the practice of the rest of the country for how quickly a defendant must be brought before a court for the first time. In 2010, only two other states required this initial appearance to take place within 24 hours.⁵

Under current law AS 12.25.150 requires a defendant be taken before a judge or committing magistrate within 48 hours of arrest. SB 91 shortens that time to 24 hours, including holidays and Sunday, unless there are “compelling circumstances.” The term “compelling circumstances” is not defined.

2. Increase discretion to issue a citation instead of arrest (sec. 51).

Currently, AS 12.25.180 defines when a peace officer may issue a citation, as opposed to arresting a person. The current law requires peace officers to issue citations for all violations and allows the officer to use their discretion in issuing citations for misdemeanors, except that arrest is mandatory (1) when the officer cannot ascertain the person’s identity, (2) when the person presents a danger to themselves or others, (3) when the crime involving violence or harm to people or property, (4) when the person requests to go before the court, and (5) when the crime

⁵ 2 states - 24 hours, calculated including weekends and holidays (FL, MD)
1 state - 24 hours, weekends and holidays *may* be excluded (WA)
6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)
1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)
7 states - 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
1 state - 48 hours, excluding Sunday, holidays, and day when court not in session (CA)
1 state - 48 hours, excluding Saturday, Sunday, and holidays (ME)
1 state - 48 hours, if 1st appearance is combined with probable cause hearing (court decision) (WI)
2 states - 72 hours, including weekends and holidays (NJ, WY)
1 state - 72 hours, excluding Saturday, Sunday and holidays (LA)
1 state - 72 hours is without delay if probable cause within 48 hours (court decision)(TN)
21 states - “without unnecessary delay” (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)
2 states - “forthwith” (SC, VA)
1 state - “promptly” (repealed 24 hour rule in 1995) (IN)
1 state - person must be released in “charged” within 20 hours, but no provision for first appearance (MO)

involves domestic violence. In those cases, the officer is required to make an arrest and take the person before a committing magistrate, who may then release them on bail.

SB 91 expands the officer's discretion to use citations by allowing the issuance of citations for class C felonies and by eliminating the requirement of mandatory arrest; under four of the five circumstances listed in AS 12.35.180(a) and described above, one circumstance in which arrests will still be mandatory is domestic violence crimes. *See* AS 12.25.030(b)(1) and AS 18.65.530).

3. Pretrial bail release (secs. 55 - 63). January 1, 2018.

Senate Bill 91 revises bail procedures in criminal cases. Under current law, bail is generally left to the discretion of the court, except there is a rebuttable presumption that, for the most serious offenses, *i.e.*, unclassified and sex felonies, no bail condition will reasonably ensure a defendant's appearance for trial or adequately protect the public. A defendant who has been unable to post bail may have their bail reviewed after 48 hours since bail is first set. Currently, the inability to post the monetary bail amount is not a basis to seek a bail review.

a. Inability to pay bail to be considered. January 1, 2018.

SB 91 requires that a court revise a person's bail when the person has remained in custody longer than 48 hours due to their inability to post bail, unless the court finds by clear and convincing evidence that bail was appropriately set. Section 57 changes existing law by providing that the inability to post bail may provide a basis to revise monetary bail.

b. Risk assessment to be used in setting bail. January 1, 2018.

SB 91 changes the presumptions that apply to bail release. Section 59 provides that bail release will be determined by a pretrial service officer, using a risk-assessment tool developed by the Department of Corrections with input from other state agencies. (*See generally*, sec. 117). The risk-assessment tool must ultimately indicate if a defendant is a low, moderate, or high risk of failing to appear or of committing another offense while on pretrial release. The chart below summarizes the new bail release criteria added by SB 91:

Offense type				
	<i>Misdemeanor nonperson offense (non-DV/ non-DUI)</i>	<i>C felony nonperson offense (non-DV/ non-DUI)</i>	<i>DUI (Felony or misdemeanor)</i>	<i>Remaining offenses</i>
<i>Low-risk</i>	Shall be released on own recognizance or unsecured bond	Shall be released on own recognizance or unsecured bond	Shall be released on own recognizance or unsecured bond *	Shall be released on own recognizance or unsecured bond*
<i>Moderate-risk</i>	Shall be released on own recognizance or unsecured bond	Shall be released on own recognizance or unsecured bond *	Shall be released on own recognizance or unsecured bond *	May be released on appearance, bail, or performance bond
<i>High-risk</i>	Shall be released on own recognizance or unsecured bond *	Shall be released on own recognizance or unsecured bond *, **	Shall be released on own recognizance or unsecured bond *	May be released on appearance, bail, or performance bond

* No release if the trial court finds, by clear and convincing evidence, that no nonmonetary conditions can ensure the person's appearance at trial and protection of the community.

