

ALASKA STATE LEGISLATURE

Session

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Rep.Jason.Grenn@akleg.gov

REPRESENTATIVE JASON GRENN

On November 26th, Governor Walker signed into law Senate Bill 54, a move intended to address issues with Senate Bill 91, the sweeping crime reform bill passed in 2016.

SB 91 still isn't in full effect; its third phase will be rolled out in January of 2018. However, SB 54 was a necessary first step in returning some important tools to the law enforcement community. I believe it strikes a right balance with the concepts that underlie criminal justice reform, while ensuring law enforcement and prosecutors have the tools they need to address crime in our neighborhoods.

So, what exactly did SB 54 change? Here's a breakdown:

- Class C Felonies – SB 54 changed the sentencing ranges for C felonies. First offenses changed from a probationary sentence to a term of 0 to 2 years of jail. Second felony offenses changed from 1 to 3 years to 1 to 4 years. Third class C felony offenses remain unchanged. Due to these changes, courts should be more willing to hold offenders on bail for a first C felony conviction because the sentence can include active jail time.
- Theft in the Fourth Degree – SB 54 created a new sentencing structure for theft of property valued at less than \$250. For a first conviction, a court is authorized to sentence a person for up to five days of jail time. For a second conviction, the sentence can be up to 10 days and for a third conviction, up to 15 days. On a fourth conviction, the offense is upgraded to a class A misdemeanor, which under most circumstances will be punishable by up to 30 days of jail time.
- Joy Riding Provisions – SB 54 changed the level of the mental state required to convict someone of riding in a stolen car from “knowing” to “criminal negligence”.
- Violating Conditions of Release – SB 54 returned the offense to a misdemeanor, punishable with up to five days of jail time. Returning this offense to a misdemeanor clarifies for judges and law enforcement alike that a person may be arrested and held until bail is set on the new offense.
- Mandatory Probation for Sex Offenders – SB 54 reestablished a mandatory period of probation for sex offenders. Convicted sex offenders who committed sex offenses considered unclassified felonies will now face 15 years of probation, while Class A and B felonies will receive 10 years' probation and Class C felonies receive five.
- Sex Trafficking Adjustments – Senate Bill 54 amends statutes to help ensure that those who profit off of other sex workers can actually be held accountable as sex traffickers.

Attached is a complete list of changes made in SB 54 and the Department of Justice's in-depth analysis of SB 54. If you have any questions, please feel free to contact me at Rep.Jason.Grenn@akleg.gov or 907-269-0234.

Regards,

Representative Jason Grenn

Alaska Criminal Justice Commission
SB54 Comparison Summary Table

November 9, 2017

Sec. No.	SB 54 Effect	Compared to Senate CS (Ver. C.)	Compared to SB 91
Legislative Intent/Training for Law Enforcement			
1	Intent that the Criminal Justice Commission work with Dept. of Public Safety and local law enforcement to offer statewide training sessions on criminal justice reform	Not in Senate version	N/A
Crimes & Sentences			
2	Lowers felony theft threshold to \$750 from \$1000	Not in Senate version	SB 91 raised the level for non-burglary theft crimes from \$750 to \$1000 (Commission recommendation) Reference SB 91 Sec. 6-15, 8-23.
3	Creates a new Recidivist Theft 3 (an A misdemeanor). A person who is convicted and sentenced of a fourth Theft 4 (value less than \$250, a B misdemeanor) within five years commits Theft 3.	Not in Senate version	SB 91 repealed a similar provision regarding a third Theft 4 (Commission recommendation) Reference SB 91 Sec. 179
4	Creates a new Recidivist Concealment of Merchandise 3 (A misdemeanor). A person convicted and sentenced for a fourth Concealment 4 (value less than \$250, a B misdemeanor) within five years commits Concealment 3.	Not in Senate version	SB 91 repealed a similar provision regarding a third Concealment 4 (Commission recommendation) Reference SB 91 Sec. 179
5	Lowers felony threshold to \$750 from \$1000 (Removal of Identification Marks)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
6	Lowers felony threshold to \$750 from \$1000 (Unlawful Possession)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
7	Lowers felony threshold to \$750 from \$1000 (Issuing a Bad Check)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
8	Lowers felony threshold to \$750 from \$1000 (Fraudulent Use of an Access Device)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
9	Lowers felony threshold to \$750 from \$1000 (Vehicle Theft)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
10	Lowers felony threshold to \$750 from \$1000 (Criminal Mischief 3)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
11	Lowers felony threshold to \$750 from \$1000 (Criminal Mischief 4)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
12	Alters the mental state for Criminal Mischief 5 when the conduct is joyriding: offender now must "disregard" with "criminal negligence" the fact that the vehicle is stolen rather than know the vehicle is stolen	Not in Senate version	N/A
13	The sentence for all degrees of Criminal Mischief that involve damage to public or private property must complete at least 25 hours of community service	Not in Senate version	N/A
14	Lowers felony threshold to \$750 from \$1000 (Criminal Simulation)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
15	Lowers felony threshold to \$750 from \$1000 (Misapplication of Property)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
16	Lowers felony threshold to \$750 from \$1000 (Defrauding Creditors)	Not in Senate version	SB 91 raised the level from \$750 to \$1000 (Commission recommendation)
17	Lowers felony threshold to \$750 from \$1000 for purposes of calculating the inflation adjustment	Not in Senate version	SB 91 raised the level from \$750 to \$1000 and created an automatic mechanism to adjust the thresholds every 5 years for inflation (Commission recommendation) Reference SB 91 Sec. 25.

