SENATOR FRED DYSON

To: Senator Kevin Meyer, Co-Chair
Senator Pete Kelly, Co-Chair
Senate Finance Committee

From: Senator Fred Dyson

Date: March 19, 2013

Re: SB 56 – Response to Questions from March 18th Hearing

On Monday, March 18th, the Senate Finance Committee heard public testimony regarding SB 56, a bill which will reclassify certain nonviolent, small-quantity drug offenses as misdemeanors. Both supporters and opponents spoke to the substance of the bill. As the bill's sponsor, I would like to clear the air about a number of claims raised in the committee hearing.

First, I want to say that I have tremendous respect for Alaskans at the frontlines of our struggle with drugs and drug addiction, including the police officers and prosecutors who voiced their concerns during the hearing. Many of these concerns are valid, and deserve to be addressed.

<u>Regarding the Quantity Limits Laid Out in SB 56</u>

Officer Seth McMillan of APD expressed doubts regarding the appropriate quantity thresholds for an implied distribution felony as set out in SB 56. I was pleased that the officer seems to agree that *some* type of threshold is necessary to differentiate drug dealers from drug abusers, and that the current system, which brings down an automatic felony on a drug user or possessor for any amount whatsoever, is not effective.

The quantity limits laid out in SB 56 are based on a survey of other jurisdictions that now prosecute simple possession as a misdemeanor, or otherwise differentiate between "small" quantities and larger amounts that imply distribution. While detailed data from every jurisdiction was a bit difficult for my staff to track down, here is a chart from several of these jurisdictions:

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Limits for "User Quantities" or Analogous Small Amounts of Controlled Substances				
State	Cocaine	Heroin	Methamphetamine	LSD
Maine	7 grams	1 gram	7 grams	25 tabs or 1,250 micrograms (.000125 grams)
Oregon (simple possession is a felony; this defines "small amounts")	10 grams	5 grams	10 grams	Two hundred or more "user units"
South Carolina	1 gram	2 "grains" (0.13 grams)	1 gram	50 micrograms (.00005 grams)
Tennessee	.5 grams	(data missing)	.5 grams	(data missing)
Vermont	2.5 grams	.2 grams	2.5 grams	100 milligrams (0.1 grams)
Wisconsin	1 gram	Any amount	Any amount	1 gram
Wyoming	3 grams	0.3 grams (in liquid form). 3 grams in powder form	3 grams	0.3 grams

As you can see, SB 56's proposed quantity limits place us at about the average of these jurisdictions. In fact, our reform tracks most closely with the laws of Wyoming, a state which shares many of Alaska's political and demographic/geographic features:

Alaska & Wyoming Felony Quantities

Substance	Alaska (Proposed)	Wyoming (Current)
Cocaine	3 grams	3 grams
Heroin	500 milligrams	3 grams (powder form); 300 milligrams (liquid form)
Methamphetamine	3 grams	3 grams
LSD	300 milligrams	300 milligrams
Psychedelic Mushrooms	3 grams	3 grams
Oxycodone/ controlled pharmaceuticals (IA & IIA)	15 or more tablets, ampules, or syrettes, or 3 grams, whichever is smaller.	3 grams in "pill or capsule form"

I again want to point out that nothing in this bill prevents law enforcement or prosecutors from pursuing felony charges against drug dealers when they have evidence of distribution. Regardless of

the quantity possessed by a drug dealer, if there is evidence of distribution, the offender will be subject to a felony distribution charge.

Regarding the Assertions of Deputy Attorney General Rick Svobodny

I was pleased that Mr. Svobodny pointed out that our current laws on drugs, as structured in the early 1980's, do not take the costs of incarceration or adjudication into account. While SB 56 does not attempt to go line-by-line through our penal code and do so, it is very much in the spirit of matching laws with their real-world costs that this bill was introduced.

Mr. Svobodny also correctly pointed out that the "look back" portion of SB 56's three-strikes provision goes back for 5 years, while the "look back" for DUI's is currently 10 years. Though SB 56's "look back" differs from our DUI laws, I believe it is of an appropriate length for this type of offense. If a drug user has remained clean for 8 years, for example, I do think that if they happen to "fall off the wagon" we should acknowledge the capacity for rehabilitation demonstrated by this extensive clean period. In contrast, I find DUI's more troublesome, even if spaced out over many years, because of the very real possibility of a victim that stems from this behavior.

Mr. Svobodny further stated that SB 56 might be the "death knell" for therapeutic courts in Alaska. As a supporter of therapeutic courts, this was a topic my office gave considerable thought to before introducing SB 56. We would not have introduced the bill had we believed it would actually eliminate these treatment efforts.

Because SB 56 contains a three-strikes provision that preserves felony charges for drug-addicted repeat offenders (a provision of the bill that was suggested by an Anchorage judge, not coincidentally), we believe that the felony hammer will remain for those serious addicts most in need of therapeutic court intervention. Furthermore, after numerous conversations with stakeholders, we feel that an appropriately-structured misdemeanor sentence can be incentive enough to keep people in treatment, especially those first and second time offenders who are more amenable to that treatment. We can see this dynamic at work in the therapeutic courts run by the Municipality of Anchorage, which works with only misdemeanants.