** High-risk defendants charged with failure to appear and violation of conditions of release may be required to post appearance, bail, or performance bonds if evaluated at high risk.

4. Department of Corrections pretrial services (sec. 117). January 1, 2018.

SB 91 directs the Department of Corrections to establish a "pretrial services program" for the purpose of (1) conducting risk assessments of arrestees to assist judges in determining whether to allow pretrial release and (2) supervising persons who have been released by the court. The Department of Corrections must develop a standardized risk assessment methodology and promulgate regulations to implement this program.

In addition to making recommendations for release, SB 91 also gives pretrial services officers the ability to (1) recommend pretrial diversion, (2) make warrantless arrests for failure to appear or violating conditions of release, (3) refer defendants to treatment programs, (4) make recommendations to the court regarding participation in the 24/7 Sobriety program, and (5) coordinate with community-based organizations to develop and expand pretrial diversion options.

5. Sobriety program (sec. 173). January 1, 2017.

Under current law, a person ordered by the court to participate in an alcohol or substance abuse monitoring program must appear at a predetermined location and submit two breath samples daily.

SB 91 removes the requirement for *in person* twice-a-day alcohol monitoring and allows the use of remote alcohol or substance abuse monitoring technology. SB 91 also adds language requiring the Department of Health and Social Services to “use a competitive procurement process” and “contract with one or more vendors” in establishing the program.

III. Sentencing.

Before addressing the changes made by SB 91 to the sentencing scheme, some terminology must be explained. An “active” term of imprisonment is the minimum term a defendant must actually serve in prison. A “suspended” term of imprisonment is the portion a defendant will not have to serve unless imposed for violations probation or parole conditions occurring after a defendant is released from imprisonment. Some suspended penalty must be imposed if a defendant is placed on probation, otherwise there is no incentive for complying with probation conditions.

A. Misdemeanor sentencing changes.

1. Reduced class A misdemeanor sentencing (sec. 91). *All cases pending sentence on July 1, 2016.*

Under current law, class A misdemeanors carry a maximum penalty of 365 days in jail, a \$10,000 fine, and a probationary term of up to 10 years. DUI, refusal to submit to a chemical test, some domestic violence assaults, assaults on peace officers, and some other class A misdemeanors have mandatory minimum sentences.

SB 91 reduces the term of imprisonment for most class A misdemeanors by implementing a presumptive term of zero to thirty days of jail for all class A misdemeanors unless they fall into one of five categories, in which case the term of imprisonment is not reduced:

- the offense carries a statutory mandatory minimum term of 30 days or more;
- the trier of fact finds that the conduct was among the most serious conduct included in the definition of the offense;
- the defendant has past criminal convictions similar in nature to the present offense;
- the conviction is for assault in the fourth degree; or
- the conviction is for sexual assault in the fourth degree, sexual abuse of a minor in the fourth degree, indecent exposure before a person under 16 years of age, or harassment in the first degree (offensive contact of a person’s genitals, buttocks, or female breast through clothing).

SB 91 also reduces the maximum length of probation for misdemeanors from 10 years to three lesser lengths depending upon the type crime: 3 years for domestic violence offenses, crimes against a person under AS11.41, and misdemeanor sex offenses; 2 years for misdemeanor DUI or refusal to submit to a chemical test if the defendant has no prior convictions under

similar laws; and 1 year for all other misdemeanors. It also increases the maximum fine that can be imposed for a class A misdemeanor from \$10,000 to \$25,000.

2. Reduced class B misdemeanor sentencing (sec. 92). *All cases pending sentence on July 1, 2016.*

SB 91 reduces the maximum term of imprisonment for class B misdemeanors from 90 days to 10 days, with one exception. The 90-day maximum sentence still applies to a person who violates AS11.61.116(c)(1) (sending an explicit image of a minor to another person) and second-degree harassment under AS 11.61.120(a)(6) (sending an explicit image with the intent to harass).

3. Reduced sentences specific crimes (sec. 93). *July 1, 2016.*

In addition to these new general reductions of sentences for misdemeanors, SB 91 further reduces sentences for some drug offenses, some theft offenses, and disorderly conduct.

a. Drug sentences reduced. *All cases pending sentencing on July 1, 2016.*

SB 91 eliminates active terms of imprisonment for possession of any controlled substance (other than the “date rape drug”) under AS 11.71.050(a)(4) and AS 11.71.060(a)(2) unless the defendant has more than one conviction for an offense under AS 11.71. The bill also limits the suspended time that can be imposed for those offenses to 30 days, unless the defendant has a prior conviction for an offense under AS 11.71, in which case the limit is 180 days.

b. Theft sentences reduced. *All cases pending sentence on July 1, 2016.*

SB 91 also eliminates both active and suspended terms of imprisonment for theft under \$250 unless the person has been convicted twice before for a similar crime. If convicted twice before for a similar crime, then SB 91 authorizes a court to a maximum of five days’ suspended imprisonment and a maximum of six months probation. Therefore, incarceration will not be imposed for theft in the fourth degree unless the person violates their probation within the six-month probationary period. Courts may still impose fines and community work service.

c. Disorderly conduct sentence reduced. *All cases pending sentencing on July 1, 2016.*

Finally, SB 91 changes the maximum term of imprisonment for disorderly conduct⁶ from 10 days to 24 hours.

