Department of Law

CRIMINAL DIVISION

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June 26, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: HB 49: Omnibus Criminal Law and Procedure; Corrections (CCS HB 49)
Our file: 2019200459

Dear Governor Dunleavy:

At the request of your legislative director, we have reviewed CCS HB 49 related to criminal law and procedure.[1] The bill covers many aspects of criminal law and procedure; we address the subject areas in this order:

I. Provisions related to the criminal code.
II. Provisions related to bail and pretrial release.
III. Provisions related to sentencing.
IV. Provisions related to probation and parole.
V. Miscellaneous provisions.

I. Provisions related to the criminal code (AS 11 and AS 28).

HB 49 amends the elements of a number of crimes, increases the classification of other offenses, and creates several new crimes. *All of these changes take effect July 1, 2019 and will apply to offenses committed on or after the effective date.*

New and amended crimes.

1. Misconduct involving a controlled substance (drug offenses) ***(secs. 48 - 55)*****.**

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1 In this letter, we will refer to HB 49 as "HB 49" or "the bill."

In 2016, SB 91[2] altered Alaska's laws on illegal drugs in three primary ways; it

(1) reduced the classifications of both drug distribution and drug possession offenses;
(2) introduced a weight threshold to the crimes of distribution; and
(3) eliminated a number of enhanced sentencing provisions which were related to combatting the manufacture of methamphetamine.

HB 49 returns Alaska law relating to the distribution of illegal drugs to its pre-SB 91 form by

(1) increasing the classification of crimes related to drug trafficking and re-instating a class A felony level offense for distributing schedule IA controlled substances (e.g. heroin);
(2) eliminating the weight threshold for determining the level of drug distribution offenses; and
(3) re-instating the enhanced sentencing provisions used to combat the manufacture of methamphetamine.

This effectively restores the analysis for determining the seriousness of the distribution in place before SB 91. That analysis 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. 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

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2 We refer to ch. 36, SLA 2016, enacted in the 29th Alaska State Legislature as "SB 91."

> 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.[3]

Under SB 91 drug possession was reduced from a class C felony to a class A misdemeanor. Drug possession sentencing was further reduced by eliminating active jail time and restricting the sentencing to probation-only for the first two offenses. Though a first offense remains a misdemeanor, HB 49 eliminates the sentencing restrictions on a first drug possession offense. Thus the sentence would now be 0 - 365 days for a first offense. A second offense within 10 years would be a C felony.

2. Property crimes.

HB 49 makes a number of changes to the state's property offenses. It repeals the automatic inflation adjustment enacted by SB 91, criminalizes theft of an identification document, possession of motor vehicle theft tools, and provides for an additional method for aggregating property offenses.

a. Inflation proofing *(secs. 16 - 23, 25, and 27 - 32)*.

SB 91 enacted an automatic inflation increase of the monetary thresholds for all property crimes. This increase is determined by the Alaska Judicial Council "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."[4] The Judicial Council is due to make this adjustment every five years. The first adjustment is scheduled for July 1, 2020. The elimination of the automatic inflation adjustment, proposed in HB 49, means legislative action will be required to adjust the monetary thresholds for the levels of property crimes. This ensures adequate public notice and involvement in determining the level of offenses.

b. Theft of identification documents *(secs. 16 and 23)*.

An identification document is an item used to establish identity such as a driver's license, passport, or employee identification.[5] HB 49 criminalizes the theft of an identification document as a class C felony. It also adds the fraudulent use of an identification document to obtain property or services to the crime of fraudulent use of an

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

4 AS 11.46.982.

5 *See* AS 11.81.900(31).

access device.[6] Under HB 49, the class C felony level threshold for fraudulent use of an access device or identification document is also lowered from $750 to $75.

c. Possession of motor vehicle theft tools *(sec. 26).*

HB 49 creates a new crime for possession of motor vehicle theft tools. This crime occurs when a person possesses certain items, other than the original keys, commonly used to open locked vehicles or start vehicles. The possession of those items must be with the intent to steal a vehicle or contents of a vehicle before the possession is criminalized. Possession of motor vehicle theft tools is a class A misdemeanor.

This crime is similar to the crime of possession of burglary tools, which are tools used to commit burglaries.[7]

d. Aggregation of amounts *(sec. 33).*

HB 49 allows property offenses to be aggregated (values of each individual property offense added together) and charged as a higher level offense if the individual offenses occurred within a period of 180 days.

3. Failure to appear *(secs. 36 - 37).*

In 2016, SB 91 amended the crime of failure to appear by creating a new violation-level offense, punishable by a fine of up to $1,000. This violation occurs when a defendant fails to appear at a hearing but contacts the court within 30 days of failing to appear. This essentially created a 30-day grace period when the person would only be guilty of a violation. If the defendant failed to appear with the intent to avoid prosecution in the underlying case or failed to appear for more than 30 days, they would be guilty of a crime.

HB 49 returns the law to pre-SB 91 law and eliminates the 30-day grace period. Therefore, a person who knowingly fails to appear for a hearing in a criminal prosecution commits the crime of failure to appear (AS 11.56.730).

4. Violating conditions of release *(sec. 38).*

A person violates conditions of release if they have been charged with a crime, released on bail, and violate a condition that has been imposed by the court as a condition

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[6] AS 11.46.285.

[7] AS 11.46.315.

of bail.[8] In 2016, SB 91 made all offenses of violating conditions of release a violation with a maximum fine of $1,000. SB 54[9] in 2017, made violating conditions of release a class B misdemeanor punishable by up to five days in jail.

HB 49 returns violating conditions of release to pre-SB 91 law making it 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. The authorized sentence is 0 - 365 days of jail for a class A misdemeanor and 0-90 for a class B misdemeanor.

5. Escape ***(secs. 34 - 35).***

The bill changes escape statutes in four ways. First, it fills a gap in our escape laws by adding juveniles who are under the jurisdiction of the Department of Health and Social Services to the escape statutes when the juvenile leaves a residence or other place where the juvenile is in custody and under electronic monitoring. This is already a crime for those under the jurisdiction of the Commissioner of the Department of Corrections.

Second, the bill increases the classification of leaving a residence or other place where the person is in custody for a misdemeanor and under electronic monitoring, from a class A misdemeanor to a class C felony.

Third, the bill increases the classification of tampering or disabling an electronic monitoring device while under official detention for a misdemeanor from a class A misdemeanor to a class C felony.

Finally, the bill makes it a class C felony to tamper with or disable an electronic monitoring device that has been ordered by a judicial officer as a condition of release before trial.

