ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 24, 2004
1:15 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. 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."

- HEARD AND HELD

HOUSE BILL NO. 517
"An Act relating to registration in beneficiary form of certain security accounts, including certain reinvestment, investment management, and custody accounts."

- MOVED HB 517 OUT OF COMMITTEE

HOUSE BILL NO. 533
"An Act relating to the state's administrative procedures and to judicial oversight of administrative matters."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 244
SHORT TITLE: CRIMINAL LAW/SENTENCING/PROBATION/PAROLE
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

04/04/03	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	(H)	JUD, FIN
04/14/03	(H)	JUD AT 1:00 PM CAPITOL 120
04/14/03	(H)	Heard & Held
04/14/03	(H)	MINUTE(JUD)
04/25/03	(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03	(H)	-- Meeting 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
05/08/03	(H)	MINUTE(JUD)
05/09/03	(H)	JUD AT 1:00 PM CAPITOL 120
05/09/03	(H)	Moved CSHB 244(JUD) Out of Committee
05/09/03	(H)	MINUTE(JUD)
05/12/03	(H)	JUD RPT CS(JUD) NT 1DP 1DNP 4NR
05/12/03	(H)	DP: SAMUELS; DNP: GARA; NR: HOLM,
05/12/03	(H)	OGG, GRUENBERG, MCGUIRE
05/13/03	(H)	FIN AT 1:30 PM HOUSE FINANCE 519
05/13/03	(H)	-- Meeting Canceled --
05/14/03	(H)	FIN AT 8:30 AM HOUSE FINANCE 519
05/14/03	(H)	Heard & Held
05/14/03	(H)	MINUTE(FIN)
05/15/03	(H)	FIN AT 8:30 AM HOUSE FINANCE 519
05/15/03	(H)	Moved CSHB 244(JUD) Out of Committee
05/15/03	(H)	MINUTE(FIN)
05/15/03	(H)	FIN RPT CS(JUD) NT 2DNP 4NR 4AM
05/15/03	(H)	DNP: KERTTULA, FOSTER; NR: MOSES,
05/15/03	(H)	CHENAULT, HARRIS, WILLIAMS; AM: HAWKER,
05/15/03	(H)	STOLTZE, BERKOWITZ, WHITAKER
05/15/03	(H)	RETURNED TO JUD COMMITTEE
05/15/03	(H)	IN JUDICIARY
03/19/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/04	(H)	Heard & Held
03/19/04	(H)	MINUTE(JUD)
03/24/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 517
SHORT TITLE: SECURITY ACCOUNT BENEFICIARY DESIGNATION
SPONSOR(S): LABOR & COMMERCE

02/23/04	(H)	READ THE FIRST TIME - REFERRALS
02/23/04	(H)	L&C, JUD
03/01/04	(H)	L&C AT 3:15 PM CAPITOL 17
03/01/04	(H)	Moved Out of Committee
03/01/04	(H)	MINUTE(L&C)
03/03/04	(H)	L&C RPT 4DP 1NR
03/03/04	(H)	DP: LYNN, ROKEBERG, DAHLSTROM, GATTO;
03/03/04	(H)	NR: CRAWFORD
03/24/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 533
SHORT TITLE: IF UNREAS. AGENCY DELAY, COURT DECIDES
SPONSOR(S): STATE AFFAIRS

03/08/04	(H)	READ THE FIRST TIME - REFERRALS
03/08/04	(H)	JUD, FIN
03/24/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SUSAN A. PARKES, Deputy Attorney General
Central Office
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Presented the proposed CS for HB 244 on behalf of the administration.

ALLEN STOREY, Lieutenant
Central Office
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of Sections 1-7 and 12, and the self-defense provisions of the proposed CS for HB 244, and responded to questions.

SIDNEY K. BILLINGSLEA, Attorney
Alaska Academy of Trial Lawyers (AATL)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 244, relayed her concerns about Sections 8-9 and 12, and the self-defense provisions of the proposed CS, and responded to questions.

MARIBETH CONWAY, Trust Manager
Wells Fargo
(Address not provided)

POSITION STATEMENT: Assisted with the presentation of HB 517 and responded to questions.

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: As chair of the House State Affairs Standing Committee, sponsor of HB 533, explained the changes encompassed in Version D.

DAVID STANCLIFF, Staff
to Senator Gene Therriault
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke on behalf of Senator Therriault, the sponsor of SB 333, companion bill to HB 533.

JAN DeYOUNG, Assistant Attorney General
Labor and State Affairs Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with HB 533.

ACTION NARRATIVE

TAPE 04-46, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:15 p.m. Representatives McGuire, Holm, Ogg, Samuels, and Gara were present at the call to order. Representatives Anderson and Gruenberg arrived as the meeting was in progress.

HB 244 - CRIMINAL LAW/SENTENCING/PROBATION/PAROLE

Number 0085

CHAIR McGUIRE announced that the first 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."

[Before the committee, adopted as a work draft on 3/19/04, was a proposed committee substitute (CS) labeled 04-0033, 1/16/2004.]

Number 0092

SUSAN A. PARKES, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), reminded members that at the last hearing on HB 244, she'd began her presentation by pointing out the similarities between the proposed CS and the version that was reported from the House Judiciary Standing Committee last year. Today, she indicated, she would begin by speaking about the new bootlegging provisions, Sections 1-4, which propose to give some additional power to local communities with regard to setting bootlegging standards. Currently, statute allows for a local option: a community can say that if one possess more than a certain amount of alcohol, then one is presumed to be possessing it for sale as opposed to possessing it for personal consumption. There are communities that have chosen to have a lower limit than that which is set in statute, but nothing under current statute allows recognition or enforcement of that choice. Sections 1-4 of the proposed CS would allow the state to recognize and enforce more restrictive local options when such are chosen by municipalities and established villages.

