ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
May 9, 2003
1:25 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 22
Relating to the USA PATRIOT Act and to defending the Bill of Rights, the Constitution of the State of Alaska, and civil liberties.

- MOVED CSHJR 22(JUD) OUT OF COMMITTEE

CONFIRMATION HEARINGS

Board of Governors of the Alaska Bar

William A. Granger - Anchorage

- CONFIRMATION ADVANCED

HOUSE BILL NO. 244
"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

- MOVED CSHB 244(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 260
"An Act relating to immunity for free health care services provided by certain health care providers; and providing for an effective date."

- MOVED CSHB 260(JUD) OUT OF COMMITTEE

HOUSE JOINT RESOLUTION NO. 9
Proposing amendments to the Constitution of the State of Alaska relating to an appropriation limit and a spending limit.

- HEARD AND HELD

HOUSE BILL NO. 56
"An Act relating to the attorney fees and costs awarded in certain court actions relating to unfair trade practices; and, if considered court rule changes, amending Rules 54(d), 79, and 82, Alaska Rules of Civil Procedure."

- SCHEDULED BUT NOT HEARD

CS FOR SENATE BILL NO. 98(TRA)
"An Act relating to civil liability for boat owners and to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 4
Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 103
"An Act limiting the factors that may be considered in making a crime victims' compensation award in cases of sexual assault or sexual abuse of a minor."

- BILL HEARING POSTPONED

HOUSE BILL NO. 13
"An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc. v. Western Auto Supply, 18 P.3d 49

(Alaska 2001), as it relates to products liability; providing that a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor only if the acquisition is accompanied by an agreement for the successor to assume the liability, results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor, constitutes a consolidation or merger with the predecessor, or results in the successor's becoming a continuation of the predecessor; defining 'business entity' that acquires assets to include a sole proprietorship; and applying this Act to the sale, lease, exchange, or other disposition of assets by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business entity that occurs on or after the effective date of this Act."

- BILL HEARING POSTPONED

PREVIOUS ACTION

BILL: HJR 22
SHORT TITLE:PATRIOT ACT AND DEFENDING CIVIL LIBERTIES
SPONSOR(S): REPRESENTATIVE(S)GUTTENBERG

Jrn-Date	Jrn-Page		Action
04/02/03	0737	(H)	READ THE FIRST TIME - REFERRALS
04/02/03	0737	(H)	STA, JUD
04/07/03	0830	(H)	COSPONSOR(S): CRAWFORD
04/23/03	1078	(H)	COSPONSOR(S): KERTTULA
05/06/03		(H)	STA AT 8:00 AM CAPITOL 102
05/06/03		(H)	Moved Out of Committee MINUTE(STA)
05/06/03	1345	(H)	STA RPT 3DP 3NR
05/06/03	1345	(H)	DP: SEATON, GRUENBERG, WEYHRAUCH;
05/06/03	1345	(H)	NR: HOLM, LYNN, DAHLSTROM
05/06/03	1345	(H)	FN1: ZERO(LAW)
05/08/03	1479	(H)	FIRST COSPONSOR(S): COGHILL
05/09/03	1522	(H)	COSPONSOR(S): HOLM, MCGUIRE
05/09/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 244
SHORT TITLE:CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
04/04/03	0770	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	0770	(H)	JUD, FIN
04/04/03	0771	(H)	FN1: ZERO(LAW)
04/04/03	0771	(H)	FN2: (COR)
04/04/03	0771	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/14/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/14/03		(H)	Heard & Held MINUTE(JUD)
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	<Bill Hearing Postponed>
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/07/03		(H)	Scheduled But Not Heard
05/08/03		(H)	JUD AT 3:30 PM CAPITOL 120
05/08/03		(H)	Heard & Held MINUTE(JUD)
05/09/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 260
SHORT TITLE:IMMUNITY FOR PROVIDING FREE HEALTH CARE
SPONSOR(S): REPRESENTATIVE(S)SEATON

Jrn-Date	Jrn-Page		Action
04/11/03	0935	(H)	READ THE FIRST TIME - REFERRALS
04/11/03	0935	(H)	L&C, JUD
04/23/03	1081	(H)	COSPONSOR(S): GARA
04/24/03	1111	(H)	COSPONSOR(S): ANDERSON
04/28/03		(H)	L&C AT 3:15 PM CAPITOL 17
04/28/03		(H)	Moved CSHB 260(L&C) Out of Committee MINUTE(L&C)
04/30/03	1197	(H)	L&C RPT CS(L&C) 2NR 5AM
04/30/03	1197	(H)	NR: LYNN, ROKEBERG; AM: GATTO,
04/30/03	1197	(H)	CRAWFORD,GUTTENBERG, DAHLSTROM,
04/30/03	1197	(H)	ANDERSON
04/30/03	1198	(H)	FN1: ZERO(CED)
05/06/03	1375	(H)	COSPONSOR(S): MCGUIRE
05/09/03	1523	(H)	COSPONSOR(S): HOLM
05/09/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HJR 9

SHORT TITLE:CONST AM: APPROPRIATION/SPENDING LIMIT
SPONSOR(S): REPRESENTATIVE(S)STOLTZE

Jrn-Date	Jrn-Page		Action
01/31/03	0102	(H)	READ THE FIRST TIME - REFERRALS
01/31/03	0102	(H)	STA, JUD, FIN
02/11/03		(H)	STA AT 8:00 AM CAPITOL 102
02/11/03		(H)	Heard & Held MINUTE(STA)
03/28/03	0687	(H)	COSPONSOR(S): ROKEBERG
04/04/03	0797	(H)	W&M REFERRAL ADDED BEFORE STA
04/09/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/09/03		(H)	Heard & Held
04/09/03		(H)	MINUTE(W&M)
04/17/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/17/03		(H)	Heard & Held
04/17/03		(H)	MINUTE(W&M)
04/24/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/24/03		(H)	Heard & Held
04/24/03		(H)	MINUTE(W&M)
04/29/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519 -- Location Change --
04/29/03		(H)	Heard & Held
04/29/03		(H)	MINUTE(W&M)
04/30/03		(H)	W&M AT 8:00 AM HOUSE FINANCE 519
04/30/03		(H)	Heard & Held
04/30/03		(H)	MINUTE(W&M)
05/02/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
05/02/03		(H)	Moved CSHJR 9(W&M) Out of Committee MINUTE(W&M)
05/02/03	1271	(H)	W&M RPT CS(W&M) NT 3DP 2NR 2AM
05/02/03	1271	(H)	DP: HEINZE, WHITAKER, HAWKER;
05/02/03	1271	(H)	NR: MOSES, GRUENBERG; AM: KOHRING,
05/02/03	1271	(H)	WILSON
05/02/03	1271	(H)	FN1: (GOV)
05/06/03		(H)	JUD AT 5:30 PM CAPITOL 120
05/06/03		(H)	<Pending Referral>
05/06/03		(H)	STA AT 8:00 AM CAPITOL 102

05/06/03		(H)	Scheduled But Not Heard --
05/06/03		(H)	STA AT 5:30 PM CAPITOL 102
05/06/03		(H)	Scheduled But Not Heard
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/07/03		(H)	<Bill Hearing Postponed> --
05/07/03		(H)	STA AT 8:00 AM CAPITOL 102
05/07/03		(H)	Heard & Held MINUTE(STA)
05/08/03		(H)	STA AT 8:00 AM CAPITOL 102
05/08/03		(H)	Moved CSHJR 9(STA) Out of Committee MINUTE(STA)
05/08/03	1465	(H)	STA RPT CS(STA) NT 3DP 3NR
05/08/03	1465	(H)	DP: SEATON, LYNN, DAHLSTROM;
05/08/03	1465	(H)	NR: GRUENBERG, HOLM, WEYHRAUCH
05/08/03	1466	(H)	FN1: (GOV)
05/08/03	1466	(H)	REFERRED TO JUDICIARY
05/08/03		(H)	JUD AT 3:30 PM CAPITOL 120
05/08/03		(H)	<Bill Hearing Postponed>
05/09/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE DAVID GUTTENBERG
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HJR 22.

REPRESENTATIVE JOHN COGHILL
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Cosponsor of HJR 22 and sponsor of HJR 23.

FRANK TURNEY
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of HJR 22, Version D.

JOHN BRADING
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of HJR 22.

MIKE FAIR
Fairbanks, Alaska
POSITION STATEMENT: During discussion of HJR 22, testified in support of rejecting portions of the USA PATRIOT Act.

ROGER SHANNON
Kenai, Alaska
POSITION STATEMENT: Provided brief comments during discussion of HJR 22.

JENNIFER RUDINGER, Executive Director
Alaska Civil Liberties Union
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HJR 22.

WILLIAM A. GRANGER, Appointee
Board of Governors of the Alaska Bar
Anchorage, Alaska
POSITION STATEMENT: Testified as appointee to the Board of Governors of the Alaska Bar.

DEAN J. GUANELI, Chief Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: On behalf of the administration, during discussion of the proposed amendments to HB 244, provided comments and responded to questions.

BARBARA BRINK, Director
Public Defender Agency (PDA)
Department of Administration
Anchorage, Alaska
POSITION STATEMENT: During discussion of the proposed amendments to HB 244, provided comments and responded to questions.

JASON HARMON, N.D., Vice President
Alaska Association of Naturopathic Physicians (AKANP)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 260.

REPRESENTATIVE PAUL SEATON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 260

MIKE HAUGAN, Executive Director
Alaska Physicians and Surgeons, Inc.
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 260 and proposed Amendment 1.

PATRICIA SENNER, R.N., President
Alaska Nurses Association (AaNA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 260.

CHIP WAGONER, Lobbyist
for Covenant House Alaska
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 260 on behalf of Covenant House Alaska.

VIRGINIA BLAISDELL, Staff
to Representative Bill Stoltze
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HJR 9 on behalf of Representative Stoltze, sponsor.

ACTION NARRATIVE

TAPE 03-57, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:25 p.m. Representatives McGuire, Anderson, Holm, Ogg, Samuels, Gara, and Gruenberg were present at the call to order.

HJR 22 - PATRIOT ACT AND DEFENDING CIVIL LIBERTIES

[Contains mention that HJR 23 and HJR 22 are being merged together.]

Number 0029

CHAIR McGUIRE announced that the first order of business would be HOUSE JOINT RESOLUTION NO. 22, Relating to the USA PATRIOT Act and to defending the Bill of Rights, the Constitution of the State of Alaska, and civil liberties.

REPRESENTATIVE GARA said he supported HJR 22.

Number 0292

REPRESENTATIVE DAVID GUTTENBERG, Alaska State Legislature, sponsor, said that HJR 22 is a unique piece of legislation, and noted that he has provided the committee with a sponsor statement.

Number 0368

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for HJR 22, Version 23-LS0924\D, Cook, 5/8/03, as the work draft. There being no objection, Version D was before the committee.

REPRESENTATIVE GUTTENBERG mentioned that Representative John Coghill would be signing on as HJR 22's first cosponsor, and that HJR 23, which was sponsored by Representative Coghill, has been merged with HJR 22 to form Version D. He then turned members' attention to what became known as Amendment 1, which read [original punctuation provided]:

Page 2, Line 2
DELETE: "Adequate Tools In Opposition to"
INSERT after "Provides":
"Appropriate Tools Required to Intercept and Obstruct"

The committee took an at-ease from 1:33 p.m. to 1:45 p.m.

REPRESENTATIVE GUTTENBERG explained that Amendment 1 will correctly state the full name for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 ("USA PATRIOT Act").

Number 0539

REPRESENTATIVE JOHN COGHILL, Alaska State Legislature, sponsor of HJR 23 and cosponsor of HJR 22, mentioned that Amendment 1 merely corrects a drafting error.

Number 0545

REPRESENTATIVE ANDERSON made a motion to adopt Amendment 1. There being no objection, Amendment 1 was adopted.

Number 0550

REPRESENTATIVE COGHILL turned members' attention to [Amendment 2], which read [original punctuation provided]:

Page 2, Line 26:
DELETE:
FURTHER RESOLVED that an agency or instrumentality of the state may not

Page 2, Line 27
Delete: (1)
Insert: **(4)**

Page 2, Line 29
Delete: (2)
Insert: **(5)**

Page 3, Line 1
Delete: (3)
Insert: **(6)**

REPRESENTATIVE COGHILL said that he'd wanted the paragraphs beginning on page 2, lines 27 and 29, and page 3, line 1, to fall under the language on page 2, lines 14 and 15, which in part says: "in the absence of reasonable suspicion of criminal activity under Alaska State law, may not". He suggested that Amendment 2 would accomplish this and keep with the original intent of the resolution.

