

MEMORANDUM

STATE OF ALASKA
Department of Law-Criminal Division

To: Senator John Coghill

Date: May 19, 2017

Thru: Robert Henderson
Deputy Attorney General

From: John Skidmore
Division Director
Department of Law – Criminal Division



Subject: **Survey of States Sentencing**

The Department of Law received several legislative inquiries about how Alaska's new sentencing scheme for typical first-time C felonies¹ compares to other states. This sort of analysis is complex and time-intensive for two reasons: first, Alaska's C felonies encompass a wide variety of conduct; and second, there can be substantial differences in how other states approach sentencing generally and how they classify their crimes specifically. This memo lays out how Law approached this analysis and what analyses have been completed to date.

Executive Summary

Alaska's sentencing reforms have been greater than any other state's sentencing reforms in the last decade. These reforms have left Alaskan judges with less discretion than judges in any other state to impose jail for the wide range of criminal conduct encompassed first time typical C felony. This means Alaska has the lowest authorized sentences in the nation for this wide range of conduct.

C Felonies In Alaska

Alaska classifies felony conduct into four groups or levels²: Unclassified, A, B, and C. Alaska's C felonies, our lowest level of felony conduct, cover a wide range of criminal conduct. There are over 100 C felonies in 12 different titles of the Alaska Statutes with the majority of those offenses found in Title 11. Class C felonies in Title 11 include crimes against persons, property, drug trafficking, family and vulnerable adults, public

¹ A typical C felony is one for which an aggravator or mitigator does not apply. If either applied, that would give the court discretion to depart from the presumptive sentencing range.

² There are a few non-classified felonies outside of AS 11.xx.xxx.

administration, public order, and public health and decency³. The current sentencing scheme for typical first time class C felonies in Alaska enacted under SB 91 is probation with a suspended term of imprisonment of 0-18 months.⁴ The wide range of criminal conduct encompassed by class C felonies calls for more discretion in fashioning the appropriate response from the criminal justice system to effectively protect the public, deter future criminal conduct, and rehabilitate the offender.

Steps In The Analysis

This analysis looked at the sentencing structures for first felony offenders in the other 49 states and the District of Columbia. The ultimate goal was to produce a chart for comparison purposes. *See* attached chart “Authorized Sentences for Low Level Felonies”. The first step considered whether the other states classify felonies (*i.e.*, place felonies into distinctive groups). Some states do not classify their felonies, but rather simply provide a sentence for each individual crime. Some states, such as Nevada and South Dakota, classify felony conduct into more than four groups or levels. If felonies were grouped into distinctive categories of offenses, then the next step was to determine if the state employs a presumptive sentencing scheme.⁵ Finally, for states that classify felonies and use presumptive sentencing, the last step was to determine if the number of prior felonies (*i.e.*, criminal history) was used to differentiate the authorized sentences. Put another way, did the state have a different sentence for a first felony versus a 2nd or subsequent felony?

³ The following list provides some examples of the types of crimes encompassed by class C felonies: **Assault in the Third Degree** (pointing a gun in another person’s face and even firing that gun so long as the victim is not hit); **Sexual Abuse of a Minor in the Fourth Degree** (a person 19 or older having sexual contact with a person 16-17 if there is a 3+ year age difference. This could include a 40 or 50 yr old person having sexual contact with a 16-17 year old.); **Arson in the Third Degree** (setting a fire to or exploding a vehicle); **Theft or Criminal Mischief \$1,000-\$25,000** (Criminal mischief is the intentional damaging of another’s property); **Endangering the Welfare of a Minor in the First Degree** (abandoning a child or not providing adequate food and water for the child); **Tampering with a Witness; Tampering with a Physical Evidence; Harming a Police Dog** (intentionally killing the dog); **Promoting Contraband** (bringing a weapon, drugs, or implement for escape into a prison); **Riot; Misconduct Involving Weapons in the Third Degree** (felon in possession); **Criminal Possession of Explosives; Misconduct of a Controlled Substance in the Third Degree** (dealing 1 of heroin or 2.5 grams of meth/cocaine).

⁴ This means imprisonment is not an option unless the court finds an aggravator. Before SB 91 was enacted, it was zero to two years of active jail time.

⁵ Presumptive sentencing refers to a sentencing scheme in which the authorized jail term is set absent aggravating or mitigating factors being found by the trier of fact.

