

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

February 21, 2001

1:07 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Jeannette James

OTHER LEGISLATORS PRESENT

Representative Lesil McGuire

COMMITTEE CALENDAR

HOUSE BILL NO. 102

"An Act relating to the theft of propelled vehicles."

- MOVED CSHB 102(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 32

"An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."

- HEARD AND HELD

HOUSE BILL NO. 119

"An Act exempting joint action agencies from regulation by the state or municipalities; relating to the relationship between a joint action agency and the public utilities that form the joint action agency; relating to powers and immunities of a joint action agency; requiring filing of the joint action agency agreement; relating to the financial affairs of a joint action agency; declaring certain joint action agencies to be political

subdivisions for certain purposes; relating to liability and indemnification of officers, employees, and agents of joint action agencies; and defining 'agency agreement' as used with reference to joint action agencies."

- BILL HEARING CANCELED

PREVIOUS ACTION

BILL: HB 102

SHORT TITLE:THEFT OF PROPELLED VEHICLES

SPONSOR(S): REPRESENTATIVE(S)KOTT

| Jrn-Date | Jrn-Page | | Action |
|----------|----------|-----|------------------------------------|
| 02/02/01 | 0225 | (H) | READ THE FIRST TIME - REFERRALS |
| 02/02/01 | 0225 | (H) | JUD |
| 02/19/01 | | (H) | JUD AT 1:00 PM CAPITOL 120 |
| 02/19/01 | | (H) | Heard & Held MINUTE(JUD) |
| 02/21/01 | | (H) | JUD AT 1:00 PM CAPITOL 120 |

BILL: HB 32

SHORT TITLE:SEX CRIME AND PORNOGRAPHY FORFEITURES

SPONSOR(S): REPRESENTATIVE(S)HAYES

| Jrn-Date | Jrn-Page | | Action |
|----------|----------|-----|------------------------------------|
| 01/08/01 | 0032 | (H) | PREFILE RELEASED 1/5/01 |
| 01/08/01 | 0032 | (H) | READ THE FIRST TIME - REFERRALS |
| 01/08/01 | 0032 | (H) | JUD, FIN |
| 01/08/01 | 0032 | (H) | REFERRED TO JUDICIARY |
| 02/09/01 | 0286 | (H) | COSPONSOR(S): MCGUIRE, GUESS |
| 02/14/01 | 0327 | (H) | COSPONSOR(S): MURKOWSKI |
| 02/21/01 | | (H) | JUD AT 1:00 PM CAPITOL 120 |

WITNESS REGISTER

HEATHER M. NOBREGA, Staff
to Representative Norman Rokeberg
House Judiciary Standing Committee
Alaska State Legislature
Capitol Building, Room 118
Juneau, Alaska 99801

POSITION STATEMENT: Provided information on HB 102.

ROGER WORTMAN, Staff

to Representative Pete Kott
Alaska State Legislature
Capitol Building, Room 204
Juneau, Alaska 99801

POSITION STATEMENT: On behalf of sponsor, provided information on HB 102.

JERRY LUCKHAUPT, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature
Terry Miller Building, Room 329
Juneau, Alaska 99801-1182

POSITION STATEMENT: Provided legal opinions and answered questions on HB 102.

MARK T. MEW, Deputy Chief
Anchorage Police Department
4501 Bragaw
Anchorage, Alaska 99507

POSITION STATEMENT: Testified on HB 102 and HB 32.

DEAN GUANELI, Chief Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law
PO Box 110300
Juneau, Alaska 99811-0300

POSITION STATEMENT: Testified on HB 102 and HB 32.

REPRESENTATIVE JOE HAYES
Alaska State Legislature
Capitol Building, Room 422
Juneau, Alaska 99801

POSITION STATEMENT: Sponsor of HB 32.

ROSS PLUMMER, Police Officer
Anchorage Police Department
4501 Bragaw
Anchorage, Alaska 99507

POSITION STATEMENT: Testified on HB 32.

MARC POESCHEL, Police Officer
University of Alaska Police Department
PO Box 75560
Fairbanks, Alaska 99775

POSITION STATEMENT: Testified in support of HB 32.

JAMES WELCH, Chief of Police
Fairbanks Police Department
800 Cushman Street
Fairbanks, Alaska 99701

POSITION STATEMENT: Testified in support of HB 32.

JENNIFER RUDINGER, Executive Director
Alaska Civil Liberties Union
PO Box 201844
Anchorage, Alaska 99520

POSITION STATEMENT: Provided comments on HB 32 and suggested amending.

ACTION NARRATIVE

TAPE 01-21, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Present at the call to order were Representatives Meyer, Coghill, Rokeberg, and Ogan. Representatives Berkowitz and Kookesh arrived while the meeting was in progress.

HB 102 - THEFT OF PROPELLED VEHICLES

Number 0082

CHAIR ROKEBERG announced the first order of business would be HOUSE BILL NO. 102, "An Act relating to the theft of propelled vehicles."

Number 0099

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, House Judiciary Standing Committee, Alaska State Legislature, came forward to explain the difference between the proposed committee substitute (CS) [Version J] and the original HB 102. On page 2, line 22, the proposed CS deletes the words "personal water craft" and then goes on to say that "watercraft" does not include "a shallow draft propelled vehicle not more than 12 feet in length with an inboard motor powering a water jet pump as its primary means of propulsion that is designed to carry not more than two persons who sit, stand, or kneel on the vehicle."

Number 0181

CHAIR ROKEBERG noted for the record that by "a shallow draft propelled vehicle not more than 12 feet in length with an inboard motor powering a water jet pump as its primary means of propulsion that is designed to carry not more than two persons who sit, stand, or kneel on the vehicle" the committee meant a jet ski or its derivations.

Number 0211

MS. NOBREGA explained:

We're ... trying to limit the definition of "watercraft" for purposes of this statute only. We don't care about the definition of "watercraft" in any other parts of Title 11, only for this statute, and it's only so that [stealing] a jet ski is not on the same level [as] stealing a boat. If you steal someone's boat, it's an automatic felony; if you steal someone's jet ski, it's a misdemeanor unless you meet the three provisions under section .360(a)(2).

