Responses to Comments On
The Memorandum Provided By the Department of Law

Quotations from State of Alaska Legal Memo	Discussion of Alleged Error in State's Memorandum	Department of Law Response
"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 "	These decisions do not just affect noncitizens, but also allow citizens of the United States to seek a reduction in sentence if they might face denaturalization and deportation as a result of the original sentence	This alleged "error" misses the point of the bill because the bill is intended to allow federal immigration policy to control Alaska's sentencing goals. If you are a citizen by birth, you **cannot be denaturalized.** So the current law creates at least two classes of citizens and grants to those not citizens by birth a privilege not afforded to those that are citizens by birth. The bill will stop with "dual class citizenship" standard. Citizens **cannot** be deported. A naturalized citizen can be "denaturalized", but only for obtaining their citizenship and certificate of naturalization fraudulently. 8 USC §§ 1451, 1481; U.S. Const. Art. XIV. Certain acts establish a *prima facie* case that a person obtained their citizenship fraudulently, but those acts involve giving allegiance to a foreign power or a group advocating violent overthrow of the United States; or voluntarily and with the specific intent to relinquish U.S. citizenship engaging in acts that show a desire to be expatriated or denaturalized. Or they involving lying about or withholding info about committing acts before being naturalized that made the person inadmissible in the first place, to include committing certain crimes in the U.S. or acts of torture, murder, terrorism or other atrocities abroad. *Id; see also* 8 USC 1182(a)(3)(E).
" ...with the resulting consequence that citizens of the United States are sentenced to harsher sentences than noncitizens."	Citizens may also seek reductions in their sentence in appropriate circumstances.	Yes citizens can. Noncitizens have those same opportunities – they do not exclude or include on the basis of citizenship, alienage, or nationality.

	They are not categorically "sentenced to harsher sentences" just because they are citizens	Citizens are denied the same opportunity to be sentenced to a reduced term by the three-judge panel and so will serve longer sentences than a noncitizen whose sentence is reduced. For instance, in Silvera's case, the trial judge *originally* sentenced him to 2 years' confinement with one year suspended. The court of appeal originally affirmed the judge's decision not to referred sentencing to the three-judge panel for deportation consequences. *Silvera v. State*, 244 P.3d 1138, 1148-50. Then the Alaska Supreme Court summarily reversed that decision without full briefing on the matter. On remand, the three-judge panel imposed a misdemeanor level sentence of less than one year with no suspended time – for stabbing the victim in the eye while threatening to kill him. Thus, had Silvera been a citizen he would have had to serve one year, with another full year of suspended time over his head to ensure compliance with normally ordered rehabilitation tools.
"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 fort he same crime than a person born In Bethel or Anchorage, Alaska."	This statement shows a fundamental misunderstanding of citizenship law. Many people born in Jamaica and/or the Dominican Republic are American citizens at birth. Likewise, a person born in Alaska to invading Japanese troops during the Japanese World War II occupation of Attu and Kiska would not be a US citizen, although born in Alaska. Many Americans are born in foreign countries. Examples include U.S. Senator Ted Cruz (born in Canada) ,U.S. Senator John McCain(born in Panama), and George Romney (born in Mexico). Place of birth is irrelevant to sentencing	The memo is clearly written in general terms and does not take into account the myriad ways in which a person might qualify for US citizenship. But those distinction are irrelevant for purposes of the bill. The point is not *how* one does or does not qualify for citizenship. The point of the memo and the bill is that citizens and noncitizens should not be, but currently are, treated differently and are sentenced according to different goals. Citizens are subject to the goals set out in Article 1, section 12 of the Alaska Constitution ("Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the

	decisions under the cases cited.	principle of reformation.") and AS 12.55.005 ("The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider (1) the seriousness of the defendant's present offense in relation to other offenses; (2) the prior criminal history of the defendant and the likelihood of rehabilitation; (3) the need to confine the defendant to prevent further harm to the public; (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order; (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and (7) the restoration of the victim and the community). In contrast, defendants claiming they face potential deportation maybe sentenced according the sentencing court's desire to circumvent federal immigration laws. The bill ensures that place of birth and the citizenship or immigration consequences flowing from that are truly irrelevant. Right now, they do matter.
"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	There is no "might" about any of this. Federal Immigration law classifies as an "aggravated felony" any crime-whether felony or misdemeanor, and whether "aggravated" or not if the offense is a "crime of violence (as defined in section 16 of title 18, United States	There is a "might." The comment itself is phrased in terms of "if" the offense is "a crime of violence." This is a term of art in immigration contexts, and not every crime that involves what the average person would call "violence" is a "crime of violence" from the federal government's perspective. All of the immigration agencies alluded to in the comment must

