IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

DAEMION PATILLO,
DOB: 04/17/1974
APSIN ID: 7439636
DMV NO. 7300751 AK
ATN: 113-825-349

Defendant.

No. 3AN-12-820 CR.

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OPPOSITION TO MOTION TO DECLARE AS 11.71.140-190 INVALID OR UNCONSTITUTIONAL & REQUEST FOR ALTERNATIVE REMEDIES

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Comes now, the State of Alaska, by and through Assistant District Attorney Andrew Grannik, to file its opposition to the defendant's Motion to Declare AS 11.71.140-190 Invalid or Unconstitutional & Request for Alternative Remedies.

ARGUMENT

The defendant argues that his and all other Alaskans' due process rights have been violated due to the State's failure to form a Controlled Substance Advisory Committee ("Committee") as prescribed by AS 11.71.100. Therefore, according to the defendant, statutes AS 11.71.140-190 are invalid or unconstitutional. This argument fails for the following reasons.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

I. The Department of Law is required to establish a Controlled Substance Advisory Committee under AS 11.71.100.

The statute at issue, AS 11.71.100, requires that the Department of Law create a Controlled Substance Advisory Committee. "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[1] The language of a statute is "construed in accordance with [its] common usage," unless the word or phrase in question has "acquired a peculiar meaning, by virtue of statutory definition or judicial construction."[2] Courts "presume that every word in the statute was intentionally included, and must be given some effect."[3] In ascertaining the plain meaning of the statute, courts refrain from adding terms."[4]

AS 11.71.100 Controlled substance advisory committee, reads:

(a) The Controlled Substances Advisory Committee is established in the Department of Law. The committee consists of:

(1) the attorney general or the *attorney general's* designee;

(2) the commissioner of health and social services or the commissioner's designee;

(3) the commissioner of public safety or the *commissioner's* designee;

(4) the president of the Board of Pharmacy or the designee of the president who shall also be a member of the Board of Pharmacy;

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[1] *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 151 (Alaska 2002)(citing *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996))(quoting *Anchorage Sch. Dist. v. Hale*, 857 P.2d 1186, 1189 (Alaska 1993)).

[2] *Id.* (citing *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 905 (Alaska 1987)).

[3] *Id.* (citing *Alaska Transp. Comm'n v. AIRPAC, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984)).

[4] *Id.* (*Cf. Hickel v. Cowper*, 874 P.2d 922, 927–28 (Alaska 1994))("Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. We are not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result.").

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

(5) a peace officer appointed by the governor after consultation with the Alaska Association of Chiefs of Police;

(6) a physician appointed by the governor;

(7) a psychiatrist appointed by the governor; and

(8) two individuals appointed by the governor.

(b) Members of the committee appointed under (a)(5) - (a)(8) of this section serve terms of four years. A member of the committee receives no salary but is entitled to per diem and travel expenses authorized by law for boards and commissions under AS 39.20.180.

(c) The attorney general is the chairman of the committee.

(d) The committee meets at the call of the attorney general.

(e) The committee may not meet less than twice a year.

(f) Five members of the committee constitute a quorum, except that a smaller number may adjourn a meeting in the absence of a quorum. A quorum being present, a majority vote of the total membership is required to take official action.

AS 11.71.100 should be read in conjunction with the commentary that follows, which states:

> This section establishes the nine-member Controlled Substance Advisory Committee in the Department of Law, sets forth the membership of the committee, specifies terms of appointment and compensation, designates the attorney general as the chairman, provides that five members are necessary to constitute a quorum and provides that a majority of the total membership is necessary for official action.[5]

When read together, there is little ambiguity in AS 11.71.100; the statute calls for the creation of a Controlled Substance Advisory Committee, describes who shall serve on the committee and in what capacity, establishes terms and

[5] AS 11.71.100, from Commentary at 46.

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

compensation of its members, outlines voting procedures to reach a quorum and states how often they should meet.

Additionally AS 11.71.110, Duties of committee, further outlines the committee's role by stating:

The committee shall:

> (1) advise the governor of the need to add, delete, or reschedule substances in the schedules in AS 11.71.140 - 11.71.190;
>
> (2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances and the diversion of prescription drugs into illicit channels;
>
> (3) evaluate the effectiveness of programs in the state providing treatment and counseling for persons who abuse controlled substances;
>
> (4) recommend programs to the Alaska Court System to be instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses and who are charged with crimes involving controlled substances;
>
> (5) review and evaluate enforcement policies and practices of the Department of Public Safety and the Department of Law with regard to crimes involving controlled substances, and recommend modifications of those policies and practices consistent with the committee's assessment of the probable danger of particular controlled substances; and
>
> (6) review budget requests and recommend amounts for appropriations to the governor and the legislature for departments and agencies responsible for
>
> > (A) enforcing criminal laws pertaining to controlled substances;

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

(B) providing treatment and counseling of persons who abuse controlled substances; and

(C) regulating the legitimate handling of controlled substances.

