SB 186

<TARGET><BILL>SB 186</BILL><SUBJECT>SB 186</SUBJECT><COMM>SJUD28</COMM></TARGET>

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: SB 186
Fiscal Note Number: 1
(S) Publish Date: 3/14/14

Identifier: SB186-LAW-CRIM-03-07-14
Title: CONTROLLED SUBSTANCES ADVISORY COMMITTEE
Sponsor: DYSON
Requester: (S) JUDICIARY

Department: Department of Law
Appropriation: Criminal Division
Allocation: Criminal Justice Litigation
OMB Component Number: 2202

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2015**	**FY 2015**	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Fund Source (Operating Only)							
None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues							

Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version, not applicable.

Prepared By:	Loretta Withington, Division Operations Manager	Phone:	(907)465-5427
Division:	Department of Law	Date:	03/07/2014 04:50 PM
Approved By:	Michael C. Geraghty, Attorney General	Date:	03/07/14
Agency:	Department of Law		

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. SB 186

Analysis

Under current law, the Controlled Substances Advisory Committee "may not meet less than twice a year". SB 186 would declare that the committee "shall meet at least twice a year".

The Department of Law does not anticipate a fiscal impact.

ALASKA STATE LEGISLATURE

SENATOR FRED DYSON

SENATE DISTRICT F

SB 186 – Sponsor Statement

An Act relating to the Controlled Substances Advisory Committee and providing for mandatory meetings of the committee at least twice a year.

SB 186 seeks to bring the State into compliance with current drug statutes established by the Alaska Legislature in 1982. Specifically, for the past 32 years the State has violated the law requiring a Controlled Substances Advisory Committee to be established within the Department of Law. This committee has never been formed, and has never met, even once, to carry out its statutory duties under AS 11.71.110, or exercised its authority to schedule controlled substances under AS 11.71.120.

AS 11.71.100 established the Controlled Substances Advisory Committee (CSAC) within the Department of Law, and designated the Attorney General or his/her designee as the chairman of the committee. This nine-member commission is to be comprised of persons that combined have a significant breadth of experience to carry out its duties which include advising the Governor on the appropriateness of classification of controlled substances; recommending regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances; evaluate effectiveness of controlled substance treatment programs; recommend to Alaska Court System alternatives to prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses; and review and evaluate enforcement policies and practices of the Departments of Law and Public Safety with regard to crimes involving controlled substances. The CSAC includes the attorney general or his designee, the commissioner of health and social services and of public safety, a pharmacist, a peace officer, a physician, a psychiatrist and two more public members. The committee is required by law to meet twice a year.

Despite a clear legislative mandate for the CSAC to provide meaningful oversight of our controlled substance laws, and our treatment and enforcement policies, this has never happened. Today, the state of Alaska is reeling under an increasingly complex patchwork of controlled substance laws and regulations, high rates of incarceration and overcrowded prisons, and enforcement policies that have produced severe over criminalization and high recidivism of controlled substance offenders.

The Department of Law recently argued in *State of Alaska vs Patillo* that the legislative language is "directory" as opposed to "mandatory", therefore, they do not have to comply with forming the committee as directed by the Legislature. SB 186 makes it mandatory the CSAC carry out the duties our state desperately needs it to.

Staff Contact – Chuck Kopp (907)465-6580

Alaska Statute Class C Felonies ⟶ PENALTY – UP TO $50,000 & 5 YEARS IN PRISON

Examples of current Alaska Class C Felony laws - Have we over criminalized drug possession offenses?

1. **Misc. Involving Controlled Substance 4th Degree** **AS 11.71.040(a)(3)(a)**
   A person possesses any amount of a schedule IA or IIA drug.
   Example: Possession of one grain of a pain killer like hydrocodone without a prescription. The law currently has no dosage matrix to discriminate between trafficking, peddling, and simple possession. It is no defense that the amount of drug was not a useable quantity, only that the substance be positively identified in a narcotics test.

2. **Assault 3rd Degree** **AS 11.41.220(a)(1)(a)**
   A person causes fear of imminent serious physical injury by means of a dangerous instrument.
   Example: A person points a firearm at the head of another person and threatens to kill them.

