ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
January 26, 2004
2:05 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 BILL NO. 348
"An Act relating to the rights of certain victims of crime to receive information about the office of victims' rights."

- HEARD AND HELD

HOUSE BILL NO. 357
"An Act relating to restitution; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 349
"An Act amending Rule 412, Alaska Rules of Evidence."

- HEARD AND HELD

HOUSE BILL NO. 398
"An Act relating to domestic violence fatality review teams."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 397
"An Act relating to defense contacts with and recordings of statements of victims or witnesses; and amending Rule 16, Alaska Rules of Criminal Procedure."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 348
SHORT TITLE: NOTICE RE OFFICE OF VICTIMS RIGHTS
REPRESENTATIVE(s): STOLTZE, DAHLSTROM, SAMUELS, MCGUIRE

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	JUD
01/26/04	(H)	JUD AT 2:00 PM CAPITOL 120

BILL: HB 357
SHORT TITLE: RESTITUTION
REPRESENTATIVE(s): SAMUELS, STOLTZE, MCGUIRE, DAHLSTROM

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	JUD
01/26/04	(H)	JUD AT 2:00 PM CAPITOL 120

BILL: HB 349
SHORT TITLE: ILLEGALLY OBTAINED EVIDENCE
REPRESENTATIVE(s): SAMUELS, MCGUIRE, STOLTZE, DAHLSTROM

01/12/04	(H)	PREFILE RELEASED 1/2/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	JUD
01/26/04	(H)	JUD AT 2:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE BILL STOLTZE
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as one of the prime sponsors of HB 348.

STEPHEN BRANCHFLOWER, Director
Office of Victims' Rights (OVR)
Alaska State Legislature
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 348 and responded to questions; provided comments during discussion of HB 349 and responded to questions.

JUDITH McARTHER (ph)
(Address not provided)
POSITION STATEMENT: Provided comments during discussion of HB 348; during hearing on HB 357 testified regarding the need for restitution to be ordered.

LINDA WILSON, Deputy Director
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Testified that the PDA has no problem with HB 348; relayed the PDA's concerns with HB 357 and responded to a question; relayed the PDA's concerns regarding HB 349, and responded to questions.

PAGE LINDER (ph)
(Address not provided)
POSITION STATEMENT: Provided comments during discussion of HB 348.

REBECCA ROBERTS (ph)
(Address not provided)
POSITION STATEMENT: Testified in support of HB 348 and urged its passage; testified in support of HB 357 and urged its passage.

ANNA FAIRCLOUGH, Executive Director
Standing Together Against Rape (STAR);
Member
Anchorage Assembly
Municipality of Anchorage (MOA)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 348; testified in support of HB 349 and asked questions of the committee.

TAMARA de LUCIA, Associate Victims' Rights Advocate
Office of Victims' Rights (OVR)
Alaska State Legislature
Anchorage, Alaska
POSITION STATEMENT: During hearing on HB 357 testified that allowing restitution judgments to be reduced from the actual damages suffered is unfair to the victim and does not hold offenders accountable for their crime.

ACTION NARRATIVE

TAPE 04-3, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 2:05 p.m. Representatives McGuire, Anderson, Holm, Ogg, and Samuels were present at the call to order. Representatives Gara and Gruenberg arrived as the meeting was in progress.

HB 348 - NOTICE RE OFFICE OF VICTIMS RIGHTS

[Contains brief testimony in support of HB 357.]

Number 0128

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 348, "An Act relating to the rights of certain victims of crime to receive information about the office of victims' rights." House Bill 348 has four prime sponsors: Representatives Stoltze, Dahlstrom, Samuels, and McGuire.

Number 0190

REPRESENTATIVE BILL STOLTZE, Alaska State Legislature, one of the prime sponsors of HB 348, offered that this bill is one of the simpler parts of a "victims' rights package" being introduced by members of the House. The bill will require law enforcement officers and prosecutors, at the time of initial contact, to notify victims, via a printed brochure or other written material, that the Office of Victims' Rights (OVR) exists and is available as a resource. The OVR, he noted, is an agency that is located within the legislative branch of government, was modeled statutorily on the Office of the Ombudsman, and was created to ensure that the constitutionally guaranteed rights of crime victims are upheld. Article I, Section 24, of the Alaska State Constitution details the rights of crime victims; this provision of the Alaska State Constitution was adopted in 1994. He noted that the OVR currently prints a brochure detailing its services.

REPRESENTATIVE GRUENBERG opined that HB 348 is a very fine bill. He raised the concern, however, that initial contact may not always be the best time to give information to the victim of a crime; he offered instances of when the victim is unconscious, in shock, inebriated, or underage as examples. He pondered whether it might be better to alter the bill so that it leaves

the time of notification up to the discretion of the person giving it.

REPRESENTATIVE STOLTZE posited that "victim" is broadly enough defined in statute to allow for instances in which the actual victim is underage or deceased - in those instances the notification would be given to family members.

CHAIR McGUIRE suggested clarifying that issue through additional research.

REPRESENTATIVE GARA noted that HB 348 adds a fifteenth [right] under AS 12.61.010(a), and remarked that this [right] seems reasonable to him. He added, however, that he wanted to make sure that HB 348 is actually needed. He asked whether there is evidence that law enforcement or prosecutors are currently not notifying victims of the existence of the OVR.

REPRESENTATIVE STOLTZE said that despite everyone's best intentions, there are instances where victims are not being notified until far too late in the process. He remarked that HB 348 is part of a broader education process, adding that sometimes a statute is the best way to go about ensuring that certain actions are taken. He mentioned that someone relayed to him an instance of being told something along the lines of, "We're not required to tell you about it," with the implication being that victims are supposed to find out on their own about the OVR.

Number 0550

CHAIR McGUIRE, one of the prime sponsors of HB 348, noted that the OVR has relayed that while most law enforcement officers and prosecutors do notify victims about the existence of the OVR, there are some cases where notification has not occurred; some victims do not get in touch with the OVR until too late for the OVR to assist them. She mentioned that in the case of victims' rights, it is not always clear how those rights are to be upheld; thus the goal of HB 348 is to ensure, via statute, that victims are notified about the existence of the OVR. Things get very harried when a crime has been committed, she remarked, with a lot of activity taking place, and that's one of the reasons that Miranda rights violations take place, for example; HB 348 is intended to clarify that notification of the OVR is one of the steps that must be taken upon initial contact.

REPRESENTATIVE GARA asked why victims of class B and class C misdemeanors are not listed among those that are to be notified of the existence of the OVR.