The commentary following AS 11.71.110 states:

> This statute specifies the duties of the Controlled Substance Advisory Committee. Among other things, the committee is to advise the governor on the need to add, delete or reschedule substances. The committee is advisory only, and all of its duties should be viewed in that light.[6]

When read in conjunction with AS 11.71.100, this statute describes in greater detail the advisory duties of the Controlled Substance Advisory Committee. Similar to AS 11.71.100, and for purposes of responding to the defendant's motion only, these statues leave little to be interpreted by the courts; AS 11.71.100 directs the Department of Law to form the Controlled Substance Advisory Committee.

The defense is correct in asserting that the Department of Law has never formed the Controlled Substance Advisory Committee. Therefore, the only question before this court is: *What, if any, legal effect does the Department of Law's failure to create a Controlled Substance Advisory Committee have on individuals being prosecuted under Alaska's Controlled Substance statutes AS 11.71.040 through AS 11.71.090.* The answer is simply: *None.*

II. The statutes creating the Controlled Substance Advisory Committee are purely directory; therefore, failure to comply with the requirement to form the Committee does not result in the invalidation of the controlled substance statutes.

To determine the legal effect of the Department of Law's failure to create the Controlled Substance Advisory Committee, the Court should begin its analysis by determining whether AS 11.71.100 is a mandatory or directory statute. Statutes

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

are typically classified as mandatory or directory to determine what effect the court should give the statute. "There is an important distinction between directory and mandatory statutes. The violation of a directory statute is attended with no consequences, since there is a permissive element."[7] However, "[t]he failure to comply with the requirements of a mandatory statute either invalidates the transaction or subjects the noncomplier to the consequences stated in the statute."[8]

The distinction stems from the fundamental differences in the intention of the legislature in enacting the two types of statutes.[9] To be clear, "no statutory provisions are intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular situation are not prescribed, the courts must judicially determine them."[10] "In doing so they must consider the importance of the literal observance of the provision in question to the object of the legislation. If the provision is essential it's mandatory. A departure from it is fatal to any proceeding to execute the statute or to obtain the benefit of. As a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes are permissive."[11]

The question of whether a statutory provision is to be given mandatory or directory effect generally arises in cases considering whether claims of legal rights are affected by the violation of statutory directives.[12] This determination involves a decision about whether the violation is serious enough to invalidate acts or proceedings pursuant to the statute, including rights, powers, privileges or immunities claimed.[13] Unfortunately, there is no simple test for determining

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[6] AS 11.71.110, from Commentary 26-27.
[7] Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, § 25:3, p 583 (2009 New Edition).
[8] *Id.* (citing to *Clary v. U.S.*, 52 Fed. /Cl. 390 (2002), aff'd in part, rev'd in part on other grounds, 233 F.3d 1345 (Fed. Circ. 2003)(*People v. Spampinato*, 70 A.D.2d 647, 416 N.Y.S.2d 662 (2d Dep't 1979)(other citations omitted).
[9] *Id.*
[10] *See Thompson v. Stanford*, 281 Ark. 365, 663 S.W.2d 932, 16 Ed. Law Rep. 345 (1984).
[11] *Statutes and Statutory Construction*, § 25:3, p 584.
[12] *Id.*
[13] *Id.*

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

whether a provision should be given mandatory or directory effect. Consequently, the Court must engage in statutory construction to determine whether AS 11.71.100 is mandatory or directory.

A. AS 11.71.100 is directory as it does not declare a penalty for non-compliance.

To begin, AS 11.71.100-120 are silent as to non-compliance. "Often the test for determining whether a statute is mandatory or directory is formulated in terms of the statutory consequences: 'If [statutes are] mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done.'"[14] In *Tuthill v. Rendleman*, the Illinois Supreme Court explained that "[t]he general rule in determining whether a statute is mandatory or advisory is as follows: 'Where the terms of the statute are preemptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.'"[15]

In the Alaska case, *Copelin v. State*, the Supreme Court discussed AS 12.25.150, which sets forth the rights of a prisoner after arrest, and the impact of a police officer's violation of this statute.[16] The Court focused on subsection b, which states:

> Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friends of the prisoner, have the right to immediately visit the person arrested.[17]

The Court found that the police had violated the defendant's statutory right by denying him the opportunity to call his attorney immediately after his arrest. The

[14] *Id.* at § 57:8, p 45, (citing *Town of Milton v. Cook*, 244 Mass. 93, 138 N.E. 589 (1921)).
[15] 387 Ill. 321, 56 N.E.2d 375 (1994).
[16] 659 P.2d 1206 (Alaska 1983).

