

1 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**

2 **THIRD JUDICIAL DISTRICT AT ANCHORAGE**

3 **STATE OF ALASKA,**)
4)
5 Plaintiff,)
6 vs.)
7 **DAEMION PATILLO,**)
8)
9 Defendant.)

Case No. 3AN-12-00820 CR

10 **MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO**
11 **DECLARE AS 11.71.140 – 190 INVALID OR UNCONSTITUTIONAL**
12 **& REQUEST FOR ALTERNATIVE REMEDIES**

13 **VRA CERTIFICATION**

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

16 Daemion Patillo is charged with one counts of second-degree misconduct involving
17 a controlled substance¹ for possessing .31 grams of heroin “with intent to deliver.”
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19 However, as will be demonstrated below, the state itself has also violated the law, much
20 more than Patillo has. The state’s has repeatedly violated the law over a protracted period
21 of time. Based on this, Patillo requests that the court find the statutes assigning criminal
22 liability to illegal activity with controlled substances invalid and unconstitutional; Patillo
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25 ¹ Patillo is charged under AS 11.71.020. Misconduct involving a controlled substance in the second
26 degree which reads as follows in pertinent part: (a) “... a person commits the crime of misconduct
27 involving a controlled substance in the second degree if the person (1) manufactures or delivers any
amount of a schedule IA controlled substance or possesses any amount of a schedule IA controlled
substance with intent to manufacture or deliver...”

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1 also requests that the court declare them unenforceable.

2 **I) THE STATE HAS VIOLATED THE LAW REQUIRING A**
3 **“CONTROLLED SUBSTANCES ADVISORY COMMITTEE” FOR**
4 **DECADES**

5 The statute Patillo is charged under requires proof, as an element of the offense, that
6 the controlled substance is a “Schedule IA controlled substance.”² Under AS 11.71.140,
7 “Schedule IA” indicates that a substance shall be placed in Schedule IA if it is found by the
8 Controlled Substances Advisory Committee to “have the highest degree of danger or
9 probable danger to a person or the public.”³

10 The “Controlled Substances Advisory Committee” is described in AS 11.71.100.⁴
11 **The committee is required by law to meet at least twice a year.**⁵ Problematically for the
12 state, however, there is no Controlled Substances Advisory Committee. There has not been
13 for at least a decade, and in fact, there may have never been one.⁶ It is not a currently

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16 ² As 11.71.020(a)(1); AS 11.71.040(a)(3)(A).

17 ³ AS 11.71.140:

18 ⁴ AS 11.71.100 reads as follows: (a) The Controlled Substances Advisory Committee is established in
19 the Department of Law. The committee consists of (1) the attorney general or the attorney general's
20 designee; (2) the commissioner of health and social services or the commissioner's designee; (3) the
21 commissioner of public safety or the commissioner's designee; (4) the president of the Board of
22 Pharmacy or the designee of the president who shall also be a member of the Board of Pharmacy; (5)
23 a peace officer appointed by the governor after consultation with the Alaska Association of Chiefs of
24 Police; (6) a physician appointed by the governor; (7) a psychiatrist appointed by the governor; and (8)
25 two individuals appointed by the governor. (b) Members of the committee appointed under (a)(5) -
26 (a)(8) of this section serve terms of four years. A member of the committee receives no salary but is
27 entitled to per diem and travel expenses authorized by law for boards and commissions under AS
28 39.20.180. (c) The attorney general is the chairman of the committee. (d) The committee meets at the
call of the attorney general.

⁵ AS 11.71.100(e).

⁶ On May 3, 2013, pursuant Alaska Statute 40.25.110, undersigned requested rosters of the
membership of the committee since 1982, copies of all meeting minutes of public meetings since
1982, and copies of various activities that the committee is statutorily required to engage in. To date
there has been no response. The state is certainly in the better position to obtain the records from
itself on this point however.

1 active committee. It is not listed as an active committee on the state website⁷ and the
2 current governor has never appointed anyone to it.⁸

3 Despite a clear legislative mandate that a Controlled Substances Advisory
4 Committee meet at least twice a year⁹ no such required oversight has occurred. This failure
5 is not inconsequential. Based on the state's own failure to follow the law,¹⁰ at a minimum
6 Alaska Statutes 11.71.140 - 190 are invalid.
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8 **A) WITHOUT THE REQUIRED OVERSIGHT THE CONTROLLED**
9 **SUBSTANCE STATUTES VIOLATE LEGISLATIVE INTENT**

10 Statutes are interpreted to have a meaning commonly understood as opposed to a
11 tortured, overtly legalistic interpretation. When interpreting a disputed statute, the court
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14 ⁷ See <http://gov.alaska.gov/parnell/services/boards-commissions/list-of-active-boards.html>.

15 ⁸ The state, which is part of the Department of Law, is in the far better position to inform the court of
16 when, if ever, was the last time a controlled substances advisory committee met since the committee
is established in Department of Law. See AS 11.71.100.

