IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
DAEMION PATILLO,)
)
Defendant.)
)

Case No. 3AN-12-06995CR

REPLY TO STATES'S OPPOSITION TO MOTION TO DECLARE AS 11.71.140 – 190 INVALID OR UNCONSTITUTIONAL & REQUEST FOR ALTERNATIVE REMEDIES

VRA CERTIFICATION

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.

Daemion Patillo, through counsel, replies as follows to the state's opposition to his motion to declare statutes AS 11.71.140-.190 invalid or unconstitutional as follows.

The state has conceded the following facts:

1) Despite a clear legislative mandate that the state (specifically the Department of Law) establish a Controlled Substances Advisory Committee, the Department has never done so.[1]

2) Despite mandatory bi-annual meetings, mandatory reporting requirements, and a specific mandate that the governor introduce legislation consistent with the recommendations of the committee, none of those legislatively-

[1] See Opposition to Motion to Declare AS 11.71.140 - .190 Invalid or Unconstitutional & Request for Alternative Remedies, at 3 (hereinafter "Opposition").

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

mandated activities has occurred, even once, in the past 32 years.[2]

The state's concessions are well-taken. Thus, the issue becomes: in light of the state's concessions that it has continuously violated the law for thirty-two years, what is the appropriate remedy for that law violation in the context of a criminal case where the law-violator is seeking to impose a penalty on a citizen for also failing to follow the law?

I) The State Cannot Thwart the Law for 32 Years Without Consequences

The State asserts that the directory/mandatory dichotomy is the appropriate method for analyzing the issues raised by its protracted law violations.[3] The state then devotes the majority of its Opposition to convincing the court that the statutes regarding the Controlled Substances Advisory Committee ("CSAC")[4] are directory as opposed to mandatory. This is likely because the state has ignored the controlling authority on this issue from the Alaska Supreme Court, and is instead relying primarily on persuasive authority from other jurisdictions.[5] In Alaska, the mandatory/directory analysis is

---

[2] *See* Opposition at 3.

[3] The state devotes much of the Opposition to the mandatory versus directory dichotomy and attempting to establish that if the statutes regarding the Controlled Substances Advisory Committee are directory as opposed to mandatory that violating them has "no legal effect." (Opposition at page 8). However, because the state concedes that it did not even minimally comply with the statutes regarding the Controlled Substances Advisory Committee for more than three decades, analysis of this dichotomy has little, if any, relevance..

[4] The statutes requiring the Controlled Substances Advisory Committee AS 11.71.100 – 120 are referred to in this pleading as the CSAC statutes. The statutes themselves and the Legislative Commentary accompanying each statute is reproduced in entirety in Appendix A attached to this document for the court's convenience.

[5] ***Opposition*** at 5-7.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

primarily applied in situations involving tax appeals[6] and statutes permitting or regulating elections.[7] However, since the state urges that this is the appropriate framework for the analysis, following is a review Alaska cases in this area that suggests a very different result than the one asserted by the state.

Under Alaska law, whether a party must strictly comply with a procedural rule, regulation, or statute turns on whether the language of the law is mandatory or directory.[8] If a statute is mandatory, strict compliance is required;[9] if it is directory substantial compliance is acceptable absent significant prejudice to the other party.[10] In this case, the state **did not comply with the CSAC statutes at all for thirty-two years.** The mandatory vs. directory dichotomy might have significance if the state could allege "substantial compliance," but here, there was no compliance at all. According to the state, citing no authority whatsoever: "AS 11.71.100 is directory in nature and there is no legal effect for not forming the Committee."[11] That is simply not accurate.

Ryman involved a taxpayer dispute with the City of Yakutat on the timing of assessment and other procedural deadlines incorporated into the property tax regime. In

---

[6] ***City of Yakutat v. Ryman***, 654 P.2d 785 (1982); ***Alascom, Inc. v. North Slope Borough, Bd. of Equalization***, 659 P.2d 1175 (1983)

[7] ***South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage***, 172 P.3d 768 (2007); ***PTI Communications of Alaska, Inc. v. Fairbanks North Star Borough***, 2001 WL 34818272 (unpub).

[8] See ***In re Reinstatement of Wiederholt***, 24 P.3d 1219, 1233 (Alaska 2001); see also ***State, Dep't of Commerce & Econ. Dev., Div. of Ins. v. Schnell***, 8 P.3d 351, 357 (Alaska 2000).

[9] ***In re Wiederholt***, 24 P.3d at 1233 citing ***Copper River Sch. Dist. v. State***, 702 P.2d 625, 627 (Alaska 1985).

[10] Id.