⁶ Disorderly conduct includes challenging another person to a fight, refusing to comply with a lawful order from a peace officer to disperse from a public place when a crime has occurred, or recklessly creating a hazardous condition for others by an act that has no legal justification or excuse.

4. Driving under the influence and refusal (secs. 107 - 108, 110).
Sentenced after January 1, 2017.

A person convicted of DUI or refusal to submit to a chemical test must serve a minimum term of 72 hours for a first offense and 20 days for a second offense. Current law states that this time must be served at either a community residential center (CRC or halfway house) or on electronic monitoring at a private residence. If either of these options is not available, then the time may be served at another place the commissioner of corrections deems appropriate.

SB 91 alters the current law in four ways. First, it eliminates CRCs as a place to serve the jail time imposed for a first offense. That 72-hour mandatory minimum would now be served at a person's home on electronic monitoring. Second, if electronic monitoring is not available at the person's home, then the commissioner of corrections must determine another method of the person serving the jail time imposed at the person's home. Third, when serving time at a person's home, the home will no longer be subject to search by a peace officer or DOC employee absent probable cause (a change from existing law). This changes the law of allowing searches in all locations where a person serves a jail sentence. This means no searches of a home would be allowed, even for alcohol, without probable cause. Fourth, under current law a first offense requires 24 hours of community work service (CWS). SB 91 eliminates the CWS requirement.

5. The alcohol safety action program (ASAP) (secs. 170 - 171). *July 1, 2016.*

Under current statutes ASAP is designed to provide substance abuse screening, referral, and monitoring to persons convicted of a misdemeanor involving the use of a motor vehicle and alcohol or a controlled substance.

SB 91 limits the imposition of ASAP to only DUI and refusal to submit to a chemical test convictions. SB 91 further requires the commissioner of health and social services develop regulations for the operation and management of alcohol safety action programs that ensure screenings use a "validated risk tool" and the level of monitoring participants is appropriate to the risk of reoffense as determined by the screening.

The provision requiring regulations regarding the "validated risk tool" is to be completed by January 1, 2017.

B. Felony sentencing (secs. 86 - 90). *July 1, 2016.*

Most felony sentences are structured in graduated presumptive ranges based on the level of the offense and the number of prior felonies a person has. A court may only impose a sentence above the presumptive range if one or more aggravators are proven; conversely, a sentence below the presumptive range may only be imposed if one or more mitigators are proven. Once a court finds an aggravator or a mitigator, it can impose a sentence above or below the presumptive range. In the case of aggravators, the court can impose a term of imprisonment up to the maximum term. There are a few felonies that do not have presumptive sentencing ranges

such as unclassified felonies like murder and kidnapping, but this may also be true for some felonies outside of AS 11.

SB 91 makes three changes to felony sentencing: it increases the mandatory minimum for murder, it reduces presumptive sentencing ranges, and it reduces the length of probation.

1. Increasing murder mandatory minimum sentence (secs. 86 - 87). *Offenses occurring after July 1, 2016.*

SB 91 increases the mandatory minimum term for murder in the first degree from 20 years to 30 years and increases the minimum term for murder in the second degree from 10 years to 15 years.

2. Decreasing presumptive sentencing ranges (secs. 88 - 89). *All cases pending sentence on July 1, 2016*

With the exception of sexual felonies, SB 91 reduces the presumptive ranges for all other felonies. The chart below⁷ shows the changes in the presumptive terms for class A⁸ and class B felonies.⁹

<u>Felony Class</u>	<u>Current Law</u>	<u>SB 91</u>
Class A		
First	[5 - 8] - 20 years	[3 - 6] - 20 years
First/Enhanced	[7 - 11] - 20 years	[5 - 9] - 20 years
Second	[10 - 14] - 20 years	[8 - 12] - 20 years
Third	[15 - 20] - 20 years	[13 - 20] - 20 years
Class B		
First	[1 - 3] - 10 years	[0 - 2] - 10 years
First/Enhanced	[2 - 4] - 10 years	[1 - 3] - 10 years
Second	[4 - 7] - 10 years	[2 - 5] - 10 years
Third	[6 - 10] - 10 years	[4 - 10] - 10 years

⁷ The bracketed numbers are the presumptive range and the number to right is the maximum sentence authorized by law.

⁸ Class A felonies include Assault in the First Degree, Robbery in the First Degree, Escape in the First Degree, and Misconduct Involving a Weapon in the First Degree.