MS. PARKES turned attention to Sections 6-7. She said that these sections propose to strengthen the state's bootlegging statutes by amending the forfeiture provisions such that "money, securities, negotiable instruments, or other things of value used in financial transactions" that are derived from the bootlegging activity could also be subject to forfeiture. She noted that these items are currently subject to forfeiture in drug cases, and so the proposed CS simply adds similar language to the statute pertaining to bootlegging. In response to questions, she explained that for the purpose of forfeiture, there must be a nexus between the money being forfeited and the bootlegging activity, and that a hearing for the purpose of establishing that nexus would be required.

REPRESENTATIVE GRUENBERG raised the question of whether the term, "cash equivalents" ought to be used.

MS. PARKES offered her belief that the proposed CS is drafted broadly enough to include future changes in the way financial transactions occur.

REPRESENTATIVE OGG said he would like to know what the sequence of events would be with regard to forfeiture, for example, in a bootlegging situation involving an aircraft.

Number 0566

MS. PARKES surmised that it is probably similar to the current process regarding felony driving under the influence (DUI) crimes. In such cases, the vehicle is seized at the time of the arrest; there is a process set up for "bonding it out," as well as ways to protect "innocent third parties." She suggested that a representative from the Alaska State Troopers could better explain the forfeiture procedure.

REPRESENTATIVE OGG asked whether there is any evidence that forfeitures and seizures really do act as deterrents.

MS. PARKES said she is unaware of any specific research being done on that issue, but offered her belief that word of such a forfeiture provision can spread quickly in small communities, and so that kind of a provision could perhaps become a deterrent.

REPRESENTATIVE GRUENBERG turned attention back to Section 1, proposed subsections (c)(1) and (2). He noted that subsection (c)(1) uses the past tense, whereas subsection (c)(2) uses the present tense. He asked whether this is intentional or whether a conforming amendment might be needed.

MS. PARKES said she would research that issue.

MS. PARKES then turned attention to Section 5, which, she relayed, is a new provision that proposes to add a new paragraph (3) to AS 04.16.051. Currently, providing alcohol to a minor is considered a class A misdemeanor, though there are certain circumstances in which such an action would become a felony, for example, if the person has a prior conviction for the same offense or if, after being provided the alcohol, the minor causes serious physical injury or death to another person while under the influence of that alcohol. Paragraph (3) proposes to add another circumstance under which providing alcohol to a minor would be considered a felony: if the violation occurs within the boundaries of a municipality or the perimeter of an

established village that has adopted a local option under AS 04.11.491. She said the intent is to recognize that it's a more serious offense to provide alcohol to a minor in a village or area that has adopted a local option.

Number 0925

MS. PARKES turned attention to Section 12, and said this section proposes to establish a new crime - violation of custodian's duty. Currently under the bail statutes, judges can release [defendant] on bail if he/she has a third-party custodian. Section 12 says that if someone agrees to be a third-party custodian and then fails to fulfill those duties, he/she can be charged with a class A misdemeanor if the released person is charged with a felony, or with a class B misdemeanor if the released person is charged with a misdemeanor.

MS. PARKES, in response to a question, said that currently, someone who fails to fulfill the duties of a third-party custodian can be charged with criminal contempt, which, she opined, is cumbersome. She offered her belief that Section 12 will provide "a cleaner way" to prosecute cases in which someone fails to fulfill the duties of a third-party custodian. She added:

> The other purpose of putting it in Title 11 is, we're trying to flag some of these [third-party custodians] who don't fulfill their duties. So if they come up years from now proposing to be a third-party [custodian] in another case, ... that flags it for us; we can know to take a look at that person to question whether maybe there's a problem with them being a third-party [custodian].

REPRESENTATIVE GARA relayed that although he does not have a problem with "that," he does have a broader concern "that a prosecutor who has a particular personal problem with a third-party custodian might retaliate against that person by ... seeking a dual charge, by using this statute and then using criminal contempt on top of that." He said he'd like to make sure that a person could only be charged under one criminal statute.

MS. PARKES offered her belief that Representative Gara's concern "would be covered by double jeopardy," adding, "you can't be prosecuted twice for the same conduct, so whether you call it a

different crime, if it's the same conduct, you can't be prosecuted twice."

Number 1086

REPRESENTATIVE GARA responded:

> But ... I'm thinking of people who commit a crime but it leads to ... many different counts, and I think if there is a different element to the behavior that is reflected in one count, as opposed to the other, then you could possibly be charged under two statutes. And I'm thinking the contempt charge might focus on the violation of something that the judge told the person to do when they became a third-party custodian that might be different than the failure to immediately report in Section 12.
>
> ... I don't think in a normal circumstance a prosecutor would try to prosecute somebody for both this new charge and criminal contempt, but ... I've seen enough cases where I think sometimes people cross the line, and I guess I wouldn't like to see somebody try to use the contempt charge on top of this. If this is what we're going to do, I think this is what we should do. Would there be a way to reword this to make sure that the criminal contempt charge couldn't be piled on top of this charge?

MS. PARKES said she would give that issue some thought, but remarked that it has not been her experience that prosecutors would do "that." She added that one of the reasons for proposing the language in Section 12 is that prosecutors are loath to try to use the criminal contempt charge because "it's a difficult statute," and offered her belief that "they would merge if they were both brought for the same conduct."

REPRESENTATIVE GRUENBERG said he has problems with the way Section 12 is drafted, one problem being that it doesn't require that the person knowingly fail to report. A person might very well violate a condition of release that is unknown to the third-party custodian; for example, "let's say somebody is in my custody and one of the conditions ... is [that] you can't use an illegal substance, and they're out at work or something and ... smoke ... marijuana ... - I wouldn't necessarily know about that." He indicated that he would be offering an amendment later to ensure that the third-party custodian "knowingly"

failed to report, or "failed to report something that they know about."