REPRESENTATIVE SAMUELS remarked that the words, "and be it" should also be removed from page 2, line 25.

REPRESENTATIVE COGHILL agreed. [There was no formal motion, but the foregoing was treated as an adopted amendment to Amendment 2.]

Number 0653

CHAIR McGUIRE made a motion to adopt Amendment 2 [as amended].

Number 0670

REPRESENTATIVE GRUENBERG objected. He said that he is concerned with the amendment because the language on line 14 would "allow them to do it with, quote, 'reasonable suspicion of criminal activity under Alaska State law' - [to] do such things as racial, ethnic, religious, and national origin profiling." That's very serious stuff, he remarked, adding that according to

lines 27-31, "an agency or instrumentality of the State" could also, with "reasonable suspicion", get involved in federal immigration matters, and collect and maintain information about political, religious, social views, and so forth. He said that although he does support the resolution, he does not support the amendment, adding, "I think it's very dangerous."

CHAIR McGUIRE suggested that Amendment 2 was created by the sponsors in the spirit of compromise.

REPRESENTATIVE GUTTENBERG clarified that he has only just seen this amendment. He noted that just prior to the meeting, he and Representative Coghill had briefly discussed the idea of perhaps simply adding something along the lines of "without just cause" on line 26, as a different option.

REPRESENTATIVE GRUENBERG said that such an option would certainly be acceptable to him.

REPRESENTATIVE COGHILL relayed that he wished to see some barrier - either "reasonable suspicion" or "just cause" or some other language - as opposed to an absolute "may not" as is currently written. He indicated that although he would not want to see any of the things listed in the aforementioned paragraphs done without a compelling reason, a situation might arise that would justify such activities.

Number 0869

CHAIR McGUIRE withdrew the motion to adopt Amendment 2 [as amended].

Number 0880

CHAIR McGUIRE made a motion to adopt new Amendment 2, to add ", without just cause" to page 2, line 26, after "may not". There being no objection, new Amendment 2 was adopted.

Number 0936

FRANK TURNEY thanked both the committee and the sponsors of HJR 22, and called the resolution an important step in defending individual liberties. He said he supports [Version D], and offered his hope that the differences between the sponsors can be worked out and that the Senate could support the resolution as well. In conclusion, he encouraged the committee to pass HJR 22.

Number 1003

JOHN BRADING said that he supports HJR 22 and that the USA PATRIOT Act is an insult to Americans - even the very name of it is an insult, given what the Act contains. The USA PATRIOT Act relinquishes any semblance of due process; violates the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and unacceptably mixes aspects of criminal investigations with aspects of immigration and foreign intelligence laws. The USA PATRIOT Act is dangerous, he said, adding that it is a travesty. Most troubling, he remarked, is that most of these powers of the USA PATRIOT Act do little to increase the ability of law enforcement or intelligence to bring terrorists to justice, but do much to undermine the U.S. Constitution by violating the rights of immigrants and American citizens alike.

MR. BRADING offered that the American Civil Liberties Union (ACLU) has said that this sort of "trust me, we're the government" solution is entirely unacceptable. He then offered the following as a quote from Nancy Chang, Senior Litigation Attorney, Center for Constitutional Rights: "To an unprecedented degree, the Act sacrifices our political freedoms in the name of national security and upsets the democratic values that define our nation by consolidating vast new powers in the executive branch of the government." Mr. Brading also offered that Ms. Chang has said:

> The USA PATRIOT Act launches a three-pronged assault on our privacy. First, the Act grants the executive branch unprecedented, and largely unchecked, surveillance powers, including the enhanced ability to track email and Internet usage, conduct sneak-and-peek searches, obtain sensitive personal records, monitor financial transactions, and conduct nationwide roving wiretaps. Second, the Act permits law enforcement agencies to circumvent the Fourth Amendment's requirement of probable cause when conducting wiretaps and searches that have, as "a significant purpose," the gathering of foreign intelligence. Third, the Act allows for the sharing of information between criminal and intelligence operations and thereby opens the door to a resurgence of domestic spying by the Central Intelligence Agency.

MR. BRADING said: "The proponents of this Act used American's shock and fear to slip this Act past our awareness." He added,

however, that he believes in the intelligence of the average American, and that regular Americans armed with knowledge will use common sense to find out what the government is up to. He asked the committee to send a message to Congress by passing HJR 22.

Number 1173

MIKE FAIR said he supports the "State of Alaska rejecting points of the [USA PATRIOT Act]" because it infringes on "our" liberty. He went on to say:

> I take this really personal. I feel that my rights and my freedoms are in jeopardy every day. I fear who's looking over my shoulder whenever I do anything. ... There's a sense of fear by a lot of people in the library; people are talking about what books they ... can take home. This isn't the country that we are wanting to protect, at least I don't think it is. I think this Act make a mockery of the deaths of the people on [9/11/01]. America in 2003 isn't what some of those people would have given their lives for. ... I hope that when this resolution is passed that Alaska's representatives can make it sound strong enough so that the federal government will hear it, because I think our representatives in Alaska here are standing up for the [U.S.] Constitution far stronger than those cowards in D.C. Thank you.

Number 1253

ROGER SHANNON said: "I think you folks down there have done the job very well for the rest of us. ... Thank you for coming together on it."

Number 1340

JENNIFER RUDINGER, Executive Director, Alaska Civil Liberties Union (AkCLU), thanked the committee for hearing HJR 22 so quickly, and Representatives Guttenberg and Coghill for their hard work and the bipartisan spirit they brought to "this important resolution." She went on to say:

> The bipartisanship that we're seeing in the House mirrors what's happening all over the country and throughout Alaska, where a broad, left-right coalition has come together to stand up in defense of the Bill

of Rights. And we recognize [that] we do need measures that actually keep us safe - but there has to be some balancing - and that many provisions of the [USA PATRIOT Act] go way too far, have nothing to do with fighting terrorism, and infringe our liberties - trade away our liberties, really - for a false sense of security.

So we laud this resolution, and we laud the committee for moving it quickly. And with that, I'll just add that Congressman Don Young has agreed to introduce a measure in Congress to begin to fix some of the more onerous provisions of the [USA PATRIOT Act] - again, it's part of a broad, left-right coalition supporting that - and a strong resolution coming out of the Alaska [State] Legislature would really arm him as he prepares for that fight.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HJR 22.

Number 1397

CHAIR McGUIRE made a motion that the committee rescind its action in adopting new Amendment 2. There being no objection, it was so ordered.

Number 1414

CHAIR McGUIRE made a motion to adopt a third Amendment 2, on page 2, line 26, insert ", without compelling justification". There being no objection, the third Amendment 2 was adopted.

Number 1434

REPRESENTATIVE SAMUELS moved to report the proposed (CS) for HJR 22, Version 23-LS0924\D, Cook, 5/8/03, as amended, out of committee [with individual recommendations and the accompanying zero fiscal note].

REPRESENTATIVE OGG mentioned that Hawaii has a similar resolution that contains a clause that "recognized this type of thought." He noted that during World War II, Alaska was occupied by foreign forces and thus its citizens experienced loss of civil rights. He suggested that HJR 22 ought to recognize that point.

REPRESENTATIVE COGHILL said that although Representative Ogg is correct about what happened in World War II, it wasn't just Alaskans that experienced a loss of civil rights. He remarked that he did not want HJR 22 to become a "history lesson." "We struggled hard on how to get the language that asserted ..., with as much strength as possible, the need to protect our liberties while still trying to say [that] we support the war on terrorism," he added.

REPRESENTATIVE OGG, in response, read the portion of the Hawaiian resolution to which he referred, and suggested that HJR 22 could use the same language and simply substitute "Alaska" for "Hawaii". He opined that Alaska should join hands with Hawaii on this point.

CHAIR McGUIRE indicated that she agreed with Representative Coghill against adding such language.

REPRESENTATIVE GUTTENBERG indicated agreement as well.

Number 1650

REPRESENTATIVE SAMUELS again moved to report the proposed (CS) for HJR 22, Version 23-LS0924\D, Cook, 5/8/03, as amended, out of committee with individual recommendations [and the accompanying zero fiscal note]. There being no objection, CSHJR 22(JUD) was reported from the House Judiciary Standing Committee.

CONFIRMATION HEARINGS

Board of Governors of the Alaska Bar

Number 1662

CHAIR McGUIRE announced that the committee would next consider the appointment of William A. Granger to the Board of Governors of the Alaska Bar.

[Representative Gara, at the beginning of the meeting, had indicated his support of Mr. Granger's appointment.]

Number 1685

WILLIAM A. GRANGER, Appointee, Board of Governors of the Alaska Bar ("the Board of Governors"), said that he has served on the Board of Governors for the last three years, and that it has

been a very valued public service. He indicated that he has voiced public concern from a layman's point of view, and watched and contributed to the process of continuing education, grievance resolution, and the general wellbeing of the bar and legal system at large. He also indicated that his particular interest is in the area of immigration and pro bono work, and that he serves as a trustee for the "Alaska Bar Foundation," which, he added, is the recipient of "IOLTA funds" - Interest on Lawyer Trust Accounts. In conclusion, he said that he enjoys the opportunity to be of service.

REPRESENTATIVE GARA relayed that he has gone before the Alaska Bar Association and suggested that it change the rule requiring attorneys that only do volunteer work to pay full "bar dues" of approximately $500 a year, but the Alaska Bar Association turned down this suggestion. He asked Mr. Granger to consider such a change to the "bar rules," so that more people would be encouraged to do pro bono work.

MR. GRANGER indicated that Representative Gara's suggestion received a great deal of consideration and was not completely "off the table."

CHAIR McGUIRE indicated that she and other members of the House Judiciary Standing Committee supported Representative Gara's suggestion.

MR. GRANGER said that he would pass that message along.

REPRESENTATIVE GRUENBERG said that he also supports "mandatory CLE [continuing legal education]."

MR. GRANGER said that fundamentally, he too supports mandatory CLE. However, he added, he is not sure that the [Alaska] Supreme Court does.

REPRESENTATIVE GRUENBERG said he is glad that Mr. Granger is willing to serve on the Board of Governors.

Number 1930

REPRESENTATIVE GRUENBERG made a motion to advance from committee the nomination of William A Granger as appointee to the Board of Governors of the Alaska Bar. There being no objection, the confirmation was advanced from the House Judiciary Standing Committee.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 1946

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 244, "An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date." Chair McGuire indicated that the committee would be considering amendments to HB 244.

Number 2014

CHAIR McGUIRE made a motion to adopt Amendment 1, which would delete Sections 1-5 and which read [original punctuation provided]:

> Page 1, line 9 - Page 3, line 6:
> Delete all material.
>
> Renumber the following bill sections accordingly.

CHAIR McGUIRE said she is pondering, however, whether to keep Section 1 in the bill. She noted that the Department of Law (DOL) has provided testimony regarding making a heat of passion defense an affirmative defense, and that she is inclined to agree with that testimony.

Number 2063

CHAIR McGUIRE restated her motion such that Amendment 1, as amended, would delete all material from page 2, line 1, to page 3, line 6 [Sections 2-5].

Number 2080

REPRESENTATIVE GARA objected, and said that he supports the deletion of Section 1. He elaborated:

> Heat of passion is a defense to a serious crime in, I believe, almost every state. ... And so, really, the

question before us is, do we place it upon the prosecution to prove this kind of case, or do we place it upon the defendant. And let me give the members of this committee an example, and I'll work from the example. ... I know of case like this: Assume that you witness somebody being raped; you witness ... a member of your family being raped by somebody else that you know. And I suppose assume that the three people involved - the person being raped, the person who is raping the victim, and then the person who observes it - all know each other and are romantically entwined. And you see this occur, and you go and you try and stop it, and there is a weapons fight. And the observer ends up killing the aggressor to protect the rape victim.

I can envision a circumstance where the heat of passion issue would come up, and in my view, depending on the circumstances, probably the observer was entitled to do what the observer did if, in the middle of the fight, the observer's life was then threatened and then, in order to protect himself and the victim, the observer then killed the rapist. It seems that the heat of passion defense should apply. It seems that the person who ... killed the rapist maybe didn't commit a crime. It seems like all of those elements, if the prosecution is going to charge that person with a crime, should be proven by the prosecution.