[11] Opposition at 8.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

addressing the mandatory versus directory dichotomy applicable to such statutory regimes, the Alaska Supreme Court held:

> In our view, when the taxpayer establishes a violation of these "directory" procedures, **the burden should be on the taxing authority to demonstrate substantial compliance with the requirements and purposes of the statute.** Once a showing of substantial compliance has been made, the taxing authority's action will be upheld unless the taxpayer is able to demonstrate that the noncompliance resulted in substantial prejudice to his interests. **Where the local government's action fails to meet the substantial compliance test, however, prejudice to the taxpayer will be presumed and the tax or assessment will be overturned.** [12]

According to the Alaska supreme court, the "substantial compliance test" is appropriate because it "strikes the proper balance between the interest of taxpayers in

---

[12] ***City of Yakutat v. Ryman***, 654 P.2d 785, 792 (1982) (*citing* ***Allen v. Pub. Util. Dist. No. 1 of Thurston Cty.***, 55 Wash.2d 226, 347 P.2d 539, 543 (1959); *accord*, ***Copper River School District v. State***, 702 P.2d 625, 630 (Alaska 1985) ("We view the 30-day deadline of 4 AAC 40.040 to be directory. In line with our view in ***Ryman***, the burden should be on the Department of Education to demonstrate substantial compliance with the regulation at issue. Given that the Department's slight delay amounted to substantial compliance, its action should be upheld unless the school district has demonstrated that the imperfect compliance, the 9-day delay, resulted in substantial prejudice to the school district's interests."); *accord*, ***PTI Communications of Alaska, Inc. v. Fairbanks North Star Borough***, 2001 WL 34818272 (Whether the Borough may deviate from the statutory deadline scheme depends on whether the statutes in question are mandatory or directory "where the purpose of the statute is to protect the taxpayer, the provision as to the time when an act is to be performed by a tax official or board is ordinarily construed to be mandatory. Where the purpose of the statute is "merely to set up a guide for the tax officials, a provision as to the time when an act is to be performed by a tax official or board is ordinarily construed to be merely directory." Mandatory guidelines are strictly construed and "total compliance is necessary to protect the taxpayers." Deviations from directory deadlines will be upheld if the taxing authority demonstrates substantial compliance with the requirements and purposes of the statute, and the taxpayer fails to show that the noncompliance resulted in substantial prejudice to his interests); accord, ***Alascom, Inc. v. North Slope Borough, Bd. of Equalization***, 659 P.2d 1175 (1983) ("We note that in this case we are not faced with a situation in which the Borough has failed to levy any taxes in a given year, see ***City of Yakutat v. Ryman***, 654 P.2d 785 at 794 (1982), and thus the "substantial compliance" rule announced in ***Ryman*** is inapplicable."); *accord*, ***South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage***, 172 P.3d 768, 772 (2007) ("Whether a party must strictly comply with a procedural rule, regulation, or statute turns on whether the language of the law is mandatory or directory. If a statute is mandatory, strict compliance is required; if it is directory, substantial compliance is acceptable absent significant prejudice to the other party. A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create "guidelines for the orderly conduct of public business"; and (3) "serious, practical consequences" would result if it were considered mandatory."); see also 1A C.D. Sands, Sutherland Statutory Construction 4th ed. § 25.03, p. 299–300 (1972).

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

having the taxing authority adhere to statutorily-mandated procedures and the interest of the taxing authority and the general public in not having levies declared invalid because of the negligence of the taxing authority's employees."[13]

Thus, under the legal framework urged by the state, assuming that the state is correct and the statute is directory, the **state still bears the burden of demonstrating "substantial compliance with the requirements and purposes of the statute."** Since the state cannot demonstrate "substantial compliance," given the concession to thirty-two years of non-compliance, under ***Ryman***, prejudice is presumed and the only remaining issue is the remedy for the state's failure to follow the law.

II) A Judicially Created Exclusionary Sanction is an Appropriate Remedy for a Statutory Violation

Which returns us to the question in the present case. What is the appropriate sanction in the context of a criminal case, where the state has literally ignored the law for thirty-two years and yet is attempting to deprive a citizen of his liberty interest, based on a criminal statute that is interconnected with the law the state ignored?

The state contends that because AS 11.71.100-120 do not contain a penalty for violating the statutes, that the absence of a penalty provision indicates that they are directory and forecloses the judicial creation of a sanction. This assertion is contrary to well-established Alaska law.

Judicially created sanctions for violations of statutes silent as to penalties have been

---

[13] ***City of Yakutat v. Ryman***, 654 P.2d at 792.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

upheld in a variety of contexts. In ***State v. Jacob***,[14] the Alaska Supreme court upheld a judicially created remedy of enhanced attorneys fees for Office of Children's Services violations of grandparent notice requirements in Child in Need of Aid statutes in AS 47.10.030(d), AS 47.10.080(f), and AS 47.14.100(e).[15] Like the CASC statutes, each of these statutes is silent as to a remedy for the state violating the statutes. The plaintiff grandparents in that case were seeking declaratory relief.

In ***Berumen***,[16] the Alaska court of appeals examined what an appropriate sanction would be for a police statutory violation in the context of a criminal case. AS 12.25.100, codified the well-settled doctrine that law enforcement personnel must "knock and announce" prior to entering a residence to make an arrest.[17] Like the CASC statutes, AS 12.25.100 is also silent as to a penalty for violating the statute.

Berumen held that an exclusionary sanction was a proper remedy for the police violating the statute.[18] ***Berumen*** relied in large part on ***Harker***[19] which recognized that

---

[14] 214 P.3d 353, 355 (Alaska 2009).

[15] AS 47.10.030(d), which went into effect on September 23, 2001, ch. 43, §§ 1–6, SLA 2001, requires notice to grandparents of CINA proceedings if they request it or if OCS knows the child has a grandparent and has the grandparent's address. AS 47.10.080(f) states that grandparents entitled to notice under AS 47.10.030(d) are also entitled to notice of permanency hearings. The version of AS 47.14.100(e) in place while the Jacobs' grandchildren's CINA cases were proceeding prohibited OCS from placing a child in a foster home if a relative requested placement of the child unless there was sufficient evidence that such a placement would be unsafe or otherwise inappropriate. Former AS 47.14.100(e) (2004).