MS. NOBREGA said the reason the definition is not included in the back under the general provisions is that the term "personal water craft" is used just once. The rules of construction are that when a term is used just once, it is defined just once, and the definition appears in the section in which the term is used.

Number 0350

CHAIR ROKEBERG added that if the term "personal water craft" were to be defined at the back of the chapter, it would be necessary to change the definition of "watercraft" throughout all the chapters, and he thought doing so would make the law more confusing to the general public. He further clarified that the intent of HB 102 is to lower the penalty for the theft of a snow machine, all-terrain vehicle (ATV), or jet ski.

Number 0475

ROGER WORTMAN, Staff to Representative Pete Kott, Alaska State Legislature, came forward on behalf of Representative Kott, sponsor of HB 102. He concurred with the proposed CS and with Chair Rokeberg's analysis. Mr. Wortman said HB 102 "creates a level playing field for those people who have to rely on a snow machine or an ATV as a primary means of transportation. It

amends the definition of ATV and it puts the personal water craft in a place away from other recognized watercraft."

Number 0540

REPRESENTATIVE OGAN expressed confusion about the motivation for putting personal water craft in a different category from other boats. He noted that personal watercraft are expensive machines and may be worth more than an old skiff.

Number 0582

MR. WORTMAN said he could not provide an answer. He explained that Jerry Luckhaupt, Legislative Counsel, had helped with the drafting.

CHAIR ROKEBERG asked him, "What's the level playing field?"

MR. WORTMAN said "personal water craft" was a term Mr. Luckhaupt suggested using in place of "jet ski."

REPRESENTATIVE OGAN wanted to know if it would be a felony to steal a personal water craft.

CHAIR ROKEBERG explained that a jet ski/personal water craft is put on the same level with a snow machine and an ATV. Under HB 102, it is not a felony to steal any of those, but a second-degree theft, a class A misdemeanor. This removes a burden from law enforcement by separating short-term "joyriding" of one of these "toys" from the more serious vehicle theft, a class C felony.

Number 0837

REPRESENTATIVE COGHILL asked for the rationale behind specifying seven days.

MR. WORTMAN explained that the seven-day time limit quantifies a difference between joyriding and theft. A person who has kept stolen property seven days is presumed to intend never to return it.

REPRESENTATIVE COGHILL wondered why it specifies seven days instead of three.

MR. WORTMAN said it was based on the fee for rental so the court system could have some way to place a value on taking a snow machine.

Number 0900

CHAIR ROKEBERG clarified that only a propelled vehicle is subject to the seven-day test.

REPRESENTATIVE COGHILL remembered when a bicycle he owned was stolen and said, "They weren't even going to start looking for it for a week." He was afraid that police would not even bother looking for a missing snow machine, he said. He thought HB 102 was sending the wrong message about theft. "It concerns me that we're saying we are elevating it, but we're going to give a grace period of a week," he added.

Number 0990

CHAIR ROKEBERG acknowledged that the seven-day time limit was somewhat arbitrary, but up to a week's use of property is comparable to its leasehold value; after that, the unauthorized use turns into a crime. "I think the key issue here is the distinction between what's a felony and what's a misdemeanor, and they're trying to make it level in terms of the category of vehicle," he said.

REPRESENTATIVE COGHILL referred to page 1, line 12, where there is reference to cases in which there is damage of \$500 or more. He surmised that meant police would act immediately rather than waiting a week if a vehicle was destroyed on the day it was stolen.

CHAIR ROKEBERG said that was correct.

Number 1063

REPRESENTATIVE OGAN observed that if somebody took a "junkie" snow machine worth less than \$500 and kept it more than seven days, that becomes a felony.

MR. WORTMAN said that would be true if that snow machine was the sole transportation of the person from whom it was taken and the thief did not intend to return it to the owner.

REPRESENTATIVE OGAN said he didn't see any reference to "sole transportation."

MR. WORTMAN said there was no reference to it in HB 102.

REPRESENTATIVE OGAN expressed concern about a teenager taking an old, broken-down snow machine, and that being a felony.

Number 1178

REPRESENTATIVE BERKOWITZ explained that "propelled vehicle" means that the vehicle currently is self-propelled, not that it used to be.

CHAIR ROKEBERG pointed out that without HB 102, that theft still would be a felony. "We're trying to lighten up and not make it tougher," he said.

REPRESENTATIVE BERKOWITZ clarified that taking a junker car is a felony, but taking a junker snow machine is not.

Number 1240

REPRESENTATIVE MEYER asked what a new snow machine costs.

MR. WORTMAN said a new snow machine costs between \$5,000 and \$7,500. The rental rate would be about \$50 an hour, \$150 for six hours, or at least \$750 for a week.

REPRESENTATIVE MEYER thought it seemed "a little strict" for a 16-year-old's theft of a snow machine to be considered a felony.

MR. WORTMAN observed, "I think the qualifiers are here." If a 16-year-old takes somebody's snow machine and is intent on depriving the owner of the machine permanently, then that is a felony. If he takes it and it is returned, that is probably not a problem. If the snow machine is only worth \$500 and he wrecks it, it's \$500 damage.

REPRESENTATIVE MEYER added that if the youth keeps it more than seven days, then it's a felony.

REPRESENTATIVE BERKOWITZ focused attention on the phrase, "deprived of the use". If the owner was out of town the whole time an unauthorized person was using his snow machine, he said it is arguable that the owner was not deprived of its use.

Number 1380

CHAIR ROKEBERG said he thought it came down to whether the owner was "constructively" deprived of the use.

REPRESENTATIVE BERKOWITZ said, "You have to look at this in the light that's harshest to the state and the light that's most favorable to an accused. That certainly would be a defense that I think any reasonable defense attorney would raise."

