STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

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Representative Cathy Muñoz
State Capitol, Room 409
Juneau, Alaska 99801

Dear Representative Muñoz:

I am writing in response to your request for "feedback" on a proposal to change Alaska statute AS 12.25.030 to allow police officers to arrest a person for a misdemeanor offense not occurring in an officer's presence. I am also writing to make a suggestion for an alternative approach that may answer your concerns without making a fundamental change in Alaska law. Such a change, without additional limitations, would be a modification of the law existing in Alaska since the United States took legal jurisdiction over the territory of Alaska.

You request that the Department of Law comment on two scenarios – first, allowing peace officers in Alaska to make a warrantless arrest for the misdemeanor offense of disorderly conduct, when the conduct is not committed in the presence of the peace officer. The second scenario would allow peace officers to make a warrantless arrest for any misdemeanor not committed in the officer's presence. Both scenarios assume that the peace officer believes that there is probable cause that the person to be arrested committed the misdemeanor. To address these scenarios it is necessary to review some principals of arrest law.

The Alaska and Federal Constitutions are the first places to look for arrest authority. Article I, Section 14 of the Alaska Constitution says:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment to the Constitution of the United States reads exactly the same as Article I, Section 14 of the Alaska Constitution. The key words for the purpose of this analysis are "unreasonable … seizures" and "no warrants shall issue, but upon probable cause…" A "seizure" is an arrest. An arrest occurs when the police use a show of

official authority such that a reasonable person would have believed he or she is not free to leave. *United States v. Edwards,* 242 F. 3d 928, 934 (10 Cir. 2001).

At first look, the language of the Fourth Amendment suggests there must be a warrant for an arrest for all criminal offenses without exception. However, the common law allows police officers to arrest a person for a felony offense without first obtaining a warrant if the officer had "reasonable grounds to believe" that a felony had been committed and that the person being arrested committed the felony. This "reasonable grounds" standard is the constitutional equivalent of the "probable cause" language from the constitution. *Henry v. United States,* 361 U.S. 98 (1959). The United States Supreme Court has said the common law rule of allowing felony arrests without a warrant based on "reasonable grounds" is essentially the same as what is needed for the issuance of an arrest warrant under the Fourth Amendment. The Supreme Court therefore concluded there need not be a warrant for a felony arrest based on probable cause, whether or not the felony occurred in the officer's presence.

The common law, as it relates to misdemeanors, is different. A warrant is required before a person can be arrested on a misdemeanor unless the 1) misdemeanor occurred in the presence of a police officer; 2) the police officer had probable cause to believe a misdemeanor occurred; 3) the police officer had probable cause to believe the person being arrested committed the offense; and 4) the misdemeanor was a breach of the peace. "A breach of the peace" means in essence an act of violence. Over the years this rule has been changed by statutes in all the states including Alaska, by eliminating the requirement of a breach of the peace. Put another way, all states allow a police officer to arrest a person without a warrant for a misdemeanor where there is probable cause and the crime occurred in the officer's presence. Several states have eliminated the "in the presence of the officer" requirement for special crimes or circumstances and five states have eliminated the distinction between felony and misdemeanor arrests.[1]

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[1] Connecticut Conn. Gen State § 54-1f(a), Illinois, Comp Stat. Ch 725 § (1)(c), Louisiana, La. Code Crim. Proc. Ann Art 213 (3), Montana Mont. Code Ann § 46-6-311(1) (1997), Wisconsin Wis. Stat. § 968.07 (1)(d). In your letter Oregon statute ORS 133.310 is quoted in a way that suggests Oregon has eliminated the distinction between felony and misdemeanors. Actually ORS 133.310 reads: Authority of peace officer to arrest without warrant (1) a peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following: (a) a felony, (b) an A misdemeanor (c) an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor, (d) any other crime committed in the officer's presence. This