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

Court explained that, "The language of this statute is clear and unambiguous and mandates that every arrestee have the right to telephone or otherwise communicate with his attorney immediately. *This mandate was viewed by the legislature as sufficiently important to warrant criminal and civil penalties for its willful or negligent violations.*"[18] The legal effect was the suppression of the defendant's breathalyzer results as it affected his ability to assert a defense at trial.[19] AS 12.25.150 is an example of a mandatory statute.

The lack of stated consequences for non-compliance leads to a directory construction.[20] In the immediate case, AS 11.71.100 merely calls for the creation of the Controlled Substance Advisory Committee. AS 11.71.110 delineates the Committee's advisory duties. AS 11.71.120, in relevant part, instructs the Governor to introduce legislation in accordance with the Committee's recommendation or when a substance is added as a controlled substance under federal law. As stated above, "[w]here a legislative provision is followed by a penalty for failure to observe it, the provision is mandatory."[21] The same rule applies with respect to both criminal and noncriminal sanctions and cases dealing with non-penal sanctions.[22] Glaringly absent from AS 11.71.100-120 are criminal or civil penalties for noncompliance. Therefore, the Court can safely conclude that because the legislature failed to impose sanctions for non-compliance, AS 11.71.100 is directory in nature and there is no legal effect for not forming the Committee.

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[17] *Id.* at 1210 (citing AS 12.25.150(b)).
[18] *Id.* (emphasis added).
[19] *Id.* at 1215 ("However, we conclude that the videotape evidence of his actions after he requested to speak with his attorney should have been suppressed entirely. Had he been allowed to consult with an attorney he may have elected to take the breathalyzer, and gained exculpatory evidence. Furthermore, had he been granted the right to consult with his attorney, it is likely that the videotaped events (his growing anger at not being able to talk with his attorney and his consequent verbal abuse of the police officer) would never have occurred.").
[20] *McCrea v. Haraszthy*, 51 Cal. 146, 1875 WL 1751 (1875).
[21] *In re Cramer's Election Case*, 248 Pa. 208, 93 A. 937 (1915).
[22] *People ex re. McGroarty v. City of Los Angles*, 9 Cal. App. 2d 431, 50 P.2d 101 (2d Dist. 1935); *Thomas v. Driscoll*, 42 Cal. App. 2d 23, 108 P.2d 43 (2d Dist. 1940).

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

B. AS 11.71.100 is directory because other statutes, namely AS 11.71.120(b), provide alternative means to schedule controlled substances.

Related statutes, in part, can assist the Court in determining whether a statutory provision is mandatory or directory. "If a particular provision in question is a part of a general legislative scheme, a consideration of the entire scheme together may make the particular provision clear."[23] AS 11.71.100-120 were passed in 1982 as part of Alaska's Controlled Substance Act.[24] The law was sweeping and comprehensive in nature; the title of Senate Bill 190 referred to it as: "An Act revising the drug laws and making amendments to the criminal laws of the state; and providing for an effective date."[25]

As discussed above, AS 11.71.100 establishes the Controlled Substance Advisory Committee. AS 11.71.110 delineates the duties of this advisory committee. AS 11.71.120 only establishes circumstances under which legislation must be proposed to the legislature. The power to actually schedule controlled substances has always, and will always, remain with the legislature.

Specifically, AS 11.71.120(a) and (b) state:

> (a) If, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 - 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.
>
> (b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

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[23] *Statutes and Statutory Construction*, § 57:6, p 41 (citing *Sigmon v. Southwest Airline Co.*, 110 F.3d 1200, 97-1 U.S. Tax. Cas (CCH) P 70076, 79 A.F.T.R.2d 97-2286 (5th Cir. 1997)(citations omitted).

[24] SLA 1982, ch. 45 § 1.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

This statute provides two situations under which the Governor is required to introduce legislation. The first occurs *if* the committee makes a recommendation. The second occurs if a substance is added as a controlled substance under federal law. AS 11.71.120 merely states that legislation shall be introduced when these two events occur. It remains within the Legislature's power to adopt, deny or modify any recommendation made by the Governor.

To accept the defense's argument that the Controlled Substance Advisory Committee would have rescheduled heroin (the drug the defendant is charged with distributing), the Court must make countless assumptions regarding the progression of any committee's recommendation. First, the Court must assume that an advisory committee would even make a recommendation to the Governor; nothing in the statute requires that the Committee actually issue a recommendation. Additionally, as discussed above, when a substance is added as a controlled substance under federal law, AS 11.71.120(b) requires the Governor to introduce legislation in accordance with that new federal law. It is quite possible that, had the committee been formed, it would have never made a single recommendation as there is another mechanism (AS 11.71.120(b)) to introduce legislation regarding the scheduling of controlled substances.