[16] ***Berumen v. State***, 182 P.3d 635 (Alaska Ct. App. 2008).

[17] AS 12.25.100 provides: "**Breaking into building or vessel to effect arrest**. A peace officer may break into a building or vessel in which the person to be arrested is or is believed to be, if the officer is refused admittance after the officer has announced the authority and purpose of the entry."

[18] ***Berumen***, 182 P.3d at 642.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

an exclusionary sanction may be appropriate to remedy police statutory violations, and set forth an analytical framework.[20] Under ***Harker,*** the following are the factors the court should consider when assessing whether a statutory violation warrants an exclusionary sanction: (1) whether the statutory requirement or restriction is "clear and widely known"; (2) whether the statute is primarily "designed to protect the personal rights" of individual citizens, as opposed to being intended more "for the benefit of the people as a whole"; (3) whether admission of evidence obtained in contravention of the statute would require the court to "condone 'dirty business' "; and (4) whether it appears that the police have engaged in "widespread or repeated violations" of the statute.[21]

In this case, the first ***Harker*** factor points toward application of an exclusionary sanction. The Attorney General, the intended chair the Committee, is the highest law enforcement officer in the State of Alaska. The language in the statutes is very clear: AS 11.71.100 states: (t)he Controlled Substances Advisory Committee **is established**. . . ; AS 11.71.110 states: "(t)he committee **shall** . . ." (and then it lists the duties of the committee); and AS 11.71.120 states: ". . . the governor **shall** introduce legislation . . .." The statutory language is clear, unambiguous and mandatory.

In ***Harker*** the statute at issue was the Posse Comitatus Act of 1873.[22] In

---

[19] ***Harker v. State***, 637 P.2d 716, 719 (Alaska Ct. App. 1981) aff'd, 663 P.2d 932 (Alaska 1983).

[20] ***Harker***, 637 P.2d at 719.

[21] Id.

[22] 18 U.S.C. s 1385; ***Harker***, 637 at 719 ("The *Posse Comitatus* Act provides: Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

creating this factor the court addressed the concern that the Posse Comitatus Act was much less well-known among police officers than the Fourth Amendment's proscription against unreasonable seizures, and that police officers may not be aware of the proscription against the use of the military in civilian law enforcement[23]

In this case, the statute is not directed at the police, it is directed at lawyers. The statute is directed at the Department of Law whose prosecutors seek accountability on a daily basis for those whose law violations are significantly less enduring than the Department's own thirty-two year long violation of the CSAC statutes. The court cannot find that the statute is not "well known" among the army of lawyers in the Department of Law. The lawyers in the Department of Law should be expected to be at least as cognizant of the law regarding their own Department's duties as police officers are expected to be; particularly when they are using statutes immediately preceding the CSAC statutes to impose criminal liability on ordinary people on a daily basis.[24] It isn't as if the lawyers had to peruse an unknown or little used section or title of the statutes. The CSAC statutes immediately follow the criminal statutes used by prosecutors in drug cases each and every day.

Admittedly, the second factor may point away from the application of an

---

part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.)

[23] Id .

[24] AS 11.71.010-060 are the statutes imposing criminal liability on defendants for misconduct involving controlled substances. AS 11.71.070 was repealed and AS 11.71.080-090 involves defenses for marijuana cases. The next statute is the CSAC statute.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

exclusionary sanction because the statutes are primarily intended "more for the benefit of the people as a whole" as opposed to "designed to protect the personal rights of individual citizens." However, as indicated in the original motion, while the original statutory intent was likely to "benefit people as a whole," important individual constitutional rights[25] are implicated by the state's failure to provide the intended benefits.

The third factor: "whether admission of evidence obtained in contravention of the statute would require the court to condone 'dirty business' "; points toward the application of an exclusionary sanction. The "dirty business" ***Harker*** factor was explained in ***Berumen***:

> And, in this light, we conclude that the third ***Harker*** factor also points toward application of the exclusionary rule here.
>
> The police officers in this case violated a longstanding requirement of Alaska law that is designed to protect the privacy and dignity of this state's citizens. On the issue of whether the police must announce their claimed authority and purpose, and on the related issue of whether the police are allowed to break into a building if they have neither sought nor been refused admittance, the statute is written in clear and unambiguous terms.[26]

In this case, the questioned statutes are long-standing and have been written in clear, unambiguous language. They direct the Department of Law with specificity as to

[25] The individual rights impacted by the state's failure are 1) the right to Due Process of Law under Sec. 1 of the fourteenth amendment to the Constitution of the United States and Art. I, s 7 of the Alaska Constitution; 2) the right to liberty in an individual's literal freedom from being incarcerated, 3) the individual right to rehabilitation under Article I, section 12 of the Alaska Constitution.

[26] ***Berumen***, *supra* at 642.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

how often the committee is to meet, what the committee's duties are and require the governor to introduce legislation consistent with the committee's recommendations. In light of that, it would indeed be "dirty business" for the lawyers in the Department of Law to ignore the law for thirty-two years and then be immune from consequences for doing so.[27]

The final factor, whether it appears that there have been "widespread or repeated violations" of the statute obviously points toward the application of an exclusionary sanction. For thirty-two years, the state continuously ignored the statutes **REQUIRING** a CSAC to meet, make recommendations, propose Schedule changes, propose alternatives to incarceration, review enforcement policies and insure the availability of treatment options. It hardly seems plausible that a law violation could get more widespread, repeated or flagrant than that.