federal immigration statutes, and so they might be considered 'deportable."'	Code, but not including a purely political offense), for which the term of imprisonment [isl at least one year." INA§101(a)(43)(F). If the US Government- not just ICE, but other federal agencies as well- considers a crime to be an "aggravated felony," then a person Is deportable under INA 237(a)(2)(A)(iii), which states that "Any alien who is convicted of an aggravated felony at any time after admission is deportable." If the alien has not yet been admitted to the United States, there is a waiver but if the alien has been granted a green card, as Silvera and Perez had, then there is no waiver for the aggravated felony	employ the same definitions; they do not change by agency because they are the federal statutory definitions as interpreted by the federal courts. Alaska has no control over these definitions or interpretations. Often the federal interpretation is counter-intuitive: the federal courts "look to the language of the State offense of conviction rather than the facts relating to the crime" and if that language requires only a risk of injury to someone or to property, it will not be enough; it has to "involve a substantial risk of using force **with intent** against a person or property." So arguably, a conviction for violating Alaska's first-degree assault statue, under which a person can be guilty if they recklessly cause a serious physical injury to another by means of a dangerous instrument, might not be considered a "crime of violence" for federal immigration purposes. Our judges and DAs lack the knowledge, training and expertise required to apply this complex (arguably convoluted) federal standard. And so they make important sentencing decisions without even knowing they do not have the full picture.
"If they are 'deportable' ICE then has prosecutorial discretion to initiate removal proceedings against them.•	Immigration detention is mandatory for "aggravated felons." ICE does not have discretion, nor do immigration judges have discretion to provide relief to "aggravated felons." Moreover, ICE is not the only federal agency that is implicated. Other federal agencies can initiate removal proceedings based on a person's conviction for an "aggravated felony." Customs and Border	See above. Agreed that ICE, USCIS, and CBP do have a part to play in immigration and the initial issuing of a notice to appear for a deportation proceeding. Each has a specific area of responsibility, and ICE has primary responsibility for cases involving "aggravated felons" who are already residing in the country. All these entities have discretion and employ it in the same manner. The claim to the contrary is inaccurate in face of official federal policy memos. *See e.g.* Policy Memorandum 602-0050, *Revised*

	Protection is mandated to deny entry to a person who has an aggravated felony conviction, and USCIS is required to deny a naturalization application filed by such a person.	*Guidance for the Referral of Cases Involving Inadmissible and Removable Aliens, U.S. Citizenship and Immigration Services*, Nov. 7, 2011. (Attached) And in fact, USCIS and ICE, both components of the Dept. of Home Land Security, have entered into a Memorandum of Agreement on enforcement issues, part of which requires USCIS to refer all cases involving criminal aliens to ICE. *Id.*; John Morton, Office of Dir., U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), Policy Number 10075, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011). That immigration defense entities (such as the Immigration Policy Center and immigration defense attorneys) believe the discretion is not exercised often enough on behalf of their clients does not establish that it does not exist or that deportation will be automatic in every case. Even the United States Supreme Court has recognized that immigration enforcement agencies have vast discretion even when an alien is "deportable." *See, e.g., Arizona v. United States*, ___ U.S. ___, 132 S.Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); *Id.* at 2508 (noting, "it seems unlikely that the Attorney General would have the alien removed . . . when an alien is an elderly veteran with significant and longstanding ties to the community.").
"The defendants asked the sentencing courts to sentence	They were not necessarily avoiding deportation, they	According to the "expert" testimony by an immigration defense lawyer, and the

