

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

January 30, 2002

1:12 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 297

"An Act related to aggravating factors at sentencing."

- HEARD AND HELD

PREVIOUS ACTION

BILL: HB 297

SHORT TITLE:AGGRAVATOR FOR SEXUAL OFFENSES

SPONSOR(S): REPRESENTATIVE(S)MEYER

Jrn-Date	Jrn-Page		Action
01/14/02	1952	(H)	PREFILE RELEASED 1/4/02
01/14/02	1952	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1952	(H)	JUD, FIN
01/14/02	1952	(H)	REFERRED TO JUDICIARY
01/30/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

LORALI CARTER, Staff
to Representative Kevin Meyer
Alaska State Legislature
Capitol Building, Room 110
Juneau, Alaska 99801

POSITION STATEMENT: Assisted with the presentation of HB 297.

KAREN BITZER, Executive Director
Standing Together Against Rape (STAR)
1057 West Fireweed Lane, Suite 230
Anchorage, Alaska 99503

POSITION STATEMENT: Testified in support of HB 297 and responded to questions.

SUSAN SCUDDER, Executive Director
Council on Domestic Violence and Sexual Assault (CDVSA)
Department of Public Safety (DPS)
PO Box 111200

Juneau, Alaska 99811-1200

POSITION STATEMENT: Testified in support of HB 297 and responded to questions.

LAUREE HUGONIN, Executive Director
Alaska Network on Domestic Violence & Sexual Assault (ANDVSA)
130 Seward Street, Room 209
Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of HB 297 and responded to questions.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration
900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501-2090

POSITION STATEMENT: Testified in opposition to HB 297 and responded to questions.

ACTION NARRATIVE

TAPE 02-5, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:12 p.m. Representatives Rokeberg, Ogan, Coghill, Meyer, and Berkowitz were present at the call to order. Representatives James and Kookesh arrived as the meeting was in progress.

HB 297 - AGGRAVATOR FOR SEXUAL OFFENSES

Number 0050

CHAIR ROKEBERG announced that the committee would hear HOUSE BILL NO. 297, "An Act related to aggravating factors at sentencing."

Number 0083

REPRESENTATIVE MEYER, speaking as the sponsor of HB 297, said that when drugs or alcohol are used to lower the inhibitions of a person to the point that he/she becomes a victim of sexual assault, the seriousness of the crime should be elevated in the eye of court for the purposes of sentencing. For example, he said, the presumptive sentence for a first offense of sexual assault is eight years; with the aggravator proposed by HB 297, the judge could increase the sentence up to as much as thirty years. He relayed that sexual assault continues to be a crime that devastates communities. He explained that "ruffies" (ph) and gamma-hydroxybutrate (GHB) are commonly known as date rape drugs, and are used by sex offenders to prevent their victims from resisting and being able to remember the crime. He said that as the father of two young daughters, "that scares the heck out of me that somebody could give somebody a drug, sexually assault them, and then [the victim] would not even know that they were sexually assaulted."

REPRESENTATIVE MEYER opined that sex offenders who use these types of drugs should receive stiffer penalties. He noted that HB 297 does not require the court to impose stricter penalties for sexual assault; it simply provides the courts with the ability to do so. He mentioned that members' packets contain letters of support from organizations that provide help to victims of sexual assault. He also said that, "There is no expected increase in cost to the state with passage of this bill."

REPRESENTATIVE OGAN said his concern with the language in HB 297 is that if the defendant supplied any amount of alcohol, even just one sip of beer, it could be considered an aggravator under the law. He surmised, notwithstanding claims by the Department of Law and the Department of Public Safety that legislative intent will be followed, that not many judges research legislative proceedings in order to follow legislative intent. He suggested that instead, judges use literal interpretations of the law, and he pointed out that language in HB 297 simply states "supplied" without reference to amount.

REPRESENTATIVE MEYER said that although he shares that concern, he thinks that in the courtroom, it would be up to the attorneys

to prove, first, that a sexual assault did occur and, then, that alcohol was used to lower the victim's inhibitions. He posited that if the defendant said, "Hey, I only bought her a half a drink," the judge is not going to let that be an aggravating factor "unless, in fact, that half a beer did lower her inhibitions." He pointed out that he is not as concerned with the alcohol aspect of HB 297 as he is with having an aggravating factor apply to the use of newly developed drugs that are used specifically to take advantage of a victim.

REPRESENTATIVE OGAN reiterated his concerns regarding the literal interpretation of the language currently in HB 297.

Number 0665

REPRESENTATIVE MEYER alluded to the fact that HB 297 also contains language stating that the aggravator applies to cases in which alcohol or controlled substances were supplied "in connection with the offense."

