ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 12, 2003
1:04 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative John Coghill
Representative Jim Holm
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 114
"An Act relating to the issuance of a search warrant."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

HOUSE BILL NO. 77
"An Act allowing certain motor vehicles to be operated while unattended."

- HEARD AND HELD

HOUSE BILL NO. 83
"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

- MOVED CSHB 83(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 49
"An Act relating to the DNA identification registration system; and providing for an effective date."

- MOVED CSHB 49(JUD) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 114
SHORT TITLE:ISSUANCE OF SEARCH WARRANTS
SPONSOR(S): RLS BY REQUEST

Jrn-Date	Jrn-Page		Action
02/19/03	0253	(H)	READ THE FIRST TIME - REFERRALS
02/19/03	0253	(H)	JUD
02/19/03	0253	(H)	REFERRED TO JUDICIARY
03/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/07/03		(H)	Meeting Postponed to 03/10/03
03/10/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/10/03		(H)	<Bill Hearing Postponed to 3/12>
03/12/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 77
SHORT TITLE:RIGHT TO LEAVE CAR RUNNING
SPONSOR(S): REPRESENTATIVE(S)LYNN

Jrn-Date	Jrn-Page		Action
02/05/03	0131	(H)	READ THE FIRST TIME - REFERRALS
02/05/03	0131	(H)	JUD
02/05/03	0131	(H)	REFERRED TO JUDICIARY
02/07/03	0155	(H)	COSPONSOR(S): CROFT
03/12/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 83
SHORT TITLE:REVISED UNIFORM ARBITRATION ACT
SPONSOR(S): REPRESENTATIVE(S)BERKOWITZ

Jrn-Date	Jrn-Page		Action
02/07/03	0148	(H)	READ THE FIRST TIME - REFERRALS
02/07/03	0148	(H)	JUD
02/07/03	0148	(H)	REFERRED TO JUDICIARY
02/10/03	0174	(H)	COSPONSOR(S): MOSES
03/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/07/03		(H)	Meeting Postponed to 03/10/03
03/10/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/10/03		(H)	Heard & Held MINUTE(JUD)
03/12/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 49
SHORT TITLE:EXPAND DNA DATABASE
SPONSOR(S): REPRESENTATIVE(S)ANDERSON, HAWKER

Jrn-Date	Jrn-Page		Action
01/21/03	0044	(H)	PREFILE RELEASED (1/17/03)
01/21/03	0044	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0044	(H)	JUD, FIN
01/21/03	0044	(H)	REFERRED TO JUDICIARY
01/31/03	0107	(H)	COSPONSOR(S): HOLM, SAMUELS
02/12/03	0201	(H)	COSPONSOR(S): LYNN, KOOKESH, WOLF,
02/12/03	0201	(H)	WILSON
02/14/03	0219	(H)	COSPONSOR(S): WEYHRAUCH
02/18/03	0232	(H)	COSPONSOR(S): GATTO
02/21/03	0274	(H)	COSPONSOR(S): SEATON
02/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
02/28/03		(H)	Heard & Held MINUTE(JUD)
03/05/03	0451	(H)	COSPONSOR(S): HEINZE
03/12/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska
POSITION STATEMENT: Presented HB 114 on behalf of the administration.

MATTHEW C. LEVEQUE, Lieutenant
Field Operations Coordinator
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 114.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 114.

WILLIAM MOFFATT, Staff
to Representative Bob Lynn
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 77 on behalf of the sponsor, Representative Lynn.

RON G. KING, Program Manager
Air Non-Point & Mobile Sources
Division of Air & Water Quality
Department of Environmental Conservation (DEC)
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 77.

JENNIFER RUDINGER, Executive Director
Alaska Civil Liberties Union
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 49.

THERESA WILLIAMS, President
Parents of People (POP)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 49.

LAUREE HUGONIN, Executive Director
Alaska Network on Domestic Violence & Sexual Assault (ANDVSA)
Juneau, Alaska
POSITION STATEMENT: Suggested amendments and responded to questions during discussion of HB 49.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 49.

CHRIS BEHEIM, Director
Scientific Crime Detection Laboratory ("Crime Lab")
Department of Public Safety (DPS)
Anchorage, Alaska

POSITION STATEMENT: Testified on HB 49, Version I, and answered questions.

JUANITA HENSLEY, Special Assistant
Office of the Commissioner
Department of Public Safety (DPS)
Juneau, Alaska
POSITION STATEMENT: Testified on HB 49, Version I, and answered questions.

ACTION NARRATIVE

TAPE 03-19, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:04 p.m. Representatives McGuire, Holm, Coghill, Samuels, Gara, and Gruenberg were present at the call to order. Representative Anderson arrived as the meeting was in progress.

HB 114 - ISSUANCE OF SEARCH WARRANTS

Number 0099

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 114, "An Act relating to the issuance of a search warrant."

Number 0122

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), explained that HB 114 was requested by the Alaska Supreme Court in order to clear up a technical problem with the way in which police officers are allowed to petition the court for the issuance of a search warrant. Right now, a police officer who needs a search warrant has a couple of options. He or she can either submit an affidavit to the court that explains the reasons for the warrant, or he/she can appear in person. And that system works just fine as long as the police officer and the judge are in the same community. It doesn't work so well when they're not in the same community. The current statute allows officers to fax in affidavits in support of search warrants and [to provide] telephonic testimony in support of search warrants, but only under very narrow circumstances:

neither can be done unless the item to be searched is in danger of being lost or destroyed.

MR. WOOLIVER relayed that this current standard is one that is simply unmet in lots of circumstances. A common situation involves bootleg liquor in villages. In Togiak, for example, village police seized a container they had reason to believe contained bootleg alcohol. However, since they had seized it - they had it in their possession - it was no longer in danger of being lost or destroyed; therefore, the officers could neither fax in their application nor testify telephonically in support of a search warrant. The current practice in such situations, he relayed, is for the officer in the field to phone in to an Alaska State Trooper (AST) office in a larger community - for example, Dillingham - and relay the circumstances of the situation to a trooper there, whereupon that trooper either fills out an affidavit and submits it to a court or testifies in person before the court.

MR. WOOLIVER said that another situation which occurs frequently involves the road system. He offered the following as an example. In a situation involving a drug case in Talkeetna, a couple of Alaska State Troopers will be called to a residence at night, and when they arrive, they detect the distinct odor of a "marijuana grow," perhaps in a shed by the house. Since the troopers are there on location, the evidence in the shed is no longer in danger of being lost or destroyed. The common practice in such situations has been for one Trooper to stay at the site - in Talkeetna, in this example - while the other trooper drives all the way into Anchorage - because [in this example] that's where a magistrate is available at night - testifies before the court, gets a search warrant, and drives all the way back to Talkeetna to serve it. In the meantime, the other officer, and, if necessary, perhaps other officers as well, must stay on site all this time to ensure that nothing happens to the evidence. Mr. Wooliver characterized this delay as a pointless waste of time for both the officer driving into Anchorage and for the officer waiting at the site "for four hours."

Number 0362

MR. WOOLIVER explained that HB 114 does two things. One, it would allow faxed affidavits unconditionally. He relayed that according to one judge, a fax is just another way to get the mail, and whether the affidavit that's sitting on the judge's desk arrived because someone delivered it in person through the

court clerk or because the court clerk picked it up off the fax machine is simply irrelevant for the judge's purposes. He opined that this feature would "help solve the Togiak situation"; the officers in Togiak could directly fax the court, rather than having to go through the AST office in Dillingham. The other change proposed by HB 114 would expand the circumstances under which a court could accept telephonic testimony. This change would affect cases in which the delay that would otherwise occur, if they weren't to do that, would interfere with an ongoing investigation. The purpose of that change, he remarked, is to alleviate the need for the troopers in the Talkeetna example to drive all the way into Anchorage.

MR. WOOLIVER characterized the changes created by HB 114 as, "Two fairly small, common-sense fixes to what is admittedly not a huge problem, but it seems like a needless inefficiency in the system." He relayed that in talking with the AST and the Department of Law (DOL), there is one change that has been suggested for HB 114: on page 1, line 11, after "in", delete "a significant". He suggested that the term, "a significant" is unnecessary, and that it might possibly add more confusion. In closing, he pointed out that HB 114 does not, in any way, change the standard that must be met before a judge can issue a search warrant. All HB 114 does is allow a more efficient way to get the question before the judge so that he/she can rule on the merits of the application, he opined.

REPRESENTATIVE GRUENBERG asked what the term "or other appropriate means" refers to.

MR. WOOLIVER replied that that term is part of existing language and has been in place since 1982.

Number 0556

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

Page 1, line 11:
Following first "in"
Delete "**a significant**"

CHAIR McGUIRE asked whether there were any objections. There being no objection, Amendment 1 was adopted.

REPRESENTATIVE COGHILL asked whether there are protocols in place to ensure that only authorized personnel provide telephonic testimony.

MR. WOOLIVER said that there are procedures in place, adding, "You have to be sworn in by the court, and it is on the record." He pointed out that this method is already allowed under current statute, though only in narrow circumstances.

The committee took an at-ease from 1:15 p.m. to 1:17 p.m.

REPRESENTATIVE GARA said he had thought that in order to get a search warrant, a law enforcement officer had to either present himself/herself personally to a judicial officer "or do it by telephone." "I didn't realize that you could get a search warrant with just a paper affidavit," he added. He offered his observation that HB 114 doesn't appear to be "changing that rule any."

MR. WOOLIVER confirmed that currently, a law enforcement officer can get a search warrant with an affidavit without having to present in-person testimony before the court.

REPRESENTATIVE GARA opined that the more checks there are to ensure that a search warrant is valid, the better. He also opined that the current system which requires an Anchorage police officer to come before the court to ask for a search warrant is a good one. He said that he did not want to make it easier for police officers in urban areas to avoid "the testimony part." The way HB 114 is currently written, he noted, a telephonic application is acceptable if it can be shown that testifying in person will cause delay." But since testifying in person will always cause delay, he remarked, the only thing further that needs to be done is for the officer to prove that it might also interfere with an ongoing investigation, which could conceivably be claimed if the officer is forced to wait in court for a half hour.