The United States Supreme Court has not given a definitive answer to the question of whether the Fourth Amendment requirement of an arrest warrant has the same exception for misdemeanors as for felonies. It is generally believed that the court will find the same exception when and if it decides this issue. *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001), is a case where the misdemeanor of driving with children not using seatbelts occurred in the officer's presence and the mother was arrested. There were two issues before the court. The first issue was whether the "breach of the peace" element of arrest for misdemeanors at common law was required by the Fourth Amendment. The answer to this question is "no". The "no" answer was based on research which showed this element was probably not the common law at the time of the drafting of the Fourth Amendment and hence the authors of the Fourth Amendment would not have understood the "breach of the peace" requirement to be the law in the colonies. The court did not do the historical analysis of the "in the presence" requirement. However, it went out of its way to disclaim any "speculat[ion] whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests". On the other hand the court also quoted Justice Whites' dissenting opinion in *Welsh v. Wisconsin,* 466 U.S. 756 (1984), for the proposition that "the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment". Put-another way, the court suggested it could go either way on this issue. We can speculate that if directly addressed the U.S. Supreme Court will follow the dissent in the *Welsh* case. However, there is no case law on this issue by the Alaska courts so it is difficult to predict how our courts would rule.

This brings up the second issue in *Atwater*: that is, whether the arrest was "reasonable". In a five to four decision the answer to this question was "yes" because the misdemeanor clearly occurred "in the officer's presence." Like for felonies, "reasonableness" was equated to probable case. This issue has never been addressed by an Alaska appellate court.

However, Alaska courts have not hesitated to suppress evidence when a search warrant under the Fourth Amendment or Article I, Section 14 of the Alaska Constitution has been found to be unreasonable. Additionally, the Alaska Constitution has a right of privacy, Article I, section 22, which the U.S. Constitution does not contain. Most people would think that the right to be left alone is more important than a property right and hence, the Alaska courts could conceivably require a broader showing of reasonableness than federal courts. If this were to happen, the proposed law change to allow arrests for

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means that B misdemeanors like Disorderly Conduct require that the offense occur "in the officers presence" before there can be an arrest without a warrant.

misdemeanors as now exists for felonies, may result in hearings on whether officers acted "reasonably". For example, the question of how much time it would have taken to get a misdemeanor warrant may become a common evidentiary issue to determine "reasonableness". This would mean officers would be required to come to court on an issue that is not litigated today, taking time off the streets, there by, lessening public protection. Likewise, this would entail an increase in the budgets of all parts of the criminal justice system to litigate these issues.

In Alaska, a peace officer may arrest a person for a misdemeanor committed outside the officer's presence without a warrant if there is statutory authority to do so. The legislature has authorized peace officers to make warrantless misdemeanor arrests for conduct outside their presence for several offenses. These include when an officer has probable cause to believe a person is driving under the influence of alcohol (AS 12.25.033); in circumstances where there is no judicial officer within 25 miles and personal or property damage is likely to occur if the arrest is not made immediately (AS 12.25.035); and in minor consuming alcohol cases (AS 12.25.030). In cases involving domestic violence the legislature mandates arrest (AS 18.65.530). These examples generally share a quality of urgency – either that the evidence will dissipate without an immediate arrest or a person is in immediate danger of further injury if an arrest is not made. In adopting these exceptions, the legislature has made a decision that it is "reasonable" to make an arrest because of particular circumstances connected with the offense. If a decision is made to change AS 12.25.030 along the lines of scenario one, the Department of Law strongly recommends that there be legislative findings as to how arrests for disorderly conduct have the same compelling necessity as are presented by other misdemeanors where statutes authorize warrantless arrest.

The second scenario that you describe would allow a peace officer to arrest for any misdemeanor with probable cause but without an arrest warrant. A small minority of states allow this. The vast majority of states, however, are like Alaska in that they allow warrantless arrests in circumstances set out in statute. In general, there are good reasons for the age-old requirement that for misdemeanors, a peace officer should obtain a warrant from a judicial officer before making an arrest for a crime committed outside the officer's presence. These include the following:

- The warrant requirement encourages peace officers to conduct a more thorough investigation of the case before obtaining the warrant. This is important for several reasons. First, it acts as a screening mechanism to weed out weak cases. This screening saves the entire judicial, prosecution and corrections systems from gearing up for a case that will not be prosecuted. Second, and no

disparagement of peace officers is intended, it is simply human nature that an officer who arrests a person for a misdemeanor and takes the person to jail will have less incentive to interview witnesses and make other inquiries that are a part of a thorough investigation. And there are good reasons for this – an officer will likely have more serious felonies to investigate. A felony investigation by its very nature will take priority and it is understandable that a misdemeanor investigation where the defendant has been arrested would be placed nearer to the bottom of the priority list.

