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RE: Comprehensive Analysis of Whether HB2 Violates the Separation of Powers Doctrine in Alaska, Supported by the Constitutionality of A.S. 12.55.085

I. QUESTION PRESENTED

Does House Bill 2 (HB2) violate the implied Separation of Powers? Furthermore, how does the established constitutionality of Alaska Statute 12.55.085, which permits courts to suspend sentences, support the argument that HB2 does not violate the Separation of Powers Doctrine?

II. BRIEF ANSWER

No, HB2 does not violate the Separation of Powers Doctrine in Alaska. The diversion program falls within the permissible delegation of authority from the legislature to the judiciary and does not constitute an impermissible usurpation of the executive branch's prosecutorial discretion. The established constitutionality of Alaska Statute 12.55.085, which grants the judiciary sentencing discretion, further supports this conclusion by demonstrating the legislature's authority to delegate aspects of the criminal justice process to the judicial branch without violating the Separation of Powers Doctrine.

III. FACTS

The issue at hand concerns House Bill 2 (HB2) and its potential impact on the Separation of Powers Doctrine in Alaska. It has been alleged that HB2 improperly vests powers belonging to the executive branch (specifically prosecutorial discretion) within the judicial branch.

The Separation of Powers Doctrine in Alaska is not explicitly stated in the Alaska Constitution. Rather, it is implied, "Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed."[1] This implied doctrine establishes three distinct branches of government: the legislative, the executive, and the judiciary. Each branch has its own inherent powers, and none of the three branches may exercise the power of another branch unless that power has been delegated.

Within the realm of criminal law and prosecution, the established roles of each branch are as follows:

- **Executive:** The executive branch "[has] exclusive authority to decide whether and how to prosecute a case: 'the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding.'"[2]
- **Legislative:** The legislative branch, as the sovereign state, "has inherent and reserved police power to enact laws to promote the safety, health and general welfare of society but stated that this power must be exercised within constitutional limits. [3]
- **Judicial:** The judicial branch "decides the relative culpability of the defendant and the severity of the penalty that should be meted out."[4]

[1] *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947 (Alaska 1975).
[2] *State v. District Court,* 53 P.3d 629 (Alaska App. 2002).
[3] *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961).
[4] *State v. Ewing*, 1999 WL 46533 (Alaska App. 1999).

However, these powers are not always mutually exclusive and can be concurrent. The legislature can delegate certain powers to other branches. For instance, the executive branch's power on whether to proceed or dispose of case is a power that has often been delegated by the legislature to the judiciary. The Alaska Courts stated:

> At common law, the power to dismiss a case rested exclusively with the prosecuting authority. However, many states have modified this common law principle, generally requiring judicial consent for dismissal. See Manning v. Engelkes, 281 N.W.2d 7, 10–11 (Iowa 1979) (collecting authority). Some states, including Alaska, have modified the common law further, authorizing the court to dismiss a criminal indictment on its own motion in the interest of justice, without regard to the prosecutor's position. People v. Panibianci, 134 Misc.2d 274, 510 N.Y.S.2d 801, 802 (Sup.Ct.1986); State v. Sonneland, 80 Wash.2d 343, 494 P.2d 469, 475 (1972) (Hale, J., dissenting). Several jurisdictions, including Alaska, have made this modification in the common law by statute or criminal rule[.][5]

Alaska Criminal Rule 43(c) is a prime example, stating, "The court may, either on its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action, after indictment or waiver of indictment, to be dismissed. . ."[6] While this rule allows the court to dismiss a case, a power traditionally held by the executive. However, this authority is limited:

> While Criminal Rule 43 vests the trial court with broad discretion to dismiss, it does not grant unlimited authority. For example, the court cannot intrude into the executive function by choosing which charge to bring against a defendant or which defendant should be prosecuted. . . Nor can the court direct the state to prosecute a given case.[7]

While the Criminal Rule 43 has never been challenged in Alaska as a carte blanche violation of the Separation of Powers Doctrine, other similar rules have been analyzed in

[5] State v. Echols, 793 P.2d 1066 (Alaska App. 1990).
[6] Alaska Rules of Criminal Procedure 43.
[7] *Ewing*, 1999 WL 46533 (Alaska App. 1999).