REPRESENTATIVE BERKOWITZ said that there are three issues that he has concerns about. First, he asked whether there are any cases in which the failure to have this aggravator constituted a problem. Second, he pointed out that AS 12.55.155(c)(5) says "the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or ... for any other reason substantially incapable of exercising normal physical or mental powers of resistance" and that it is supported by case law - Sakeagak v. State; he asked why this did not already cover the conduct HB 297 is attempting to address. Third, he asked whether there is a risk that by applying an aggravator to a case in which alcohol is used, it is asserting that such a crime is worse than what he called a "snatch and grab" type of case in which someone is dragged off and raped but alcohol does not play a part. He asked, "Is the use of drink or drug something that we want to condemn as a worse form of conduct?". Representative Berkowitz noted that he appreciates what the sponsor is trying to do, and that he thinks the sponsor is sending an important public message, much of which, he opined, is "getting across" through this discussion.

REPRESENTATIVE BERKOWITZ also mentioned that in addition to the Sakeagak case, both Denny v. State (ph) and George v. State, a 1992 Alaska Court of Appeals case, "go to show that intoxication of the victim can be used as an aggravator." He then read from the Sakeagak decision:

When Sakeagak presented this argument to Judge Jeffery, the judge concluded that AS 12.55.155(g) was intended to bar a sentencing judge from finding aggravators or mitigators based on the defendant's intoxication, but that AS 12.55.155(g) was not intended to bar a judge from considering a victim's intoxication when determining the disabilities described in AS 12.55.155(c)(5). We agree.

REPRESENTATIVE BERKOWITZ concluded from this paragraph that the Alaska Court of Appeals agrees with the trial court decision that intoxication of the victim is an element that can be used in aggravating a sentence.

Number 0936

REPRESENTATIVE JAMES noted that while certainly the intoxication of the victim is an aggravator, it seems to her that the aggravators could stack up if the defendant supplied the alcohol with the intent to cause the victim's vulnerability. She surmised that stacking aggravators against the defendant in such a fashion is part of the sponsor's intent.

REPRESENTATIVE MEYER said his intent is to make it perfectly clear that [supplying] alcohol or drugs is an aggravator. On the point of whether it is worse to rape someone after providing him/her with alcohol or drugs versus just simply raping someone, he said that this is a policy call for the committee to make, but in his opinion it is much worse because the victim's trust in that person has been violated.

REPRESENTATIVE BERKOWITZ, in response to questions, pointed out that the crime of sexual assault in the second degree [AS 11.41.420] is committed when "(3) the offender engages in sexual penetration with a person who the offender knows is (A) mentally incapable; (B) incapacitated; or (C) unaware that a sexual act is being committed". He also pointed out that the crime of sexual assault in the third degree [AS 11.41.425] is committed when the offender "(1) engages in sexual contact with a person who the offender knows is (A) mentally incapable; (B) incapacitated; or (C) unaware that a sexual act is being committed". He said he thinks that in some convictions, the incapacitation of the victim is something that's factored into the charge. He also indicated that another Alaska Statute says that if one supplies incapacitating elements such as the date-rape drug rohypnol, that's a separate charge altogether - a separate felony.

CHAIR ROKEBERG surmised, "So, you could have the gradations in the level of sexual assault [according to] the definition under statute, take it into account, and have a second charge as well."

REPRESENTATIVE MEYER asked which statute contains that separate charge.

REPRESENTATIVE BERKOWITZ indicated that he and his staff would research the specific statute and provide details.

Number 1274

LORALI CARTER, Staff to Representative Kevin Meyer, Alaska State Legislature, sponsor, added that in 1997 "the legislature passed legislation to add rohypnol and GHB to the schedule IVA drug list."

REPRESENTATIVE OGAN said that he does not think that a rape involving alcohol is worse than a rape where the victim consumed no alcohol; both are violent assaults. He opined that people already know that when they consume alcohol their judgment is impaired and they are placing themselves in a vulnerable position.

MS. CARTER stated:

It doesn't matter if a woman is out drinking a lot, or wearing a short skirt or a low-cut blouse - her rights to live freely are her rights. She's not asking to be sexually assaulted no matter what her behavior is. No means no. It doesn't matter how much alcohol she's had, she's not asking to be sexually assaulted.

REPRESENTATIVE OGAN said: "I don't mean in any way to imply that, but what I am saying is that if this is going to be an aggravator, ... there is some conduct that a person willingly engaged in beforehand that maybe made them a little bit more susceptible." He added that he agrees with Ms. Carter that, "No means no."

CHAIR ROKEBERG noted that the courts also recognize mitigating factors at sentencing.