... I think in my example there are some circumstances where a heat of passion defense would apply, and some circumstances where it wouldn't. But it seems to me that the point that applies to all these other affirmative defenses applies here, which is, if you didn't do anything illegal and the prosecution wishes to charge you with doing something illegal, it should be the prosecution's burden to prove beyond a reasonable doubt, even on that element, that you did something wrong. So, I think when we start relaxing the burden on these affirmative defenses, we are making it easier for people who have done nothing illegal to be prosecuted and thrown in jail for very long periods of time. So I think these cases should be treated like any other criminal case.

REPRESENTATIVE GARA reiterated that he would prefer Amendment 1 to also include the deletion of Section 1.

CHAIR McGUIRE suggested that the committee first consider the deletion of Sections 2-5, and then entertain the question of whether to delete Section 1.

Number 2261

REPRESENTATIVE GRUENBERG offered his belief that Section 2 relates to Section 1. He suggested that Amendment 1, be amended to delete only Sections 3-5: page 2, line 10 - page 3, line 6.

CHAIR McGUIRE agreed.

Number 2314

CHAIR McGUIRE restated the motion to adopt Amendment 1, as amended, to delete all material on page 2, line 10 - page 3, line 6. There being no objection, Amendment 1, as amended, was adopted; thus Sections 3-5 were deleted.

Number 2329

REPRESENTATIVE GARA made a motion to adopt [Conceptual] Amendment 2: delete all material on page 1, line 9, through page 2, line 9.

Number 2347

REPRESENTATIVE GRUENBERG observed that [Conceptual] Amendment 2 would delete Sections 1 and 2.

CHAIR McGUIRE announced that Representative Samuels objected.

Number 2387

A roll call vote was taken. Representatives Ogg, Gara, Gruenberg, and Anderson voted in favor of [Conceptual] Amendment 2. Representatives Holm, Samuels, and McGuire voted against it. Therefore, [Conceptual] Amendment 2 was adopted by a vote of 4-3.

Number 2400

CHAIR McGUIRE turned attention to [Amendment 3, proposed by Representative Anderson, which, with original punctuation provided, read]:

Page 3, line 11, after "prisoner" insert "or any relative or friend of the prisoner"

TAPE 03-57, SIDE B
Number 2385

CHAIR McGUIRE observed that Amendment 3 addresses Section 6, which pertains to a prisoner's rights after he/she has been read the Miranda warning.

The committee took an at-ease from 2:14 p.m. to 2:15 p.m.

Number 2351

CHAIR McGUIRE stated that she'd heard a motion to adopt Amendment 3.

Number 2349

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE ANDERSON explained that Amendment 3 deals with Section 6 of the bill, which seeks to restrict a person's access to an attorney. Although a prisoner has been read the Miranda warning and advised of the right to seek counsel, his/her relative or friend should be allowed to retain counsel on his/her behalf. Representative Anderson said he supports Amendment 3 because it has not been demonstrated that limiting a prisoner's right to counsel is in any way good public policy.

REPRESENTATIVE SAMUELS argued:

> It's not good public policy to get "Mirandized" twice so we can just say, "You can't possibly speak to the police unless you have an attorney there." And that's not good public policy. The Miranda warning is to tell them what their rights are; it doesn't specifically give them any more rights, and in this case, now you're trying to give the rights to somebody else. You're jumping in the middle of the investigation. The police have a right to investigate the crime, and to "Mirandize" somebody twice does such a disservice to the victims of the crime.
>
> If you are a rape victim, and your person gets arrested and they're "Mirandized" and they turn Miranda down, and the police are questioning you, and

you've turned it down, you are advised what your rights are, then we should not be going out of the way to help any individual, whether you have a wealthy family or you happen to have an in-law that saw you get arrested. That's not fair, and it's not fair to the victim. If we're going to be a level playing field for everybody, we "Mirandize" them all, and that's it. And we can get anecdotal on it; I know the defense lawyers hated the anecdotes yesterday until they start coming up with anecdotes that help them out. But this is bad public policy; we're treating people differently.

Number 2256

REPRESENTATIVE GARA relayed that he is considering offering an amendment that would delete Section 6 altogether and retain current law. He said:

> I think that the debate about examples touches on this issue, but sometimes doesn't exactly address what this provision does. ... Representative Anderson's amendment only addresses the right to get counsel immediately after an arrest. We're not talking about somebody who's been sitting in jail for a week and changes his mind whether he wants an attorney. We're talking about this very narrow window of time. So if you look at page 3, line 8, the rights we're talking about are the rights to [an] attorney, quote unquote, "immediately after an arrest".
>
> The reality is that some people are not sophisticated; some people don't have like a direct hotline to their own attorney. A lot of people don't have a direct hotline to their own attorney. What happens in the real world is, somebody calls and says, "Mom," or somebody calls and says to their wife, "Please get me an attorney," because they didn't dial their attorney's number - they don't have an attorney. I mean, how many people in this room have an attorney? I don't have an attorney.

CHAIR McGUIRE remarked that Section 6 still allows a prisoner to telephone or otherwise communicate with any relative or friend.

REPRESENTATIVE GARA agreed on that point. He pointed out, however, that the reality is that there are many examples where

a person who is arrested will ask a relative or friend to retain an attorney. He opined that in such instances, when the relative or friend lets the arresting officers know that an attorney has been retained for the prisoner, that should be enough; the police should know, then, that they need to give the prisoner access to that attorney. He expressed disbelief that Section 6 actually addresses the perceived problem as relayed by the administration, and suggested that although deleting Section 6 altogether may not address the perceived problem, Section 6 is divorced from real-world situations. He opined that it is appropriate to allow prisoners to have friends and family retain an attorney; therefore, he added, he supports Amendment 3.

Number 2143

REPRESENTATIVE GRUENBERG said:

> When a person is put in jail, possibly for the first time, they may be very scared, certainly are in an unfamiliar situation, probably aren't thinking very clearly, may not fully realize - even though somebody has said - that they have a right to an attorney, and they don't probably know who the attorney is going to be. But if an attorney shows up who's been retained by the family, maybe a friend of the family, somebody this person knows, that's going to be comforting to the person.
>
> Now, confessions are often used to convict people, and they probably should be, but they can be problematic, too, particularly if the person is young, maybe intoxicated, maybe of low mental ability. And so an attorney, maybe an ethical attorney, can be quite helpful and ensure that the process is conducted ... fairly. Admittedly, if you have a defense lawyer in the process, it won't be as easy to convict people, but the system is built on the cornerstone of fairness. And regardless of who retains the attorney, the person should have the right to make that choice. And that's all this does.

REPRESENTATIVE SAMUELS surmised that as long as the person says he/she wants to talk to an attorney, it won't matter who hires the attorney. He opined that what Section 6 pertains to is a defendant who has already turned down an attorney.

Number 2020

REPRESENTATIVE GARA indicated that he has a possible amendment to Amendment 3, and that it consists of adding language currently in statute. He suggested that on page 3, line 10, the language be changed to read "(3) an immediate visit from an attorney".

Number 1989

REPRESENTATIVE ANDERSON said he did not have a problem with that amendment to Amendment 3.

Number 1973

CHAIR McGUIRE, hearing no objection, indicated that the foregoing amendment to Amendment 3 was adopted.

Number 1967

A roll call vote was taken. Representatives Gara, Gruenberg, Anderson, and Ogg voted in favor of Amendment 3, as amended. Representatives Holm, Samuels, and McGuire voted against it. Therefore, Amendment 3, as amended, was adopted by a vote of 4-3.

The committee took an at-ease from 2:27 p.m. to 2:28 p.m.

Number 1925

REPRESENTATIVE ANDERSON made a motion to adopt Amendment 4, which read [original punctuation provided]:

> Page 3, line 15 - Page 4, line 1:
> Delete all material.
>
> Renumber sections accordingly.

REPRESENTATIVE ANDERSON explained that Amendment 4 would delete Section 7, the provision pertaining to the admissibility of prior convictions.

CHAIR McGUIRE objected.

REPRESENTATIVE ANDERSON offered his belief that the introduction of prior convictions during a criminal trial is highly prejudicial.

Number 1854

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said that introducing prior convictions is done in sexual assault cases and domestic violence cases, but added that such has not always been the case. What can be admitted in a trial as evidence is determined by court rule, and a few years ago, he explained, the legislature stepped in and changed the court rules to allow for the admissibility of prior convictions in sexual assault cases and domestic violence cases. He opined that the legislature should do the same for DWI (driving while intoxicated) cases because it would be in keeping with the tougher DWI laws for repeat offenders that the legislature has enacted.

Number 1766

BARBARA BRINK, Director, Public Defender Agency (PDA), Department of Administration, said that what is troubling about the process of allowing prior convictions to appear in the case in chief is that the jury can be unduly swayed by evidence of someone's past behavior. She relayed that the PDA continues to believe that a person should be convicted based upon the evidence of the present offense, not on his/her prior record. She went on to say:

> It seems like this is an attitude where we're just not trusting the jury system. And the community, when representatives are seated as a jury, have the ability to decide the facts of the case and whether or not they've been proven or not proven. I think we should continue to leave that responsibility in the hands of the jury. The State of Alaska is basically arguing [that] the jury doesn't know what they're doing, so we should be permitted to provide [the defendants'] history of their past in an effort to convict them on this current offense. I don't think we should do that. I think we should make the state prove a case up, based on the evidence of that case alone. Then, if there is a prior record, it can be submitted to the jury in the same trial after the original finding of guilt in order to enhance the penalties.

CHAIR McGUIRE offered, however, that allowing prior convictions to be introduced in a current case is actually saying that the

jury is trusted, trusted to not be unduly influenced by that information.

MR. GUANELI, in response to a question, relayed that currently, Rule 404 of the Alaska Rules of Evidence says in part:

> In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible.

Number 1650

REPRESENTATIVE ANDERSON asked whether the issuance of a domestic violence restraining order that is later retracted is something that could be brought up in a current case.

MR. GUANELI indicated that Rule 404 addresses instances in which a specific crime involving domestic violence has occurred, rather than the issuance of a restraining order. In response to another question, he relayed that Rule 404 specifically says "is admissible", as opposed to within the discretion of the court. However, under the Alaska Rules of Evidence, judges have a fair amount of discretion; thus, he opined, if a particular piece of evidence is extremely old or pertains to an unusual situation, the judge could deem it irrelevant and instead weigh other circumstances. In response to another question, he explained that issuance of a protective order does not constitute a conviction, although the facts that gave rise to its issuance might be admissible as proof that an actual crime did occur.

REPRESENTATIVE HOLM asked whether information kept by law enforcement agencies on a particular person would be admissible under Section 7.

MR. GUANELI reiterated that although the underlying facts that prompted the issuance of a protective order, if proven to have occurred, might be admissible at the judge's discretion, issuance of the protective order is not admissible. Section 7, he explained, does not pertain to unproven, uncharged offenses; Section 7 pertains to those crimes that have, as an element of the offense, prior convictions. For example, felony drunk driving, felony shoplifting, or instances in which a crime is committed by a felon. In those types of cases, it must be

proven that the person has prior convictions or is a felon. In response to another question he said that currently, in those types of cases, there are two phases to the trial. The first phase involves looking only at the current incident; then, if the person is convicted of the crime, the second phase involves notifying the jury of the those prior convictions, for example, by being presented certified copies of those convictions or by having those convictions stipulated. Currently, the jury is prevented from knowing about those prior convictions during the first phase of the trial.

Number 1318

REPRESENTATIVE GARA said:

> There is a problem with Section 7, and that is that the tradeoff is completely imbalanced. In order to make it easier for the prosecution to prove the prior elements in one proceeding rather than two, we are making it much easier for the prosecution to convict somebody of a new crime. So currently, what's really the burden to the prosecution? ... In a ... prosecution of somebody where the prosecution has to prove this is your third DWI, you make the prosecution prove that the person drove drunk; after you do that, it takes ... really not very much time to reconvene the jury and say, "Ladies and gentlemen of the jury, here's the second part of the case; here are two convictions for two prior DWIs." What's the defendant going to say?
>
> I mean, that part of the case is proven very easily, so what is the burden we're trying to ... delete? [There's] very little burden on the part of the prosecution, right now, to do the second part of the trial, where the prosecution just introduces the two prior convictions and says, "Here they are." The prosecution wins.
>
> So, to save that burden, what are we doing? We're taking away a very substantial right from the public. The public has the right to be presumed innocent. And the moment you go into trial with a shaky DWI case against somebody, that you might not be able to prove because, frankly, the person wasn't drunk, but then tell the jury, "Hey, this [guy has] ... two prior DWIs," all of a sudden, you make it that much easier

that you're going to convict somebody for a crime the person didn't commit.