Number 1223

MS. PARKES offered her belief that under Title 11, if a mental state is not specified in a statute, it is presumed to be "knowingly"; thus "knowingly" would be read into this provision.

REPRESENTATIVE GRUENBERG concurred that such is "a general statute," but opined that "it ought to be put into ... here so that there is no question" and it can't be misinterpreted. He then raised the issue of perhaps creating a class C misdemeanor for a third-party custodian of someone who is only charged with a class B misdemeanor, and suggested that the maximum someone could be jailed for a class C misdemeanor would be 30 days.

MS. PARKES, in response to a question about the mental state of "knowingly", said that one can't report something that one is unaware of; for example, if the released person sneaks out of the house while the third-party custodian is sleeping, the custodian couldn't report that disappearance until he/she becomes aware of it.

REPRESENTATIVE OGG asked whether the term "as directed by the court" means that the court is going to tell the third-party custodian what circumstances and behaviors he/she is supposed to report.

MS. PARKES said yes, adding that currently, when one becomes a third-party custodian, he/she must sign paperwork that specifically lists the conditions of release. In response to a question, she said that it is her understanding that the courts currently inform third-party custodians what the consequences are of failing to perform the custodial duties as specified in the release paperwork, which currently also gives notification of possible consequences. She relayed her hope that if this provision is adopted into law, that the DOL and the Alaska Court System (ACS) would work together to have the paperwork pertaining to third-party custodians altered to reference this new crime as a possible consequence of failing to perform the custodial duties.

Number 1455

MS. PARKES then turned attention to Section 27. She said that currently, there is no statutory provision that would allow a

state or municipal agency, or employees of such, to disclose information to a member of the public regarding juvenile offenders who are a danger to the public. Currently there are provisions for such information to be given to law enforcement, to schools, and to other government agencies. Section 27, along with a forthcoming amendment, is intended to allow disclosure of information to a member of the public - if that member requests it - regarding the adjudication of a sexual offense if it would be used for the purpose of protecting the safety of a child or vulnerable adult. She relayed:

> Where we saw situations arising were social workers perhaps going into homes ... and being aware that there was a juvenile, who was perhaps babysitting for a family, who had been adjudicated or charged with a sex offense, and there was no provision for that [social worker] to warn the family. We're looking for a way for the public to be protected, potentially, from dangerous juveniles.

MS. PARKES, in response to a question, relayed that although the language currently in Section 27 only pertains to adjudications of sexual offenses, the aforementioned forthcoming amendment would broaden this provision somewhat. In response to question about who would be entitled to this type of information, she said:

> That's one of the concerns about this; there certainly needs to be some policy and procedures put in place on how this would be handled, and the release of information, and what kind of showing there would need to be as to some child or vulnerable adult actually being in danger. And so as to specifically how this would be enforced, [the Department of Health and Social Services (DHSS)] would need to come up with regulations.

MS. PARKES then turned attention to Sections 10 and 11, which are new provisions and which also pertain to juveniles and sexual offenses. Currently, [sexual abuse of a minor] crimes committed by juveniles who are 15 years old or younger are all classified as misdemeanors. The DOL, however, feels that such does not proportionally recognize the seriousness of certain [sexual abuse of a minor] offenses when committed by 15-year-olds. She elaborated:

> Right now, if a 15-year-old penetrates a 3- or a 4-year-old, it's a misdemeanor. We think that sends the wrong message, that if you burglarize a home you commit a felony but [if] you sexually assault a young child it's a misdemeanor. ... Again, this will only affect 15-year-olds and younger; these would be provisions handled in the juvenile system. ... The "sexual contact" provisions would remain a misdemeanor, but it would make the penetration offenses a [class] C felony.

Number 1699

ALLEN STOREY, Lieutenant, Central Office, Division of Alaska State Troopers, Department of Public Safety (DPS), said he wanted to offer the DPS's support of the proposed CS, specifically Sections 1-4 and 6-7, positing that these provisions will be great tools for investigators, allowing them to increase their efforts in helping villages help themselves in their battle against alcoholism and the effects that alcohol is having on their lifestyles. He added that the DPS has substantially ramped up its efforts to catch those that are involved in bootlegging activities, and reiterated that the aforementioned provisions will be fantastic tools for that effort. The forfeiture provisions will bring alcohol [bootlegging] violations into line with what has historically been done for many years in drug cases. He noted that one of the aforementioned provisions would allow the DPS to share some of the seized and subsequently forfeited items with local law enforcement agencies.

LIEUTENANT STOREY relayed that every dollar of money invested in bootlegging can generate as much as a $15 return, sometimes more, so there is quite a bit of incentive to engage in bootlegging activities. Law enforcement has recently seized several snow machines and boats, he noted, and opined that this is having a direct impact on bootlegging behavior. He then characterized Section 5 as a really good tool that will hopefully have some impact with regard to breaking the cycle of drinking in villages.

LIEUTENANT STOREY added:

> It's not uncommon for us to receive direct information that adults are giving alcohol to minors in return for use of their snow machine or just to party with them or whatever the dynamics of that particular

> relationship are. Alcohol is freely passed from adults to minors in these local option communities, and we need to have some tools there to help us ... break that cycle of generational alcoholism and alcohol abuse, and hopefully improve the quality of life within those communities.