⁹ Class B felonies include Assault in the Second Degree, Robbery in the Second Degree, Burglary in the First Degree, etc.

3. Reducing class C felony presumptive range to probation (sec. 90).

SB 91 reduces the presumptive term for class C felonies in a different manner. SB 91 reduces the presumptive term for a first class C felony from 0 - 2 years imprisonment to probation with a suspended term of imprisonment of up to 18 months, except for felony DUI or refusal to submit to a chemical test. SB 91 changes the presumptive sentence for a second felony at class C from 2 - 4 years to 1 - 3 years. And it reduces a third felony at class C level from 3 - 5 years to 2 - 5 years.

SB 91 leaves the mandatory minimums for felony DUI and refusal to submit to a chemical test unchanged. Section 90 of the bill, however amends AS 12.55.125(e) by amending paragraph (4) to establish presumptive ranges for felony DUI and refusal to submit to a chemical test that did not exist before.

4. Reduced felony maximum probation lengths (sec. 79).

SB 91 also reduces the length of probation for most felonies. The probation period for sex felonies is reduced from a maximum of 25 years to 15 years. The probation period for unclassified felonies and crimes against a person under AS 11.41 remains unchanged at a maximum of 10 years. The probation length for all other felonies is reduced from a maximum of 10 years to 5 years.

C. Community work service (secs. 75 - 76).

Under current law, a person sentenced to pay a fine can perform community work service instead. Each hour of community work service offsets \$3 of the fine. A person sentenced to community work service also can opt for imprisonment time (1 day for each 8 hours of community work service) in lieu of paying the fine or performing the service, and the court can convert uncompleted community work service to imprisonment if the community work service is not completed on time.

SB 91 increases the monetary value of one hour of community work service to the state minimum wage (currently \$9.75). SB 91 will prohibit the conversion of community work service into imprisonment and requires that community work service convert to a fine if not completed by the deadline.

D. Suspended entry of judgment (sec. 77).

Section 77 creates a new probationary sentence referred to as a suspended entry of judgment (SEJ). The SEJ will be available only when agreed to by both the defendant and the prosecution. Under the SEJ, if the defendant successfully completes probation, the underlying case will be dismissed. Further, SB 91 prohibits the Alaska Court System from publishing on its online docket the record of a case where the underlying case was dismissed because the person successfully completed probation as part of an SEJ on its on-line public docket. However, if the defendant fails to successfully complete probation, the court may impose any sentence in

accordance with the applicable sentencing law and the person's case record will then be available to the public on its on-line public docketing system.

E. Jail credit for time in treatment and on electronic monitoring (sec. 70). *90 days after SB 91 is enacted.*

Under current law, a defendant who has been court-ordered into a residential treatment program is entitled to day-for-day credit against any jail sentence that is imposed. The order must require the defendant to live and remain at the treatment facility except for certain specified purposes (such as employment or court appearances). A defendant can also claim credit for time spent on bail on electronic monitoring.

SB 91 eliminates the requirement that the treatment be residential, instead allowing credit for any treatment program that the court finds "furtheres the reformation and rehabilitation of the defendant" and that "places a substantial restriction on the defendant's freedom of movement and behavior."

SB 91 also establishes a 360-day cap for the amount of credit a person can receive against their term of imprisonment while on pretrial release and on electronic monitoring. The cap applies to cases of violent felonies, domestic violence, residential burglary, first degree arson, sex crimes, or delivery of controlled substances to minors.

These provisions will apply to all sentences imposed on or after the effective date. Defendants who have already been sentenced would not be able to claim additional credit.

IV. Probation and parole.

A. Probation.

1. Periods of Probation (sec. 79). *July 1, 2016.*

As discussed above, SB 91 reduces almost all maximum lengths of probation.

2. Length of probation further reduced further if no violations (sec. 8).
July 1, 2016

SB 91 adds a new requirement for probation officers to recommend early termination of probation and discharge when a defendant has been on probation for one or two years (depending on the offense of conviction), successfully completed all treatment programs, has not violated any conditions of probation for one or two years (depending on the conviction), and is currently in compliance with all conditions of probation in all cases in which the defendant is on probation. The court may not terminate probation unless it has given the victim an opportunity to be heard by the court and has considered input from the victim.

3. Terms of imprisonment for probation violations (secs. 64 and 84).
January 1, 2017

SB 91 limits the court's discretion by setting caps on the sentences that may be imposed for "technical violations" of probation. A "technical violation" is a violation of probation that is not a new criminal offense, a failure to complete sex offender treatment, or a failure to complete an intervention program for batterers. The court is limited to these caps regardless of whether the defendant admits or contests the violation. AS 12.55.110(c).