The State cites ***Copelin***[28] in the Opposition. ***Copelin***, like ***Harker*** and ***Berumen***, also involves a judicially created exclusionary sanction for police violating AS 12.25.150.[29] Unlike the CSAC statutes and the statutes at issue in ***Harker*** and

---

[27] In ***State v. Avery***, 211 P.3d 1154, 1159 (Alaska Ct. App. 2009) the court of appeals explained that the third criteria is: "whether admission of the evidence would make courts accomplices to the willful disobedience of the law." In this case, given the state's flagrant, lengthy law violation and unapologetic concession combined with the assertion that the state can violate the law with impunity, if the court were to reward the state it would become a willing accomplice in willfull disobedience of the law.

[28] 659 P.2d 1206 (Alaska 1983).

[29] **12.25.150 "Rights of prisoner after arrest"** reads as follows: (a) A person arrested shall be taken before a judge or magistrate without unnecessary delay, and in any event within 48 hours after arrest, including Sundays and holidays. This requirement applies to municipal police officers to the same extent as it does to state troopers. (b) Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's 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 friend of

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

Berumen, AS 12.25.150 contains potential civil and criminal violations[30] associated with a violation of the statute by police. According to the state's Opposition, this means the statute is "mandatory" and presumably even the state would have to follow that one.

In ***Copelin,*** the court of appeals upheld a judicially created exclusionary sanction for a statutory violation, identifying the two benefits obtained by suppression of evidence where the defendant is denied a pre-intoximeter-test phone call to his attorney: (1) deterrence of future illegal police conduct; and (2) prevention of state interference with the defendant's ability to present a defense at trial.[31] ***Copelin*** was later extended by the Alaska Supreme court in ***Zsupnik v. State,***[32] which held: "whether the exclusionary sanction is appropriate in a given case is 'resolved by weighing the costs and benefits' of depriving the state of relevant evidence."

The state also discusses ***Sundberg,***[33] in the Opposition. In ***Sundberg*** the Alaska

---

the prisoner, have the right to immediately visit the person arrested. This subsection does not provide a prisoner with the right to initiate communication or attempt to initiate communication under circumstances proscribed under AS 11.56.755 . (c) It shall be unlawful for an officer having custody of a person so arrested to wilfully refuse or neglect to grant the prisoner the rights provided by this section. A violation of this section is a misdemeanor, and, upon conviction, the offender is punishable by a fine of not more than $100, or by imprisonment for not more than 30 days, or by both. (d) In addition to the criminal liability in (c) of this section, an officer having a prisoner in custody who refuses to allow an attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of $500, recoverable in a court of competent jurisdiction.

[30] Though suppression has been granted in multiple cases for ***Copelin*** violations over the years, undersigned counsel is unaware of any law enforcement officer actually having ever been charged with violating AS 12.25.150(c), much less convicted.

[31] ***Copelin***, 659 P.2d at 1214–15.

[32] 789 P.2d 357, 363 (Alaska 1990).

[33] ***State v. Sundberg***, 611 P.2d 44 (Alaska 1980).

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

supreme court examined whether to create an exclusionary sanction as a remedy for a violation of an arrest statute that was also silent as to remedy. The court explained the analysis:

> Initially, we note that there is no legislative directive calling for invocation of an exclusionary rule as a sanction against resort by the police to excessive force in making an arrest (i. e., a violation of AS 12.25.080). Therefore, in the absence of any compelling legislative history of AS 12.25.080, we are faced with the policy decision as to whether a judicially created exclusionary rule should be fashioned and employed in the situation where arrests are accompanied by excessive force on the part of the police. Some measurable consequence should attach in the circumstance where police conduct is violative of a statute and in turn significantly affects substantial rights of the accused. In assessing the significance of the rights involved in the case at bar, we think it relevant to consider the relationship between AS 12.25.080 and the goals of the exclusionary rule as developed in the context of searches and seizures.[34]

Based on the fact that there were other significant deterrents in place to prevent police from using excessive force (ie. possible criminal sanctions; police departmental proceedings; civil rights actions; and common law tort suits against the offending officer) the court held that application of the exclusionary rule was unnecessary for that particular law violation. ***Sunberg*** concluded with a cautionary warning from the Alaska supreme court:

> On the other hand, we think it appropriate to caution that our holding is not immutable. In the event a history of excessive force arrests is shown, demonstrating that existing deterrents are illusory, we will not hesitate to reexamine the question of whether an exclusionary deterrent should be fashioned in the situation where evidence is obtained as a result of an

[34] ***Sundberg***, 611 P.2d at 50-51.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

1 arrest which is effectuated by excessive force.[35]

2 In this case, the law violation is significant and protracted. Unlike the situation
3 in ***Sunberg***, there are no other significant deterrents to prevent the state from continuing
4 to ignore the law. Based on the warning at the end of the ***Sunberg***, it is entirely
5 reasonable to conclude that if a thirty-two year history of use of excessive force was
6 demonstrated, the Alaska supreme court may well conclude that an exclusionary
7 deterrent is warranted under those circumstances.