REPRESENTATIVE SAMUELS, one of the prime sponsors of HB 348, offered his understanding that the OVR covers felonies.

REPRESENTATIVE STOLTZE added that the OVR has jurisdiction only over certain types and classes of crimes; for example, the OVR would not have jurisdiction over [misdemeanor] property crimes.

REPRESENTATIVE SAMUELS suggested that victims of felonies need to know what their rights are in much the same way that defendants need to be notified of their rights; the sponsors have simply chosen the OVR, via HB 348, as the vehicle though which to tell victims about their constitutional rights. He referred to the OVR as a victim's ombudsman, opined that the bill does not impose a big burden on law enforcement officers or prosecutors, and noted that it does not have much in the way of penalties for noncompliance. He suggested that if it is later found that the OVR's jurisdiction needs to be expanded, then that can be done through a different bill.

REPRESENTATIVE GARA asked whether the OVR is statutorily precluded from helping victims of crimes other than those currently listed in HB 348.

Number 0864

STEPHEN BRANCHFLOWER, Director, Office of Victims' Rights (OVR), Alaska State Legislature, explained that the OVR has been in existence for approximately 18 months, during which it has handled several hundred cases. One of the things that the OVR discovered, he relayed, is that most of its clients learned about the OVR either at the last minute or just at the very time when they had to make critical decisions and was oftentimes too late. The problem, he outlined, is that many rights which victims have are tied into various stages of the criminal process and are thus time sensitive. For example, victims have specific rights during the investigative stage, the arraignment stage, the bail-hearing stage, the trial stage, and so forth. Therefore, if victims are not aware by a particular point in time that they have certain rights specific to a given stage in the criminal justice process, then those stages go by without an invocation of the rights associated with them.

MR. BRANCHFLOWER surmised that the number one reason for the commonly heard refrain of, "Boy, if I'd just known about you ... six months ago ..." or, "... a year ago ..." seems to be simply a lack of awareness that the OVR exists as a resource for crime victims. To remedy this, he explained, the OVR has undertaken a very aggressive program to educate those in the criminal justice system: police agencies, victim support organizations, district attorney offices, judges, and so forth. The OVR has given more than 40 presentations in the last eight months, but this is only just scratching the surface; what is needed, he opined, is a law like HB 348, which would require law enforcement officers and prosecutors to notify victims that the OVR is available to assist them.

MR. BRANCHFLOWER, turning to the jurisdictional issue, explained that by statute, the OVR has jurisdiction over all felonies and class A misdemeanors involving domestic violence or crimes against a person under AS 11.41. Thus the OVR does not have jurisdiction to provide services to victims of class B, or lower, misdemeanors. House Bill 348 would place an affirmative obligation on the part of prosecutors and law enforcement officers to notify crime victims - those in the appropriate categories - upon first contact with them and without request from them, that the OVR exists. This includes providing victims with the OVR's address, telephone number, and other contact information. The requirement imposed by HB 348 would be satisfied if officers and prosecutors give victims a brochure, which would be provided to law enforcement officers and prosecutors by the OVR.

Number 1113

MR. BRANCHFLOWER relayed that upon taking a poll of police officers, they encouraged him to make the requirement as simple and clear as possible; thus HB 348 is simply a "notice" requirement rather than an "explanation" requirement. One of the reasons for this, he added, is, as Representative Gruenberg pointed out, many times victims are intoxicated, in shock, don't speak English, or for some other reason not of a mind to start learning what their rights are. The benefit of being given a brochure is that victims can take it home, read it, perhaps even read it over with family, and then decide whether to contact the OVR. He noted that the definition of victim [AS 12.55.185(17)] is extremely broad and includes immediate family such as parents and siblings. Therefore, if law enforcement or prosecutors have any contact with those folks, a brochure could be given to them [as well].

MR. BRANCHFLOWER relayed that the OVR's brochure has been distributed pretty widely - about 16,000 copies have been circulated around the state - and that it is an informational brochure which provides contact information. In conclusion, he said that "this" is one way of getting word out to victims, especially in the Bush, who would benefit from being notified, early on, of what their rights are. He suggested that there might be others available to speak about the hardships resulting from not knowing about the existence of the OVR.

REPRESENTATIVE GARA raised the issue of whether information about the Violent Crimes Compensation Board (VCCB) ought to be incorporated into the OVR's brochure.

MR. BRANCHFLOWER indicated that VCCB information could be added to the OVR's brochure; he noted that law enforcement agencies are currently required to notify victims about the availability of the VCCB.

REPRESENTATIVE GARA expressed a desire to see a paragraph regarding the VCCB added to the OVR's brochure, which could then be handed out to all victims of violent crimes. "Should we or should we not consider doing that?" he asked.

MR. BRANCHFLOWER mentioned that he is not conversant with the VCCB's jurisdiction or whether that organization has jurisdictional restraints similar to the OVR in terms of the class of crime for which someone would be entitled to compensation.

REPRESENTATIVE SAMUELS raised the concern that altering HB 348 to require the restructuring and reprinting of the OVR's brochure to include VCCB information might create a fiscal note. He suggested that perhaps a written request from the committee that the OVR's brochure be altered when it is next scheduled for printing would be sufficient. "Rather than put it in the statute, as long as we get to the same place, that seems cleaner to me than having [the OVR] print up a whole new batch and throwing the [current] ones ... in the trash.

Number 1295

REPRESENTATIVE GARA said he is worried that a future OVR director might not remember to restructure the brochure if such were not specifically required via statute.

CHAIR McGUIRE suggested that adding intent language to the bill would be sufficient to ensure that new OVR brochures include information regarding the VCCB.

REPRESENTATIVE GARA agreed, indicating that he did not want the OVR to incur additional costs.

MR. BRANCHFLOWER relayed that he is intending to reprint the OVR's brochures in the spring, and that he believes he can find room on it for information regarding the VCCB.

REPRESENTATIVE GARA mentioned that he would probably be offering a conceptual amendment to add [intent language]. On the issue of the OVR's jurisdictional restraint, Representative Gara asked Mr. Branchflower whether he sees any benefit to expanding the OVR's jurisdiction to include class B misdemeanors.

MR. BRANCHFLOWER said no, adding that cases involving class B misdemeanors are generally resolved too quickly for assistance from the OVR to be necessary.

Number 1516

JUDITH McARTHER (ph) stated that the OVR's brochure needs to be handed out as soon as possible, and relayed that she did not find out about the OVR until approximately 18 months after the incident with which she was involved took place.