17 ⁹ AS 11.71.110: "The duties of the committee are as follows: The committee shall (1) advise the
18 governor of the need to add, delete, or reschedule substances in the schedules in AS 11.71.140 -
19 11.71.190; (2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive
20 prescription of controlled substances and the diversion of prescription drugs into illicit channels; (3)
21 evaluate the effectiveness of programs in the state providing treatment and counseling for persons
22 who abuse controlled substances; (4) recommend programs to the Alaska Court System to be
23 instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal
24 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; (B) providing
treatment and counseling of persons who abuse controlled substances; and (C) regulating the
legitimate handling of controlled substances."

25 ¹⁰ Somewhat ironically, under the *Chaney* criteria, because the state has actually violated the law
26 repeatedly over a protracted period of time, its prospects for rehabilitation are not as good as
27 DelPriore's, who delivered an possessed controlled substances only one day. See *State v. Chaney*,
477 P.2d 441, 446 (Alaska 1970).

1 must begin by considering the legislative intent leading to its enactment.¹¹ The intent of
2 lawmakers is found in the language used, and the language in a statute is controlling unless
3 there are reasons for a belief that the language does not fully and accurately disclose the
4 legislative intent.¹²

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6 The current drug statutes were enacted in 1982. When that enactment was
7 accomplished, the legislature's stated primary goal was to pattern Alaska's drug laws after
8 the Uniform Controlled Substances Act and the federal Controlled Substances Act of
9 1970.¹³ This goal is evidenced by the plain language of the AS 11.71.110: "[i]f a substance
10 is added as a controlled substance under federal law, the governor shall introduce
11 legislation in accordance with the federal law."¹⁴

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13 The lawmakers adopted the statutory scheme because it also provided for mandatory
14 bi-annual oversight of all chemicals listed in the schedules, input from non-law
15 enforcement professionals to find treatment alternatives to prosecution and incarceration
16 and review of law enforcement policy. The advisory committee is required to contain a
17 breadth of experience other than just law enforcement: pharmacists, doctors and
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20 ¹¹ *Glidden v. State*, 842 P.2d 604 (Alaska 1992) see *Femmer v. City of Juneau*, 9 Alaska 315, 97
21 F.2d 649 (Alaska 1938).

22 ¹² *Territory of Alaska v. Five Gallons of Alcohol*, 10 Alaska 1 (Alaska 1940) Unreported.

23 ¹³ See *Pocock v. State*, 270 P.3d 823, 825 (Alaska Ct. App. 2012), as amended on reh'g (Mar. 19,
2012) citing SLA 1982, ch. 45, § 1. See also 1981 House Journal, Supplement No. 60 (June 19)
24 (discussing and analyzing Senate Bill 190, the bill that became SLA 1982, ch. 45).

25 ¹⁴ AS 11.71.120(b). This is not to say that the legislature envisioned that Alaska's drug laws would be
26 exactly the same as federal law. When the statutes were enacted, marijuana, a Federal Schedule IA
27 controlled substance was placed in Alaska's Schedule VIA in conformity with prior Alaska cases (see
AS 11.71.190); *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Rather it was intended to provide a
required mechanism by which changes to the federal schedules would also be considered by Alaska's
elected representatives.

1 psychiatrists.¹⁵ The legislative intent for the committee to act as a safeguard against over-
2 criminalizing addiction is evidenced by the committee's functions listed in the statute:
3 adding, deleting or rescheduling controlled substances, evaluating the effectiveness of
4 treatment and counseling programs for addicts, recommending programs to the court
5 system as alternatives to prosecution and imprisonment, reviewing appropriations for
6 agencies that provide treatment and counseling for addicts, reviewing the practices of law
7 enforcement and the Department of Law.¹⁶ The committee was intended to have
8 meaningful oversight as opposed to just an advisory capacity because the governor is
9 **required** to introduce legislation **consistent with the recommendations of the**
10 **committee.**¹⁷ In other words, the committee was intended to prevent the drugs statutes
11 from evolving into precisely what they are now: a statutory scheme that punishes addicts
12 with costly, disproportionately severe terms of incarceration.

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16 In the absence of any oversight by the advisory committee, Alaska's penalties for
17 small-quantity drug sales have become so severe that they are now substantially harsher

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20 ¹⁵ AS 11.71.100 (a) (1) – (8).

21 ¹⁶ AS 11.71.110 "Duties of the Committee" *supra*.