18	Lowers felony threshold to \$750 from \$1000 for purposes of calculating the inflation adjustment	Not in Senate version	SB 91 raised the level from \$750 to \$1000 and created an automatic mechanism to adjust the thresholds every 5 years for inflation (Commission recommendation) Reference SB 91 Sec. 25.
19	Returns Violations of Conditions of Release (VCOR) to a crime (a B misdemeanor) (See Section 36 for sentencing info)	Same	Made VCOR an arrestable violation punishable by a fine up to \$1000 (Commission recommendation) Reference SB 91 Sec. 29-31, 51.
20	Classifies VCOR as a B misdemeanor	Same	Before SB 91, VCOR was a Class A misdemeanor if the defendant was out on bail from a felony, and was a Class B misdemeanor if the defendant was out on bail from a misdemeanor.
21	Alters elements of Sex Trafficking 3	Same	SB 91 altered the elements of sex trafficking to clarify that it is not sex trafficking when a person has not caused another person to engage in prostitution but they are working in the same location (not a Commission recommendation) Reference SB 91 Sec. 37-39.
22	Alters elements of Sex Trafficking 4	Same	[see 21 above]
23	Defines "compensation" for purposes of Sex Trafficking statutes	Same	N/A
24	Amends schedule IA to include U-47700	Not in Senate version	N/A
25	Amends schedule IVA to include mixtures, compounds, etc. of tramadol and related substances	Not in Senate version	N/A
32	Amends Class A felony sentencing with a carve-out for for 1 st time felonies if conduct was directed at law enforcement/EMS; new range is 7-11 years	Not in Senate version	Reduced the carve-out for conduct directed at first responders from 7-11 years to 5-9 years, as part of the realignment of presumptive terms. (Commission recommendation) Reference SB 91 Sec. 88-90.
33	Amends Class C felony sentencing: 1 st felony: 0-2 years (was 0-18 months suspended) 2 nd felony: 1-4 years (was 1-3) 3 rd felony: 2-5 years (same) Removes sentencing provisions for felony DUI/Refusal Note: 1 st felony range for Class C is now the same as 1 st felony range for Class B.	1 st felony conviction for Class C: 0-1 year; no other changes	Changed C felony sentences: 1 st felony: 0-18 months suspended with probation supervision (was 0-2 years) 2 nd felony: 1-3 years (was 2-4) 3 rd felony: 2-5 years (was 3-5) (Commission recommendation) Reference SB 91 Sec. 90.
35	Adds posting an explicit image of a minor on a public web site (AS 11.61.116(c)(2)) to SB 91's list of exceptions that allow for up to a 1 year sentence for a Class A misdemeanor	Also created a half-step for people convicted of a second similar offense (60 days); this was removed in the House version.	SB 91 made many first-time Class A misdemeanors punishable by 0-30 days (down from 0-1 year) "Exceptions (sentence remains at 0-1 year): Assault; Sexual Assault 4; Sexual Abuse of a Minor 4; Indecent Exposure 2 if the victim is under 16; Harassment 1; any crime with a mandatory minimum of 30 days or more; any situation where the offense was the most serious conduct included in the definition of the offense. Also created a provision that allows a sentence of up to 1 year if the defendant had previous convictions for similar conduct. (Commission recommendation) Reference SB 91 Sec. 91."
36	5 days maximum sentence for Violations of Conditions of Release (VCOR)	Same	VCOR changed from a misdemeanor (A or B) punishable by up to 1 year or 90 days, to a violation punishable by a fine of \$1000. SB 91 gave law enforcement officers the authority to arrest defendants violating the conditions of release so they could be brought before a judge for a bail review hearing. (Commission recommendation) Reference SB 91 Sec. 29-31, 51.
37	Amends sentencing for property crimes under \$250: 1st: max 5 days active/6 months probation 2nd: max 10 days active/6 months probation 3rd: max 15 days active/6 months probation	1st: max 5 days suspended/6 months probation 2nd: max 5 days active/6 months probation 3rd: max 10 days active/6 months probation	SB 91 reduced the penalties to: 1st: no jail, fine up to \$2000, and restitution available 2nd: no jail, fine up to \$2,000, and restitution available 3rd: max 5 days suspended/6 months probation, fine up to \$2,000, restitution available. (Commission recommendation) Reference SB 91 Sec.