- An arrest in Alaska generally starts the running of the speedy trial rule. Criminal Rule 45 requires, with exceptions, that a person be brought to trial within 120 days of a charging document being served upon the defendant. A change in the arrest law may have three unintended consequences: 1) police will need to do more of their own charging documents; 2) there will be more dismissals of cases because of premature arrests; 3) more cases will be lost under the speedy trial rule. The state would strongly urge an amendment to Criminal Rule 45 which would allow a dismissal by the state of a charge until a police investigation is complete without time running against the 120 day rule to get the person to trial.

- Authorizing a warrantless arrest for all misdemeanors would significantly increase the cost every participant in the justice system. Bypassing judicial screening will guarantee that more cases will be screened out by the prosecuting authority, the courts, and ultimately juries. The costs of booking a person into jail and transporting them to an arraignment alone are significant and will increase.

- Other significant costs would result from making an arrest for a charge that the parties later resolve themselves. In is not uncommon for misdemeanors to be settled by the parties. When tempers fade people often conclude the matter informally, by civil means, or decide that the problem no longer justifies any response. For example, there are often civil compromises in cases where people fail to pay cab drivers their fare or a restaurant for a meal that did not come in the time expected. These civil resolutions will be less likely if a person is arrested.

- There would likely be an increase in lawsuits claiming damages from police agencies alleging unlawful arrest.

- Losses will result that are not related to the prosecution itself. For example, a defendant's family will suffer financial loss at least for the time the defendant is in custody and may result in the loss of a job. If an arrest occurs the Office of Children's Services may need to step in to taking temporary custody of children. This is what occurred in the *Atwater* case where the mother was arrested for driving without seatbelts being buckled for the children. There will be social, as well as financial costs if this change occurs.

- Of major concern is the financial implication of a change in the arrest law for misdemeanors. Last fiscal year there were 31,713 misdemeanors offenses filed in Alaska state courts. Studies show that approximately 45% of all cases result in an immediate arrest.[2] This means that 55% of 31,713 misdemeanors can potentially be new arrests. The worst case would be 17,442 new arrests. Corrections estimate a cost of over $100 for simply the booking process to enter a person into a correctional facility. This is an additional potential cost of $1.74 million just for booking. Of greater concern to the Department of Law is whether the criminal prosecutions conducted by the municipalities of Anchorage and Juneau will be discontinued because of the additional costs of incarceration for these communities. Both Anchorage and Juneau have been responsible for prosecution under their city ordinances. However, the state has experienced the withdrawal of communities from the prosecution of criminal cases because of the cost of incarceration. For example, Fairbanks simply repealed all their criminal ordinances in order to save money. Both Anchorage and Juneau have considered ways of reducing correction costs. The City and Borough of Juneau removed from the police department's budget the cost of incarceration and placed the budget item in the municipal attorney's office. Concurrent with the movement of this budget item was the reduction from one million dollars to $500,000

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[2] The 45% arrest rate is from a 10 year old national study. Hence, its implications may not apply to Alaska. Also it is noted that there were 75,552 minor offenses filed in FY 2010. It is unknown how many of the minor offenses are violations compared to misdemeanors.

for the cost of incarceration. The police department had difficulty in operating within its budget. The municipal attorney's office through managing its caseload has kept within the reduced budget. If with this proposed change the city's budget again goes to one million dollars the city may consider repealing ordinances as was done by Fairbanks. This means a choice between no law enforcement or the state picking up the cost. Anchorage and the state have also have had disputes over paying for cost of incarceration. This ended in litigation. If Anchorage and Juneau remove themselves from criminal prosecutions and the state picks up those cases there would need to be an increase in the Department of Law's budget of at least 15 attorneys, five law office assistants, and five paralegals given current municipal staffing. This would be a cost of $3.5 million.

