ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 25, 2002
1:08 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair
Representative Albert Kookesh

COMMITTEE CALENDAR

HOUSE BILL NO. 373
"An Act relating to marijuana and controlled substances and forfeitures related to controlled substances."

- MOVED CSHB 373(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 376
"An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 124
"An Act prohibiting nursing facilities and assisted living homes from employing or allowing access by persons with certain criminal backgrounds, with exceptions."

- BILL HEARING POSTPONED

PREVIOUS ACTION

BILL: HB 373
SHORT TITLE:WEIGHT OF MARIJUANA/CONTRABAND FORFEITURE
SPONSOR(S): REPRESENTATIVE(S)MURKOWSKI

Jrn-Date	Jrn-Page		Action
02/01/02	2121	(H)	READ THE FIRST TIME -

			REFERRALS
02/01/02	2121	(H)	JUD
03/25/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE LISA MURKOWSKI
Alaska State Legislature
Capitol Building, Room 408
Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of HB 373.

DEAN J. GUANELI, Chief Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
PO Box 110300
Juneau, Alaska 99811-0300
POSITION STATEMENT: Assisted with the presentation of HB 373 and responded to questions.

AL STOREY, Lieutenant
Commander
Statewide Drug Enforcement
Central Office
Division of Alaska State Troopers
Department of Public Safety (DPS)
4500 West 50th Avenue
Anchorage, Alaska 99502
POSITION STATEMENT: Assisted with the presentation of HB 373 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: During discussion of HB 373, mentioned the PDA's concerns and responded to questions.

ACTION NARRATIVE

TAPE 02-37, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:08 p.m. Representatives

Rokeberg, James, Coghill, Meyer, and Berkowitz were present at the call to order.

HB 373 - WEIGHT OF MARIJUANA/CONTRABAND FORFEITURE

Number 0043

CHAIR ROKEBERG announced that the committee would hear HOUSE BILL NO. 373, "An Act relating to marijuana and controlled substances and forfeitures related to controlled substances."

Number 0064

REPRESENTATIVE LISA MURKOWSKI, Alaska State Legislature, sponsor, said that HB 373 is before the committee primarily as a consequence of a fieldtrip that she took a couple of years ago to the contraband warehouse located in the Matanuska-Susitna area ("Mat-Su Valley"). She relayed that this warehouse is a large facility, and that in the back of it, there was a marijuana-drying operation in process. She indicated that in an effort to find out why such a an operation was taking place, she discovered that Alaska is the only state where, if live plants are seized, in order to prosecute for possession of marijuana, it is required that the entire crop be processed to a usable form and then weighed, rather than just taking a representative sampling of the plants. This current requirement involves drying all the plants, separating the usable parts of the plant, and then, once everything is processed, the resulting product is weighed for evidence and prosecution purposes. In the meantime, she noted, the entire seized crop is saved.

REPRESENTATIVE MURKOWSKI said that it seems incredible to her that Alaska has to go through all of these steps, and when she inquired why, she was told that it is because that is the way the state laws are. In response to her inquiries regarding how much time it takes for state employees, national guardsmen, or "drug enforcement people" to do this process, she was informed that it takes a substantial amount of time, resulting in a substantial cost to the state. Based on information she has since gathered regarding how Alaska handles marijuana processing, she said that she could find no good reason for the state "to continue to do it this way." And, as a consequence, she introduced HB 373.

REPRESENTATIVE MURKOWSKI explained that under HB 373, in order to prosecute, law enforcement would simply save a representative sample and destroy the excess marijuana; "we wouldn't need to do

the full process that we currently do." She noted that another section of HB 373 defines contraband and the disposition of the contraband, and that this provision was suggested by law enforcement because, currently, there is not a mechanism in place to just collect a representative sample of the contraband. Instead, the state just stores everything and, after a point, "you start to just run out of room."

Number 0380

REPRESENTATIVE MURKOWSKI, in response to a question, reiterated that Alaska is the only state to calculate the weight of marijuana in this fashion, adding that the majority of states do it the same way the federal government does, which is to take a representative sample. Referring to her notes, she read:

> The entire plant is used when determining the weight and it doesn't need to be dried out. All the plants, including the root system, are taken, and a representative sample is used for testing and prosecution.

REPRESENTATIVE JAMES, after remarking that this entire subject seems very familiar to her, asked whether changes such as those proposed by HB 373 have already come before the legislature and, if so, what the end result was.

REPRESENTATIVE MEYER asked why the state started processing marijuana in this fashion to begin with.

REPRESENTATIVE MURKOWSKI said that she was not that familiar with the history behind this issue, noting that in response to her similar questions, she was told simply that it has always been done this way. In response to a question regarding the fiscal notes, she agreed that HB 373 ought to save the state money.

CHAIR ROKEBERG asked whether "the importance of the aggregate weight has to do with the levels of penalty under criminal law."

REPRESENTATIVE MURKOWSKI said that to her understanding, yes.

CHAIR ROKEBERG referred to the provision in HB 373 stipulating the use of "one-sixth of the measured weight" for purposes of calculation, and asked what the justification was for using one-sixth.

REPRESENTATIVE MURKOWSKI deferred that question to the Department of Law.

CHAIR ROKEBERG inquired whether Representative Murkowski would consider a friendly amendment to reserve some of the seized marijuana for "medical-marijuana patients in need."

REPRESENTATIVE MEYER inquired whether Representative Murkowski would consider an amendment "to tax the product."

REPRESENTATIVE BERKOWITZ remarked that he has looked into the issue of having a tax on contraband, and estimated that such a tax would raise just under $1 million annually.