Number 1416

JERRY LUCKHAUPT, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, Alaska State Legislature, said he thought if the owner were out of town and unaware that the vehicle was taken, it would be a reasonable interpretation that the owner was not deprived of the use. If the owner had someone staying at the home who noticed that the vehicle was gone, the owner would be deprived of the use, since he/she could otherwise have loaned it to someone.

Number 1480

REPRESENTATIVE BERKOWITZ further argued that HB 102 only specifies that the owner is being deprived of the use, not that the houseguest is being deprived of the use.

MR. LUCKHAUPT said the owner has the right to the use of the vehicle in any way he wants, including loaning it to someone. It is a technical term as to when a person is deprived or not deprived. If a person takes a snow machine while the owner is away, brings it back and fills it up with gas, and the owner wasn't aware that it was gone, then the owner hasn't been deprived of its use; having taken it is a misdemeanor, vehicle theft in the second degree. The felony offense would not apply in that circumstance.

MR. LUCKHAUPT then responded to Chair Rokeberg's request to speak to the question of the seven-day limit. He explained that seven days seemed like a reasonable approximation based on normal rental rates. To a certain extent, seven days is an arbitrary figure.

Number 1645

REPRESENTATIVE COGHILL observed that in a rural area where a snow machine or four-wheeler might be a person's main transportation, taking it for less than seven days could

endanger life. He thought that endangerment had more to do with "a real criminal issue" than did the cost of a rental.

CHAIR ROKEBERG pointed out that any activity such as that described is criminal. The point is whether it is a felony or a class A misdemeanor.

MR. LUCKHAUPT further explained that the time component is designed to address Representative Kott's concern for those owners who do not choose to go out and rent another vehicle during the time theirs is gone or who get the vehicle back with less than \$500 damage. The goal was to provide another component for those persons who lose their vehicle for a period of time. It is an attempt to reclassify some of the cases that now are misdemeanors by saying that taking a person's snow machine for seven days is a substantial loss, great enough to be classified as a felony. Commenting on HB 102, he said, "We aren't taking cases away from current felonies ..., we are taking cases from misdemeanors and making them felonies. If a person is out working a trap line and someone takes his snow machine, other criminal charges would apply. It might be considered murder or attempted murder, assault, or reckless endangerment.

Number 1843

REPRESENTATIVE OGAN said he thought he understood that the sponsor's intent was to give people who depend on [an alternative] vehicle for their primary transportation the same status as those who depend on vehicles they drive on the road system. If a person lives in rural Alaska and gets around by four-wheeler or snow machine and that vehicle has been stolen, that rises to the level of a car being stolen in urban Alaska. "As a matter of fact, they used to hang horse thieves," he noted. He suggested that language about "primary transportation" might be included in HB 102. He asked if that was what the bill sponsor intended and if so, should that language be included?

MR. WORTMAN said the intent of HB 102 is, as the sponsor statement says, to level the playing field for owners of ATVs and snow machines. An individual had brought this up four years ago, and this bill "doesn't fix all, but it is a good solution to the current situation right now," he said.

Number 1843

REPRESENTATIVE OGAN said he was still trying to get to the intent of the legislation. "Somebody's toy that sits in their yard isn't as important as somebody's primary source of transportation if they aren't on a road system," he said. Was that the intent?"

CHAIR ROKEBERG said he didn't think the sponsor was "interested in making a Bush exemption; there's no need ... to make that distinction."

Number 1970

REPRESENTATIVE OGAN said he did not think taking a snow machine rises to the level of felonious behavior if the machine is "just somebody's toy that [the thief] keeps for a week." He said he thought taking it might rise to that level if the vehicle is something the owner truly needs and depends upon for a livelihood.

Number 1990

MR. LUCKHAUPT said he understood that to be the sponsor's intent, and had drafted HB 102 to put snow machines, ATVs, and jet skis on the same level [with one another], and not necessarily to put snow machines on the same level with cars and trucks. The current laws still put snow machines and ATVs on a lower level than jet skis, he explained. Jet skis now are included in the broad definition of watercraft. Other committees that have considered HB 102 have been concerned that it not put snow machines and ATVs on the same level with cars and trucks.

MR. LUCKHAUPT continued, saying, "We could try to craft something that deals with vehicles that are used away from the road system. But potentially, an ATV or a snow machine, regardless of whether it is a the person's primary mode of transportation, may be very valuable to the person." He cited the example of someone 40 miles out in horrible weather working a trap line. He said he thought it would be difficult to draw the line, and that drawing it based on the vehicle being the person's primary mode of transportation might not be the appropriate way.

Number 2103

REPRESENTATIVE BERKOWITZ said he tended not to like "bright lines" in the criminal code. He suggested it would be better

left to the jury to decide whether seven days is too long or too short a time. He proposed that it might be better to refer to being "deprived of the [vehicle's] use for a protracted period of time." "Protracted" is a term on which there are some court interpretations, and also is an issue on which both sides could argue. It would depend on the circumstances of the case.

Number 2165

REPRESENTATIVE MEYER said he thought proponents had suggested that HB 102 might reduce court costs, but prosecuting cases as felonies rather than as misdemeanors would be more expensive.

TAPE 01-21, SIDE B
Number 0001

MR. LUCKHAUPT explained that HB 102 singles out the jet ski cases and makes those misdemeanors instead of felonies. On the other hand, HB 102 creates an additional way to commit the felony offense, by depriving the person of the use of the vehicle for seven days. So some cases are going to drop out of the felony category into the misdemeanor process, and some are going to be added. There could be differences in cost to the state or to a municipality. He mentioned the Municipality of Anchorage, which prosecutes the misdemeanors while the state handles the felony offenses.

REPRESENTATIVE MEYER said he was thinking of Anchorage, where the stealing of snow machines is a problem. In Anchorage, a snow machine is not the owner's main means of transportation. But as he understands HB 102, stealing one's neighbor's snow machine and keeping it for seven days or returning it with more than \$500 damage would be a felony.