6. Generalized threat statute ***(sec. 39).***

Terroristic threatening in the second degree criminalizes knowingly making a *false report* that a circumstance dangerous to human life exists or is about to exist and the report:

(1) places a person in reasonable fear of physical injury;
(2) causes the evacuation of a building;

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8 AS 11.56.757.

9 Ch. 1, 4SSLA 2017.

(3) causes serious public inconvenience; or
(4) claims that a biological or chemical substance has been sent or is present at a public place.[10]

The requirement that the report be "false" has created a loophole in the law which makes it difficult to address circumstances in which the person making the threat actually intended on carrying out the threat but had not taken a "substantial step" towards doing so, thus falling short of an attempted offense.[11]

HB 49 amends terroristic threatening in the second degree to criminalize generalized threats regardless of whether the threat is "false" or the person actually intended on carrying out the offense. In essence, under HB 49, a person will commit terroristic threatening in the second degree if the person makes a threat that a circumstance dangerous to human life or property exists or is about to exist with reckless disregard that the threat may

(1) place a person in reasonable fear of serious physical injury to any person by means of a dangerous instrument;
(2) cause the evacuation or initiation of emergency protocol for a building or public place;
(3) cause a serious public inconvenience; or
(4) cause the public or substantial group of people to fear serious physical injury.

The language of HB 49 focuses on the threat and the defendant's reckless disregard of the possible effect the threat may have on others.

Criminalizing the utterance of certain statements may result in challenges on first amendment grounds. The Department of Law believes that this statute will likely be upheld if it were challenged on first amendment grounds.

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[10] AS 11.56.810.

[11] AS 11.31.100. *See also, Sullivan v. State,* 766 P.2d 51, 53 (Alaska App. 1988) ("In order to constitute a 'substantial step,' conduct must go beyond mere preparation. *Gargan v. State,* 436 P.2d 968, 971 (Alaska 1968). Whether an act is merely preparatory or is 'sufficiently close to the consummation of the crime to amount to attempt, is a question of degree and depends upon the facts and circumstances of a particular case.' *Braham v. State,* 571 P.2d 631, 637 (Alaska 1977) *cert denied,* 436 U.S 910, 98 S.Ct.2246, 56 L. Ed.2d 410 (1978))".

First, the United States Supreme Court has upheld 18 U.S.C. 875(c), that makes it a crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.”[12] It is well settled that the United States Constitution does not protect “true threats.”[13] A “true threat” encompasses statements in which a person communicates a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”[14] The speaker does not need to intend to actually carry out the threat, rather, statutes which prohibit certain threats are intended to protect individuals from the “fear of violence” and the disruption that that type of fear creates.[15] Alaska’s courts have made similar findings.[16]

Additionally, the amendments to AS 11.56.810 in HB 49 require that the defendant act knowingly[17] as to the conduct – that is, the defendant is speaking volitionally and knows what he or she is saying and recklessly as to the fact that the threat communicated may place others in fear.[18] The “reckless” mental state, when coupled with a “knowing” mental state in regards to the conduct, is likely to be found by a court as sufficiently protective of first amendment rights. Alaska courts have already recognized that a reckless mental state offers sufficient protections in the context of the current terroristic threatening in the second degree (AS 11.56.810), interference with

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[12] *Elonis v. United States,* 135 S.Ct. 2001, 2002 (2015) (quoting 18. U.S.C.§ 875 (c).

[13] *Id.* at 2015, citing *Virginia v. Black*, 538 U.S. 343 (2003).

[14] *Virginia v. Black supra.* at 359.

[15] *Id.* at 360.

[16] *Baker v. State,* 22 P.3d 493, 499 (Alaska App. 2001) (“However, the statute does not punish protected speech, for there is no First Amendment right to threaten someone else with harm.”).

[17] AS 11.81.900(a)(2).

[18] *See* AS 11.81.900(a)(3) (“a person acts ‘recklessly’ with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards 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 disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk”).

official proceedings (AS 11.56.510), and stalking (AS 11.41.260 and 11.41.270) statutes which also criminalize certain communications.[19]

7. Driving with license canceled, suspended or revoked (DWLS) *(secs. 92 - 93).*

Under current law, as enacted in SB 91, a person commits DWLS (a class A misdemeanor) by driving during the time their license has been suspended or revoked for a conviction for driving while under the influence or refusal to submit to a chemical test.[20] If the person's license has been canceled, suspended, or revoked for any other reason, the offense is an infraction punishable by a fine not to exceed $300.

HB 49 expands the list crimes for which a person driving while their license is canceled, suspended, or revoked as a result of that crime is a class A misdemeanor.[21]

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[19] *See Baker v. State, supra.* note 16, at 499 ("Rather, to prove that a defendant has made a threat, the State must prove (at a minimum) that the defendant acted recklessly concerning the possibility that their words or conduct would be threatening to others—that their words or conduct, reasonably construed, communicated an intention to inflict harm."); *Petersen v. State*, 930 P.2d 414, 427 (Alaska App. 1996) ("That is, the State must establish that the defendant's actions actually caused another person to fear injury or death, that the defendant consciously disregarded a substantial and unjustifiable risk that his actions would have this effect, and that the defendant's disregard of this risk constituted a gross deviation from the standard of care that a reasonable person would exercise in that situation."); *see also*, *Allen v. State,* 759 P.2d 541, 545 (Alaska App. 1988).

[20] AS 28.15.291.

[21] These crimes include: (1) manslaughter or negligent homicide resulting from driving a motor vehicle; (2) a felony in the commission of which a motor vehicle is used; (3) failure to stop and give aid as required by law when a motor vehicle accident results in the death or personal injury of another; (4) perjury or making a false affidavit or statement under oath to the department under a law relating to motor vehicles; (5) operating a motor vehicle or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance; (6) reckless driving; (7) using a motor vehicle in unlawful flight to avoid arrest by a peace officer; (8) refusal to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) while under arrest for operating a motor vehicle, commercial motor vehicle, or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, or authorized under AS 28.35.031(g); (9) driving while license, privilege to drive, or privilege to obtain a license, canceled, suspended, or revoked, or in violation of a limitation; (10) vehicle theft in the first degree in violation of AS 11.46.360 or vehicle theft in the second degree in violation

Upon a person's first conviction the mandatory minimum sentence is 10 days with 10 days suspended. Upon the second conviction there is a mandatory minimum sentence of 10 days.

If the person's driver's license is canceled, suspended, or revoked for conduct not included in the expanded list found at AS 28.15.181 or 28.15.182, the person is guilty of an infraction punishable by up to a $300 fine. Upon a second conviction, the person is guilty of a class A misdemeanor, with no required mandatory minimum sentence.