Next, to accept the defense's argument, the Court must assume that the legislature would pursue the Governor's proposed legislation and it would then survive numerous committee and sub-committee hearings to become a bill. Once the recommendation-turned-proposed-legislation, or some form thereof, became a bill it would need to survive a vote by both the House and the Senate, as well as the entire legislature. Last, should the bill pass, whatever form it is in up to this point must survive the then-sitting Governor's veto. Because AS 11.71.120(a) instructs the Governor to introduce the committee's recommendation in the form of legislation, there is no guarantee that the then-sitting-Governor will actually

[25] *Id.*

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

endorse the bill. This is arguably why the legislature created two sets of circumstances under which legislation pertaining the scheduling of controlled substances is to be introduced. Because AS 11.71.120(b) provides an alternate means for scheduling controlled substances, AS 11.71.100 is directory in nature.

III. The Alaska State Legislature and its committees have, in effect, operated as the Controlled Substance Advisory Committee.

Despite not having a Controlled Substance Advisory Committee, the Alaska State Legislature has been able to successfully schedule controlled substances and amend the statues establishing their schedules numerous times since the creation of the Controlled Substance Act in 1982. AS 11.71.140, schedule IA controlled substances, was amended during the following legislative years: 1990, 1994, 2006 and 2011. AS 11.71.150, schedule IIA controlled substances, was amended during the 1990 legislative year. AS 11.71.160, schedule IIIA controlled substances, was amended during the 1990 and 2011 legislative years. AS 11.71.170, schedule IVA controlled substances, was amended during the 1990, 1997, 2000, 2006 and 2011 legislative years. AS 11.71.180, schedule VA controlled substances, was amended during the 1987, 1990 and 2006 legislative years. And finally, AS 11.71.190, VIA controlled substances, was amended in 1998 (per Ballot Measure No. 8) and 1999.

The business of legislating controlled substances has not remained stagnant since the enactment of the Controlled Substance Act in 1982. In fact, the legislature has managed to stay apprised of current drug trends and has reacted accordingly. For example, in 2012, Senator Kevin Meyer introduced SB 140: "An Act classifying certain synthetic cathinones as schedule IIA controlled substances; and providing for an effective date." The Legislature took action to criminalize the possession and distribution of certain synthetic cathinones and assigned them as schedule IIA controlled substances. Interestingly, the United States Drug Enforcement Agency has scheduled synthetic cathinones as a schedule I controlled

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

substance, which is more severe than Alaska's classification as a schedule II controlled substance.[26]

During a January 2012 Senate Judiciary Committee hearing on SB 140, Anchorage Public Defender Quinlan Steiner testified about the criminal penalties associated with the scheduling of synthetic cathinones. According to the committee minutes, Mr. Steiner, "expressed concern about the level of offense and [schedule] [and] if there was any consideration given to dropping it to schedule III. That would be similar to what was done last year with the synthetic cannabinoids bill. He noted that schedule IIA offenses have some of the most severe penalties available under the state criminal code."[27] At the conclusion of the hearing, Senate Judiciary Committee Chairman Hollis French closed public testimony and announced that:

> He would hold SB 140 in committee. He commented that this brings up all the debates about drug sentencing and penalties. The point is to get people to stop using drugs when they're home working and living as free citizens. Putting them in prison for 24 months doesn't solve that problem, and prisons are expensive. The sponsor is sensitive to that problem, as is the committee.[28]

The legislative trajectory of SB 140 and HB 253 (the House version of SB 140) are prime examples of the oversight demanded by the defendant; these committees held numerous hearings relying on testimony from experts in the

[26] *See* http://www.justice.gov/dea/druginfo/drug_data_sheets/Bath_Salts.pdf ("On Friday, October 21, 2011, DEA published a final order in the Federal Register exercising its emergency scheduling authority to control three synthetic stimulants that are used to make bath salts, including: Mephedrone, 3,4 methylenedioxypyrovalerone (MDPV) and Methylone. Except as authorized by law, this action makes possessing and selling these chemicals, or the products that contain them, illegal in the United States. This emergency action was necessary to prevent an imminent threat to the public safety. The temporary scheduling action will remain in effect for at least one year while the DEA and the United States Department of Health and Human Services (DHHS) further study whether these chemicals should be permanently controlled. As a result of this order, *these synthetic stimulants are designated as Schedule I substances under the Controlled Substances Act*. Schedule I status is reserved for those substances with a high potential for abuse, no currently accepted use for treatment in the United States and a lack of accepted safety for use of the drug under medical supervision.)(emphasis added).