MR. LUCKHAUPT said that is correct. The \$500 damage is a felony under existing law. But under existing law, the person who chooses not to go out and rent another snow machine while his is missing simply does without. There is no compensation if the owner does not incur those costs, perhaps by borrowing someone else's snow machine to check his trap line. It costs the owner a lot of extra effort. Is that a loss that is comparable to incurring a \$500 cost to rent one? That was the attempt here.

Number 2063

REPRESENTATIVE MEYER returned to the question of overall cost to the legal system. "So in your mind, it will balance out by

lowering one and raising the other," he observed. "But in some ways, it almost sounds like we'll be saving money for the municipalities but maybe adding more cost ... to the state in the sense of more felonies being prosecuted."

MR. LUCKHAUPT acknowledged that was a possibility. However, he pointed to testimony on Monday, which was "that everybody thought any additional cost would be negligible because they are already prosecuting most of these cases somehow." For someone who doesn't have a previous conviction, he said the difference in corrections costs is probably not that much different. He said it was hard to quantify.

Number 1960

MARK T. MEW, Deputy Chief, Anchorage Police Department, testified by teleconference. In investigating auto thefts, he had always wondered why stealing a \$1,000 ring or a lawnmower or a set of golf clubs is a misdemeanor but stealing a \$7,000 snow machine or a \$5,000 four-wheeler also is a misdemeanor. Police are going to investigate and prosecute these cases anyway. He said he thinks many first-time offenders will plead down to a misdemeanor. He thinks the cleanest way to look at this is to make things over a certain dollar level a felony and under a certain dollar level a misdemeanor, and let it go at that. He said he does not know why something extremely valuable should not be a felony just because it is not transportation. He also noted that \$500 meant something different 20 years ago than it does today, and suggested that the dollar amount for a felony needs to be raised so that the theft of "every mountain bike is no longer a felony."

Number 1885

REPRESENTATIVE OGAN reported that he had looked up "felony" in Black's Law Dictionary and found that felonious intent is applied to the crime of larceny "where a person knowingly takes and carries away the personal property of another without any claim or pretense of right, with the intent wholly and permanently to deprive the owner of his property." He suggested a statute should be crafted that fits those parameters of case law.

MR. LUCKHAUPT pointed out that Representative Ogan had defined what larceny or theft is. He stated:

You've got to have this intent to deprive the owner of the property permanently. That's how it existed in common law, and that's sort of what we have retained in our criminal code. Therefore, if someone does steal a car and they take the car in order to chop it up for parts, ... we'll go ahead and charge the person under ... the theft statutes.... But in most cases, we aren't able to prove that he had that intent to deprive the owner permanently, and that's why the states came up with things like "joyriding" or ... "criminal mischief."

If you take the car of another without any right and then you drive around in it a while, or you drop it off somewhere, but you aren't intending to keep it permanently, ... that wasn't theft, and that's why prosecutors ran into problems in prosecuting those cases where people were only taking the car for a period of time. People won those cases; criminal defendants won and weren't convicted of theft because they had no intent to deprive the owner permanently.

So ... we've created a new crime to deal with the situation where all we can prove is the person intended to take the car, took the car away, and, therefore, the owner suffers some loss, ... whether it's damage to the vehicle or damage to other property or merely by not having access to their vehicle for a period of time. And so we've had to get away from what normally was felt ... was theft or larceny because these cases didn't fit in there. It was difficult to prove and convict anyone of that.

Number 1740

REPRESENTATIVE BERKOWITZ agreed with Representative Ogan, "It may be an esoteric argument, but ... when you carve out special exceptions for vehicle theft, the next thing you know, you have special exceptions for weapons theft or clothing theft -- one could make a case for all of them." He said he understood that the drafters of HB 102 "went the vehicle theft route" because it hinges on the intent to deprive another of property, but "deprive" is defined in the case of Glidden v. State as appropriating property with intent to withhold it for so extended a period as to result in a loss of the major portion of its beneficial use. One could argue to a jury that when someone takes a car, even for a day, the owner is going to be deprived

of his or her beneficial use. "I think the criminal statute should be written as broadly as possible, and theft in this case would cover the intent to deprive that currently is swept up in vehicle theft," he concluded.

Number 1671

REPRESENTATIVE COGHILL said he was struggling with the seven days, and wondered about saying something to the effect that the owner is deprived of reasonable control or use; then a jury could decide if the value of the danger or the value of the deprived time was above the \$500 limit. He asked if HB 102 could be amended so that the number of days is not specified. It is possible that in one day, the value of the machine could be significant, he added.

CHAIR ROKEBERG said he thought that already was addressed in [subparagraph] (B).

MR. LUCKHAUPT explained that if a person actually incurs the cost, it is covered in [subparagraph] (B). That is the approach he was taking when he began drafting, letting the prosecution prove what a reasonable replacement value would be. The owner wouldn't have to actually incur the costs if the replacement value was \$500. For example, renting a D-9 Cat for a day is going to cost substantially more than \$500. If someone takes a D-9 Cat for a few days now, that's only a misdemeanor unless there is \$500 worth of damage or the owner incurs \$500 in reasonable costs to replace it. What about the person who doesn't expend the cost? That was the approach the drafters were taking, Mr. Luckhaupt said, but Dean Guaneli, Chief Assistant Attorney General, was not enthusiastic about that from a prosecution standpoint because he didn't want to add to the prosecution's burden at trial by having to prove what a reasonable replacement cost would have been.

Number 1535

REPRESENTATIVE COGHILL said he appreciated that discussion. If the damage happens after the fact, that is easily proven. But sometimes if one is deprived of the use of something, that is very costly, too, but there is no physical damage done. Sometimes time lost can be very valuable. Sometimes access or control over something creates a liability for the owner. That is why he thought "reasonable use or control" amounting to \$500 was appropriate, he explained. That way, the owner could say

the vehicle was only gone for a day, but it cost him a contract or 14 fish in his fish wheel.