3. **Stalking 1st Degree** **AS 11.41.260**
   A person engages in a "course of conduct" with a victim (i.e. following them, entering their property, contacting by phone, delivering items to victim) and places victim in fear of death or physical injury and the person possesses a deadly weapon.

4. **Custodial Interference 1st Degree** **AS 11.41.320(a)**
   A relative of a child who is under 18 years old, or of a an incompetent person, knowing they have no right to do so, keeps that child or incompetent person from their lawful custodian with intent to hold them for a protracted period and causes the child or incompetent person to be removed from the state or kept outside the state.

5. **Sexual Assault 3rd Degree** **AS 11.41.425(a)(1)(2)**
   A person engages in sexual contact with a person who he knows is mentally incapable, incapacitated or otherwise unaware and unable to consent to the sex act. Or, a prison guard engaging in sexual intercourse with a prisoner.

6. **Indecent Exposure 1st Degree** **AS 11.41.458(a)**
   A person knowingly exposes his genitals to a child while masturbating.

7. **Theft 2nd Degree** **AS 11.46.130(a)**
   A person steals property of another with a value between $500 and $24,999.99.

8. **Burglary 2nd Degree** **AS 11.46.310(a)**
   A person enters or remains unlawfully in a building with intent to commit a crime in the building.

9. **Vehicle Theft 1st Degree** **AS 11.46.360**
   A person, having no right to do so, steals a car, truck, motorcycle, motorhome, airplane, or boat of another person. Or, a person steals a police car.

10. **Criminally Negligent Burning 1st Degree** **AS 11.46.427(a)**
A person with criminal negligence damages property of another by fire or explosion, and has two separate prior convictions for this act within the previous 10 years.

11. **Endangering the Welfare of a Child 1st Degree** **AS 11.51.100(a)**
A guardian of a child under 16 years of age leaves the child with another person knowing the person previously had sexual contact with any child, and the other person causes physical injury to or engages in sexual contact with the child.

12. **Endangering the Welfare of a Vulnerable Adult 1st Degree** **AS 11.51.200**
A person fails, without lawful excuse, to provide support for a vulnerable adult and the vulnerable adult is in the person's care by authority of law and the vulnerable adult suffers serious physical injury.

13. **Promoting Contraband 1st Degree** **AS 11.56.375(a)**
A person illegally brings a firearm or drugs into a prison.

14. **Harming a Police Dog 1st Degree** **AS 11.56.705(a)**
A person intentionally kills or seriously injures a dog he knows to be a police dog.

15. **Impersonating a Public Servant 1st Degree** **AS 11.56.827(a)**
A person pretends to be a Peace Officer and exercises that authority in relation to another.

16. **Possession of Child Pornography** **AS 11.61.127**
A person knowingly possesses child pornography.

17. **Cruelty to Animals** **AS 11.61.140(a)**
A person intentionally inflicts severe physical pain or prolonged suffering on an animal. Or, a person knowingly kills an animal with intent to intimidate or threaten another person. Or, a person engages in a sexual conduct with an animal.

18. **Recruiting a Gang Member 1st Degree** **AS 11.61.160**
A person uses force to induce someone to join a criminal street gang, or commit a crime for a gang.

19. **Unlawful Furnishing of Explosives** **AS 11.61.250(a)**
A person gives explosives to another knowing that the person intends to use them to commit a crime.

20. **Sex Trafficking 3rd Degree** **AS 11.66.130(a)**
A person, with intent to promote prostitution, manages, supervises, controls or owns a place of prostitution.