[27] The Alaska State Legislature, Senate Judiciary Committee Minutes on SB 140, January 27, 2012 (http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00552&end_line=00749&session=27&comm=JUD&date=20120127&time=1337).

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

medical, law enforcement and legal field in determining whether to criminalize, schedule and penalize these controlled substances.[29] The defendant, as well as all other Alaskans, has not been erroneously deprived of the oversight required when the legislature schedules controlled substances. As this example demonstrates, the legislature, through its normal process of passing a bill has, in effect, acted as the Controlled Substance Advisory Committee.

IV. The sentencing range for controlled substance crimes does not constitute cruel and unusual punishment.

The defense also asserts that the enforcement of the drug statutes under the current circumstances violates proportionality and the Eighth Amendment because they are "disproportionate to the offense being committed as to be completely arbitrary and shocking to the sense of justice."[30]

The defense carries the high burden of establishing this claim. Courts "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[31] The Alaska Constitution "does not require that criminal penalties be directly proportionate to the offense."[32] Accordingly, "only punishments that are 'so disproportionate to the offense committed as to be completely arbitrary and

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[28] *Id.*

[29] At the January 27, 2012 Senate Judiciary Committee hearing, Dr. Michael Cooper, Deputy State Epidemiologist, Division of Public Health, Dept. of Health and Human Services testified about the public danger posed by synthetic cathinones. (http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=S&beg_line=00552&end_line=00749&session=27&comm=JUD&date=20120127&time=1337). At a February 8, 2012 House Judiciary Committee hearing, Rodney Dial, Deputy Commander Division of Alaska State Troopers, testified about law enforcements ability to detect whether someone is under the influence of a controlled substance. (http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00186&end_line=00501&session=27&comm=JUD&date=20120208&time=1303).

[30] Motion to Declare AS 11.71.140-190 Invalid or Unconstitutional & Request for Alternative Remedies, at 7 (quoting *Moore v. State*, 262 P.3d 217, 222-23 (Alaska Ct. App. 2011) citing *Thomas v. State*, 566 P.2d 630, 635 (Alaska 1977)).

[31] *Dancer v. State*, 715 P.2d 1174, 1181 (Alaska App. 1986)(quoting *Solem v. Helm*, 463 U.S. 277, 290 (1993)).

[32] *Sikeo v. State*, __ P.3d __, Op. No. 2315, 2011 WL 2611285, at * 1 (Alaska App. July 1, 2011).

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

shocking to the sense of justice' are cruel and unusual for purposes of Article I, Section 12 of our Constitution."[33]

The defense has not met its burden of demonstrating that Alaska's current sentencing scheme is so arbitrary that it shocks the conscience. To begin, in order to meet the high burden of showing cruel and unusual punishment, it is not enough to simply point out a circumstance-specific difference between a potential federal and state sentence for a drug crime. The defendant generally complains about the lengthy terms of incarceration for repeat felony offenders convicted of drug possession and distribution, but fails to allege disproportionate punishment under Alaska law. Instead, the defendant cites "a wide disparity of sentences" between Alaska law and Federal laws. At its most basic level, the defendant's argument is that where State and Federal laws prohibiting the same conduct differ as to punishment, the more severe of the two is unconstitutional. If you follow the defense's argument to its natural conclusion, any state whose sentencing guidelines are harsher than the Federal Government's must be deemed unconstitutional. Unsurprisingly, no cases are cited in support of that argument. To the contrary, Alaska courts assessing claims that presumptive sentences are arbitrarily and shockingly disproportionate to the offense look to whether or not such disproportionality exists between the claimant's sentence and that of other defendants sentenced under the statute.[34]

Additionally, and more importantly, the State of Alaska has adopted uniform sentencing guidelines based on the classification of the crime and the defendant's prior criminal history. AS 12.55.005, Declaration of purpose states:

> The purpose of this chapter is to provide the means for determining the appropriate sentence to be imposed upon conviction of an offense. *The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in*

[33] *Id.*
[34] *See, e.g. Sikeo v. State*, 258 P.3d 906, 911-912 (Alaska App. 2011).

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

> *sentences can best be achieved through a sentencing framework fixed by statute* as provided in this chapter.[35]

The statute goes on to outline factors which the court must consider when imposing a sentence:

> (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.