Number 0717

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), explained that back in 1970s, the Alaska Supreme Court ruled that adult Alaskans have a right of privacy to possess small amounts of marijuana. As a result of this ruling, marijuana was decriminalized, and it was not until the 1980s that the legislature decided to step in and set some boundaries on that court opinion. Therefore, most of Alaska's drug laws derive from the early 1980s. In response to an interjected question, he mentioned that there was an initiative regarding marijuana in the 1990s. Returning to the subject of when Alaska's drug laws were developed, he said that because marijuana-growing in Alaska wasn't the same kind of industry then as it is now, some of the laws put on the books were done at a time when the law enforcement community didn't have the kind of knowledge it has now about the marijuana-growing industry.

MR. GUANELI said that as a result of those circumstances, there is a provision in law that says if live plants are confiscated, before the plants are weighed for the purpose of charging, the police are required to actually process that growing plant as though it were going to be sold and used. What this means is that the roots, stalks, and large limbs are removed, and what is left - the dried leaves and buds, which have the highest concentration of the active ingredient - is what is weighed for purposes of prosecution. He noted that this is the statute that law enforcement has been following all these years.

MR. GUANELI, referring to Representative James's observation that this topic is very familiar to her, said that she is not

mistaken; this issue has come up before. A number of years ago, there was a provision put into law that instead of processing all of a marijuana crop, law enforcement could count the plants, and if there were more than a certain number - 25 or more - the crime could rise to a felony level. This was done in order to try to relieve the police from some of the onerous duties of, essentially, becoming some of the biggest marijuana producers/processors in the state.

MR. GUANELI added, however, that even that provision "doesn't quite do it." There are certain crops, depending upon what part of the growing cycle they are in when seized, where the 25 plants are very small, and so he was not certain how fair it was to subject somebody to a felony penalty. More important, because some of the modern marijuana-growing operations can be done in a fairly confined area using hybrid growing techniques, a profitable amount of marijuana can be harvested from less than 25 plants. He noted that in such cases, law enforcement is still required to process the entire crop in order to calculate the weight for purposes of [prosecution].

Number 0940

MR. GUANELI remarked that there are problems with having to do that. One is, as Representative Murkowski pointed out, it takes a big operation: it takes a big warehouse, it takes a lot of fans, it requires areas in which to spread out the marijuana, and somebody has to actually go through and process it by cutting the usable parts away from the unusable parts. And while it might seem simple to just have law enforcement process part of it and save the rest without processing it, he explained that the problem with that is that wet marijuana tends to produce a mold that is hazardous to humans, so it can't just be stored; rather, it has to be destroyed.

MR. GUANELI posited that what Section 1 of HB 373 does is create a shortcut. Rather than going through this long, laborious processing procedure, law enforcement will be able to cut off the plant at the roots, weigh it, and then take one-sixth of that weight as an estimate of what the product would weigh had it been processed. He relayed that the amount of one-sixth came from a number of tests conducted by the state troopers over the last couple of years, in which they have took marijuana crops and weighed them, both before and after processing. Through a total of twelve tests - twelve different crops with plants of different sizes and at different stages of development - the troopers determined that the average ratio is about 6:1. After

acknowledging that a lower ratio might be possible with "some very good plants" that have a lot of buds and a lot of leaves, he said that the overall average on those tests was actually 5.8:1, but when the highest and lowest ratios were discarded, the average was about 6.1:1, which is really very close to 6:1.

MR. GUANELI referred to Section 9, and explained that it basically says that under procedures prescribed by the commissioner of public safety, contraband can be destroyed, but if the evidence is necessary for a criminal proceeding, then a representative sample shall be retained to allow for an independent test if the defendant so chooses. In addition, the contraband shall be photographed and other documentation provided so that the ultimate destruction of the contraband doesn't deprive people of their ability to defend themselves. He noted that Section 9 and Section 1 are the two operative provisions of HB 373.

MR. GUANELI said that the rest of HB 373 - Sections 2-8 - makes changes to the state's forfeiture laws, which are fairly detailed with regard to forfeited "drug property." He mentioned, for example, that there are currently some specific requirements for publishing notice in a newspaper regarding seized items, and for allowing someone to challenge the seizure/forfeiture. He explained that Sections 2-8 are provided to allow for "this shortcut" - this process of taking the marijuana or any dangerous substance and destroying it [after obtaining a representative sample]. He remarked that in the case of "methamphetamine labs," that property could simply be seized and immediately forfeited to the state without going through the current complicated process, and then that property could be destroyed right away simply because almost anything produced in methamphetamine labs is dangerous. And in cases involving "wet" marijuana, because it grows a mold that is dangerous to humans, the unprocessed portion needs to be destroyed.

Number 1269

MR. GUANELI informed the committee that he has a suggested amendment for page 2, line 2: after "substance" insert "that has no currently accepted medical use in treatment in the United States". [This suggested amendment would come to be called Conceptual Amendment 1.] He explained that the reason for that change is because there are some schedule IA or IIA [controlled substances] that do have some medical uses. [Conceptual Amendment 1] would prevent, for example, the seizure of morphine

that is "being possessed by a hospital," but would allow the seizure and immediate destruction of things like LSD (lysergic acid diethylamide) and methamphetamines.

REPRESENTATIVE BERKOWITZ asked: What about medical marijuana? Since this state has determined that marijuana has a medical use, would it be impossible to forfeit marijuana under [Conceptual Amendment 1]?

MR. GUANELI clarified that marijuana is not included in schedules IA or IIA; marijuana is included in schedule VIA and so would not be affected by [Conceptual Amendment 1]. He added that in order for marijuana to be forfeited, it would have to be done under [paragraph (2) or (3)] of Section 2, but only if in violation of AS 11.71, which is where the provisions regarding medical marijuana are located. Therefore, if "it's legal under the medical marijuana law, it is not subject to seizure and forfeiture," he said.