22 ¹⁷ AS 11.71.120 reads: (a) [i]f, after considering the factors set out in (c) of this section, the committee
23 decides to recommend that a substance should be added to, deleted from, or rescheduled in a
24 schedule of controlled substances under AS 11.71.140 - 11.71.190, the governor shall introduce
25 legislation in accordance with the recommendation of the committee.(b) If a substance is added as a
26 controlled substance under federal law, the governor shall introduce legislation in accordance with the
27 federal law.(c) In advising the governor of the need to add, delete, or reschedule a substance under
28 AS 11.71.110(1), the committee shall assess the danger or probable danger of the substance after
considering the following: (1) the actual or probable abuse of the substance including (A) the history
and current pattern of abuse both in this state and in other states; (B) the scope, duration, and
significance of abuse; (C) the degree of actual or probable detriment which may result from abuse of
the substance; (D) the probable physical and social impact of widespread abuse of the substance;

1 than the penalties for the identical conduct under federal law.¹⁸

2 The current penalties for delivering heroin violation of AS 11.71.020 are
3 substantially harsher than the penalties for worse conduct under federal law.¹⁹ Under
4 federal sentencing guidelines, a person with no criminal history who delivers less than 5
5 grams of heroin is subject to a sentence of 6 - 12 months if the person timely pleads.²⁰
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7 While under state law, similar but less serious conduct is punishable by a presumptive
8 sentence of 5 years.²¹ Under the federal sentencing guidelines, someone with the
9 maximum enhancement for criminal history, who delivers less than five grams of heroin,
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13 ¹⁸ In 2005, for example, following the United States Supreme Court's decision in *Blakely v.*
14 *Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the legislature amended our
15 state's presumptive sentencing law to provide for presumptive ranges of imprisonment instead of
16 specifying a single presumptive term. See, e.g., *Anderson v. State*, 289 P.3d 1, 9-10 (Alaska App.
17 2012). But the legislature decided to set the high end of the presumptive ranges above the former
18 presumptive terms. This had the effect of increasing potential presumptive terms for all classes of
19 felony offenses without the necessity of proving aggravators.

20 ¹⁹ Unlike Alaska law, federal law distinguishes different sentencing ranges for the unauthorized
21 possession and delivery based on both the schedule and quantity of the controlled substance
22 involved. Under federal sentence guidelines, the most severe sentencing range for sales of heroin
23 (base offense level 38) applies to sales of 30 kilograms or more (i.e., 66 pounds or more). There are
24 twelve intermediate sentencing ranges with cut-offs of 10 kilograms (22 pounds), 3 kilograms (6.6
25 pounds), 1 kilogram (2.2 pounds), 700 grams, 400 grams, 100 grams, 80 grams, 60 grams, 40 grams,
26 20 grams, 10 grams, and 5 grams. The fourteenth and least severe sentencing range for sales of
27 heroin under federal law (base offense level 12) applies to sales or deliveries of less than 5 grams of
28 heroin.

²⁰ Under federal sentence guidelines there is a downward departure in the sentencing guidelines for
acceptance of responsibility, without such a departure the person would be subject to a range of 10-16
months following a trial. Counsel for Patillo has consulted with the federal defender agency and is
prepared to call a federal defender as a witness at a hearing on this motion to establish these points.

²¹ Because 11.71.1020 is a class A felony, AS 12.55.125 (c)(1) applies. AS 12.55.125 (c) reads as
follows in pertinent part: ... "a defendant convicted of a class A felony may be sentenced to a definite
term of imprisonment of not more than 20 years, and shall be sentenced to a definite term within the
following presumptive ranges, subject to adjustment as provided in AS 12.55.155--12.55.175 (1) if the
offense is a first felony conviction... five to eight years... (3) if the offense is a second felony
conviction, 10 to 14 years;(4) if the offense is a third felony conviction and the defendant is not subject
to sentencing under (l) of this section, 15 to 20 years.

1 is only looking at a maximum of **37 months as a worst-case scenario**.²² While under
2 Alaska law, the same person is subject to a presumptive sentence 15 – 20 **years**²³ for the
3 delivery of **any** amount, even an un-weighable, microscopic trace of heroin.
4 Additionally, because the definition of “delivery” is so broad it encompasses two addicts
5 passing a pipe back and forth between them.²⁴ Under Alaska law, even though this is
6 clearly typical addict behavior and not the behavior the legislature intended to be subject
7 to these harsh penalties, each has technically “delivered” to the other.
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9 Having penalties substantially harsher than federal law, without meaningful
10 access to treatment, without alternatives to prosecution and incarceration, and without
11 oversight of law enforcement policies contradicts legislative intent and invalidates at
12 least the drug schedules if not the entire statutory scheme.
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14 **II) ENFORCEMENT OF THE DRUG STATUTES UNDER THESE**
15 **CIRCUMSTANCES VIOLATES PROPORTIONALITY AND THE**
16 **EIGHTH AMENDMENT**

17 The Alaska Constitution's prohibition on cruel and unusual punishments is likely
18 construed more broadly than its federal counterpart.²⁵ Even so, only punishments that are
19 “so disproportionate to the offense committed as to be completely arbitrary and shocking to
20 the sense of justice” are cruel and unusual for purposes of Article I, Section 12 of our state
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22
23 ²² Even with the worst criminal history, the sentence range for delivering less than 5 grams of heroin is
30 - 37 months after trial or 24 – 30 months if the person timely pleads.