LEGAL SERVICES

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MEMORANDUM October 21, 2013

SUBJECT: Mandatory Meetings of the Controlled Substances Advisory Committee; AS 11.71.100(e) (Work Order No. 28-LS1055\A)

TO: Senator Fred Dyson
Attn: Chuck Kopp

FROM: Doug Gardner
Director

Please find enclosed a bill amending AS 11.71.100(e) to clarify that the minimum of two meetings a year of the Controlled Substance Advisory Committee are mandatory, rather than directory. In your drafting request, which I understand was a response to the litigation in *State of Alaska v. Daemion Patillo,* 3AN-12-00820 CR, and the position that the state argued in the State's Opposition to Motion to Declare AS 11.71.140 - 190 Invalid or Unconstitutional, you provided me the latitude to consider including a provision in AS 11.71.100 providing for a criminal (or other) penalty for failure of the Controlled Substance Advisory Committee to meet at least twice a year as provided in AS 11.71.100(e).[1]

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[1] I note that currently, AS 11.71.100(e) provides:

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

Whether this language is mandatory or directory has been raised by the parties in the *Patillo* case, and it is not my intention to comment on the arguments of the parties. However, please review the following section from the *Manual of Legislative Drafting,* pp. 64 - 65 (2013 ed.), which discusses the interpretation courts have given to the legislature's use of "may," "shall," and "must," with examples:

> (h) "May," "shall," "must"
>
> Use the word "shall" to impose a duty upon someone. The Alaska Supreme Court has stated that the use of the word "shall" denotes a mandatory intent. Fowler v. Anchorage, 583 P.2d 817 (Alaska 1978).
>
> Use the word "must" when describing requirements related to objects such as forms or criteria. (Use "must" sparingly, however, because most sentences using it can probably be written more clearly to impose a duty

My recommendation is not to include a penalty to assure at least two annual meetings of the committee. I chose instead to use the term "shall" to make two meetings of the committee a year mandatory. There is no restriction in AS 11.71.100 that limits the attorney general from calling additional meetings of the committee if the attorney general deems additional meetings necessary.

Please review the bill draft, and make sure that the draft achieves the senator's legislative goals for this statute.

DDG:ray
13-020.ray
Enclosure

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upon a person, in which case "shall" would be the proper word.) Use the word "may" to grant a privilege or discretionary power. Rutter v. State, Alaska Board of Fisheries, 963 P.2d 1007 (Alaska 1998), p.5. Use the words "may not" to impose a prohibition upon someone. For a further discussion, see Martineau, Drafting Legislation and Rules in Plain English (1991), pp. 81 - 82. For example:

> The commissioner shall issue a license . . ., i.e., it is the commissioner's duty to do so.
>
> The information on the form must include . . ., i.e., the form is required to have something in particular on it.
>
> The commissioner may inspect records . . ., i.e., the commissioner may if it is necessary or proper, but the commissioner is not obligated to do so.
>
> The commissioner may not issue a license . . ., i.e., under the defined circumstances, it is beyond the power of the commissioner to issue the license.
>
> A person may not operate a . . . without a license . . ., i.e., under the circumstances, a person is not permitted to do the specified act without a license.

Do not use "must not" or "shall not." Also, do not use the "No . . . may" construction; use "may not." For instance, avoid "No fish trap may be . . .," and use "A fish trap may not be . . ."

When drafting a constitutional provision, however, follow the style of the provision you are drafting.

THE STATE of ALASKA
GOVERNOR SEAN PARNELL

Department of Law

CRIMINAL DIVISION
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May 14, 2013

KeriAnn Brady
750 W. 2nd Ave, Ste. 104
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RE: Controlled Substances Advisory Committee

Dear Mrs. Brady:

You requested copies of rosters of the membership of the committee, copies of the committee's meeting minutes, a copy of the committee's memorandum to the governor, a copy of the committee's recommended regulations, copies of the committee's recommendations to the Alaska Court System, copies of the committee's recommended modifications of policies for LAW and DPS, and copies of the committee's evaluations of treatment programs.