REPRESENTATIVE BERKOWITZ, referring to [paragraph] (5) of Section 2, noted that it seems very broad. He asked whether a car used to pick up the dangerous, toxic, or hazardous materials, for example, would be subject to this type of forfeiture.

MR. GUANELI clarified that the phrase "dangerous, toxic, or hazardous" is intended to modify both "raw materials" and "equipment". So if it is simply a piece of ordinary equipment that is not otherwise dangerous, it would have to go through the normal forfeiture procedures. However, if it's part of laboratory equipment in a "meth lab" that gets tainted with very toxic materials and therefore becomes dangerous to even handle, it could just be [seized, forfeited, and destroyed].

Number 1450

REPRESENTATIVE BERKOWITZ asked whether there is a definition of dangerous, toxic, or hazardous anywhere that would apply here. He said his concern is that [this provision] starts to run pretty close to going afoul of the "takings clause."

MR. GUANELI said that there is no definition of dangerous, toxic, or hazardous provided in HB 373 or in any other statutes. He surmised that the police are going to have to use some common sense in applying this provision, and that if they take and destroy something that shouldn't have been destroyed, they're going to have to pay for it.

REPRESENTATIVE BERKOWITZ pointed out, however, that under Section 8, a court may not order the remittance of contraband listed in subsection (b) [of Section 2]. Therefore, he surmised, if the police fail to exercise discretion, then the court, according to Section 8, would be unable to order remittance.

MR. GUANELI, in response, said that if the police have determined that something is dangerous, toxic, or hazardous, they are likely going to destroy it. Therefore, as a practical matter, the court is not going to be in a position of ordering that that property, which has been destroyed, be given back. He said "the police are just going to have to write a check for it. He continued:

> They may make mistakes, but I think what we're talking about is ... laboratory equipment used in meth labs, we're talking about plants that are being grown in marijuana-growing operations, and we're not talking about cars that are being used to deliver drugs. Those have to go through the normal court procedures for forfeiture. We're just talking about things that need to be destroyed because it's difficult for the police to store them, it's hazardous for the police to store them, and it's best that they just be destroyed.

Number 1538

REPRESENTATIVE BERKOWITZ offered the following hypothetical situation:

> You have a regular commercial lab, one of the employees in the commercial lab is using some of the equipment and some of the materials there to produce a controlled substance. It seems to me, the way I read the language as it's configured now, the lab, innocent though it might be, would be subject to forfeiture, and then the lab owner wouldn't be allowed to get any kind of remittance.

MR. GUANELI responded that first of all, these kinds of things don't happen in commercial labs. They happen in clandestine labs that are hidden away, often in rural areas, in basements, or in trailers with blinds drawn and the windows painted or boarded over. They simply don't happen in commercial labs. But if they did, and if equipment was tainted or raw materials were

created that were hazardous to somebody's health as a result of somebody's illegal activity, he opined that law enforcement ought to deal with that situation and that the owner of the lab would probably be happy to have the police do so. And with regard to who is liable for the loss, he surmised that the offender would be liable to his employer for destroying or making toxic that person's equipment.

REPRESENTATIVE BERKOWITZ, referring to the one-sixth [standard], asked whether the tests the troopers performed to arrive at this figure would be made available for discovery purposes.

MR. GUANELI said that is a good question, and responded thus:

> Let's put it this way, the troopers conducted those tests, they have the results of those tests, but whether or not those tests would be available through ordinary criminal discovery -- the only way they would be relevant is to challenge the statute and try to invalidate the statutes, or show that the statute is arbitrary. And I'm not certain whether that would be available through criminal discovery or whether there'd have to be a specific court order. In other words, there are specific court rules that cover certain things that the state has to turn over to a defendant, and there are other things that the defendant has to ask for and prove that it would be relevant to the case, and I'm not sure in which category that would fall. I would think, however, that somebody challenging the validity of the statute would be able to, certainly, ask questions and get the results of those tests.

Number 1696

REPRESENTATIVE BERKOWITZ opined that "if we built a good record here, that would help circumvent the problem."

MR. GUANELI said he certainly agrees that the better the record built in the legislative forum, the less likely that a law would be subject to challenge, "and I think that's important."

REPRESENTATIVE BERKOWITZ said he has some concern about "a representative sample". He asked: "If, in these cases, weight is at issue, how can you have a representative sample? And who makes the determination of this representative?"

MR. GUANELI opined that this is going to be a matter of the police applying some common sense and probably consulting with the district attorney in determining what's representative. He added, "I agree that weights do become critical; if you're talking about methamphetamine, you may be talking about very, very small quantities, and in that case, my guess is that the troopers are probably going to preserve all of it." However, when talking about a marijuana-growing operation, it might involve many pounds. So in those cases, he offered, the trooper will probably call up the crime lab and ask how much marijuana would be needed to do a good test; the troopers are just going to have to apply some common sense in preserving enough so that an independent test could be performed.

CHAIR ROKEBERG said he appreciated that law enforcement and the DOL want flexibility, but mentioned that he, too, has concerns that enough physical evidence be retained. He asked Mr. Guaneli what he, in his capacity as district attorney, would advise when the troopers call him to find out how much contraband should be retained for a sufficient representative sample.