Number 1490

MR. LUCKHAUPT said that was the way he had started: the owner incurred or would have incurred reasonable expenses of at least \$500 as a result of the loss of the vehicle. He restated that Mr. Guaneli did not want to add to the burdens on the Department of Law. "It would be easier on them if [in HB 102] we created some defined set of criteria, for example, a period of time that the vehicle was gone," Mr. Luckhaupt added.

Number 1438

REPRESENTATIVE COGHILL ventured, "If in (B) it's all addressed, then maybe we don't need (C). But if in (C), we're trying to say that that seven-day period is going to be equivalent to that loss, then we may need to say, 'the control or use of it for that period of time' is ... the same value as (B)."

CHAIR ROKEBERG suggested that it is implicit in (C) that the value is based on the length of time, based on a leasehold theory.

REPRESENTATIVE COGHILL said he understood that, but he was concerned about the seven-day issue. His point was that having a vehicle missing only one day could be a "big deal."

Number 1420

CHAIR ROKEBERG said he wasn't sure he understood Representative Coghill's point because the monetary values would be reflected in the value of whatever vehicle and/or use that was put to. So one would have to go through the \$500 ceiling, and with the D-9 Cat, that would be reached immediately. If it's an old junker snowmobile

REPRESENTATIVE COGHILL asked: If a \$5,000 machine is returned undamaged within seven days, how does the owner demonstrate that not having it cost him \$500 or more in a lost contract or a loss in picking up fish? Would he have to file a whole separate suit?

MR. LUCKHAUPT said for the theft of a vehicle to be aggravated up to a felony, one would actually have to incur the cost, spend \$500 to replace the missing vehicle while it was gone. The loss

of a contract would not be considered under HB 102. In establishing the time period, the drafters were trying to make it easy for everyone to understand. It isn't a "bright line" in regard to the valuation of what a replacement cost per day might be.

Number 1258

REPRESENTATIVE OGAN said he thought one could prove felonious intent with the seven-day rule "because if a person hasn't brought the property back in a week, he probably isn't going to bring it back."

Number 1226

DEAN GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law, confirmed that Mr. Luckhaupt had accurately characterized the tenor of their discussions and their interests. From a prosecution standpoint, he said it's certainly not attractive to have to prove on a case-by-case basis what the rental value of a certain property was in a certain locale, and it's certainly easier if "we" just pick a number like seven days.

MR. GUANELI continued:

On the other hand, I certainly understand Representative Coghill's interests and his concerns. If the proposal is to add some language, ... for example, where it says, "the owner incurs reasonable expenses in the amount of \$500 or more" or ... [what in civil law is consequential damages] -- in other words, you could have done something. You could have run your trap lines; you could have gotten a contract; you could have done something else. If that's the concept, I don't have any problem with including that as another way of committing this offense. In other words, you have significantly inconvenienced somebody monetarily. We may not be able to prove that in very many cases, but I certainly don't have any objection to including that ... here.

I think there is some danger to expanding these provisions too much. It wasn't too many years ago that all joyriding was a misdemeanor, and a lot of people were legitimately upset when they lost the use of their car for a period of time. But I think you

have to realize that many of these offenses, perhaps most of them, are committed by kids. Creating a whole long list of offenses where kids are committing felony offenses that get them into juvenile delinquency, juvenile court, that sort of thing, I'm not certain that's necessarily appropriate. On the other hand, things that they do certainly do inconvenience people greatly, and they're legitimately upset, so I think there certainly is a balance.... I understand Representative Coghill's concerns, and I certainly would have no objection to including the notion of consequential damages

CHAIR ROKEBERG suggested incorporating a change in HB 102 [Version J]: On [page 1,] line 12, after [incurs], to say "or could have incurred" reasonable expenses.

Number 1035

REPRESENTATIVE COGHILL said that did not take into account the value of time lost.

Number 0990

REPRESENTATIVE BERKOWITZ said he thought in the most egregious case, in which someone took a car and thereby prevented the owner's going to work for a week, one could reasonably charge a second count of theft. "The difficulty I see with what Representative Coghill suggests is that if you take someone's car without even thinking that the person is not going to be able to get to work, getting to a second offense is a considerable challenge," he said.

Number 0895

REPRESENTATIVE COGHILL agreed, adding that he could foresee "running into some real troubles" with the seven-day issue outside the urban environment.

Number 0886

REPRESENTATIVE OGAN asked Mr. Guaneli if he concurred that the seven-day time line is a reasonable measure of felonious intent to permanently deprive someone of property.

MR. GUANELI explained that the purpose in coming up with seven days was not as a measure of intent to permanently deprive

someone. "It had more to do with what we thought would be a reasonable rental rate," he said. In many instances, kids take a snow machine, drive it around, and leave it in a place where it isn't found for seven days. It's not that they intended to permanently take it; it just isn't found for seven days.

Number 0737

CHARLES KOPP, Vice President, Alaska Peace Officers Association, testified by teleconference. He echoed previous testimony that there is a hazard in carving out a special exemption for vehicles. Prosecutorial discretion is very important, especially when dealing with youngsters who have no previous record of criminal mischief and with property that is recovered basically undamaged. Also, it would be difficult to explain to a victim why it takes seven days for the theft of a snow machine to be considered a felony when that is not the case when other property [other than a vehicle] is stolen. He said he thinks adding the reference to seven days complicates the law needlessly.

Number 0571

REPRESENTATIVE BERKOWITZ said he thought that raised a problem. It is one of the rules of construction that if someone can be charged for the same conduct under two different classes of crime, then that person has to be charged under the lesser degree of crime, "So going to Theft 2 isn't necessarily an option," he added.

Number 0530

MR. GUANELI said:

When there are two statutes that cover the precise same conduct, that does present some problems for prosecutors. However, the court will look for any difference between the two statutes to interpret them. In the theft statutes, if we are able to prove to a jury beyond a reasonable doubt that there was an intent to permanently deprive someone of their property, that's a difference from the vehicle theft statute where that level of proof is not required, and we can choose to go under one or the other, depending on the level of proof we've got. So I don't really think that ... [the issue that Representative Berkowitz raised] is an issue here

CHAIR ROKEBERG observed that it shouldn't inhibit the law enforcement officers from prosecuting and fining the criminal because the charge could vary depending on the circumstances.