Number 0783

REPRESENTATIVE GARA made a motion to adopt Amendment 2, on page 1, line 14, after "might", to insert "materially". He explained that this change would force the officer seeking a search warrant to show that the delay "might materially interfere with an ongoing investigation". Merely because an officer has to sit in court for a half hour is not sufficient, he opined.

REPRESENTATIVE SAMUELS objected.

MR. WOOLIVER remarked that Amendment 2 might create the same potential problems that the term "a significant" posed. He offered that judges tend to prefer in-person testimony whenever possible, and suggested that they will use their discretion to ensure that officers in urban areas do not abuse the new provisions of HB 114.

REPRESENTATIVE SAMUELS agreed with Mr. Wooliver. Additionally, he suggested that "materially" would be open to each individual judge's interpretation.

REPRESENTATIVE GARA said that his concern is that they are relaxing the standards that apply when the government is being given the authority to obtain a search warrant to go into somebody's home. He relayed that he did not want the court to be able to interpret HB 114 as a "green light" to start doing "facsimile search-warrant requests," which, he opined, could be the way the bill will be interpreted, since neither "a significant" nor "materially" is included in the language. He elaborated:

> I think it's a good thing to require somebody to stare somebody in the eye and prove that they're not flinching when they ask for something. It works very well throughout the criminal [justice] system. So, ... I would request that the term "materially" be put in there. I would certainly state on the record that the Talkeetna situation - the out-of-town situation that the [ACS] mentioned - would constitute a material interference. And to the extent the [ACS] were comforted with ... the sponsor of the amendment's intention, that we do intend to allow the Talkeetna folks and folks from out of town who are trying to get search warrants in a more expeditious way, that we agree with that, and that even with the term "materially" in the bill, we agree that that's an appropriate way to get a search warrant. But I'm not thrilled about going any further than that.

Number 1084

REPRESENTATIVE COGHILL said that although he tended to agree with the discussion, he didn't know that "putting it in the language of this bill will be important." He asked, if a court were to see an increase in faxed requests within an urban area,

whether that would create enough of a red flag within a district that the court could then start requiring in-person requests instead. He said that he wants assurance that the ability to fax in search warrant requests will not be abused.

MR. WOOLIVER said that under HB 114, faxed requests would always be allowed, in the same way that written affidavits are always allowed without the need for personal testimony; it makes no difference to the court whether an affidavit is dropped off or faxed in. He explained that oftentimes, there is no personal testimony on an affidavit, even under current law, and to the extent that the court wants personal testimony, HB 114 would allow that to occur via the telephone in more cases, though still not in all cases.

REPRESENTATIVE ANDERSON remarked that he agrees with Mr. Wooliver's comments regarding the possible effects of Amendment 2, and with Representative Samuels's comments regarding interpretation.

Number 1230

MATTHEW C. LEVEQUE, Lieutenant, Field Operations Coordinator, Division of Alaska State Troopers, Department of Public Safety (DPS), on the issue of Amendment 2, said:

> At this point, a Trooper can simply present a search warrant affidavit and never see the judge, and [there are] a number of cases I can remember where I never got to see the judge. So the eyeball-to-eyeball scrutiny doesn't happen ..., in many cases, even when a trooper or a police officer is collocated - as our courthouse in Palmer, for example, and the Trooper post are - virtually within a couple of blocks of one another. So I don't believe ... that the eyeball-to-eyeball issue is significant from the Troopers' perspective.
>
> It does seem that Representative Gruenberg's amendment that passed with respect to deleting the words "a significant" is somewhat put aside by adding back in "materially". And I don't believe that any law enforcement agency is interested in trying to abuse a judge's discretion, in particular because we're just going to find that if there are issues with the search warrant, that they'll come up at evidentiary hearings later. And as a matter of fact, we would prefer to

find judges who will closely scrutinize our search warrant applications to find flaws so that we don't run down directions that ... are inappropriate.

Number 1353

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration, said:

As previously testified, this bill would loosen the circumstances under which a judge or magistrate could grant a search based on telephonic testimony, and also fully allow all faxed affidavits sent in application of a search warrant, without any special findings whatsoever. A police officer in Anchorage could fax an affidavit, and do no more than that, and let the application lie on the faxed affidavit - no other showing required. Under current law, the norm is that you require a police officer or a Trooper seeking a search warrant to deliver an original sworn affidavit or mail it, or appear personally to testify in application for a search warrant. This is because under our constitution, we require that a search warrant not issue but on probable cause and that it's supported by oaths or affirmation. This is based on our constitution - Alaska and federal constitutions; in ours it's Article I, Section 14.

An exception was carved out in the current statute that is sought to be amended by this bill, to allow faxed affidavits and telephonic testimony. So, under current law, you can submit a faxed affidavit and telephonic testimony instead of personal testimony or an original affidavit, but only when the delay in appearing personally or presenting an original affidavit will result in the loss or destruction of the evidence that is sought to be searched or destroyed. Now this bill seeks to eliminate any restriction whatsoever on the use of faxed affidavits in seeking a search warrant. This will likely result in faxes becoming the norm, not the exception, even in urban communities, not just in the targeted rural situations identified, where the officer seeking the warrant and the magistrate are in different communities.

Number 1452

MS. WILSON continued:

> In our [Alaska Rules of Criminal Procedure] governing grand jury proceedings ... -- and the reason I bring them up is because they are similar to search warrant proceedings in that they are one-sided; there's no right for the defendant or the owner of the property to be searched to participate in the proceedings or to present his or her arguments or evidence .... In a grand jury situation, telephonic testimony is allowed only when the witness that is speaking - to testify - telephonically would be required to travel more than 50 miles to the location where the grand jury is sitting, or they live in a place from which people customarily travel by air to the place where the grand jury is sitting.
>
> Limiting the acceptance of both faxed affidavits and telephonic testimony in support of a search warrant to a similar situation as presented in a grand jury context - with the added requirements that the delay in obtaining a search would otherwise result if the officer had to appear personally or send an original affidavit, and that that delay would result in the loss or destruction of property or interference with an ongoing investigation - would certainly keep a tighter rein on the process for obtaining a search warrant than suggested in this bill.
>
> Now, why is the Public Defender Agency concerned? And why should there be concern, on your part, with the process for obtaining a search warrant? [It's] because it's very difficult to suppress evidence seized pursuant to a search warrant. They are given preference of validity, and a great deference is given to a magistrate's determination of probable cause for the issuance of a search warrant. A search warrant will not be overturned unless there is an abuse of the magistrate's discretion, and the evidence is always viewed in a light most favorable to upholding the search warrant. So there's definitely a deference given to a search warrant.

Number 1569

MS. WILSON went on to say:

Now, the [PDA] has a concern with the scope of this bill because it seems to be broader than the problem that was identified specific to Bush areas, and it may not be that serious of a problem, and the scope of this bill may be larger than that needed. ... There is also a concern that if it were so serious, we certainly probably would have heard and had proposed legislation from [the Department of Public Safety (DPS)] representing the Troopers and the police officers involved, [rather than from just the ACS]. Would there be more challenges under this proposed bill if it were to pass? Possibly, yes, but the challenges would certainly be difficult.

Under this exact same statute, to suppress evidence seized or searched under a search warrant issued under these special circumstances proposed, which would be a fax or one telephonically, the statute requires there has to be a finding of bad faith. And that's under [subsection] (f) of this statute, ... [AS 12.35.015, which] provides that absent a finding of bad faith, evidence obtained under a search warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances did not support its issuance under (a) of this section. And (a) is the [subsection] that's being proposed to be amended.

But there certainly may be situations where, in a fax, let's say, where let's say one or more pages of a faxed affidavit that wasn't paginated are not received by the courts, but yet the search warrant is issued based upon the pages received. It may not have been, had all the pages been received. But if there was no finding of bad faith, does the search warrant stand? ... An original affidavit has that seal of the notary that is very obvious and visible. A faxed [affidavit] would not have that authenticity. So there may be challenges to the authenticity of the faxed affidavit on the question of who prepared it, [and] whether ... the original matches the one that was sent.

There also may be ... challenges to the circumstances that supported the testimony ... - the special procedures of the telephonic testimony. For example, would the personal testimony have really resulted in a delay in obtaining or executing a search warrant? And

would the delay really have interfered with an ongoing investigation? And from the description of wanting to modify it by the word ["materially"], it certainly raises questions to having most applications for search warrants, even in Anchorage, submitted telephonically, because, arguably, any inconvenience in going to the courthouse could arguably result in interfering with an ongoing investigation. So that language, also, is pretty broad.

Number 1703

MS. WILSON concluded:

> So while the [PDA] recognizes that it may be difficult and challenging, sometimes, for an officer to obtain a search warrant in a remote location when the community is away from the magistrate, this proposed legislation ... seems too broad for the narrow problem identified, and may not be necessary, especially in light of the overarching constitutional rights and protections that are involved in protecting people from unreasonable searches and seizures. I thank you very much for allowing me to testify ....

REPRESENTATIVE GARA withdrew Amendment 2. He offered that it does not do what he intended it to do. In addition, he said that he no longer supports the bill because it doesn't do what it's intended to do. He elaborated:

> I think the bill could be much better drafted, where the perceived problem relates to out-of-town police officers and the inconvenience or sometimes impossibility of getting into town in time. And I'm sympathetic to that, and I think we could deal with that problem, but I don't think this bill does it. This bill is written too broadly. So my amendment doesn't solve the problem, but I don't think the bill solves the problem.

CHAIR McGUIRE asked Mr. Wooliver to comment on the language used with regard to grand juries as mentioned by Ms. Wilson. She said she likes that language, and opined that perhaps it might be a better solution to the problem.

MR. WOOLIVER remarked that he has not looked "at the grand jury language" and thus does not know what such an amendment might

necessarily look like. He reiterated that since affidavits can currently be mailed in, from the court's perspective it makes no difference whether an affidavit has been mailed in or faxed in. The constitutional standard for issuing a search warrant doesn't change; probable cause must still be shown. He said that he is not aware that lost fax pages are a problem, and indicated that he does not see the possibility of not having the final page with the signature and the notary as being a significant problem.