Under the authority delegated to me by the Attorney General, I am denying your request because no responsive records are known to exist in the Department of Law. *See*, 2 AAC 96.335(a)-(c). Because your request is being denied, I am required by 2 AAC 96.335(d) to inform you that you may administratively appeal the denial under the procedures of 2 AAC 96.340. There is no bond requirement for an administrative appeal. You may also seek immediate judicial review by seeking an injunction from the superior court under AS 40.25.125. An election not to pursue injunctive relief in superior court will have no adverse effects on your rights before the department. A copy of 2 AAC 96.335 – 2 AAC 96.350 is enclosed.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: John Skidmore
Director, Criminal Division

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-12-00820 CR

MOTION AND MEMORANDUM OF LAW IN SUPPORT OF 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 is charged with one counts of second-degree misconduct involving a controlled substance[1] for possessing .31 grams of heroin "with intent to deliver." However, as will be demonstrated below, the state itself has also violated the law, much more than Patillo has. The state's has repeatedly violated the law over a protracted period of time. Based on this, Patillo requests that the court find the statutes assigning criminal liability to illegal activity with controlled substances invalid and unconstitutional; Patillo

[1] Patillo is charged under AS 11.71.020. Misconduct involving a controlled substance in the second degree which reads as follows in pertinent part: (a) "...a person commits the crime of misconduct 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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also requests that the court declare them unenforceable.

I) THE STATE HAS VIOLATED THE LAW REQUIRING A "CONTROLLED SUBSTANCES ADVISORY COMMITTEE" FOR DECADES

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

The "Controlled Substances Advisory Committee" is described in AS 11.71.100.[4] **The committee is required by law to meet at least twice a year.**[5] Problematically for the state, however, there is no Controlled Substances Advisory Committee. There has not been for at least a decade, and in fact, there may have never been one.[6] It is not a currently

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

[3] AS 11.71.140:

[4] AS 11.71.100 reads as follows: (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.

[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.

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active committee. It is not listed as an active committee on the state website[7] and the current governor has never appointed anyone to it.[8]

Despite a clear legislative mandate that a Controlled Substances Advisory Committee meet at least twice a year[9] no such required oversight has occurred. This failure is not inconsequential. Based on the state's own failure to follow the law,[10] at a minimum Alaska Statutes 11.71.140 - 190 are invalid.

A) WITHOUT THE REQUIRED OVERSIGHT THE CONTROLLED SUBSTANCE STATUTES VIOLATE LEGISLATIVE INTENT

Statutes are interpreted to have a meaning commonly understood as opposed to a tortured, overtly legalistic interpretation. When interpreting a disputed statute, the court

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[7] See http://gov.alaska.gov/parnell/services/boards-commissions/list-of-active-boards.html.

[8] The state, which is part of the Department of Law, is in the far better position to inform the court of 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.

[9] AS 11.71.110: "The duties of the committee are as follows: The committee shall (1) advise the governor of the need to add, delete, or reschedule substances in the schedules in AS 11.71.140 - 11.71.190; (2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances and the diversion of prescription drugs into illicit channels; (3) evaluate the effectiveness of programs in the state providing treatment and counseling for persons who abuse controlled substances; (4) recommend programs to the Alaska Court System to be instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses and who are charged with crimes involving controlled substances; (5) review and evaluate enforcement policies and practices of the Department of Public Safety and the Department of Law with regard to crimes involving controlled substances, and recommend modifications of those policies and practices consistent with the committee's assessment of the probable danger of particular controlled substances; and (6) review budget requests and recommend amounts for appropriations to the governor and the legislature for departments and agencies responsible for (A) enforcing criminal laws pertaining to controlled substances; (B) providing treatment and counseling of persons who abuse controlled substances; and (C) regulating the legitimate handling of controlled substances."

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

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

The current drug statutes were enacted in 1982. When that enactment was accomplished, the legislature's stated primary goal was to pattern Alaska's drug laws after the Uniform Controlled Substances Act and the federal Controlled Substances Act of 1970.[13] This goal is evidenced by the plain language of the AS 11.71.110: "[i]f a substance is added as a controlled substance under federal law, the governor **shall introduce legislation in accordance with the federal law.**"[14]

The lawmakers adopted the statutory scheme because it also provided for mandatory bi-annual oversight of all chemicals listed in the schedules, input from non-law enforcement professionals to find treatment alternatives to prosecution and incarceration and review of law enforcement policy. The advisory committee is required to contain a breadth of experience other than just law enforcement: pharmacists, doctors and

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[11] ***Glidden v. State***, 842 P.2d 604 (Alaska 1992) see ***Femmer v. City of Juneau***, 9 Alaska 315, 97 F.2d 649 (Alaska 1938).