Number 1463

KAREN BITZER, Executive Director, Standing Together Against Rape (STAR), testified via teleconference in support of HB 297. She explained that last year, STAR advocates responded to 267 callouts for newly reported cases of sexual assault, and to almost 300 cases of child sexual abuse. She said that the need for this type of special sentencing aggravator was clearly noted during a 2001 meeting of the STAR legislative committee focus group, which was sponsored by STAR and attended by district attorneys, law enforcement, board members, and other interested persons. During this meeting, discussion regarding the number of sexual assaults involving alcohol and the increased numbers of date-rape drug cases brought to light the need for judicial clarity on these topics.

MS. BITZER posited that HB 297 would offer clarity to judges during the sentencing phase without having to build case law in order to "impose a higher degree of punishment because of the use of drugs or alcohol in a crime." She said that unfortunately, STAR is beginning to see more and more cases of sexual assault that may be date-rape cases involving the use of drugs that incapacitate victims. She explained that drugs such as rohypnol are slipped into the drinks of victims for the purpose of incapacitating them, and she concluded that this makes the act much more premeditated. While acknowledging that alcohol is still mainly the drug of choice, she indicated that date-rape drugs are becoming more prevalent in Alaska. She also noted that the formula for these drugs, which can be made with high school chemistry sets, can be found on Internet sites. In conclusion, she said that on 1/16/02 the board of directors of STAR passed a motion to support HB 297.

MS. BITZER, in response to a question, reiterated her position that HB 297 would clarify for judges that the use of alcohol or drugs in sexual assault cases could be considered an aggravating factor. She opined that it would benefit the judge to have some clear direction regarding aggravators. She surmised that providing clarity to the judges at sentencing is one of the reasons why there is such an extensive list of aggravators. In response to another question, she said that STAR believes that this is an opportunity to make it very clear that the judge can, indeed, impose a higher sentence if rohypnol or alcohol is used with the intent to incapacitate the victim in order to make him/her more vulnerable to the crime.

REPRESENTATIVE MEYER remarked that it is very difficult to prove that a sexual assault occurred, "let alone trying to prove the aggravators."

Number 1720

MS. BITZER agreed, adding that it is especially difficult when date-rape drugs are involved because the victim's memory is fuzzy and so an evidentiary case must be made. She noted that district attorneys work hard to build those cases, and that more and more of those types of cases are getting through the judicial process. She remarked that a high percentage of cases involve either alcohol or drugs. She noted, however, that the problem with proving drugs were used is that by the time the victim wakes up, the drugs have passed through his/her system and so drug tests won't show the presence of rohypnol. She said:

We do know that, just from [the] consistency of the victim's story: "I wasn't drinking very much; I don't understand what happened." Or, "I wasn't drinking at all and I don't understand what happened; I was just having a Coke." And then [through] little flashbacks and pieces of memory they're able to piece some things together, which very much leads to the fact that they've been assaulted.

MS. BITZER added that the stronger the case and the more clarity there is for the judge, the better the sentencing; "what we're trying to do here is ... make things extremely clear for the sentencing phase."

REPRESENTATIVE OGAN noted that Ms. Bitzer used the phrase: "The intent to incapacitate the victim." He asked if she expected the aggravating factor in HB 297 to also apply in instances where the victim had just one beer, for example, before he/she was sexually assaulted.

MS. BITZER, after noting that just sitting down and having a beer with someone doesn't necessarily increase a person's vulnerability, replied that if the motive for supplying the alcohol is to try and render a person more vulnerable then, indeed, that is an aggravator. She suggested that it is not the purpose of HB 297 to pinpoint when someone becomes vulnerable, since that varies from person to person; instead, the purpose is to give judges the ability to add a sentencing aggravator if it becomes clear during the trial that alcohol or drugs were used "as a part of that case."

Number 1917

REPRESENTATIVE OGAN again reiterated his concern that the proposed law could be literally interpreted to say that an aggravator would apply if alcohol were supplied, regardless of the amount or the intent of the supplier. He remarked that, "for felonious behavior, there has to be a culpable mental state."

MS. BITZER argued that what HB 297 is saying is that if someone supplies another with alcohol and then goes on to sexually assault him/her, the judge then has the ability to impose an aggravator at sentencing. She reminded members that it is not merely the fact that some amount of alcohol was supplied that is sending a person to jail; that person is going to jail because he/she was found guilty of sexually assaulted someone.