As mentioned above, a number of states do not classify offenses at all. Instead they prescribe a specific penalty range within each individual statute. For those states, this survey selected three C felonies in Alaska that were common, non-violent C felonies: vehicle theft, theft of property worth more than \$1000, and commercial burglary. The authorized sentence for a first offender convicted of one of those three crimes was used in this survey for comparison purposes. Violent crimes were not used for comparison because in almost every state judges have the discretion to impose jail time (whereas in Alaska, judges do not have such discretion absent an aggravator).

Conclusion

The vast majority of states (44) provide judges the discretion to impose imprisonment (some states even require imprisonment) for first felony offenders convicted of the lowest category of felony. Only five other states have a “presumption” for probation (they are discussed individually in the chart), but even in those states judges have the discretion to impose imprisonment. Two of the five states with presumptive probation authorize up to a year of “shock incarceration” as a condition of probation. Alaska does not allow shock incarceration for those serving a presumptive probationary term. The remaining states that have a presumption of probation do not apply their presumption to the same wide range of conduct as Alaska does (these states exempt many offenses that are C felonies in Alaska). In short, even in those five states, judges have more discretion to impose jail for the wide range of criminal conduct that is classified as a C felony in Alaska.

It is also important to note that in those states which have engaged in criminal justice reform, none have reformed their respective sentencing scheme to the same extent as Alaska. In November 2016, the Pew Charitable Trusts released an overview of the criminal justice reform efforts undertaken since 2007.⁶ *See* attached chart or hyperlink in the footnote. This document outlines the different reform measures 36 states have undertaken since 2007. The reforms are broadly broken down into four categories, including sentencing/pretrial. Within the sentencing and pretrial category, Pew identified four specific reforms related to general reductions in sentences: "Establish presumptive probation for certain offenses", "Revise sentencing enhancements", "Revise mandatory minimums", and "Revise sentencing guidelines/establish sentencing commission". According to Pew, sixteen states have implemented one or more of these four provisions, though any single provision has not been implemented in more than eight states. (These

⁶ *See* "33 States Reform Criminal Justice Policies Through Justice Reinvestment", available at http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment

numbers include Alaska.) However, as the chart makes clear, Alaska is an outlier. The other fifteen states implemented no more than two categories of reforms, while Alaska alone enacted *all four* reforms to sentencing.

A closer look at how other states implemented their reforms demonstrates that Alaska's changes have been unusually broad. First, Alaska decreased sentencing ranges for virtually all classified felonies⁷ and class A misdemeanors, other states generally confined their amendments to limited types of offenses (generally drug or non-violent offenses) or made the new sentencing ranges advisory similar to the Federal Sentencing Guidelines. Second, while Alaska required a probationary sentence for all typical first C felonies, other states that created a presumption of probation generally limited the presumption to a narrower class of offense (again, generally drug offenses) and/or gave the sentencing judge the discretion to impose jail time. In other words, no other state established a presumptive probation for such a broad range of criminal conduct and eliminated the judge's discretion to impose any jail time. For example, Ohio, the state that comes closest to Alaska, still offers a significantly broader set of exceptions from the presumption – a list that has been expanded by subsequent legislative enactments, suggesting that the system proved unsatisfactory as designed.

⁷ They did not set sentence ranges for sex offenses and unclassified felonies do not have presumptive ranges.