38	Creates look-back provisions for determining prior convictions for A misdemeanor sentencing (similar to provisions for felonies).	Same	N/A
39	Alters definition of sex offense to align with revision to Sex Trafficking 3 in sec. 21	Same	N/A
42	Makes Driving Without a Valid License (DVOL) an infraction	Same	N/A
65	Alters definition of "illegal activity involving a place of prostitution" to align with revision to Sex Trafficking 3 in sec. 21	Same	N/A
72	Repealed: provisions regarding sex trafficking	Same	SB 91 amended the sex trafficking statutes (see sec. 21)
Pretrial Process			
26	Amends class of persons who may be detained for an additional 48 hours to give the prosecuting attorney time to demonstrate that any conditions of release would not reasonably ensure appearance or public safety. Included are anyone charged with certain Class C felonies (person, FTA, DUI, Refusal, Sex), and anyone charged with any Class C felony who is assessed as moderate or high risk (eff. 1/1/18)	Not in Senate version	Excluded anyone charged with a Class C felony who was assessed as low risk (not a Commission recommendation) Reference SB 91 Sec. 55.
27	Bail schedule must include a condition that DOC must breathalyze anyone about to be released after making bail release; DOC and may detain anyone above a .08 or release them to a person willing to take them. (Eff. 1/1/18)	Not in Senate version	N/A
45	Amends pretrial assessment provision so that the new pretrial program does not have to assess those who are not in custody unless the prosecutor requests it	Same	SB 91 created the new pretrial program. (Commission recommendation) Reference SB 91 Sec. 117 (eff. 1/1/18).
78	Effective date for pretrial items is 1/1/18		
Parole, Probation & Post-Conviction EM			
28	Removes reference to administrative parole	Not in Senate version	SB 91 created administrative parole for a limited group of prisoners who met the requirements of their case plan. Available to misdemeanants; and first-time, non-sex, non-person Class B or C felonies serving at least 181 days. These prisoners could be released by the parole board after serving at least ¼ of their term, a mandatory minimum, or any period of ineligibility imposed by a judge, without a hearing unless the victim requested a hearing. (Commission recommendation) Reference SB 91 Sec. 122.
29	Clarifies that no one can be released on EM post-conviction, pre-sentencing if they are ineligible for release under 12.30.040(b)	Not in Senate version	N/A
30	A defendant convicted of a non-sex, non- DV Class C felony may be recommended for early discharge from probation after 18 months (previously 1 year)	Not in Senate version	SB 91 created early discharge provision: PO shall recommend early discharge from probation after 1 year for defendants convicted of non-sex, non- DV Class C felonies if they have completed all probation requirements. (Commission recommendation) Reference SB 91 Sec. 81, 115, 143, 144. [Also those convicted of A and B felonies are eligible after 2 years. No unclassified felonies, sex felonies, or DV felonies are eligible.]
31	Removes reference to administrative parole	Not in Senate version	SB 91 created administrative parole (see section 28 above)