MR. GUANELI noted that the felony level threshold is one pound, and that means that if there are several plants that weigh six pounds, then under Section 1 that threshold will be met. He pointed out that there is also an additional requirement that photographs and other documentation be taken. He surmised that in very close cases, the troopers would be advised to keep all of the marijuana and just process it in the current manner. On the other hand, if the case involves a field of marijuana, or a basement full of marijuana, or twenty to thirty pounds of marijuana, he said he would not have any problem advising the troopers to follow the provisions of Section 1, take photographs, and preserve some for the representative sample. And in such cases, if someone wants to argue that there really wasn't twenty-five pounds, for example, then let the jury decide, he said. In response to questions, he said that to reach the felony level, there would have to be one pound of dried marijuana, 25 plants, or - under Section 1 - six pounds of "growing" marijuana that have been cut from the roots.

Number 1901

CHAIR ROKEBERG mentioned his concern that people would try to "game the system" by growing an amount of marijuana that is just under the felony level. He asked how many such cases there are in which the amount seized is close to the felony level as

compared to how many cases there are in which the amounts are far greater.

MR. GUANELI asked to defer that question to the representative from the state troopers.

REPRESENTATIVE BERKOWITZ, referring to Section 1, asked why the term "measured weight" is used instead of simply "weight".

MR. GUANELI surmised that it is simply a matter of drafting.

REPRESENTATIVE JAMES suggested that that term stipulates that the marijuana has to be weighed, and is simply an alternative to saying "one-sixth of the plant that has been weighed".

REPRESENTATIVE BERKOWITZ asked whether there is certification on the instruments that measure the weight and, if so, whether that certification is maintained on a regular basis.

MR. GUANELI said he did not know whether the gross weight of wet plants is determined at the crime lab using a precise electronic scale or by law enforcement out in the field using some other type of instrument. He remarked that in cases that are "close to the line," he would prefer the weight to be measured by a very precise scale, but in cases that are "way over the line," a less precise scale would be sufficient.

CHAIR ROKEBERG voiced concern that law enforcement might weigh the marijuana plants just after they have been watered, which would increase the plants' overall weight; he suggested that in order to ensure that law enforcement would not "hose the plants down" before weighing them, perhaps that portion of Section 1 should read: "one-sixth of the dry measured weight".

MR. GUANELI asked to defer that issue to the representative from the state troopers.

Number 2081

REPRESENTATIVE BERKOWITZ, referring to the language in Section 1 that says: "after the plant has been severed from its roots", asked where on the plant, exactly, would that severing occur. "My experience with plants is sort of limited, but I've severed things from the roots close to the ground, [and] I've severed things from the roots higher up the tree," he noted.

MR. GUANELI explained that the way the twelve tests were conducted, the plants were severed at the soil level or, if they were grown using hydroponics, at the water level.

REPRESENTATIVE BERKOWITZ noted that plants would not necessarily have to be severed at that level since nothing in Section 1 stipulates it.

MR. GUANELI pointed out that severing the plants higher up would favor the defendant.

REPRESENTATIVE BERKOWITZ remarked that all defendants should be treated equally, and if there is a lack of precision, there is the possibility that different defendants will receive different treatment.

MR. GUANELI noted that for almost 20 years, the troopers, national guard, and the other people who've been processing seized marijuana crops have had to operate under the statute that says: (1) the weight of the marijuana when reduced to its commonly used form", and although doing so involves a large amount of discretion, he has never heard it claimed that these people were leaving in a whole bunch of big, thick stalks to "jack up the weight." Notwithstanding this, he said he did not have any problem with inserting language stipulating that the plants will be severed at the soil level or the water level.

REPRESENTATIVE JAMES reminded members that law enforcement would also be taking pictures of [the plants].

REPRESENTATIVE MEYER predicted that additional testimony will indicate that law enforcement is "going after huge plantations/fields of marijuana" and, thus, the issue of whether the plants have been recently watered or whether they are cut right at the soil level is moot - it will still be a felony.

Number 2211

AL STOREY, Lieutenant, Commander, Statewide Drug Enforcement, Central Office, Division of Alaska State Troopers (AST), Department of Public Safety (DPS), testified via teleconference. He said that typically, the marijuana "grows" that the AST comes across, especially in the Mat-Su Valley, the Fairbanks area, and down in the Kenai-Soldotna area, range anywhere from 25 plants up to hundreds of plants and involve huge amounts of equipment - the most sizable being the lighting systems that are used to light these "grows," which are almost always indoor-type

[operations]. Once such equipment is confiscated, it takes an enormous amount of space to store it. In addition to the light systems, there are also the ballast systems that power those lights; humidifiers and dehumidifiers; fan systems; propane systems; and other systems that inject gas into the atmosphere to cause different growing functions within the plants. And, as Mr. Guaneli said, those plants can range from 20-24 inches tall to 7-8 feet tall.

LIEUTENANT STOREY said that a typical grow, if it has 25 plants or more, normally results in four felony counts under AS 11.71.040; those include possession of an ounce or more for distribution, possession of a pound if the dried weight of those plants exceeds a pound, possession of 25 plants, and using a dwelling or a shop for drug activity. He explained that when grows are found, the plants - sometimes hundreds of them - are taken back to the evidence-handling facility to be dried down to a usable form, which can take three to four days, and are then groomed down to the most commonly used form, as the current statute requires, by taking the [leaves and] buds off of the stems.

Number 2290

LIEUTENANT STOREY noted that in the trooper facility, there are certified scales that are used to weigh the marijuana to determine if the weight is in excess of a pound. If the marijuana is grossly over that weight, which it frequently is, it is reflected in the police report that the weight exceeded a pound for the purpose of that particular felony count. If the weight is near or close to a pound, the AST forwards the marijuana to the crime lab for measurement and forensic examination and identification. And while a person won't get charged the felony count of having 25 or more plants if he/she is growing less than that amount, it is not uncommon for the plants to be very large and easily exceed a pound when dried. He acknowledged that it would be a benefit to be able to use the one-sixth standard and thus avoid the three- to four-day process of "drying and grooming" all those plants, as well as cutting down on the storage space needed to process grows that contain several hundred plants and occasionally thousands of plants.