CHAIR McGUIRE asked: "Is the bill designed to get at the problem that you stated? Or is it really designed to open up the law to allow for faxes within an urban area?" She opined that this should be decided, adding that it is either one way or the other.

Number 1874

MR. WOOLIVER said that HB 114 would do both. It would allow any faxed affidavit, just as any affidavit can be mailed. He suggested that when technology improves, [the ACS] will be back before the legislature petitioning for the allowance of electronic transmissions. He noted that the provision in HB 114 regarding telephonic testimony is a minor change to the current statute, which is more narrowly tailored to accept other circumstances.

CHAIR McGUIRE, on the issue of faxed affidavits, remarked that the concern of many revolves around the fact that an affidavit involves minimal steps. The question being raised, she observed, is, as a policy, does the legislature want to eliminate that extra step of testifying in person, which some believe is one more check to ensure that people are not abusing the system. Chair McGuire said that she agrees with Ms. Wilson with regard to the difficulty of suppressing evidence obtained by a search warrant. Chair McGuire said that her original understanding of the bill was that it would address a problem encountered in rural areas; she did not understand that it would open up, to urban areas, a method of faxing in affidavits. She opined that faxing in affidavits will become the norm, not the exception: "Why would you take the time to go down to the courthouse with the original affidavit when you don't have to?"

REPRESENTATIVE SAMUELS said that to him, there would be no difference between faxing in an affidavit and mailing it.

REPRESENTATIVE GRUENBERG said that although he generally supports HB 114, he does see some problems with it. He recommended that the bill be worked on a bit and changed so that there is one provision dealing with affidavits and another provision dealing with oral testimony. With regard to affidavits, he relayed that he has had a lot of experience in his civil practice dealing with faxed documents, "and it's quite an issue." There can be problems with faxed documents, he said, adding that "you can have a lengthy affidavit of 25 pages or [more] ... and [with] somebody just leafing through it very quickly for the purpose of ... an emergency search warrant, which often have to be done quickly, they could miss a page."

REPRESENTATIVE GRUENBERG also relayed that he has litigated the issue of the validity of a signature. Sometimes the signature is light, or is written in blue or red ink, and it doesn't come through very well. So on this point, with regard to a provision dealing with affidavits, he said that he would like the bill redrafted to require the judge to make some findings on the acceptance of the faxed affidavit in place of the original, and to require that the original affidavit be filed as well. In this way, it can later be verified by the attorneys or during a review in court that the faxed affidavit is in fact a true and complete copy of the original and that the signature is genuine. He remarked that he has had a trial regarding whether a signature was forged.

REPRESENTATIVE GRUENBERG, on the issue of oral testimony, explained that the time constraints regarding a grand jury are much different; in a grand jury, jurists are determining whether there is probable cause to indict a person. On the other hand, with a search warrant, there can be a real emergency. "So I see the time exigencies being somewhat different," he concluded.

Number 2197

CHAIR McGUIRE announced that for the purpose of creating acceptable substitute language, HB 114 would be [held over and] assigned to a subcommittee consisting of Representative Coghill, Samuels, and Gruenberg.

HB 77 - RIGHT TO LEAVE CAR RUNNING

Number 2237

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 77, "An Act allowing certain motor vehicles to be operated while unattended."

Number 2248

WILLIAM MOFFATT, Staff to Representative Bob Lynn, Alaska State Legislature, said on behalf of Representative Lynn, sponsor, that HB 77 was introduced in response to a January 29, 2003, Anchorage Daily News article titled "REMOTE CONTROL Starting car from afar is just the ($40) ticket." He relayed that the article describes how a lady received a traffic ticket for starting her unattended car with a remote starter. He said that the violation is based on a 1978 Anchorage municipal code. However, he added, current state law also prohibits people from leaving unattended vehicles running. He opined that this state prohibition is obsolete.

MR. MOFFATT referred to a legislative research report dated February 18, 2003, which relayed [that the Consumer Electronics Association estimates] that approximately one million remote car starters were sold [industry-wide] in 2002, with a typical increase in sales of 10 to 15 percent per year. He mentioned that General Motors Corporation has announced plans to offer remote starters as a factory option on certain 2004 automobile models. He said that according to six dealers in Anchorage, 11,000 remote starters were sold in 2002; and according to three dealers in Fairbanks, 4,400 were sold in 2002. He posited that these numbers probably represent only 40 to 50 percent of remote starter sales statewide. He offered his estimation that approximately 10 to 15 percent of all Alaskan vehicles have remote starters.

MR. MOFFATT observed that due to extremely cold climates in several areas of Alaska, it has long been common practice for drivers to leave automobiles running unattended, while business is conducted indoors nearby. He suggested that failure to leave an automobile running during extremely cold whether might result in the car not restarting. Thus, he opined, the law should make allowances for Alaska's weather conditions. In closing, he said, "HB 77 will repair the current obsolete law, and permit an automobile to have its engine running, so long as the vehicle is locked and is not occupied by a child under 14 or by a disabled person."

CHAIR McGUIRE questioned whether HB 77 is merely a proposed state law that would essentially throw out all the municipal policy decisions on this issue.

MR. MOFFATT opined that if a municipality has developed policy that prohibits people from running their vehicles unattended, then the policy is improper and should be corrected.

CHAIR McGUIRE asked which other municipalities have such policy.

MR. MOFFATT said he only knew that Anchorage did.

CHAIR McGUIRE relayed that she strongly favors local control; she said she would feel more comfortable with "permissive language" as opposed to "mandating." She suggested that in a state as big as Alaska, certain policy decisions have to made at the local level.

TAPE 03-19, SIDE B
Number 2382

REPRESENTATIVE GRUENBERG remarked that Chair McGuire's statements have a lot of merit. He then turned to the language on page 1, line 14, which says, "or that is occupied by a disabled person". He said:

> Let's say that you have a person who is disabled because they're paralyzed from the waist down, and they may be fully capable of operating that car with special controls. ... For the purpose of this legislation, they should not be treated any differently than any other fully capable driver. And I really want to protect those people.

REPRESENTATIVE GRUENBERG surmised that HB 77 needs a little work regarding that issue.

CHAIR McGUIRE asked Mr. Moffatt whether he has done any research to ensure that HB 77 complies with the [Americans with] Disabilities Act (ADA).

MR. MOFFATT, in response, said that he and the sponsor were largely concerned [instead] "with the remote starter" [issue]. He recalled that the law prohibiting people from leaving their vehicles running was originally developed in an effort to help prevent auto theft. He relayed that it would be his and Representative Lynn's preference to simply repeal all [such

restrictions]. He said that according to the aforementioned newspaper article, the state law is more restrictive than the municipal ordinance. He mentioned that he would be willing to remove from HB 77 the reference to disabled persons.

CHAIR McGUIRE remarked that from a constitutional standpoint, when making reference to disabled persons in statute, one needs to be very clear what that definition entails, adding that some folks are disabled in ways that don't have anything to do with driving. She mentioned that the committee would be seeking information from him on the issue of compliance with the ADA.

Number 2253

REPRESENTATIVE ANDERSON noted that HB 77 does not actually delete anything from statute; rather, the restrictions under discussion are located in the Alaska Administrative Code as a regulation. Alaska statute does not prohibit someone from leaving a vehicle running, only the state regulation does. He suggested that perhaps the sponsor should consider a solution involving a change of regulation, rather than a change of statute. He then mentioned that he, too, views local control as important, and prefers permissive language. He asked how many tickets have been issued for violating the state regulation.

MR. MOFFATT said that he has not researched that information, adding that the sponsor holds the conviction that "one is enough."

REPRESENTATIVE ANDERSON, turning to language on page 1, line 14, asked why the age of 14 was chosen.

REPRESENTATIVE SAMUELS remarked that 14 is the age at which one can get a driver's permit.

MR. MOFFATT noted that 14 was the age chosen by the drafter, and suggested that perhaps it was chosen for that very reason.

REPRESENTATIVE COGHILL mentioned that several communities "get levied" by the Department of Environmental Conservation (DEC) for "air-quality issues." He remarked that perhaps leaving vehicles running could be problematic during certain times of the year.

MR. MOFFATT relayed that the DEC has conducted research on this issue.

Number 2095

RON G. KING, Program Manager, Air Non-Point & Mobile Sources, Division of Air & Water Quality, Department of Environmental Conservation (DEC), confirmed that the DEC has performed tests and found that the emissions from a car that has been idling and then driven are not significantly different than the emissions from a car that is simply started up and driven off, as long as the idling vehicle has been doing so for less than an hour. He stated that the Department of Conservation has no position on HB 77.

CHAIR McGUIRE asked Mr. Moffatt to provide the committee with information regarding how many municipalities currently have codes that prohibit leaving a vehicle running; how many tickets have been issued - she remarked that one is probably not enough; whether HB 77 as written complies with the ADA, how "disabled" is being defined, and what the link is with operating a vehicle; and why the age of 14 was chosen. She asked Mr. Moffatt to talk with the sponsor regarding the committee's concern about local control.

REPRESENTATIVE GRUENBERG remarked that since this [restriction] is currently a regulation, the committee should give thought to the issue of whether it wants to establish a precedent by addressing a regulatory concern via statute.

MR. MOFFATT asked whether the committee would be amenable to a committee substitute that simply voids the regulation.

CHAIR McGUIRE remarked that that would be one way of doing it. She asked Mr. Moffatt to consider the whole issue from a policy standpoint, to provide the committee with the information it has requested, and to consider the possibility of coming back with a committee substitute that addresses the committee's concerns.

REPRESENTATIVES COGHILL and GRUENBERG, on the issue of a potential conflict of interest, noted that they have remote starters for their vehicles.

[HB 77 was held over.]