24 ²³ AS 12.55.125 (c)(4) “if the offense is a third felony conviction and the defendant is not subject to
sentencing under (l) of this section, 15 to 20 years.”

25 ²⁴ AS 11.71.900 (6) “deliver” or “delivery” means the actual, constructive, or attempted transfer from
26 one person to another of a controlled substance whether or not there is an agency relationship.

27 ²⁵ *Sikeo v. State*, 258 P.3d 906, 912 (Alaska Ct. App. 2011).

1 Constitution.²⁶

2 In this case, Patillo possessed .3 grams of heroin and a digital scale. Under federal
3 sentencing guidelines, he would get a sentence right around 37 months because he has prior
4 felonies outside Alaska. But under Alaska's sentencing laws, his presumptive sentence is
5 15 – 20 years. Even with a mitigator, the least he can legally be sentenced to is 7.5 years.²⁷
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7 When inexactitude of statutory language has invited arbitrary enforcement so that
8 there has been a history or a strong likelihood of uneven application, laws have been
9 stricken as unconstitutional.²⁸ Here, such a wide disparity of sentences invites precisely
10 the kind of arbitrary enforcement that is constitutionally infirm. If a snitch agrees to work
11 with federal agents, the target will be charged federally, while a snitch agrees to work with
12 APD, the target will be charged by the state. It is currently being left to the discretion of
13 snitches who will receive the lenient federal penalties and who will receive a much harsher
14 state sentence based on who they chose to buy from. This is the definition of arbitrary.
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17 Patillo is a heroin addict. Like most heroin addicts he keeps a small quantity of
18 heroin around to avoid painful physical withdrawal symptoms. He is precisely the person
19 the legislature envisioned in 1982 to need the treatment and alternatives to prosecution and
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23 ²⁶ *Moore v. State*, 262 P.3d 217, 222-23 (Alaska Ct. App. 2011) citing *Thomas v. State*, 566 P.2d
630, 635 (Alaska 1977); see also *Green v. State*, 390 P.2d 433, 435 (Alaska 1964); *McNabb v. State*,
860 P.2d 1294, 1298 (Alaska App.1993).

24 ²⁷ See AS 12.55.155(a).

25 ²⁸ *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974) citing *Papachristou v. City of Jacksonville*, 405 U.S.
156, 169, 92 S.Ct. 839, 847, 31 L.Ed.2d 110, 119 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611,
26 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214, 218 (1971), *Gregory v. City of Chicago*, 394 U.S. 111,
27 120, 89 S.Ct. 946, 951, 22 L.Ed.2d 134, 141 (1969); *Marks v. City of Anchorage*, 500 P.2d at 650.

1 incarceration that the Controlled Substances Advisory Committee was intended to
2 recommend.

3 Unfortunately, for the last thirty or so years, (most of Patillo's life) the state violated
4 the law and failed to constitute the committee that would have provided these kinds of
5 alternatives to people like him. According to the Department of Corrections:
6

7 . . . the availability of [substance abuse treatment] programs is minimal at
8 best as the number of publicly-funded substance abuse treatment programs
9 has declined. A significant factor in the overall reduction of community
10 based substance abuse treatment capacity is that State grant funding for these
11 services over several years has not kept pace with the increased operating
12 cost of the programs despite new funding approved through the legislature.
13 Substance abuse treatment programs declined from 87 in 2002 to 70 in
14 2006.²⁹

15 Had a Controlled Substances Advisory Committee been active, it would obviously
16 recommend increasing treatment opportunities. The governor would have been legally
17 required to introduce legislation consistent with the committee's recommendations. The
18 state's failure to constitute the statutorily required committee has caused treatment
19 opportunities to dwindle over the same period of time that state sentencing laws increased
20 terms of incarceration and the federal sentencing guidelines reduced them. Under these
21 circumstances, the presumptive sentence attached to Patillo's controlled substance
22 violations is both arbitrary and shocking.

23 Patillo is charged with possessing .31 grams of heroin that he had in his wallet when
24 he was arrested. Recently, the legislature considered SB 56, a measure that would reduce
25

26 ²⁹ Alaska Prisoner Re-Entry Task Force Five Year Prison Re-Entry Strategic Plan 2011 – 2016, page
27 40; available at <http://www.correct.state.ak.us/commish/docs/StrategicPlan.pdf>.