Violation	SB 91 Cap
First technical violation	3 days
Second technical violation	5 days
Third technical violation	10 days
Fourth and subsequent violations	Up to the remainder of suspended sentence
"Abscond"	30 days

"Absconding" means failing to report to probation officer within five days of release from custody or failing to maintain contact with probation officer for more than 30 days.

Additionally, SB 91 limits the amount of time a defendant may be held in-custody on a technical violation of felony probation. Under current law, the court sets bail as appropriate until the defendant's eventual disposition hearing. However, SB 91 requires the person to be released once they have served the maximum amount of time that could be imposed for a technical violation of probation. This release provision will become effective on January 1, 2017, and will apply to probation violations that occurred before, on, or after that date.

B. Parole. *January 1, 2017.*

Current law provides for three types of parole: special medical, discretionary, and mandatory. Special medical parole is based on a medical need. Discretionary parole is based on a review of the inmate by the parole board after the inmate has served either 1/4 or 1/3 of their active term of imprisonment and applies for parole. Mandatory parole, otherwise known as "good time," is based on the accumulation of one day of "good time credit" for every three a defendant serves in prison without having caused behavioral problems.

SB 91 creates two new types of parole: administrative and geriatric.

1. Administrative parole (secs. 120 and 122). *January 1, 2017.*

Administrative parole eliminates the requirement for an inmate to apply for discretionary parole and eliminates the review conducted by the parole board. As a result, it automatically grants what would otherwise be discretionary parole for certain offenders. Administrative parole applies to all misdemeanors and class B and C felonies that are not sex offenses or offense against a person under AS 11.41. Administrative parole is further restricted to only those offenders without a previous felony conviction and who have been sentenced to at least 181 days

of active jail time. An inmate must have served 1/4 of the active jail sentence imposed and to have met the requirements of their case plan to be eligible for administrative parole.

A victim in a case may request a hearing in a case where an inmate would otherwise be eligible for administrative parole. The request would result in a hearing by the parole board to determine if the inmate should be released.

2. Geriatric parole (sec. 123). January 1, 2017.

SB 91 also creates a second new form of parole referred to as geriatric parole. Geriatric parole is a new method by which an inmate may be considered for discretionary parole. The inmate must be 60 years of age or older, served 10 years of the active jail time imposed, and the offense cannot have been a sex offense or an unclassified felony.

3. Discretionary parole revisions.

In addition to creating two new types of parole, SB 91 also revises discretionary parole by expanding who is eligible and changing the criteria used by the board to evaluate if an inmate should be released.

a. Expands who is eligible (sec. 124). January 1, 2017.

Under current law AS 33.16.090(b) restricts discretionary parole by prohibiting certain offenses from being eligible when sentenced within or below the presumptive range. Those offenses are found at 12.55.125(c) (class A felonies), (d)(2) - (4) (criminally negligent homicide with a victim under 16 years of age, making methamphetamine, class B felony with prior felony convictions), (e)(3) (class C felony with prior felony convictions), and (i) (felony sex offense).

Current law also restricts discretionary parole for those same offenses until the first half of the sentence has been served when a prisoner was sentenced by a three-judge panel.¹⁰

SB 91 expands discretionary parole eligibility in three ways. First, SB 91 eliminates the restriction on discretionary parole for prisoners sentenced *within or below the presumptive range* for class A felonies, criminally negligent homicide with a victim under 16 years of age, making methamphetamine, prisoners with prior felonies sentenced class B and C felonies, and class B and C sex felonies.

Second, SB 91 eliminates the restriction on discretionary parole for prisoners sentenced *by a three-judge panel* for class A felonies, criminally negligent homicide with a victim under 16 years of age, making methamphetamine, and prisoners with prior felonies sentenced class B and C felonies.

¹⁰ Three-judge panels are used to sentence below the presumptive range when circumstances warrant such a departure but are not found in statutory mitigating factors.

Third, prisoners convicted of class B or C felonies who are disqualified by the three-judge panel from consideration for discretionary parole may nevertheless be considered for discretionary parole during the second half of their sentence.

b. Changes factors for release (secs. 125 and 127). January 1, 2017.

AS 33.16.100(a) sets out the factors the Parole Board must consider in all cases when determining whether to release a prisoner on discretionary parole. SB 91 makes these factors applicable only (1) to prisoners convicted of an unclassified felony and who are otherwise eligible for discretionary parole and (2) to prisoners seeking geriatric parole.

SB 91 changes and reduces the factors the parole board must find are satisfied in order to release a prisoner on discretionary parole. Currently, AS 33.16.100(a) states the board may release a prisoner on parole if the board determines (1) the prisoner will live and remain at liberty without violating parole conditions, (2) the prisoner's rehabilitation and reintegration into society will be furthered by parole release, (3) the prisoner will not pose a threat of harm if released, and (4) the release will not diminish the seriousness of the crime. Section 125 amends this statute so those factors will apply to unclassified offenses.

c. Makes release mandatory (sec. 127). January 1, 2017.