Number 1863

LIEUTENANT STOREY turned attention to Section 12, regarding third-party custodians, and characterized it as a tool that is long overdue. He relayed that is not uncommon for a drug dealer to be picked up by law enforcement one day, be released to a third-party custodian, and be out on the street the next day selling drugs again because he/she had managed to slip away from his/her custodian. He opined that historically, third-party custodians have not taken their responsibilities as custodians very seriously, and offered his belief that Section 12 will result in third-party custodians being more responsible and exerting more control over those that have been released into their care.

LIEUTENANT STOREY then offered his belief that the self-defense provisions of the proposed CS are good provisions from law enforcement's point of view. He elaborated:

> It's not uncommon... [to] show up at a "sting" where a multitude of things have happened and everybody is pointing at everybody else and declaring self defense. ... Obviously, crimes have been committed, [but] to try and figure out who did what to [whom] can be incredibly complex, and this gives us the tool to allow us to more appropriately investigate these things. There's another provision also related to ... co-participants in crimes ... being charged with the death of their co-participant, and we believe that that's a good tool, also, that will give us a good opportunity to, again, properly ... separate ... the bad from the good - take the criminals away from the law-abiding people, and put them where they should [be], that's away from society.

REPRESENTATIVE HOLM asked Lieutenant Storey to describe what the sequence of events would be regarding forfeiture of property related to a bootlegging offense.

LIEUTENANT STOREY, using the example of a drug bust, relayed that law enforcement takes possession as soon as possible of any vehicles, vessels, or aircraft involved in the crime. The burden, at that point, is on law enforcement to maintain that property and keep it from harm so that if it is not subsequently forfeited, it can be returned to the owner. He pointed out that for any illegal activity, whether drug-related or alcohol-related, searches and seizures by law enforcement must be conducted in a legal manner. In response to a question, he clarified that seizure and forfeiture are two separate things; seizure of property could very likely happen on the spot, but actual forfeiture of that property would involve a forfeiture proceeding - the parameters of which are outlined in statute - that would occur later on in the process.

Number 2095

REPRESENTATIVE GRUENBERG turned members' attention back to Section 7, which specifies what percentage a court may award forfeited property to municipal law enforcement agencies, and suggested that this provision might prove unconstitutional, because of an irreconcilable conflict of interest, in much the same way that in Toomey v. Ohio, the [U.S.] Supreme Court found it to be unconstitutional for magistrates who heard traffic offense cases to get paid their salary from traffic offense fines. He opined that the amounts of forfeited property that could be awarded to municipal law enforcement agencies under Section 7 could create a substantial interest in the outcome of the forfeiture proceedings.

LIEUTENANT STOREY pointed out that the language in Section 7 merely mirrors language currently in the drug statutes. He relayed that before such language exited in the drug statutes, local law enforcement agencies were often reluctant, because of budgetary issues, to assist state law enforcement agencies in the battle against drugs. He mentioned that any proceeds from forfeitures that are not awarded to local law enforcement agencies will end up going into the general fund (GF). He offered his belief that awarding to municipalities proceeds from forfeitures pertaining to drug crimes has provided an incentive for those municipalities to help state law enforcement agencies and themselves in doing drug enforcement. He opined that the same would prove true regarding alcohol enforcement, and noted that he's not yet seen any evidence that such forfeiture provisions have been abused.

MS. PARKES added that the language in the drug statutes has not been challenged on a constitutional basis.

REPRESENTATIVE GRUENBERG asked whether there are any statutory protections in place for innocent co-owners or lien holders of forfeited property.

MS. PARKES said that there are, both in the bootlegging statutes and in the drug statutes. She then read a portion of AS 04.16.220(e) as an example of such a protection.

REPRESENTATIVE OGG asked for an example of the process used for seizing money or negotiable instruments.

LIEUTENANT STOREY explained that there must be a direct nexus between the money and the illegal activity. If, during a search, any money is found, it taken into possession and documented; the money is then held in the evidence locker until a court order allows further processing. He, too, mentioned the statutory protections currently in place for innocent co-owners and/or lien holders.

TAPE 04-46, SIDE B
Number 2363

REPRESENTATIVE SAMUELS asked about the possibility of altering Section 7 such that forfeited items could be awarded to Village Public Safety Officer (VPSO) programs.

LIEUTENANT STOREY said that the DPS has struggled with that idea in the past, but couldn't come up with a way to do it. He mentioned, however, that if the DOL could come up with some acceptable language regarding sharing forfeiture proceeds with the VPSO programs, it could enhance the VPSO's drug and alcohol enforcement efforts. In response to further questions, he detailed how successfully-forfeited items, or the proceeds from such items, get distributed either to local agencies, state agencies, or the GF. He offered some examples of property that gets forfeited, and noted that forfeited property, with the exception of firearms, automatically becomes the property of the commissioner of the Department of Administration (DOA); the DOA is then responsible for distributing that property or its proceeds.

REPRESENTATIVE GRUENBERG offered some remarks about lien holders of forfeited property and possible contractual agreements between lien holders and owners.

REPRESENTATIVE OGG, turning attention back to Representative Gruenberg's concern that Section 7 might create a conflict of interest, offered the suggestion that simply having all forfeited property, and proceeds from such, go into the GF would prevent any conflict of interest.