1 possession of less than 3 grams of heroin to a misdemeanor.³⁰ The bill had wide support
2 from justice policy groups, the medical community, current and former justice system
3 practitioners, the Alaska Native Justice Center, the Alaska Mental Health Board, and the
4 Advisory Board on Drug and Alcoholism,³¹ the community from which members of the
5 Controlled Substances Advisory Board members would have been selected. SB 56 revised
6 AS 11.71.040 with an escalating punishment regime, similar to Alaska's approach to
7 DUI's. Under the bill, initial possession of less than three grams of Schedule IA and IIA
8 drugs (slightly less than 10 times the amount Patillo possessed in this case) would be
9 reclassified from a Class C Felony to a Class A Misdemeanor. Even the current "tough on
10 crime" majority Republican legislature recognizes that the current controlled substances
11 statutes are disproportionately harsh and unwisely make felons out of citizens for first time,
12 small quantity, non-distributive drug offenses. According to Senator Dyson:

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16 This reform is following a trend led by conservative states such as Texas and
17 Wyoming that focus prison bed space on violent and career criminals, and
18 reduces the incidence of incarceration of non-violent individuals, SB 56 takes
19 into account the huge collateral consequences of felony convictions,
20 especially for youthful offenders who are cut off from employment, student
21 loans and housing opportunities for a single mistake.³²

22 ³⁰ SENATE BILL NO. 56(JUD) reads as follows in pertinent part: "Section 1. AS 11.71.040(a) is
23 amended to read: (a) Except as authorized in AS 17.30, a person commits the crime of misconduct
24 involving a controlled substance in the fourth degree if the person ... (3) possesses (A) any amount
25 of a (i) schedule IA controlled substance listed in AS 11.71.140(e); or (ii) schedule IA or IIA controlled
26 substance other than[EXCEPT] a controlled substance listed in (i) of this subparagraph, and, two or
27 more times within the preceding seven years, the person was convicted under AS 11.71.010 -
28 11.71.050 or a law or ordinance of this or another jurisdiction with elements similar to those of an
offense under AS 11.71.010 - AS 11.71.050[AS 11.71.150(e)(11) - (15)]. . . .

³¹ <http://www.akbizmag.com/Alaska-Business-Monthly/April-2013/Senate-Passes-Bill-Reforming-Alaskas-Drug-Policy/>

³² *Id.*

1 The current legislature recognizes that that lengthy prison terms and huge collateral
2 consequences are not a solution to the problem of drug abuse. What they apparently don't
3 realize is that there is an inexplicably nonexistent committee, intended to address these
4 concerns at least twice a year, by making recommendations required to be proposed by the
5 governor as legislation for their consideration.
6

7 The state's failure to follow the law for the last thirty or so years has, in some ways,
8 created the addicts of today. While drug use certainly imposes costs on society, on others,
9 and on families, that harm is indirect in its secondary effects on others. Indirect harms are
10 only rarely punished by the criminal justice system and rarely punished with lengthy terms
11 of incarceration. Drug addicts don't take drugs intending to become addicted or hurt their
12 families. While addicts may be aware of these effects generally and act indifferent toward
13 them, it is obvious that typical drug users don't use drugs maliciously. Punishing addicts
14 with disproportionately harsh terms of incarceration for being addicts is not only arbitrary,
15 it is shocking to a sense of justice, particularly considering the way in which the state's own
16 protracted failure to follow the law contributed to creating the addicts in the first place.
17
18

19 **III) ENFORCEMENT OF THE DRUG STATUTES UNDER THESE** 20 **CIRCUMSTANCES VIOLATES DUE PROCESS**

21 Abraham Lincoln once said: "[t]hese men ask for just the same thing, fairness, and
22 fairness only. This, so far as in my power, they, and all others, shall have." Patillo has a
23 Constitutional right to due process of law.³³ The due process clause protects citizens from
24
25

26 ³³ Sec. 1 of the fourteenth amendment to the Constitution of the United States provides in part: 'No
27 state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property,

1 arbitrary or fundamentally unfair use of government power.³⁴ “Fundamental fairness” is the
2 main requirement of due process.³⁵ The state ignoring its own law violations, while
3 criminally prosecuting a citizen for his is “fundamentally unfair.”

4 Under Alaska law: the executive branch has exclusive authority to decide whether
5 and how to prosecute a case: “the Attorney General cannot be controlled in either his
6 decision of whether to proceed, or in his disposition of the proceeding.”³⁶ Many Alaska
7 cases have reaffirmed that the executive branch has broad discretion to decide whether to
8 initiate criminal charges and, if so, what charges to bring.³⁷

9 But who enforces the law when the executive branch violates it? To the extent that
10 this court is squeamish about invalidating an entire legislative enactment or set of statutes,
11 the court should ask itself this question: if not me in this case, then who? If the court does
12 not enforce the laws that the state is required to follow, then who will insure that the state
13 follows its own laws? The court must enforce laws requiring the state to undertake specific
14 actions to validate statutes enabling their continued vitality for criminal prosecution.

15 without due process of law.’ Art. I, s 7 of the Alaska Constitution contains a similar prohibition. See
16 **Stock v. State**, 526 P.2d 3, 7 (Alaska 1974).