LIEUTENANT STOREY noted that even if HB 373 does become law, law enforcement would still have to do a bit of storing and a bit of drying because even the representative samples must be dried in order to avoid fungus growth. He mentioned that currently, it

typically takes 2 people to completely process a grow of 40 or 50 plants and prepare the end product for weighing and storage.

TAPE 02-37, SIDE B
Number 2373

LIEUTENANT STOREY said that commonly, there are two to three grows processed in "the Mat-Su" each week, and other grows are processed fairly frequently in other locations around the state. He noted that there is also the seized equipment to be dealt with and managed, including lifting fingerprints and disassembling it so that it takes up less space while being stored during the prosecution process, and finally, disposing of it after adjudication. All of this process, too, requires a huge number of hours, and he opined that the language in HB 373 pertaining to the management of evidence is a huge asset to law enforcement because it will alleviate this demand on time.

LIEUTENANT STOREY explained that when law enforcement confiscates a grow, they typically cut the plants two to four inches above the growing medium, although that is not a set rule. He added that sometimes the size and shape of the pots determines where the plant is cut, and that the pots the plants are grown in are no longer taken from the scene. He reiterated that at most contraband facilities, they have calibrated scales, and if "it's a close call," they will send the marijuana off to the crime lab to get the official weight, which is then attached to the police report. Referring to the one-sixth standard proposed by Section 1 and the tests used to formulate that standard, Lieutenant Storey surmised that those test results could be made available since there are no names attached to the spreadsheets; there are simply adjudicated case numbers.

MR. GUANELI, in response to a question, said that he does have a copy of that spreadsheet and will make it available to the committee after he creates a cover letter for it.

LIEUTENANT STOREY, in response to a question, said that the most potent part of the marijuana plant is the "bud" of the female plant, adding that the leaves, which are frequently sold in high-school-type environments, also contain tetrahydrocannabinol (THC). In response to further questions, he explained that under AS 11.71.040, a person can be charged with a class C felony for manufacturing, delivering, or possessing with intent to manufacture or deliver one ounce or more of a schedule VIA controlled substance, which is marijuana; for possession of a pound or more of marijuana; for possession of 25 or more

marijuana plants; or for maintaining a dwelling for the purpose of producing [marijuana]. With regard to retaining a representative sample, he acknowledged that HB 375 does not stipulate what size that sample should be. He surmised, however, that if there were a large amount of marijuana, a sample of two to four ounces would be appropriate, although there might also be instances of "smaller seizures" wherein two ounces would be sufficient.

CHAIR ROKEBERG asked Lieutenant Storey if he would prefer to have a fixed amount [listed in statute].

Number 2130

LIEUTENANT STOREY, in response, relayed that with the typical marijuana grow that the DPS seizes containing "mid-level and adult plants", a fixed amount would make it easier for the officers; they'd know exactly what the law is requiring. He added, however, that there are those cases where the plants have just been introduced into the growing cycle, for example, and the DPS would be hard-pressed to come up with an established, fixed amount even though it is still plainly marijuana; therefore, he opined, discretion is still needed for those types of grows.

REPRESENTATIVE BERKOWITZ asked what the street value is of 25 plants, for example.

LIEUTENANT STOREY, after noting that the amount could vary, said that if 25 plants were brought to maturity and were harvested at their peak, he expects that there could be between a half-pound and a pound of usable, saleable marijuana per plant. He also relayed that he had recently spoken with a subject who told him that he had just paid $4,800 per pound for marijuana that was on its way to Kotzebue. Lieutenant Storey added that the typical market value of a pound of marijuana "in this area" is between $2,000 and $4,500.

REPRESENTATIVE BERKOWITZ mentioned that perhaps the legislature ought to look again into the issue of a contraband tax.

CHAIR ROKEBERG, returning to issue of establishing a set amount for a representative sample, asked Lieutenant Storey whether he thought a one-ounce minimum would be acceptable.

LIEUTENANT STOREY opined that one ounce would be "a good minimum number," barring objection from Mr. Guaneli, since it would be

more than sufficient for any defense [issues]. In response to further questions, he said that there would be a huge savings in labor under HB 373, even though law enforcement would still have to process a certain amount of marijuana. He also pointed out that because marijuana dries out more as time goes by, law enforcement would have to collect a bit more than just a one-ounce sample if that were to become the minimum for a representative sample.

MR. GUANELI said that it is his preference, for a couple of reasons, that there not be any set amount in statute. One reason is that in smaller operations, an ounce may constitute a fairly large portion of that crop, and in some operations, there may not be one ounce total in the entire crop. Another reason not to specify an amount, he explained, is that it is not the weight of the representative sample that is critical. To take a representative sample does not mean that "you grab the first ounce that you see"; it means that you take portions from a few different plants so that it is representative of the entire crop. Consequently, to begin specifying how many plants to take samples from, or what percentage of the plants must be part of the sample, could demand a level of specificity that is not possible to apply uniformly in the field.

Number 1873

MR. GUANELI surmised that there have not been, and would not be, any problems preserving adequate samples of marijuana because, unlike a lot of other controlled substances, it is clearly marijuana. With a little bit of white powder, on the other hand, enough of it must be retained as a sample in order for an independent test to confirm whether it is cocaine, some form of heroin, some form of methamphetamine, or some other substance. He also noted that the crime lab in Alaska has not experienced the same sort of problems as have occurred elsewhere in the nation; "we've got good honest people running those tests, they produce reports that are pretty much relied upon without too much questioning ... and if [defendants] want to do some independent testing, they can." He reiterated that his preference is to "keep it the way it is" with regard to retaining a representative sample.