8 Finally, the state devotes several pages of the Opposition to discussing ***Nathan v.***
9 ***Municipality of Anchorage***.[36] However, Nathan is inapposite because Judge Rhoades
10 found that, despite Nathan's disability, effective communication did in fact take place
11 between Nathan and the officers, and Nathan did understand his right to an independent
12 test.[37] According to the Alaska court of appeals: "[t]he **judge's resolution of these**
13 **issues of fact constituted an implicit finding that no violation of the Americans with**
14 **Disabilities Act took place.**"[38] In *dicta* the court concluded: "[i]f Nathan, because of
15 his hearing impairment, had failed to acquire a basic understanding of his right to an
16 independent test, then he would be entitled to suppression of his breath test result.[39]

17
18
19
20
21
22
23
24
25
26
27
28

[35] Id at 52..

[36] 955 P.2d 528 (Alaska Ct. App. 1998).

[37] Nathan, 955 P2d at 532.

[38] *Id.*

[39] *Id* at 533 *citing* ***Ahtuangaruak v. State***, 820 P.2d 310, 311–12 (Alaska App.1991)(a DWI arrestee's purported waiver of the right to an independent test is invalid "if the arrestee, because of ... a language barrier, or [for] any other reason, fails to acquire a basic understanding of the right to an independent test").

Notably however, according to the state's Opposition: "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.'"[40]

Nathan is significantly different than the situation in this case, where the statute was clearly violated for thirty-two years and the violator arrogantly asserts that it can violate a "directory" law with complete impunity. As indicated above, under the ***Harker*** factors it is clear that a judicially created exclusionary sanction is appropriate under these facts. The question then becomes, what should the court exclude?

III) The Requested Remedies are Appropriate Exclusionary Sanctions Under Alaska Law

In the Alaska cases cited above a judicially crafted sanction was applied to exclude evidence the state wouldn't have had if the law violation not occurred. In ***Berumen*** all of the evidence flowing from the illegal entry into the hotel was suppressed,[41] in ***Copelin***, the breath-test result was suppressed,[42] in ***Zsupnik***, the breath-test result was also suppressed.[43]

In each of those cases a state actor violated a statute pertaining to a specific

---

[40] State's Opposition at page 22 *citing* ***Nathan v. Municipality***, *supra.*

[41] ***Berumen***, 182 P.3d at 355

[42] ***Copelin***, 659 P.2d at 1214–15.

[43] ***Zsupnik***, 789 P.2d 357, 363.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

individual on certain day. In this case, the state chose to ignore the law pertaining to the CSAC that was created to provide oversight to the schedules contained in AS 11.71.140-190 continuously for thirty-two years. The state engages in burden-shifting, claiming it is the defendant's burden to prove the consequences of this protracted law violation.[44] However, under ***Ryman***, it clearly is not.

Under ***Ryman***, "where the local government's action fails to meet the substantial compliance test . . . **prejudice to the taxpayer will be presumed and the tax or assessment will be overturned**." Thus, under ***Ryman***, when the governmental authority fails to demonstrate substantial compliance with the statutory tax regime, the tax is overturned. Unspoken in ***Ryman,*** but clearly present is the idea that when the government fails to substantially comply with it's own laws, an exclusionary sanction (ie loss of the ability to collect the tax) is imposed.

A similar remedy is appropriate in this situation. Unlike the many of examples cited above, where evidence resultant from a statutory violation is subjected to a judicially crafted exclusionary sanction, this situation is more difficult to remedy, in part because the state's law violation lasted decades. As indicated by the state in the Opposition: "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

[44] See State's Opposition at 22: "the defense is requesting an inappropriate remedy because he cannot demonstrate how the Department of Law's failure to form the CSAC has prejudiced his ability to present a defense at trial;" State's Opposition at 20: "Other than making a vague assertion that his due process righta have ben violated due to a lack of oversight, the defendant fails to explain how this has caused him injury;"

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

prescribed the courts must judicially determine them."[45]

The defendant has suggested several alternatives to remedy the state's failure to follow the law.

1) Invalidate the Entire 1982 Enactment.

In this remedy, the court provides declaratory relief, similar to the relief requested in ***Jacobs***, by "declaring" the entire 1982 enactment invalid or unconstitutional. This is unlikely to happen and is similar to declaring the tax statute invalid as opposed to the tax under ***Ryman***. For this reason, this is probably not the appropriate remedy.

2) Invalidate Only AS 11.71.140-190.

This remedy is the most similar to ***Ryman***. Based on the state's inability to demonstrate substantial compliance with the statutes, prejudice is presumed and the [subject of the dispute] "tax or assessment" is overturned. In this case, the subject of the dispute is the controlled substances schedules listed in AS 11.71.140-190. Had the state been following the law, these schedules would have been monitored for additions and/or subtractions; penalties, enforcement policies and alternatives to incarceration would have been being monitored at least bi-annually. This over sight was statutorily required, yet the state asserts, "we didn't follow the law for thirty-two years, so what, they can't prove things would be different." The arrogance of this assertion offends fundamental

[45] Opposition at 6 *citing* ***Thompson v. Stanford***, 281 Ark. 365, 663 S.W. 2nd 932, 16 L.Ed Law Rep. 345 (1984).

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

fairness and fails to address the constitutional concerns caused by the state's law violation.