8. Provisions related to sex offenses.

HB 49 amends a number of sex offenses and creates new offenses relating to sexual conduct.

a. Sexual assault in the second and third degrees *(secs. 4 - 5).*

A person commits the crime of sexual assault in the second degree if the person engages in sexual penetration with a person who the offender knows is mentally incapable, incapacitated, or unaware that the sexual act is being committed.[22] Sexual assault in the second degree is a class B sex felony.[23] Similarly, a person commits the crime of sexual assault in the third degree if the person engages in sexual contact with a person who the offender *knows* is mentally incapable, incapacitated, unaware that the sexual act is being committed. Sexual assault in the third degree is a class C sex felony. Both offenses are registerable sex offenses.[24]

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of AS 11.46.365. AS 28.15.181. These crimes also include situation where the person was involved in, and was a significant contributing cause of, an accident causing the death of another person. AS 28.15.182

[22] *See* AS 11.41.470(2) ("'incapacitated' means temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act"); AS 11.41.470(4) ("'mentally incapable' means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person").

[23] In this document "sex felony" means that the offense is sentenced as a sexual felony under AS 12.55.125(i).

[24] A registerable sex offense requires the offender to register with the Department of Public Safety as a sex offender or child kidnapper depending on the nature of the conviction. Registration periods in Alaska continue for 15 years or a lifetime depending

A "knowing" mental state requires that the offender be "aware that the conduct is of that nature or that the circumstance exists;…knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist."[25] HB 49 reduces the requisite mental state for sexual assault in the second and third degrees to "recklessly" as to the circumstances of the offense. A reckless mental state occurs when the offender is "aware of and consciously disregards 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 disregard of it *constitutes a gross deviation* from the standard of conduct that a *reasonable person* would observe in the situation."[26] This brings the mental state for these offenses in line with the requisite mental states for all other sexual assault offenses.

b. Marriage defense *(secs. 6 - 8).*

Under current law, marriage is a defense[27] to sexual assault if the victim is mentally incapable, incapacitated, or unaware that the sexual act is being committed.[28] HB 49 eliminates marriage as a defense under those circumstances.

There was discussion in several committee hearings about when a person would be deemed mentally incapable under the law. Despite testimony from the Department of Law that a victim would need to be mentally incapable *at the time of the sexual activity*, legislators chose to establish an affirmative defense[29] for the circumstances in which a victim is "mentally incapable." That defense applies when the offender is married to the victim and neither party has filed for separation, divorce, or dissolution, and the victim consented to the act while the victim was capable of understanding the nature or consequences of the offender's conduct.

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on the conviction and whether the person has been previously convicted of a sex offense. *See* AS 12.63.010 – 12.63.100.

25 AS 11.81.900(a)(2).

26 AS 11.81.900(a)(3)(emphasis added) .

27 A defense requires the State to disprove the existence of the defense beyond a reasonable doubt. AS 11.81.900(b)(19).

28 AS 11.41.432; *see also* AS 11.41.410; AS 11.41.420; AS 11.41.425.

29 An affirmative defense requires the defendant prove the circumstances proscribed by a preponderance of the evidence. AS 11.81.900(b)(2).

Marriage will remain a defense when both parties consent and the sexual activity would be legal but for the nature of the non-marital relationship. That is, the sexual activity is criminalized because of a certain relationship (peace officer and person in custody, probation officer and person on probation, juvenile probation officer and person who is 18 or 19 years of age and under the jurisdiction of the Department of Health and Social Services, etc.), but the illegal nature of the sexual activity is only due to the relationship which is legalized when the parties are married.

c. Harassment in the second degree *(sec. 41).*

HB 49 creates a new subsection of harassment in the second degree. The new subsection criminalizes the repeated sending of images of genitalia to another person with the intent to harass or annoy that person. Harassment in the second degree is a class B misdemeanor and is *not* a registerable sex offense.

d. Unlawful exploitation of minor *(sec. 14).*

Under current law, unlawful exploitation of a minor occurs when a person produces a film, photograph, or drawing of a person under 18 years of age engaging in sexual activity such as lewd touching, sexual penetration, bestiality, or sexual masochism or sadism.[30] Unlawful exploitation of a minor is a class B sex felony on a first conviction, and becomes a class A sex felony if the person has been previously convicted.

HB 49 increases the classification to a class A sex felony for a first offense and an unclassified sex felony if the person has been previously convicted. HB 49 also makes a first offense an unclassified sex felony when the victim is under 13 years of age.

e. Indecent exposure in the first degree *(sec. 15).*

Under current law, indecent exposure in the first degree is a class C sex felony if the person exposes themselves within the observation of a person under 16 years of age and masturbates or the person has been previously convicted of indecent exposure.[31] Indecent exposure in the first degree is a registerable sex offense.

HB 49 increases the classification of indecent exposure in the first degree and adds those over 16 years of age as victims deserving greater protection when the offender masturbates while exposing themselves. When a person masturbates while exposing themselves or if the person exposes themselves and has been previously convicted, the

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[30] AS 11.41.455.

[31] AS 11.41.458.

offense would be a class C sex felony if the victim is 16 years of age or older. If the person engages in the same conduct and the victim is under the age of 16 the offense would be a class B sex felony.

f. Online enticement *(secs. 11 - 13).*

A person commits the crime of online enticement of a minor if the person is 18 years of age or older and uses a computer to entice, solicit, or encourage a person under the age of 16 to engage in sexual activity, such as lewd touching, sexual penetration, bestiality, or sexual masochism or sadism.[32] Online enticement of a minor is a class A sex felony if the person was required to register as a sex offender or child kidnapper at the time of the offense, otherwise it is a class B sex felony. Online enticement is a registerable sex offense.

HB 49 would remove the requirement that a computer be used in the course of this offense.[33] Therefore, any enticement, solicitation, or encouragement by a person who is 18 years of age or older of a person under the age of 16 to engage in sexual activity, such as lewd touching, sexual penetration, bestiality, or sexual masochism or sadism, would meet the elements of this offense.

g. Indecent viewing or production of a picture *(secs. 42 - 46).*

Under current law, a person commits the crime of indecent viewing or photography[34] if the person knowingly views or produces a picture of the private exposure of the genitals, anus, or female breast of another person and the viewing or production is without the knowledge or consent of:

(1) the person viewed if the person is at least 13 years of age; and
(2) the parent or guardian of the person if the person is under 16 years of age.[35]

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[32] AS 11.41.452.

[33] HB 49 also changes the title of this offense to "enticement of a minor."

[34] The amendments in HB 49 also change the title of the statute from "indecent viewing or photography" to "indecent viewing or production of a picture."