34	Requires a minimum probation term with suspended time for sex felonies: Unclassified: 15y probation/5y suspended A or B: 10y probation/3y suspended C: 5y probation/2y suspended	Same	SB 91 changed the maximum probation term for all sex offenses to 15 years (was 25 years) (Commission recommendation) Reference SB 91 Sec. 79.
43	Amends the earned compliance credit provision so that anyone convicted of a sex offense or DV offense must complete all treatment programs required as a condition of probation before being discharged based on earned credits.	Not in Senate version	SB 91 created earned compliance credits – felony probationers and parolees are incentivized to fully comply with all terms of supervision by the ability to earn 30 days of credit against their total term of supervision for each 30-day period served in full compliance. (Commission rec) Reference SB 91 Sec. 114, 151
44 80	Maximum caseload for probation/parole officers must not exceed an average of 75 except in temporary or extraordinary circumstances (eff. 7/1/19).	Not in Senate version	N/A
46- 52	Removes references to administrative parole	Not in Senate version	SB 91 created administrative parole (see section 28 above)
53	Amends discretionary parole hearing procedure to remove references to scheduling the next hearing 2 years after parole is denied.	Same	SB expanded discretionary parole eligibility and amended the procedure to provide that the Parole Board may schedule an inmate's next review hearing 2 years after denying parole. (Commission rec) Reference SB 91 Sec. 123-128, 133
54- 62	Removes references to administrative parole	Not in Senate version	SB 91 created administrative parole (see sec 28 above)
63	Amends the earned compliance credit provision so that anyone convicted of a sex offense or DV offense must complete all treatment programs required as a condition of parole before being discharged.	Not in Senate version	SB 91 created earned compliance credits (see sec 43 above)
64	Adds a subsection that a prisoner serving time at a private residence when EM is not available does not have a liberty interest in that status, and may be returned to prison if the prisoner violates the conditions of imprisonment.	Same	SB 91 requires DUI/Refusal offenders to serve their sentences on EM (instead of at a CRC), or if EM is not available, at a private residence by other means approved by DOC. (Commission rec) Reference SB 91 Sec. 107, 110
67	Removes reference to administrative parole	Not in Senate version	SB 91 created administrative parole (see sec 28 above)
Alaska Criminal Justice Commission Membership & Duties			
41	Requires study of risk factors for criminal activity among inmates to be conducted by Alaska Judicial Council if the Commission sunsets before 2025 (see Sec. 68 below)	Not in Senate version	N/A
66	Adds DHSS Commissioner to the ACJC (nonvoting)	Not in Senate version	N/A
68- 70, 73- 74, 76, 81- 83	Requires Commission, in consultation with DOC, AJC, and UAA Justice Center, to study inmate risk factors related to criminal activity, and to including a summary and analysis in the Commission's annual report. Note: the study ends Feb. 14, 2025. If the Commission sunsets before that date, the Alaska Judicial Council assumes responsibility	Not in Senate version	N/A
Alcohol Safety Action Program			
71 77 79	Expands Alcohol Safety Action Program (ASAP) to include any case involving alcohol or a controlled substance, including Minor Consuming Alcohol, eff. July 1, 2018. Conditional effect: expansion occurs only if ASAP receives increased funding for FY ending June 30, 2019.	Expanded ASAP to include cases involving MICS 4	The Commission recommended either expanding funding for ASAP or restricting eligibility so the program would be more effective. SB 91 restricted eligibility to DUI/Refusal cases.
Violent Crimes Compensation Board			
40	Alters application of Violent Crimes Compensation Board statute to align with revision to Sex Trafficking 3 in sec. 21	Same	N/A

Question? Corrections? Additions? Please contact Barbara Dunham, Alaska Criminal Justice Commission project attorney

(bdunham@ajc.state.ak.us), or Susanne DiPietro (sdipietro@ajc.state.ak.us) or call 279-2526.



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

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November 22, 2017

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

Re: Crimes, Sentencing,
Probation, and Parole: HCS
CSSB 54(FIN) am H
Our file: JU2017200760

Dear Governor Walker:

At the request of your legislative director, we have reviewed HCS CSSB 54(FIN) am H.¹ The bill relates to criminal law and sentencing; for clarity we have organized our review into the following subject areas for a more detailed analysis:

- I. Offenses
- II. Bail
- III. Sentencing
- IV. Probation and parole
- V. Miscellaneous.