REPRESENTATIVE BERKOWITZ pointed out that AS 12.55.155(c)(4) currently reads, "the defendant employed a dangerous instrument in furtherance of the offense". He suggested changing it to read, "the defendant employed [a dangerous instrument,] an intoxicant, or controlled substance in furtherance of the offense". He opined that such a change "could be used as an aggravator" and would answer Representative Ogan's concerns. He also noted that it would do something else which he thinks is fairly critical when working within the criminal code: it would keep the language general, rather than tailoring it to specific types of offenses. Thus if someone died as a result of a nonsexual assault, for example, then this aggravator could also apply. Otherwise, he pointed out, if this aggravator is limited to sexual assaults, using alcohol or drugs to further a [nonsexual] assault might not constitute an aggravator.

Number 2067

SUSAN SCUDDER, Executive Director, Council on Domestic Violence and Sexual Assault (CDVSA), Department of Public Safety (DPS), testified in support of HB 297. She noted that just this week in USA Today there is a headline that reads: "'Date rape' drug GHB making inroads in nation's club scene; As it grows, so does death toll." She recounted that the article states that in a two-year period, the emergency room visits for this drug, which reflect only the very serious cases of people dying or becoming very sick, quadrupled from 1998 to 2000. She stated that the drug is out there, it's being used, and it's readily made with chemicals that are available following recipes off the Internet. She said that the CDVSA supports the addition of an aggravator pertaining to the use of "something that incapacitates ... or

lowers the inhibitions of the victim." If it means that a perpetrator will be off the streets longer, that will help lower the rate of sexual assault in Alaska, she stated, adding that last year, through programs throughout Alaska, the CDVSA helped more than 2,000 victims of sexual assault.

REPRESENTATIVE OGAN said he agrees that the use of date-rape drugs should be an aggravating factor because there is "clearly a culpable mental state of the perpetrator to influence the victim". He again reiterated, however, that what he is struggling with is the concept that the legal and socially acceptable behavior of having a glass of wine with dinner, for example, could also be considered an aggravator.

MS. SCUDDER opined that sexual assault is a crime of power and control, and when the perpetrator is doing something to lower the inhibitions of the victim, then it would be fitting to make it an aggravating factor.

REPRESENTATIVE BERKOWITZ asked whether Ms. Scudder knew of any cases in which - or any reason why - existing AS 12.55.155(c)(5) would not apply. He also asked her whether she thinks that adoption of HB 297 as currently written would in essence say that a rape involving alcohol or drugs is worse than a rape without those elements.

MS. SCUDDER, in response to the latter question, said it does seem to imply that. She added that although both types of rape involve predatory behavior, by using alcohol or drugs, the perpetrator is specifically trying to make the victim more helpless, which, she opined, is a valid case for having an aggravator.

CHAIR ROKEBERG made reference to the possibility that having an aggravator pertaining to the consensual use of alcohol might predispose the judge to being lenient in sentencing.

Number 2315

REPRESENTATIVE MEYER asked Ms. Scudder whether she thinks the use of alcohol or drugs should be listed as a separate aggravating factor, as HB 297 proposes, or whether AS 12.55.155(c)(4) - if altered as Representative Berkowitz suggested - and AS 12.55.155(c)(5) adequately address the issue. He posited that by passing HB 297, the legislature would be saying that the courts should decide whether the amount of alcohol or drugs was excessive and/or were used to lower the

victim's inhibitions, and thus should be considered an aggravator.

MS. SCUDDER, in response, indicated that having a specific aggravator listed separately would be preferable, and agreed with Representative Meyer's assessment of HB 297.

REPRESENTATIVE BERKOWITZ, on the issue of crimes that violate trust, asked:

Shouldn't we cover people who are victimized for a regular assault on account of a trust relationship gone bad, or who are robbed on account of a trust relationship gone bad? Isn't what we're trying to protect, as a policy concern, [is] the violation of trust?

CHAIR ROKEBERG, on that point, mentioned "a trailer case out in Muldoon this fall: son kills mother for money, stuffs her under the ... the cabinet."

REPRESENTATIVE BERKOWITZ continued: "Those are trust issues. They would clearly, it seems to me, apply in a sexual assault context. But if we want to punish violations of trust, why limit it to this type of crime?"

MS. SCUDDER responded: "Because of the nature the crime; I think being sexually assaulted and being robbed are horrifically different as far as the impact on the victim."

REPRESENTATIVE BERKOWITZ said if there is a violation of trust, for example, and that constitutes an aggravator, then this would include violations of trust in the context of sexual assault; however, it would also include violations of trust in the context of assault and property crimes, and would send a message that the protection of trust is something the legislature wants to ensure. He said that to him, this makes as much sense as specifying that the aggravator only pertain to crimes of sexual assault.

REPRESENTATIVE MEYER suggested that creating an aggravator for violations of trust should be done in separate legislation.