AS 11.55.125 establishes the presumptive ranges for individuals being sentenced to felony-level crimes. The sentences are based on the classification of the crime and the individual's criminal history. The commentary following AS 11.55.125 explains that, "[a] presumptive sentence is a legislative determination of the term of imprisonment the average defendant convicted of an offense should be sentenced to, absent the presence of legislative prescribed factors in aggravation or mitigation or extraordinary circumstances. The sentence may be increased or decreased as a result of those specified factors pursuant to the range of sentencing

[35] Emphasis added.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

discretion provided in AS 12.55.155-12.55.175."[36] The legislature specifically crafted these sentencing guidelines to eliminate any sense of arbitrariness or uneven application in their enforcement. In *State v. Juneby*, the Alaska Court of Appeals explained the importance of having uniformity under the State's current sentencing guidelines:

> When viewed in the light of the fundamental goals of the new sentencing statutes, the rationale for this relatively inflexible sentencing framework is readily understood. If sentencing courts were permitted, under the presumptive sentencing scheme, to deviate routinely and substantially from the presumptive terms prescribed by law, *the fundamental purposes of eliminating disparity and establishing reasonable uniformity in sentencing would be completely undermined.* Unless the provisions of AS 12.55.155 are adhered to strictly, and unless a measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, *then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality*, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.[37]

Throughout its opinion, the *Juneby* court reiterates the fundamental purpose of the State's current presumptive sentencing guidelines: to eliminate disparity and any sense of arbitrariness when courts sentence defendants. For this very reason, the defendant's argument that the current sentencing guidelines are cruel and unusual fails.

The defense also argues that had a Controlled Substance Advisory Committee been formed, it would have obviously recommend increasing treatment opportunities based on the financial burden placed upon the state in prosecuting drug-related crimes, as well as the need to rehabilitate drug addicts. There is simply no way to predict what the Committee would have recommended,

[36] AS 11.55.125, Commentary from Senate Journal Supp. No. 47, at 153-56 (June 12, 1978).
[37] 641 P.2d 823, 833 (Alaska App. 1982)(opinion modified, 665 P.2d 30 (Alaska App. 1983)).

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

including increasing drug-treatment opportunities in lieu of a serving time in accordance with current sentencing guidelines, had it been formed. The defense's argument is pure conjecture and should not be given any weight.

Additionally, the legislature has other means available to ensure sentences are appropriate and justified. As discussed above, the Alaska State Legislature has continued to create, amend and repeal controlled substance legislation despite not having a Controlled Substance Advisory Committee. In fact, and as the defense points out, Senator Fred Dyson recently introduced SB 56, which would reduce specific felony drug crimes to misdemeanors.[38] According to the bill's sponsor statement:

> HCS CSSB 56(JUD) creates an escalating punishment regime, similar to Alaska's approach to DUI's, reclassifying the initial possession of non-distributive (small quantity) amounts of Schedule IA (e.g. heroin, codeine, oxycodone) and IIA substances (e.g. methamphetamine, mushrooms, cocaine) from a Class C Felony to a Class A Misdemeanor. This reclassification preserves a serious criminal penalty for drug possession, but allows first time offenders to avoid the collateral consequences and longer prison sentences of a felony.[39]

As is evidenced by the introduction of SB 56 and subsequent committee hearings, the legislature is having an informed and lengthy discussion on the current drug laws and the sentences attached to those laws. It is quite possible that SB 56 will pass and the current drug laws will change. However, that does not equate to deeming the current sentencing ranges as being cruel and unusual. It simply means that the legislative process is working as intended. The defense has not demonstrated how the existing presumptive ranges are cruel and unusual.

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

[38] Senate Bill 56: An Act relating to certain crimes involving controlled substances; and providing for an effective date, introduced February 15, 2013.

[39] SPONSOR STATEMENT FOR HCS CSSB 56(JUD), Senator Fred Dyson, Senate Judiciary Committee, April 13, 2013.

V. The Department of Law's failure to establish the Controlled Substance Advisory Committee has no legal effect thereby making the requested remedies inappropriate.

In his motion, and without providing any case law to support its argument, the defense requests the following remedies:

1) Invalidate the entire 1982 enactment declaring it unconstitutional and/or in violation of legislative intent . . .
2) Invalidate AS 11.71.140-190 because the lack of required oversight for the schedules violates Patillo's due process rights. . .
3) Place all of the controlled substances listed in AS 11.71.140-180 in AS 11.71.190, Schedule VIA, until the legislature meets and fixes the schedules by either eliminating the oversight requirement or re-scheduling the controlled substances as described.[40]

A. Invalidating the entire Controlled Substance Act is inappropriate as AS 11.71.100 is severable from the rest of the Act.

The defense's request to invalidate the entire 1982 enactment of the Controlled Substance Act is inappropriate. AS 01.10.030, Severability, states: "Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: 'If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.'" Should the Court find that the Department of Law's failure to create the Controlled Substance Advisory Committee somehow invalidates AS 11.71.040-190, it should automatically sever this statute from the entire Act.