Number 1563

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration (DOA), relayed simply that the PDA has no problem with HB 348.

Number 1583

PAGE LINDER (ph) relayed that she was involved in an automobile accident in June of 2003; she was hit head on by a drunk driver without insurance. The driver left the scene of the crime, so it was also considered a hit and run incident. At the time of the accident, she was put in contact with a police officer, was taken to the hospital, and was given paperwork to fill out regarding proof of insurance and the police officer's information. She said that she'd tried to keep up with process, but it wasn't until she was given a subpoena for court and showed up there that she discovered that the drunk driver was only being charged with driving without insurance; he was not

charged with reckless driving, or with driving while intoxicated, or with leaving the scene of the accident, or with hitting another vehicle.

MS. LINDER mentioned that the drunk driver, after hitting her vehicle head on, had also attempted to run her over when she got out of her car; in the process of attempting to run her over, he struck her car again, leaving behind his bumper and license plate, which was later used to identify him as the person to take into custody. She explained that she'd only found out about the OVR in late August through a friend; when she contacted the OVR, she relayed that she'd wished she'd known about the OVR and its services at the time of the accident, because, by the time she did become aware of the OVR, she'd almost lost her window of opportunity to receive its help. With the OVR's help, the drunk driver was additionally charged with several felonies as well as with misdemeanor reckless driving and driving without insurance. She concluded by saying she feels that HB 348 would be a very beneficial bill.

Number 1706

REBECCA ROBERTS (ph) offered her support of HB 348. She relayed that in June of 2003, her son was the victim of a violent crime - first degree felony assault. She added:

> Had we known about the [OVR] at the time the incident occurred, we might have been able to be afforded true justice, meaningful assistance, and compassionate treatment before the law. Victims are unlikely to attempt to assert rights they do not know they have. Victims' rights can be ensured only if resources are sufficient, legally mandated, and enforced. I urge you to pass this legislation. I did want to make a comment on the [VCCB]. I fully support their efforts. I believe their brochure was offered to me on at least five occasions, three of which physicians called me personally to let me know that our son was a candidate for [the VCCB's] services and assistance. But at no time was I ever informed about the [OVR].

MS. ROBERTS said that she was also calling in to offer her support of HB 357.

CHAIR McGUIRE, upon determining that no one else wished to testify, closed public testimony on HB 348.

Number 1791

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

> Insert at p. 3 line 17 after "purpose." "To the extent feasible, new versions of this pamphlet printed after the effective date of this act shall also include information about compensation from the Violent Crimes Compensation Board."

Number 1796

REPRESENTATIVE ANDERSON objected and [asked] whether the bill's sponsors concur with Amendment 1; he added that he did not think it was necessary.

REPRESENTATIVE SAMUELS said he understood the intent of Amendment 1 and agreed with it, but indicated a preference for addressing it after it has been reviewed by Legislative Legal and Research Services to ensure that the wording will not cause difficulties.

REPRESENTATIVE STOLTZ said he concurred with Representative Samuels's comments.

Number 1853

REPRESENTATIVE GARA withdrew Amendment 1.

REPRESENTATIVE OGG pointed out that generally, when rights are created, remedies follow along; HB 348, however, appears to create a right without providing a corresponding remedy for noncompliance.

REPRESENTATIVE STOLTZE suggested that there are remedies available through existing statutes.

MR. BRANCHFLOWER referred to AS 12.61.010(b), which says:

> (b) Law enforcement agencies, prosecutors, corrections agencies, social services agencies, and the courts shall make every reasonable effort to ensure that victims of crimes have the rights set out in (a) of this section. However, a failure to ensure these rights does not give rise to a separate cause of

action against law enforcement agencies, other agencies of the state, or a political subdivision of the state.

MR. BRANCHFLOWER characterized the above language as a hold harmless provision, with the OVR primarily providing education to law enforcement agencies. However, in extreme cases, the OVR can undertake other remedies available under its authorizing statutes; these remedies essentially amount to providing reports to the public. He added that such has been done in the past in exceptional cases.

REPRESENTATIVE OGG said he just wanted it to be clear that [HB 348] creates a right that has no corresponding remedy if that right is violated.

REPRESENTATIVE GRUENBERG turned attention to page 3, lines 11-12. He asked whether class A misdemeanors involving theft would fall under the OVR's jurisdiction.

MR. BRANCHFLOWER said no, reiterating that the only class A misdemeanors that fall under the OVR's jurisdiction involve domestic violence or crimes against a person under AS 11.41.

CHAIR McGUIRE, upon learning that someone else wished to testify on HB 348, reopened public testimony.

Number 2051

ANNA FAIRCLOUGH, Executive Director, Standing Together Against Rape (STAR); Member, Anchorage Assembly, Municipality of Anchorage (MOA), remarked that [as the Executive Director of STAR], she'd attended a meeting with Victims For Justice, Inc. (VFJ), the Alaska Women's Resource Center (AWRC), and Abused Women's Aid in Crisis (AWAIC) - the domestic violence shelter in Anchorage - during which the concern was raised that HB 348 might engender a fiscal note should law enforcement officers in Anchorage notify every crime victim of the OVR. She elaborated: "Our concern is that somehow the [OVR] would become a clearinghouse or the referral base for victim services in Anchorage."

MS. FAIRCLOUGH, as an Anchorage Assembly member, relayed that the assembly had had a less than desirable experience with the OVR in relation to the Godfrey case. She expressed a desire to discuss in detail with committee members, at another time, how the OVR presented information to the public, the service that

this provided, what Anchorage was already involved in doing, and how [the OVR's involvement] did not expedite the process. She acknowledged that the OVR's intent was noble, but said that her concern and dissatisfaction stemmed from the fact that Anchorage had already been doing all the things that the OVR publicly suggested. "When it became a public ping-pong paddle with who ... had jurisdiction, it was a very uncomfortable feeling as an Anchorage Assembly member - to sit on that."

MS. FAIRCLOUGH [on behalf of STAR] pondered whether, should the OVR become a referral office, more people will be hired in order to deal with possible workload increases.

CHAIR McGUIRE read brief portions of the OVR's brochure.

REPRESENTATIVE SAMUELS surmised that social service organizations would only be helped by ensuring that information about the OVR gets distributed. "The [OVR] is basically a law firm ...; they're just the ombudsman," he remarked, adding that the OVR will be able to let those that call their office know about other available resources.

Number 2219

MS. FAIRCLOUGH argued, however, that from the point of view of sexual assault victims, another layer of bureaucracy is not a good thing - it will not make them come forward; instead, it will stop them from seeking help.