REPRESENTATIVE MEYER asked whether contraband would include growing lights, sprinkler systems, fans, "or whatever else that they're using."

MR. GUANELI relayed his belief that equipment that is just standard equipment - something that is not dangerous, toxic, or hazardous - has to go through the normal forfeiture procedures. The "shortcut forfeiture procedure" proposed by HB 373, which eventually leads to destruction of the item, is really designed for things that are inherently dangerous; therefore, equipment such as lights and "those kinds of things" are going to have to be stored for a while. So even though HB 373 will cut down on the amount of space needed for storing items seized from marijuana-growing operations, a certain amount of space will still be needed; "that's just the nature of the game."

CHAIR ROKEBERG noted that the current statute, which would become AS 17.30.110(a) if HB 373 were to become law, already lists what kinds of items are subject to the regular forfeiture procedure if used in violation of AS 11.71; by contrast, Section 2 of HB 373 stipulates which items shall be seized and summarily forfeited without need for further proceedings.

REPRESENTATIVE MEYER pointed out that (b)(5) of Section 2 refers to "equipment used," which, he surmised, would include things like lights and sprinkler systems.

REPRESENTATIVE BERKOWITZ offered that the term "dangerous, toxic, or hazardous" is intended to modify both "raw materials" and "equipment used". He asked for an example of what would constitute dangerous, toxic, or hazardous equipment.

Number 1690

MR. GUANELI reiterated that it would be the kind of property, particularly in a meth lab, that ends up becoming tainted or toxic as a result of exposure to chemicals. He agreed that it could be, for example, something like a vessel with a trace element inside it.

CHAIR ROKEBERG mentioned that that would be his interpretation of that language.

MR. GUANELI went on to say that in meth labs, everything that's been exposed to the fumes - including the carpet, the drapes, and the bedding - is potentially toxic. There was a case in Juneau, he relayed, where half of a duplex was used as a meth lab, and all of the items in that portion of the building had to be taken outside and burned. So some of the items in such a situation might be equipment and some of it might just be "other stuff," but the site still has to be cleaned up.

REPRESENTATIVE BERKOWITZ noted, however, that under the definition provided in HB 373, the drapes in Mr. Guaneli's example would not have been subject to forfeiture because they had not been used in the manufacture of a controlled substance.

CHAIR ROKEBERG said he agrees with that interpretation; it's just the vessel or whatever device or equipment that's used for the manufacture of the controlled substance, not the surrounding property, which could be handled by the current statute.

REPRESENTATIVE BERKOWITZ mentioned that Representative Guess has sponsored a bill dealing with the disposition of equipment and residences used for meth labs.

Number 1589

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration, testified via teleconference and said that the PDA's concerns center primarily around Section 9. She added that she'd had some questions about how the one-sixth standard proposed in Section 1 was arrived at, mentioning that there certainly could be some challenges to that standard and to those tests. Returning to the topic of Section 9 - disposition of contraband - she said that she has some serious concerns about whether this provision could withstand some challenges, particularly regarding the duty to preserve evidence. If, for example, there was a challenge to the accuracy of the weight using the one-sixth standard, but only a small sample was saved, then it could be problematic to prove that the weight used for charging purposes was really one-sixth of the total weight of the unprocessed crop. Not preserving enough of a representative sample could deny someone due process or a fair trial, she said. She suggested that the committee should be very careful with regard to how much is retained as a representative sample.

CHAIR ROKEBERG asked Mr. Guaneli if he knew of any case law allowing "for the reduction of the gross amount of evidence to be retained."

MR. GUANELI surmised that Ms. Wilson is raising two questions. One, does the legislature have the authority to establish a 6:1 ratio? He opined that it clearly does and that there is a rational basis for doing so. And, two, how does one determine the weight of something? He said he is having a little trouble understanding this question.

CHAIR ROKEBERG suggested that the question raised is: If one doesn't keep all six sixths, how can one be assured that one-sixth is really representative of the whole?

REPRESENTATIVE JAMES offered, "You weigh the whole thing, and you have that evidence, and then you have this one-sixth calculation, but in the meantime, you photograph what you've done."

MR. GUANELI noted that in criminal cases, the police seize lots of evidence, and it's not just drugs; it's anything in a house: cigarette buts, torn clothing, and ripped up books, and the police have a duty to preserve those things in a way that enables the defense to mount a credible defense. So with certain types of property, and some of that being property belonging to victims of theft, for example, there are some statutes that say "you don't just keep the TV in the evidence locker for two years while this case is in court"; the evidence gets photographed and identified, and then gets given back to the victim. Therefore, the idea behind photographing the entire marijuana crop is to give an indication of how much volume is there. And when those photographs are coupled with the sworn testimony of somebody who is using a certified scale, he opined, it is unlikely that person would commit perjury regarding the weight of the marijuana that in most cases is going to be way over the threshold limit for a felony.

Number 1336

REPRESENTATIVE BERKOWITZ said that the one-sixth standard seems like a general parameter but does not necessarily constitute a rational basis. He noted that Mr. Guaneli's previous testimony indicated that there is some variability in which, with high-quality plants, it might be a lower ratio, and that these are not all large grow operations. He also recalled that there is some question as to where on the stalk the plant is cut, which, according to testimony, is anywhere from two to four inches. Therefore, he reiterated, he is not convinced that [a 6:1 ratio] "constitutes a rational basis."