[40] Motion to Declare AS 11.71.140-190 Invalid or Unconstitutional & Request for Alternative Remedies, at 18-19.

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

B. Invalidating AS 11.71.140-190 or, alternatively, placing all controlled substances in AS 11.71.190, schedule VI, is not the appropriate remedy because the Department of Law's failure to form the Controlled Substance Advisory Committee has not affected the defendant's ability to present a defense.

The defendant has failed to specify how the Department of Law's failure to establish a Controlled Substance Advisory Committee has caused him injury. The Ohio Supreme Court noted in *Miller v. Lakewood Housing Co.*:

> Whether a statutory requirement is mandatory or directory depends on its effect. *If no substantial rights depend on it and no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed and substantially the same results obtained,* then the statute will generally be regarded as directory; but, if not, it will be mandatory.[41]

The defendant argues that because the government violated AS 11.71.100 the statutes should be deemed invalid or all classes of controlled substances should be rescheduled to class VI. This is in essence an invocation of the exclusionary rule because the defendant is asking the Court to suppress the drugs or reduce the charges in all drug cases across Alaska because his constitutional right to due process has been violated.

AS 11.71.100-120 do not create constitutional rights for Alaskans. Rather, the statutes create an advisory committee that makes recommendations to the Governor, which the Governor is then required to introduce to the legislature. At that point, the legislature can adopt, deny or modify the Governor's recommendation. The advisory committee's purpose is purely to inform the legislature by providing the Governor an "overview of drug use and abuse in Alaska and to determine what is being done about, from the standpoint of law enforcement, treatment and counseling, prevention and education, and legitimate

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

handlers."[42] In fact, the commentary following AS 11.71.110 unambiguously states, "The committee is advisory only, and all of its duties should be viewed in that light."[43] Other than making the vague assertion that his due process rights have been violated due to a lack of oversight, the defendant fails to explain how this has caused him injury.

In *Nathan v. Municipality of Anchorage*, the defendant, who was deaf, was arrested for DWI.[44] Once at the jail, the defendant submitted to a breath test on the DataMaster, but declined to have an independent blood test. The defendant later contested that the breath test result should be suppressed because, when he gave up his right to an independent blood test, he did not really understand his right to such a test due to his deafness. The district court ruled that based on the defendant's ability to communicate with the magistrate setting bail and the officers throughout the rest of their contact, the defendant "despite his disability, had understood his right to an independent test and had knowingly waived that right."[45]

The defendant appealed the decision and argued, in the alternative, that: "even if he knowingly waived his right to an independent test, his breath test result should nevertheless be suppressed because the police failed to take reasonable steps to accommodate his hearing and speech disability. Nathan asserts that the police violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., by failing to provide him with an American Sign Language interpreter or to utilize some alternative method to facilitate communication."[46] 28 C.F.R. § 35.160(b)(1),

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[41] 125 Ohio St. 152, 11 Ohio L. Abs. 543, 180 N.E. 700, 81 A.L.R. 1239 (1932)(overruled in part by *Bliss Realty, Inc. v. Darash*, 158 Ohio St. 287, 49 Ohio Op. 128, 109 N.W. 2nd 276 (1952))(emphasis added).
[42] AS 11.71.110, Commentary at 26-27.
[43] *Id.*
[44] *See* 955 P.2d 528 (Alaska App. 1998).
[45] *Id.* at 530 (Judge Rhoades concluded, based on Nathan's apparent understanding of Officer Hsieh's communications at the scene, that Nathan "must have been reading Officer Hsieh's lips[;] ... the defendant [described] what was being explained to him [by Officer Hsieh] in his own testimony." With regard to the more important issue of Nathan's communications with, and understanding of, Officer Caswell, Judge Rhoades concluded that Nathan had sufficiently understood the officer to acquire an understanding of his right to an independent test.").
[46] *Id.*

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310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

obligates public entities to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." The Act's definition of "auxiliary aids and services" expressly includes "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[47] The defendant argued that "the Anchorage Police Department's processing of arrestees qualifies as a 'service[ ], program[ ], or activit[y] of a public entity' for purposes of section 12132 of the Act. Based on this premise, [the defendant] contends that the police were obliged to furnish him with an interpreter during his DWI processing (and, in particular, during the explanation of his right to an independent blood test)."[48]

The defendant further argued that, "even though he did understand his right to an independent test—that is, even though the police department's asserted violation of the Americans with Disabilities Act did not adversely affect his understanding of his rights or the voluntariness of his decision to waive the independent blood test—he still is entitled to suppression of the breath test result."[49] The defendant argued that suppression of evidence is the only effective way to make the police obey the mandates of the Act.