HB 83 - REVISED UNIFORM ARBITRATION ACT

Number 1942

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 83, "An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

REPRESENTATIVE GARA recounted that at the last hearing on HB 83, a sticking point arose regarding the language, "and whether a contract containing a valid agreement to arbitrate is enforceable", found on page 3, lines 9-10. He relayed that a proposed amendment has been developed to alleviate this sticking point, adding that he, Representative Berkowitz, and Mr. Lessmeier [approve] of the amendment. The proposed amendment [labeled 23-LS0047\H.1, Bannister, 3/11/03], which later became known as Amendment 1, read:

Page 2, line 17, following "09.43.330(a)":
Insert "or (b)"

Page 3, line 5, following "contract":
Insert ", and except as provided by (b) of this section"

Page 3, following line 5:
Insert a new subsection to read:
"(b) To the extent an agreement that contains an arbitration provision is invalidated on the grounds that a party was induced into entering into the agreement by fraud, the arbitration provision in the agreement is not enforceable, and the party is not required to prove that the party was induced into entering into the arbitration provision by fraud."

Reletter the following subsections accordingly.

Page 3, lines 9 - 10:
Delete "and whether a contract containing a valid agreement to arbitrate is enforceable"

Number 1901

REPRESENTATIVE GARA explained that [Amendment 1] would delete the aforementioned controversial language, and would effectively adopt the dissenting opinion in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967). He elaborated:

We have ... two ways to go on this arbitration Act. With most contracts, a contract is void if a person was defrauded into entering into it. That's the law in Alaska .... Prima Paint said, in the area of federal arbitrations, if you enter into a contract because you were duped into it by fraud, you still can't get out of the arbitration provision itself unless you can show that you were specifically duped into the arbitration provision of the contract. ...

The committee aide has sent out some material explaining that rule to you: On one side is the Prima Paint court's philosophy that they want to do everything they can to uphold arbitration provisions; on the other side is the philosophy that if a contract is entered into by fraud, it just is invalid, and to pretend that somebody would really read the specific ... arbitration part of the contract and get duped into the arbitration part of the contract is sort of a fiction - that just doesn't happen in real life.

So, [Amendment 1] ... adopts the rule that says if ... you're duped into a contract by fraud, the contract's just void and you don't have to, then, go to the second level of proving that not only were you duped into the contract, but you were specifically duped into the arbitration provision as well. ... I've got to tell you, I don't have the strongest feelings in the world about it, [but] I feel that this is the right way to go. ... I'll tell you, just so everybody knows, if we do this, our arbitration law will be different than the Federal Arbitration Act [FAA] ....

Number 1778

REPRESENTATIVE GARA continued:

The courts will be able to deal with this. ... There are areas where the state arbitration Act applies - those are in-state contracts, generally; there are areas where the [FAA] applies - those have to do with interstate commerce; [and] there are some joint areas, where they intersect. [And] by us following a different law than the [FAA], the courts are going to have to decide ..., in those joint areas where both acts could apply, whether we're allowed to differ from

> the federal law, and that will be a constitutional question for the courts. ... We'll know for ... state arbitrations, our law applies; for clearly federal arbitrations, their law will apply; and in this area where they intersect, where either law could apply, we're going to have to leave it for the courts to decide whether or not, if we adopt ... [Amendment 1], we're allowed to.

Number 1739

REPRESENTATIVE GARA made a motion to adopt Amendment 1 [text provided previously].

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE SAMUELS asked what percentage of cases would be affected by both state law and federal law, and do other states differ from the [FAA] as well.

REPRESENTATIVE GARA said that although he could not answer the specifics regarding differences in law that other states might have as they relate to the Revised Uniform Arbitration Act (RUAA), it is common for states to adopt uniform laws that contain differences from the original uniform laws. In response to the question of how many cases might be affected by a difference in Alaska law, he said that he did not know, but offered the following observation:

> The state law will clearly apply among two local people; if they have a contract - two local people enter into a contract, it's just a local in-state contract - the state law will apply. If there's some impact on interstate commerce, if it's with an out-of-state company - the contract - then [either] the federal or the state law could apply. So, maybe the litigation will arise over a contract like that. And then, in federal government contracts and things having a very clear federal nature, only the Federal Arbitration Act applies. There will be some cases, I suppose, where [Era Aviation, Inc. ("Era"), for example,] enters into a supply contract with a fuel distributor in Washington, and in those, either law could apply, ... but I don't know numbers.

REPRESENTATIVE GRUENBERG turned members attention to the "federal pre-emption issue," and said, "We are doing something

that may be unconstitutional under the supremacy clause." He said that under Title 1, there is a general severability statute which says that if part of an act can be construed unconstitutional and the rest of it can be construed separately, the rest shall remain constitutional. He asked Representative Gara whether he would consider adding to the end of the new subsection (b), as proposed in Amendment 1, something to the effect of, "If this subsection is declared unconstitutional, the remainder of the Act shall not be".

Number 1562

REPRESENTATIVE GARA replied, "It's a thorny question for not such a big change in the law." In large part, he opined, there is not a constitutional problem; in the areas for which the Alaska Act applies and the FAA doesn't, Alaska can do what it wishes. Thus the only point at which the constitutional issue will arise is when either the FAA or the state arbitration Act could be followed. In that area of intersection, he remarked, the courts will look to our current statute, which says essentially that if a part of a statute is held unconstitutional, the court should strive to hold as much of the rest of the statute as valid as possible. He opined that the current statute on this issue will be adequate; it will tell the courts that if only a portion of HB 83 is found to be unconstitutional, the rest of the Act would still be enforceable. Thus the courts would leave [HB 83] in effect with regard to Alaska arbitrations.

REPRESENTATIVE GRUENBERG said that this information comforts him, and noted that AS 01.10.030 reads:

> Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

CHAIR McGUIRE remarked that there are a variety of reasons that companies do business in Alaska, and that a large part of how Alaskans do business is via contracts; thus it is important to consider the practical implications of HB 83. She offered the comment that businesses generally prefer arbitration as a means of resolving differences because it is easier, cheaper, and less

time consuming. She relayed that one view of the issue raised by the language in question holds that "if there is fraud in the inducement of the contract as a whole, [then] you ought not get to hold in one part of it." She surmised that many companies draft contracts under the assumption that arbitration will be available, and said she wonders whether companies will change the way they do business based upon the knowledge that federal law is "more favorable toward keeping arbitration clauses in."

Number 1407

REPRESENTATIVE GARA said:

> As we stand here today - I can tell you this because I've litigated the issue - nobody in this state knows, in state arbitrations, whether or not the Prima Paint rule applies or doesn't; or at least they didn't as of about four years ago when I litigated this issue. So people weren't fleeing from the state based on this uncertainty; nobody knew, nobody really cared. The reality of this situation is, you get form contracts drafted by a larger, more powerful party, [and] the other side signs on. If the bigger, more powerful party includes an arbitration provision, dupes you into a contract, why give them the benefit of saying, "Okay, well, I duped [you] into it and at least I get to take you to arbitration"? ... So, they sort of have unclean hands, and I don't think that anybody who ... engages in fraud would have any expectation that they should get any benefit out of what they did.

REPRESENTATIVE GARA then paraphrased from a portion of Justice Black's dissent in the Prima Paint case:

> Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated.

REPRESENTATIVE GARA relayed that Justice Black called the majority's view, "fantastic," adding that he feels the same way.

CHAIR McGUIRE said she did not disagree, mentioning that particularly with adhesion contracts, it is a bigger, more powerful party that gets to set the terms. Remarking that she is inclined to support [Amendment 1], she cautioned that the

committee also needs to consider the ramifications, particularly with regard to interstate/federal issues.

REPRESENTATIVE GRUENBERG, referring to a brief written by Representative Gara, mentioned that there is some question regarding whether Prima Paint has been overruled. "So, I gather, ... it may no longer even be good law."

REPRESENTATIVE GARA offered that there is probably a 75 percent chance that the U.S. Supreme Court has not overruled Prima Paint.

Number 1266

REPRESENTATIVE GRUENBERG sought confirmation that the dissenting opinion agrees with the [American Law Institute's Restatement (Second) of Contracts ("Restatement")], noting that Restatements of Law are general doctrines that many attorneys and courts refer to as the rule of law regarding certain issues.

REPRESENTATIVE GARA replied that according to the Restatement and common law in other states, including Alaska, if there is fraud in entering into a contract, the contract is simply invalid. "That's what the dissent relied upon in Prima Paint, that's the basis for my view, why we should adopt this rule in our arbitration Act," he added, noting, however, that there are other states which follow the Prima Paint rule. He posited that this issue is merely a policy call for the legislature to make.

REPRESENTATIVE GRUENBERG asked whether the language in Amendment 1 "closely tracks" the language in the Restatement.

REPRESENTATIVE GARA relayed that the Restatement does not address the issue of arbitration; it merely addresses contracts in general.

CHAIR McGUIRE mentioned that some have referred to arbitration as a lesser form of justice. In contrast to this view, she added, arbitrators take what they do very seriously and view arbitration as a fair and equitable way to work out a dispute. She suggested the possibility that going contrary to Prima Paint might imply "something other than that."

REPRESENTATIVE SAMUELS asked whether it would be possible to insert a clause in HB 83 to the effect that if there is a conflict between state and federal law, that the state would defer to federal law.

REPRESENTATIVE GARA said that although that would be possible, his intention is to have the courts determine, on a case-by-case basis, when either federal law or state law could apply, whether following the state law would undermine a federal policy and is therefore unconstitutional; if it is determined so, then the federal law would apply. He surmised that doing as Representative Samuels suggests would essentially "give up the farm" in that area without even asking the courts to make a determination. "My intention is not to give in, in that area of joint jurisdiction, because I think there's a fair chance the courts would say we're allowed to have a different law than the federal law," he said, adding that the courts haven't decided this issue yet.

Number 0988

REPRESENTATIVE GRUENBERG added:

> There's a very, very significant development in the U.S. Supreme Court today, called state's rights, and they are giving much greater deference to the state's right to enact legislation in areas that the feds have ... recently occupied. And it is a very fast-evolving area, and it may be that the current [U.S.] Supreme Court would uphold Alaska, where the court five, ten years ago wouldn't. And we can't predict what's going to happen and ..., in this particular case, I think it's something that might very well help Alaska.