SB 91 *requires* release on discretionary parole for all prisoners, except those convicted of an unclassified felony, if the defendant (1) meets the requirement of a case plan, (2) agrees to conditions of parole, and (3) has not been released on administrative parole. Release is not required; however, if the Parole Board finds by clear and convincing evidence that the prisoner poses a threat of harm to the public if released.

d. Require hearing to be timely (sec. 121). January 1, 2017.

SB 91 requires the Parole Board to consider, at least 90 days before a prisoner is eligible for parole and upon receipt of a prisoner's application for parole, the prisoner's suitability for parole.

4. Creates new methods for early discharge of parolee.

a. One year of parole (sec. 143). January 1, 2017.

SB 91 allows the Parole Board to unconditionally discharge from parole a parolee after the completion of one year of parole. It also allows the discharge of a mandatory parolee before the completion of one year of parole if the parolee is serving a concurrent period of residual probation. SB 91 also requires a parole officer to recommend early discharge for a parolee who has completed at least one year on parole, has not violated a parole condition for at least one year, and has completed all treatment programs required as a condition of parole. Prisoners convicted of unclassified or sexual felonies or crimes involving domestic violence are ineligible for early discharge.

b. Earned compliance credit (30 for 30) (sec. 151).

SB 91 creates a new method for early discharge of a parolee. A prisoner's parole is reduced by 30 days for each 30-day period served without a parole violation.

5. Restricting sanctions that can be imposed for parole violations (secs. 145 and 150). *January 1, 2017.*

SB 91 limits the length of the sentences that the Parole Board can impose for technical violations of parole that do not involve absconding, i.e., a violation that is a new criminal offense, a failure to complete sex offender treatment, or a failure to complete batterer's treatment. Under this provision the Board may impose not more than three days' incarceration for the first technical violation, five days for the second, ten days for the third, and up to the remainder of the sentence for the fourth. If the violation consists of absconding, the Parole Board can impose not more than 30 days. SB 91 prohibits the Parole Board from treating as a technical violation the violation of a special condition imposed on sex offender under AS 12.55.100(e). The Board may sentence a parolee who violates that condition outside of the graduated system outlined above.

Section 150 of the bill requires the release from incarceration of a parolee arrested for a technical violation once they have served the maximum number of days that could be imposed for the technical violation.

C. Good-time calculations (sec. 154). *July 1, 2016,* for anyone in DOC custody.

SB 91 authorizes good-time credits "for any time spent under electronic monitoring or in a residential program for treatment of alcohol or drug abuse under a prerelease furlough as provided in AS 33.30.101." This replaces the prohibition against good-time credit under those circumstances.

D. Surrender license and reapply for redline license (secs. 2, 102, 140). *July 1, 2016.*

AS 04.16.160(a) and AS 28.15.191(g) currently allows the court to require a defendant to surrender their driver's license and identification card if convicted of only three types of offenses - minor consuming alcohol, DUI, or refusal to submit to a chemical test - and authorizes the defendant to obtain, if eligible, an identification card that restricts the defendant's ability to purchase alcoholic beverages.

SB 91 requires that defendants surrender their driver's license or identification card, when ordered, as a condition of parole or probation, to refrain from consuming alcoholic beverages. The defendant may still be eligible to obtain a new license or identification card that lists the restriction on the defendant's ability to purchase alcoholic beverages.

E. Administrative sanctions (secs. 114, 115). *January 1, 2017.*

SB 91 will require the Department of Corrections to use “administrative sanctions and incentives” that it will be required to develop to respond to a probationer’s “negative and positive behavior” without the imposition of further imprisonment. An administrative sanction imposed under this provision might be a double jeopardy violation if the sanction has the effect of increasing a defendant’s sentence.

F. Electronic monitoring (sec. 157). *January 1, 2017.*

SB 91 authorizes the Department of Corrections to provide electronic monitoring services through a private contractor.

G. Reentry (sec. 158). *January 1, 2017.*

SB 91 requires the Commissioner of the Department of Corrections to establish a program to prepare inmates serving a sentence of more than one year for their release from prison. This includes instruction on obtaining identification documents and available community resources for housing, employment, and treatment, to craft a re-entry plan for the inmate, and to partner with nonprofit organizations to help achieve these goals. Inmates must participate in this program beginning 90 days before their release.

H. Correctional restitution centers. *July 1, 2017.*

SB 91 augments the purposes of correctional restitution centers (CRC’s or halfway houses), adding that they must provide certain offenders with rehabilitation through “comprehensive treatment for substance abuse, cognitive behavioral disorders, and other criminal risk factors, including aftercare support.”