REPRESENTATIVE BERKOWITZ also said:

> We don't know whether these were two- to four-inch cuts, we don't know whether this was particularly fine- or poor-grade marijuana, we don't know when in the harvesting cycle these plants were cut, we don't

know whether there's a variability based on where plants are grown.

CHAIR ROKEBERG asked whether the THC level has to be tested.

REPRESENTATIVE BERKOWITZ noted that Section 1 pertains to the weight of the marijuana, not the THC level.

MR. GUANELI explained that the THC level is not a part of the required proof in a criminal case; it is the weight of the marijuana that is at issue, and one must simply establish that it is, indeed, marijuana. With regard to marijuana, he noted that there are statutes that say, when there is a mixture of substances such as with marijuana brownies, for example, not every little bit of marijuana has to be picked out and weighed; the entire mixture is weighed and if it meets the pound threshold, so be it. He opined that the legislature often has to deal with drawing lines that aren't always precise; for example, in the case of drunk driving, the legislature has recognized that there is some variability in intoximeter [instruments]. He opined that the one-sixth provision of HB 373 is a similar situation; since the bill addresses public safety issues and health and welfare concerns, and given that the test results show that the 6:1 ratio is very accurate over a wide range of tests, the legislature is justified in using that ratio.

Number 1171

REPRESENTATIVE JAMES pointed out that even if HB 373 passes, law enforcement could still process all the marijuana in the current fashion if, in certain cases, that proves to be best option.

MR. GUANELI said that is correct; HB 373 simply provides an option to law enforcement. When the weight of the marijuana is "right to the line," he said, law enforcement would be well advised to keep and process all of the material in the current fashion.

REPRESENTATIVE BERKOWITZ said he is not convinced that the legislature can just arbitrarily assign a number, opining that although 6:1 is probably close, there needs to be some concrete evidence showing a rational basis; peoples' liberties are going to be affected by what the legislature does, so there needs to be a rational basis for the conclusions reached.

REPRESENTATIVE JAMES surmised that that would mean continuing the current process.

CHAIR ROKEBERG opined that it would be ludicrous for the state to continue to expend that type of time, energy, money, and resources doing so.

REPRESENTATIVE BERKOWITZ said, "if you want smaller government, you can just decriminalize everything," but since the legislature has made a policy choice not to do that, "we have to pay for the enforcement of criminal statutes." But at the same time, he noted, "we" have to recognize that there is a criminal justice system in place whereby the defendants have rights, and part and parcel of a criminal trial is that the burden of proof remains with the state.

CHAIR ROKEBERG asked Lieutenant Storey: How big was the largest marijuana-growing operation you know of?

Number 0983

LIEUTENANT STOREY recalled that back in the mid-80s, there was a grow consisting of 2,400 plants, although the typical size they come across now ranges between 35 and 125 plants. In response to questions, he confirmed that the current process does involve drying and grooming all the plants in order to arrive at a total weight. In cases of very large grows, often the plants are laid out on all the open spaces of the evidence facilities and dried with fans, which can typically take up to five or six days, and up to eight people to process the entire grow. On the other hand, smaller grows - 30 to 100 plants - are managed by two to three people over a three- to five-day period, he added.

LIEUTENANT STOREY, in response to further questions, confirmed that passage of HB 373, with its one-sixth standard, would result in cutting down on the drying process; law enforcement would simply obtain representative samples, perhaps three to four ounces of wet material, and after consultation with the DOL to ensure that enough has been retained, the remaining marijuana would be destroyed. He did note, however, that he could not, at this time, provide an exact amount of how many man-hours would be saved by passage of HB 373, but opined that it could be a 90 percent or better reduction. He also noted that although he could not recall the exact amount, the current electric bill for such processing is enormous.

REPRESENTATIVE BERKOWITZ said that the concerns he has do not pertain to the large grows, but rather with the small, single-plant kind of operations. He opined that any potential problems could be resolved by having a representative sample that is larger than the amount necessary to qualify as a felony. In this way there is not the problem of measurements being significant.

CHAIR ROKEBERG surmised that that's what Mr. Guaneli is saying.

REPRESENTATIVE JAMES said that that is the point she made; if a pound is needed, then more than a pound should be retained. She then asked whether any photographs or videotapes are produced during this process.

LIEUTENANT STOREY explained that typically, when law enforcement goes to a marijuana grow, everything is photographed and videotaped as it is found, paying particular attention to the wiring, timing meters, watering mechanisms, and other sophisticated items, to show that the person is involved in an organized criminal effort. Also, hand diagrams are made, which are then attached to the police reports, to illustrate the size of the operation. All of this is done as a matter of routine, he assured the committee.

Number 0690

CHAIR ROKEBERG, after noting that Representative Berkowitz still maintains "that there is not a rational basis," asked Mr. Guaneli if a solution would be to insert a standard that the representative sample is not to exceed two pounds. For example, if the case involved a grow that had 1.1 pound.

REPRESENTATIVE BERKOWITZ opined again that everything would have to be retained unless the representative sample exceeded the amount necessary to qualify for the crime. Preserving as much as possible for the representative sample so that the amount is over what is required for the crime would avoid any question of whether the sample was truly representative, he added. He noted that there might be an occasion where it would be best to save more than two pounds.

MR. GUANELI added that there might be occasions, with very large growing operations, where even a representative sample of 10 percent could exceed two pounds, so to have maximum limit on what should be retained would preclude taking a proper representative sample. He indicated that he would almost rather

see it as "some intent language in the troopers' budget" that they start destroying marijuana in order to save money.

REPRESENTATIVE BERKOWITZ again mentioned the issue of a contraband tax.

CHAIR ROKEBERG suggested that perhaps after the words "one-sixth the" on page 1, line 10, the word "dry" could be inserted, so that it would read: "one-sixth the dry measured weight". He asked whether such a change would be harmful to the administration.