- The Department of Correction will bear the major increase in cost under these proposals and should be contacted for a cost estimate.

The first scenario you describe would allow a peace officer to make a warrantless arrest for disorderly conduct (AS 11.61.110). That statute covers a reasonably broad range of prohibited conduct – from fighting not in self-defense to making an unreasonably loud noise. The department assumes you are mainly concerned with fighting not in self-defense. We agree that there may be some urgency to make an arrest. and you might consider making a statutory change to allow an officer to make an arrest without a warrant for fighting not in self-defense. This could be justified to a certain extent by the urgency of protecting the victim. However, it is important for law enforcement to remember that before a warrantless arrest for this offense, there must be probable cause that the person to be arrested was not acting in self-defense.

There are other considerations that would weigh on the side of waiting to obtain a warrant. The state is concerned that an "arrest them and sort it out later" attitude will grow with amending Alaska's misdemeanor arrest law, resulting in an increase in false arrest and civil litigation. We believe that unless there are special circumstances not described in your letter, on balance it would be better to require the peace officer to investigate the situation and then obtain a warrant from a judicial officer before making an arrest for fighting in violation of AS 11.61.110(a)(6). If a court has made a probable cause finding, officers will be absolved of civil liability. [3]

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[3] A simple hypothetical may be of help: The police are dispatched to a bar; they see two people fighting. They arrest both fighters. They remove the fighters from the bar and put them in separate patrol cars. Officers return to the bar to interview witnesses to

The other provisions of AS 11.61.110 also would, without other circumstances not described in your letter, be better served with an investigation and then a judicial warrant before an arrest – or possibly a citation rather than an arrest at all. For example, AS 12.61.110(a)(1) prohibits making an unreasonably loud noise with the intent to disturb the peace and privacy another person. It is probably better public policy to interview the victim and then either obtain an arrest warrant or cite the perpetrator. There is no urgency at that point that would justify an immediate arrest.

For all the reasons discussed above, the Department of Law has both legal and practical concerns in changing the law for either scenario.

We have, however, some suggestions for legislation that would help law enforcement officers perform their duties in a more efficient manner. The first is to consider the possibility of authorizing a law enforcement officer to obtain an arrest warrant from a judicial officer over the telephone, or by facsimile or over the Internet. This procedure was adopted in 2008 for search warrants (AS 12.35.015), and allows a peace officer to avoid a trip to the court house to obtain a search warrant. Another suggestion is to consider looking at specific misdemeanor offenses or circumstances that may pose an urgent need for an immediate arrest, and propose statutory authority for a peace officer to make an arrest without a warrant for that specific misdemeanor or under particular circumstances.

Another suggestion, although unrelated to the issue of arrest warrants, addresses a serious concern of the Department of Law, that is, the safety of law enforcement officers and other participants in the criminal justice system. It is to protect the personal information of these participants from being placed on the Internet. Arizona has a statute (A.R.S. §13-2401) that addresses this concern, and in pertinent part provides:

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find that either no one is willing to speak or claim to have seen nothing. Unfortunately this is a common occurrence. Both fighters were arrested so they need to be provided their rights under Miranda. Both choose not to speak. What is the officer to do? There is no legal principal that allows for the two people to be un-arrested. There was no probable cause for this arrest because probable cause consists of two parts; did a crime occur- here it probably did. But the second part of the equation is not present, that is, did each person commit the crime. Here the officers have no idea. Was the fight in self-defense, if so, then only one of the two arrestees committed a crime while the other was a victim. Which one? If they were not fighting in self-defense, there is no evidence of this element.

> A. It is unlawful for a person to knowingly make available on the world wide web the personal information of a peace officer, justice, judge, commissioner, public defender or prosecutor if the dissemination of the personal information poses an imminent and serious threat to the peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's safety or the safety of that person's immediate family and the threat is reasonably apparent to the person making the information available to the world wide web to be serious and imminent.
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> D.5 "Personal information" means a peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's home address, home telephone number, pager number, personal photograph, directions to the person's home or photographs of the person's home or vehicle.

I look forward to discussing your ideas and these suggestions with you. I hope this information is helpful to you.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By: Richard A. Svobodny
Deputy Attorney General