REPRESENTATIVE BERKOWITZ mentioned that amending HB 297 to include all violations of trust as an aggravator would allow it to address "a greater universe of crimes."

TAPE 02-5, SIDE B
Number 2480

LAUREE HUGONIN, Executive Director, Alaska Network on Domestic Violence & Sexual Assault (ANDVSA), testified in support of HB 297. In response to some of the issues raised, she said:

Sexual assault is horrible, whatever the circumstance, and I don't think that we're trying to say one victim's experience is more or less horrible because of the factors surrounding what happened. ... I think what we're trying to look at is the offender's behavior and his choices of how he commits the sexual assault. I think we agree with Representative James that if [AS 12.55.155(c)(5)] applies, good. [But] we want another factor to also apply so that more years can be added. We feel more strongly about the date-rape drugs but we are [still] concerned with alcohol; the sexual assault statutes covered in this bill don't only cover adults, it covers children. Pedophiles can groom children, they can use alcohol as a means to ... further the crimes that they're going to commit, and that's not acceptable to us.

MS. HUGONIN said she understood the concern regarding the what-happens-with-one-drink kind of situation, but didn't think that would be the majority of cases. She suggested, rather, that what should be included in law are the situations in which someone gives "one bottle, two bottles, slips in some vodka"; in other words, the type of perpetrator that provides more than just the one drink.

MS. HUGONIN offered that in sexual assault crimes there are usually three defenses. First, the perpetrator claims that it's a case of mistaken identity: "it happened but it's not me - you got the wrong person." Second, the perpetrator claims consent was given: "it did happen but the person who's alleging that it was not consensual is wrong - it was consensual." Or third, the perpetrator claims it just didn't happen at all. She opined that such defenses are furthered if the use of alcohol or drugs cannot be brought in as an aggravator.

Number 2365

REPRESENTATIVE BERKOWITZ, on that last point, interjected to clarify that an aggravating factor would not be presented at

trial - it would not be part of the proof. The discussion pertaining to HB 297 is an entirely separate issue, he added.

MS. HUGONIN noted that she understands that HB 297 pertains to sentencing. On the issue of why it would be preferable to specify only sexual assault crimes rather than including a broad range of crimes in which trust may be involved, she pointed out that Alaska has consistently, at least since 1989, ranked in the top five states in per-capita sexual assaults. In fact, she added, Alaska usually ranks number one or number two. She remarked that she did not know where Alaska is ranked with regard to the number of robberies or [other] property crimes. Therefore, she opined, as a public policy decision, and since the crime of sexual assault happens regularly and is a significant problem in Alaska, it is appropriate to treat it more seriously. She concluded by saying that she hopes the committee will be able to work out language that will send a strong message that, "If people choose to use substances to further their criminal activity, it's going to cost them more when they're convicted."

REPRESENTATIVE JAMES commented that she finds it strange that aggravating factors are not brought up at trial.

REPRESENTATIVE BERKOWITZ, to further clarify, explained that "aggravators only apply following conviction; you need to be convicted in order to go through sentencing, and at sentencing, that's when the ... aggravators would kick in."

REPRESENTATIVE JAMES, after noting that she understood that, asked: "But how are they recognized? How do you know they're there if they haven't been presented in trial?"

REPRESENTATIVE BERKOWITZ explained that there are sentencing hearings during which sentencing paperwork is filed; thus it's a subsequent set of procedures.

CHAIR ROKEBERG noted that in Alaska courts, sometimes the sentencing hearing can be as "big" as the trial itself.

REPRESENTATIVE BERKOWITZ added that the trial prosecutor has to file a notice of aggravators that he/she is going to suggest to the court, while the defense files a list of mitigators that might apply, "and then the two sides go at it to try and prove or disprove what they think would apply in that case."

Number 2216

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration, testified via teleconference in opposition to HB 297. She brought up the following areas of concern:

If the intent of the bill, as expressed in the sponsor statement and all the testimony I've already heard so far, [is] to focus more on intentional supply of alcohol or controlled substances with the specific purpose of lowering the inhibitions of the victim [for] a premeditated sexual assault, this bill does way more than that. It is over-inclusive. It includes, as we've already heard in previous [testimony], things that are not related to lowering the inhibitions significantly [for] a premeditated assault. You could have somebody just handing a person a drink, as Representative Ogan explained, that would fit and would be a basis to find this aggravator.

This aggravator is also not necessary because, as already explained, there is an existing aggravator - [AS] 12.55.155(c)(5) - that has been liberally interpreted by the courts ... [in] Sakeagak v. State, ... [which] specifically said [it applies]. So there's no confusion now; it's quite clear that if a victim is vulnerable for any reason [or] they have been incapacitated - they are incapable of exercising normal physical or mental powers of resistance - by intoxication, then that already is an aggravator. So, we have an aggravator on the books now that fits [this situation].

