

MEMORANDUM

STATE OF ALASKA

Department of Law

To: Honorable Mike Chenault
Speaker of the House

Date: February 11, 2014

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From: Richard Syobodny
Deputy Attorney General

Subject: HB 218 and Analysis of
State v. Silvera and State v. Perez 309, P.2d 1277,
(Alaska App 2013)

State v. Silvera and *State v. Perez*, 309 P.3d 1277 (Alaska App. 2013), are two cases that allow for a reduction in a sentence by a three-judge sentencing panel for noncitizens of the United States, with the resulting consequence that citizens of the United States are sentenced to harsher sentences than noncitizens. Put another way, a person born in Jamaica (Mr. Silvera) or the Dominican Republic (Mr. Perez) who comes to Alaska and commits a felony can receive a lesser sentence for the same crime than a person born in Bethel or Anchorage, Alaska.

These combined cases involve two noncitizens convicted of violent felonies. In a drunken rage, Silvera stabbed a man in the face with a knife after Silvera's drunken girlfriend began a verbal argument with the victim. (The girlfriend was casting slurs about the victim's Native ethnicity). Perez severely beat a State's witness in Perez's then pending felony drug case when both the victim and defendant were in a State confinement facility. If the defendants were to receive at least one year's confinement (the presumptive minimum) for their offenses, each might be classified by U.S. Immigration and Customs Enforcement (ICE) as an "aggravated felon," as that term is defined by the federal immigration statutes, and so they might be considered "deportable." If they are "deportable" ICE then has prosecutorial discretion to initiate removal proceedings against them. The defendants asked the sentencing courts to sentence them below the minimum statutory presumptive ranges for their crimes so that they could avoid possible deportation – that is, so that they could avoid being classified as "aggravated felons." The three-judge panel sentenced Silvera below the minimum presumptive range and proposes to similarly sentence Perez below the presumptive range. The panel's rulings are based solely on their determinations that "manifest injustice" will occur if the defendants are subjected to United States immigration law regarding removal of people convicted of aggravated felonies.

In its decision, the court of appeals ruled that Alaskan sentencing courts may impose less severe sentences on noncitizen defendants than sentences they would impose on otherwise similarly situated citizen defendants, to specifically include imposing sentences below the presumptive minimum sentences generally mandated by the Alaska Legislature. Under the court of appeals' ruling, courts may do so for the sole purpose of providing noncitizen defendants with *de facto* immunity from or providing them with otherwise prohibited defenses to immigration law. Specifically, the court ruled that a three-judge panel may impose a sentence below the presumptive minimum term for the sole purpose of shielding a noncitizen defendant from possible deportation proceedings (the outcome of which would be uncertain). The state sought discretionary review by the Alaska Supreme Court but the State's petition for hearing was denied.

The court of appeals has adopted an overly broad interpretation of Alaska sentencing law and this interpretation should be reversed. The sentencing criteria upon which Alaskan courts may base a sentence (presumptive or otherwise) are the seriousness of the offense; the defendant's criminal history; rehabilitation, deterrence of self and others, affirmation of community norms, and where necessary, isolation to protect the community, as well as victims' rights. State court's control over whether a defendant may be subject to removal from the United States and what exceptions to removal may apply are not listed among these criteria. Thus, formulating a sentence based on the goal of controlling whether and to what extent a defendant may be subject to removal under federal law exceeds the scope of authority the Alaska Constitution and the Legislature have granted sentencing judges, including the three-judge panel.

The court of appeals' ruling violates the equal protection principles of the Alaska Constitution because it authorizes courts to treat defendants differently based on their citizenship and immigration status. Although noncitizen defendants benefiting from the diverse treatment will most likely not claim a violation, similarly situated citizen defendants denied the same non-statutory mitigating factor will have colorable equal protection claims. Applying a different sentencing standard for citizens and noncitizens will undermine public confidence in Alaska's criminal justice system. From the citizens' point of view, they will be denied an opportunity to be sentenced by the three-judge panel simply because they are citizens and so are not subject to federal immigration laws that the state judges have decided are unjust.