Mr. Svobodny also mentioned that many offenders who currently qualify for therapeutic courts voluntarily choose jail time instead, even with the option of a "Suspended Imposition of Sentence" (SIS) for their felony charge. What he failed to point out is that after the completion of an SIS—wherein an offender avoids jail time and has the charge "set aside"—offenders nevertheless *still receive the label of a convicted felon* in our current system. I submit that this is the most serious disincentive for participation in the therapeutic courts, and urge the Department of Law to help address it.

Similar to his concerns about treating misdemeanants in the therapeutic courts, Mr. Svobodny also raised the issue of probation officers and misdemeanants. Yet here too, he misspoke. Mr. Svobodony

stated that Alaska provides no probation officer supervision to misdemeanants. This is not the case. While it is true that at present the DOC does not provide Division of Probation and Parole supervision to misdemeanants, nearly all misdemeanants convicted of substance abuse offenses are assigned to the Alcohol Safety Action Program (ASAP) and with it a probation officer from the Department of Health and Social Services. Supervision by this probation officer and completion of ASAP involves an initial assessment of the misdemeanant, assignment to treatment if appropriate, and follow up with the treatment provider to ensure that the offender completed this treatment. While the program's name might suggest an exclusive focus on alcohol offenses, research conducted by Mr. Dunbar, whose report you received, indicated that ASAP can and does work with the abusers of other substances. A supervisor at ASAP confirmed that they already work with a number of drug addicted convicts.[1]

Finally, the full version of Mr. Dunbar's report also expressly addresses Mr. Svobodny's prediction that some prosecutorial practices will change (e.g. some MICS-3's will no longer be negotiated down to MICS-4's); that is why the report provides a "low," "medium," and "high" estimate of savings, each corresponding to a different level of prosecutorial adjustment.

Regarding Federal Grant Monies

Senator Bishop asked Mr. Svobodny if Alaska might miss out on certain federal grant monies if we adopted this reform. While Mr. Svobodny did not claim to know of specific grants that might be threatened by this reform, he did allude to problems winning federal grants now experienced by Colorado and Washington State following their legalization of marijuana. But this assertion conflates two different types of reforms. SB 56 does not legalize anything. Every drug that is currently illegal will remain illegal under SB 56, and will be subject to felony charges with regards to distribution—where the majority of federal dollars are targeted.

My office is aware of no evidence that the fourteen states which already classify possession as a misdemeanor are categorically disadvantaged when applying for federal grants because of this feature of their laws, or that they receive less grants per capita. Given that classifying possession as a misdemeanor while maintaining distribution felonies is a far cry from legalization, I doubt that such evidence exists.

Regarding the Seriousness of a Class A Misdemeanor

I would like to close with this point, because I believe it is tremendously important: at times during the public testimony, it was asserted or alluded to that by reclassifying possession as a Class A Misdemeanor we are "sending the wrong message to children," or indicating to them that we do not

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[1] Dunbar, Forrest, "Reclassifying Nonviolent, Small Quantity Drug Possession as a Misdemeanor: Potential Impacts on Alaska's Budget and Society," at 39 (January 7th, 2013). Summary version in committee packet; full version available upon request.

consider drug abuse a serious crime. Those of you who have worked with me know that I care deeply about Alaska's youth, and I think always about how our policies affect them. But I simply do not believe that a Class A Misdemeanor is an ambiguous message. It is a very serious charge—the highest level of misdemeanor—and can carry with it up to a year in prison and a $10,000 fine. I suspect that if any of you told your son or daughter that their behavior could lead to a year in jail and a $10,000 fine, they would not view that behavior as being condoned by our laws.

For comparison, I have included several other offenses that are Class A Misdemeanors. I think you will agree that they are unambiguously and rightly condemned by our legal code, and are perhaps even more dangerous than simple drug possession:

Assault in the Fourth Degree (AS 11.41.230), wherein an offender "recklessly causes physical injury to another person" or "with criminal negligence... causes physical injury to another person by means of a dangerous instrument." **This can include domestic violence, as defined in AS 18.66.990.**

A *second* DUI, as well as a first (AS 28.35.030).

Endangering the Welfare of a Child in the First Degree (AS 11.51.100 (b)), when the charge relates to operating a vehicle while under the influence of alcohol or another substance (as defined in AS 28.35.030).

Endangering the Welfare of a Vulnerable Adult in the Second Degree (AS 11.51.210) wherein an offender "fails without lawful excuse to provide support for the vulnerable adult and the vulnerable adult is in the person's care (1) by contract or authority of law; or (w) in a facility or program that is required by law to be licensed by the state."

Sexual Abuse of a Minor in the Fourth Degree (AS 11.41.440), wherein either "(1) being under 16 years of age, the offender engages in sexual contact with a person **who is under 13 years of age** and at least three years younger than the offender; or (2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim."

These are all serious crimes, most of which require victims. Yet all of them are Class A Misdemeanors. If a Class A Misdemeanor was truly such an insignificant charge, we would have constituents—not to mention the Department of Law—beating down our doors to make these felonies. That this has not occurred demonstrates that a Class A Misdemeanor is far from a slap on the wrist or the legal equivalent of decriminalization. I thus believe that a Class A Misdemeanor is an appropriately serious charge for nonviolent, small-quantity offenders, and carries with it a strongly disapproving social message.