[35] AS 11.61.123; *See also* AS 11.61.123(e)(2) ("'private exposure' means that a person has exposed the person's body or part of the body in a place, and under circumstances, that the person reasonably believed would not result in the person's body or body parts being (A) viewed by the defendant; or (B) produced in a picture.")

Indecent viewing or photography is a class C felony if the person viewed or shown in the picture is a minor and a class A misdemeanor if the person viewed or shown in picture is an adult. Under current law, this offense is *not* a registerable sex offense.

HB 49 makes a number of amendments to this statute. Many of the amendments clarify the statute. In addition, HB 49 increases the penalties for this conduct. If a person *produces* a picture of a minor, the person will be guilty of a class B sex felony and that offense will be a registerable sex offense. If the person *views* a picture of a minor or *produces* a picture of an adult, the person will be guilty of a class C sex felony and that offense will be a registerable sex offense. If a person views an image of an adult, that offense will be a class A misdemeanor and *will not* be a registerable sex offense.

h. Solicitation or production of an indecent picture of a minor ***(sec. 47).***

In addition to the amendments to the crime of indecent viewing or photography mentioned above, HB 49 creates a new offense: solicitation or production of an indecent picture of a minor. This offense criminalizes an adult soliciting or producing indecent pictures of a young person.[36]

Under HB 49, a person commits the crime of solicitation or production of an indecent image of a minor if the person is 18 years of age or older and solicits or produces an image of the genitals, anus, or female breast of a person who is under 16 years of age *and* at least four years younger than the offender. Solicitation or production of an indecent picture of a minor is a class C felony if the person solicited or produced in the picture is under 13 years of age or the person *produces* the indecent picture. It is a class A misdemeanor if the person solicited is 13 years of age or older. This offense is not a sex felony and is not a registerable sex offense.

i. Out-of-state sex offender registration ***(secs. 82 - 85).***

Under current law a person is required to register as a sex offender or child kidnapper if they have been convicted of a sex offense as defined in AS 12.63.100 or similar law of another jurisdiction. For offenders convicted in another jurisdiction, this requires an element-by-element analysis to determine whether the offense is similar to one in Alaska. This procedure was reaffirmed by the Alaska Supreme Court in *State, Department of Public Safety v. Doe*,[37] which held that sex offenders who were present in

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[36] The pictures described in the new statute do not necessarily constitute child pornography defined under AS 11.41.455. Therefore, a separate crime such as the one proposed in HB 49 would need to be enacted to address the solicitation or production of images that do not rise to the level of child pornography.

[37] 425 P.3d 115 (Alaska 2018).

Alaska did not have to register as sex offenders if the offenses they were convicted of in another jurisdiction were not similar to a registerable sex offense in Alaska.

HB 49 dispenses with the element-by-element analysis and simply requires a person to register as a sex offender or child kidnapper in Alaska when they are present in the state if they have been convicted of an offense in another jurisdiction which requires them to register in that jurisdiction. As the intent language in the bill states, this change is needed to assist in protecting the public and to give reciprocity to the decisions of other jurisdictions.

II. Provisions related to bail and pretrial release *(secs. 56 - 61).*

HB 49 makes a number of revisions to the bail and conditions of release statutes that predominantly revert them to pre-SB 91 law. These changes are effective on July 1, 2019, and will apply to offenses committed on or after that date.

SB 91 revised bail procedures in criminal cases by:

(1) requiring the court to 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;
(2) tying the bail release decision to a defendant's risk assessment score as determined by a risk assessment conducted by the Department of Corrections by establishing a presumption of release without the imposition of monetary bail *unless* the court finds by *clear and convincing evidence* that no non-monetary conditions will reasonably ensure the appearance of the person in court or the safety of the victim, other persons, and the community;
(3) establishing a "pretrial services program" for the purpose of conducting risk assessments of arrestees and supervising persons who have been released by the court;
(4) restricting the court's ability to order a third-party custodian in locations where a pretrial services officer can provide supervision.

HB 49 makes three significant changes to the law of pre-trial release. First, it decouples the court's bail release decision from the risk assessment score. In essence, bail is reverted back to what the law was prior to SB 91 and left to the discretion of the court. The risk assessment tool may still be considered, but does not control the standard used in determining release.

Second, the burden of proof changes back to a preponderance of the evidence instead of clear and convincing evidence.

Third, HB 49 establishes a rebuttable presumption for the most serious offenses (unclassified, class A felonies, sexual felonies, felony crimes against a person, crimes involving domestic violence, and fugitive from justice cases) that there is a substantial risk that the defendant will not appear in court and poses a danger to the victim, other persons, or the community. This language clearly sets forth what should be common knowledge: that these offenses are very serious and it is presumed that those who commit them pose a danger to the public. This presumption can be overcome, but serves as the starting point for the analysis.

HB 49 still allows inability to pay to be a basis for one additional bail review hearing; however, the defendant must show something more than current law requires: that they have made a good faith effort to post the required bail.

HB 49 also lifts the restriction on the court for when it can order a third-party custodian. Current law only allows the court to order a third-party custodian if pretrial service officers are not available in the community. Under HB 49, a third-party custodian is among the options that the court can order as a condition of release whenever the court determines that a third-party custodian is appropriate for a particular defendant, regardless of whether pretrial supervision by the Department of Corrections is available in that location.

HB 49 also adjusts the criteria for a third-party custodian slightly by prohibiting a person who has been unconditionally discharged[38] within the previous five years from any felony or crime against a person from serving as a third-party custodian. The previous law required the person to be unconditionally discharged within the previous three years from a crime against a person.

III. Provisions related to sentencing.

Before addressing the changes to the sentencing scheme, some terminology should be explained. An “active” term of imprisonment is the term a defendant must serve in prison. A “suspended” term of imprisonment is the portion a defendant will not have to serve unless imposed for violations of 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. Finally, a “presumptive” term or range is explained in the felony sentencing section below.

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[38] AS 12.73.090(4) (“‘unconditionally discharged’ means that a defendant is released from all disability arising under a sentence, including probation and parole”).

The changes made to the sentencing laws by HB 49 will apply to conduct occurring on or after July 1, 2019.

1. Misdemeanor sentencing changes.

a. Class A misdemeanor sentencing *(sec. 75).*

In 2016, SB 91 introduced presumptive ranges to misdemeanor sentencing that effectively reduced the term of imprisonment for most class A misdemeanors to a presumptive term of zero to 30 days of jail unless they fell into certain exceptions.

Under HB 49, discretion is returned to judges for *all* class A misdemeanors to impose between zero and 365 days of jail.[39]

b. Class B misdemeanor sentencing *(sec. 76)*.