V. Victim’s rights.

A. Release date/parole discharge date (sec. 65). *90 days after signing.*

SB 91 will require the court to provide victims with a form that would include information about the potential release of the defendant and information about Victim Information and Notification Everyday (VINE) Service.

B. Parole discharge date (sec. 156). *January 1, 2017.*

Current law does not require the Department of Corrections to notify a victim when a parolee is discharged from parole. SB 91 adds a provision requiring the commissioner of corrections to notify victims when a parolee is discharged from parole.

C. Notice of plea agreements expended from DV to all crimes (sec. 94). *July 1, 2017.*

SB 91 authorizes any victim, not only domestic violence victims, as under current law, to request that the prosecutor confer with a victim concerning a proposed plea agreement.

D. Confidentiality of investigating a sexual offense (sec. 95). *90 days after signing.*

SB 91 will prohibit law enforcement from disclosing information related to the investigation of a sexual offense to the victim's employer unless the victim expressly agreed, or the disclosure is necessary to investigate or to prevent a crime.

E. Prohibiting interference by a victim's employer (sec. 96). *90 days after signing.*

SB 91 will add a prohibition against employers penalizing a victim for reporting an offense to a law enforcement agency or otherwise participating in the investigation.

F. Victims can get an inmate's case reentry plan (sec. 129). *January 1, 2017.*

SB 91 will, upon request, entitle a victim of a crime against a person or first-degree arson to receive a copy of the defendant's parole plan.

G. Required victim notice expanded to sexual assault offenders (sec. 131).
January 1, 2017.

SB 91 expands to include sexual assault victims the requirement of notice of parole board hearings to review or consider a prisoner's parole.

VI. Miscellaneous provisions.

A. Civil in rem forfeiture (sec. 3). *90 days after signing.*

SB 91 abolishes the use of civil *in rem* forfeitures in criminal proceedings. Civil *in rem* forfeiture is a common-law proceeding initiated against the property to be forfeited, rather than against the person who holds the property. A severability clause (sec. 186) states that if sec. 3 violates the single subject clause, it shall be severed and the remainder of the act will not be affected.¹¹

We raise this to alert you to the severability clause, but do not analyze it in depth because in our view there is little risk that the bill could be successfully challenged based on violation of

¹¹ The Director of the Division of Legislative Legal Services has opined that a severability clause would likely not save a bill from invalidation should the court find a single subject violation. *Single subject and severability*, Doug Gardner, Director, Division of Legislative Legal Services (April 27, 2016).

the single subject clause.¹² As interpreted by the Alaska Supreme Court, the single-subject requirement requires matters in an act to “fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.”¹³ The single-subject rule has been broadly interpreted by the Alaska Supreme Court. The test for compliance requires no more than that the various provisions of the bill fairly relate to the same subject, or have a natural connection with that subject.¹⁴ Further, the rule must “be construed with considerable breadth.”¹⁵ To date, the court has addressed the single-subject rule in eight cases and found a violation in only one of those cases.¹⁶

Here, we suggest that the prohibition on civil *in rem* forfeiture in lieu of criminal proceedings is within the general subject of the bill. We find support for this conclusion in *State v. Graybill* where the Alaska Supreme Court stated that “it is commonly understood that forfeitures, even when civil in form, are basically criminal in nature.” 545 P.2d 629, 631 (Alaska 1976). The court went on to note several cases from other jurisdictions in which courts have made a similar holding. (e.g. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (the purpose of civil *in rem* forfeitures is to penalize commission of offenses)).¹⁷

B. Food stamps when convicted of drug felony (sec. 169). July 1, 2016.

SB 91 will disqualify (as required under federal law) from participation in the Alaska temporary assistance program and the supplemental nutrition assistance program (food stamps) persons who have been convicted of first-, second-, third-, or fourth-degree MICS. Eligibility may be restored if the person (1) is satisfactorily serving, or has successfully completed, probation or parole; (2) is satisfactorily serving, or has successfully completed, mandatory participation in drug or alcohol treatment program; (3) has taken action toward rehabilitation, including participation in a drug or alcohol treatment program; or (4) has successfully complied with the requirements of their reentry plan.

¹² Article II, sec. 13, Constitution of the State of Alaska (Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws.)

¹³ *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1979) (internal citation omitted).

¹⁴ *Short v. State*, 600 P.2d 20, 24 (Alaska 1979).

¹⁵ *Id.*

¹⁶ *See, Croft v. Parnell*, 236 P.3d 369, 374 (Alaska 2010) (The court found an initiative to publicly fund elections and increase the oil production tax to fund the new elections program violated the single subject rule).

¹⁷ *Cf., In Resek v. State* the court held that a civil *in rem* forfeiture of conveyances used and profits made in drug trafficking was not a criminal prosecution. 706 P.2d 288 (Alaska 1985).

