MEMORANDUM OF LAW

Re: HB2 and Separation of Powers

The Division of Legal and Research services drafted a "memorandum" on February 18, 2024(I believe they meant to type 2025), which alleged that HB2, as currently written, violates the doctrine of Separation of Powers. However, the memorandum makes no legally cognizable claim. This is because the memorandum argues that the law affects charging and dismissing of criminal charges, when in reality, the law only touches on sentencing of a crime.

Therefore, the memorandum's argument regarding Separation of Powers does not affect HB2. The case law cited in the memorandum supports that HB2 is properly allocating authority to the judiciary, specifically stating:

> As a general matter, the executive branch has the sole authority to decide whether to bring criminal charges and what criminal charges to bring. In contrast, sentencing is primarily considered a judicial function, subject to the parameters and guidelines created by the legislature.[1]

HB2 does not touch on the explicitly enumerated authority of the executive branch to charge and prosecute a case. As stated, HB2 offers an alternative sentencing scheme, which is the sole authority of the judiciary, that can be imposed on a defendant.

The memorandum's main argument lies with the postulate that, if a prosecutor objects to a defendant's request to enter the program, the court gets the final decision. This argument bears no merit. This is because, before the defendant can enter into the

---

[1] Frankson v. State, 518 P.3d 743, 753 (Alaska App. 2022).

program, the defendant must first plead guilty to the charged offense. A defendant has the right to plead guilty at any time. And likewise, a prosecutor has no standing to oppose a defendant's guilty plea to the charges brought by the prosecution.

The author of the memorandum does properly cite a Supreme Court of Kentucky case where the court found that a defendant's entry into the Kentucky felony diversion program did violate the Separation of Powers doctrine. However, the author conveniently left out the fact that the Kentucky statute which creates the diversionary program requires prosecutor's consent. Therefore, under Kentucky's felony diversion program, it would be improper for a court to accept a plea and entry into the program without a prosecutor's consent. But that is not the case with HB2.

It is clear that Kentucky's diversionary program is a bargaining token for the prosecutors to use while securing a plea. In contrast, HB2 is a sentencing method, designed to prevent an offender from reoffending. Because of the differences in Kentucky's diversionary program and HB2, the Kentucky case is irrelevant.

All of the case law cited in the memorandum deals with the charges against the defendant being altered. HB2 requires a plea to the initially charged crime. HB2 does not offer a reduction in the charge. HB2 only touches sentencing. In fact, if a defendant is charged with additional crimes, or if someone was injured as a result of the DUI, the defendant is precluded from entering the program. It should be noted that a larger concern with HB2 would be an overzealous prosecutor attempting to charge additional crimes to preclude a defendant from the program.

In conclusion, HB2 does not violate Separation of Powers because it does not give the power to charge or reduce a crime to the judiciary. Rather, those powers are unaffected by HB2, and still remain entirely with the executive branch. Because HB2 in substance and form is a sentencing statute, it does not violate any constitutional standards, rights, or doctrines.