SB 91 reduced the maximum term of imprisonment for almost all class B misdemeanors from 90 days to 10 days. HB 49 returns the sentencing range to 0 - 90 days.

c. Sentences specific crimes *(sec. 93).*

In addition to returning discretion in sentences for misdemeanors, HB 49 also returns discretion to judges in sentences for specific crimes such as drug possession, low level theft, and disorderly conduct.

i. Drug sentences.

As mentioned above, SB 91 limited active terms of imprisonment for possession of any controlled substance (other than the "date rape drug") to no active jail time for the first two offenses.

HB 49 repeals this sentencing limitation and authorizes up to 1 year of jail for first time drug possession, the same sentence that applies to all other class A misdemeanors.

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[39] The sentencing range for class A misdemeanors will be 0 days to 365 days unless there are specific statutory mandatory minimums that apply for a particular offense. *See* AS 12.55.135(c) (assault in the fourth degree involving the violation of a protective order is subject to a mandatory minimum sentence of 20 days); AS 12.55.135(g) (defendant convicted of assault in the fourth degree that is a crime of domestic violence shall be sentenced to a mandatory minimum term of 30 days if the person has been previously convicted of a crime against a person or a crime involving domestic violence.).

ii. Theft sentences.

SB 91 eliminated both active and suspended terms of imprisonment for theft under $250, a class B misdemeanor, unless the person has been convicted twice before for a similar crime.[40] In 2017, SB 54[41] changed the law to allow five, 10, and 15 days for a first, second, and third offense, respectively.

HB 49 repeals these sentencing provisions and authorizes a range of 0 - 90 days in jail for any theft under $250, the same range that applies to all other class B misdemeanors.

iii. Disorderly conduct sentence *(sec. 40).*

SB 91 also limited the maximum term of imprisonment for disorderly conduct[42] to 24 hours. HB 49 authorizes 72 hours for the first offense and up to 10 days for subsequent convictions.

d. Driving under the influence and refusal *(secs. 94 and 97)*.

SB 91 required a person convicted of a first driving under the influence or refusal to submit to a chemical test to serve a sentence of imprisonment at a private residence by electronic monitoring, or other means if electronic monitoring is not available.

HB 49 returns discretion to the commissioner of corrections to require the person to serve the sentence for a first offense by electronic monitoring, at a community residential center ("CRC"), or another appropriate place if neither electronic monitoring nor a CRC is available.

Additionally, HB 49 eliminates a provision of law enacted by SB 91 that prevents searches without probable cause of a residence when the residence is where the person is serving their sentence. The pre-SB 91 law allowed searches in locations where a person was serving a jail sentence. HB 49 returns to pre-SB 91 law.

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[40] AS 11.46.150.

[41] Ch. 1, 4SSLA 17.

[42] 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. AS 11.61.110.

2. Felony sentencing.

Most authorized felony sentences are structured in graduated presumptive ranges based on the level of the offense and the number of prior felony convictions. 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. In the case of aggravators, the court may 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; this may also be true for some felonies outside of Title 11.

a. Increased presumptive sentencing ranges *(secs. 70 - 73).*

The chart below[43] shows the changes in the presumptive terms for class A,[44] B[45] and C felonies.[46]

Felony Class	Current Law under SB 91	HB 49
Class A		
First	[3 – 6] – 20 years	[4 – 7] – 20 years
First/Enhanced[47]	[5 – 9] – 20 years	[7 – 11] – 20 years
First /Enhanced[48]	[7-11] – 20 years	[7 – 11] – 20 years

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

44 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.

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

46 Class C felonies include Assault in the Third Degree, Theft in the Second Degree, Vehicle Theft, etc.

47 Defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury or death during the commission of the offense. AS 12.55.125(c)(2)(A).

48 Defendant "knowingly directed the conduct constituting the offense at 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)(2)(B). HB 49 added: when manufacturing methamphetamine

Second	[8 – 12] – 20 years	[10 – 14] – 20 years
Third	[13 – 20] – 20 years	[15 – 20] – 20 years
Class B		
First	[0 –2] – 10 years	[1 – 3] – 10 years
First/Enhanced[49]	[2 - 4] – 10 years	[2 – 4] – 10 years
Second	[2 – 5] – 10 years	[3 – 7] – 10 years
Third	[4 – 10] – 10 years	[6 – 10] – 10 years
Class C		
First	[0 –2] – 5 years	[0 – 2] – 5 years
First/Enhanced[50]	[1 – 2] – 5 years	[1 – 2] – 5 years
Second	[1 – 4] – 5 years	[2 – 4] – 5 years
Third	[2 – 5] – 5 years	[3 – 5] – 5 years

b. Sentences for sex offenses.

In addition to the reclassification of certain sex offenses as described above, HB 49 makes a number of other changes to the sentences for some sexual felonies.

i. Distribution of child pornography.

The bill increases the presumptive sentencing range for a first conviction of distribution of child pornography[51] from 2 to 12 years to 4 to 12 years. In addition, if the

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and the offense occurred in a building that was used as a place of lodging for one or more children under the age of 18 or was a place frequented by children, or the defendant obtained the assistance of one or more children under the age of 18 or one or more children were present during the commission of the offense. *See* HB 49, sec. 70.

[49] Defendant convicted of criminally negligent homicide and the victim was under 16 years of age. AS 12.55.125(d)(2)(A). HB 49 added: attempt or conspiracy to manufacture methamphetamine and the offense occurred in a building that was used as a place of lodging for one or more children under the age of 18 or was a place frequented by children, or the defendant obtained the assistance of one or more children under the age of 18 or one or more children were present during the commission of the offense. *See* HB 49, sec. 71.

[50] The offense is a first felony and the defendant violated a state statute or regulation prohibiting waste of a wild food animal or hunting on the same day airborne. AS 12.55.125(e)(4).

[51] AS 11.61.125.

offense is a first felony conviction and the person distributed child pornography and also hosted, created, or assisted in hosting or creating a mechanism for multi-party sharing or distribution of child pornography, or if the person received a financial benefit or had a financial interest in the distribution of child pornography, the sentencing range is enhanced to 6 to 14 years.

ii. Sexual abuse of minor in the third degree *(secs. 9 - 10).*

A person commits the crime of sexual abuse of a minor in the third degree if the person is 17 years of age or older and engages in sexual contact[52] with a person who is 13, 14, or 15 years of age and at least four years younger than the offender.[53] Under current law, sexual abuse of a minor in the third degree is a class C felony and sentenced as a non-sex felony with a presumptive range of 0 - 2 years for a first felony offense and a maximum of 5 years. Even though sexual abuse of a minor in the third degree is sentenced as a non-sex felony, it is a registerable sex offense.