Number 0405

MR. GUANELI said he thought that was right. There are a variety of potentially overlapping statutes throughout the theft statutes now, but there usually is some element in a case that strongly suggests which statute is most relevant.

Number 0351

REPRESENTATIVE COGHILL made a motion to adopt the proposed committee substitute (CS) for HB 102, version 22-LS0347\J, Luckhaupt, 2/20/01, as a work draft. There being no objection, the proposed CS, Version J, was adopted.

Number 0262

REPRESENTATIVE COGHILL offered Conceptual Amendment 1: "On page 1, line 12, after the word "incurs", put "or could have incurred".

Number 0234

REPRESENTATIVE BERKOWITZ objected. He said he appreciated the idea but thought Conceptual Amendment 1 was vague.

Number 0205

REPRESENTATIVE COGHILL responded to the objection, saying, "The rest of the sentence spells out that it would be about \$500 value loss, and he thought by rules of interpretation, that would stay within that context."

REPRESENTATIVE BERKOWITZ maintained his objection.

Number 0159

REPRESENTATIVE OGAN recalled testimony that what could have happened, rather than what did happen, was getting into the civil area of the law.

CHAIR ROKEBERG defended the amendment based on the idea that an action could have occurred but did not necessarily have to occur to prove value.

CHAIR ROKEBERG declared a brief at-ease in order for the tape to be changed. [Tape 01-21 stopped with approximately one minute left unused.]

TAPE 01-22, SIDE A
Number 0001

CHAIR ROKEBERG called the meeting of the House Judiciary Standing Committee back to order.

A roll call vote was taken. Representatives Meyer, Coghill, and Rokeberg voted for Conceptual Amendment 1. Representatives Berkowitz, Kookesh, and Ogan voted against Conceptual Amendment 1. Therefore, Conceptual Amendment 1 failed by a vote of 3-3.

Number 0092

REPRESENTATIVE MEYER again mentioned that \$500 did not seem like much money, and offered Conceptual Amendment 2, "that everywhere we see \$500 that it be \$1,000", specifically on [page 1,] lines 11 and 13.

Number 0145

REPRESENTATIVE BERKOWITZ spoke in favor of Conceptual Amendment 2. He pointed out that the Criminal Justice Assessment Commission (CJAC) recommended that the legislature double the dollar amounts that define the levels of property crimes. Conceptual Amendment 2 is consistent with that recommendation, which was based on a review in the recent past.

REPRESENTATIVE MEYER added that changing the dollar amount gets to the point that Representative Ogan had raised about somebody stealing a junker car. Under Conceptual Amendment 2, the junker would have a value of at least \$1,000.

CHAIR OGAN noted that the junker would not be a car, but a kind of propelled vehicle not including a car, truck, motorcycle, motor home, bus, aircraft, or watercraft.

MR. WORTMAN, representing the sponsor of HB 102, deferred comment to Mr. Luckhaupt.

CHAIR ROKEBERG asked Mr. Guaneli if Mr. Berkowitz's recollection about the (CJAC) recommendation was applicable in this instance.

Number 0271

MR. GUANELI said he thought it would be applicable. However, he thought the CJAC recommendation "was to double the felony threshold for theft for all theft offenses, and that would mean regular theft, criminal mischief, vehicle theft, et cetera." He said he thought there was some danger in just increasing the amount for one particular type of theft and leaving the others at \$500. He said he feared that the issue that Mr. Berkowitz had raised about "similar conduct with similar consequences" being covered under two separate statutes might apply. "You damage a vehicle in the amount of \$750, it's only a misdemeanor, but you damage any other type of property in the amount of \$500, and it's a felony criminal mischief," he said. He suggested what was needed was to comprehensively, across the board, increase all of the dollar amounts.

MR. LUCKHAUPT said he had nothing he wished to add to the discussion.

CHAIR ROKEBERG declared that Conceptual Amendment 2 was before the committee. He said that notwithstanding Mr. Guaneli's comments, he did not object to the amendment.

Number 0493

REPRESENTATIVE COGHILL objected, saying he thought the committee should not increase the amount in this one instance, but, as a matter of equity, should make the increase across the board.

CHAIR ROKEBERG took exception to Representative Coghill's objection, "because we'd never get any bills out of this committee if we did that."

REPRESENTATIVE OGAN asked if the maker of the motion [Conceptual Amendment 2] wished to continue with the motion.

REPRESENTATIVE MEYER said he did wish to continue.

Number 0602

REPRESENTATIVE COGHILL maintained his objection.

A roll call vote was taken. Representatives Berkowitz, Kookesh, Ogan, Meyer, and Rokeberg voted for Conceptual Amendment 2. Representative Coghill voted against Conceptual Amendment 2. Therefore, Conceptual Amendment 2 passed by a vote of 5-1.

Number 0650

REPRESENTATIVE OGAN moved to report HB 102, version 22-LS0347\J, Luckhaupt, 2/20/01, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 102(JUD) was reported from the House Judiciary Standing Committee.

HB 32 - SEX CRIME AND PORNOGRAPHY FORFEITURES

Number 680

CHAIR ROKEBERG announced that the next item of business before the committee would be HOUSE BILL NO. 32, "An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."

Number 692

REPRESENTATIVE JOE HAYES, Alaska State Legislature, came forward to testify as sponsor of HB 32. He said:

As the use of computers and the Internet expands, so, too, do crimes involving the use of these technologies. One area of particular concern is sex crimes against children. Adults prone to abusing children will use the Internet to solicit a minor for sex or to set up a meeting with a child in order to rape or abuse the child. Further, many people who are inclined to distribute or view child pornography are now using their computers to do so. These are new technologies, and the state still has relatively few tools for dealing with criminals using these technologies. House Bill 32 provides us with another tool to use in combating sexual predators.