CHAIR McGUIRE pointed out, however, that HB 348 merely requires that information about the OVR gets distributed to crime victims; it doesn't mandate that victims go through the OVR in order to receive any other organization's services. "In point of fact, this is in addition, perhaps, to any other resources that are available to a woman in that [situation]," she added. She said she sees no harm in requiring distribution of the OVR brochure.

MS. FAIRCLOUGH remarked that at the aforementioned meeting, none of the groups present took a position on HB 348. She offered her belief that the Anchorage Police Department (APD) does not want to become a referral service and is, in fact, trying to consolidate all of the pieces of literature it is now distributing regarding the social service organizations that are available in Anchorage.

CHAIR McGUIRE explained, however, that an important distinction is that the OVR was statutorily created for the purpose of enforcing victims' constitutional legal rights, whereas the opportunity to access STAR and similar organizations is not a legal right - it is simply an opportunity.

REPRESENTATIVE GARA asked whether the concern about excessive literature is something the legislature ought to consider.

CHAIR McGUIRE reiterated the distinction between the OVR and social services organizations. The OVR enforces victims' constitutional rights, rights much like those afforded to defendants as a result of case law. With regard to whether law enforcement should be required to distribute information about the OVR, she said, "I think it is critical because I think [that] when a crime occurs, there ought to be as much attention paid to the victims as there [is] to the defendants; it's critical for me to know that ... an officer ... responding to an incident is paying ... attention to both sides of the equation." The more attention that can be given to victims' rights, the better, she indicated, adding that it is also important to continue other forms of outreach to victims.

TAPE 04-3, SIDE B
Number 2393

MS. FAIRCLOUGH, in response to Representative Gara, said she believes the police in Anchorage are doing all they can to reduce excessive literature. Furthermore, the police aren't mandated to carry those other vehicles of information. Ms. Fairclough relayed that she wasn't opposed to the distribution of the material; however, if there is a way to consolidate it, then there would be one piece rather than multiple pieces. She noted that carrying a particular amount of any kind of brochure will be an issue, she said. Ms. Fairclough clarified that "we" do want victims to be supported whenever possible, although she didn't want [the OVR] to become a referral service for victims. The police were trying to avoid the aforementioned by creating one pamphlet that would detail all the services available to victims. Although there have been assurances that the OVR won't become a referral service, she expressed concern that victims with the OVR's brochure will start calling its number.

CHAIR McGUIRE said she would continue to make sure that the OVR wouldn't become a bureaucratic barrier to obtaining the other services that are available. Furthermore, there is no intention for the OVR to become a clearinghouse.

MS. FAIRCLOUGH noted that there are hundreds of thousands of other victims that are unrepresented. She relayed her belief that police officers will continue to hand out the names of organizations such as AWAIC, AWRC, and STAR. She noted that she is the new legislative chair for the Alaska Network on Domestic Violence & Sexual Assault (ANDVSA), and expressed her appreciation for various pieces of legislation dealing with [the issues with which she is involved].

REPRESENTATIVE GARA noted that his staff would be working on an amendment regarding information about the Violent Crimes Compensation Board.

CHAIR McGUIRE mentioned that Anchorage Assemblymen Tremaine and Traini were in attendance. Upon determining that there was no further committee discussion, Chair McGuire set HB 348 aside.

HB 357 - RESTITUTION

Number 2177

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 357, "An Act relating to restitution; and providing for an effective date." House Bill 357 has four prime sponsors: Representatives Stoltze, Dahlstrom, Samuels, and McGuire.

Number 2165

REPRESENTATIVE SAMUELS moved to adopt the proposed CS for HB 357, 23-LS1384\D, Luckhaupt, 1/20/04, as the work draft.

REPRESENTATIVE SAMUELS, one of the prime sponsors of HB 357, stated that the changes embodied in Version D can be found on page 2, line 26, where a new Section 5 was added. This new Section 5 clarifies that the court retains jurisdiction into adulthood.

Number 2141

CHAIR McGUIRE remarked that there was no objection to the motion. Therefore, Version D was before the committee.

REPRESENTATIVE SAMUELS pointed out that the committee packet should contain a sponsor statement and a letter of support from the Anchorage School District. He highlighted the language

change from "may" to "**shall**" on page 1, line 4. The result of this change will be that if an individual causes someone else financial hardship, then that individual will pay at least part of the price. With regard to new Section 5, he opined that a [juvenile] shouldn't be let off the hook [just because he/she turns 18].

REPRESENTATIVE GRUENBERG provided the committee with a copy of the current AS 12.55.045. He relayed his understanding that even with respect to a large amount of restitution, [the repeal of AS 12.55.045(f)] is taking away the court's flexibility to consider the defendant's ability to pay restitution. This could lead to a very unfair result. He posed an example in which a young person, with dependants to support, does damage to a school building. If the court can't even consider [the defendant's ability to pay], it may lead to innocent children being left with no support. Therefore, he opined, the court, in some cases, should be able to consider such things. He said he hesitates to completely repeal AS 12.55.045(f), which, he recalled, requires the defendant to show clear and convincing evidence of his/her inability to pay. He announced that he supports the legislation itself, but reiterated his belief that the court should have some flexibility to consider the [defendant's ability to pay].

REPRESENTATIVE SAMUELS noted that AS 12.55.045(f) includes the following language: "the defendant's sentence includes a period of unsuspended incarceration exceeding 90 days". He remarked that of course the individual has no ability to pay during the 90 days when he/she is incarcerated and not working. However, the individual shouldn't be let off the hook when the individual is no longer incarcerated. He remarked that the individual should be reminded of what he/she did even if it's through payment of only $10 per week. He offered his belief that providing latitude to the courts means that there could be unfair situations from judge to judge.

REPRESENTATIVE GRUENBERG suggested that perhaps this is something that needs to be discussed between now and the bill's next hearing.

Number 1762

TAMARA de LUCIA, Associate Victims' Rights Advocate, Office of Victims' Rights (OVR), Alaska State Legislature, noted that AS 34.50.020 currently caps damages for vandalism against public buildings, including school vandalism, committed by minors at

$10,000. House Bill 357 will bring AS 12.55.045 into line with the [current] stated legislative purpose: "a public policy favors requiring criminals to compensate for damages and injuries to their victims". She highlighted that victims of a terrible crime can never be made whole. Although much of the suffering that victims go through can't be compensated, a restitution award is a way in which a defendant can attempt to right the wrong.