HB 49 makes sexual abuse of a minor in the third degree a class C sex felony if there is a six year age difference between the offender and the victim. This offense will be subject to a presumptive sentencing range of 2 - 12 years, up to a maximum of 99 years.

iii. Counting prior felonies for sex offenders (*sec. 77).*

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52 AS 11.81.900(b)(60) "sexual contact" means:
(A) the defendant's
(i) knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast; or
(ii) knowingly causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast;
(B) but "sexual contact" does not include acts
(i) that may reasonably be construed to be normal caretaker responsibilities for a child, interactions with a child, or affection for a child;
(ii) performed for the purpose of administering a recognized and lawful form of treatment that is reasonably adapted to promoting the physical or mental health of the person being treated; or
(iii) that are a necessary part of a search of a person committed to the custody of the Department of Corrections or the Department of Health and Social Services;

53 AS 11.41.438.

AS 12.55.145 directs a court on how to determine whether a prior conviction counts when determining the appropriate presumptive range. HB 49 amends this statute to clarify that *any* prior felony conviction, regardless of age, shall be counted when determining the presumptive sentencing range for sexual felonies. This clarification overturns the Court of Appeals' decision in *Williams v. State*.[54] In *Williams*, the court altered the interpretation of this statute holding that a prior felony conviction should not be considered if 10 or more years have elapsed between the date of the defendant's unconditional discharge of the preceding offense and the present offense, unless the prior conviction was for an unclassified or class A felony. This interpretation is inconsistent with previous interpretations and results in lesser sentences for some individuals convicted of sexual felonies. HB 49 clarifies the proper interpretation of the statute on how prior felonies should be counted to determine the correct presumptive term for a sexual felony.

iv. Reduced felony maximum probation lengths *(sec. 68).*

SB 91 reduced the maximum period of probation for all offenses including sex felonies. HB 49 returns the maximum probation period for sex felonies to 25 years from the current limit of 15 years. The maximum probation period for all other offenses is returned to a maximum of 10 years.

v. Jail credit for time in treatment *(sec. 66).*

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 program must impose sufficient restrictions on the person's liberty before jail credit may be awarded. HB 49 limits the amount of jail credit that can be awarded to 365 days.

vi. Victim notifications *(secs. 62, 80, and 81).*

HB 49 adds a number of protections for victims of crime. First, for defendants convicted of crimes involving domestic violence or a sex offense, the court must order, as a condition of probation, that the defendant have no contact with the victim. The proposed law does allow the court to avoid this no contact order, but only if the court finds that contact between the victim and defendant is necessary.

In addition, HB 49 requires the prosecuting attorney to notify a victim of a sex offense or crime involving domestic violence if, before trial, the defendant is discharged from a treatment program for noncompliance.

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[54] 418 P.3d 870 (Alaska App. 2018).

Further, when an offender is released from incarceration or, if the offender was ordered to have no contact with the victim as a condition of probation, when the offender's period of probation ends, the Department of Corrections must notify victims of sex offenses and crimes involving domestic violence of their option to request a protective order and provide these victims with contact information for state victim resources.

IV. Provisions related to probation and parole.

1. Probation.

a. Early termination *(secs. 69 and 113; applies to probation and parole ordered on or after July 1, 2019).*

SB 91 required probation officers to recommend early termination of probation if a defendant had been on probation for two years or less (depending on the person's conviction), successfully completed all treatment programs, had not violated any conditions of probation for the required period of time (depending on the conviction), and was in compliance with all conditions of probation in all cases in which the defendant was on probation.

HB 49 makes the recommendation by the probation officer discretionary, but maintains much of the criteria established by SB 91 including the minimum length of probation that must be completed, completion of all treatment programs, and current compliance with all conditions. The bill also restricts recommendations for persons convicted of an unclassified felony, sexual felony, or crime involving domestic violence.

A similar provision was created by SB 91 for the early termination of parole. Again, HB 49 makes the recommendation by the parole officer discretionary but keeps much of the criteria established in SB 91 such as the minimum length of parole that must be completed, completion of all treatment programs, and current compliance with all conditions. The bill also restricts recommendations for early termination of parole for persons convicted of an unclassified felony, sexual felony, or crime involving domestic violence.

b. Terms of imprisonment for probation and parole violations *(secs. 63, 102, 114, 118, and repealer section 138; applies to probation and parole ordered before, on, or after July 1, 2019 for conduct occurring on or after July 1, 2019.).*

SB 91 limited the court and parole board's discretion by setting limits on the sanctions that may be imposed for "technical violations" of probation or parole. The

limits were a maximum of 3 days for a first technical violation, 5 days for a second technical violation, and 10 days on a third technical violation. A "technical violation" is any violation of probation or parole except a new criminal offense, a failure to complete sex offender treatment, failure to comply with sex offender specific conditions, or a failure to complete an intervention program for batterers. The maximum sanction for absconding became 30 days.[55]

HB 49 repeals these limits and returns discretion to the court and parole board to determine the appropriate sanction given the nature of the violation, the underlying offense, and any other relevant circumstances.

c. Earned compliance credits for probation and parole *(secs. 100, 101, 116, and 117; applies to probation or parole ordered before, on, or after July 1, 2019 for conduct occurring on or after July 1, 2019).*

SB 91 created a new method for early discharge of a probationer or parolee by reducing the period of probation or parole by 30 days for every 30 days that the person is in compliance with their conditions of probation or parole.

HB 49 reduces the credit granted from 30 days for every 30 days that the person is in compliance to 10 days for every 30 days that the person is in compliance. In addition, persons convicted of the following offenses are *not eligible* to accrue credits against the period of probation or parole: unclassified felonies; sex offenses defined in AS 12.63.100; AS 11.41 felonies (crimes against a person); and AS 11.41 (domestic violence crimes).

2. Discretionary parole.

Discretionary parole is early release from incarceration based on a review of the inmate by the parole board after the inmate has served the minimum period required by statute. The minimum period that must be served is identified in statute based on the type of conviction. Release onto discretionary parole is generally at the discretion of the parole board. *The changes made to discretionary parole apply to offenses occurring on or after July 1, 2019.*

a. Eligibility *(secs. 106 - 107).*

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[55] "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. *See* AS 12.55.110(h)(1) and AS 33.16.215(f)(1).