I. Offenses (*immediate effective date, applicable to conduct occurring on or after the effective date of the bill*).

This bill would make several changes to certain elements of offenses or the classification of offenses already in existence. The bill also criminalizes certain conduct by adding two new substances to the list of controlled substances.

¹ In this letter, we will refer to HCS CSSB 54(FIN) am H as "Senate Bill 54" or "the bill."

A. Theft.

The bill would lower the threshold for felony property crimes under AS 11.46 from \$1,000 to \$750. The bill also lowers the mental state for criminal mischief in the fifth degree² from “knowingly” to “criminal negligence.”³ Fifth-degree criminal mischief occurs when the offender is a passenger in a stolen vehicle (*i.e.*, joyriding). The reduction in the mental state will likely hold more offenders accountable who participate in vehicle theft operations, but who are not the person who has actually taken the vehicle.

B. Sex Trafficking.

Last year’s omnibus crime bill, Senate Bill 91 (Ch. 36, SLA 2016), created circumstances in the law which allowed a person to operate a place of prostitution and avoid prosecution for sex trafficking if the person also practiced prostitution themselves in that location unless they induce or cause another person to engage in prostitution. Legislative history suggests that these earlier provisions were enacted to prevent the state from prosecuting cooperatives of independent sex workers working in the same location.

Senate Bill 54 would amend the sex trafficking statutes to focus the statutes on individuals who receive compensation for prostitution services rendered by another while specifically excluding situations in which a person receives payment for “reasonably apportioned shared expenses.”⁴ Thus, Senate Bill 54 would codify the original legislative intent while at the same time ensuring that those who profit off of sex workers are held accountable for their conduct.

C. Drugs.

The bill adds two new substances to the list of controlled substances. The synthetic opioid U-47700 (known as “pink”) is added as a schedule IA controlled substance and Tramadol is added as a schedule IVA controlled substance. The addition of these substances criminalizes the illicit distribution and possession of these substances.

² Bill sec. 12, amending AS 11.46.486(a) (3).

³ Under current law, a person acts with “criminal negligence” “when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation [that, for example, a vehicle was a stolen vehicle].” (AS 11.81.900(a)(4))

⁴ Bill sec. 23, amending AS 11.66.150.

D. Violating Conditions of Release.

The bill (sec. 19) would return the offense of violation of condition of release to a misdemeanor. Last year's omnibus crime bill, Senate Bill 91 (Ch. 36, SLA 2016), reduced the offense of violation of conditions of release to a violation punishable by only a fine. The 2016 change created confusion in the court system and law enforcement agencies over the ability to arrest and hold a person who violated their conditions of bail. Returning this offense to a misdemeanor, punishable by up to five days of imprisonment, clarifies the mechanism for judges and law enforcement alike that a person may be arrested and held until bail is set on the new offense. This will allow the person's conduct to be addressed immediately while allowing a bail hearing in the underlying case to be set at a later date.

E. Driving Without a Valid License.

Senate Bill 54 reduces the offense of driving without a valid license (sec. 42) from a misdemeanor to an infraction punishable by up to a \$300 fine under AS 28.90.010.

II. Bail (*effective January 1, 2018, applicable to offenses committed on or after the effective date*).

The bill would make various changes to the bail statutes and responsibilities of the pretrial services program established within the Department of Corrections. The provisions related to sober release and risk assessments are effective January 1, 2018. If the bill is signed after that date, they will be effective at 12:01 a.m. the day after the bill is signed.⁵

A. Sober Release.

Section 27 of the bill would amend AS 12.30.011 to direct that if the Alaska Supreme Court establishes a schedule of bail amounts or conditions of release for misdemeanor offenses, the schedule must include a condition that the correctional facility shall conduct a chemical breath test of an individual in custody who is arrested and intoxicated and either (1) detain that person until the person's breath has less than .08 grams of alcohol for each 210 liters of breath; or (2) release the person to another person who is willing and able to provide care for the individual.