MS. de LUCIA characterized the provision repealing the court's ability to take into account an offender's ability to pay restitution as important. She explained that often the court reduces the restitution award when an offender has been sentenced to jail time because the defendant's earnings while incarcerated will be nominal or nonexistent. However, a reduction in the restitution award doesn't account for a potential windfall that that offender may receive during his/her lifetime nor does it account for the possibility that the offender may obtain a good job and then be able to compensate the victim. Offenders are often young and have a lifetime of earnings ahead of them. She opined that allowing restitution judgments to be reduced from the actual damages suffered is unfair to the victim and does not hold offenders accountable for their crime.

Number 1680

CHAIR McGUIRE, one of the prime sponsors of HB 357, turned to AS 34.45.020 and noted that it only refers to minors.

REPRESENTATIVE GARA said he supported obtaining every last penny of restitution possible from someone who commits a crime against someone else, and therefore he agrees with the concept and the approach. However, he expressed concern with regard to deleting any reference to the criminal's ability to pay. He posed an example in which a criminal disfigures someone and this results in $500,000 worth of medical bills. The judge in such a situation has the ability to place the offender in jail and retain jurisdiction over the offender for 10 years from the date of the crime. Under HB 357, the judge wouldn't be able to consider the defendant's ability to pay and, thus, over the course of the next 10 years this defendant would have to come up with $500,000 while the court has jurisdiction. Therefore, he expressed concern that HB 357 may result in the court saying that the defendant must pay more money than he/she will ever have. He questioned whether the aforementioned may cross a

constitutional line and thus he asked if any constitutional research had been done on this matter.

MS. de LUCIA responded that Article 1, Section 24, gives victims a constitutional right to restitution from their offenders. She said that she doesn't have any information that indicates this provision would go against the constitutional rights of defendants. However, she noted that she isn't an authority on the latter. In further response to Representative Gara, Ms. de Lucia specified that she had done no research [regarding whether HB 357 may cross a constitutional line].

Number 1449

JUDITH McARTHUR (ph) informed the committee of her daughter's car accident, which resulted in $420,000 worth of medical bills to date for her and her friend. She pointed out that there was a separate hearing for restitution during which the defendant denied having any property, although some research revealed that the defendant did own property. The defendant claimed that because the state had taken his driver's license, he [was earning] insufficient money to pay restitution. Ms. McArthur noted that her daughter had to replace her car, which wasn't considered in restitution. Furthermore, because of neurological deficits [due to this incident] it's taking six years [for her daughter] to complete college. She echoed earlier sentiments that restitution can never make her daughter and her friend whole. "Restitution does need to be ordered; it does need to be made," she said.

Number 1312

LINDA WILSON, Deputy Director, Alaska Public Defender Agency, Department of Administration (DOA), began by saying that although the [PDA] certainly supports restitution and restorative justice, it does have concerns with HB 357. The language change from "may" to "shall" is problematic because nowhere in the legislation is there language specifying that there be a request from the victim for reimbursement of loss. She asked if [this language change] would require the court to go through a process to determine the amount of any loss. She noted that many times victims don't request restitution.

MS. WILSON turned to the fiscal note and the provision repealing AS 12.55.045(e) and (f). As mentioned earlier, she remarked, if a large amount of restitution is owed, there is the presumption that the defendant has the ability to pay, and so the defendant

would have to overcome that presumption. Without taking into consideration the defendant's ability to pay, she said she felt that the legislation binds the ability of the courts and the judges to be fair in determining restitution.

MS. WILSON posed a situation in which a defendant is unable to pay, yet that is part of the conditions for release. Currently, in such a situation, if the defendant petitions for revocation of the defendant's probation, it must be proven that it was a willful violation. Therefore, there is a process by which to determine whether the defendant can pay or not and whether the nonpayment is willful.

REPRESENTATIVE GARA said he is trying to determine whether there might be a constitutional problem with [the bill], for example, in a situation in which an individual pays as much as he/she can in restitution but [still] doesn't have enough to pay it all.

MS. WILSON answered that it would be cruel and unusual punishment to incarcerate an individual for his/her inability to pay [restitution].

Number 0941

REBECCA ROBERTS (ph) informed the committee that she is the parent of a child who was permanently disfigured as the result of a violent crime. She indicated she supported HB 357 because it would require judges to order restitution in every case in which victims have suffered financial loss. In the case of a juvenile, she opined that a juvenile's restitution order should survive past the legal age of 19. Ms. Roberts relayed her belief that young offenders should be held accountable. By not ordering restitution the juvenile justice system is leading youth into thinking that there are no serious consequences to crime. Many studies confirm that repeat offenders commit much, if not most, of the predator violent crime. Furthermore, many juvenile offenders are becoming violent at earlier ages. Ms. Roberts concluded by urging the committee to pass HB 357.

CHAIR McGUIRE, upon determining that no one else wished to testify, closed public testimony.

REPRESENTATIVE SAMUELS turned to the constitutional issues and highlighted that victims have a constitutional right to restitution "right off the bat." Therefore, he opined, forcing the court to make the judgment is not going to be a problem. He reiterated his earlier sentiments regarding the need for those

[juveniles] who commit crimes to pay into their adulthood [when able to do so]. He said he would obtain an opinion from Legislative Legal and Research Services regarding the constitutionality of such. He also offered to review [subsection] (f) of the current statute in order to see that everyone's concerns are addressed.

CHAIR McGUIRE suggested that Legislative Legal and Research Services should also be asked to review mandatory minimum sentences because she believes that issue will engender a similar line of questions. By not removing subsection (i), by taking away the courts' discretion, and by requiring that the defendant pay restitution in some way, [it will result] in "beefing up" a part of the sentence. It will be interesting, she remarked, to see what Legislative Legal and Research Services returns on the aforementioned issue as well as the one regarding how the [defendant's] constitutional right bumps up against the victim's constitutional right to restitution.

REPRESENTATIVE GARA clarified that he wasn't saying that [the legislation] is unconstitutional; rather, that he didn't want to pass legislation that would jeopardize an existing statute merely because there was a desire to have a better one.

Number 0591

CHAIR McGUIRE announced that CSHB 357 [Version D] would be set aside.

HB 349 - ILLEGALLY OBTAINED EVIDENCE

Number 0511

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 349, "An Act amending Rule 412, Alaska Rules of Evidence." House Bill 349 has four prime sponsors: Representatives Stoltze, Dahlstrom, Samuels, and McGuire.

The committee took an at-ease from 3:33 p.m. to 3:44 p.m.