In ***Stephan v. State***,[46] the Alaska Supreme Court held that exclusion was an appropriate remedy for evidence obtained in violation of the due process clause of the Alaska Constitution.[47] The ***Stephan*** court judicially created a remedy of exclusion for the unexcused failure to electronically record an entire custodial interrogation. While there was no statute at issue in ***Stephan***, the same due process considerations that required suppression of evidence in ***Stephan,*** prevent the state from utilizing the controlled substances schedules (AS 11.71.140-190) when they have been violating the law in regulating them for thirty-two years.

According to the Alaska supreme court, this kind of sanction "strikes the proper balance between the interest of taxpayers in having the taxing authority adhere to statutorily-mandated procedures and the interest of the taxing authority and the general public in not having levies declared invalid because of the negligence of the taxing authority's employees." Like the tax regime in ***Ryman***, if the state could demonstrate substantial compliance, or even ANY compliance, the subject of the dispute would not be overturned. However, here, the state seeks to impose criminal liability on its citizens when it has been ignoring its own laws for thirty-two years.

---

[46] 711 P.2d 1156, 1159 (Alaska 1985).

[47] ***Stephan***, 711 P.2d at 1159-60 (holding article I, section 7, "due process" clause of Alaska constitution requires police to record every custodial interrogation that occurs at a police station--or any other place of detention--if recording is feasible).

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

Under this remedy, there are probably several non-violent,[48] non-weapon carrying[49] addicts who would have their cases dismissed. However, how many more were prosecuted in violation of their rights to due process and rehabilitation during the thirty-two years the state was ignoring the CSAC statutes? Moreover, the issue this creates is easily remedied in the upcoming legislative session when the CSAC requirement can either be eliminated or the CSAC can be constituted as it should have been for the last thirty-two years.

This remedy strikes the proper balance between the interest of the state and the general public in having addicts who violate the law punished and the interest of the addicts in getting the treatment and rehabilitation they so desperately need.

3) **Place All Controlled Substances in AS11.71.190, Schedule VIA**

This remedy occurs at the intersection of ***Ryman*** and the Rule of Lenity, which applies only to criminal cases. Under the Rule of Lenity, if a statute establishing a penalty is susceptible of more than one meaning, it should be construed so as to provide the most lenient penalty.[50] In this case, because the state cannot demonstrate substantial compliance with the CSAC statutes, which provide mandatory oversight to the controlled substances schedules, it is certainly possible to interpret the oversight as a

[48] Since violence against another person is charged under a separate statutory regime AS 11.41. *et seq*, that would remain intact, presumably the state could still proceed on the other charges regardless of the outcome of the controlled substances charges.

[49] Since Misconduct Involving weapons is charged under a separate statutory regime AS 11.61 et seq, that would remain intact presumably the state could still proceed on those charges regardless of the outcome of the controlled substances charges.

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

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

prerequisite to the validity of the schedules. Therefore, under the operation of the Rule of Lenity, in conjunction with "substantial compliance" test, all schedules are presumed invalid and reduced to schedule VIA, which has the lowest penalties, until the legislature acts to correct the schedules by either eliminating the oversight requirement and/or reclassifying all of the controlled substances into appropriate schedules.

IV) Cruel and Unusual Punishment

The state devotes a great deal of time and attention to explaining the importance of state defendants being treated similarly. When inexactitude of statutory language has invited arbitrary enforcement so that there has been a history or a strong likelihood of uneven application, laws have been stricken as unconstitutional.[51] Here, the wide disparity of sentences causes both a history and a strong likelihood of uneven application. As explained in the motion, snitches are currently determining who will receive the lenient federal penalties and who will receive the much harsher state sentence based on the same or similar conduct.

Unlike what the state asserts, not every state having sentencing laws harsher than federal sentencing law violates the Eighth Amendment. Only those states that have themselves violated the law for thirty-two years while drastically increasing penalties well-beyond federal sentencing guidelines violate the Eighth Amendment.

[51] ***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, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214, 218 (1971), ***Gregory v. City of Chicago***, 394 U.S. 111, 120, 89 S.Ct. 946, 951, 22 L.Ed.2d 134, 141 (1969); ***Marks v. City of Anchorage***, 500 P.2d at 650.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

Moreover, the state's argument ignores the clear trend throughout the United States away from lengthy periods of incarceration for drug offenders. The state's suggestion that, had a CSAC met and performed its statutory duties over the past thirty-two years there would be no substantive change in the sentences, substance abuse treatment, and alternatives to incarceration for drug offenders is speculative and contrary to the recent trends in sentencing repeat drug offenders and the trend toward treatment and the use of drug courts throughout the nation.[52]

Texas,[53] in 2007, increased treatment resources, reinvested $241 million from averted prison growth to expand substance abuse treatment and transitional reentry programs, as follows:

> Prison/jail substance abuse treatment: 500 beds for in-prison treatment targeting DWI offenders; 1,200 slots for intensive substance abuse treatment in state jail system.
>
> Reentry transition: 300 beds in halfway houses for parole reentry; 1,000 slots for in-prison to post-prison substance abuse treatment program.
>
> Community substance abuse treatment: 800 inpatient beds and 3,000 outpatient slots for probationers; 1,500 inpatient beds for Substance Abuse Felony Punishment, a program that provides six months secure inpatient treatment and

[52] *See, e.g.,* ***Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001 – 2010 (Vera Institute of Justice (September 2010). Executive Summary. Page 2:*** States redefined and reclassified criminal offenses, often resulting in a reduction in offense severity and sentence length. State's strengthened alternatives to incarceration, with an emphasis on increasing investment in substance use treatment, specialty courts, and community supervision. States took steps to reduce prison terms, from rolling back mandatory minimum sentences to enhancing mechanisms designed to accelerate sentence completion.