other jurisdictions. The Vermont Supreme Court analyzed one such claim in *State v. Sauve*, which referenced Alaska Criminal Rule 43. "The case law from other jurisdictions indicates that trial courts have the discretion to dismiss prosecutions in furtherance of justice on a case-by-case basis when it would be fundamentally unfair to continue the prosecution."[8]

Furthermore, the legislature has enacted Alaska Statute 12.55.085, which permits the courts to suspend the imposition or execution of a sentence in criminal cases. This statute grants judges the discretion to determine whether, and under what conditions, a sentence may be suspended. The constitutionality of such legislative delegation to the judiciary in the realm of sentencing is well-established.

IV. DISCUSSION

The central question is whether the specific provisions of HB2 that involve the judiciary in informing defendants about and evaluating eligibility for a DUI diversion program constitute an impermissible violation of the Separation of Powers Doctrine. To answer this, the bill must be analyzed in light of existing jurisprudence regarding the roles of each branch in criminal matters and the permissible delegation of powers. Critically, the established constitutionality of A.S. 12.55.085, granting courts sentencing discretion, provides a strong basis for concluding that HB2 also respects the Separation of Powers Doctrine.

[8] *State v. Sauve*, 666 A.2d 1164 (Vermont 1995).

A. The Requirement to Inform Defendants About the Diversion Program Does Not Constitute Plea Negotiation.

HB2 mandates that the court inform DUI defendants about their potential eligibility for a diversion program at their initial appearance or arraignment. The concern raised is whether this constitutes the judiciary engaging in plea negotiations, a function generally reserved for the executive branch, as highlighted by the prohibition against judicial participation in negotiations in *State v. Buckalew*[9]. However, this requirement does not cross the line into negotiation for several reasons.

First, Alaska Rules of Criminal Procedure 5 requires the court to inform a defendant of the charges against them and the possible sentences they face. If HB2 were enacted, the DUI diversion program would become one of the potential statutory outcomes for a DUI charge. Informing the defendant about this program is consistent with the court's existing duty to disclose potential penalties. Therefore, because HB2 and Criminal Rule 5 require disclosure of the program, the judge presiding over the hearing is not participating in negotiation with the defendant. This is because the judge is bound, by operation of law and the rules of criminal procedure to disclose the existence of the punishment.

Second, simply informing a defendant about a statutorily created alternative to traditional prosecution is not akin to the judiciary actively bargaining with the defendant over the terms of a plea agreement. The judge is not offering specific concessions or engaging in back-and-forth discussions to secure a particular outcome. The information provided is a

[9] *State v. Buckalew*, 561 P.2d 289 (Alaska 1977).

factual statement about a potential option created by the legislature. This is distinct from the prohibited conduct under *Buckalew*.

Furthermore, it is the role of the legislature to craft law and the penalties for breaking the laws. Article II Section 1 of the Alaska Constitution states: "The legislative power of the State is vested in a legislature. . ." Article VII Section 4 states: "The legislature shall provide for the promotion and protection of public health." Section 5 states: "The legislature shall provide for public welfare."

These provision in the Alaska Constitution have been accepted to mean that the legislative branch has full authority to pass laws and delegate responsibility for the administration of these laws. Delegation of authority has been upheld in the Alaska Supreme Court:

> The legislative power of the state 'is vested in a legislature.' It is argued that because of this constitutional provision the power may not be delegated.
>
> But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility[.][10]

B. The Judiciary's Role in Evaluating Eligibility for the Diversion Program is a Permissible Exercise of Delegated Authority.

HB2 also requires that a judge evaluate a defendant's eligibility for the DUI diversion program. This raises the question of whether this encroaches upon the executive branch's authority to decide whether and how to prosecute a case. However, this function is

[10] *Boehl v. Sabre Jet Room*, 349 P.2d 585 (Alaska 1960).

analogous to existing areas where the judiciary exercises discretion in criminal matters, often based on legislative delegation.

