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To: **House Judiciary Committee**
Rep. Wes Keller, Chair

From: Rep. Doug Isaacson

Re: **HB 178 - April 3rd Hearing of the Judiciary Committee**

This memo mirrors a similar response put out by Senator Dyson's office on March 19th, regarding HB 178's companion bill in the Senate. That response addressed testimony given by Deputy Attorney General Rick Svobodny and others before the Senate Finance Committee. Because Mr. Svobodny's testimony remained substantively unchanged between March 18th and April 3rd, most of the explanation and rebuttal already laid out by Senator Dyson's office stands. However, we have sharpened the focus on several points raised, provided additional detail where necessary, and omitted several sections present in the memo of March 19th, already included in the House bill committee packet.

Regarding the Comments of Deputy Attorney General Rick Svobodny

1. On Mandatory Sentencing

The supporters of this reform have analogized the proposed "three-strike" system to the State's approach to DUI's, domestic violence and theft. I believe that in the most important respect this analogy holds true: we do not usually impose an immediate felony sentence on first time offenders in those other offense categories, but provide an escalating punishment system that allows for redemption for first and second time offenders. However, Mr. Svobodny points out that unlike in the DUI context, there is no mandatory sentencing in this bill, and in that way possession offenses will not be analogous. This observation is correct, but not dispositive; I do not believe mandatory minimum sentences are appropriate in this context.

For possession offenders, I believe that judges should be given the discretion to order screening and treatment. These are tools they already have and widely deploy. We know from conversations with judges and attorneys that in the vast majority of instances when an offender is convicted of possession of a Schedule IA or IIA substance they will be ordered into a screening program similar to that conducted in Alcohol Safety Action Program (ASAP). In the rare case that this does not occur, it is because a judge has evaluated the specific circumstances (such as the case of the hunter with the old Oxycotin in his pocket that was raised in committee) and determined that this response is not necessary. We believe that judges are in the best position to make those calls based on the facts of the case and the criminal history of the defendant.

Studies have shown that providing drug treatment to offenders who are experimenters rather than addicts can actually be deleterious, and can lead to a deepening drug problem.[1] Furthermore, in cases where a prosecutor strongly believes that an offender is an addict, they have the ability to stress treatment elements in their plea bargain negotiations. They thus have a tremendous amount of influence over the process. I am confident that the overwhelming majority of people who require screening and treatment will receive that treatment under HB 178, and I believe the increased costs and negative side effects of a mandatory sentencing scheme significantly outweigh the benefit it might provide in capturing the very rare offender who falls through the cracks on their first offense.

2. Concerns about the "Look Back" Provision

Mr. Svobodny also correctly points out that the "look back" portion of HB 178's three-strike provision goes back for 5 years, while the "look back" for DUI's is currently 10 years. Though HB 178's "look back" differs from our DUI laws, it is an appropriate length for this type of offense. A drug user that has remained clean for 8 years, for example, and happened to "fall off the wagon" should be acknowledged as an example of the capacity for rehabilitation demonstrated by this extensive clean period. In contrast, I find DUI's more troublesome, even if spaced out over many years, as this is a lethal behavior (operating a motor vehicle while impaired) with the very real possibility of an innocent victim.

Mr. Svobodny raised the hypothetical of an offender violating at two or three year increments, and thus avoiding jail time. He stated that the first offense could lead to "no jail time," and the second offense could also lead to "no jail time," and the third, and the fourth, and so on, as the offender (rather cleverly, considering he or she would presumably be a drug addict) avoided the five year felony window. In addition to this being an unrealistic picture of offender behavior, it is also an extremely unlikely representation of prosecutor approaches to the plea and

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[1] See e.g. the research underlying the Substance Abuse and Mental Health Services Administration's "Treatment Improvement Protocols," particularly protocol #43, which discusses matching patients "to appropriate levels of care and types of services." See also the work of Dr. Mark A.R. Kleiman of the UCLA School of Public Affairs.

sentencing processes. A repeat offender like the one he describes is almost certain to see jail time, even if he or she is fortuitous enough to avoid a felony charge. Our judges and prosecutors have easy access to records of prior offenses, and take those factors into consideration at sentencing.

3. Regarding the Therapeutic Courts

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

Because HB 178 contains a "three-strike" provision that preserves felony charges for drug-addicted repeat offenders (a provision of the bill that was suggested by an Anchorage judge involved in the therapeutic courts, not coincidentally), we believe that the felony hammer will remain for those serious addicts most in need of therapeutic court intervention. Furthermore, after numerous conversations with stakeholders, we feel that an appropriately-structured misdemeanor sentence can be incentive enough to keep many people in treatment, especially those first and second time offenders who are more amenable to that treatment. We can see this dynamic at work in the therapeutic courts run by the Municipality of Anchorage, which works with only misdemeanants.

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

Testimony by a representative of the Court System before the Senate Finance Committee further established that the Courts do *not* believe that there will be a shortage of individuals in the Anchorage drug court following reclassification, because of the high number of eligible individuals. I was surprised that Mr. Svobodny reiterated his claim following the Court representative's testimony.

The problems in the Bethel therapeutic court, which Mr. Svobodny raised as an example of low participation, go far beyond any felony/misdemeanor distinction, and have been a frequent topic of conversation at the Criminal Justice Working Group.

Finally, Mr. Svobodny failed to mention that, while it is true that the Anchorage drug court serves exclusively felons, there are a number of mental health courts around the state that

serve primarily or exclusively misdemeanants. This is important, because many of those offenders are dual-diagnosis, suffering from both a mental disorder and substance abuse problems. This reform would actually *increase* the pool of eligible offenders for those therapeutic courts.