REPRESENTATIVE SAMUELS, one of the prime sponsors of HB 349, specified that HB 349 will amend a court rule. He explained that presently, when there is a violation of Miranda, a statement or evidence can be excluded from court and can only come to light in a subsequent perjury trial. In Anchorage there was a case in which a man provide statements detailing how he murdered his wife. However, on the witness stand the man told a

completely different story. This man was subsequently given a sentence of up to 99 years. Had the state not been able to convict him the way it did, and had it instead had to go after him for perjury, the man would've faced a sentence of six years. Representative Samuels explained that HB 349 attempts to change the rule such that if a defendant chooses to [confess] during the investigative process and then later gives a completely different story while on the stand, the original statement can be brought forth so that the jury can decide which of the defendant's statements was the truth. The bill contains a caveat on page 2, lines 1-2, which specifies, "**shows that the statement was otherwise voluntary and not coerced**". The aforementioned language would retain the judge's ability to preclude a coerced statement under any circumstances, but will allow statements to be used if there was a "technical violation" of Miranda.

CHAIR McGUIRE, one of the prime sponsors of HB 349, informed the committee that what [HB 349 proposes] is already the law under the federal rules of evidence. She noted that many other states have this law as well, highlighted that under such rules, the jury decides which statement has more credibility.

Number 0118

STEPHEN BRANCHFLOWER, Director, Office of Victims' Rights (OVR), Alaska State Legislature, turned to the notion of suppression, which stems from the concept of the exclusionary rule. The exclusionary rule is based on the premise that police shouldn't be rewarded for enforcing the law incorrectly. Therefore, if the police break the law, the jury doesn't get to hear the evidence. He emphasized that the rule change embodied in HB 349 doesn't change the exclusionary rule or the doctrine of suppression. However, the legislation does hold defendants who use Miranda and other rights as a sword [rather than a shield].

TAPE 04-4, SIDE A
Number 0001

MR. BRANCHFLOWER stated that what is being proposed via HB 349 has been the law in federal courts since 1971 as a result of a U.S. Supreme Court decision in Harris v. New York, 401 U.S. 222 (1971). The following are statements Mr. Branchflower attributed to Chief Justice Burger regarding that decision:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so, but that

> privilege cannot be construed to include the right to commit perjury. ...
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. ...

MR. BRANCHFLOWER indicated that HB 349's rule change would prevent just such [perversions] from occurring.

REPRESENTATIVE GARA asked if there were constitutional rules which require, under any circumstances, that a statement be taped and kept.

MR. BRANCHFLOWER replied that under Alaska law, there are a couple of cases - one of them being the Alaska Supreme Court case, Stephan v. State of Alaska, 711 P.2d 1156 (Alaska 1985) - which say that during a custodial interrogation which occurs at a place of detention, the police are required to tape record the entire statement including the reading of the rights. If that is not done, he explained, unless the police can demonstrate one of the exceptions - for example, the malfunction of the tape recorder, or if the defendant wished to talk but declined to do so on tape - there is what is called a per se rule of exclusion.

REPRESENTATIVE GARA gave a hypothetical example of a taped custodial interrogation of a sixteen-year-old defendant and a badly motivated law enforcement officer who "has it out for" the defendant. What happens if the officer "accidentally" loses the tape, shows up at trial, and says the defendant admitted the crime, he asked. He questioned whether or not HB 349 allows the officer to get away with saying the tape was lost.

Number 0330

MR. BRANCHFLOWER answered that it does not. He said that the state would have to sustain a burden of proof in a pretrial hearing and show that there was good faith on the part of the officer losing the tape. Assuming that the state would prevail, the defendant would always still have the ability to argue a bias on the part of the police officer, he said. What this amendment seeks to address is the situation where the defendant would make some claim that was inconsistent with that earlier statement. Referring to the aforementioned hypothetical case, he said such cases usually get screened out or are resolved with a plea or reduction. House Bill 349 is designed to address

egregious situations in which what happened on the tape is clear, he added.

REPRESENTATIVE GARA asked for clarification about evidence not being excluded any more.

MR. BRANCHFLOWER replied that there is a requirement under paragraph (1)(B) that statements be voluntary and not coerced, so there is still an element that the state has to address.

REPRESENTATIVE GARA argued that [in his hypothetical case], HB 349 says that the officer who loses the tape in bad faith can come in and testify that the sixteen-year-old defendant said he did it.

MR. BRANCHFLOWER replied that that would be the case only if, first, the judge rules in the state's favor in a pretrial issue regarding the requirement to tape record, and second, only if the defendant takes the stand and lies. The bill doesn't allow the state to do anything different than what it is permitted to do now in terms of its case in chief; excluded statements are still excluded and suppressed statements are still suppressed, he said. The only change comes about when the defendant takes the stand and lies, he added.

CHAIR McGUIRE said she thought Mr. Branchflower's explanation was very clear. She stated that the bill really applies to those cases where defendants are going to take the stand and use this law, in effect, as a sword, in order to be able to say whatever they want because the fact that they have made prior inconsistent statements will not be introduced or become part of the record for the jury to consider.

Number 0615

REPRESENTATIVE GARA said that he understood that the bill only applies once the defendant wants to testify. He again questioned the allowance of illegally obtained evidence.

MR. BRANCHFLOWER reiterated that the court would first have to rule on the admissibility of the earlier statements when the tape is missing. If the officer lies during rebuttal, it would become a question of credibility. Without any tape, the state would have a tough burden to sustain, he said, adding, again, that these kinds of cases would be infrequent.

REPRESENTATIVE GARA agreed that this type of case would be rare, but added:

> Those are the kinds of things that Congress thought wouldn't occur under the [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001] too and they all voted for it ...; it's these occurrences that rarely ever happen that the constitution is there ... to prevent from ever happening.

MR. BRANCHFLOWER said he agreed, but noted that situations like the aforementioned Anchorage example happen more often when defendants learn from their lawyers that their confessions are nonexistent and so they then testify when they ought not to.

CHAIR McGUIRE stated, "You still have to prove that the statement was voluntary and uncoerced," and emphasized the importance of this point.

REPRESENTATIVE GARA agreed. He asked whether HB 349 is altering a court ruling or the [Alaska State] Constitution.

MR. BRANCHFLOWER answered that Rule 412 of the Alaska Rules of Evidence was promulgated and amended by the Alaska Supreme Court through its constitutionally granted authority. Rule 412 is derived from what used to be called [Criminal] Rule 26(g) of the Alaska Rules of Criminal Procedures, he said, and explained that it was amended in 1979 by adding the exception for perjury so that it would be possible for a person who commits perjury to be prosecuted in a separate prosecution. That was the Wortham v. State case. He said HB 349 is not changing the constitution, but is in line with what is constitutionally permitted. If the rule was changed by the Supreme Court in 1979 to permit for collateral prosecution for perjury, he said, then he doesn't see a problem with now changing the rule by a two-thirds vote.