REPRESENTATIVE COGHILL surmised that [Amendment 1] would "kick" the question into the courts sooner.

REPRESENTATIVE GARA replied:

> It will only kick it into the courts if this issue arises: whether or not somebody was defrauded into a contract. If that issue arises, just that one issue goes to the court .... So if the court finds, "No, you weren't defrauded into the contract," it goes back to the arbiter. If the court finds, "Yes, you were defrauded into the contract," then it never gets to the arbiter because there's no arbitration agreement. But you're right: by giving somebody this additional right to get out of the contract because of fraud, you're giving them the right to go to court to do that.

REPRESENTATIVE COGHILL raised the issue of "discovery," and said he was trying to envision "what that would look like."

REPRESENTATIVE GARA replied:

> It would be more expensive. Under Alaska law, ... if you really were defrauded into a contract, well, I think you should have that right to go to court and say, "I don't want to be bound by this arbitration agreement." If you weren't defrauded by a contract, and you run to the court and ... say, "I was defrauded, I was defrauded," ... you're taking the risk that you're going to have [attorney] fees ... [and] costs imposed against you. I think it would be a pretty dumb thing for somebody to do, but they might do it. Hopefully, that will keep some of those folks out of court. And then there's the rule that says if you make a frivolous claim in court, you have to pay the other side's full [attorney] fees. Those are the only protections we have ....

Number 0822

REPRESENTATIVE COGHILL said that if there was at least some hope that going to court would bring swift action, he would tend to favor [Amendment 1].

CHAIR McGUIRE turned members' attention to page 17 of the Uniform Arbitration Act (UAA), which contains the following commentary regarding the Prima Paint case:

> There the plaintiff filed a diversity suit in federal court to rescind an agreement for fraud in the inducement and to enjoin arbitration. The alleged fraud was in inducing assent to the underlying agreement and not to the arbitration clause itself. The Supreme Court, applying the FAA to the case, determined that the arbitration clause was separable from the contract in which it was made. So long as no party claimed that only the arbitration clause was induced by fraud, a broad arbitration clause encompassed arbitration of a claim alleging that the underlying contract was induced by fraud. Thus, if a disputed issue is within the scope of the arbitration clause, challenges to the enforceability of the underlying contract on grounds such as fraud,

illegality, mutual mistake, duress, unconscionability, ultra vires and the like are to be decided by the arbitrator and not the court.

CHAIR McGUIRE remarked that Representative Gara makes a compelling argument to the contrary, that if a contract is found to be invalid, then there is no contract and, thus, no arbitration clause.

Number 0666

CHAIR McGUIRE then withdrew her objection to adopting Amendment 1. There being no further objection, Amendment 1 was adopted.

Number 0634

REPRESENTATIVE SAMUELS moved to report HB 83, as amended, out of committee with individual recommendations and the accompanying [zero] fiscal notes. There being no objection, CSHB 83(JUD) was reported from the House Judiciary Standing Committee.

HB 49 - EXPAND DNA DATABASE

Number 0608

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 49, "An Act relating to the DNA identification registration system; and providing for an effective date."

Number 0572

REPRESENTATIVE ANDERSON moved to adopt the proposed committee substitute (CS) for HB 49, Version 23-LS0132\I, Luckhaupt, 3/3/03, as the work draft. There being no objection, Version I was before the committee.

Number 0523

JENNIFER RUDINGER, Executive Director, Alaska Civil Liberties Union (AkCLU), informed the committee that the AkCLU opposes HB 49 and urges the [legislature] to put an end to the progressive expansion of DNA (deoxyribonucleic acid) collection by the government. She pointed out that DNA collected from one person reveals personal information about that individual, much of which has nothing to do with the needs of law enforcement, as well as personal information about the individual's blood relatives. Unlike fingerprinting, which only reveals

information that can be used for identification purposes, DNA gives the government control over a great deal of personal and private information about anyone related to the sample source. Therefore, expansion of governmental power to collect DNA from its citizens should not be taken lightly.

MS. RUDINGER recalled the testimony of Chris Beheim, Director of the Scientific Crime Detection Laboratory ("Crime Lab") in the Department of Public Safety. She recalled that Mr. Beheim pointed out that DNA testing is becoming increasingly more common across the nation. At the same time, the scientific knowledge regarding the content of DNA is growing incredibly. She informed the committee that in 1988, the FBI opened a national database that gathers the DNA records from all 50 states and the federal government into the centralized system known as the Combined DNA Index System (CODIS). Initially, these DNA storehouses were created to house information about convicted sex offenders, who, it was argued, were especially prone to recidivism and typically left DNA evidence at the crime scene. Therefore, there was the promise at the time that only convicted sex offenders would be tested and the information obtained from these tests would be used by law enforcement strictly for identification purposes. However, it's often the case that information initially collected for one limited purpose is ultimately used for many other purposes, which has been the case with DNA testing.

MS. RUDINGER pointed out that in less than a decade, law enforcement officials across the country have gone from advocating for collection of DNA only from convicted sex offenders, to wanting it from all violent offenders, then to wanting it from all burglars, and now to wanting it from all persons, including juvenile offenders, convicted of any [felony] crime. She pointed out that in many states, the DNA samples are maintained even when the conviction is overturned. She noted that in Louisiana, DNA is collected from everyone arrested for a felony crime. She informed the committee that former U.S. Attorney General Janet Reno asked the National Commission on the Future of DNA Evidence to review the possibility of taking DNA from arrestees across the country. The 1998 New York City police commissioner proposed the same idea, and Rudy Giuliani voiced his support for the aforementioned proposal as well as for taking DNA samples from all babies at birth.

Number 0215

MS. RUDINGER said:

The collection of DNA samples and the creation of DNA databanks have legitimate and vital medical, scientific, and forensic purposes; that can hardly be argued. Research can lead to treatment and even cures for many genetic diseases. DNA can prove that an individual was at the scene of a crime. It can also prove the innocence of a suspect, preventing terrible miscarriages of justice. DNA can even be used to correct wrongful convictions based on an erroneous identification, although law enforcement and prosecutors seem decidedly less enthusiastic about this use. But as we look at the good uses of DNA, it is equally clear there is tremendous potential for abuse. The vast amount of information to be gleaned, the incredible longevity of DNA samples, and the ease with which DNA databases can be shared and accessed raise grave privacy, equality, and due process [concerns].

Although DNA has been touted as a high-tech equivalent of fingerprints, this comparison is dangerously misleading. Where fingerprints can be used only for identification purposes, DNA samples can provide insight into [a] breathtaking wealth of singularly private information: information about a person's ethnicity, family relationships, family history, and the likelihood of getting ... some 4,000 different genetic diseases and conditions. This information belongs to the individual, not the government. Further, geneticists are constantly increasing the database of information that can be gleaned from DNA. Some geneticists even claim that there are genetic markers for criminal tendencies, sexual orientation, substance abuse. The possibilities are endless, and therefore the dangers are endless.

Today the growing law enforcement databases raise the immediate specter of widespread discrimination. Given the overtargeting of Alaska Natives, African Americans, Latinos, and other minorities within the criminal justice system nationwide, the government will have the disproportionate power to track millions of people of color. Now the sponsors of HB 49 want the Alaska legislature to expand DNA sampling to include all convicted felons, including felony shoplifting, DWI, perjury, providing alcohol to

minors, forgery, writing a bad check, as well as some misdemeanors. This will help identify more violent criminals in the future, proponents say. Claiming that this is a minor and necessary expansion of the present system, proponents are [asking, "Well, What's the harm?"] [The previous bracketed portion was not on tape, but was taken from the Gavel to Gavel recording on the Internet.]

TAPE 03-20, SIDE A
Number 0001

MS. RUDINGER continued:

The harm is this: because genetic information pertains not only to the individual whose DNA is sampled, but to every person who shares in that person's bloodline, potential threats to genetic privacy posed by the collection of the DNA extend well beyond the millions of Americans whose samples are currently on file. Moreover, there is no requirement in House Bill 49 or in the Alaska Statutes or in federal law that the DNA sample - the drop of blood, the drop of saliva - ... from which the genetic information is taken, [will] ever be destroyed. It is precisely the availability of these samples laying around that sparks ingenious ideas about new ways to use the information contained in the samples, thus prompting new legislation authorizing ever-increasing numbers of permissible uses for Alaskans' DNA.

At the last hearing, Representative Gara [asked] the AkCLU [to] take a look at the current restrictions in law. We've looked at those; they appear to limit the use of the DNA, they appear to make it clear that this is not a public record, but, as I just pointed out, there are always examples of the government finding neat new ways to use information once it becomes able to do so. For example, social security numbers were initially intended only for use as [a way to] track social security payments, and the law had very strict controls to prevent other uses, but now social security numbers are universal identifiers. There is a long and unfortunate history of government using personal information about its citizen in ways that we did not consent to, in ways that go beyond what the law initially allowed for.

Number 0270

MS. RUDINGER added:

> Another example: census records created for general statistical purposes were used to round up innocent Japanese Americans and put them in internment camps during World War II. Bottom line, to sum up, your constituents throughout Alaska are concerned about the government's ever increasing control over their personal information, and their concerns cross party and ideological lines. The [AkCLU] fields inquiries virtually every week regarding the government's demand for personal information: social security numbers, background checks, DNA substance information, other genetic information; almost every week Alaskans voice concerns that government cannot be trusted to keep this information confidential or to limit its use to the initial purpose for which it was collected.
>
> And we agree. Your constituents are right. So, in conclusion, please keep in mind [that] this bill does not only affect the person from whom the DNA sample is taken. It affects their relatives, who are law-abiding citizens innocent of any crime, and the government's proposed justification for collecting DNA just doesn't fly. There needs to be a much tighter fix between means and ends.