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

[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) (discussing and analyzing Senate Bill 190, the bill that became SLA 1982, ch. 45).

[14] AS 11.71.120(b). This is not to say that the legislature envisioned that Alaska's drug laws would be exactly the same as federal law. When the statutes were enacted, marijuana, a Federal Schedule IA 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.

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

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

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[15] AS 11.71.100 (a) (1) – (8).

[16] AS 11.71.110 "Duties of the Committee" *supra*.

[17] AS 11.71.120 reads: (a) [i]f, after considering the factors set out in (c) of this section, the committee decides to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 - 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.(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;

than the penalties for the identical conduct under federal law.[18]

The current penalties for delivering heroin violation of AS 11.71.020 are substantially harsher than the penalties for worse conduct under federal law.[19] Under federal sentencing guidelines, a person with no criminal history who delivers less than 5 grams of heroin is subject to a sentence of 6 - 12 months if the person timely pleads.[20] While under state law, similar but less serious conduct is punishable by a presumptive sentence of 5 **years.**[21] Under the federal sentencing guidelines, someone with the maximum enhancement for criminal history, who delivers less than five grams of heroin,

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[18] In 2005, for example, following the United States Supreme Court's decision in ***Blakely v. Washington***, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the legislature amended our state's presumptive sentencing law to provide for presumptive ranges of imprisonment instead of specifying a single presumptive term. See, e.g., ***Anderson v. State***, 289 P.3d 1, 9-10 (Alaska App. 2012). But the legislature decided to set the high end of the presumptive ranges above the former presumptive terms. This had the effect of increasing potential presumptive terms for all classes of felony offenses without the necessity of proving aggravators.

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

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is only looking at a maximum of **37 months as a worst-case scenario.**[22] While under Alaska law, the same person is subject to a presumptive sentence 15 – 20 **years**[23] for the delivery of **any** amount, even an un-weighable, microscopic trace of heroin. Additionally, because the definition of "delivery" is so broad it encompasses two addicts passing a pipe back and forth between them.[24] Under Alaska law, even though this is clearly typical addict behavior and not the behavior the legislature intended to be subject to these harsh penalties, each has technically "delivered" to the other.

Having penalties substantially harsher than federal law, without meaningful access to treatment, without alternatives to prosecution and incarceration, and without oversight of law enforcement policies contradicts legislative intent and invalidates at least the drug schedules if not the entire statutory scheme.

II) ENFORCEMENT OF THE DRUG STATUTES UNDER THESE CIRCUMSTANCES VIOLATES PROPORTIONALITY AND THE EIGHTH AMENDMENT

The Alaska Constitution's prohibition on cruel and unusual punishments is likely construed more broadly than its federal counterpart.[25] Even so, only punishments that are "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice" are cruel and unusual for purposes of Article I, Section 12 of our state

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[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.

[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."

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

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

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Constitution.[26]

In this case, Patillo possessed .3 grams of heroin and a digital scale. Under federal sentencing guidelines, he would get a sentence right around 37 months because he has prior felonies outside Alaska. But under Alaska's sentencing laws, his presumptive sentence is 15 – 20 years. Even with a mitigator, the least he can legally be sentenced to is 7.5 years.[27]

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.[28] Here, such a wide disparity of sentences invites precisely the kind of arbitrary enforcement that is constitutionally infirm. If a snitch agrees to work with federal agents, the target will be charged federally, while a snitch agrees to work with APD, the target will be charged by the state. It is currently being left to the discretion of snitches who will receive the lenient federal penalties and who will receive a much harsher state sentence based on who they chose to buy from. This is the definition of arbitrary.

Patillo is a heroin addict. Like most heroin addicts he keeps a small quantity of heroin around to avoid painful physical withdrawal symptoms. He is precisely the person the legislature envisioned in 1982 to need the treatment and alternatives to prosecution and

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[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).

[27] See AS 12.55.155(a).

[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, 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.