Number 1222

REPRESENTATIVE GARA continued:

And that's the purpose for the current rule. If you allege a crime against somebody, prove it to the jury. But don't prejudice the jury by saying ... "This guy's done stuff like this in the past." It's a longstanding rule, it's an important rule, and it fits within the constitutional rubric that people should be innocent until proven guilty. And I can't imagine that under the current law, it's that hard for the prosecution to prove the second part of the crime, that there were prior convictions; just do it later ....

REPRESENTATIVE OGG said that he has problems with limiting the defendant's ability to legally challenge the validity of a previous conviction only to the right to counsel and to the right to a jury trial. This appears to narrow what the defendant can raise up as a defense, he added.

Number 1163

CHAIR McGUIRE proposed that Amendment 4 be amended such that all conforming language to Section 7 throughout the bill would also be deleted if Amendment 4, which deletes Section 7, is adopted. [No objection was stated and this conceptual amendment to Amendment 4 was treated as adopted.]

REPRESENTATIVES ANDERSON and GRUENBERG observed that this would entail Sections 28 and 29.

Number 1114

A roll call vote was taken. Representatives Gara, Gruenberg, Anderson, and Ogg voted in favor of Amendment 4, as amended. Representatives Samuels, Holm, and McGuire voted against it. Therefore, Amendment 4, as amended, was adopted by a vote of 4-3.

Number 1073

CHAIR McGUIRE made a motion to adopt Amendment 5, which read [original punctuation provided]:

Page 4, line 15 - Page 6, line 1:
Delete all material.

Page 8, lines 11-16:
Delete all material.

Renumber the following bill sections accordingly.

The committee took an at-ease from 2:43 p.m. to 2:44 p.m.

CHAIR McGUIRE noted that Amendment 5 would delete Sections 9-12 and 17, but would not affect Section 8. She remarked that it was Ms. Brink's testimony from the bill's prior hearing that persuaded her to keep Section 8 in the bill.

REPRESENTATIVE SAMUELS objected for the purpose of commenting: "I agree with you, but I don't feel comfortable knowing enough about it just after the one hearing to stand up and fight for you." He then withdrew his objection to Amendment 5.

CHAIR McGUIRE mentioned that over the interim, the administration might work some more on the issue of immunity and perhaps propose a separate bill. She opined that the current provisions in the bill relating to immunity constitute a dramatic, substantive change - a constitutional change - and said that at this point, she is not comfortable keeping those provisions in HB 244.

MR. GUANELI acknowledged that the administration would continue to work on this issue, adding that meanwhile, there may very well be cases in which prosecutors won't be granting immunity because they are uncomfortable granting immunity "in the dark."

REPRESENTATIVE GARA remarked that Section 8 appears to be an accurate statement of transactional immunity, adding that he appreciates the provision because it clarifies the law.

Number 0849

CHAIR McGUIRE asked whether there were any further objections to Amendment 5. There being none, Amendment 5 was adopted.

CHAIR McGUIRE noted that she has no objection to Section 14, which pertains to consecutive terms of imprisonment.

REPRESENTATIVE GARA mentioned that later he would be offering an amendment to the provisions pertaining to consecutive terms of imprisonment [Sections 13, 14, and 18-20].

Number 0793

CHAIR McGUIRE, after noting that she did not like Section 16, made a motion to adopt Amendment 6, which read [original punctuation provided]:

> Page 8, lines 7-10:
> Delete all material.
>
> Renumber the following bill sections accordingly.

Number 0775

REPRESENTATIVE GRUENBERG objected for the purpose of discussion. He said that Section 16 seemed to him to be a reasonable amendment to current law because it encouraged those without a defense to plead guilty.

REPRESENTATIVE GARA disagreed. He elaborated:

> Currently, I believe that victims of sexual assault receive short shrift, that their cases are plead down to misdemeanor way too often, that violent crimes against women are way too often charged as misdemeanors when they're felonies. And ... I always understand the interest in trying to efficiently prosecute people - and I suppose this does this, it encourages guilty pleas - but by reducing the criminal sanction in this class of cases, it especially bothers me because this is a class of cases where people are underprosecuted in the first place.

REPRESENTATIVE GRUENBERG indicated that because he did not know enough about the issue, he would not be [maintaining his objection] to Amendment 6.

CHAIR McGUIRE relayed that she is offering Amendment 6 on the basis of Ms. Hugonin's and Ms. Brink's testimony during a prior hearing.

Number 0628

CHAIR McGUIRE asked whether there were any further objections to [Amendment 6]. There being none, Amendment 6 was adopted.

CHAIR McGUIRE, after acknowledging that Sections 18-20 relate back to Sections 13 and 14, mentioned that she favors Section 21, which is a direct court rule amendment. She indicated that the testimony regarding victims, victims' families, expedience, and considerable delays has engendered in her a belief that the current system is broken. She posited that Section 21 will help the situation and assist in providing an expedient outcome for all parties.

Number 0555

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 7, which read [original punctuation provided]:

> Page 9, line 20, after "defense" delete the remainder of line 20 through "defense" on line 22.

REPRESENTATIVE GRUENBERG said he is offering Amendment 7 because, currently, Section 21 takes away the court's discretion whether to allow a particular defense if notice of it is not given at least 7 days before trial. The specific defenses listed include: alibi, justification, duress, entrapment, or other statutory or affirmative defense. He pointed out that in some cases, a defendant may not know about a key witness or a key piece of information until right before trial. Therefore, to absolutely prohibit the defendant from offering a defense "for a reason like this" is clearly unconstitutional, he opined.

MR. GUANELI said that currently, notice of those defenses must be provided 10 days prior to trial. Section 21 changes that to 30 days and builds in some sanctions including prohibiting the assertion of the designated defense if notice is not given at least 7 days before trial. He asserted that currently, it is a defense tactic to not notify the prosecution of a defense until the absolute last moment. He opined that if a defendant is going to use a defense of alibi, justification, duress, or entrapment, it is not a last-minute decision; the defendant already knows what that defense will be, and thus there is no reason to delay notice to the prosecution. In addition, he explained, Rule 53 of the Alaska Rules of Criminal Procedure allows a judge to relax the rules to prevent a manifest injustice. So, for example, if there is a change of attorney at the last minute and the new attorney wants to use a different defense, that is the kind of thing that a judge could take into

consideration and thus relax the rules to allow for the new defense.

Number 0290

REPRESENTATIVE GARA indicated that although there are times when an attorney might give notice of a defense at the last minute in order to gain a strategic advantage, there are also times when it is simply that the attorney is overworked and is not able to provide notice until the last minute. He said:

> Here's the problem with what you're doing. If an attorney does something wrong, the attorney should be sanctioned. I have no problem with that. But you shouldn't throw somebody in jail because their attorney didn't follow the rules. That's a longstanding rule in the public process; it says ... punish the person who did the bad thing. So, I just can't accept that if somebody hires a private criminal-defense attorney or, especially, a public defender who has a 150 cases that they're carrying, and the ... [attorney] lets something slip through the cracks, maybe intentionally, maybe not - it doesn't really matter - that the consequences of that person's conduct should be thrown on the person that we're supposed to treat as innocent until proven guilty. There's a disconnect.
>
> So, I would have no problem saying that the prosecution is entitled to a continuance of trial if they're not given this information in time - that would be wonderful, that is fine, [and] it's also the current law - ... [and] if we want to make that stronger to make sure the prosecution is always given a continuance in these cases, that would be fine. But to take the rights away from a defendant and to make it easier to convict somebody - to take away their defense, to take away their witnesses - because their attorney had 150 cases they were working on and rightly or wrongly didn't provide notice in time, gosh, that's a big right we're taking away from people.

REPRESENTATIVE OGG noted that although Mr. Guaneli had mentioned some of the designated defenses as being ones that the defense would know of before the last minute, Mr. Guaneli had not said the same of, "or other statutory or affirmative defense", which

is also listed as a designated defense. Representative Ogg said he could envision a scenario wherein such a defense is not settled upon until the last minute.

REPRESENTATIVE GRUENBERG said:

> It is not a question of whether you know you have the defense. It's a question of whether you can prove it. And these are affirmative defenses. What that means is, even though it's a criminal case, the defendant has the burden of persuasion by a preponderance of the evidence, and the burden is on them because it's an affirmative defense. This is not just a typical kind of a defense; [they have to prove their case by a preponderance of the evidence]. [The previously bracketed portion was not on tape, but was taken from the Gavel to Gavel recording on the Internet.]

TAPE 03-58, SIDE A
Number 0001

REPRESENTATIVE GRUENBERG continued:

> And an alibi, for example, may involve proof of another witness. And at the last minute, a witness can come up. And Mr. Guaneli, I'm sure, knows that this has occurred. I do; it has, in fact, occurred. And it's the word "shall" that bothers me, and to put that additional burden on the defendant, when it's his burden anyway to prove this, I think that's wrong.

Number 0062

A roll call vote was taken. Representatives Gara, Gruenberg, and Ogg voted in favor of Amendment 7. Representatives Anderson, Holm, Samuels, and McGuire voted against it. Therefore, Amendment 7 failed by a vote of 3-4.

The committee took an at-ease from 3:06 p.m. to 3:20.

Number 0179

REPRESENTATIVE GARA made a motion to adopt Amendment 8, a handwritten amendment which read [original punctuation provided]:

> Delete p.7 line 26 - p.8 line 6.

CHAIR McGUIRE objected.

REPRESENTATIVE GARA, in support of Amendment 8, said:

> Here we're addressing cases where we're in the sentencing phase of the trial; the defendant has already been convicted, and the defendant's sentence may be increased if the defendant has a prior conviction. ... Currently, under the law, a defendant can show that a prior conviction wasn't valid or a prior conviction was questionable. And so the ways a prior conviction might be invalid or questionable would be: A defendant comes from a state where they didn't give him an interpreter, and the defendant can show that he sat through trial with an overburdened public defender in Washington, D.C., and then the defendant would have to prove that [he] ... didn't understand the trial or somehow wasn't given an interpreter. That would be something that ... [the state] should let [the defendant] ... try and prove, if [the state is] ... going to try and show that a prior conviction is [valid].
>
> ... Section 15 now ... limits the number of places where your conviction was possibly improper and doesn't let you address those circumstances. There is no evidence, currently, that this is a problem that needs to be fixed. There is no evidence, currently, that defendants are in there proving, under bogus claims, that their prior convictions were invalid. It almost never happens. And there's been no proven abuse by the courts in this area. So why are we trying to fix this problem? If the general rule is, you shouldn't count a prior conviction if it was invalid, let the person come in and show it was invalid. It's not going to happen too often, but just let them do it.

REPRESENTATIVE GARA, in response to a question, explained:

> By deleting Section 15, we leave in the current law. The current law is that your prior convictions do count. The current law says, though your prior convictions count, the defendant can come in and show the conviction was invalid .... They can't retry the case, but they can [show] it was invalid for a

constitutional reason, that it either didn't occur or that is was invalid for a major constitutional reason. And the courts will listen to that. It's very rare that they ever say, "Okay, I'm not going to count this prior conviction." But, no, this would just leave the current law in place.

Number 0443

MR. GUANELI, in defense of Section 15, offered an example:

Let's say that in 1997, someone was convicted of drunk driving. They're convicted, they're sentenced, they have 30 days to decide whether to appeal that conviction. Once their 30 days are up, their appeal rights have gone, but there is, under Alaska law - and the laws ..., really, of most states - there is sort of a second phase appeal; it's called post-conviction relief, and that allows within a period of, I think, two years that you ... can file an action in the court and say, "That conviction was invalidly obtained," for any one of the reasons that Representative Gara mentioned.

But once that two-year -- and the legislature actually had to go in and change the court rules to stop some of the abuses that were occurring several years ago, where convictions, many, many years ago, were being relitigated. And the legislature set some time limits on that. ... So, ... [if] convicted in 1997, by 1999, under Alaska law, you've had your right to direct appeal - appeal within 30 days - or, within two years, your rights to post-conviction relief. By 1999, the Alaska law is, that conviction is a matter of right, it's a matter of record, and we are not going to allow you to relitigate it.