The Alaska Court of Appeals began its analysis by explained that, "even assuming that the police violated the Act, [the defendant] must still cross another legal hurdle: he must establish that a violation of the Americans with Disabilities Act will trigger the exclusionary rule and require suppression of his breath test result. This is not self-evident." The Court also discussed the purpose of the exclusionary rule, which is "to deter the police from engaging in future illegal

[47] *Id.* at 532 citing 42 U.S.C. § 12102.
[48] *Id.* at 532.
[49] *Id.* at 533 (emphasis added).

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

conduct."[50] However, the analysis is different when the government violates a statute (as opposed to the Constitution): "suppression of evidence has generally been imposed only when the government's violation of the statute demonstrably prejudiced a defendant's ability to exercise related constitutional rights or to prepare or present a defense."[51]

In its discussion on the appropriate remedy, the Court of Appeals cited to *State v. Sundberg* where the police used excessive force to arrest a fleeing suspect.[52] In *Sundberg*, the Alaska Supreme Court refused to suppress the resulting evidence and concluded that other effective means existed to deter future similar illegality; the court cited "the possibility of ... police department [disciplinary] proceedings; civil rights actions; and common law tort suits against the offending officer."[53] Relying on *Sundberg*, the *Nathan* court held that, "Similar measures are apparently available to deter and redress violations of the Americans with Disabilities Act. Given the existence of these measures, and the absence of any indication that the police have engaged in persistent, purposeful violations of the Act, we hold that exclusion of evidence would not be the remedy even if [the defendant] could show that the police violated the Act in his case."

In the underlying case, the defense is requesting an inappropriate remedy because he cannot demonstrate how the Department of Law's failure to form the Controlled Substance Advisory Committee has prejudiced his ability to present a defense at trial. The only way the defense can do this is by demonstrating the following: 1) had there been a Committee they would have recommended that heroin be reclassified to something other than a schedule IA or IIA controlled substance, 2) the legislature agreed with the recommendation and passed legislation reclassifying heroin as something less serious than a schedule IA or IIA controlled substance, and 3) the Governor signed the bill into law. The defendant

[50] *Id.*
[51] *Id.*
[52] 611 P.2d 44 (Alaska 1980).

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

simply cannot prove that this would have happened. Between January 1, 2011 and January 14, 2013, 596 bills were introduced to the Legislature.[54] Of the 596 bills introduced, only 115 were passed by both the House and the Senate. To put this into perspective, less than 20% of the bills introduced to the Legislature were passed by both the House and the Senate. The likelihood of heroin being rescheduled to a lower class than IA or IIA is incredibly small and cannot possibly be proved. Therefore, the requested remedies are inappropriate and the motion must be denied.

CONCLUSION

The Department of Law never created a Controlled Substance Advisory Committee as required by AS 11.71.100. However, AS 11.71.100 is a directive statute. Consequently, the Department's failure to comply with the requirement to form the Committee does not result in the invalidation of the controlled substance statutes. Last, the Department's failure to establish the Controlled Substance Advisory Committee has not impeded the defendant's ability to present a defense thereby making the requested remedies inappropriate. The defendant's motion must be denied.

DATED June 20, 2013 at Anchorage, Alaska.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: _____
Andrew V. Grannik
Assistant District Attorney
Alaska Bar No. 0505022

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300

This is to certify that a copy of the forgoing is hereby
X mailed ____ caused to be mailed
____ hand delivered ____ caused to be hand delivered
____ faxed
to the following attorney/parties of record.
Keri Brady
LB LB 6/21/13
Signature Printed Name Date

[53] *Nathan*, 955 P.2d at 533 (citing to *Sundberg*, 611 P.2d at 51–52).
[54] The Alaska State Legislature, Bill/Resolution (Statistics 27th Legislature), http://www.legis.state.ak.us/basis/bandr_stat.asp?session=27).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

DAEMION PATILLO,
DOB: 04/17/1974
APSIN ID: 7439636
DMV NO. 7300751 AK
ATN: 113-825-349

Defendant.

No. 3AN-12-820 CR.

ORDER

HAVING CONSIDERED the defendant's Motion, the State's Opposition, any reply, and otherwise being fully advised in the premises,

IT IS HEREBY ORDERED that the defendant's Motion to Declare AS 11.71.140-190 Invalid or Unconstitutional & Request for Alternative Remedies is hereby, **DENIED**.

DATED this ___ day of _____, 2013, at Anchorage, Alaska.

_____
Honorable Philip R. Volland
Superior Court Judge

DISTRICT ATTORNEY, STATE OF ALASKA
310 K STREET, SUITE 520
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6300