MS. WILSON also noted that the court has the ability to convict a person on separate charges, and that there is a preference for consecutive sentencing; hence, there are already mechanisms for providing increased sentences. For example, a person could be convicted of both a sexual assault charge and a controlled substance charge, or a sexual assault charge and a contributing-to-the-delinquency-of-a-minor charge.

Number 2053

MS. WILSON referred to the language "supplied" and asked whether simply handing a person a drink that he/she has already bought would fall under HB 297. She said that "supplied" seems to be a

difficult term, and opined that it is perhaps overly inclusive compared to what is intended by the sponsor. In response to one of the points raised by Representative Berkowitz, she said that she does not know of any cases where the failure to have this aggravator has been problematic, particularly in light of the fact that AS 12.55.155(c)(5) is available and has been applied in some cases already.

MS. WILSON then referred to the 1994 Alaska Court of Appeals case of Haire v. State. She said that Mr. Haire was convicted of sexual abuse of a minor in the first degree, exploitation of a minor, and misconduct involving a controlled substance in the third degree. She explained that, "this involved him sexually abusing his two stepdaughters over a period of time where he displayed x-rated videos; plied them with cigarettes, liquor, and marijuana; and then engaged in sexual contact with them." She noted that the AS 12.55.155(c)(5) aggravator was applied in this case as well as other aggravators such as (c)(9), (c)(10), and (c)(18). She added that he was also convicted of other crimes, thus, further incarceration resulted as well.

MS. WILSON then asked whether the committee really wanted to say, as a matter of policy, that a rape that occurs after the victim is supplied with one beer is a more aggravated situation than what she called a "power rape" where the victim is going about his/her business but is then snatched away and raped. On a question raised earlier, she clarified that AS 11.71.170, Schedule IVA now includes the drug flunitrazepam - rohypnol - as a controlled substance. In conclusion, she said:

It appears the intent of this legislation, as Representative Meyer said, [is to] provide the courts with ... specific language. Unfortunately, this aggravator ... is not specific; it doesn't say anything about the perpetrator intending to lower the inhibitions [of the victim]. It just says, "supplied".

REPRESENTATIVE JAMES asked Ms. Wilson whether changing the language [on line 6] to say "in furtherance of the offense" instead of "in connection with the offense" would be clearer.

MS. WILSON opined that it would make it clearer in terms of meeting the intent of the sponsor.

REPRESENTATIVE JAMES mentioned that she is assuming that HB 297 would cover situations in which the people involved are of age

to drink alcohol legally, and she opined that since alcohol does seem to play a part in a lot of "these" crimes, HB 297 somehow ought to include that specific language.

Number 1834

MS. WILSON noted that there are other "crimes" that already exist for the act of supplying; thus there is no need to have a separate aggravator.

CHAIR ROKEBERG asked Ms. Wilson whether passage of HB 297 would hurt the chances of conviction.

MS. WILSON said it would not because the aggravator doesn't come into play until after there is a conviction.

REPRESENTATIVE OGAN asked Ms. Wilson whether a person [who] commits a crime, especially a felony, would have to have a culpable mental state and, thus, would have to knowingly supply the alcohol or controlled substance for it to be considered an aggravator. He also asked whether including language such as "with the intent to incapacitate" would make her feel better about HB 297.

MS. WILSON said that it probably would not make her feel any better about the bill. She continued:

The culpable mental state for [the crime of sexual assault] is knowingly, and it looks like this is more geared towards the intentional supplying with the specific purpose of lowering the inhibitions of the victim so that [the perpetrator] can commit this premeditated sexual assault. This aggravator says way less than that; it's way more broad than that specific scenario. So, certainly, adding to it specific intent [language] would make it better.

REPRESENTATIVE BERKOWITZ asked what would happen if the definition of "dangerous instrument" were expanded to include alcohol or controlled substances.

MS. WILSON replied: "Oh, I think that's a real slippery slope." She noted that there are many circumstances where "a dangerous instrument" is specifically designated for weapons.

REPRESENTATIVE BERKOWITZ then asked Ms. Wilson whether she thinks that amending AS 12.55.155 to say: "the defendant

knowingly employed [a dangerous instrument,] alcohol, or a controlled substance in furtherance of the offense" would go more towards what she feels the intent of HB 297 is.

MS. WILSON replied that it appears to her to do so.

Number 1638

CHAIR ROKEBERG closed public testimony on HB 297, and called an at-ease from 2:20 p.m. to 2:21 p.m.