During legislative hearings, a representative of the Alaska court system testified that this provision may be void because the bill does not include a provision to amend a

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AS 01.10.070.

court rule.⁶ Under the Alaska Constitution, the Alaska Supreme Court “shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts.”⁷ The legislature may change court system rules of practice and procedure by a “two-thirds vote of the members elected to each house.”⁸ However, where a provision of law does not conflict with current court rules, it is not necessary for the legislature to amend court rules with a two-thirds vote.⁹ While a direct conflict between a statute and a court rule may require a direct court rule amendment,¹⁰ where a statute serves to indirectly amend a court rule and the legislature fails to adopt a court rule change, both the statute and the court rule remain valid.¹¹ In the event of a conflict, the court rule may control (further, the court system may choose to amend the court rule to reconcile with a conflicting statutory provision). Here, we do not believe that sec. 27 of the bill directly conflicts with current court rules; therefore, we do not believe this provision is likely to be found to have no effect.

As noted above, sec. 27 of Senate Bill 54 requires the Alaska Supreme Court to include a provision related to the creation of a misdemeanor bail schedule. This is a procedural matter. The applicable court rule – Rule 41, Rules of Criminal Procedure – generally cites to AS 12.30.006 – 12.30.080. Criminal Rule 41(d) also specifies what *must* be contained in any bail schedule. Because section 27 of Senate Bill 54 directs a provision to be added to the bail schedule and Criminal Rule 41 also provides what must be in the bail schedule, sec. 27 has an indirect effect on Criminal Rule 41. In our view, since the courts draw their authority from both statute and court rules, we believe sec. 27 of Senate Bill 54 can be read harmoniously with Criminal Rule 41(d). The court may look to both sec. 27 of Senate Bill 54 and Criminal Rule 41 for direction on what conditions will be made a part of any bail schedule.

⁶ Testimony by Nancy Meade, before the Senate Finance Committee, November 10, 2017, at 10:18:01 a.m.

⁷ Art. IV, sec. 15, Constitution of the State of Alaska.

⁸ *Id.*

⁹ *Stiegele v. State*, 685 P.2d 1255, 1259 (Alaska App. 1984).

¹⁰ See, *Mund v. State*, 325 P.3d 535 (Alaska App. 2014) (to resolve a conflicting procedural court rule and statute; the court of appeals invalidated the statutory subsection in conflict with the procedural court rule).

¹¹ *Galbraith v. State*, 693 P.2d 880, fn. 5 (Alaska App. 1985), see also *Manual of Legislative Drafting*, Legislative Affairs Agency, p. 50 (2017); <http://akleg.gov/docs/pdf/DraftingManual.pdf>.

B. Release Pending Sentencing.

Alaska Statute 12.30.040 requires an offender to be remanded to jail when convicted of certain crimes, including an unclassified felony, class A felony, sexual felony, class B felony if the person has been previously convicted of a similar offense, or a felony crime against a person and the defendant has been found to be guilty but mentally ill. The bill would amend AS 12.55.027 (sec. 29) to clarify that remand is required and cannot be satisfied by release on electronic monitoring under AS 12.55.027.

C. Risk Assessment.

Starting January 1, 2018, Senate Bill 91 (Ch. 36, SLA 2016) requires all defendants to undergo a pretrial risk assessment, which will assist judges in establishing bail and release conditions. Senate Bill 54 narrows the group of persons to be assessed to only those offenders who are detained in custody (who are not released on their own recognizance or who post bail per the bail schedule) or for whom the prosecution requests an assessment. Therefore, if a person is released prior to arraignment, the Department of Corrections will not prepare a pretrial risk assessment unless the prosecution requests it.

III. Sentencing (*Immediate effective date, applicable to conduct occurring on or after the effective date*).

The bill would also make a number of changes to both the felony and misdemeanor sentencing laws.

A. Class C Felonies.

The bill would change the presumptive sentencing ranges for class C felonies. For a first felony offense the range is changed from a probationary sentence to a term of 0 - 2 years of jail. For a second felony offense, the class C felony range is changed from 1 - 3 years to 1 - 4 years. The range for a third class C felony offense remains unchanged. Further, the bill would not change the presumptive sentencing ranges for class B felony offenses. Under current law, the range for a first felony offender convicted of a class B felony offense is also 0 - 2 years. Second felony offenders convicted of a class B felony offense face a sentencing range of 2 - 5 years. Thus, under the changes found in Senate Bill 54, the sentencing range for a first time class C and class B felony offense would be the same. It is likely that an affected offender will challenge the legality of this sentencing framework. However, such a change is both well within the Legislature's prerogative and is likely constitutionally sound if challenged.