C. Permanent fund dividend garnishments (sec. 161).

SB 91 prohibits the application of the 20 percent exemption from permanent fund dividend garnishments when the purpose of the garnishment is to satisfy court-ordered forfeiture of an appearance or performance bond.

D. Driver's license revocation (secs. 101 and 109). *July 1, 2016.*

SB 91 requires the division of motor vehicles (DMV) to reinstate the driver's license of a person whose license was administratively revoked as a result of a refusal to submit to a chemical test if (1) the person was acquitted of driving under the influence (DUI) or refusal to submit to a chemical test arising from the same incident that resulted in the revocation or (2) those charges were dismissed with prejudice. SB 91 also authorizes the DMV to restore a person's driver's license if (1) the license has been revoked for at least 10 years, (2) the person has not been convicted of a driving-related criminal offense while the license was revoked, and (3) the person provides proof of financial responsibility. SB 91 requires the DMV to restore a person's driver's license if (1) the person has successfully driven under a limited license for at least three years without a revocation of the limited license, (2) the person has successfully completed a court-ordered or rehabilitative treatment program, (3) the person has not been convicted of DUI or refusal to submit to a chemical test while the license was revoked, (4) the person is otherwise eligible to have their driving privileges restored, and (5) the person provides proof of financial responsibility.

E. Limited driver's license (secs. 103, 106). *July 1, 2016.*

SB 91 authorizes a court that has revoked a defendant's driver's license to grant limited license privileges if (1) the revocation was for felony DUI, (2) the person is participating in, and has done so successfully for at least six months, a court-ordered treatment program, (3) the person provides proof of insurance, (4) the person is required to use an ignition-interlock device during the period of the limited license, and (5) the person has not previously been granted a limited license that was revoked.

SB 91 also allows the court or the DMV to revoke a limited license if the person is convicted of DUI or refusal to submit to a chemical sobriety test or is not in compliance with a court-ordered treatment program or rehabilitative treatment program.

SB 91 specifies that a court may reduce a sentence imposed for DUI or refusal to submit to a chemical test, including imprisonment, fine, or license revocation in exchange for the defendant's compliance with court-ordered treatment.

F. Sections relating to municipalities (sec. 113). *All cases pending sentence on July 1, 2016.*

SB 91 will prohibit a municipality that has a criminal ordinance that is comparable to an offense under AS 11 or AS 28 from imposing a greater punishment than that authorized under the comparable state statute.

G. Powers and duties of the Alaska Criminal Justice Commission (secs. 163 - 167 and 182 - 184). *July 1, 2016 and 90 days after signing.*

SB 91 gives additional responsibilities to the Alaska Criminal Justice Commission (ACJC). The ACJC must monitor the implementation and effectiveness of the recommendations codified in SB 91. This includes collecting and analyzing data supplied by the Department of Public Safety, Department of Corrections, and the Alaska Court System as well as entering into data-sharing agreements with other research institutions. The ACJC also will be responsible for providing a summary of the savings generated from criminal justice reform and making recommendations as to how that money should be reinvested.

Additionally, the ACJC will be responsible for reviewing and analyzing other areas of law and making recommendations. For example, the ACJC is directed to review Alaska's sexual offense statutes and issue a report to the Alaska Legislature if there are "circumstances under which victims' rights, public safety, and the rehabilitation of offenders are better served by changing existing laws." It is also directed to make recommendations regarding the laws surrounding the offenses of DUI, refusal, and driving without a valid license; collection of victim's restitution; and social impact bonds. Additionally, the ACJC is directed to explore the possibility of entering into agreements with regional nonprofit organizations, including tribes, to provide pretrial, probation, and parole services in underserved areas of the state.

Finally, ACJC must cooperate with the Commissioner of the Department of Health and Social Services in implementing the recidivism reduction program that provides for programs with a primary focus on rehabilitation and recidivism reduction.

H. Funding (sec. 1). *90 days after signing.*

Senate Bill 91 establishes the recidivism reduction fund which consists of 50 percent of the excise tax collected on marijuana under AS 43.61.010. Section 1 expresses the legislature's intent to supplement the recidivism reduction fund with money from the alcohol and other drug abuse and prevention fund if the money collected under AS 43.61.010 is lower than expected for fiscal year 2017. Money from the recidivism reduction fund may be appropriated to the Department of Corrections, Department of Health and Social Services, or the Department of Public Safety for recidivism reduction programs. If there is any excess money in the fund, the legislature intends for that money to be directed to providing additional law enforcement resources in communities across the state.

Conclusion

Other than as discussed above, we have not identified constitutional or legal issues in HCS CSSB 91(FIN) am H. Yet this bill makes a number of changes to current law, and it is not always possible to identify or comment on all legal issues in a bill of this complexity. We are available to assist agencies as needed in interpreting and implementing the bill.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

By:
John B. Skidmore
Director, Criminal Division

CWR:JBS:jc