Across the country and at the federal level, there are forfeiture laws in place. Several other states

already have laws on the books specifically relating to the forfeiture of computers used in sex crimes. The use of computers in sex crimes is a national problem. As more and more states pass forfeiture legislation, it is becoming increasingly obvious that this is a useful and valuable tool in the fight against computer crimes.

House Bill 32 would make it possible for the police to stay on top of this rapidly changing industry without spending more state dollars. Advances in computer technologies seem to happen on a daily basis. New technology can often "outwit" last year's model computers, leaving the police at a large disadvantage in their attempt to curb crimes committed with the aid of the newest technology. In order for the police to combat computer and Internet crimes effectively, it is imperative that they be constantly provided with new hardware.

Under AS 12.55.015(c), the court may award forfeited property or a percentage of it to any municipal law enforcement agency involved in the arrest or conviction of the defendant. This would allow for the courts to pass on seized property to the police so that the police can stay up to date with available technology in a cost-effective manner.

HB 32 is designed to help protect our children in a twofold manner: 1) forfeiture is a proven tool in the fight against crime, and 2) the forfeited property can be given to our law enforcement agencies in order to help make sure that they have the necessary tools to protect our children. I ask for your support in passing this legislation.

Number 0856

REPRESENTATIVE HAYES presented letters of support for HB 32 from the Anchorage Police Department, the Alaska Peace Officers' Association, the Public Safety Employees Association, and the Interior Alaska Forces, a forensic recovery computer evidence specialist group in Fairbanks. He also provided background information concerning recent sex abuse crimes in the Fairbanks community and statewide involving the Internet. Representative Hayes noted that there was a zero fiscal note and one letter of opposition from the Naturalists Action Committee.

Number 0900

CHAIR ROKEBERG called attention to the lateness of the hour and noted that there were four people on the teleconference line as well as others whose testimony he would like to take that day. He asked that questions be held to a minimum.

Number 0956

MARK T. MEW, Deputy Chief, Anchorage Police Department, testified by teleconference. He said the Anchorage Police Department favors HB 32. The department does a fair amount of undercover investigation using computer equipment, and would welcome the opportunity to acquire through seizures the tools that perpetrators are using in order to use it against them.

Number 0997

REPRESENTATIVE MEYER recalled that the Anchorage assembly had run into "all sorts of problems" in relation to a forfeiture ordinance. He asked how HB 32 differs from that.

MR. MEW said the forfeiture ordinance attempted in Anchorage applied to certain felony activities and to some misdemeanors in the area of vice crimes. Some of the objections revolved around whether the police would seize property if someone were arrested as opposed to if someone was convicted. He noted that under HB 32, conviction is required. Another objection revolved around who was going to provide oversight, monitoring law enforcement zeal for acquiring equipment. He did not think it was fully understood at that time that the answer was the court system, which is involved in either an arrest or a conviction. That is probably less of an issue in HB 32 because conviction is required.

Number 1100

REPRESENTATIVE COGHILL noticed that on page 1, line 9, it says, "used to aid in a violation." He added: If somebody misused his equipment, would he have to give it up.

MR. MEW said that was what the wording says, but he assumed it would be up to the police department and the prosecutors to determine at what point it was legitimate to invoke [confiscation], and the court would have to agree.

Number 1206

ROSS PLUMMER, Police Officer, Anchorage Police Department, testified by teleconference in support HB 32. He has dealt with numerous forensic cases as well as child pornography cases on the Internet. "These people are serious about the business they're in and that is to harm children," he said. He noted that [offenders] have their own equipment and usually do not risk exposure by using somebody else's.

Number 1239

REPRESENTATIVE OGAN asked Mr. Plummer if he would object to changing the language of HB 32 to make sure the equipment is owned by the person who perpetrated the crime.

MR. PLUMMER that there are mechanisms used by the prosecutors and the court system in determining whether equipment will be seized.

Number 1274

CHAIR ROKEBERG noted that there had been a request to exclude indecent exposure in the second degree (a class B misdemeanor) from the provisions of HB 32. He asked Mr. Plummer if he thought it would be appropriate to include or exclude indecent exposure.

MR. PLUMMER said he considers indecent exposure to be a different type of crime "than what we're talking about with the use of the Internet and computers as a crime." Indecent exposure doesn't seem to him to fall into what he sees as the intent of HB 32.

CHAIR ROKEBERG asked if in connection with the Internet, he had ever charged anybody with indecent exposure in the second degree.

MR. PLUMMER said he had not.

Number 1340

MARC POESCHEL, Police Officer, University of Alaska Police Department, testified by teleconference in support of HB 32. He explained that the Interior Alaska Forces group was formed to combine forces against Internet predators and computer criminals, and to provide training and assistance to those sworn

to protect. He commented on the issue of confiscating property that does not belong to the person convicted. When someone frequently violates the law while using a computer that is not his or her own, (in an Internet cafe or a business that provides access to the Internet), he thinks it is important to maintain the avenue of forfeiture for the business as well. House Bill 32 will make a big difference to the Interior Alaska Forces group because it lacks funding in many areas. Computers and training are so expensive that it is very difficult to stay current, and being able to confiscate computers used by people who perpetrate crimes against children would make it much easier for police to try to keep up.

CHAIR ROKEBERG recalled that a few years back there was a case at the University of Alaska - Fairbanks involving an employee using a university computer while trafficking in child pornography. He asked Mr. Poeschel if he thought the university's computer should have been confiscated.

MR. POESCHEL said he thought the courts would have to determine whether forfeiture would be appropriate. In a situation in which equipment is used repeatedly for that type of crime, he thought that confiscation should not be ruled out. However, he thought HB 32 is aimed more toward those who use their own computers.