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

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

> . . . the availability of [substance abuse treatment] programs is minimal at best as the number of publicly-funded substance abuse treatment programs has declined. A significant factor in the overall reduction of community based substance abuse treatment capacity is that State grant funding for these services over several years has not kept pace with the increased operating cost of the programs despite new funding approved through the legislature. Substance abuse treatment programs declined from 87 in 2002 to 70 in 2006.[29]

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

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

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

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

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

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[30] SENATE BILL NO. 56(JUD) reads as follows in pertinent part: "Section 1. AS 11.71.040(a) is amended to read: (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person ... (3) possesses (A) any amount of a (i) schedule IA controlled substance listed in AS 11.71.140(e); or (ii) schedule IA or IIA controlled substance other than[EXCEPT] a controlled substance listed in (i) of this subparagraph, and, two or more times within the preceding seven years, the person was convicted under AS 11.71.010 - 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[38] See 11.71.140 , Schedule IA, which reads as follows in pertinent part: "A substance shall be placed in schedule IA if it is found under AS 11.71.120(c) to have. . .. " AS 11.71.120," Authority to schedule controlled substances," reads in pertinent part: "If, after considering the factors set out in (c) of this section, **the committee decides** to recommend that a substance should be added to, deleted from, or rescheduled in a schedule of controlled substances under AS 11.71.140 - 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee. . . ." Schedules IIA - VIA contain identical language requiring the committee to decide which substances are placed on

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

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

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

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

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

[40] ***Univ. of Alaska v. Geistauts***, 666 P.2d 424, 428 n. 5 (Alaska 1983). *See also* ***Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough***, 527 P.2d 447, 452 (Alaska 1974) (It is 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).

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

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

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

A) The Private Interest Affected by the Official Action

Patillo's liberty interest is his literal freedom to remain outside a prison cell. He has a liberty interest in not being locked away in a correctional facility for violating drug laws, when he was not afforded the requisite statutory process. The absence of the committee

[41] ***Griswold v. City of Homer***, 925 P.2d 1015, 1019 (Alaska 1996) (Alaska supreme court has repeatedly held that it is the role of elected representatives rather than the courts to decide whether a particular statute or ordinance is a wise one) *citing* ***Norene v. Municipality of Anchorage***, 704 P.2d 199, 202 (Alaska 1985); ***Seward Chapel, Inc. v. City of Seward***, 655 P.2d 1293, 1299 (Alaska 1982).

[42] ***Xavier v. State***, 278 P.3d 902, 904 (Alaska Ct. App. 2012). See ***Alyssa B. v. State, Dep't of Health & Soc. Servs.***, 123 P.3d 646, 649 (Alaska 2005) *citing* ***Varilek v. City of Houston***, 104 P.3d 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).

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

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

As described in the previous sections, without oversight by the Controlled Substances Advisory Committee, the risk of erroneous deprivation of Patillo's liberty and/or property interest is high. The legislature explicitly provided for mandatory oversight to occur a minimum of twice a year to prevent these risks, yet it likely **never** has. This led to disproportionately harsh sentences when compared to federal guidelines for similar conduct and a lack of treatment options. If the treatment programs and alternatives to prosecution had been implemented as the legislature intended, it's conceivable that Patillo could have availed himself of those one or more of those programs and would not find himself in his current dilemma. We will never know however, because despite the mandatory language of the statute, it was completely, unjustifiably ignored by the state.

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[43] See ***Diaz v. State, Dep't of Corr.***, 239 P.3d 723, 732 (Alaska 2010); Article I, section 12 of the Alaska Constitution identifies the principle of reformation as one basis of criminal administration. See, e.g., ***Ferguson v. State, Dep't of Corr.***, 816 P.2d 134, 139–40 (Alaska 1991) (holding prisoners have 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).

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

The fiscal and administrative burdens of having the committee meet are extremely slight given the fact that committee members are not paid[44] and nothing precludes them from meeting over the telephone to fulfill their duties. Those burdens pale in comparison to the burden created by Alaska's ever-growing prison population, steadily increasing at one of the fastest rates in the nation, largely due to non-violent offenders.[45] Despite the $250 million Goose Creek Correctional Center that just opened, the Department of Corrections estimates that all available prison beds will be full once again by 2016.[46] Compared to these costs, the cost of having the committee provide the required oversight is miniscule.