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."	were merely attempting to avoid being classified as "aggravated felons." They remain highly likely to face deportation proceedings. Being an "aggravated felon" is not the only reason why a person might face deportation proceedings. There are numerous offenses that can lead to deportation and being an "aggravated felony" is only one of them. *See, generally*, INA 237(a); *see also* the attached Factsheet from the Immigration Policy Center. The defendants, however, were trying to avoid being convicted of something defined under federal law as an "aggravated felony" because those convicted of such crimes generally have no possible relief from deportation, no matter how long they have lived in the US, no matter what their ties here, and no matter what their equities. If they are considered deportable or a reason besides being an "aggravated felon," they can sometimes obtain relief from deportation before an Immigration Judge.	defendant's public defenders at the sentencing hearings, the defendants were in fact and absolutely avoiding deportation as aggravated felons. The defense witness claimed that Silvera would not be deportable at all, and that although Perez would be "deportable" for his drug dealing, he would have defenses to blocking that basis for deportation that would be unavailable to him an aggravated felon. To the extent any of these claims were inaccurate or incomplete, these were the claims upon which the courts decided the cases. If the statements fail to account for all the complexities of immigration law, this only goes to show that our judges lack sufficient knowledge and expertise to be making these decisions – because they did not realize the defense provided information was, as the comment alleges, inaccurate. And so Alaska should not allow federal policy to drive Alaska sentencing policy. Again see above for the discussion regarding discretion – the comment ignores the prosecutorial discretion available to immigration officers and attorneys and ignores that in *Padilla v. Kentucky*, the Supreme Court recognized that Congress chose to take away that discretion for criminal sentencing judges. Congress also removed the discretion that federal immigration judges possess, but it did not curtail the federal executive's (*i.e.*, ICE, USCIS, CBP, & OPLA) discretion.
"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	The Court of Appeals indicated that it could also impose less severe sentences on citizens who might face deportation after being denaturalized.	Again, if they are "denaturalized" under federal law; then they are not citizens anymore. And applying the court's holding to someone who *might* be denaturalized involves applying even more complex federal law that our judges

on otherwise similarly situated citizen defendants, to specifically include imposing sentences below the presumptive minimum sentences generally mandated by the Alaska Legislature."		and DAs lack the expertise and training to apply. The result would simply be even more guess work and would simply be allowing even more federal law to control state sentencing. The State's sentencing goals should be its own. They should not be driven by federal policy. The comment shows that criminal sentencing should not take citizenship, nationality, or alienage into account.
"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."	The defendants received no immunity whatsoever. They may still face deportation. They only avoided the classification of "aggravated felon." An Immigration judge could still order them deported.	Again, the claims presented to the sentencing courts claimed otherwise. Moreover, by taking the offenses out of the definition of "aggravated felony" via the "crime of violence" provision, the defendants **did** receive *de facto* (that is, "in practice or actuality, but not officially established at law") immunity since they cannot be deported as "aggravated felons" under the "crime of violence" provision for their offenses.
"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 noncitlzen defendant from possible deportation proceedings (the outcome of which would be uncertain)."	The outcome of a deportation for an "aggravated felon" is certain-the person is ordered removed, with no relief available unless the person would be torture if returned to his or her country of citizenship. The person is also subject to mandatory detention when transferred from state to immigration custody.	Again, since federal immigration officials are not required to initiate deportation proceedings, and can cancel a Notice to Appear (the document that starts deportation proceedings) and can dismiss proceedings, the outcome is not clear when a state judge is passing sentence. *See* the supplied official policy memoranda attached hereto.
"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."	The Court of Appeals specifically rejected the argument that considering deportation consequences would violate equal protection. Moreover, there is no equal protection violation because (1) citizens who face possible deportation may also ask for a	The Dept. of Law believes this ruling was in error for several reasons. The Ninth Circuit Court of Appeals' view in the federal criminal context accords with the Dept.'s position. In *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990) the Ninth Circuit further noted that permitting possible deportation to affect sentencing decisions "would be treating aliens differently simply because

	sentence reduction, and (2) equal protection does not mean that all persons have to be treated exactly the same. For example, it is not an equal protection violation against sane people that Insane people may raise an Insanity defense, a defense that is not available to sane people. Moreover, citizens are harmed when their noncitizen loved ones are banished permanently from the United States.	they are not citizens" and inconsistent with its prior holding that deportation is not a proper ground for an *upward* departure. (In a prior case, *United States v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990), the court had to reverse a sentence that was increased on the theory that the defendant not amenable to probation because he would be deported if released from jail and so an increased sentence increase would "make up" for the time he would ordinarily have spent on probation.) Just as a sentencing court should not *increase* a sentence based on citizenship or immigration status, it should not decrease a sentence on the same basis. Further, when state officials (*i.e.* sentencing judges) treat people differently based on citizenship, nationality, or alienage, then the disparate treatment but be narrowly tailored to achieve a legitimate state concern. Simply trying to circumvent federal immigration law is not a valid state concern. *See* Alaska Const. art. 1, §12; AS 12.55.005. So a citizen (native-born or naturalized) might bring a successful equal protection claim in Alaska, which is more protective of equal protection rights than its federal counterpart. And, regardless of the ultimate legal outcome of such a claim, the current law allows Alaska's courts to impose more severe punishments on citizens with the same criminal history and who committed the exact same crime. Without this bill one set of defendants – aliens/noncitizens – will be sentenced under a different set of goals than citizens will be. Under the current court