SB 91 expanded eligibility for discretionary parole to offenses previously ineligible: class A felonies, class B felonies if the person had one or more prior felony convictions, C felonies if the person had two or more prior felony convictions, B and C sex felonies.[56]

HB 49 returns the restrictions to eligibility to pre-SB 91 law. Therefore, the above offenses will no longer be eligible for discretionary parole, if the person is sentenced within or below the presumptive range.[57]

In addition, HB 49 makes persons convicted of murder in the first and second degrees ineligible for discretionary parole until they have served two-thirds of their sentence or the mandatory minimum, whichever is greater. These individuals will also be ineligible for mandatory parole or a good time deduction.[58]

Under the provisions of HB 49, all other unclassified offenses will be eligible for discretionary parole after serving one-half of their sentence. Those sentenced for class B felony level drug distribution will also be eligible for discretionary parole after serving one-half of their sentence. Under HB 49, class B felony level drug distribution includes delivering any amount of methamphetamine or cocaine to another person.[59]

b. Factors for release on discretionary parole *(secs. 108, 109, and repealers sec. 138).*

SB 91 *required* release on discretionary parole for all prisoners, except those convicted of an unclassified felony, if the defendant:

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[56] Generally, unclassified and class A sex felonies were ineligible for discretionary parole before the passage of SB 91 and SB 91 made no changes to that law. Similarly, HB 49 does not alter the eligibility of unclassified and class A sex felonies, they will continue to be ineligible for discretionary parole.

[57] If the offender is sentenced above the presumptive range, the portion of the sentence that is above the presumptive range will be eligible for discretionary parole.

[58] Mandatory parole means "the release of a prisoner who was sentenced to one or more terms of imprisonment of two years or more, for the period of good time credited under AS 33.20, subject to conditions imposed by the board and subject to its custody and jurisdiction." AS 33.16.900(10). A "good time deduction" is a deduction of one-third of the term of imprisonment rounded off to the nearest day if the prisoner follows the rules of the correctional facility. AS 33.20.010.

[59] HB 49, sec. 49.

(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 required unless the Parole Board finds by *clear and convincing evidence* that the prisoner poses a threat of harm to the public if released.

HB 49 restores the law to pre-SB 91 law in that it makes release on discretionary parole subject to the parole board's discretion. The parole board must determine if there is a *reasonable probability* that

(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.

c. Application for discretionary parole *(sec. 105).*

SB 91 required the parole board to consider a person's suitability for discretionary parole at least 90 days before the person was eligible for discretionary parole. It also removed the requirement that the person apply for discretionary parole.

HB 49 removes the 90-day timeline and requires the person to apply for discretionary parole if they have had a disciplinary action while they were in custody. It is only if the person has *not* had a disciplinary action while in custody that the parole board would be required to consider the person without having that person submit an application for discretionary parole.

d. Good-time calculations *(sec. 119).*

SB 91 authorized good-time credit "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." HB 49 reestablishes the prohibition on good time credit under those circumstances.

V. Miscellaneous provisions.

HB 49 made a number of other changes to the law relating to driver's licenses, mandatory reporting, the village public safety officer program, and sexual assault examination kits. The bill also imposes a new reporting requirement on the Department

of Law and Department of Public Safety, requires the court system to transmit certain information regarding involuntary commitments to the Department of Public Safety, and allows a person's criminal history report to be used at grand jury. *These changes are effective on July 1, 2019.*

1. Cancellation of driver's license for failure to pay fines *(sec. 91).*

The bill adds a new subsection to AS 28.15.161(a) requiring the Division of Motor Vehicles (DMV) to cancel a driver's license when the licensee owes more than $1000 in unpaid fines for offenses involving a moving motor vehicle and fails to either pay the fines in full or failed to make payments in good faith under a payment plan established by the department. If enacted, the Department of Law will work with DMV to develop the necessary guidelines or regulations to both implement a payment plan and determine whether payments on the unpaid balance are made in good faith. *This section would apply to the failure to pay fines imposed on or after July 1, 2019.*

2. Restoration of a driver's license *(secs. 95, 96 and 98).*

Under current law, a court permanently revokes the license for a person convicted of a felony driving under the influence or refusal to submit to a chemical test.[60] Current law allows for administrative review of these revocations, but only if the license has been revoked for a period of at least 10 years, the person has not committed another driving-related criminal offense (or criminal offense in the case of refusal to submit to a chemical test) since the license was revoked, and the person submits proof of financial responsibility.[61] This means that if a person has committed another disqualifying offense in the 10 year period, their license is permanently revoked and there is no other opportunity to get the license back.

HB 49 amends the path to license restoration in two ways. First, it restricts restoration if the driving while under the influence or refusal to submit to a chemical test offense was committed in conjunction with murder, manslaughter, criminally negligent homicide, or an assault in the first or second degree or if the person has been convicted of three or more felony charges driving under the influence (DUI). Second, it allows the 10-year period of good behavior to restart after a new conviction, unless that conviction is another DUI.

These changes apply to a revocation of a driver's license occurring before, on, or after July 1, 2019.

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[60] AS 28.35.030(n)(3) and AS 28.35.032(p)(3).

[61] AS 28.35.030(o) and AS 28.35.032(q).

3. Child protection – mandatory reporting *(secs. 131 - 134).*

Current law requires certain professionals and volunteers to report suspected child abuse, including sexual abuse, to the Department of Health and Social Services (DHSS).[62] HB 49 requires suspected sexual abuse be reported to law enforcement in addition to DHSS. HB 49 further requires DHSS to report suspected sexual abuse to law enforcement.

4. Village Public Safety Officer Program *(secs. 87 - 90).*

Under AS 18.65.670(b), the Department of Public Safety (DPS) provides grants to nonprofit regional corporations for village public safety officers (VPSOs). If a regional nonprofit corporation declines a grant, DPS may provide the grant to a municipality with a population of less than 10,000 willing to administer the grant for the regional nonprofit corporation. These are the only types of entities statutorily eligible to receive grants for VPSOs. Therefore, federally recognized tribes are not eligible to receive grant funds for VPSOs.

HB 49 adds "Alaska Native organizations" as defined under AS 47.27.070(a)[63] to AS 18.65.670 which will make federally recognized tribes statutorily eligible to receive grant funds for VPSOs.

5. Failure to use headlights (sec. 99). *July 1, 2019*

The current regulation on use of headlights under 13 AAC 04.010 requires every vehicle traveling on a highway or other vehicular way to illuminate headlights (1) between one-half hour after sunset and one-half hour before sunrise; or (2) at any other time when, because of insufficient light or other atmospheric conditions, persons or vehicles on the highway are not clearly discernible at a distance of 1,000 feet.

Additionally, 13 AAC 04.010(c) requires that every vehicle traveling on a highway or vehicular way or area must illuminate lights when traveling on *any roadway*

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62 AS 47.17.020.