REPRESENTATIVE GARA asked whether case law has said that Rule 412 is required by the Alaska State Constitution.

Number 1090

MR. BRANCHFLOWER indicated that there was not, adding that the clearest indication is the Wortham case, which said that it doesn't offend the Alaska State Constitution to use illegally seized evidence, though such use is limited to a collateral

prosecution for perjury. In response to a question he cited Wortham v. State, 641 P2d 223 (Alaska App. 1982).

CHAIR McGUIRE indicated that members would be provided a copy of that case.

REPRESENTATIVE GARA asked for clarification of the rule before Wortham. He surmised that illegally obtained evidence couldn't be used in a subsequent prosecution, but then Wortham made the exception for perjury. He asked if HB 349 creates a much broader exception.

MR. BRANCHFLOWER replied that it is broader in the sense that the jury in the principle case will know that the defendant is lying, as opposed to having a collateral prosecution. He noted that if a person was on trial for first degree murder it is a small hindrance to risk a prosecution for a class C felony or a class B felony.

REPRESENTATIVE OGG said that in some areas, the Alaska State Constitution is broader than the U.S. Constitution in its protection of citizens' rights. He asked how other states' constitutions compare to the Alaska State Constitution with regard to the issues the bill addresses.

MR. BRANCHFLOWER replied that he did not know.

REPRESENTATIVE OGG said that he would like to get information on that point.

REPRESENTATIVE SAMUELS agreed to investigate that point.

CHAIR McGUIRE referred to a handout in members' packets detailing the commentary regarding Rule 412, and noted that it makes reference to Wortham and whether or not Rule 412 is constitutionally based. According to that commentary, there is precedent for changing court rules at the supreme court level, she said, adding that she does not believe such requires a constitutional change. She acknowledged that it might be interesting to see what other states have done with regard to this issue.

Number 1290

REPRESENTATIVE OGG asked why the language, "if it is relevant to the guilt or innocence" was left out of [paragraph] (1)(B), remarking that perhaps such language ought to be inserted after

"statement" in order to narrow the use of the proposed exception.

MR. BRANCHFLOWER said that guilt or innocence is the focus of any trial, adding that ultimately, it is the judge's responsibility to admit reliable evidence that goes to determine guilt or innocence.

REPRESENTATIVE OGG stated his concern that the current language is quite broad.

MR. BRANCHFLOWER, remarking that he did not know why the aforementioned language was not included in paragraph (1)(B), said that it should be added for clarity.

REPRESENTATIVE OGG recommended that there be a committee substitute that included that language.

CHAIR McGUIRE agreed.

Number 1498

LINDA WILSON, Deputy Director, Public Defender Agency (PDA), Department of Administration (DOA), said that there is a need to look at the purpose of Rule 412 and what it addresses, and to remember the reason why this exclusionary rule came about. In the past, law enforcement has broken the law to obtain evidence: cheated, lied, or done something illegal. Such evidence has been ruled as ineligible by the state, she added. She said that the example given by Representative Gara was a good example of a "swearing match" where the defendant, the sixteen-year-old kid, would lose to the law enforcement officer. She said the current rule will keep law enforcement in check and encourage them to behave legally.

MS. WILSON said that the second part of the bill is extremely problematic. It talks about using evidence illegally obtained to impeach a witness, and this could be any witness. A witness could be called by the state, set up as a "straw man" and then the state could say, "This is an adverse witness, a hostile witness, and I want to impeach them." That witness could be used to then get in the evidence that has been suppressed. It seems like an opportunity to get around the exclusionary rule, because paragraph (2)(B) says, "any prosecution to impeach a witness if the prosecution shows that the evidence was not obtained in substantial violation of rights of the witness." Therefore, she remarked, it seems like one wouldn't necessarily

even have the defendant taking the stand in that situation; instead, statements made by a witness called by either the state or the defense could be used against a defendant. This possibility certainly raises concern, she added.

MS. WILSON said that some version of the current evidence rule has been in effect since 1979, mentioning that there are specific Alaska cases in which the Alaska Supreme Court has used this rule. She agreed that the Alaska State Constitution is more broadly construed than the U.S. Constitution and, as a result, there are constitutional underpinnings to this rule regarding due process and other rights which insure that the police are not encouraged to behave illegally by canceling out the current rule regarding illegally obtained evidence if the defendant elects to testify.

CHAIR McGUIRE remarked that at the federal level, a person would be subject to what is being proposed via HB 349 because the federal government has had a similar rule in place since 1971 due to a U. S. Supreme Court case.

Number 1833

MS. WILSON pointed out, however, that Alaska laws do not mirror federal laws, adding that the Harris v. New York decision is an example of the Alaska Supreme Court disagreeing with the merits of a [federal] decision. She said that in many respects, Alaska has differed from the federal government in how it prosecutes cases, and mentioned the USA PATRIOT Act as an example. The right to privacy is in the Alaskan State Constitution but not in the Federal Constitution, she remarked, suggesting that none would want to minimize that right by comparing it to what might happen on that issue in federal court.

CHAIR McGUIRE argued, however, that Alaskans also celebrate personal responsibility, and opined that a defendant who would attempt to use [the current rule] as a [sword] is a coward. She said that she is concerned about the defendant's rights, also, but [the situation that occurred in Anchorage] goes too far. In conclusion she said:

> I just think that you cannot use it as a [sword] ..., and you ought to have the ability, if you take the stand, to explain [a prior statement] away; if you made that statement under duress, if you made that statement because you didn't understand or out of confusion, you will be afforded the opportunity to

explain that to a jury, but I don't think you can take the stand simply to use it as a [sword].

REPRESENTATIVE GARA said that a bill is never black and white and that sometimes when a bill passes, "a lot of things are better, and some things are worse, and if you don't pass the bill, a lot of things are bad, but some things are better." He characterized HB 349 as one of those bills. For example, if HB 349 is not passed, perhaps a certain number of defendants will get away without being held accountable, but if it is passed, perhaps law enforcement officers will receive the message that they can engage in illegal conduct without suffering any consequences. He indicated that he wanted to move beyond having the debate merely be: if one opposes the bill then one is pro-crime, and if one supports the bill then one is anti-civil liberties.