MR. GUANELI continued:

Then let's say in 2000, the person gets another drunk driving conviction, doesn't appeal that one either, within 30 days, doesn't take post-conviction relief from that, doesn't claim that it's invalid within the two years. So, by 2000 he's got two drunk driving convictions as a matter of record. Well, 2003 he gets his third drunk driving arrest, all of a sudden he's facing a felony, and all of a sudden what we hear is,

"Oh, those prior convictions [weren't] valid." In essence, what he's trying to do is get a third bite at the apple. ... He decided not to appeal those previous convictions, or maybe he did appeal and maybe the appeal was denied, but now he wants a third bite at the apple.

Number 0572

And this often occurs years later, it occurs in felony drunk driving situations, it occurs anytime there's an enhanced sentencing provision, and Alaska law allows the courts to look back any number of years to enhance these sentences. And what we end up having to do, in the context of a new case, is litigate things that occurred sometimes many, many years in the past, sometimes in another state, that the defendant had a right to appeal at that time or sometime shortly after that and decided not to, or did and was turned down. And we simply want to stop these kinds of abuses.

MR. GUANELI concluded:

... In some senses, I will agree with Representative Gara, it doesn't happen very often that the courts will allow these challenges to be successful, but it causes a lot of litigation, it causes a lot of confusion in these cases, it delays the processing of these cases, and it's simply an abuse that we think ought to be stopped. And unless the defendant can show that he was denied the right to counsel, or was denied the right to a jury trial, that conviction that occurred many, many years in the past that he had an opportunity to litigate in the past, ought to be a matter of record. The state ought to be able to rely on it, the courts ought to be able to rely on it. And that's this provision [in] Section 15.

REPRESENTATIVE GRUENBERG responded:

The defendant enjoys a number of constitutional rights. Two of them are the right to counsel, under the Sixth Amendment, and a right to a jury trial, [under] I think the Sixth or Seventh Amendment (indisc.). But he enjoys other constitutional rights also, and the one that comes to mind is due process, procedural due process. Let me give you an example of

that: let's say you have a judge who's on the take - that may not come to light until later, but it would certainly be a denial of due process - or a DNA [deoxyribonucleic acid] situation, which we dealt with earlier.

Number 0721

A due process right, if it's violated, is just as important as a denial of the right to counsel or the right to jury trial. I would feel more comfortable if, instead of just listing two constitutional rights, we would say a denial of their constitutional rights, because I don't know, at this point, what constitutional rights might have been violated. And I'm asking Mr. Guaneli: would you, would the administration, oppose us saying "denial of constitutional rights".

MR. GUANELI replied:

The reason why there is the focus on right to jury trial and right to counsel in this provision is because those are the two constitutional rights that have been recognized by the courts as really the fundamental ones in our criminal justice system, and without which the conviction is considered invalid. When you start talking about due process and some of these other rights that are not as clear-cut as these, you end up in the situation of litigating almost anything that the defendant wants to claim was a violation of due process.

Due process simply means, "It wasn't fair, it wasn't fair to me," ... and under that rubric, you could - most attorneys could - probable squeeze just about anything that happens in a criminal case under that. So for that reason, we have focused on the two provisions that the courts generally recognize as invaliding a conviction; if you didn't have a right to counsel or didn't have a jury trial, that conviction [is] generally considered invalid, and that's what we've focused on.

REPRESENTATIVE GRUENBERG asked Mr. Guaneli whether he could think of any types of cases that would be equally well recognized that maybe should be added. He elaborated, "I'm not

trying to open this up; I'm trying to make sure that there are not classes of cases well recognized that we should maybe put on the list too.

Number 0898

MR. GUANELI acknowledged that Representative Gruenberg's example of a judge on the take could be such a case because the conviction would have occurred on the basis of fraud. On the other hand, Representative Gara's example of a person that didn't have an interpreter, he surmised, is the type of case that should have been appealed either then or within the two-year time period for post-conviction relief. He posited that because he has never encountered any allegations of a conviction obtained by fraud, that is why it has not been included in Section 15.

REPRESENTATIVE GARA responded:

> See, that's the problem with Section 15. We have a small class of cases where the prosecution believes there is a problem, but they're taking away many more rights than the rights that address the problem they've identified. I would have no problem with ... a section that addressed the situation Mr. Guaneli mentioned, which is, in the case where somebody doesn't ask for post-conviction relief, they can't claim that ... their conviction was invalid when it could have been corrected on appeal.
>
> ... I guess we could come up with a section of law that addresses that circumstance. But instead we're tossing out a defendant's rights where they didn't have the right to an interpreter. We're tossing out the defendant's rights because their attorney wouldn't let them testify .... Believe it or not, some attorneys ... think they know better than a client, and in other states that has happened: attorneys have told their clients they're not allowed to testify, and they've been convicted.
>
> In this state you're not allowed to do that as an attorney; if a client wants to testify, they testify. In other states, sometimes, a public defender with a 180 cases on their caseload assumes all their clients are guilty and just doesn't let any of them testify. That's an exaggeration, but it happens sometimes. And

that would be, I think, outrageous, not to be able to consider that. So, I would be sympathetic to a section that addressed the problem the prosecution has identified. I'm not sympathetic to a section that ... throws out many more rights than I think have been, arguably, abused.

Number 1024

A roll call vote was taken. Representatives Gruenberg and Gara voted in favor of Amendment 8. Representatives Ogg, Holm, Samuels, and McGuire voted against it. Therefore, Amendment 8 failed by a vote of 2-4.

REPRESENTATIVE GARA asked for more information about Section 20.

MR. GUANELI said that the three subsections of current statute that are being deleted via Section 20 of HB 244 are the current laws pertaining to consecutive sentencing. He suggested that upon a plain reading of those subsections of statute, one would think that consecutive sentencing is mandated for everything. However, the courts have not interpreted those subsections to mean that; instead, they have been interpreted as a legislative preference for consecutive sentencing. He indicated that Section 20 is in place because HB 244 proposes to adopt more comprehensive consecutive sentencing provisions.

REPRESENTATIVE GARA relayed that he would return to this issue when he addresses his amendment pertaining to those consecutive sentencing provisions.

Number 1115

REPRESENTATIVE GARA made a motion to adopt Amendment 9, a handwritten amendment which read [original punctuation provided]:

Delete p.9 line 8 - p.11 line 28

CHAIR McGUIRE indicated that Amendment 9 would delete Sections 21-23.

Number 1140

REPRESENTATIVE GARA, after acknowledging that Section 21 has already been addressed, said that he would amend Amendment 9 such that it would instead delete all material from page 10,

line 5, through page 11, line 28, and thus have the effect of deleting Section 23.

Number 1162

CHAIR McGUIRE objected.

MR. GUANELI, in response to a question, explained that currently, notice of an expert witness must be given 30 days before trial. He added that once one party discloses an expert witness, the other party "has a certain period of time after that."

MS. BRINK said that Mr. Guaneli's explanation is generally correct, adding that under the current Alaska Rules of Criminal Procedure Rule 16, the defense has the duty to disclose 30 days prior to trial, and the prosecution has the duty to disclose 45 days prior to trial.

REPRESENTATIVE GARA sought confirmation that under Section 23, one of the sanctions is that the court shall prohibit the defense from introducing the witness.

MR. GUANELI confirmed this, adding that this provision pertains to expert witnesses - psychiatrists, ballistics experts, et cetera - but not eyewitnesses to the crime.

REPRESENTATIVE GARA said that he is offering Amendment 9 because sometimes, in an effort to economize, the defense does not hire expert witnesses until the last minute because the defense is hoping to settle the case before it goes to trial. Section 23 will cause people to hire and provide notice of an expert witness way in advance, just as a matter of caution. He added, "Section 23 includes this draconian punishment that says you don't get to use your expert witness at trial which could gut a case." He opined that the proper remedy for not giving proper notice is a continuance, adding that he would entertain such a change.

CHAIR McGUIRE argued that the point of this provision is to speed up the process for victims, rather than delaying it via additional continuances.

REPRESENTATIVE GRUENBERG noted that according to language on page 11, lines 7-14, it appears that the disclosure requirements of Section 23 do not apply to "peace officers and other crime

investigators". In other words, those experts do not have to be made available for a deposition or recorded interview.

MR. GUANELI confirmed this and said that the main thrust of Section 23 is that when there are expert witnesses, those who have not been directly involved in the investigation of a case, they need to be disclosed if used at trial. The exception stipulated on page 11, lines 7-14, however, pertains to "peace officers and other crime investigators" who have directly participated in the investigation.

Number 1490

MS. BRINK, addressing Section 23, said:

> I do think this section is problematic in that -- frankly, it isn't that the defense attorney is claiming that the state is using a police officer as an expert witness, but rather that, in fact, the prosecutor is trying to qualify the investigator as an expert witness so [that] they are permitted to issue an opinion and testify about their opinions [of] the case to the jury. And so it doesn't seem to make a whole lot of sense to me that the 45-day timeframe should not apply to these witnesses as well. I mean the defense needs to know, is this person just testifying factually as to their observations, or are they, in fact, being used as an expert witness. Are they going to be permitted to give their opinions to the jury? In those situations, I think if we're going to be required to provide 45 days notice, it's fair to require that of the state witnesses as well.
>
> And one other observation. I can tell you that I appreciate, Madame Chairman, your desire to have the court system proceed efficiently and smoothly; I certainly don't disagree with any of those goals. But I have to tell you, in the regular processing of misdemeanor cases in Anchorage, ... first we have an arraignment where a person is charged with an offense and then the next scheduled court hearing is a pretrial conference. The conference is set up so it forces the prosecutor and the defense attorney to meet and talk about the case and try to settle it early and get it resolved. There is very rarely 45 days between the pretrial conference and then the trial date.

Number 1562

MS. BRINK concluded:

> So all the impetus for the parties to settle the case is focused on the pretrial conference, and if they reach an impasse and then it's determined that this case is, indeed, one of the very few that are going to trial - because it's less than 10 percent of our cases that go to trial - there are not 45 days remaining 'til the trial date. And so the 45-day rule is really kind of problematic. What Representative Gara pointed out about retaining experts -- we do try to discourage hiring experts until we know it's one of those very few cases that is going to trial, and so this timeframe can be a problem for us. Thank you.

REPRESENTATIVE GRUENBERG said it sounds as if the problem really arises if an officer is going to be designated as an expert. He suggested changing the exception to say that unless someone is designated as an expert, he/she is exempt from Section 23.

MR. GUANELI said he has no objection to doing so.

CHAIR McGUIRE agreed that that would be a good change.

REPRESENTATIVE GRUENBERG asked Representative Gara if he would accept the aforementioned as a friendly amendment to Amendment 9, as amended.

REPRESENTATIVE GARA suggested, instead, taking up that issue after Amendment 9, as amended, is dealt with. On the issue of Amendment 9, as amended, he remarked that given the current fiscal situation, the PDA is always going to be trying to economize. Therefore, he added, "we can't have them economize, have them not hire experts 'til the last minute, and then punish clients when they try to economize."

MR. GUANELI, in response to a question, said that Section 23 provides a 45-day notice requirement for both the prosecution and the defense. He acknowledged that Ms. Brink is correct in that most cases are resolved before trial, but added that expert witnesses are not generally used in misdemeanor cases. He opined that most experienced defense attorneys and prosecutors have a pretty good idea which cases are likely to settle. He reiterated that the courts retain the ability to relax the rules in the interest of justice.

Number 1770

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 9, as amended. Representatives Ogg, Holm, Samuels, and McGuire voted against it. Therefore, Amendment 9, as amended, failed by a vote of 2-4.

Number 1788

REPRESENTATIVE GRUENBERG [made a motion to adopt] Conceptual Amendment 10: On page 11, line 11, delete "and" after the semicolon. On page 11, line 12, before the period, insert "; and (D) the prosecution has not designated the officer or investigator as an expert witness". There being no objection, Conceptual Amendment 10 was adopted.

Number 1921

REPRESENTATIVE GARA made a motion to adopt Amendment 11, a handwritten amendment which read [original punctuation provided]:

Delete
P.11 line 29 - p.12 line 13.