63 Alaska Native organizations under AS 47.27.070(a) include: Arctic Slope Native Association, Kawerak, Inc., Maniilaq Association, Association of Village Council Presidents, Tanana Chiefs Conference, Cook Inlet Tribal Council, Bristol Bay Native Association, Aleutian Pribilof Island Association, Chugachmiut, Tlingit Haida Central Council, Kodiak Area Native Association, Copper River Native Association, and Metlakatla Indian Community.

that is posted with signs requiring the use of headlights. Use of low intensity headlights or daytime running lights is considered compliant with this section.

HB 49 codifies 13 AAC 04.010(a)(1) and (2) as written, and clarifies that headlights must be illuminated on a road *that is a designated traffic safety corridor*[64] rather than any roadway that is merely posted with signs requiring use of headlights.

Under HB 49, a person may only be cited for a violation of AS 28.35.191 if they fail to use headlights between one-half hour after sunset and one half-hour before sunrise, at any other time when conditions warrant, or on a road that is a designated traffic safety corridor.

6. Sexual assault examination kits *(secs. 126 - 129).*

There are no provisions under current law that mandate timelines for submission and testing of sexual assault examination kits.

HB 49 establishes required timelines for law enforcement agencies to submit all sexual assault kits collected by the agency to the state crime lab within 30 days after collection. It further requires the state crime lab to test all eligible sexual assault kits within one year of receiving the sexual assault kit and requires reasonable attempts be made to notify victims that their sexual assault kit has been tested within two weeks after completion of the testing. Law enforcement is not required to meet these time limits if a case is resolved prior to testing of the sexual assault examination kit.

A sexual assault examination kit is ineligible for testing if the kit is scientifically unviable, does not meet the eligibility requirements for inclusion in the Combined DNA Index System (CODIS) database, or was collected from a person who wishes to remain anonymous.

Finally, HB 49 requires the Department of Public Safety to include in its annual report to the legislature information regarding the number of sexual assault examination kits determined to be ineligible for testing and the reason the kits were deemed ineligible for testing.

7. Reporting requirement – Department of Law and Department of Public Safety *(secs. 123 - 125).*

HB 49 requires the Department of Law, in consultation with the Department of Public Safety, to develop a tool to track information regarding the reasons that cases involving sex offenses were not referred for prosecution, or, if they were referred, why

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[64] Current traffic safety corridors include segments of the Parks Highway, Knik/Goose Bay Road, Seward Highway, and Sterling Highway.

the case was not ultimately prosecuted, or, if it was prosecuted, why the case was resolved as something other than a sex offense. The departments must then report information to the Alaska Judicial Council which includes (1) the number of felony sex offenses reported that were not referred to the Department of Law for prosecution; (2) the number of felony sex offenses that were referred for prosecution but not prosecuted; (3) the number of felony sex offense that resulted in a conviction for something other than a sex offense; and (4) the number of sex offenses referred for prosecution that were charged as a felony, but were resolved by a plea agreement for a crime other than a sex offense.

8. Involuntary commitments *(sec. 141)*.

Alaska enacted AS 47.30.907 in 2014. AS 47.30.907 brought Alaska closer to being in compliance with the Brady Handgun Violence Prevention Act[65] by requiring that information about persons who have been involuntarily committed be transferred to the Department of Public Safety for inclusion in the National Instant Criminal Background Check System. This system is used by those who sell firearms to determine whether a person is prohibited under federal law from purchasing firearms. However, AS 47.30.907 was prospective and only applied to involuntary commitments from 2014 forward.[66]

HB 49 requires the Alaska Court System to transmit information regarding persons who have been involuntarily committed since January 1, 2011, forward to the Department of Public Safety for inclusion in the National Instant Criminal Background Check System. The Alaska Court System must transmit this information by December 31, 2020.

Concerns were raised in committee about the transmittal of this information potentially altering a person’s right to purchase firearms. The transmittal of this information does not change a person’s constitutional right to purchase and possess firearms because, under the Brady Handgun Violence Prevention Act,[67] once a person has been involuntarily committed they become a “prohibited person” under that Act and may not purchase or possess firearms. The transmittal of the information merely provides an enforcement mechanism.

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[65] 18 U.S.C.A. sec. 922

[66] Ch. 73, SLA 14.

[67] 18 U.S.C.A. sec. 922.

The Brady Handgun Violence Prevention Act was enacted in 1993 and required a background check on those who attempt to purchase firearms from a licensed dealer.[68] Federal law prohibits the transfer of a firearm to a person who has been involuntarily committed.[69] When Alaska enacted AS 47.30.907 it *did not* alter the constitutional rights of a prohibited person to possess a firearm. Federal law under the Brady Handgun Violence Prevention Act already prohibited that person from possessing a firearm.[70] The Brady Handgun Violence Prevention Act makes the possession of a firearm today illegal based on past conduct. This concept is used throughout the criminal code. For example, Alaska's statute which prohibits felons from possessing firearms prohibits a person who has been convicted of a felony from possessing a firearm which is capable from being concealed on one's person.[71] This statute prohibits the possession of such a firearm today because of the person's past conduct.

AS 47.30.907 requires the transfer of information so that the Brady Handgun Violence Prevention Act may be better implemented. Therefore, the amendment in HB 49 requiring the inclusion of information about involuntary commitments prior to 2014 does not alter a person's constitutional rights.

9. Use of criminal history at grand jury (*sec. 135*).

Criminal Rule 6 requires a certified judgment to be presented to the grand jury when an element of the offense requires proof of prior convictions. The only exception to this rule is if the case involves proving prior convictions of driving under the influence or refusal to submit to a chemical test when indicting on a felony level offense for those offenses. It is only then that a person's criminal history will suffice to prove the existence of those prior convictions.

However, there are a number of other offenses which require the State to prove the existence of a prior conviction. For example, a person with two misdemeanor assault convictions may be charged with a felony if they commit another misdemeanor assault within 10 years.[72] A person who is prohibited from possessing a firearm because they have a prior felony conviction may be charged with misconduct involving weapons in the

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[68] *Id. sec.* 922(t)

[69] *Id. sec.* 922(d)

[70] *Id.*

[71] AS 11.61.200.

[72] AS 11.41.220.

third degree.[73] These types of offenses require the State to prove the existence of the prior convictions. Certified judgments can take days to obtain and it is possible that they cannot be obtained within the timeframe in which the State is required to bring a case to the grand jury for indictment.

HB 49 addresses this issue by allowing a person's criminal history report to be used, instead of a certified judgment, at the indictment phase of the case if the crime requires proof of prior convictions. This brings all other offenses where a prior conviction is an element of the offense in line with the current exception described above for felony driving under the influence and refusal to submit to a chemical test.

Conclusion

Other than as discussed above, we have not identified any constitutional or legal issues in HB 49.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
John B. Skidmore
Deputy Attorney General
Criminal Division

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[73] AS 11.61.200(a)(1) (class C felony).