4. Probation Officers and Supervision

Similar to his concerns about treating misdemeanants in the therapeutic courts, Mr. Svobodny also raised the issue of probation officers and misdemeanants. He believes that probation officers are helpful in ensuring that offenders are both provided support and held accountable, a conviction that I share.

While it is true that the DOC does not provide Division of Probation and Parole supervision to misdemeanants, nearly all misdemeanants convicted of substance abuse offenses are assigned to programs such as the Alcohol Safety Action Program (ASAP) and with it a probation officer from the Department of Health and Social Services. Supervision by this probation officer and completion of ASAP involves an initial assessment of the misdemeanant, assignment to treatment if appropriate, and follow up with the treatment provider to ensure that the offender completed this treatment. While the program's name might suggest an exclusive focus on alcohol offenses, ASAP can and does work with the abusers of other substances. A supervisor at ASAP confirmed that they already work with a number of drug addicted convicts.[2]

5. Changing Prosecutor Behavior

Following this reform, Mr. Svobodny warned that some cases that are currently plead down to MICS-4 possession felonies would instead be prosecuted as higher level distribution felonies, because prosecutors are unwilling to agree to misdemeanor charges. The full version of Mr. Dunbar's report expressly addresses Mr. Svobodny's prediction that some prosecutorial practices will change as a result of reclassification (e.g. some MICS-2's and MICS-3's will no longer be negotiated down to MICS-4's); that is why the report provides a "low," "medium," and "high" estimate of savings, each corresponding to a different level of prosecutorial adjustment. Our cost savings projections thus take his prediction into account.

However, I cannot help but point out that if the Department of Law has evidence of drug distribution it should *already* be charging and pursuing those crimes as such. If this bill is coupled with an increased focus on drug distribution and a more aggressive approach towards drug dealers, I see that as a net positive, not a problem. In the rare instances where the DOL feels that a drug distribution charge is truly disproportionate to an offense, as in the Juneau case Mr. Svobodny raised, *and* that drug dealer has quantities small enough to avoid our felony

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

thresholds, then I would think that prosecutors should be content in pleading down to Class A misdemeanor and insisting on the full year in prison that can accompany that charge.

6. Prior Offenses in Other Jurisdictions

This reform establishes an "escalating punishment" regime, wherein an offender is subject to a felony charge if they have previously offended under our drug statutes. This includes offenses prior to the passage of this bill and offenses in other jurisdictions. Mr. Svobodny expressed concern that it will be difficult for the Department of Law to establish that an offense in another jurisdiction is analogous to an Alaskan offense, because other jurisdictions might have their own quantity limits—or no limits—that establish drug felonies and misdemeanors.

This logic does not follow. The language of HB 178 states clearly that an offender earns a "strike" if they violate:

> **(i) AS 11.71.010 - 11.71.050; or**
> **(ii) a law or ordinance of this or another jurisdiction with elements similar to those of an offense under the provisions described in (i) of this subparagraph"**

This covers the *highest level* of distribution crime (AS 11.71.010—Misconduct Involving a Controlled Substance in the First Degree) all the way down to a possession misdemeanor, following reform, of *any* amount of a Schedule IA or IIA substance (AS 11.71.050, as revised). Any conceivable crime of possession or distribution of a substance listed in Schedule IA or IIA, of *any* quantity, would count as a "strike" for the purposes of this statute. Moreover, in the determination of whether or not an offense from another jurisdiction is a "strike," there is no differentiation between a felony and misdemeanor.[3] Thus, the "strikes" provision should be a very easy element of the crime for the Department of Law to prove, because whatever the prior offense in another jurisdiction was, if it involves a Schedule IA or IIA substance, it counts as a "strike."

7. "Bifurcated Trials"

Mr. Svobodny claimed that this reform will lead to "bifurcated trials" or even two trials for every offense. My staff discussed this issue at length with a number of criminal attorneys. According to those accounts, "bifurcated trials" are not two separate trials, but rather two separate parts of the same trial. The first part of the trial is used to prove possession; the second part determines "prior bad acts," i.e. the former convictions needed for the "three strikes" language.

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[3] Though of course there may be a difference in sentencing based on the severity of a crime in another jurisdiction. But this factor already exists in all our laws, including the drug laws at issue.

But these "bifurcated trials" are not a major driver of expense. Alaska already has a number of contexts, including DUI and low-level theft, which use this system. The same jury is utilized in both portions of these trials, helping to alleviate the jury pool exhaustion warned about by Judge Steinkruger. In the vast majority of these cases, the defense simply stipulates to the prior convictions, because prior convictions are extremely easy for the State to prove. For the reasons stated in the section above, this holds true even when prior convictions are from other jurisdictions, as all convictions involving Schedule IA and IIA substances count as "strikes." While this "bifurcated trial" process may lead to slightly longer or more expensive trial in a very limited number of cases, that additional cost is overwhelmed by the savings potential to the State of an overwhelming majority of cases being resolved faster, with less expensive judges and attorneys.

8. Specific Concerns Regarding LSD

At present, Alaska law stipulates that when measuring the quantity of a substance (for example, in a MICS-4 charge involving Schedule IIIA substances); the state calculates the total mass of the "preparations, compounds, mixtures, or substances of an aggregate weight."[4] Our current laws thus often charges people with having a much larger quantity of a substance than they might actually have, because the substance has been "cut" or diluted with other substances. Taken in this context—where the law is already heavily skewed against defendants—Mr. Svobodny's specific concerns about LSD seem oddly placed. The State has not previously taken the position that it is unfair to charge an offender caught holding a large mixture with a higher charge than one caught with a smaller, purer form of a drug. Nevertheless, if Mr. Svobodny would prefer language that specifies a number of "delivery units"—in addition to or instead of aggregate weight—I am open to such a change, and hope to work with his office.

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4 Alaska Stat. § 11.71.040(a)(3)(C)