		interpretation, one set of defendants gets the benefit of a potential mitigating factor that is unavailable to any other set of defendants. A citizen defendant or victim would justifiably question the fairness and integrity of such a system. This bill stands for the proposition that all people who commit crimes in Alaska will be sentenced according to the same principles of justice and the same sentencing goals – regardless of their citizenship, immigration, or alienage status. The insanity defense example is inapposite: Comparing an affirmative defense to guilt is not the same as affording a sentence reduction based on a protected classification.
"Applying a different sentencing standard for citizens and noncitizens will undermine public confidence in Alaska's criminal justice system."	Having the Alaska State legislature ratify the break-up of mixed status families so that mandatory detention and deportation may occur will no doubt undermine public confidence in Alaska's criminal justice system. Moreover, the United States Supreme Court specifically ratified the concept of taking immigration consequences into account when sentencing a defendant, in the case of Padilla v. Kentucky.	This bill is neither endorsement of nor an indictment of federal immigration policy or enforcement of that policy. It is not about the wisdom (or lack thereof) of current federal immigration policies or enforcement. It is about Alaskan independence from those policies in the criminal sentencing arena. Since at least 1978 no Alaskan appellate court cases involving a claim of separation of a family caused by sentencing and resulting deportation have occurred in state courts. (presumptive sentencing The State Legislature is not and cannot ratify federal deportation policy or decisions to deport. Alaska does not detain people for immigration proceedings, does not deport people, and cannot control federal decisions in this area.

		Moreover, the federal policy memos show that where a defendant has family and community ties to this country, prosecutorial discretion can be exercised in the defendant's favor. The comment misreads the *Padilla* case. There, the court ratified the idea that deportation consequences are an important issue for the defendant to be informed about by his defense attorney. That is not the same as saying it is important for the court to base a sentencing decision on. To the contrary, in that case the Supreme Court specifically recognized that Congress has *taken away* criminal sentencing courts' authority to stop deportation based on a sentence (the authority was known as a judicial recommendation against deportation and was binding on immigration officials). So while the deportation consequences might influence whether a defendant is willing to plead guilty to an offense or take his chances in front of a jury, they should not determine the appropriate sentence for the crime of which the defendant is convicted. Moreover, the federal circuit courts of appeals have also recognized Congress's prohibition against the federal criminal courts using sentencing to circumvent immigration law. That is, federal law already says basically the same thing this bill says. *See e.g.*, *United States v. Maung*, 320 F.3d 1305, 1309 (11th Cir. 2003) (stating "as courts cannot directly alter the result of the decision that Congress has made about the immigration consequences of an aggravated felony, they also cannot indirectly change that result by departing downward at sentencing in order to take a case out of the definition of aggravated felony"); *United States v. Aleskerova,* 300 F.3d 286, 300-01 (2nd Cir. 2002); *United*

		States v. Restrepo, 999 F.2d 640, 644 (2nd Cir. 1993) (stating "a court's disproval of [a congressional immigration] policy choice would not be an appropriate basis for a departure from the [sentencing] Guidelines, for the court's attempt to palliate that choice would encroach on the prerogative of the Legislative Branch."), *cert. denied*, 510 U.S. 954 (1993). The United States Supreme Court was asked to, but refused to consider reversing the *Restrepo* case. See also *United States v. Hernandez*, 325 F.3d 811, 815-16 (7th Cir. 2003) (finding that imposing a decreased sentence to avoid deportation consequences, which included the defendant's claim she would be separated from her family, would be improper).
"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"	Nothing in current prevents a citizen who may face denaturalization and deportation from asking to be sentenced by a three-judge panel. Citizens may also be subject to federal Immigration laws. The State's proposed amendment would prevent citizens from arguing to a three-judge panel that the immigration consequences to citizens maybe taken in to account in sentencing.	This is claim is simply incorrect based on the language and intent of the bill. The bill does not differentiate between a "citizen" that purportedly may face deportation consequences and a "noncitizen." It does not even use the words "citizen" or "noncitizen." The bill prevents consideration of a claim that "the sentence may result in the classification of the defendant as deportable;" it does not limit the manner in which federal law might work to make that classification possible. Thus, the bills applies to everyone and prohibits consideration of immigration and/or deportation consequences no matter the defendant's status.