Survey of States First Low Felony Sentencing

| Reforms | 49 States & DC | Classified felonies | Presumptive ranges | Lowest Level First Felony | Theft over \$1,000 | Vehicle Theft | Nonresidential burglary |
|---------|----------------|---------------------|--------------------|---------------------------|--------------------|---------------|-------------------------|
| ● | Alabama | Y | Y | 1 - 5 | 1 - 5 | - | 1 - 10 |
| | Arizona | Y | Y | 0.5 - 1.5 | 0.5 - 1.5 | 2.5 - 7 | 1.5 - 3 |
| | Arkansas | Y | Y | 0 - 6 | 0 - 6 | - | 3 - 10 |
| | California | N | N | - | 0 - 1 | 0 - 3 | 0 - 3 |
| | Colorado | Y | Y | 1 - 1.5 | 0.5 - 1.5 | 1 - 2 | 2 - 6 |
| | Connecticut | Y | Y | 0 - 3 | - | 0 - 10 | 0 - 5 |
| | Delaware | Y | N | 0 - 2 | - | 0 - 2 | 0 - 3 |
| | Florida | Y | N | 0 - 5 | - | 0 - 5 | 0 - 15 |
| ● | Georgia | N | N | - | - | 1 - 5 | 1 - 8 |
| ● | Hawaii | Y | Y | 1 - 5 | 1 - 5 | 1 - 5 | 1 - 5 |
| | Idaho | N | N | - | 1 - 14 | 1 - 14 | 1 - 10 |
| ● | Illinois | Y | Y | 1 - 3 | - | - | - |
| | Indiana | Y | Y | 0.5 - 2.5 | - | - | - |
| | Iowa | Y | N | 0 - 5 | - | - | - |
| | Kansas | Y | Y | *KS | - | - | - |
| ● | Kentucky | Y | Y | 1 - 5 | - | - | - |
| ● | Louisiana | N | N | - | 0 - 10 | 0 - 5 | 0 - 12 |
| | Maine | Y | N | 0 - 5 | - | - | - |
| ● | Maryland | N | N | - | - | 0 - 5 | 0 - 3 |
| | Massachusetts | N | N | - | 0 - 5 | - | 0 - 20 |
| | Michigan | N | N | - | 0 - 5 | - | 0 - 10 |
| | Minnesota | N | N | *MN | - | - | - |
| ● | Mississippi | N | N | - | 0 - 5 | 0 - 20 | 0 - 14 |
| | Missouri | Y | Y | 0 - 4 | - | - | - |
| | Montana | N | N | - | - | - | 0 - 20 |
| ● | Nebraska | Y | N | 0 - 2 | - | - | 0 - 25 |
| | Nevada* | Y | N | 0 - 1 | 1 - 5 | - | 1 - 10 |
| | New Hampshire | Y | N | 0 - 7 | - | - | - |
| | New Jersey | Y | Y | *NJ | - | - | - |
| | New Mexico | Y | Y | 1.5 | - | - | 1.5 |
| | New York | Y | Y | 1 - 4 | - | - | - |
| ● | North Carolina | Y | Y | 4-6 mo. | - | - | - |
| | North Dakota | Y | Y | 0 - 5 | - | - | - |
| ● | Ohio | Y | Y | 0.5 - 1 | - | - | - |

| | | | | | | | |
|---|----------------|---|---|---------|---|-----------|-----------|
| | Oklahoma | Y | N | - | - | 0 - 5 | 2 - 7 |
| ● | Oregon | Y | N | *OR | - | 1 - 3 mo. | 1 - 3 mo. |
| | Pennsylvania | Y | Y | 0 - 7 | - | - | - |
| | Rhode Island | N | N | - | - | 0 - 10 | 0 - 10 |
| ● | South Carolina | Y | N | 0 - 5 | - | - | - |
| ● | South Dakota | Y | Y | *SD | - | - | 0 - 15 |
| | Tennessee | Y | Y | 1 - 2 | - | - | - |
| | Texas | Y | Y | 0.5 - 2 | - | - | - |
| ● | Utah | Y | N | 0 - 5 | - | - | - |
| | Vermont | N | N | - | - | 0 - 10 | 0 - 15 |
| | Virginia | Y | N | 1 - 5 | - | - | - |
| | Washington | Y | N | 0 - 5 | - | - | - |
| | West Virginia | N | N | - | - | 1 - 10 | 1 - 10 |
| | Wisconsin | Y | Y | 1 - 1.5 | - | - | - |
| | Wyoming | N | N | - | - | 0 - 10 | 0 - 10 |
| | Washington DC | N | N | - | - | 0 - 5 | 2 - 15 |

- states that have engaged in sentencing reform since 2007 per PEW

states with judicial discretion to impose jail sentences of 1 year or more

*KS: Presumptive probationary sentence for first felony, unless conviction is for hindering prosecution or vehicle theft.

*MN: uses a sentencing grid for presumptive sentences. Minnesota uses a criminal history score. A theft crime of \$5,000 or less and non-residential burglary will be presumptively stayed for a first time felony offender, but the court discretion can impose a sentence up to 1 year and one day, if the offender has the lowest possible criminal history score.

*NJ: Prison cannot be imposed unless the judge finds that "imprisonment is necessary for the protection of the public", that "there is a substantial likelihood that the defendant is involved in organized criminal activity" or case is domestic violence, or defendant is convicted of vehicle theft or identity theft. If prison is imposed, presumptive term is 4 years

*NV: First conviction for the lowest level felony (Class E) carries a 1 to 4 year prison term, but the court "shall suspend the execution of the sentence and grant probation" and can include 1 year of shock incarceration.

*SD: Class 5 and 6 felonies carry a maximum sentence of 5 and 2 years, respectively. A first conviction has a presumptive probationary sentence, but this presumption does not apply to escape, assault, stalking, DVPO violation, custodial interference, indecent exposure, or marijuana distribution

*OR: Oregon sets detailed presumptive ranges based on the offense: the ranges for the three designated offenses are given