REPRESENTATIVE BERKOWITZ remarked that he wished to discuss a possible amendment. He again asked Ms. Wilson if she felt that amending AS 12.55.155(c)(4) to include "alcohol or controlled substance" would satisfy the intent of the sponsor.

MS. WILSON said that such a change seems to better address the situation. She added, however, that if the victim is incapacitated or incapable of resisting the perpetrator due to the consumption of alcohol or drugs, it is already covered by language in AS 12.55.155(c)(5); thus there is no need to amend AS 12.55.155(c)(4) nor, in fact, add this aggravator at all, since current aggravators already cover these types of situations.

REPRESENTATIVE BERKOWITZ asked what the practical consequence is of having two aggravators that cover the same conduct.

MS. WILSON explained that they both would apply; they don't cancel each other out. They both could exist, but just one of them could be used as a basis to aggravate a sentence up to the maximum. She added that even under existing AS 12.55.155(c)(5), the sentence could be aggravated up to the maximum amount of 30 years for sexual assault in the first degree.

REPRESENTATIVE MEYER, notwithstanding the arguments that existing statutes could be used in place of HB 297, said his intention is to make it clear that supplying alcohol or drugs to the victim of a sexual assault could be considered as an aggravating factor. He noted, however, that he would consider amending HB 297 in some fashion because testimony has convinced him that, currently, it is too broad.

[Representative Ogan made a motion to adopt Amendment 1, and then withdrew his motion at the request of Chair Rokeberg for the purpose of discussion.]

CHAIR ROKEBERG said that he is extremely uncomfortable with the "one-beer scenario" that has been raised by several people.

Number 1396

REPRESENTATIVE BERKOWITZ said: "I'm going to offer my amendment about 'employing alcohol or [a] controlled substance in furtherance of the offense'."

REPRESENTATIVE MEYER asked whether that would be an amendment to existing AS 12.55.155(c)(4) or to HB 297's proposed (c)(30).

REPRESENTATIVE BERKOWITZ said, "Either way, it's going to be in there; I just think it's cleaner [as an amendment to AS 12.55.155(c)(4)]."

CHAIR ROKEBERG remarked that if such a change occurs to HB 297, all that is being taken from [AS 12.55.155(c)(4)] is the language "in furtherance of the offense".

REPRESENTATIVE BERKOWITZ agreed but added that he would also remove from HB 297 any reference to AS 11.41.410 - 11.41.455.

CHAIR ROKEBERG asked whether Representative Berkowitz wanted the proposed aggravator in HB 297 to apply to all offenses, not just sexual offenses.

REPRESENTATIVE BERKOWITZ said yes; "I think that that makes sense." He asked why this aggravator shouldn't also apply to a homicide in which alcohol was used in furtherance of the crime.

CHAIR ROKEBERG remarked that such a change would probably generate a fiscal note.

REPRESENTATIVE BERKOWITZ said: "We ought to be doing this based on the correct policy rather than how much it costs."

REPRESENTATIVE MEYER said that he would prefer to limit the aggravator in HB 297 to sexual assault offenses.

REPRESENTATIVE BERKOWITZ opined that the language "in furtherance of the offense" is fairly critical, adding that it is language that has already been litigated, it is currently in statute in other places, and it "gets at some of what Representative Ogan is trying to do."

Number 1249

REPRESENTATIVE OGAN made a motion to adopt Amendment 1, which read [original punctuation provided]:

Delete lines 4 - 6

Insert new paragraph to read:

(30) the defendant is convicted of an offense specified in AS 11.41.410 - 11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in the [sic] connection with the offense with the intent to incapacitate.

Number 1230

CHAIR ROKEBERG made a motion to amend Amendment 1 by deleting "the [sic] connection with" and inserting "furtherance of".

REPRESENTATIVE OGAN said he would consider this amendment to Amendment 1 as a friendly amendment and would not object to it.

CHAIR ROKEBERG, in response to questions, opined that the language "with the intent to incapacitate" in Amendment 1 should remain because otherwise the language in HB 297 would be too broad.

REPRESENTATIVE MEYER agreed.

CHAIR ROKEBERG, to clarify, explained that Amendment 1, if amended, would read:

Delete lines 4 - 6

Insert new paragraph to read:

(30) the defendant is convicted of an offense specified in AS 11.41.410 - 11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in furtherance of the offense with the intent to incapacitate.

REPRESENTATIVE JAMES mentioned that that language seems to drag with "those two phrases."

CHAIR ROKEBERG remarked that "knowingly" relates to "the intent to incapacitate" and both terms are important.