17 ³⁴ **Xavier v. State**, 278 P.3d 902, 904 (Alaska Ct. App. 2012);; **State v. Mouser**, 806 P.2d 330, 336
18 (Alaska App.1991) (“[T]he essence of due process is basic fairness....”).

19 ³⁵ **P.M. v. State, Dep’t of Health & Soc. Servs.**, 42 P.3d 1127, 1133 (Alaska 2002) (holding that
20 fundamental fairness is the main requirement of due process)

21 ³⁶ **State v. Dist. Court**, 53 P.3d at 631-32 citing **PDA vs. Superior Court**, 534 P.2d 947 (Alaska
22 1975).

23 ³⁷ See **Surina v. Buckalew** 629 P.2d 969, 973 (Alaska 1981) (noting that prosecutors have wide
24 discretion in deciding whether to institute criminal proceedings); **Nao v. State** 953 P.2d 522, 526
25 (Alaska App.1998)(declaring that “prosecutors have traditionally been vested with wide-ranging
26 discretion as to whether to bring criminal charges and, if so, what charges to bring”; and **State v.**
27 **Jones**, 751 P.2d 1379, 1382 (Alaska App.1988)(holding that Criminal Rule 43(c) does not give courts
28 the authority to “intrude into the executive function by choosing which charge to bring against a
defendant or which defendant should be prosecuted”).

State v. Patillo, 3AN-12-00820CR.

1 Without court enforcement, how can Alaskans have any confidence that the legislature's
2 otherwise unfulfilled promises have any meaning whatsoever?

3 By enacting the statutory scheme contained in AS 11.71.010 – AS 11.71.190, the
4 legislature established the process by which the drug statutes are enforceable and made a
5 promise to the Patillos of this state about how these statutes would be enforced and how the
6 enforcement of these laws would be reviewed.

7
8 The legislature required a Controlled Substances Advisory Committee to review the
9 schedules. The legislature wisely knew that both public policy and public perception of this
10 area of the law changes over time. Providing for the committee to review the schedules
11 twice a year was the legislature's way of insuring that at least twice a year the schedules
12 were looked at to determine if changes were warranted. Further, that if changes were
13 warranted, to provide a mandatory mechanism by which legislation consistent with the
14 recommended changes would be brought forward for consideration by the people's elected
15 representatives.

16
17 The plain language of each of the schedules contains a specific reference to the
18 statute that authorizes the committee to schedule controlled substances and requires the
19 governor to introduce language consistent with the committee's recommendations and
20 requires the governor to propose legislation consistent with those recommendations.³⁸

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24 ³⁸ See 11.71.140 , Schedule IA, which reads as follows in pertinent part: "A substance shall be placed
25 in schedule IA if it is found under AS 11.71.120(c) to have. . . " AS 11.71.120," Authority to schedule
26 controlled substances," reads in pertinent part: "If, after considering the factors set out in (c) of this
27 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. . . ." Schedules
IIA - VIA contain identical language requiring the committee to decide which substances are placed on

1 Maybe the schedules weren't immediately invalid after the first 6 months when no
2 committee reviewed them for the first time, but certainly after thirty years without a
3 committee ever engaging in the statutorily required review of them, they cannot possibly be
4 valid.

5
6 The Alaska Supreme court has held that "[a]s a general rule, people are presumed to
7 know the law" without being specifically informed of it.³⁹ That means that Patillo is
8 presumed to be aware of this process and to expect it. He is entitled to the statutory process
9 that he was promised when the statutory scheme was enacted. Instead, the state has
10 violated the law apparently abandoned the required process. Without this statutorily
11 required process occurring the mandated minimum of twice a year, the schedules are
12 constitutionally fatally flawed, fundamentally unfair and violate Patillo's right to due
13 process.

14
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16 Though the policy decision of whether bi-annual committee meetings should be
17 required to maintain the validity of the controlled substances schedules may subject to
18 debate, that is not a decision for the court. The wisdom underlying a particular legislative
19 enactment is not a justiciable question.⁴⁰ Elected representatives, not courts, decide

20 which schedules and the governor is required to propose legislation consistent with the committee's
21 recommendations.

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23 ³⁹ *Calvert v. State, Dep't of Labor & Workforce Dev., Employment Sec. Div.*, 251 P.3d 990, 1008
24 (Alaska 2011).

25 ⁴⁰ *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 428 n. 5 (Alaska 1983). See also *Concerned*
26 *Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974) (It is
27 not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between
competing notions of public policy is to be made by elected representatives of the people).

1 whether a statute is a wise one.⁴¹ Here, the court's inquiry is twofold, whether the
2 unambiguous language of the statute requires the specified process previously explained,
3 and if so, whether it violates Due Process when the required process is not followed.