Neither the Alaska Constitution nor the United States Constitution requires strict proportionality of minimum sentences. *See Green v. State*, 390 P.2d 433, 435 (Alaska 1964). The Alaska Supreme Court has expressly declined to hold that, a sentencing scheme where a higher level offense may conceivably be sentenced to a lower term of

incarceration than a lower level offense, constitutes an infliction of cruel and unusual punishment or an infringement of the due process clause in any respect. *Id.* It is well established that it is the legislature, and not the judiciary, that determines the punishment for a particular offense. *See Alex v. State*, 484 P.2d 677, 685 (Alaska 1971). For this reason, “generally speaking, a criminal defendant cannot challenge the legislature’s assessment of the proper penalty range for a particular offense.” *State v. Morgan*, 111 P.3d 360, 365 (Alaska App. 2005). “The comparative gravity of offenses and their classification and resultant punishment is for legislative determination.” *Alexie v. State*, 229 P.3d 217, 219, 221 (Alaska App. 2010). Thus while it would have been preferable to avoid litigation over this issue, the statute will likely survive any constitutional challenge.

B. Special Circumstances.

Additionally, the bill would increase the sentencing range for a first time class A felony when the conduct is directed at a first responder from 5-9 to 7-11 years.¹²

C. Theft in the Fourth Degree.

Next, the bill would create a new graduated sentencing structure for theft in the fourth degree; theft of property valued at less than \$250. Upon a person’s first conviction, a court is authorized to sentence a person to a period of incarceration of up to 5 days. Upon the second conviction, the person may be sentenced to a period of incarceration of up to 10 days, and upon the third conviction, the person may be sentenced up to 15 days. Upon the person’s fourth conviction, the offense is upgraded to a class A misdemeanor (theft in the third degree), which under most circumstances will be punishable by up to 30 days of imprisonment.

D. Community Work Service for Criminal Mischief.

The bill creates a mandatory 25 hours of community work service as a part of their sentence for a person convicted of criminal mischief in any degree.

E. Lookback Periods for Misdemeanors.

Because certain sections of Senate Bill 91 (Ch. 36, SLA 2016) established enhanced penalties for misdemeanors based on prior convictions, the legislature added a five year lookback period for misdemeanors in Senate Bill 54. Therefore, when counting prior convictions for the purpose of enhancing a penalty for a misdemeanor, a prior conviction may not be counted if a period of five years has elapsed between the person’s

¹² A first responder would include a “uniformed or otherwise clearly identified peace officer, firefighter, correctional employee, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense.” (AS 12.55.125(c))

unconditional discharge of the prior offense and the commission of the new offense. If the offense immediately preceding the new offense is an unclassified or class A felony and qualifies as an applicable prior conviction, the court may go beyond the five years and count the prior convictions regardless of how old they are.

F. Authority of the Commissioner to Return Person to Correctional Facility (*Immediate effective date*).

In 2016, Senate Bill 91(Ch. 36, SLA 2016) required a person to serve their period of imprisonment for a first conviction of driving while under the influence on electronic monitoring or, if electronic monitoring is not available, at a private residence by other means determined by the commissioner of corrections. Section 64 of Senate Bill 54 would clarify that even though the person is statutorily required to serve their sentence outside of a correctional facility, this does not create a liberty interest. If the person violates the terms and conditions of the imprisonment at a private residence, the commissioner of corrections has the authority to return the person to a correctional facility.

IV. Probation and Parole.

A. Early Termination (*Immediate effective date, probation ordered for offenses committed on or after the effective date*).

Under current law, probation officers are required to recommend early termination of probation when a person has been on probation for one year for most class C felony offenses, successfully completed all treatment programs, has not violated any conditions of probation, and is currently in compliance with all conditions of probation. The court may not terminate probation unless the victim has been given an opportunity to be heard and the court has considered any input from the victim. The bill before you, Senate Bill 54, would change the period in which the probation officer must recommend early termination from one year to 18 months for these class C felony convictions. All other conditions mentioned above remain the same.

B. Mandatory Probation for Sex Offenders (*Immediate effective date for offenses committed on or after effective date*).

In an apparent oversight, Senate Bill 91(Ch. 36, SLA 2016) eliminated the statutory provision requiring sex offenders to serve a period of probation. Here, Senate Bill 54 would reinstate mandatory probation for sex offenders by establishing a period of probation of 15 years for an unclassified felony, 10 years for a class A or class B felony, and five years for a class C felony. These are the same terms of probation that were in existence prior to the enactment of Senate Bill 91(Ch. 36, SLA 2016).