REPRESENTATIVE BERKOWITZ noted that the "intent to incapacitate" is different than, for example, the intent to soften someone's inhibitions. He remarked that the use of "intent to incapacitate" could engender litigation. He suggested that a defendant could argue: "I just got her drunk so I could reduce her inhibitions; I didn't want her incapacitated."

REPRESENTATIVE OGAN mentioned that Ms. Bitzer had used the term "intent to incapacitate".

CHAIR ROKEBERG suggested that Representative Berkowitz's point pertains to whether this is a legal term that has been litigated or defined in statute.

REPRESENTATIVE OGAN noted that "incapacitated" is already defined in statute.

Number 0997

REPRESENTATIVE JAMES made a motion to amend Amendment 1 a second time by deleting "with the intent to incapacitate" and having it end with "in furtherance of the offense."

Number 0930

CHAIR ROKEBERG, after noting that there were no objections to the first amendment to Amendment 1, stated that it was adopted. He then stated that the second amendment to Amendment 1 was before the committee for consideration.

REPRESENTATIVE OGAN objected to the second amendment to Amendment 1. He again reiterated his concern that HB 297 could be interpreted to mean that the aggravator would apply to someone who provides even just a sip of wine or beer. He opined that if an act does not contribute to a crime in any way, it should not be considered an aggravator.

REPRESENTATIVE BERKOWITZ remarked that this aggravator would not apply until the sentencing phase, and has nothing to do with the defendant's culpability.

REPRESENTATIVE JAMES said that she found out only today that aggravators apply only at sentencing rather than at trial. She asked: Don't judges, during trial, make their decisions based on the presentation of the circumstances, including aggravating or mitigating factors?

CHAIR ROKEBERG suggested that testimony indicates that the facts of the case, including the use of drugs or alcohol, do influence what type of crime a person is convicted of.

REPRESENTATIVE MEYER opined that there is still some confusion in the courts as to whether the use of alcohol or drugs can be considered as an aggravating factor.

REPRESENTATIVE BERKOWITZ said he disagrees with that premise.

CHAIR ROKEBERG noted that he wishes to finish working on Amendment 1 and ultimately see it adopted, and then hold HB 297 over and let the sponsor fine-tune it.

REPRESENTATIVE MEYER said he would work with an attorney regarding some of the legal issues raised.

REPRESENTATIVE BERKOWITZ asked that the Department of Law be permitted to give testimony on HB 297 at its next hearing.

Number 0562

CHAIR ROKEBERG brought attention back to the question of whether to adopt the second amendment to Amendment 1, which would delete "with the intent to incapacitate." He indicated that he agrees with Representative Ogan that that language is necessary to keep HB 297 from being applied too broadly.

REPRESENTATIVE OGAN stated that he is maintaining his objection to the second amendment to Amendment 1. He opined that to simply say "supplied", without including "with the intent to incapacitate", gives no indication as to what amount could be considered an aggravator. By keeping "with the intent to incapacitate", he surmised, the aggravator would not apply unless the perpetrator could be shown to have had "some kind of culpable mental state."

REPRESENTATIVE JAMES, in defense of the second amendment to Amendment 1, opined that "in furtherance of the offense" is the key to this aggravator, but that including "with the intent to incapacitate", negates it. She said she trusts the court system to apply this aggravator appropriately.

Number 0174

A roll call vote was taken. Representatives Berkowitz, Kookesh, and James voted for the second amendment to Amendment 1. Representatives Ogan, Coghill, Meyer, and Rokeberg voted against it. Therefore, the second amendment to Amendment 1 failed by a vote of 3-4.

CHAIR ROKEBERG announced that the committee would hold HB 297 over, and asked Representative Meyer to review HB 297 in light of the testimony heard today.

REPRESENTATIVE OGAN noted that he is proud to serve on this committee and that he appreciates its serious deliberations.

CHAIR ROKEBERG said he found it alarming that according to the sponsor statement for HB 297, a first-time offender of the crime of sexual assault in the first degree could have his/her sentence aggravated from eight years up to the maximum of thirty years.

Number 0005

CHAIR ROKEBERG adjourned the House Judiciary Standing Committee at 2:45 p.m. [The tape ended just as Chair Rokeberg made this announcement.]

TAPE 02-6, SIDE A
Number 0001

CHAIR ROKEBERG reconvened the House Judiciary Standing Committee at 2:48 p.m. for the purpose of addressing the question of whether to adopt Amendment 1, as amended. Present were Representatives Rokeberg, Meyer, Coghill, and Ogan.

Number 0070

CHAIR ROKEBERG asked whether there were any objections to adopting Amendment 1, as amended. There being no objection, Amendment 1, as amended, was adopted. [HB 297 was held over.]

ADJOURNMENT

Number 0098

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:50 p.m.