Number 1963

SIDNEY K. BILLINGSLEA, Attorney, Alaska Academy of Trial Lawyers (AATL), indicated that she would be discussing the sections of the proposed CS that she has the most concern with. She said:

> The first section is Section 8, which is on page 5, the second degree murder section, and my main concern on that is the unintended consequences that could result from trying a person for murder in the second degree if one of their cohorts was killed in the course of one of the listed felonies. The scenario that I see happening quite commonly, that's a potential downfall to this, is the fact that most residential burglaries - ... one of the predicate felonies - [occur] between the hours of 2 and 6 in the afternoon and they're committed by young people generally between the ages of ... 14 and ... 21. If one of these regular sort of kids who goes to high school and (indisc.) going to burglarize one of their neighbor's houses, and somebody happens to be home and is taken by surprise [and] shoots one of theses teenagers or young adults, the other teenagers can be charged as adults with second degree murder. I don't think that the goal of the statute is to create murderers out teenage burglars, but that could be one of the unintended consequences.
>
> The other thing that is a problem with some of the other predicate felonies is that the government would first have to prove, posthumously, that the decedent was in fact a codefendant, or would have been a codefendant if they had lived, [and] they [were] not somebody who was merely present at the time of the alleged offense. So, in a sense, the decedent would have to be posthumously tried and found to be guilty in order to prove the second degree murder charge against the accused, against the live defendant who would be accused, there, of second degree murder. That doesn't make sense to me, and I think that

> jurisprudence has excluded codefendants for hundreds of years partly because of that and partly because [of the] notion that people should take personal responsibility for their behavior: they knowingly engage in a crime; therefore, they shouldn't (indisc.) of being the victim of a crime if something happens ....

Number 1823

REPRESENTATIVE GARA asked why the example Ms. Billingslea used doesn't already warrant a charge of murder in the second degree.

MS. BILLINGSLEA relayed that under current law, if the person who dies is one of the participants in the crime, then co-participants are not charged with second degree murder; it is only if someone other than a participant dies that that charge is leveled against those who were committing the crime.

CHAIR McGUIRE concurred, and surmised that the intent of Section 8 is to say that a life is a life and if someone is killed, regardless of whether he/she is also engaged in the crime, then those who are committing the crime should be charged with second degree murder. She indicated agreement with Ms. Billingslea's point that having to prove posthumously that someone was engaged in an illegal activity could pose practical problems.

MS. BILLINGSLEA additionally pointed out that under Section 8, it would not just be the kids who enter the house or place of business who could be charged with second degree murder; that charge would also be leveled at the kids who are outside waiting in the car even if they had no idea that the kids inside were attempting to commit a burglary.

CHAIR McGUIRE said she agrees that there could be a problem with regard to proving posthumously who was engaged in the crime, but said she disagrees with the argument that what is being proposed by Section 8 is a bad idea because it would turn a kid attempting to commit a burglary into a murderer, since such is already the case if the person who dies is not a participant.

MS. BILLINGSLEA acknowledged that latter point.

REPRESENTATIVE GRUENBERG suggested that the policy question before the committee is whether, in Ms. Billingslea's example, the kids who are waiting out in the car and who know nothing about their friends' attempt at burglary should be held

responsible if someone dies. He proposed that the committee reexamine current law in light of that question. He surmised that doing so would also lead to the self-defense issues related to gang activities. He added: "These cases, some of them are difficult to prosecute; unfortunately, ... that's life. Some cases are difficult to prosecute, other cases ... are difficult to defend. But whether they are difficult to prosecute or difficult to defend isn't the real issue; the real issue is justice, fairness, and public policy."

Number 1524

CHAIR McGUIRE agreed, adding her belief that the "transferred intent rules and the felony murder rules" are some of the most difficult public policy choices that the legislature has because somebody ends up being charged with a higher level crime than that which he/she intended to commit. The state's current policy, she surmised, has been to say, "Just don't engage in these serious, dangerous types of crimes, because somebody could get hurt."

REPRESENTATIVE GARA asked what the policy basis was for adopting the language currently in law.

MS. BILLINGSLEA offered that it was perhaps an intention to say that someone who is killed while engaging in felonious criminal activity doesn't get to be a crime victim; for example, "the homeowner that kills you isn't a murderer because he killed you while he's defending his house," she added.

REPRESENTATIVE GRUENBERG noted that Alaska, unlike most other states, allows the use deadly force to defend property. He suggested that the question before the committee is whether to punish the person in the car differently depending on who it is that gets killed. He mentioned that he, too, would like to know the rational behind the current law.

CHAIR McGUIRE surmised that the unknowing person waiting in the car might well be charged as an accomplice but probably would not be charged, or at least could argue against being charged, with the same level of crime as the persons who enter the building with the intention of committing a crime.

MS. PARKES agreed. If the prosecutor can't show that someone was an active participant, whether remaining in the car or going into the building, then the prosecutor isn't going to be able to charge or convict that person. She said that certainly there

will be degrees of culpability, but noted that that will be factored in during the process. In response to a question by Representative Gara, she acknowledged that someone who is an active participant in the commission of a crime is an accomplice and is just as liable as the main perpetrators of the crime for the events that unfold.

Number 1199

REPRESENTATIVE GARA offered the following scenario:

> You're a conspirator, you agree to commit the crime with all these other kids; you're in the car, your job is, you're the getaway driver. One of the kids goes in, they rob the home, they start running away, and the homeowner - angry, disturbed, scared, terrified - shoots the kid running away. Under [Section 8] ..., the kid sitting in the car is now guilty of murder in the second degree, right?

MS. PARKES replied:

> That's correct because the homeowner isn't guilty. The homeowner was acting lawfully, and ... the homicide only occurred because of the conduct of those people going and robbing and burglarizing this home. It is their conduct that brought upon this foreseeable consequence, which is what felony murder is based on to begin with - it is a foreseeable consequence that someone could die during the course of the commission of one of these serious offenses. Right now we say [that] if it's a non-participant, we're going to prosecute it, [but] ... if it is a participant, we're not. And that's where, if the logic is, it's a foreseeable consequence someone's going to die, isn't [it] just as foreseeable [that] the homeowner's going to be quicker on the trigger than the bad guy?