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE GARA said:

> When the prosecution obtains illegal evidence, there is a very strong rule in this country, and that is that only under the most narrow circumstances can it ever be used. In this circumstance, the prosecution would be allowed to use it to impeach a witness, the prosecution would be allowed to use illegal evidence to impeach a defendant, and it in too large a circumstance, I think, overrules the Miranda rule. And I also think that it's constitutionally suspect. So, I think one of our interests should be to have as little of this bill come back to us two years from now, because I don't want to see it again.
>
> But I also see this as a big problem: this issue addresses something that [is] a very complex area of the law. The governor has thrown 26, 27, 28 different sections of law at this committee and asked us to

decide them in a few couple-of-hour hearings. It's not enough time. So, I'm asking members of this committee to send a message to the governor's office. If the governor wishes us to validly and responsibly consider a bill, the governor's office should give us one that is discrete enough and clear enough that we can possibly and competently handle it in the amount of time we have in a committee hearing, or a series of committee hearings. This is not the right place to address major constitutional issues, major issues of evidence.

REPRESENTATIVE GARA continued:

This issue, if it were debated before the supreme court, would require a lot of argument by learned counsel. I don't feel that we have that here, and I don't feel that any of the six of us who are remaining here know this issue well enough that we could put together five valid sentences. At the fifth sentence, we would run out of knowledge; we wouldn't be able to address it any further than that. So I ask you to vote in favor of this Amendment, either because you believe this section is a bad section or because you believe that we don't have enough time to consider it. I really do think this is a message we should send back to the governor's office; they bit off way too much in this crime bill.

Number 2022

MR. GUANELI, in support of keeping Section 24, said:

With respect to this particular provision, I think we start from the proposition that this was a voluntary statement - the person voluntarily gave this statement - it was not a coerced statement. In Alaska, we know exactly what is said during these police interrogations because the supreme court has adopted a rule that says all interviews must be taped. If you don't tape record the interview -- and a lot of them are actually videotaped, so you actually see the interactions; so we know exactly what was said, we know the kinds of pressures that were brought to bear, and this is voluntary statement.

> If there was some technical violation of Miranda, ... suppose at some point the guy says, "Well, maybe I really ought to talk to an attorney, gee, I don't know," some courts will hold that those kinds of equivocal statements about wanting to talk to an attorney mean that you've got to stop questioning. ... So there are some technical violations of Miranda. And this envisions that there was a technical violation of Miranda that was a voluntary statement and then the person gets on the stand and lies and says exactly the opposite of what he said before.

MR. GUANELI concluded:

> And all this says is, if you're going to make a voluntary statement on tape and it wasn't coerced, and then you're going to get up and say the exact opposite in court, we're going to be able to impeach you with that statement. And it's simply a matter of, ... if you're charged with murder and you got lucky and there was a technical Miranda violation and your confession was suppressed, you can get up on the stand and you can lie with impunity, because the only thing you face right now under current law is that that statement could be later used in a prosecution for perjury.
>
> And frankly, I don't know of any defendant who wouldn't trade a murder conviction for a perjury conviction. So this simply means that if you're going to get on the stand and testify, we want truthful testimony; we want juries to base their decisions on truthful testimony. And I think this enhances that goal that verdicts are going to based on truthful testimony.

Number 2098

REPRESENTATIVE GRUENBERG asked if "this" is in accordance with current U.S. Supreme Court law.

MR. GUANELI offered his belief that it is.

REPRESENTATIVE GRUENBERG asked whether the Alaska Supreme Court has determined that it is in accord with the Alaska State Constitution.

MR. GUANELI offered his belief that the Alaska Supreme Court has not yet addressed this issue directly. He relayed, however, that the "attorneys who do the appellate work for the state" believe that "this" would withstand constitutional scrutiny.

REPRESENTATIVE GRUENBERG asked whether this issue has been addressed in either a court of appeals or a superior court.

MR. GUANELI said he did not believe so.

REPRESENTATIVE GRUENBERG said he is developing a concern about the inclusion of retroactivity provisions in bills, and then turned attention to subsection (b) of Section 30 as an example. He said that he would not object to this provision on one condition: before HB 244 gets to the House floor, the Department of Law provide, in writing, the answer to the question of whether any Alaska court has addressed the issue of whether "this" would violate the Alaska State Constitution. He relayed that if such is not done, he would be offering a floor amendment.

CHAIR McGUIRE said she agreed, adding that that is a reasonable request.

MR. GUANELI agreed as well and said he would provide that information.

Number 2200

MS. BRINK, on the issue of Amendment 11, which would delete Section 24, said:

> I don't believe any Alaska court has addressed this issue, because under current Rule 412 [of the Alaska Rules of Criminal Procedure], any evidence illegally obtained was not admissible for this purpose. So if trial judges were not admitting illegally obtained evidence in trials, nobody had reason to appeal those rulings because the evidence rule was being followed. I would like to point out, though, that I'm not sure I understand what Mr. Guaneli means by a, quote, "technical violation of Miranda."
>
> If a statement is taken in violation of Miranda, that in fact is in violation of your right to remain silent and your right to counsel. That is illegal under Miranda. And, frankly, it just isn't that hard to

comply with Miranda. Since 1965, police officers have known they have to read this little statement off the card and get someone to agree to talk to them. So while it's characterized as a technical violation, it just isn't that hard to get legally obtained statements. And illegally obtained statements should not be used to promote convictions.

You have to look at [paragraph] (2) of this ... [section] as well, because this addresses other evidence illegally obtained, and then we're talking about not just technical violations of Miranda, but violations of the Fourth Amendment - your right to privacy in your own home - [and] violations of the Fifth Amendment - your right to remain silent. So this is [a] very broad, sweeping change. It says illegal evidence is now going to be admissible at trial. And so this is a huge sea change in how we have enforced people's individual constitutional rights. Thank you, Madame Chair.

REPRESENTATIVE GRUENBERG expanded his request for more information to include information regarding "subsection (b)".

MR. GUANELI agreed.

Number 2285

A roll call vote was taken. Representative Gara voted in favor of Amendment 11. Representatives Holm, Samuels, Gruenberg, Ogg, and McGuire voted against it. Therefore, Amendment 11 failed by a vote of 1-5.

Number 2296

REPRESENTATIVE GARA made a motion to adopt Amendment 12, a handwritten amendment which read [original punctuation provided]:

Delete
P. 6 line 14 - p.7 line 25
P.8 line 17 - p.9 line 6.

[Discussion among members indicated that the intent of Amendment 12 is to delete Sections 14 and 18-19.]

REPRESENTATIVE GARA additionally relayed a desire to amend Amendment 12 such that line 7 on page 9 be included. [Therefore, Amendment 12, as amended, would also delete Section 20.

Number 2315

REPRESENTATIVE SAMUELS objected.

REPRESENTATIVE GARA said:

> This is where we have a debate about Alaska's sentencing structure in four minutes and decide whether or not to change it. I'm not going to repeat my argument about how this is just not a good way to present legislation for a committee to decide .... But I really would ask the members of this committee if they completely understand the current law and completely understand how this changes the current law. And [if] you like it, then vote for it, but if you don't completely understand either, this isn't the time to pass a sentencing structure change like this.
>
> Here are some things that I have figured out: ... This is not a well thought-out sentencing structure that the prosecution has offered - and I will say this now so I don't have to say it in wrap up. ... It is a very bad process for a group of prosecutors to get together and decide how they want to change the law. I would hope that on the sentencing issue, but [also] on these other issues, maybe the prosecution would sit down with learned members of the defense bar and come up with a way that at least people have, from both sides, considered to change the law, instead of coming up with something that seems to be very one-sided and not well thought out.
>
> Here's why this one's not well thought out. Let me give you an example of what we are going to do to people if we adopt the sentencing structure that the ... administration has offered. Under current law, almost all sentences for serious crimes are consecutive; they already are. You just have to read current law to see that. Under current law, ... sentences already run consecutively except for a narrow circumstance where the crimes are part of a continuing episode - so they're a hybrid between ...

one crime and many crimes all at once - and then the judge is given the discretion. The judges always consider the seriousness of the crimes; they consider the prior history of the defendant. ...

TAPE 03-58, SIDE B
Number 2402

REPRESENTATIVE GARA continued:

[I can give one example that I] hope will compel a number of members of this committee to cast doubt on this proposed sentencing scheme. Let's say you have somebody with a shotgun, and he decides to go out in the woods and have some fun but really wreak a little bit of havoc irresponsibly. And he ends up shooting his shotgun out into the woods because, well, he just wants to shoot his shotgun out into the woods. Inadvertently, he hits a group of ... [people] with spray from his shotgun and seriously injures them.

And under the criminal code, a serious injury would be a major flesh wound; it would be something ... like that or worse. That would be first degree assault. If the reckless person, the person with the shotgun, ended up hitting one person, it's a 7-year presumptive sentence. That seems appropriate. But he's hit five people, and so all of a sudden we're sending this person to jail for a 35-year presumptive sentence. Well, I don't condone the conduct of this person who went out into the woods and, though he thought he was having fun, endangered the public stupidly. I don't condone that at all. And I think maybe something more than a 7-year sentence would be justified.

But a 35-year sentence? I'm not so sure. The courts already have discretion in this area. And I think we're going to sort of pass a sentencing scheme that results in very many unintended consequences. So ... I'd ask people to favor the amendment; I would ask people that if they vote for this amendment, the message they're sending to the administration is to take this back to the drawing board and think it through and maybe actually consult with people outside of the prosecution office in coming up with a sentencing scheme.

Number 2320

REPRESENTATIVE SAMUELS posed the example of a man with a hunting rifle who shoots and kills three kids. He asked whether this should result in the same penalty as for killing one kid.

REPRESENTATIVE GARA countered that currently, it doesn't result in the same penalty.

MR. GUANELI responded:

> This is a big bill. I apologize [that] it's a big bill. I apologize that it was introduced late in the session. I think it does impose a burden on the committees. This particular provision is obviously not well understood, because it doesn't do what Representative Gara said it would do. What this provision does -- [let me] first explain about current law. In 1982 the legislature adopted the current consecutive sentencing statutes, and if you read them, they do appear to say [that] just about everything is consecutive.
>
> But ... there was a problem in drafting, and the Alaska appellate courts have said ..., "That isn't what it says, it may be what was intended and we recognize that the legislature prefers there to be consecutive sentencing, but that isn't the law." So what this bill does is, it tries to address two kinds of crimes for mandatory consecutive sentencing: homicides and rapes or first degree sexual abuse of a minor - in other words, penetration of a minor under 13. Everything else is essentially at the judge's discretion. [For] the particular crime that Representative Gara talked about, and that was first degree assault, ... there is no provision for mandatory consecutive sentencing under this bill.

MR. GUANELI went on to say:

> The only thing that this bill says is that - and it would be on page 7, starting at line 13, it's under (F) there, it says, "some active term of imprisonment of each additional crime, or each additional attempt or solicitation, under AS 11.41.200 - [11.41.250]", and 11.41.200 is first degree assault - what it says is that the judge really ought to recognize that there

were separate victims and impose some additional time. ... It doesn't say how much; it can be one day. And so the situation he suggested, the presumptive sentence for first degree assault with a dangerous instrument is 7 years, so 7 years and four days for five victims presumably would be about the minimum.

Number 2219

With the other types of offenses, homicides - and that really gets to Representative Samuels hypothetical, where you ... kill three victims - there this bill does impose some type of consecutive sentencing, but it's really fairly modest. If you look, for example, at ... the one case that really brought this to the forefront, ... the drunk-driving murder of two Juneau men a couple of years ago up north [and] serious physical injury of another, Cindy [Cashen] ..., who is head of the local MADD [Mothers Against Drunk Driving] chapter, her father was one of the victims who was killed. In that particular case, the judge ended up ... - for two victims [who] died and one [who] was seriously and permanently injured - giving a sentence that was barely more than the minimum for a single death.

We think that's wrong. And what we propose is that for those kinds of cases ... where there are homicides or there are rapes, ... some additional period of imprisonment be imposed consecutively. And in that particular example, where it's two counts of second degree murder, for the second count ... what we propose is that the judge impose, as a mandatory period of consecutive sentencing, at least the mandatory minimum. So, ... if the law designates that 10 years is the mandatory minimum sentence for second degree murder, and you've killed two people, then at least for the second one you ought to get the minimum, and that ought to be consecutive to whatever you got on the first sentence.

MR. GUANELI also said:

... Frankly, that's a fairly modest provision. And when you look at, for example, under (E) on page 7, ... line 8, and you talk about rapes, and let's say someone is convicted of multiple rapes, it isn't just

> the presumptive [terms] stacked on top of each other; ... in fact, for the extra rapes, you only get one-quarter of the presumptive term. So if the presumptive term is 8 years, if you commit two rapes, that it would be an extra 2, so that would be 10 years; three rapes would be 12. This really is a fairly modest provision.