[53] Texas attitudes toward crime and sentencing are universally regarded as disproportionately harsh. In this particular arena, sentencing nonviolent drug offenders, Texas has shown remarkable insight.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

three months nonsecure residential treatment to probationers and parolees who have violated their supervision terms.[54]

Likewise, Kansas passed SB 203 in 2003 mandating up to 18 months of drug treatment and probation for nonviolent drug possessors. The law also requires that technical violators be subject to non-prison sanctions (rather than program discharge and revocation to prison). [55]

Kentucky established the "Recovery Kentucky" initiative in SB 4 in 2009, requiring its DOC to establish a minimum security drug treatment facility within an existing prison with the capacity to house 200 felony offenders. The law also expanded pretrial diversion programs for offenders that complete a pretrial substance abuse program.

New Jersey expanded eligibility criteria for its drug courts to persons with two or more felony convictions in SB 4 (2009).

Minnesota removed mandatory minimum sentences for low level drug cases in SF 802 (2009).

Rhode Island lowered its mandatory minimum sentences for drug Offenses in SB 39aa (2009).

[54] ***Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001 – 2010 (Vera Institute of Justice (September 2010). Executive Summary. Page 8.***

[55] *See also Trend to Lighten Harsh Sentences Catches on in Conservative State*, The New York Times, August 12, 2011.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

New York eliminated mandatory minimums and restored judicial discretion in law level drug cases and authorized judges to retroactively resentence 1500 offenders in S 56-B (2009).

Delaware decreased its mandatory minimum sentences for drug trafficking crimes, doubled the quantity threshold for drug trafficking to 10 grams, and made convicted drug traffickers eligible for transitional community programs during the last 180 days of a prison term in HB 210 (2003).

Michigan eliminated most of its mandatory minimum drug laws, eliminated consecutive sentences on multiple charges, and revised weight thresholds in PA 665, 666, 670 in 2002.

Indiana reformed its mandatory minimum sentencing regime for certain nonviolent drug offenses and granted judges discretion to sentence offenders to home detention or work release, granted judges discretion to divert offenders from prison who sell drugs to support their personal use, and exempted drug offenders from the three strikes law in HB 1892, SB358 in 2001.

South Carolina reduced penalties for drug possession in SB 1154 in 2000.

Louisiana increased the authorization for house arrest from 2 years to 4 years in HB 225 in 2009.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

Washington expanded sentencing options by creating a special treatment-oriented drug grid for drug offenders and made most of them eligible for drug-court sentences in HB 2338 in 2002.

These clear trends cannot be ignored, particularly where prejudice is presumed based upon the state's concession that it has failed to constitute, fund and conduct the statutory requirements of the controlled substances advisory committee for thirty-two years. The clear trend has been to divert non-violent drug offenders to treatment in lieu of incarceration and to revise penalties downward.[56] The failure of the state to staff, fund, and marshall the efforts of the CSAC makes Alaska an outlier in the current trends for sentencing drug offenders throughout the nation.

V) Severability is Not a Remedy for the State's Failure to Follow the Law

The state has the audacity to assert that under AS 01.10.030, "severability" means that the sanctions discussed above are inappropriate. By asserting this, the state is actually telling the court that it should sever out the part of the statute that requires the state to perform and then the remaining statutes become "constitutional." If this were the appropriate remedy for the state's protracted law violation, the appellate courts involved in each of the cases discussed infra, ***Berumen***, ***Copelin***, ***Zsupnik***, ***Harker***, ***Nathan*** and ***Sunderland*** could have resorted to this remedy for the statutory violations

---

[56] *See, e.g.*, *Positive Trends in State-Level Sentencing and Corrections Policy*, (Greene, Judith, November 2003) Families Against Mandatory Minimums.

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

in each of those situations. However, none of them did. Severability will not cure the state's thirty-two year failure to follow the law.

VI) Conclusion

The state alleges that it can violate the law continuously for more than three decades with impunity. It asserts that its flagrant, long-standing law violation is completely without consequences. The defendant accepts that the state's mandatory/directory dichotomy is appropriate and asserts responsively that because the state cannot demonstrate "substantial compliance" with the CSAC statutes prejudice is presumed and the only remaining issue is the remedy. Judicially created exclusionary sanctions are appropriate remedies for governmental statutory violations and have been repeatedly upheld in Alaska. The remedies requested by the defendant in his original motion are appropriate under Alaska law. The state's failure to follow the law implicates individual constitutional rights and the prohibition against cruel and unusual punishment. Severability will not cure the state's flagrant law violations. For all of these reasons, the defendant's motion should be granted.

Dated July 22, 2013 at Anchorage, Alaska.

By: ______________________
KeriAnn Brady
Attorney for Daemion Patillo
Alaska Bar No. 9711084

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on this date a true copy of the foregoing document was hand-delivered to the following: Anchorage District Attorney's Office.
Signature: Reece Brazzle-Robert Date: 7-22-2013

Law Office of KeriAnn Brady
750 West Second Avenue, Suite 104
Anchorage, AK 99501
Tel (907) 644-6900 Fax (907) 929-7660
Keri@Last-Frontier-Law.com

11.71.100 Controlled substances advisory committee.

(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;
(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.