4 To determine compliance with procedural due process, Alaska courts balance: (1)
5 "the private interest affected by the official action;" (2) "the risk of an erroneous
6 deprivation of such interest through the procedures used and the probable value, if any, of
7 additional or substitute procedural safeguards;" and (3) "the government's interest,
8 including the fiscal and administrative burdens that additional or substitute procedural
9 requirements would entail."⁴²

10 An analysis applying each of these criteria to the state's failure to follow the law in
11 this case follows:

12 A) The Private Interest Affected by the Official Action

13 Patillo's liberty interest is his literal freedom to remain outside a prison cell. He has
14 a liberty interest in not being locked away in a correctional facility for violating drug laws,
15 when he was not afforded the requisite statutory process. The absence of the committee
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22 ⁴¹ *Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996) (Alaska supreme court has
23 repeatedly held that it is the role of elected representatives rather than the courts to decide whether a
24 particular statute or ordinance is a wise one) *citing Norene v. Municipality of Anchorage*, 704 P.2d
25 199, 202 (Alaska 1985); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1299 (Alaska 1982).

26 ⁴² *Xavier v. State*, 278 P.3d 902, 904 (Alaska Ct. App. 2012). See *Alyssa B. v. State, Dep't of*
27 *Health & Soc. Servs.*, 123 P.3d 646, 649 (Alaska 2005) *citing Varilek v. City of Houston*, 104 P.3d
28 849, 853 (Alaska 2004) (quoting *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111
(Alaska 2002)). This test is derived from *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47
L.Ed.2d 18 (1976). See *City of Homer v. State, Dep't of Natural Res.*, 566 P.2d 1314, 1319 (Alaska
1977).

1 also implicates his liberty/property interest in participation in rehabilitation programs,⁴³
2 such as controlled substances treatment, that would have been available to him, had the
3 committee been constituted and made the required recommendations.

4
5 **B) The Risk of An Erroneous Deprivation of Such Interest Through the**
6 **Procedures Used and the Probable Value Of Additional Procedural**
7 **Safeguards**

8 As described in the previous sections, without oversight by the Controlled
9 Substances Advisory Committee, the risk of erroneous deprivation of Patillo's liberty
10 and/or property interest is high. The legislature explicitly provided for mandatory oversight
11 to occur a minimum of twice a year to prevent these risks, yet it likely **never** has. This led
12 to disproportionately harsh sentences when compared to federal guidelines for similar
13 conduct and a lack of treatment options. If the treatment programs and alternatives to
14 prosecution had been implemented as the legislature intended, it's conceivable that Patillo
15 could have availed himself of those one or more of those programs and would not find
16 himself in his current dilemma. We will never know however, because despite the
17 mandatory language of the statute, it was completely, unjustifiably ignored by the state.
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24 ⁴³ See *Diaz v. State, Dep't of Corr.*, 239 P.3d 723, 732 (Alaska 2010); Article I, section 12 of the
25 Alaska Constitution identifies the principle of reformation as one basis of criminal administration. See,
26 e.g., *Ferguson v. State, Dep't of Corr.*, 816 P.2d 134, 139–40 (Alaska 1991) (holding prisoners have
27 protected liberty interest in continued participation in rehabilitation programs based on the reformation
clause); *Rathke v. Corr. Corp. of Am., Inc.*, 153 P.3d 303, 306–09 (Alaska 2007) (deeming colorable
an inmate's claim that he was entitled to due process before he could be placed in punitive
segregation for 30 days because of his state-constitutional interest in rehabilitation).

1 **C) The Fiscal and Administrative Burdens That The Committee's**
2 **Oversight Would Entail**

3 The fiscal and administrative burdens of having the committee meet are extremely
4 slight given the fact that committee members are not paid⁴⁴ and nothing precludes them
5 from meeting over the telephone to fulfill their duties. Those burdens pale in comparison to
6 the burden created by Alaska's ever-growing prison population, steadily increasing at one
7 of the fastest rates in the nation, largely due to non-violent offenders.⁴⁵ Despite the \$250
8 million Goose Creek Correctional Center that just opened, the Department of Corrections
9 estimates that all available prison beds will be full once again by 2016.⁴⁶ Compared to these
10 costs, the cost of having the committee provide the required oversight is miniscule.
11

12 **IV) ALTERNATIVE REMEDIES**

13 If AS 11.71.140 – 190, the statutes scheduling controlled substances, are invalid,
14 then what effect does that have on AS 11.71.010 – 11.71.060, the statutes that criminalize
15 conduct based on those schedules? In other words, can the state criminally prosecute a
16 person for a violation of a criminal statute that contains as an element a statute that the state
17 itself has been violating for several decades?
18

19 This court has several alternatives to remedy the state's failure to follow the law.
20

- 21 1) Invalidate the entire 1982 enactment declaring it unconstitutional and/or in
22 violation of legislative intent as previously described.
- 23 2) Invalidate AS 11.71.140-190 because the lack of required oversight for the
24 schedules violates Patillo's due process rights as previously described.

25 ⁴⁴ AS 11.71.100 (b).