Number 2132

> Partly it was designed to give judges some guidelines because they really don't have any right now - and, frankly, the sentencing ..., on a lot of homicide cases, ... is all over the board (indisc.) multiple homicide cases - and this gives some legislative guidance. At the same time, it was also designed to not burden the Department of Corrections [DOC] with unreasonably long sentences that would carry people ... in the prison beds for years and years and years. So we tried to strike a balance; I think we did it reasonably.

MS. BRINK, on the issue of the mandatory sentencing provisions, said:

> I guess I must respectfully disagree with Mr. Guaneli's reading of the proposed ... [provisions]. If you look on page 7, lines 1-5, I think that Representative Gara's example is right on point. Assault in the first degree is a class A felony, and this part of the bill requires that the presumptive term be imposed for each additional crime that's a class A felony. So I believe that Representative Gara's example, (indisc.) 7 years to 35 years because of the fortuitous circumstance of the numbers of people involved, is correct. And that's my main objection to [those provisions of] the bill. ... If you take away the discretion from the judge and you impose a formula, that can result in sentences that are not commensurate with the level of conduct involved. Thank you, Madame Chair.

CHAIR McGUIRE predicted that committee members might never agree on this issue.

REPRESENTATIVE GARA, in conclusion, said:

> Oddly enough, ... the truth is that there's a lesser sentence in this bill introduced by the administration for ... people who commit rapes than there is for these other crimes ... The consecutive sentences for people who commit rapes is only a quarter of the time for each additional person. I think that's too little. But on the other ones I think it's too much.

CHAIR McGUIRE suggested that before the bill gets to the House floor, Representative Gara could work more on that issue.

REPRESENTATIVE GARA said he would be happy to work on something that addressed just the consecutive sentencing for sexual assault.

Number 2029

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 12, as amended. Representatives Samuels, Anderson, Ogg, Holm, and McGuire voted against it. Therefore, Amendment 12, as amended, failed by a vote of 2-5.

CHAIR McGUIRE said she did not disagree with Representative Gara's comments.

Number 1999

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 13, which would delete Section 26.

Number 1987

CHAIR McGUIRE objected.

REPRESENTATIVE GRUENBERG, in defense of Amendment 13, said:

> My problem is, sometimes people who have claimed they're victims of domestic violence later decline to testify. And what this ... [section] will do, will be to allow the prosecution to introduce their domestic violence petition even though it was subsequently dropped and it may have been as a result of an argument. And the allegation, when we're talking about a crime involving domestic violence, may have been a simple assault based upon somebody shoving somebody else, not even any serious violence.

... I've had this happen in my family-law practice: in the middle of a divorce where people are seeking, for example, to get immediate custody of a child on an ex parte basis without even going [through] the normal process of having a hearing on temporary custody, they bootstrap themselves with a DV [domestic violence] petition. And then they, in an attempt to leverage themselves in the divorce, say they want to prosecute, and ultimately go forward with the bluff until they get to the criminal court door. And then they realize their going to be hit with a perjury if they really continue with this, and they decline to prosecute.

And the only thing the prosecution has left in good faith is this report, and they could conceivably prosecute based on this hearsay report. And the person couldn't examine the spouse, and it could lead to not only to a misdemeanor minor charge and a conviction or even a plea, but that can have terrific implications in the family court and on the custody of the child. There are all kinds of exceptions in hearsay already .... And I just, with due respect, think this is really overbroad because I've seen it used that way.

CHAIR McGUIRE noted that the excited-utterance exception has already been debated quite a bit.

Number 1857

A roll call vote was taken. Representatives Gara, Gruenberg, and Holm voted in favor of Amendment 13. Representatives Anderson, Ogg, Samuels, and McGuire voted against it. Therefore, Amendment 13 failed by a vote of 3-4.

Number 1835

CHAIR McGUIRE made a motion to adopt Conceptual Amendment 14, "to renumber accordingly, to adopt any conforming amendments necessary to meet with this committee's intent for sections we've removed, and ... to amend the title to reflect the provisions of the bill that are still left." There being no objection, Conceptual Amendment 14 was adopted.

Number 1813

REPRESENTATIVE SAMUELS moved to report HB 244, as amended, out of committee with individual recommendations and the accompanying fiscal notes.

Number 1805

REPRESENTATIVE GARA objected.

Number 1785

A roll call vote was taken. Representatives Anderson, Ogg, Holm, Samuels, and McGuire voted in favor of reporting HB 244, as amended, from committee. Representatives Gara and Gruenberg voted against it. Therefore, CSHB 244(JUD) was reported out of the House Judiciary Standing Committee by a vote of 5-2.

HB 260 - IMMUNITY FOR PROVIDING FREE HEALTH CARE

Number 1754

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 260, "An Act relating to immunity for free health care services provided by certain health care providers; and providing for an effective date." [Before the committee was CSHB 260(L&C); in members' packets was a proposed committee substitute (CS) for HB 260, Version Q, 23-LS0823\Q, Ford, 5/8/03, and a proposed amendment to Version Q.]

Number 1728

JASON HARMON, N.D., Vice President, Alaska Association of Naturopathic Physicians (AKANP), offered the AKANP's support of HB 260, saying that it is an important bill for Alaska in the sense that it is potentially going to open up health care in rural communities by reducing some of the liabilities currently faced by health care providers who wish to volunteer their services.

Number 1673

REPRESENTATIVE PAUL SEATON, Alaska State Legislature, sponsor, noted that naturopathic physicians and registered nurses have been included in the definition of "health care provider" as used in proposed AS 09.65.290.

DOCTOR HARMON posited that the concerns of the legislature and health care providers align in the sense that both groups are

concerned about access to excellent health care and the aging of the "medical population." He mentioned that other states have made changes similar to what is being proposed via HB 260.

CHAIR McGUIRE noted the importance of looking beyond just the urban centers when considering issues of health care.

Number 1586

MIKE HAUGAN, Executive Director, Alaska Physicians and Surgeons, Inc., said simply that his organization represents approximately 170 physicians in Anchorage and strongly supports HB 260 and [Amendment 1].

Number 1558

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

Delete page 3, line 4, and renumber accordingly.

CHAIR McGUIRE asked whether there were any objections to adopting Amendment 1. There being none, Amendment 1 was adopted.

Number 1535

REPRESENTATIVE SAMUELS moved to adopt the proposed (CS) to HB 260, Version 23-LS0823\Q, Ford, 5/8/03, as the work draft.

The committee took an at-ease from 4:29 p.m. to 4:31 p.m.

Number 1534

CHAIR McGUIRE asked whether there were any objections to the motion. There being none, Version Q was before the committee.

Number 1529

REPRESENTATIVE GRUENBERG restated his motion to adopt Amendment 1. There being no objection, Amendment 1 was adopted.

Number 1515

REPRESENTATIVE OGG made a motion to adopt Conceptual Amendment 2, to add "direct-entry midwives" after "nurse midwife" on page 3, line 5.

CHAIR McGUIRE clarified that because Version Q was now before the committee, Conceptual Amendment 2 would instead apply to page 3, line 12.

REPRESENTATIVES GRUENBERG, HOLM, and SEATON pointed out, however, that "certified direct-entry midwife" is already included in Version Q, on lines 14-15 of page 3.

Number 1456

CHAIR McGUIRE indicated that Conceptual Amendment 2 was withdrawn.

REPRESENTATIVE GARA indicated that he might be offering another amendment depending on whether the issue raised in the letter from the Alaska Nurses Association has been addressed yet.

REPRESENTATIVE SEATON relayed that Legislative Legal and Research Services has researched that issue and concluded that volunteer work done in emergency shelters and temporary trauma units is already covered, under both a separate statute and HB 260.

Number 1361

PATRICIA SENNER, R.N., President, Alaska Nurses Association (AaNA), relayed that the AaNA along with the Alaska chapter of the American Red Cross, the [Division of Public Health, Nursing Section], and the Municipality of Anchorage's health department have recently established the Alaska Nurse Alert System. She said that the AaNA is concerned about the "description of the location of health services," specifically that temporary emergency services are not clearly [included] in proposed AS 09.65.290(a)(3). Because attorneys might, in the future, argue that somehow the services provided to their clients were not meant to be covered by this bill, she remarked, the AaNP would prefer that the inclusion of temporary emergency services be clearly spelled out.

REPRESENTATIVE SEATON said that according to Legislative Legal and Research Services, because those services would be provided at facilities owned by a municipality, the stare, or the federal government, they would be covered under HB 260. In addition, AS 09.65.091 addresses civil liability for responding to a disaster. He offered, however, that he has no objection to adding language that would further clarify this issue.

REPRESENTATIVE GARA noted that nonprofit facilities are also addressed in the bill. He opined that such should cover a "Red Cross unit." He asked Ms. Senner whether she is comforted by the foregoing information.

MS. SENNER said yes, adding that it was the term "owned by" that had her concerned that perhaps providing services from a tent set up in the middle of a field would not be covered.

CHAIR McGUIRE and REPRESENTATIVE GARA indicated that it was their belief and intention that such would be covered.

Number 1199

CHIP WAGONER, Lobbyist for Covenant House Alaska, said that his client strongly supports HB 260. He said that Covenant House Alaska had experiences wherein health care providers that wanted to volunteer services to the organization had been unable to do so because of malpractice liability. He noted that members should have received a letter of support from Covenant House Alaska.

CHAIR McGUIRE assured him that copies of that letter were included in members' packets.

REPRESENTATIVE GRUENBERG asked Mr. Wagoner whether there were any other category of people whom his client would like to see included in HB 260

MR. WAGONER suggested that perhaps emergency medical technicians (EMTs) ought to be included, but surmised that perhaps they are already covered under other statutes.

CHAIR McGUIRE closed public testimony on HB 260. She then said that Amendment 1 was offered and adopted because the language it deleted had "absolutely nothing to do with the bill," and that to have kept that language in as a political statement simply would have been wrong.

Number 1099

REPRESENTATIVE HOLM moved to report the proposed (CS) for HB 260, Version 23-LS0823\Q, Ford, 5/8/03, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 260(JUD) was reported from the House Judiciary Standing Committee.

HJR 9 - CONST AM: APPROPRIATION/SPENDING LIMIT

Number 0990

CHAIR McGUIRE announced that the final order of business would be HOUSE JOINT RESOLUTION NO. 9, Proposing amendments to the Constitution of the State of Alaska relating to an appropriation limit and a spending limit. She noted that the version before the committee was CSHJR 9(STA).

REPRESENTATIVE GARA indicated that he has a lot of questions about this constitutional spending limit.

CHAIR McGUIRE predicted that the discussion on HJR 9 would be thorough.

Number 0907

VIRGINIA BLAISDELL, Staff to Representative Bill Stoltze, Alaska State Legislature, on behalf of Representative Stoltze, sponsor, said that regardless of whether HJR 9 passes this session or next, its constitutional amendment would not go on the ballot until 2004. She acknowledged that adoption of the constitutional amendment proposed by HJR 9 would be a serious change to the Alaska Constitution; thus, she relayed, the sponsor appreciates the committee taking the time to thoroughly deliberate the resolution. She then turned attention to a document she'd prepared for the committee that provides an analysis of CSHJR 9(STA) and answers to commonly asked questions.

MS. BLAISDELL, referring to that document, said:

> The first question is, "[What's] the difference between an appropriation and spending?" ... Appropriation is the amount that you are allowed to spend, and that's the legislative prerogative saying the governor ... can spend up to a particular limit. Spending is the cash part; spending is actually writing the checks and promising financial commitment. On page 3 it says, ["Doesn't Alaska already have a constitutional appropriation and spending limit?"]. Yes. It's not working now. It has grown exponentially faster than the state's use. Right now, the constitutional appropriation/spending limit would allow us about $6.4 billion in state funds. We're at

about $3.4 billion, so it's kind of an unrealistic limit to ourselves.

REPRESENTATIVE GARA asked where the present spending limit is located.

Number 0657

MS. BLAISDELL said it is in Article IX, Section 16, adding that that's what HJR 9 would repeal and readopt with new language. She went on to say:

We also have a statutory spending limit that most of us have never taken the time to follow because it's included with the statutory budget reserve fund, which ... most of think of [as] the constitutional budget reserve fund. But it says, statutory budget reserve fund and appropriation limit. It's not a cumulative calculation, but it just adds inflation and population growth. And that one we actually have over-appropriated last year, in FY [fiscal year] 03, and one other time in the late '80s. So we've actually broken our own statutory spending limit. Most of the time, we're [$80 million to $90 million] below. It allows about a $250-million-a-year growth.