IV) ALTERNATIVE REMEDIES

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

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

1) Invalidate the entire 1982 enactment declaring it unconstitutional and/or in violation of legislative intent as previously described.

2) Invalidate AS 11.71.140-190 because the lack of required oversight for the schedules violates Patillo's due process rights as previously described.

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[44] AS 11.71.100 (b).

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

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

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

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

Closely allied to the doctrine that criminal statutes must be strictly construed is the so-called 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.[49] In this case the law is not ambiguous at all, it simply was not followed by the state. Under the rule of lenity, the court could determine that all of the controlled substances listed in schedules IA – VA are in the most lenient category, VIA, at least until the legislature acts to correct this problem and either re-schedule them or eliminate the oversight requirement.

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

[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).

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V) CONCLUSION

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

DATED May 10, 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 and proposed order was caused to be emailed & hand delivered the following: ADA Grannik 310 K Street Suite 520, Anchorage AK 99501.
Signature Rebecca Dunge-Kober Date 5-10-2013

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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-12-00820 CR

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

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

_____

_____

_____

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

_____
SUPERIOR COURT JUDGE

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

STATE OF ALASKA,

Plaintiff,

vs.

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

Defendant.

No. 3AN-12-820 CR.

SCANNED PGS 23
RTG 3
CALENDAR 7-1-13 Reply
MASTER CLIENT DOC SCANNED
CC: CLIENT
HARDFILE
OTHER KAB Email

RECEIVED
JUN 26 2013
BY: Mail

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

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

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

ARGUMENT

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

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

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

AS 11.71.100 Controlled substance advisory committee, reads:

> (a) The Controlled Substances Advisory Committee is established in the Department of Law. The committee consists of:
>
> (1) the attorney general or the *attorney general's* designee;
>
> (2) the commissioner of health and social services or the commissioner's designee;
>
> (3) the commissioner of public safety or the *commissioner's* designee;
>
> (4) the president of the Board of Pharmacy or the designee of the president who shall also be a member of the Board of Pharmacy;

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

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

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

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

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

(6) a physician appointed by the governor;

(7) a psychiatrist appointed by the governor; and

(8) two individuals appointed by the governor.

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

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

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

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

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

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

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

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

[5] AS 11.71.100, from Commentary at 46.

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

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

The committee shall:

(1) advise the governor of the need to add, delete, or reschedule substances in the schedules in AS 11.71.140 - 11.71.190;

(2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances and the diversion of prescription drugs into illicit channels;

(3) evaluate the effectiveness of programs in the state providing treatment and counseling for persons who abuse controlled substances;

(4) recommend programs to the Alaska Court System to be instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses and who are charged with crimes involving controlled substances;

(5) review and evaluate enforcement policies and practices of the Department of Public Safety and the Department of Law with regard to crimes involving controlled substances, and recommend modifications of those policies and practices consistent with the committee's assessment of the probable danger of particular controlled substances; and

(6) review budget requests and recommend amounts for appropriations to the governor and the legislature for departments and agencies responsible for

(A) enforcing criminal laws pertaining to controlled substances;

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

(C) regulating the legitimate handling of controlled substances.

The commentary following AS 11.71.110 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] *Statutes and Statutory Construction*, § 57:6, p 41 (citing *Sigmon v. Southwest Airline Co.*, 110 F.3d 1200, 97-1 U.S. Tax. Cas (CCH) P 70076, 79 A.F.T.R.2d 97-2286 (5th Cir. 1997)(citations omitted).
[24] SLA 1982, ch. 45 § 1.

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

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

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

[25] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[28] *Id.*

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

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

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

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

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

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

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

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

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

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

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

> (1) the seriousness of the defendant's present offense in relation to other offenses;
>
> (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
>
> (3) the need to confine the defendant to prevent further harm to the public;
>
> (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
>
> (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;
>
> (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and
>
> (7) the restoration of the victim and the community.

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

[35] Emphasis added.