Number 0327

THERESA WILLIAMS, President, Parents of People (POP), after explaining that POP advocates for the rights of children as individuals and people, relayed an example of man who had been abusing his 15-year-old daughter for two years. That man "has plead out," and at this time does not have to register his DNA. Under HB 49, he would be required to provide a sample. She noted that this man has spent many years working around other children. She remarked that there are many individuals, just like this man, who have plead down and currently do not have to provide a DNA sample. She characterized the current situation as a loophole that needs to be corrected. She said that POP is in support of HB 49 because it will include all sex offenders in the group that must provide a DNA sample.

Number 0550

LAUREE HUGONIN, Executive Director, Alaska Network on Domestic Violence & Sexual Assault (ANDVSA), said:

> We appreciate the sponsors' wanting to make more information available to law enforcement, to ease their investigations in being able to capture criminals. ... In trying to figure out what our concern was, I think what it came down to was more of practical nature with ... the possibility of so many more samples coming into the Crime Lab. We would appreciate some discussion on the record from the Crime Lab, talking about the ways in which they keep current with processing the samples, and the ways in which they keep current and intend to continue to keep current [with] processing rape exam kits.
>
> Our interest, of course, is in catching sex offenders. And when somebody goes through the additional trauma and invasion of a having a rape exam kit completed, we would want to know that there is an emphasis placed on processing those kits and getting information back to law enforcement as quickly as possible. That there is a commitment to making sure that you're looking at sex offender DNA first, before you go to the person who's written the bad check, and that they can keep current. We supported the original DNA databank; we supported adding burglars into the DNA database ....
>
> So, I think that's our problem: We want to hear that there's a mechanism in place to be able [to] handle these and handle them expeditiously and not have rape exam kits fall in the cracks, not have sex offender DNA not done because they have 50 other samples that came in ahead of that. We have supported the Crime Lab in trying to catch up on their backlog. A few years ago, for two years in a row, through the Violence Against Woman Act, we supplied funding to bring in a person to help catch the backlog up. So, our experience is that they do have backlogs, that they are slow, and we're concerned with the influx of ... [additional samples].

Number 0720

MS. HUGONIN continued:

> And, then, if I might make a quick comment on the work draft, I noticed on page 3, [lines] 2-5, you're giving the department permission to collect, for inclusion into the registration system, samples that are collected from crime scene evidence. And I have not had a chance to talk to the [ANDVSA] about this, but my feeling is that we would want to have some discussion about exactly what that means. If it's a sex offense, and it was committed against me, I'm the crime scene. So you're going to be collecting my DNA evidence, and I don't know how we feel about a victim's DNA being adding into the registry. I would think we would have a problem with that. So I realize that that was not part of the original bill, and would appreciate some discussion on that, and maybe some consideration of either better defining it or taking it out. ... So, thank you for the opportunity to testify; we appreciate the sponsor's intent and want to do what we can to help make it work, but we do have those practical concerns.

CHAIR McGUIRE remarked: "Very good point, and we will have that discussion. I'm going to have [staff] do an amendment on that, that we can discuss, regarding the victim's DNA. I don't think that's the intent, but we should make it clear."

REPRESENTATIVE GARA said he would like to echo one concern, which he acknowledged might be dealt with via a forthcoming amendment. He elaborated on his concern:

> Nationwide, law enforcement agencies collect rape kits, the rape kits they collect are from victims of a traumatic crime, and the rape kits require that the victim then undergo a pretty intrusive process to help law enforcement agencies ... maybe track the person who committed the rape. It's an intrusive process ... but, nationwide, ... law enforcement agencies are up to a year behind on processing these rape kits. And I guess I'm sympathetic to the proposal that we make sure that by adopting this law, we don't push back our time lag any further on processing rape kits.

REPRESENTATIVE GARA opined that at some point, the legislature should do what it can to make sure that law enforcement agencies get caught up with its rape-kit processing. "It's a huge burden we put [victims] through, and the benefits should follow the burden pretty quickly," he added.

MS. HUGONIN said that the ANDVSA also appreciates the inclusion of misdemeanor crimes against a person. Stalking is a misdemeanor crime, and that seems to be pretty closely aligned to sexual assault; if people are committed to stalking someone, they don't have a good end in mind. Therefore, as the committee discusses which crimes to include and which crimes to leave out, she asked that it remember that crimes against a person, if not limited to felonies, include stalkers.

Number 0961

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), offered to explain the changes in Version I. She said that the first difference is that Version I includes legislative findings. The second difference is that Version I expands the crime of violating an order to submit to DNA testing to include the crime of failing to give a sample if one is required to do so because he/she is registered as a sex offender. She noted that this language can be found of page 2, line 12, of Version I. Also, the crime of violating an order to submit to DNA testing has been raised from a class A misdemeanor to a class C felony. Ms. Carpeneti also noted that the original version of HB 49 clarified that it also included a juvenile adjudicated as delinquent for an act that would have required DNA testing had the individual been an adult.

MS. CARPENETI relayed that Version I also proposes making it a class C felony to knowingly, without authorization, possess or allow another person to possess a tissue sample or a blood or oral sample that is collected and stored at the Crime Lab.

REPRESENTATIVE ANDERSON suggested that the latter should allay the concerns of the AkCLU with regard to the possibility that DNA samples will be abused.

MS. CARPENETI confirmed that this new crime is intended to address the possibility of such abuse. The Crime Lab tests 14 loci on the DNA strand that addresses identification, and this testing provides what is known as a DNA fingerprint. The other material is saved because, if there is a hit or a match, the Crime Lab wants to be able to go back and confirm it. It is the keeping of these samples that raises concerns, but Version I would make it a class C felony to misuse the samples stored at the Crime Lab. She turned to [Section 5] of Version I and noted that it specifies what can be included in the databank. New to

the list is the inclusion of DNA samples from those committing misdemeanor crimes against a person, such as stalking, fourth degree assault, and reckless endangerment. This list will also include samples from volunteers such as those with missing relatives, and samples taken from crime scene evidence, and from unidentified bodies or body parts.

MS. CARPENETI assured members that in drafting the provision that allows for the inclusion of samples from crime scene evidence, the intent was that a crime scene would be a place rather than a person. She remarked that if there is any confusion on that point, it should be clarified with additional language, since there is no intention to include a victim's DNA. She also noted that Version I specifies that tissue samples can be included in the database; sometimes when collecting samples from body parts, for example, tissue samples have to be taken rather than blood or oral samples. Version I also specifies that samples can be taken from those who are currently in jail or a juvenile facility for the crimes listed in the bill, and from those who are on active probation or parole for those same crimes, as well as from those who are on interstate probation or parole for those same crimes. In conclusion, she confirmed that Version I includes many of the DOL's suggestions.

CHAIR McGUIRE announced, at 3:07 p.m., that the committee would recess to a call of the chair.

Number 1346

CHAIR McGUIRE called the meeting back to order at 4:45 p.m. Present were Representatives McGuire, Anderson, Samuels, Gara, Gruenberg, Holm, and Coghill.

Number 1425

CHRIS BEHEIM, Director, Scientific Crime Detection Laboratory ("Crime Lab"), Department of Public Safety (DPS), addressing questions brought up earlier, said that expanding the DNA database will have no effect on the Crime Lab because it currently uses federal grant money to outsource all convicted offender samples. He said that he anticipates that this federal grant money will be available in the future for this purpose. With regard to Ms. Hugonin's concern regarding victims' DNA profiles, he said that entering a victim's DNA profile into the system is strictly prohibited by the National DNA Index System's (NDIS's) guidelines, as is the inclusion of "elimination

samples" that are tested during the course of an investigation. He concluded by saying, "Those are two non-issues."

Number 1516

JUANITA HENSLEY, Special Assistant, Office of the Commissioner, Department of Public Safety (DPS), relayed that the DPS has placed a priority on sexual-assault-kit DNA sampling, and feels very strongly about that issue. The commissioner, she added, is very committed to domestic violence and sexual assault issues. Even though DNA samples for convicted offenders are sent out, she explained, the DPS has a technician and criminologist on staff at the Crime Lab that handle all of the rape kits coming into the department. "So, we are working on making sure that ... any backlog that's there is caught up, and that it doesn't have a backlog," she added.

REPRESENTATIVE GARA asked for an estimate of the time lag between when a rape kit is completed and when its results are available.

MR. BEHEIM replied that there are many factors involved, depending on the nature of the case and its urgency. It takes a while to screen the case; if there are a lot of clothing items, for example, it can take several days just to go through those items. The DNA typing generally takes about three weeks.

CHAIR McGUIRE closed public testimony on HB 49.

Number 1677

The committee began discussion of Conceptual Amendment 1, which read [original punctuation provided but formatting changed]:

> Page 2, lines 20 and 22:
> Delete all material and insert:
> "tissue sample collected for inclusion in the DNA identification registration system.
> (b) In this section "DNA identification registration system" means the deoxyribonucleic acid identification registration system established under AS 44.41.035.
> (c) Unlawful use of DNA samples is a class C felony."
>
> Page 4, line 3:
> Delete "subsection" and insert "subsections"

Page 4, after line 7:
Insert the following:
"(m) The Department of Public Safety may not include in the DNA registration system a blood sample, oral sample, or tissue sample of the victim of a crime, unless that person would otherwise be included under (b)(1)-(b)(5) of this section."

REPRESENTATIVE GRUENBERG reported that during the recess, Ms. Carpeneti had brought up a technical point. He asked her to speak on that issue.

MS. CARPENETI explained that she'd noticed what she believes to be a typographical error in Version I, which she'd discussed with [the committee aide]. She indicated she'd drafted an amendment [which became the first portion of Conceptual Amendment 1, relating to page 2, lines 20-22].

CHAIR McGUIRE, addressing the last portion of Conceptual Amendment 1, explained that she and Representative Samuels had a concern regarding victims. She offered her understanding that Ms. Carpeneti had worked with [Vanessa Tondini, the committee aide] during the recess and had come up with the language relating to page 4, line 3, and page 4, after line 7.

MS. CARPENETI said the amendment to page 4 [line 3] just makes "subsections" plural. Reporting that she'd spoken with Ms. Hugonin about the provision [proposed on page 4, after line 7], who thought it was okay, she noted that Mr. Beheim had said it is a nonissue; she therefore questioned its necessity.