The Commentary to AS 11.71.100 reads:

This section establishes the nine-member Controlled Substances 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

11.71.110 Duties of committee. The committee ***shall***

(1) advise the governor of the need to add, delete, or reschedule substances in the schedules in AS11.71.140 - 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;
(B) providing treatment and counseling of persons who abuse controlled substances; and
(C) regulating the legitimate handling of controlled substances.

The Commentary to AS 11.71.110 reads:

This section specifies the duties of the Controlled Substances 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.

The purpose of this committee is to provide an overview of drug use and abuse in Alaska and to determine what is being done about it, from the standpoints of law enforcement, treatment and counseling, prevention and education, and legitimate handlers. This committee should be able to study Alaska's resources for eliminating and preventing drug abuse, and suggest cohesive policies which will enable all agencies to function more effectively.

11.71.120 Authority to schedule controlled substances.
(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 AS11.71.140 - 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.***
(c) In advising the governor of the need to add, delete, or reschedule a substance under 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;

(2) the biomedical hazard of the substance including

(A) its pharmacology, in the effects and modifiers of the effects of the substance;
(B) its toxicology, the acute and chronic toxicity, interaction with other substances, whether controlled or not, and the degree to which it may cause psychological or physiological dependence;
(C) the risk to public health and the particular susceptibility of segments of the population;

(3) whether the substance is an immediate precursor of a substance already controlled under this chapter;
(4) the current state of scientific knowledge regarding the substance, including whether there is any acceptable means to safely use the substance under medical supervision;
(5) the relationship between the use of the substance and other criminal activity, including

(A) whether persons engaged in illicit trafficking of the substance are also engaged in other criminal activity;
(B) whether the nature and relative profitability of manufacturing or delivering the substance encourages illicit trafficking in the substance;
(C) whether the commission of other crimes is one of the effects of abuse of the substance;
(D) whether addiction to the substance relates to the commission of crimes to support the continued use of the substance.

> (d) [Repealed, Sec. 40 ch 6 SLA 1984].
> (e) The committee has no authority over tobacco or alcoholic beverages as defined in AS 04.21.080.

(Emphasis added). The commentary to AS 11.71.120 provides:

> The first two subsections of this section provide that the governor ***shall*** introduce legislation regarding the controlled substances schedules upon either of two events occurring: ***(1) if the advisory committee recommends that a substance be added to, deleted from, or rescheduled within the schedules, the governor must take action in accordance with the recommendation; or (2) if a substance is added to a federal schedule of controlled substances, the governor must also introduce legislation in accordance with the federal enactment.***
>
> Subsection (c) establishes the criteria to be considered by the committee in making a determination regarding the addition, deletion, or rescheduling of controlled substances. These criteria were also considered and followed by the legislature in passing this legislation. The criteria which must be assessed when the committee considers the scheduling, rescheduling or removal of a controlled substance from the schedules are set forth in APPENDIX C, along with a comparison of the criteria required under federal law. These criteria include: (1) the actual or probable abuse of a substance; (2) the biomedical hazard of a substance; (3) whether a substance is an immediate precursor of a substance already controlled; (4) the current state of scientific knowledge concerning a substance; and (5) the relationship between use of a substance and other criminal activity. Scheduling decisions are based on findings made under these criteria viewed as a whole, without any of the criteria necessarily being given more weight than any other.
>
> The specified criteria differ from federal law in several ways. First, the federal requirements in schedule I include "no currently accepted medical use" of the substance. 21 U.S.C. § 812(b)(1)(B). This criterion has been specifically omitted from this Act. Marijuana and LSD, for example, are scheduled federally as schedule IA controlled substances because of this standard. 21 U.S.C. § 812(c)(9) and (10). Second, in Alaska all the criteria are considered in determining the danger or probable danger of each controlled substance, even though some of the criteria may not apply to a particular substance. In contrast, federal law more specifically designates the weight to be given certain factors, requiring different findings for the placement in different schedules. *See* 21 U.S.C. § 812(b)(1)-(5). Third, while the criteria in paragraphs (1)-(4) are similar or identical to some criteria in federal law, (21 U.S.C. § 811(c)), the Alaska criterion specified in paragraph (5), "the relationship between the use of substance and other criminal activity," is not found in federal law. By adoption of this factor, the legislature has

specifically found that there is or may be a relationship between the use of certain controlled substances and other criminal activity, including but not limited to those factors set out in subparagraphs (A)-(D).

The "danger or probable danger of the substance" determines the schedule in which it is placed. The degree of danger or probable danger of any controlled substance is relative to all of the other controlled substances. Substances having the highest degree of danger or probable danger are placed in schedule IA, while those with lower degrees of danger or probable danger, in relationship to other substances, are placed in descending schedules. The description in schedule VIA preceding the listing of substances in that schedule is not intended to mean that any substance scheduled in VIA has little or no danger to a person or the public. On the contrary, the legislature has specifically found, as stated in the Declaration of Legislative Purpose, that marijuana poses a serious threat to the public health. However, substances placed in schedule VIA have the lowest degree of danger or probable danger to an individual or the public *relative* to those substances controlled under higher schedules considering the criteria specified in sec. 11.71.120(c).