C. Earned Compliance Credits for Sex Offenders and DV Offenders
(Immediate effective date, for offenses committed on or after the effective date).

Previously, Senate Bill 91 (Ch. 36, SLA 2016) created a new method for early discharge from probation or parole by reducing the period of probation or parole by 30 days for every 30-day period that the person goes without violating a probation condition. This program has become known as the “earned compliance credit program”. Here, Senate Bill 54 would require a person convicted of a sex offense or a crime involving domestic violence to complete all treatment programs before being discharged from probation or parole due to the accrual of earned compliance credits.

D. Administrative Parole Repealed.

In 2016, a new parole procedure referred to as “administrative parole” was enacted through Senate Bill 91 (Ch. 36, SLA 2016). Administrative parole eliminated both the requirement for an inmate to apply for discretionary parole and the review conducted by the parole board. Instead, it automatically granted parole for offenders convicted of misdemeanors, class B, and class C felonies that are not sex offenses or offenses against a person under AS 11.41. Before administrative parole could be granted the inmate had to have served at least one-fourth of the active jail sentenced imposed and met the requirements of their case plan. Senate Bill 54 repeals administrative parole. An inmate remains eligible for discretionary parole as allowed by law.

E. Timing of Discretionary Parole Hearings.

In 2016, Senate Bill 91(Ch. 36, SLA 2016) established guidelines as to how often the parole board should schedule subsequent hearings after an initial denial of an offender’s discretionary parole application. Prior to this provision, the parole board had discretion in scheduling additional discretionary parole hearings as necessary, and had a policy that no discretionary parole applicant could be prohibited from reapplying for discretionary parole for a period of more than ten years. This bill would eliminate the language suggesting that the parole board hold hearings every two years after an initial denial thereby restoring discretion in scheduling additional discretionary parole hearings to the parole board.

F. Alcohol Safety Action Program (ASAP).

The ASAP is designed to provide substance abuse screening, referrals, and monitoring of persons convicted of a misdemeanor involving alcohol. However, Senate Bill 91 (Ch. 36, SLA 2016) limited ASAP referrals to only those convicted of driving under the influence, refusal to take a breath test, and for a minor consuming alcohol, but altered the type of screenings to use a “validated risk tool” and structure the level of monitoring to the level of re-offense determined by the risk tool. Here, Senate Bill 54

would leave the use of the risk tool in place but expand the program to include persons charged or convicted of a misdemeanor involving the use of alcohol or a controlled substance.

The expansion of the program will likely require additional funding. To that end, the legislature has made this provision conditioned upon an appropriation that is 50 percent greater than the appropriation the program received in fiscal year 2018. If that condition is met, this section will be effective on July 1, 2018.

V. Miscellaneous Provisions.

A. Probation and Parole Caseloads (*Immediate effective date*).

The bill would establish an average caseload for probation and parole officers of 75 except in temporary and extraordinary circumstances approved by the commissioner. It is unclear what the practical effect of this provision will be as it is an entirely new concept for probation and parole officers.

B. Studies, Training and Alaska Criminal Justice Commission Membership.

The bill would require the Alaska Criminal Justice Commission, Department of Corrections, and the University of Alaska Justice Center to work together on studying risk factors related to criminal activity, the prevention of crime, and improving crime prevention strategies. This section is effective immediately, but must be implemented by June 30, 2019.

The bill also includes intent language requesting that the Alaska Criminal Justice Commission to work with the Department of Public Safety and other law enforcement agencies to conduct informational sessions which include information on crime trends, the costs to the correctional system, and successful criminal justice reforms. This section is effective immediately.

In addition to the above provisions, Senate Bill 54 gives the commissioner of the Department of Health and Social Services a seat on the Alaska Criminal Justice Commission. The commissioner will be a nonvoting member. This section is also effective immediately.

Our review of HCS CSSB 54(FIN) am H has not identified any additional constitutional or legal concerns, except as noted above. However, the bill is complex and contains varying effective dates; therefore there may be questions about implementation issues not yet apparent. We expect that those issues, if any, will be resolvable.

Hon. Bill Walker, Governor
Our file: JU2017200760

November 22, 2017
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Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By:


Robert Henderson
Director, Criminal Division