Criminal Rule 11(i) governs restorative justice programs and provides a useful parallel. Criminal Rule 11(i) states: "with the consent of the victim(s), the prosecutor, and the defendant(s), the judge may refer a case to a restorative justice program." While the prosecutor's consent is required for initial entry, the ultimate decision to refer the case rests solely with the judiciary. This demonstrates that the legislature has already delegated final authority to the judiciary to make determinations regarding alternative resolutions to traditional prosecution, even in situations where the executive branch plays a role.

Furthermore, Criminal Rule 11(e)(1) & (2) permit a judge to accept or reject negotiated plea agreements between the defendant and the executive branch. As noted in *Frankson v. State*: ". . . the criminal rule that governs the acceptance or rejection of plea agreements, Rule 11(e), is limited to the presentation and evaluation of sentencing agreements, over which the courts do have authority."[11] The judiciary's role in evaluating eligibility for a diversion program under HB2 can be seen as a similar exercise of its authority to assess whether a particular resolution is appropriate.

Furthermore, A.S. 12.55.155, governs aggravating and mitigating factors in sentencing. Under this statute, both the prosecution and the defense can request the application of various factors, and the judiciary ultimately decides whether to accept or reject those

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

requests after a hearing. The judiciary rejecting the request of the executive branch to apply an aggravating factor does not violate Separation of Powers Doctrine. Similarly, a judge determining eligibility for a legislatively created diversion program does not inherently violate Separation of Powers. The judiciary's role in evaluating a defendant's eligibility for a diversion program, even if it involves considering factors that the executive branch might weigh differently in its charging decisions, is akin to the established role of the judiciary in applying aggravators and mitigators in sentencing.

The key distinction is that HB2 does not allow judges to unilaterally initiate or control the prosecution of a case. The decision to charge a defendant with DUI always remains with the executive branch. HB2 merely provides a potential alternative to traditional prosecution, and the judiciary's role in informing defendants, evaluating eligibility, and placing a defendant into an alternative justice program is a permissible exercise of authority delegated by the legislature, consistent with the judiciary's existing functions in sentencing and reviewing alternative resolutions.

C. The Constitutionality of A.S. 12.55.085 Which Establishes The Suspended Imposition of Sentence(SIS) Supports the Conclusion that HB2 Does Not Violate Separation of Powers.

The fact that Alaska Statute 12.55.085, permitting the suspension of sentences(SIS) by the judiciary, has not been successfully challenged as a violation of the Separation of Powers Doctrine provides significant support for the constitutionality of HB2's provisions regarding the DUI diversion program. The SIS concept has moreover been alive and well in Alaska for over fifty years. A.S. 12.55.085(a) reads:

> Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, *the court may, in its discretion,* suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

Section (f) outlines when the court may not suspend a sentence. The statute does not require executive branch consent. In fact, many SIS outcomes have occurred over vigorous prosecutorial objection. Further, the Alaska Supreme Court has stated "We further note that whether or not a sentencing court should impose a suspended imposition of sentence in a given case is, by AS 12.55.085(a), left to the discretion of the sentencing court."[12] This decision bolsters the point that the judiciary does not need the consent of the executive to suspend a sentence, nor does it jeopardize the Separation of Powers Doctrine. To the contrary, the SIS was created by the legislature, not the judiciary.

In *Parrot v. Municipality of Anchorage*[13] the Alaska Court of Appeals explains why the court is permitted to suspend a sentence without executive branch consent. "By statute, sentencing courts have discretion whether to impose a suspended imposition of sentence in a given case."[14] (emphasis added).

[12] *Natrass v. State*, 554 P.2d 399 (Alaska 1976).
[13] *Parrot v. Municipality of Anchorage.* 69 P.3d 1 (Alaska App. 2003).
[14] Id. At 5-6.

A.S. 12.55.085 represents a clear instance where the legislative branch has delegated a significant aspect of the criminal justice process to the judicial branch. This delegation being the determination of whether and how a legally imposed sentence will be executed.

This SIS delegation in A.S. 12.55.085 recognizes the judiciary's role in applying the law to specific facts and exercising discretion within the bounds set by the legislature. Sentencing, including the decision to suspend a sentence, requires a nuanced consideration of the individual defendant and the circumstances of their crime, a task for which the judicial branch is uniquely positioned. The constitutionality of this delegation confirms the principle that the legislature may, without violating the Separation of Powers, confer upon the judiciary discretionary powers within the criminal justice system, even those that might tangentially relate to the enforcement of laws (an executive function).