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

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

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

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

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

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

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

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

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

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[38] Senate Bill 56: An Act relating to certain crimes involving controlled substances; and providing for an effective date, introduced February 15, 2013.
[39] SPONSOR STATEMENT FOR HCS CSSB 56(JUD), Senator Fred Dyson, Senate Judiciary Committee, April 13, 2013.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED June 20, 2013 at Anchorage, Alaska.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

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

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This is to certify that a copy of the forgoing is sent:
X mailed ____ caused to be mailed
____ hand delivered ____ caused to be hand delivered
____ faxed
to the following attorney/parties of record.
Kuri Brady

LB LB 6/21/13
Signature Printed Name Date

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

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

STATE OF ALASKA,

Plaintiff,

vs.

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

Defendant.

No. 3AN-12-820 CR.

ORDER

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

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

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

_____
Honorable Philip R. Volland
Superior Court Judge

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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").

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

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[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.

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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

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[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.

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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

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[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).

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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.

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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

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[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.

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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

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[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

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

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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.

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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.

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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

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[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

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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

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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).

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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.

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arrest which is effectuated by excessive force.[35]

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

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

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[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").

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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

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[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.

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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;"

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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).

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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.

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[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).

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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).

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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.

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[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.

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

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[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.

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).

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[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.

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.

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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.

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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: _____
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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: _____ Date: 7-22-2013

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).

ALASKA STATE LEGISLATURE

SENATOR FRED DYSON
SENATE DISTRICT F

The Seriousness of a Class A Misdemeanor Offense

I believe it is tremendously important that we do consider drug abuse a serious crime. Those of you who have worked with me know that I care deeply about Alaska's youth, and I think always about how our policies affect them. A Class A Misdemeanor is an unambiguous message. It is a very serious charge—the highest level of misdemeanor—and can carry with it up to a year in prison and a $10,000 fine. I suspect that if any of you told your son or daughter that their behavior could lead to a year in jail and a $10,000 fine, they would not view that behavior as being condoned by our laws – *Senator Dyson, Response to Questions from March 18, 2013 Senate Finance Hearing- SB56*

CLASS A Misdemeanor Offenses **Penalty up to 1 year in jail & up to a $10,000 fine**

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

A second Driving Under the Influence (DUI) charge, as well as a first DUI (AS 28.35.030).

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

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

Resisting or Interfering with Arrest (AS 11.56.700(a)), wherein a person knowing a peace officer is making an arrest, and with intent to prevent the arrest, resists the arrest of himself or interferes with the arrest of another by force.

Official Misconduct (AS 11.56.850(a)), wherein a public servant knowingly, and with intent to obtain a benefit or to injure or deprive another of a benefit, performs an unauthorized exercise of his official function; or refrains from performing a duty of his office.

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

Alaska Statutes Establishing the Controlled Substances Advisory Committee

Sec. 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.

Sec. 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 AS 11.71.140 - 11.71.190;

(2) recommend regulations for adoption by the Board of Pharmacy to prevent excessive prescription of controlled substances and the diversion of prescription drugs into illicit channels;

(3) evaluate the effectiveness of programs in the state providing treatment and counseling for persons who abuse controlled substances;

(4) recommend programs to the Alaska Court System to be instituted as alternatives to the prosecution or imprisonment of offenders who have no prior criminal record involving controlled substance offenses and who are charged with crimes involving controlled substances;

(5) review and evaluate enforcement policies and practices of the Department of Public Safety and the Department of Law with regard to crimes involving controlled substances, and recommend modifications of those policies and practices consistent with the committee's assessment of the probable danger of particular controlled substances; and

(6) review budget requests and recommend amounts for appropriations to the governor and the legislature for departments and agencies responsible for

(A) enforcing criminal laws pertaining to controlled substances;

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

(C) regulating the legitimate handling of controlled substances.

Sec. 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 AS 11.71.140 - 11.71.190, the governor shall introduce legislation in accordance with the recommendation of the committee.

(b) If a substance is added as a controlled substance under federal law, the governor shall introduce legislation in accordance with the federal law.

(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.