Number 1519

JAMES WELCH, Chief of Police, Fairbanks Police Department, testified by teleconference in support of HB 32. He told members that pornographic use of the Internet is a big issue throughout the nation and in Alaska. Fairbanks has followed Anchorage in passing a forfeiture bill allowing the seizure of vehicles being driven by those under the influence of alcohol or drugs. There are state and federal protocols regarding forfeiture in drug-related cases and other criminal offenses, and he thinks HB 32 "somewhat mirrors those efforts." There is always concern about law enforcement depriving someone of property, he said, but with the ability of the court system and the prosecutor's office to work out those issues and the system of due process in place to protect an individual's rights, he is comfortable with HB 32 as written. He said he thinks it sends a message that these crimes will not be tolerated.

CHAIR ROKEBERG asked Mr. Welch what he thought about including or excluding reference to indecent exposure in HB 32.

MR. WELCH agreed with previous testimony that as a rule, the people involved in indecent exposure cases are not those involved in child pornography.

Number 1547

REPRESENTATIVE BERKOWITZ observed, "It may well be that you wind up with a reduced charge as part of a negotiated settlement to a case, in which instance you might also want to retain the ability to forfeit the instrumentality."

MR. WELCH added that the prosecutor's office needs broad outlines to effectively manage any statutes.

Number 1690

JENNIFER RUDINGER, Executive Director, Alaska Civil Liberties Union (AkCLU), came forward to testify. She commended the sponsor of HB 32 for requiring conviction prior to forfeiture. In a number of states, that has been a problem. The ACLU recognizes a legitimate need of law enforcement to keep pace with computer technology and to protect children, she said, and applauds the sponsor for having that as the rationale for his bill. The AkCLU is happy with the fact that this is a discretionary forfeiture and that forfeiture is not mandatory under the statute.

MS. RUDINGER continued:

However, we do see a number of points, three points primarily, where the statute is subject to a challenge on the grounds of "overbreadth," in other words, that it reaches too far and it goes beyond what the sponsor probably intends for it to do. First of all, the statute appears to apply even to rudimentary equipment like cameras, a darkroom, binoculars, anything that could be used to commit these crimes. It does not necessarily in the statute specify that it has to be high-tech equipment. So the AkCLU would urge some sort of an amendment clarifying that there should be an adversarial preliminary hearing prior to forfeiture to determine whether in fact law enforcement needs the property in order to keep pace with technology, which seems to be the sponsor's intent.

Second, there seems to be no requirement in here that the equipment seized must be owned by the person

convicted, and we agree with Representative Ogan, who raised this point. If a kid is staying at his grandma's house, are we going to go and seize Grandma's computer? If an employee is using his employer's computer, are we going to storm into businesses and take computers? There is nothing in the bill that specifies ownership is required, and we would strongly urge that ownership should be a condition precedent to forfeiture.

Finally, the third point we have in terms of overbreadth is that it doesn't seem for purposes of helping law enforcement keep pace with technology that a permanent forfeiture is warranted. There may be other legitimate uses, for example, for a hard drive. Maybe other people in the household use that for work or for a livelihood, and it seems to me that perhaps the forfeiture could be temporary so that law enforcement could learn about the technology but that there is not a legitimate government interest in saving money by taking citizens' property in order to not have to buy it themselves.

MS. RUDINGER mentioned that the United States Supreme Court has accepted a case that asks the question, "Is it a crime at all to view digital imagery of children where no real person was the subject of the image?"

MS. RUDINGER volunteered that the AkCLU will be happy to work with the committee on crafting some narrowing amendments to protect HB 32 from an overbreadth challenge.

Number 1950

DEAN GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law, came forward to testify. He noted that there are some general principles of law that relate to forfeiting property that is not owned by the offender. The primary concept is deprivation of property without due process of law. The owner of the property has a right to be heard in court, and if that person can show that he or she did not know of the violation and had no reason to know of the violation, it would be unconstitutional to take that person's property. That even would apply to someone else within the family.

MR. GUANELI said in addition, there also has to be some finding by the court that this property was used to aid a violation of the law. He concluded that even though it isn't specifically stated, there are sufficient procedures established in case law to protect innocent owners from having their property taken.

CHAIR ROKEBERG asked if it was unnecessary to speak to that in HB 32.

MR. GUANELI said he thought it is always better to set things out specifically in statute. There are forfeiture provisions scattered throughout the statutes, and it might be good at some point to have a definitive forfeiture procedure set out somewhere in the law. Up to now, it has been dealt with by case law.

CHAIR ROKEBERG wondered if it would be appropriate to say that a finding [regarding forfeiture] would be made at the sentencing hearing.

MR. GUANELI said he didn't think that was necessary.

Number 3331

CHAIR ROKEBERG noted that there were several suggestions for amendments and that the meeting time was running out. He wanted to hold the hearing open in case someone else wants to speak to HB 32. He proposed to work with the sponsor and the committee aide to come up with a committee substitute and asked for suggestions to guide the drafting.

Number 2255

REPRESENTATIVE BERKOWITZ suggested an amendment limiting forfeiture to property that is an instrumentality of the crime. That would mean property that's not just used in the commission of the crime, but that is directly and materially contributing to it. The language of "direct and material contribution" comes from a Michigan statute, he noted, which is included in the packet. There is always a concern that the state may take more than is proportionate to the crime. "Direct and material" linkage assures that the seizure of property is proportionate.

CHAIR ROKEBERG said he thought HB 32 should limit forfeiture to electronic type property, which is the thrust of the bill.

REPRESENTATIVE BERKOWITZ cautioned, "Once you get into that area of specificity, then you take away the discretion"

CHAIR ROKEBERG said he would like to see the bill as specific as possible, keeping in mind Representative Berkowitz's concern. Other issues that needed to be addressed in relation to confiscation were the ownership of the property and whether the property is going to help law enforcement. He also wanted to make sure real property is excluded, so that houses are not confiscated. He still did not know what to do in response to the nudists' objection to including nude sunbathing, he said. He asked the sponsor of HB 32 to bring back a revised version of the bill to consider as a CS. [HB 32 was held over.]

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:09 p.m.