LIEUTENANT STOREY suggested that unless there is suspicion that law enforcement would water the plants down before weighing them, insertion of the word "dry" will lead to confusion on whether it means plants should be dried to their usable form before being weighed. He assured the committee that typically, upon arrival at the grow, law enforcement finds plants in a healthy, growing state and not overly damp; he opined that this is the state in which the plants should be weighed.

Number 0493

MR. GUANELI added that in most marijuana-growing operations, because they are indoors, it is not as though they have fire sprinklers from above watering them; instead, they are watered from below, at the base of the plant. So, ordinarily, there won't be any excess moisture on the plants.

LIEUTENANT STOREY confirmed that Mr. Guaneli is correct: the plants are typically watered either at the soil level or via the growing medium.

CHAIR ROKEBERG withdrew his suggestion. He then returned to [Conceptual Amendment 1] and asked whether it should say "United States" or "United States of America".

MR. GUANELI said it was the committee's choice.

REPRESENTATIVE BERKOWITZ asked who would be determining whether a controlled substance has an accepted medical use in treatment. He noted that there is a wide range of what people might consider as an accepted medical use.

REPRESENTATIVE JAMES asked for an example of what could be a schedule IA or IIA controlled substance.

MR. GUANELI explained that schedule IA controlled substances are generally opiates but also include morphine and codeine, both of which do have accepted medical uses; schedule IIA controlled substances include mescaline, peyote, and methamphetamines, but also include the active ingredients of Quaaludes, which do have some accepted medical uses as well. He opined that there wouldn't be much question of which items in those two schedules have accepted medical uses. In response to questions, he said that the items in those schedules that do have accepted medical uses are all prescription drugs; however, a laboratory, doctor, or others may possess them.

MR. GUANELI said that although Representative Berkowitz's concern regarding who would be making the decision about the accepted medical use or whether it is possessed in violation of AS 11.71 is a legitimate one, he opined that the committee needs to recognize that the items in these two schedules are, essentially, inherently dangerous substances. He surmised that the police will have to be relied upon to only get rid of items that are difficult or dangerous to "hold." In response to questions, he confirmed that morphine is an opiate, and explained that if someone was in illegal possession of it, subsection (b)(2) of Section 2 would apply. He said that [Conceptual Amendment 1] is specifically designed to allow laboratories, medical offices, and pharmacies to possess these prescription drugs or the substances that create them, if they are possessed legitimately.

REPRESENTATIVE BERKOWITZ opined that [Conceptual Amendment 1] is confusing. He mentioned that there was a big debate that reached the U.S. Supreme Court regarding peyote, for example.

CHAIR ROKEBERG said it is debatable whether there is a current accepted medical use for peyote.

REPRESENTATIVE BERKOWITZ said that there is arguably a religious use for peyote. He also mentioned that Section 8, which says that the court may not order the remittance of contraband, is not discretionary, since "may not" is almost always read as "shall not".

MR. GUANELI said that currently, peyote is a schedule IIA drug. If someone possesses it, he/she is guilty of a crime. If there is some religious exception to that, he opined, then that point could be litigated in the courts, but right now it is a criminal offense. He noted that subsection (b)(2) of Section 2 gives the police the discretion to destroy the peyote, which is a far cry,

he added, from what exists in Alaska law, which says someone could go to jail for it.

TAPE 02-38, SIDE A
Number 0035

CHAIR ROKEBERG made a motion to adopt Conceptual Amendment 1, page 2, line 2: after "substance" insert "that has no currently accepted medical use in treatment in the United States". There being no objection, Conceptual Amendment 1 was adopted.

Number 0070

REPRESENTATIVE BERKOWITZ made a motion to adopt Amendment 2, on page 5, line 9, after "contraband", to insert "seized". He said that without the word "seized", the sentence does not make sense because AS 17.30.110(b) is only a list of items.

CHAIR ROKEBERG noted that there was no objection. Therefore, Amendment 2 was adopted.

Number 0144

REPRESENTATIVE JAMES moved to report HB 373, as amended, out of committee with individual recommendations and the accompanying zero fiscal notes.

Number 0167

REPRESENTATIVE BERKOWITZ objected for the purpose of discussion. He said that he still hasn't been shown that there is a rational basis for the 6:1 ratio; he is concerned about the forfeiture provisions as they pertain to equipment; and he is concerned about the representative samplings provision because it poses potential evidentiary problems.

CHAIR ROKEBERG, speaking to the 6:1 ratio, surmised that the committee's discussion and the record formed for HB 373, combined with Mr. Guaneli's forthcoming cover letter regarding the 12 tests performed by the DPS, do give it a rational basis.

REPRESENTATIVE BERKOWITZ said that good science is something that can be recreated under laboratory conditions, and if the DPS could recreate the 6:1 ratio on a regular basis, that's one thing, but that's not what the variables in this test [indicate]. There are different types of research, he noted, and while the research that the troopers did was probably fine

in terms of making a rough determination, he opined that in terms of leading to some kind of scientific conclusion, it [falls short].

CHAIR ROKEBERG noted that while there is good science and sound science, there are also practical applications to which the troopers are adapting. He opined that the use of a representational sample should be adequate given that there are other states, as well as the federal government, that use similar methods for weighing marijuana.

REPRESENTATIVE BERKOWITZ warned that whatever savings are achieved with "a smaller warehouse, you will burn up in increased litigation on this [issue]."

REPRESENTATIVE BERKOWITZ then withdrew his objection.

Number 0366

CHAIR ROKEBERG, hearing no further objection, stated that CSHB 373(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 0421

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