REPRESENTATIVE GARA remarked:

> I have no problem with charging somebody with murder if they're in this tense situation and the homeowner ends up getting off the first shot; I don't have a problem with that. ... I do have a problem with the [situation of] then the people leaving the scene of the crime - no longer a present danger to anybody - and then somebody deciding to blow away the kid

> anyway, like we had with the case of those kids who committed the prank at that car dealership on 15th Avenue in Anchorage a number of years ago. It was the property owner and he shot the kids in the back. ...

MS. PARKES relayed that that man was prosecuted.

Number 1052

REPRESENTATIVE GARA asked whether Section 8 as currently written would allow a homeowner to shoot someone who is no longer a threat, for example, someone who is leaving the property. "Under this [proposed] statute, the kids have committed robbery in the second degree and a ... killing has occurred, so isn't ... the kid sitting in the car, the getaway driver, still guilty of murder in the second degree when the property owner shoots the fleeing kid in the back?" he asked.

MS. PARKES replied:

> An unlawful killing by the homeowner - you know, they're chasing them down the street - ... it's a separate crime, and ... I see your concern and I'd have to take a look at it and think about your factual scenario ...

CHAIR McGUIRE interjected to say that what they did not want to have happen is for someone to use deadly force on a person who is running away and then claim self defense. She observed that that issue ought to be researched to see whether the language in Section 8 needs to be clarified to that effect.

REPRESENTATIVE GARA indicated that he would do so.

REPRESENTATIVE SAMUELS surmised that whether or not the driver in the hypothetical example actually knew what was going on would be a matter for the jury to determine.

MS. PARKES replied: "Absolutely; we would have to prove beyond a reasonable doubt that that person knew that's what was going to happen."

REPRESENTATIVE OGG opined that if someone does something of his/her own volition, then that person is responsible for what occurs.

Number 0719

REPRESENTATIVE GRUENBERG asked whether someone who provides burglary tools to a person who later gets killed while committing a burglary would be charged with murder in the second degree. He then asked whether they should make a distinction between armed and unarmed participants.

CHAIR McGUIRE, in response to the latter question, opined that because they live in Alaska, it should just be assumed that everyone is armed.

MS. PARKES, in response to the former question, said no, adding that the person has to either commit the offense or attempt to commit the offense.

MS. BILLINGSLEA, after remarking that Section 8 appears to still need some work, turned attention to Section 9 of the proposed CS, and said:

> The major issue I take with making a ... criminally negligent act a felonious act is that our [Alaska] Supreme Court has said that the difference between civil and criminal negligence, quote, "while not major, is distinct." And what it comes down to is whether or not an act is a gross deviation from the standard of care and [whether] that gross deviation is something more than the slight degree of negligence required for civil torts. A really good discussion of criminal negligence comes from the Hazelwood case that you may be familiar with from our [Alaska] Supreme Court in 1997, and I think that would be instructive for the committee to review. Negligence is essentially carelessness, and criminal negligence is, quote, "something more than carelessness but it doesn't require a guilty mind," and felonies are serious crimes.
>
> So it seems to be that if you convict somebody of a serious crime with an equally serious level of criminal intent, it probably violates our due process clause. I ... think Alaska's due process clause requires ... that society's interest in obtaining compliance with [this law] not outweigh an individual's interest in freedom from substantial punishment if that person couldn't reasonably be expected to avoid the violation. And I know that sounds complex, but let me throw something out

hypothetically. So the dangerous instrument is anything, and could be snow machines, snowboards, skis, cars. You could have an individual who had a few drinks at the top of Alyeska, or even a couple of drinks at the top Alyeska, and skis or snowboards down and hurts somebody, causes serious physical injury as defined by statute - which isn't that great ... a standard to prove, it's physical injury that's protracted - they could be charged with a felony.

Number 0501

And I'm not sure that the committee wants that to happen in Alaska. There's carelessness that is assault in the fourth degree, that causes physical injury, and I think that that's sufficient for our purposes. So having said that I'll move on to my next problematic section that I'm focusing on, which is Section 12 on page 7 about criminalizing third-party custodians. I don't know what the fiscal ... note on this bill is, but I can tell you [that] criminalizing the failure of third-party custodians to do their duty to report violations of bail - which is now a contempt of court [and] which is punishable by fines and/or jail depending on the level of contempt - will have the effect of reducing the number of volunteers to be third-party custodians.

MS. BILLINGSLEA continued:

Alaska, Anchorage in particular, is addicted to third-party custodians for conditions of bail release. We'll have fewer people out of jail on pretrial release, [and that] would raise the cost of incarcerating people. I can tell you that both jails are full and they have "boats" in the rooms now - boats are those plastic sleds that people sleep in; they're sleeping four, five, and six to a room right now [in a] brand new jail. And if you prosecute people for violating ... third-party custodian duties under criminal law, you may actually be incarcerating more people. So this is not a freebee. I don't think the system is broken right now; I'm not sure that there's a need to fix [it]. I don't know where this idea came from. I don't know why people need to criminalize more and more behavior by people who are essentially no-criminal-record volunteers [getting]

people out [of] jail, essentially, doing the court system a favor. So it's nuts to me - that section is nuts. ...

Number 0353

Self defense is the last issue ... and I just want to briefly say that it does tie in, to a degree, with the felony murder section that we talked about [earlier]. ... I've been practicing criminal law up here since 1986 [and] I've been a lawyer since 1984. I see what the State of Alaska prosecutes [and] I see what they screen out; ... I represent people before they've been charged with crimes formally, [and] represent them, certainly, after. ... What [Chair McGuire] said earlier about Alaska being a place where you can assume everybody is armed, you know, we're all citizens; everybody in this state is a citizen, and that's the first thing that we need to not lose sight of.