CHAIR McGUIRE said she'd rather keep it in just to be 100 percent clear about the intent. She stated, "We do not want tissue, blood, oral sample, and so on from the victim of a crime; we don't want them to have to go through another process on top of all ... they've been through before."

Number 1784

CHAIR McGUIRE [moved to adopt] Conceptual Amendment 1 [text provided previously]. She clarified that the intent [with regard to the insertion on page 4, after line 7] is to not include the victim's DNA in the database.

MS. CARPENETI, after noting that she'd typed the amendment, suggested there should be a hyphen on the first line, rather than "and". Thus it would read "20-22".

CHAIR McGUIRE acknowledged that as a friendly amendment. [It was treated as adopted.]

Number 1833

CHAIR McGUIRE asked whether there was any objection to adopting Conceptual Amendment 1 [as amended]. There being no objection, it was so ordered.

Number 1860

REPRESENTATIVE GARA moved to adopt [Conceptual] Amendment 2, which read [original punctuation provided but some formatting changed]:

page 3, line 19, insert a new section:
Sec.?. AS 44.41.035(f) is amended to read:
(f) The DNA identification registration system is confidential, is not a public record under AS 40.25.110-40.25.140, and may be used only for
(1) providing DNA or other blood grouping tests for identification analysis;
(2) law enforcement purposes including criminal investigations and prosecutions;
(3) exoneration of the wrongfully convicted;
(4) statistical blind analysis; or
(5)[4]

There being no objection, [Conceptual] Amendment 2 was adopted.

The committee took an at-ease from 4:54 p.m. to 4:59 p.m.

Number 1929

REPRESENTATIVE GARA moved to rescind the committee's action in adopting [Conceptual] Amendment 2.

CHAIR McGUIRE asked whether there was any objection. There being no objection, it was so ordered.

Number 1938

REPRESENTATIVE GARA moved to adopt a new Conceptual Amendment 2, which would [read like Conceptual Amendment 2] except that "wrongfully convicted" would be replaced by "innocent" [in paragraph (3)].

REPRESENTATIVE GARA explained that Ms. Carpeneti had suggested using the phrase "exoneration of the innocent" to ensure that exoneration remains a purpose of this Act. He added, "We will want to exonerate people who haven't maybe yet [been] convicted; the point is to exonerate innocent people."

CHAIR McGUIRE asked whether there was any objection to adoption of new Conceptual Amendment 2. There being no objection, Conceptual Amendment 2 was adopted.

Number 1995

REPRESENTATIVE GARA moved to adopt Amendment 3, which read [original punctuation provided]:

page 1, line 14, following "repeat offenders,":
Insert "the exoneration of innocent persons,"

There being no objection, it was so ordered.

The committee took an at-ease from 5:02 p.m. to 5:10 p.m.

Number 2009

REPRESENTATIVE GRUENBERG moved to adopt new Amendment 4 [which had begun as a document labeled 23-LS0132\I.3, Luckhaupt, 3/7/03, but which had been crossed through in places, with some handwritten words inserted, before the copies were made]. New Amendment 4, with the handwritten changes, read:

Page 1, line 6:
Delete "FINDINGS."
Insert "FINDINGS AND INTENT. (a)"

Page 1, line 12, following "offenders;":
Delete "and"

Page 2, line 1, following "remains":
Insert "; and
(4) the federal government is paying most of the costs of the DNA identification registration

system and will reimburse the state for most of the costs of the DNA identification registration system.

(b) The legislature may reexamine the DNA identification registration system and its expansion by this Act if the federal government eliminates or reduces the level of funding it provides."

Page 4, following line 24:

Insert a new bill section to read:

"*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INSTRUCTION TO COMMISSIONER OF PUBLIC SAFETY. The commissioner of public safety shall notify the president of the senate and the speaker of the house of representatives if, at any time after the effective date of sec. 1 of this Act, the federal government fails to [sic] the costs of the DNA identification registration system."

Renumber the bill sections accordingly.

REPRESENTATIVE GRUENBERG pointed out that the word "pay" had been eliminated [in the second to last line of the amendment before the renumbering], and that it should read "government fails to pay the costs of the DNA identification". [The addition of "pay" was treated as adopted.]

Number 2087

CHAIR McGUIRE objected [to new Amendment 4] for discussion purposes.

REPRESENTATIVE GRUENBERG explained that when legislation is largely dependent on federal funding, he believes it is a good policy for the legislature to be informed when the federal funding goes away. Therefore, this instructs the agency administering the program to provide a report notifying the presiding officers when the federal government reduces or eliminates the funding mechanism. He noted that it would provide in the findings that the legislature finds that the government is currently paying most of the costs of the program, and that there is intent stated that the legislature may - he emphasized the word "may" - reexamine the program if the federal government eliminates or reduces the level of funding in the future. He told members, "I strongly support the program; this is just sort of ... keeping track of federal money so we're not left with unfunded mandates that we know nothing about."

Number 2149

CHAIR McGUIRE withdrew her objection. She asked whether there were any other objections.

REPRESENTATIVE HOLM offered his understanding that [the DPS] had indicated [the federal government] pays all of the costs of DNA identification registration, with no charge whatsoever to the state. He highlighted the zero fiscal note.

MS. HENSLEY explained that [the DPS] has a federal grant through NIJ [National Institute of Justice] that pays for the cost of all the samples it sends out, as well as a grant that pays for a criminologist to do rape kits for sexual assaults. She added:

> President Bush, yesterday, and [U.S.] Attorney General Ashcroft just announced that they have added another 232.6 million in federal funding for fiscal year '04, and then over the next five years adding another $1 billion for DNA. That's going to be given [in] grants to the states, and it's strictly for the DNA sampling and things of this nature. ... And it's over a five-year period. So we fully expect all this to be covered over a five-year period with the large expansion.

REPRESENTATIVE GARA remarked:

> We anticipate that the funding will be available for the next few years, but at some point all of these federal mandates, and federal funds for federal mandates, tend to change. And we just don't know five years from now whether or not we'll receive the federal funding. And if that happens, if ... all of a sudden the federal funding disappears, it will be good for the legislature to be alerted, so that ... if we're faced with a decision of whether or not to fund the DNA database or to fund troopers on the streets, or to fund both, we can make that decision. So ... the amendment would just require that [the] DPS alert us, ... just in case we want to take action at that point. But ... it does nothing to take the law off the books or anything like that. It just deals with the problem of always-disappearing federal money.

REPRESENTATIVE HOLM, noting that new Amendment 4 says "paying most of" [in paragraph (4)], offered a friendly amendment, to say "all" if it is all [of the costs].

REPRESENTATIVE SAMUELS objected for discussion purposes.

CHAIR McGUIRE asked Ms. Hensley whether, indeed, [the federal government] pays all of the costs.

MS. HENSLEY answered:

> It is only all of those samples that we have told the federal government we were going to send to the lab. What happens in these circumstances is, we ... get this grant given to the state. We tell the federal government how many samples we're going to send out. They tell us what labs ... they contracted with. We send the sample to the lab. Then the lab actually sends the bill to the federal government and they pay it. The state is not involved in any of the money transfers or anything like that, which is really great, and it's kind of unique under the circumstance. ...
>
> When the original law was passed ... several years ago, we did have a large fiscal note on it, but it was start-up cost. And we do have ongoing cost, but [it] pays for the sexual-assault kits, ... and we still have some federal grants for that as well. So we do have ongoing costs to the Crime Lab that's in our budget, and its ongoing cost, but it also pays for the criminologist to do other duties, other than just the ... DNA stuff.

REPRESENTATIVE HOLM again expressed concern about the zero fiscal note because the amendment says "most" of the costs, which indicates to him that at some point there will be a fiscal note that isn't being identified at this point. He asked, "They'll pay for what you give them, but we don't know what else we may have with this law that will have costs to us?" He pointed out that these aren't all sexual offenses, and offered his understanding that if they aren't rape cases, [evidence] won't be sent to a lab for rape purposes; rather, there would be blood samples sent for DNA [determination]. He said they aren't the same, and asked whether that is correct.

Number 2347

MS. HENSLEY replied:

> What we do is, in-house, take the rape kits, and we do the DNA sampling in-house on those rape kits. It's all of the other crimes ... where we get the DNA sampling ... from the convicted offender already that ... we contract out to the labs. This is not going to be any additional cost to us because the federal government has said, "Give us an estimation on the early basis [of] how many samples you're going to send to the lab." And if we need to adjust that, we certainly can, based on the number of cases that we're going to be sending to the lab.

TAPE 03-20, SIDE B
Number 2378

REPRESENTATIVE HOLM surmised, then, that those numbers are already in the general budget for rape kits. He said that the word "most" indicates, to him, that something else might come in and have to be funded. Therefore, he questioned why there isn't a fiscal note that addresses it.

REPRESENTATIVE ANDERSON asked if it's true that currently the DNA program that Mr. Beheim directs is covered by federal grants and will be covered by federal grants for the next five years. He also asked if it's true that Representative Gruenberg's amendment says "if or when there is a reduction in the grant, so that the state has to pay for some of the DNA program, then the Department of Public Safety will notify the legislature." He said that's how he reads it.

MS. HENSLEY said that is correct. Unless there are major changes to this legislation, Ms. Hensley didn't expect there to be any fiscal impact.

REPRESENTATIVE SAMUELS asked, "Aren't we going to find this out once you look at the budget anyway?" He posed a situation in which eight years from now the commissioner doesn't tell. He asked if the commissioner would be punished.

REPRESENTATIVE GRUENBERG agreed that it would appear somewhere in the budget. He suggested that there should be a mechanism by which the legislature is notified that the federal funding is going away. Furthermore, it should be done in advance of the budget.

REPRESENTATIVE COGHILL pointed out that the aforementioned is done in many cases with repealers. He noted his objection to saying that the federal government is going to pay for a program that the legislature is willfully installing in statute. He expressed the need to take care when doing such. He said, "We're really surrendering ourselves, I think, at this point and I don't know if that's wise."