Similarly, HB2 involves a legislative delegation of authority to the judiciary. The legislature has created a diversion program as an alternative to traditional prosecution for certain DUI offenses. To implement this program effectively and fairly, the legislature has assigned the judiciary the tasks of informing defendants about the program and evaluating a defendant’s eligibility based on criteria established by the legislation. This delegation is analogous to the delegation of sentencing discretion in A.S. 12.55.085 in that it empowers the judiciary to make determinations within a framework established by the legislature, impacting the potential outcome of a criminal case. The established acceptance of A.S. 12.55.085 demonstrates that such legislative delegation to the judiciary within the criminal justice arena is permissible under Alaska's implied

Separation of Powers Doctrine and therefore supports the conclusion that HB2's similar delegation is also constitutional.

D. HB2 Creates a New Category of Delayed Sentences Sui Generis of SIS and SEJ Delayed Sentences.

Some have incorrectly attempted to shoehorn HB2 as being subject to prosecutorial discretion, arguing that HB2 creates a suspended entry of judgment akin to the SEJ described in A.S. 12.55.078. A.S. 12.55.078, (SEJ) specifically requires prosecutorial consent to suspend the entry of the judgment against the defendant,[15] and is available for a wide variety of crimes.

But this is not the case for the diversion program envisioned by HB2. To the contrary, HB2's diversion program is sui generis, unique unto itself, of these statutory sentencing schemes. This program does not need prior legislation or preexisting legal framework. Rather, it creates a distinctly new operation of law that is and of itself constitutional. Both SIS and SEJ suspensions were created by the legislature. Additionally, the legislature has the inherent authority to create a diversion program for first time DUI offenders. Any authority that either the judiciary or executive branch has vested in SIS or SEJ exists solely because the legislature chose to delegate that authority to the respective branch.

[15] A.S. 12.55.078(a): Except as provided in (f) of this section, if a person is found guilty or pleads guilty to a crime, the court may, with the consent of the defendant and the prosecution and without imposing or entering a judgment of guilt, defer further proceedings and place the person on probation. The period of probation may not exceed the applicable terms set out in AS 12.55.090(c). The court may not impose a sentence of imprisonment under this subsection.

Here, the legislation that creates the diversionary program has built a statutory and constitutional delegation of authority to each branch. HB2 is not bound by any previous legislative acts.

E. HB2 is not a Unique Diversionary Program within the United States.

HB2, while creating unique and novel approaches to justice in Alaska, is not the first of its kind. Many similar diversionary programs such as HB2 are alive and well in other jurisdictions.[16] HB2 mirrors Oregon's first time DUI diversion program. Unlike Alaska, Oregon's constitution has an explicit and strongly written Separation of Powers clause. Article III of the Oregon constitution reads: "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the function of another, except as in this Constitution expressly provided." If the diversion program HB2 was modeled after violated Separation of Powers, then Oregon's strong Separation of Powers Clause would have prevented the program from being implemented. Yet, no such challenges have been brought in Oregon.

HB2 and its out of state precursors do not create a contest between the three branches of government. Rather, HB2 creates a diversion option while ensuring a defendant may repay their debt to society, focus on rehabilitation and discourage re-offending.

[16] Oregon, Florida, Minnesota, Georgia, Kansas, Pennsylvania and others.

V. CONCLUSION

HB2 does not violate the Separation of Powers Doctrine under the Alaska Constitution. The bill’s provisions are permissible exercises of delegated authority, consistent with existing judicial functions and the legislature's constitutional power to create alternative resolutions to prosecution. Furthermore, the established constitutionality of Alaska Statute 12.55.085, which delegates significant sentencing discretion to the judiciary, strongly supports the conclusion that HB2's similar delegation of responsibilities does not infringe upon the Separation of Powers. To the contrary, both scenarios reflect a proper allocation of authority within the criminal justice system, where the legislature defines the law and potential outcomes, the executive branch prosecutes violations, and the judicial branch applies the law and exercises discretion within the established framework.

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