We're all entitled to equal protection of the laws, we're all entitled to the right to self defense, and we're all aware that this is a dangerous society. Some of us live closer to the front lines than others; some of us who make these laws live in the back, in the rear, but we're aware, from our observation and [from] the fact that we actually pass laws that permit people to carry firearms in ever-growing quantities, that it's dangerous. It's not a good idea, in my opinion, to carve out a group of citizens and deprive them of a right to defend themselves when, in fact, they live on the front lines of this dangerous society.

MS. BILLINGSLEA concluded:

... I think that the question of whether ... reasonable self defense occurs in a case should be left to ... other citizens sitting on a jury, and if a person has reasonably defended himself and that's proved - that is, not disproved beyond a reasonable doubt - then they'll be acquitted. If they can't produce some evidence - as our standard now - that they defended themselves in a reasonable way, they'll be convicted. Depriving the alleged gangsters and the alleged drug dealers - or the people who want to be

gangsters [or] who might want to be drug dealers - of the right to self defense is not an equal protection. And that's what I have to say. Thank you.

CHAIR McGUIRE thanked Ms. Billingslea for her comments.

REPRESENTATIVE GARA, turning attention back to Section 8, said that there is only one possible circumstance that he has concern about, that being if the homeowner shoots a participant in the back and the other participants are charged with second degree murder. He suggested amending Section 8 such that it would apply unless the killing was the result of illegal conduct by a non-participant.

MS. BILLINGSLEA offered her recollection, however, of a case wherein a homeowner shot a burglar in the back as the burglar was fleeing the house. The burglar, a young man, was killed, but the homeowner was not prosecuted. She said, "You would have to prove that his behavior was illegal over [vociferous self defense and defense of property claims.] [The previously bracketed portion was not on tape but was taken from the Gavel to Gavel recording on the Internet.]

TAPE 04-47, SIDE A
Number 0001

MS. BILLINGSLEA continued: "I'm not sure that you can carve out a sufficient amendment for that. It would add extra elements to the crime; it would be sort of like the hearsay rule where the exceptions consume the rule."

REPRESENTATIVE GARA said he is comfortable with the concept of applying a charge of murder in the second degree when someone creates an array of circumstances that are somewhat foreseeable. He remarked, however, "Except I draw the line at: it's not foreseeable for, then, somebody else not related to you to then go commit a crime, an illegal act, that [you then] get held responsible for."

MS. BILLINGSLEA mentioned that foreseeability is usually confined to conspiracy statutes, and pointed out that there is no foreseeability clause in the statute pertaining to murder in the second degree.

CHAIR McGUIRE asked interested parties to fax written comments to the committee and relayed that HB 244 would be held over.

[Following was a brief discussion regarding when the bill would be heard next, who had provided the proposed amendments currently in members' packets, and what form further proposed amendments should take.]

HB 517 - SECURITY ACCOUNT BENEFICIARY DESIGNATION

Number 0425

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 517, "An Act relating to registration in beneficiary form of certain security accounts, including certain reinvestment, investment management, and custody accounts."

REPRESENTATIVE ANDERSON, speaking as the chair of the House Labor and Commerce Standing Committee, sponsor of HB 517, relayed that the bill will permit an investment management or custody account with a trust company, or a trust division of a bank with trust powers, to have a beneficiary designation take effect upon the death of the owner. Under current law, securities and brokerage accounts may have beneficiary designations take effect upon the death of the owner pursuant to the Uniform Transfer-On-Death Security Registration Act. However, the current definition in Alaska statutes regarding security accounts is not broad enough to include investment management or custody accounts, which are generally used by trust departments.

REPRESENTATIVE ANDERSON relayed that HB 517 comes at the request of Wells Fargo and will allow all of "these products" to avoid probate by providing statutory authorization to use a beneficiary designation. The bill will also put banks' trust departments on an equal footing with brokerage firms. The problem cannot be solved other than by statute, he opined, and noted that several states have enacted similar legislation in the last three years, including California, Idaho, Iowa, Minnesota, and Washington. He mentioned that members' packets contain a letter of support from Wells Fargo.

Number 0580

MARIBETH CONWAY, Trust Manager, Wells Fargo, offered her belief that HB 517 is a simple technical change to Alaska's current transfer on death (TOD) law. Current Alaska law, which was initially drafted as a uniform state law, focuses on accounts offered by brokerages and other financial institutions because

it is generally assumed that bank accounts fall under another statute. However, banks' trust departments and trust companies do have investment management and custody accounts that are not included in the current statutory definition of security accounts. Consequently, security and brokerage accounts can have a specified beneficiary designation that takes effect upon the death of the owner - the form used is very similar to the beneficiary designation form used for life insurance policies or individual retirement accounts (IRAs) - allowing probate to be avoided, but investment management accounts and custody accounts offered by banks do not yet have this flexibility.

MS. CONWAY remarked that customers of banks, however, expect that investment management accounts and custody accounts would be handled the same way as similar accounts are treated in brokerage firms, and HB 517 would, in fact, make this possible. Without passage of the bill, investment management accounts and custody accounts, whether in a trust company or in a trust division of a bank, must go through probate. House Bill 517 allows for very simple treatment of beneficiary designations, clarifies the definition of security account, and puts the same types of accounts held in different companies on equal footing with regard to transfers on death. She mentioned that similar changes have recently been enacted in other states, that the changes appear to be non-controversial, and that no one has experienced problems with the changes. For these reasons, she remarked, Wells Fargo would appreciate the committee's support in passing HB 517.

MS. CONWAY, in response to questions, relayed that it is very common for individuals to have investment management accounts through Wells Fargo's trust department even though such accounts are not specifically trust accounts; the same can be done via a trust company, and these accounts are similar to ones that can be arranged through brokerage firms, which currently have forms that allow for beneficiary designations to take effect upon death of the account owners.