And then I have [some] pages that describe how this appropriation limit is different from the existing limit. The existing limit was developed before the permanent fund dividends [PFDs], before ... most of the state corporations were established and then [became] financially successful. There were no GO [general obligation] bonds. And at this point, calculating that base year by which we grow the limit is really up to interpretation, and you can get a wide variety of how to calculate that starting year. The existing appropriation limit is based on population and inflation growth, sometimes as great as 13 percent annually.

MS. BLAISDELL continued:

And when I looked back at probably 20 years' worth of people trying to calculate that growth, I had as many as eight different variations in the dollar amount in one given year, depending on who was using which index and which population figure. And what the statutory

... appropriation limit actually identified, you had to use [the Department of Labor and Workforce Development's] population growth, and you had to use the Anchorage CPI [Consumer Price Index]. They tried to correct that, but we've never really followed it. It also required that one-third of all state appropriations be spent on capital projects; the term that's ... not incorrect but difficult there is that a capital project can be anything that has a term date that goes beyond one fiscal year.

Number 0502

And if it had said capital improvements, those are more of our infrastructure - ... highways, buildings, that kind of thing - but a capital project can be anything that has a continued lapse date. So, for example, is a long-term contract for software design really a capital improvement? No, but I think the intention there was, we needed more infrastructure in [the] ... early '80s. [House Joint Resolution 9] provides for a steady but limited appropriation growth over time. ... [Subsection] (a), which is the first [subsection], allows a 2-percent cumulative growth based on a two-year prior budget. That comes to ... about $66 million. If you look at it one year to the next, it's a $33-million growth - $33 [million], $34 million - each year.

CHAIR McGUIRE asked what the rationale is behind 2 percent.

MS. BLAISDELL replied:

We looked at ... the rate of inflation, we looked at population growth, and it was fairly sporadic. And what was happening is that when we took a number of years of appropriations and just said, ... level them out and see if we're decreasing [or] increasing, [at] about what percent ... over time, ... it was approximately 2 percent. ... And depending on how you wanted to calculate, what exclusions and what inclusions, it was actually between 2 and 4 percent.

CHAIR McGUIRE asked whether any other states have a percentage in their constitution and, if so, what that percentage is.

MS. BLAISDELL said that she contacted the National Conference of State Legislatures (NCSL), and according to their 1996 document on state tax and expenditure limits, all states with such limits have an expenditure limit based on taxation; thus, those states would not overtax their population groups in order to grow state government, and the limits were put in effect because of taxation. Therefore, no other state has anything that would clearly equate to Alaska's scenario.

CHAIR McGUIRE observed, "Our scenario of handing out money when we don't have it and not taxing anybody except corporations."

REPRESENTATIVE GARA, referring to what other states do, asked: "So if they regulate theirs by trying to keep the growth in taxes down, how much do they allow their growth in taxes to go up? Do you know?"

Number 0296

MS. BLAISDELL, indicating that she was reading from a document, replied:

> Tax and expenditure limits are designed to curtail growth in government spending by placing constitutional or statutory restrictions on the amount a government entity can spend or tax its citizens. Limits may be imposed on both state and local governments.

MS. BLAISDELL commented:

> Only state limits, however, are discussed in this report, and most of them required a supermajority requirement - even up to three-fifths majority; voter approval was on a number of them; and ... [one referred to] 7.23 percent of personal income tax without regard to sales tax. Some of these are spending limited to growth of population and inflation, requiring voter approval; some were personal income growth; one was 98 percent of estimated revenue. It's just all over the board, and they [have] really chosen a variety of ways to calculate it.

REPRESENTATIVE OGG referred to page 1, line 8, and asked: "Am I clear in saying that ... this year, we would use the base year [that] would be ... 2001? Or 2002?

MS. BLAISDELL replied that it would be 2002, since it would be two years behind 2004.

Number 0169

REPRESENTATIVE OGG posed the following example:

> "Let's say that last year, or in 2002, we had a budget of $100 - just for simple numbers - and then two years before we had a budget of $100. So this next year we think we would like to grow our government a little bit - and so we grow it to $102 dollars - next year, because we need some increases in services and stuff, and we would like to take advantage of growing another 2 percent, we couldn't.

MS. BLAISDELL said, "That's correct.

REPRESENTATIVE OGG surmised:

> So ... we would have to maintain that. And then, should we go into a period where, for some reason, we wanted to decrease the size of government or the amount of appropriations for some anomaly, you go down 10 percent, that having gone down that 10 percent in every other year, just because [that] was an anomaly, now ... you would have pegged in a drop [of] 10 percent, even though it may not have been realistic.

MS. BLAISDELL replied: "It would be 2 percent of 10 percent. But, eventually, if you just kept going like that, you could end up with little, small spikes on the graph."

REPRESENTATIVE OGG surmised:

> So, actually, if the government, [if] you wanted it to proceed along in a steady fashion if it wanted to, under the way this is written, you could actually end up going like this, which is something you're trying to avoid. Would it not be better to just say [it] should not exceed 2 percent of the preceding [fiscal] year? Is there a reason why you didn't go that way?

TAPE 03-59, SIDE A
Number 0001

MS. BLAISDELL replied that such could not be done because of appropriations that occur late in the year, for example, emergency appropriations or adjustments. A fiscal year really isn't finalized until June 30th, the day before the day the next budget would start. She posited that the legislature wouldn't want to adjust its appropriation bills on a daily basis because of other appropriation changes.

REPRESENTATIVE OGG remarked:

> My point is, ... if you're putting this into the constitution, you have to start somewhere. So it's enshrined on day one. That's the two preceding years right there, the ones that have gone by, perhaps the one that you're in. And while it goes in, you decide, "Well, heck, I'm going to take advantage of it all - raise it up," and you could increase that, and so you could start this gyration you couldn't get out of for quite some time. But once you set it in, even if you did the preceding fiscal year, that would set your trigger. So even ... if you have supplemental appropriations, they couldn't exceed that 2 percent.

MS. BLAISDELL said, "That's true."

REPRESENTATIVE OGG remarked, then, that he didn't see the reasoning for going back two years.

REPRESENTATIVE SAMUELS, however, referring to a previous meeting's discussion involving percentage of market value, noted that the current year had to be skipped "for the same reason ..., because you don't know what you're going to spend this year until you get the supplemental."

REPRESENTATIVE OGG pointed out, though, that HJR 9 "isn't doing a running average; this is setting yourself to a year, two years, preceding."

REPRESENTATIVE HOLM said:

> In essence, it's going act like a tax cap, or a revenue cap if you will. That works well at the Fairbanks North Star Borough - worked well in all the areas that I know where it's being worked. It certainly wouldn't ... [become] a problem. If we had an emergency or something [of] that order, that's a different issue; ... we're talking about just the

> appropriations. ... I was going to ask [Ms. Blaisdell] ... to talk about the difference between enacted and appropriated, because ... it deals somewhat with this idea of setting a limit of growth.

Number 0203

MS. BLAISDELL responded:

> Actually, when you get to the portion of the [resolution] that says that the governor will restrict spending and reduce appropriations by line item veto, the reason that that came up is because, typically, at the end of a legislative session, Legislative Finance [Division] and OMB [Office of Management & Budget] will calculate how much money has been enacted for that year. And that comes out somewhere in May, whenever the legislature passes those [budget] bills and after the governor signs them. We take that enacted number. By the time you get to July 1, there's a significant difference because the agencies then put a value to "language appropriations" that had no monetary accountability at the time [of] passing the [budget bills].
>
> And so, for instance, the example I gave in [the House State Affairs Standing Committee] yesterday was that for FY 03, there is approximately a [$90 million] increase from the enacted number of what the legislature believed they passed, ... by the time it [came] into effect on July 1st. And that had to do with language appropriations, primarily. ... The [portion] of the [resolution] that would address that is [subsection] (c) that says if appropriations for a fiscal year exceed the amount that may be appropriated under this Act, the governor shall reduce expenditures by line item veto to avoid spending more than the amount that was appropriated.

MS. BLAISDELL concluded that the governor would have to choose where to use a line item veto to keep it under the appropriation limit.

Number 0342

REPRESENTATIVE GARA remarked:

We have a tax cap in Anchorage too; it tends to work, except there's one problem with it that ... a lot of the folks are ... silent about because they would be grilled if they talked about it. Our tax cap, the way it works in Anchorage, links your expenditure rate to last year's rate, very strictly. So in Anchorage, one year we received a big, unforeseen amount of cash, and the mayor said, "Gosh, we have all this extra money, we can reduce your taxes this year." ... But the next year we didn't have that extra money and we couldn't bring ... our spending level back to where it was two years ago.

And of course that was linked to the taxed amount, and this is linked to the spending amount. So, let's say one year, for example, we just have so much less in the way of maintenance costs, and we say, "Well, shoot, we don't have to spend last year's amount of money on maintenance costs, we don't have to spend last year's amount of money on a couple of things because this year things look okay." Will a reduction in one year have a ripple effect and require ... us to base our budget ... on that reduced budget in the future? So we couldn't get back to the [prior year's] spending level? Or is there a way to ...

MS. BLAISDELL interjected to respond:

It's similar to Representative Ogg's question. There's two approaches, probably, to resolve a spike in your ... "stability growth line." First of all, 2 percent from two years prior is a pretty conservative amount of growth. I would imagine that that would typically be appropriated. That's why the next [portion] of the bill says [that] with a three-quarters vote, you can add an additional 2 percent. Still conservative, controls the growth, but gives you a little bit to bounce above that, that is not included in that cumulative growth factor; it gets excluded later.

So, let's say you have a 2 percent accumulative growth: the other thing that a legislature can do is, if they do not want to see a downward spike, they can always appropriate the maximum first 2 percent, and you keep that constant line. It does not mean the governor has to spend it; the governor can spend less

than that. So, that would be more of his choice of saying, "This agency is going to have a severe reduction." The legislature can choose to keep their appropriation line consistent.

Number 0551

Your situation with the tax issue, I'm not sure why it said that you can't ... build the tax back in or increase it again, but to me that sounds more like a revenue issue. This is strictly appropriation, it has nothing to do with how much money are we going to collect, and it's only one side of a balanced budget.

REPRESENTATIVE SAMUELS remarked that Anchorage has both a tax cap and a spending cap, adding, "you never hear about one because you never can generate enough revenue."

MS. BLAISDELL, returning to the document she'd prepared, said:

This chart right here gives you a quick view of the last couple of years, where it ... was very spiky, and then a projected ... 2-percent growth. And what I did was I wrote out FY 01 to FY 04 and showed you significant increases and decreases, approximately $200-million fluctuation in the last three years. If you had done just the 2-percent growth factor starting with the same four years, ... for FY 04, [it] would be about [a] $30-million increase, rather than having that huge $100-million cut in [FY] 03. You still show a consistent increase, it's just managing the money a little bit differently.

Following that ..., I restate the exemptions and give a vary brief ... lay description of how the exemption works. There have been a lot of questions about how does Alaska's government grow ... fast enough to accommodate and attract future economic growth. I gave a couple of examples on how we can grow economics. I would say probably the strongest example would be through bonding-type issues, [to] help get their infrastructure built up. If it doesn't work, under the [House State Affairs Standing Committee] version, you would have to go through this process again and reintroduce a new "constitutional spending limit" bill.

Number 0698

MS. BLAISDELL continued:

> And then I said, now that I understand the appropriation side, how does the spending side work? And basically, the governor can line item [veto] to keep us within the appropriation level, ... and the governor is instructed specifically to not overspend and put the legislature in a position of having to break their own appropriation limit. And, yes, the governor can spend less than what was appropriated; it's just like not pushing your credit card limit to the end, every single month.
>
> ... The other question I got was what constitutes a disaster, and I could only find three provisions that really describe what a disaster was. And this is one thing that is an excluded provision in here, and so there are a number of scenarios where a governor could increase spending above the appropriation limit. And that gives you an overview of [HJR 9].

[HJR 9 was held over.]

ADJOURNMENT

Number 0758

The House Judiciary Standing Committee was recessed at 5:10 p.m. to a call of the chair. [The meeting never was reconvened.]