26 ⁴⁵ Alaska Prisoner Re-Entry Task Force Five Year Prison Re-Entry Strategic Plan 2011 – 2016.

27 ⁴⁶ Alaska Prisoner Re-Entry Task Force Five Year Prison Re-Entry Strategic Plan 2011 – 2016.

1 3) Place all of the controlled substances listed in AS 11.71.140 – 180 in
2 AS11.71.190, Schedule VIA, until the legislature meets and fixes the
3 schedules by either eliminating the oversight requirement or re-scheduling
4 the controlled substances as described below.

5 Ambiguities in criminal statutes must be narrowly read and construed strictly against
6 the government.⁴⁷ The foregoing rule applies equally to provisions governing sentencing
7 and provisions defining crimes.⁴⁸ As previously explained, it is not for the court to
8 legislate, rather it is the court’s job to apply the law as passed by the legislature. If the law
9 is applied, and the required process has not occurred, the statutes must be declared invalid
10 as previously explained.

11 Closely allied to the doctrine that criminal statutes must be strictly construed is the
12 so-called rule of lenity. If a statute establishing a penalty is susceptible of more than one
13 meaning, it should be construed so as to provide the most lenient penalty.⁴⁹ In this case the
14 law is not ambiguous at all, it simply was not followed by the state. Under the rule of
15 lenity, the court could determine that all of the controlled substances listed in schedules IA
16 – VA are in the most lenient category, VIA, at least until the legislature acts to correct this
17 problem and either re-schedule them or eliminate the oversight requirement.

21 ⁴⁷ *State v. Andrews*, 707 P.2d 900, 907 (Alaska Ct. App. 1985) opinion adopted, 723 P.2d 85 (Alaska
22 1986); *State v. Rice*, 626 P.2d 104 (Alaska 1981); *Kuvaas v. State*, 696 P.2d 684 (Alaska App.1985);
23 *Conner v. State*, 696 P.2d 680, 682 (Alaska App.1985); *State v. Rastopsoff*, 659 P.2d 630, 640
24 (Alaska App.1983); *Hugo v. City of Fairbanks*, 658 P.2d 155, 161 (Alaska App.1983); *Siggelkow v.*
25 *State*, 648 P.2d 611, 614–15 (Alaska App.1982); *Cassell v. State*, 645 P.2d 219, 222 (Alaska
26 App.1982); *Belarde v. Anchorage*, 634 P.2d 567, 568 (Alaska App.1981); *Pierce v. State*, 627 P.2d
27 211, 219 (Alaska App.1981); 3 C. Sands, *Sutherland Statutory Construction*, §§ 59.03, 59.04, 59.06
(4th ed. 1974).

28 ⁴⁸ *Andrews*, 707 P.2d at 907; see *Kuvaas*, 696 P.2d at 685; *Rastopsoff*, 659 P.2d at 640; see also
Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

⁴⁹ *Id.* see, e.g., *Brookins v. State*, 600 P.2d 12, 17 (Alaska 1979).

1
2 **V) CONCLUSION**

3 The state violated the law repeatedly over a protracted period of time. Because of
4 these repeated violations the statutes assigning criminal liability for illegal activity with
5 controlled substances are invalid because they violate legislative intent. They are also
6 unconstitutional because they violate the Eighth Amendment, the right to Due Process and
7 result in sentences that are disproportionately harsh. The court should order one of the
8 alternate remedies requested.
9
10

11 DATED May 10, 2013 at Anchorage, Alaska.

12
13 By: 

14 KeriAnn Brady
15 Attorney for Daemion Patillo
16 Alaska Bar No. 9711084

17 **CERTIFICATE OF SERVICE**

18 The undersigned hereby certifies that on this date a true copy of the foregoing document and proposed order was
19 caused to be emailed & hand delivered the following: ADA Grannik 310 K Street Suite 520, Anchorage AK 99501.

20 Signature Rebecca Dunge-Hobert Date 5-10-2013
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1 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**

2 **THIRD JUDICIAL DISTRICT AT ANCHORAGE**

3 **STATE OF ALASKA,**)
 4)
 5 Plaintiff,)
 6 vs.)
 7 **DAEMION PATILLO,**)
 8 Defendant.)
 9)

10 Case No. 3AN-12-00820 CR

11 **MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION**
 12 **TO DECLARE AS 11.71 ENTIRELY OR PARTIALLY INVALID OR**
 13 **UNCONSTITUTIONAL & REQUEST FOR ALTERNATIVE REMEDIES**

14 THIS MATTER HAVING COME before this court, and the court being fully
 15 advised in all the premises, it is hereby ordered that Patillo's Motion to Declare AS 11.71
 16 Entirely or Partially Unconstitutional is GRANTED. _____
 17 _____
 18 _____
 19 _____
 20 _____

21 DATED this ____ day of _____, 2013, at Anchorage, Alaska.

22 _____
 23 SUPERIOR COURT JUDGE
 24
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 27
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