REPRESENTATIVE GARA surmised that the circumstance the sponsors are trying to get to is the circumstance in which a defendant decides to testify, but has made, or is alleged to have made, prior inconsistent statements; the sponsors want to be able to impeach that defendant. He asked whether HB 349 allows illegally obtained evidence to be used even if the defendant doesn't take the stand.

Number 2031

MS. WILSON said yes, noting that paragraph (2)(B) refers to impeaching a witness.

REPRESENTATIVE GARA asked if there would be a way to word that provision so that it only addresses the issue of the defendant taking the stand.

MS. WILSON suggested that changing the word "witness" to "defendant" would be an improvement.

REPRESENTATIVE SAMUELS indicated that he would have Legislative Legal and Research Services look into that issue.

CHAIR McGUIRE offered that the kind of situation the bill is attempting to address is when the defendant chooses to take the stand in a perceived attempt to use this law as a [sword].

REPRESENTATIVE SAMUEL said that it is not an easy issue, and gave examples of citizens being [victimized] by a guilty defendant who had confessed but was then acquitted. He said

that this is how citizens lose faith in their government. There is a balancing act that needs to happen, he remarked.

CHAIR McGUIRE agreed, adding that she didn't want to encourage police misconduct or coercion of defendants and witnesses.

REPRESENTATIVE GRUENBERG referred to page 2, line 4, and asked whether that language contained a typo; specifically, did there need to be a "the" between "to" and "issue". In other words, should that language read: "if it is relevant to the issue".

REPRESENTATIVE SAMUELS said he would research that point.

Number 2248

ANNA FAIRCLOUGH, Executive Director, Standing Together Against Rape (STAR); Member, Anchorage Assembly, Municipality of Anchorage (MOA), asked whether the defendant actually had to use a violation of Miranda as a defense in order to trigger what is being proposed in HB 349.

REPRESENTATIVE SAMUELS replied that it applies if the defendant chooses to testify that he is innocent, but there is an old statement admitting guilt; then the old statement is brought in and the issue of guilt or innocence is left up to the jury to decide.

MS. FAIRCLOUGH surmised, then, that if the defendant chooses to use it as a [sword] so that evidence can't come forward, then he/she is the one who causes that evidence to be excluded, not the police officer.

CHAIR McGUIRE agreed and said that it is the defendant who makes the plea for evidence to be excluded based on police misconduct [or] a Miranda violation; that evidence is then off the table.

MS. FAIRCLOUGH restated her opinion that it wouldn't matter if the tape is lost or not as long as the defendant is not the one going forward using that excuse as his defense.

REPRESENTATIVE GARA said that it won't matter if the defendant is the first one to claim the statement was taken illegally, because ultimately the court will address that issue.

TAPE 04-4, SIDE B

MS. FAIRCLOUGH relayed that she supports HB 349, adding that she wants to see credibility returned to the justice system.

Number 2346

REPRESENTATIVE GRUENBERG made a motion to adopt [Amendment 1], to add "the" on page 2, line 4, between "to" and "issue".

CHAIR McGUIRE asked if there was any objection [to Amendment 1].

REPRESENTATIVE SAMUELS said he had no objection to Amendment 1.

[Although Representative Holm stated that he objected, this appeared to be in jest; therefore, Amendment 1 was treated as adopted.]

REPRESENTATIVE GRUENBERG - turning attention to page 1, line 15, and on page 2, [line 7] - relayed that there was no such thing as a prosecution to impeach a witness. He said that impeachment is a trial technique, an evidentiary technique. He said he wanted to have that part of the bill clarified, perhaps changed, because there is "no such animal."

CHAIR McGUIRE remarked that perjury would be a separate trial on the same basic [case].

REPRESENTATIVE GRUENBERG agreed, and suggested adding a comma after "prosecution" on page 1, line 15, and on page 2, [line 7]. He acknowledged, however, that it might be better to not limit the bill to a prosecution, but allow for impeachment in a civil context, also.

Number 2248

CHAIR McGUIRE agreed, and asked Representative Samuels to investigate that issue.

REPRESENTATIVE GRUENBERG noted that except in a civil case, the trier of fact cannot comment to the jury when somebody claims, for example, the privilege against self-incrimination. He said that if the evidence is illegally obtained, there would have to be a caution that it can only be used for the purpose of impeachment. He opined that such a caution would be absolutely essential for HB 349. He added that if the prosecution is going to be using illegal evidence for the limited purpose of impeachment, they should be required to give advance notice to the defense that if their witness takes the stand there will be

a hearing outside the presence of the jury. The judge, then, would determine whether a cautionary instruction could be given or whether the prejudicial value would outweigh the probative value. He then turned to the issue of a civil prosecution, and suggested that that should be investigated as well.

CHAIR McGUIRE, addressing Representative Samuels, asked that before the bill's next hearing, he give consideration to the issue of whether to include both civil and criminal cases, and to the issue of clarifying the bill as it relates to impeachment.

REPRESENTATIVE SAMUELS said he thought the prosecution shouldn't have to give notice that it was going to implement a court rule. Instead, he opined, the defense lawyer should tell his/her client that if the client changes his/her story, the issue will come back to the table. He remarked that he'd hate to put a burden on the prosecution.

REPRESENTATIVE GRUENBERG stated, however, that the danger is that in a criminal case, the jury can't help but consider illegally obtained evidence beyond the purpose of impeachment, and this could severely impact the rights of the defendant. What is normally done in that situation is for a hearing to be held outside the presence of the jury in order to argue that issue. But in order to do that, notice has to be given. The issue is not whether the lawyer knows the rules of evidence. If one waits until the person has taken the stand and "opened the door," then it's too late, he opined.

Number 2007

REPRESENTATIVE SAMUELS maintained his belief that the prosecution does not know what is going to be said and the defense is not going to tell them.

CHAIR McGUIRE said that the court would decide what to put into the jury instructions. She said she assumes that any judge would make it clear to the jury that they may only take the statements into account for impeachment purposes, not to the question of guilt or innocence.

REPRESENTATIVE GRUENBERG pointed out that [those instructions] would be given at the time the testimony is given.

CHAIR McGUIRE surmised that this issue wouldn't be addressed by the bill; rather, it will be decided by the court.

REPRESENTATIVE GARA, in conclusion, pointed out that sometimes, when it is easier to prosecute a guilty person, it is then also easier to prosecute an innocent person. He suggested that a lot more discussion of the bill is needed to get a balance.

[HB 349, as amended, was held over.]

ADJOURNMENT

Number 1938

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:50 p.m.