REPRESENTATIVE GRUENBERG clarified that was not his intent and pointed out that the language uses "may". He explained that this is to ensure that the federal government realizes that [the state] isn't giving them a blank check.

REPRESENTATIVE COGHILL acknowledged that the "may" language is utilized. However, there is a lot of other language that discusses what [the state] will or will not do. Therefore, Representative Coghill begged the committee to reconsider because he felt that it's not appropriate to place in statute. The language could be put in a letter of intent or the bill could include a sunset. He relayed his belief that this is a poor policy call.

Number 2193

CHAIR McGUIRE commented that perhaps this conversation would be more appropriate in the House Finance Committee. She mentioned that she did like having advance notice when funding is running out for a program so that the legislature can plan for it. However, she said she also understood Representative Coghill's concern that there may be impacts that aren't known at this time. Therefore, she asked if Representative Gruenberg would be willing to offer this through a House Finance Committee member.

REPRESENTATIVE GRUENBERG said he could. However, if the language of concern for Representative Coghill is subsection (b) of new Amendment 4 as amended, that language can be removed. Representative Gruenberg related his preference, if the committee is so inclined, to put in the language and point it out to the House Finance Committee so that it can determine whether to delete it or not.

REPRESENTATIVE COGHILL said that would probably address his concern.

REPRESENTATIVE COGHILL moved that the committee delete subsection (b) from new Amendment 4 as amended. [No objection

was stated and the amendment to new Amendment 4 deleting subsection (b) was treated as adopted.]

REPRESENTATIVE ANDERSON pointed out that the new Amendment 4, as amended, specifies in paragraph (4) "that the federal government is paying most of the costs" while the committee has said on record that the federal government is paying the cost. Therefore, he asked if the words "most of" should also be deleted.

REPRESENTATIVE GRUENBERG noted his acceptance of Representative Anderson's suggestion. [Therefore, the amendment to new Amendment 4, as amended, to delete from paragraph (4) the words "most of" was treated as adopted.]

CHAIR McGUIRE clarified, then, that new Amendment 4, as amended, would request that the federal government tell us when the money isn't available.

Number 2078

REPRESENTATIVE GARA asked if there is any objection to also notifying the Minority leaders of each body.

REPRESENTATIVE COGHILL remarked that leadership is usually trusted to handle procedural items correctly, adding that anything that is read across House Floor is available to all members. Therefore, he indicated, his inclination would be to leave the notification provision as is.

REPRESENTATIVE ANDERSON noted his agreement.

REPRESENTATIVE GARA withdrew his suggestion.

CHAIR McGUIRE said that new Amendment 4, as amended, is before the committee. New Amendment 4, with the handwritten changes, as amended, read:

Page 1, line 6:
Delete "FINDINGS."
Insert "FINDINGS AND INTENT. (a)"

Page 1, line 12, following "offenders;":
Delete "and"

Page 2, line 1, following "remains":
Insert "; and

(4) the federal government is paying the costs of the DNA identification registration system and will reimburse the state for most of the costs of the DNA identification registration system.

Page 4, following line 24:
Insert a new bill section to read:
"*** Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:
INSTRUCTION TO COMMISSIONER OF PUBLIC SAFETY. The commissioner of public safety shall notify the president of the senate and the speaker of the house of representatives if, at any time after the effective date of sec. 1 of this Act, the federal government fails to pay the costs of the DNA identification registration system."

Renumber the bill sections accordingly.

REPRESENTATIVE SAMUELS withdrew his objection.

CHAIR McGUIRE noted that there were no further objections to adopting new Amendment 4, as amended. Therefore, Amendment 4, as amended, was adopted.

Number 1973

REPRESENTATIVE HOLM said:

I move that we adopt Amendment 5. That we remove under Section 7, line 21 and 22, [AS] 11.41.230 - Assault in the fourth degree, 11.41.330 - Custodial Interference in the second degree, 11.41.250 - Reckless Endangerment, and 11.41.270 - Stalking in the second degree.

CHAIR McGUIRE objected for purposes of discussion.

REPRESENTATIVE HOLM explained that he wanted to delete those statutes because of his concern that class A misdemeanors are treated as felonies.

REPRESENTATIVE SAMUELS inquired as to how Amendment 5 would work for the Department of Public Safety and the Department of Law.

MS. CARPENETI clarified that the only folks from whom there will be samples taken are those who are convicted.

MS. HENSLEY relayed that the DPS would have difficulty with Amendment 5 because those [statutes deleted by Amendment 5] relate to crimes against a person. She relayed specific concern with the deletion of AS 11.41.230 and AS 11.41.270.

MS. HUGONIN reminded members that the committee has previously heard legislation that allows for a civil remedy for victims of stalking because the criminal statute is so difficult to prove. She emphasized that it's difficult to even have someone charged with stalking in the second degree much less obtain a conviction. Therefore, when [such a conviction] happens, it's appropriate to have the DNA sample taken. Of the four statutes cited, Ms. Hugonin encouraged the committee to leave in [AS 11.41.270] stalking in the second degree. She explained that in order for stalking to rise to the first degree, there has to be some added elements such as the stalking occurring in violation of the protective order, or against a child under the age of 16. Therefore, stalkers should be included if the intent is to capture DNA from those persons most likely to repeat crimes or commit sex offenses.

Number 1743

REPRESENTATIVE GARA said he appreciated and agreed with the intent behind Amendment 5. He recalled earlier discussion regarding the existence of some crimes, that if committed, have no bearing on whether the individual will commit a violent crime in the future. Therefore, he understood Amendment 5 to [delete] crimes that may have no bearing on whether someone would commit a violent crime in the future. However, Representative Gara announced that he didn't support Amendment 5 because the four crimes specified do have an aspect of violence or attempted violence. He relayed his belief that many people convicted of the crimes [being deleted by Amendment 5] are people with a propensity for violence.

REPRESENTATIVE ANDERSON acknowledged that there is the question of how many samples should be taken and from which crimes. He recalled Mr. Beheim's testimony regarding taking DNA samples from folks who write bad checks. The statistics showed that 12 of the folks who wrote bad checks murdered someone.

MR. BEHEIM specified that those statistics were from Virginia. The latest statistics show that 82 percent of the hits in the database would've been missed if it had been limited to violent offenses. In the case of forgery, statistics show that those

who have committed forgery have committed other crimes including sexual assault and homicide.

REPRESENTATIVE ANDERSON said that illustrates that those are white-collar crimes that don't suggest any propensity for violence. He indicated that he was in a quandary with regard to what to include or not to include.

Number 1571

REPRESENTATIVE HOLM withdrew Amendment 5. However, he offered that if there are going to be laws that allow people to plea down such that there is no meaning [to the laws], then perhaps those laws should be reviewed. He emphasized that the penalty for a class A misdemeanor is completely different than a class C felony.

REPRESENTATIVE GRUENBERG noted that he supports [DNA sampling] extended to felonies. He informed the committee that the following felonies that appear to be nonviolent include: issuing a bad check of $500 or more, third degree criminal mischief - that's $500 damage to property - forgery, falsifying business records, deceptive business practices, defrauding creditors, perjury, interference with official proceedings, misconduct by a juror, possession of gambling records, and third conviction for DWI. Representative Gruenberg announced that he supported the legislation as written. He expressed his desire for this committee to discuss and address the issues within its jurisdiction.

REPRESENTATIVE GARA agreed with Representative Gruenberg that they should make sure that the legislation says what the committee wants before passing it out. Representative Gara noted his support of HB 49 as written.

REPRESENTATIVE GARA highlighted that Representative Anderson narrowed the definition of the crimes that will result in someone being placed in the DNA database to all crimes against a person. Therefore, Representative Gara asked if the list read by Representative Gruenberg included crimes against a person.

REPRESENTATIVE GRUENBERG replied no.

MS. CARPENETI explained that the legislation includes all felonies in Title 11 and crimes against a person. The crimes against a person that are in Title 11 include those read by Representative [Gruenberg], some misdemeanors, and sex offenses.

REPRESENTATIVE ANDERSON opined that Mr. Beheim has made the case, with the forgery example, that there is a need for DNA sampling to be taken for all felonies.

Number 1334

REPRESENTATIVE GARA reiterated his support of the legislation as written. However, he said he disagrees with Representative Anderson's analysis of Mr. Beheim's statistics. Representative Gara said the statistics show that there are a certain number of people who committed nonviolent crimes that also committed violent crimes. He pointed out that Mr. Beheim provided no statistical analysis saying those who commit nonviolent crimes have any more propensity than anyone else to commit violent crimes in the future. He remarked that the statistics show [only] that if DNA from everyone in the world were taken, more crimes would be solved.

REPRESENTATIVE COGHILL noted that he has struggled with this legislation. Representative Coghill turned to AS 44.41.035(b)(3), which in part says, "(3) a minor 16 years of age or older, adjudicated as a delinquent for an act that would be a crime against a person, a burglary, or a felony attempt to commit burglary, if committed by an adult." He asked if adjudication is the same as conviction.

MS. CARPENETI answered that in the juvenile justice system, adjudication is similar to a conviction.

REPRESENTATIVE COGHILL asked if that would be consistent for a crime against a person.

MS. CARPENETI replied yes.

REPRESENTATIVE COGHILL relayed his belief that the barrier has to be high, which he indicated was achieved through conviction. Representative Coghill said that this is an interesting path of how to identify people without it becoming problematic for an overzealous government.

CHAIR McGUIRE said that she didn't disagree, but she pointed out that the legislature has the ability to change this if there are problems.

REPRESENTATIVE HOLM remarked that this legislation carries a bit more gravity than most because this issue involves a database.

The database doesn't have a way in which [it can be] stopped, similar to the situation with social security numbers. Therefore, he opined, personal protection should be upheld.

Number 1071

REPRESENTATIVE GRUENBERG moved to report the proposed CS for HB 49, Version 22-LS0132\I, Luckhaupt, 3/3/03, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 49(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 1021

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:50 p.m.