Number 0901

REPRESENTATIVE GRUENBERG turned attention to AS 13.33.310(b)(3), which uses the term "LDPS." He asked what "LDPS" stands for.

MS. CONWAY said she was not sure.

REPRESENTATIVE GRUENBERG asked whether the bill "just puts bank-managed accounts on the same footing as brokerage-managed accounts."

MS. CONWAY said that is correct. In response to another question, she offered her recollection that the model Act was adopted in whole, for the most part, in Alaska.

REPRESENTATIVE GRUENBERG turned attention to page 2, lines 8 and 20, and asked what would be considered "cash equivalents".

MS. CONWAY offered as an example a money market investment fund.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 517.

REPRESENTATIVE ANDERSON, in response to a question, reiterated his earlier comments regarding the perceived need for the bill.

REPRESENTATIVE GARA noted that the bill is only a definition section.

REPRESENTATIVE GRUENBERG offered that it is a definition section for the Uniform Transfer-On-Death Security Registration Act, which allows one to simplify a transfer at the time of death and avoid probate by setting up either a "pay on death (POD)" account or a "transfer on death (TOD)" account. He mentioned that a POD usually pertains to money, whereas a TOD usually pertains to securities. Such accounts are simple ways of ensuring that upon the death of the owner, the assets are passed on to the beneficiary or beneficiaries without the need for probate.

Number 1297

REPRESENTATIVE GARA moved to report HB 517 out of committee with individual recommendations and the accompanying zero fiscal [note]. There being no objection, HB 517 was reported from the House Judiciary Standing Committee.

HB 533 - IF UNREAS. AGENCY DELAY, COURT DECIDES

Number 1326

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 533, "An Act relating to the state's

administrative procedures and to judicial oversight of administrative matters."

Number 1368

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for HB 533, Version 23-LS1833\D, Bannister, 3/24/04, as the work draft. There being no objection, Version D was before the committee.

Number 1381

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, as chair of the House State Affairs Standing Committee, sponsor of HB 533, reviewed the changes encompassed in Version D. On page 2, line 12, the word ["significant" is replaced by the word "immediate"], and the sentence on page 2, lines 14-16, was added. Representative Weyhrauch explained that for those individuals who come before an administrative law judge, the decision is under advisement for some time, occasionally for years or even decades. This can be quite frustrating for those individuals who have a permit or decision pending within the purview of an agency hearing officer but no decision has been reached. This legislation would allow the individual in the aforementioned situation to ask the court to either enjoin the agency to issue a decision sooner rather than later or take some other remedial step to that effect.

REPRESENTATIVE WEYHRAUCH pointed out that HB 533requires that the individual notify the agency that if the agency doesn't "move," then it will be taken to court. The individual will request a reason why no ruling is being made. Representative Weyhrauch posed a situation in which an individual has "a simple summary judgment action." An opposition and a reply is filed, and the court then holds oral arguments. At that point, the case is taken under advisement and the record is closed. Six months from the day the case is under advisement, the court has to rule or its checks are withheld. Although delays don't happen in every case, it's frustrating to the public when they do.

CHAIR McGUIRE inquired as to the case in which the petitioner continues to file appeals to delay the process because it's not to the petitioner's benefit to obtain an ultimate result.

REPRESENTATIVE WEYHRAUCH acknowledged that there are instances in which someone would file appeal and that individual wants a

delay and doesn't want a decision to ever be issued. Those individuals don't have to act under this legislation. "There's no requirement that they repair to a court to force a decision maker of an agency," he clarified. With respect to the Commercial Fisheries Entry Commission (CFEC), the longer the pending permit is under advisement, the longer the person has an interim permit and the longer that person can continue to fish. Therefore, it's in the interest of someone with zero points on his/her permit to draw out the case. Representative Weyhrauch reiterated that this legislation doesn't require that the CFEC drag out a decision, rather it's a remedy in cases that are where that is occurring.

REPRESENTATIVE SAMUELS offered his belief that in the supreme court, if one justice can't make a decision within six months, the case is passed to the next justice.

REPRESENTATIVE WEYHRAUCH said that from everything he has heard, the [judiciary] is trying its best to put forth decisions in a timely manner.

Number 1746

REPRESENTATIVE GRUENBERG referred to AS 22.05.140, which says that a judge may not receive a salary warrant until an affidavit is signed specifying that no opinion or decision has been uncompleted or undecided by the justice for a period of more than six months. In the supreme court or the court of appeals, which are multi-judge courts, this means that there must be an opinion circulating within the [six-month] period. Representative Gruenberg said he believes that [withholding checks until opinions or decisions are completed or decided] works.

REPRESENTATIVE SAMUELS pointed out that there are justices with work that is over six months old, but who have signed the affidavit and received payment. For those cases, there is no remedy.

REPRESENTATIVE GRUENBERG opined that the remedy would be with the Commission on Judicial Conduct because that's filing a false affidavit, which is against the judicial tenets.

REPRESENTATIVE GARA agreed that there are times when the judges have waited too long to issue opinions. However, one must keep in mind that these judges have numerous opinions before them to

decide. He suggested that the committee hear from the Alaska Court System (ACS) on this issue.

REPRESENTATIVE GARA said he believes the legislation is a good idea, although he has a couple of concerns. He pointed out that once the right of unreasonable delay is created, very sophisticated parties are going to try to use this in the administrative process. In order to prevent abuse of the process, Representative Gara suggested the sponsor exempt corporate tax and oil revenue cases from the legislation because, in a billion-dollar case, the parties will attempt to find any possible advantage in order to avoid or delay paying. Representative Gara recalled a case involving the Amerada Hess Corporation, which was a multibillion-dollar case in which parties on both sides did everything possible to obtain an advantage, and said he didn't want to see this happen under HB 533.

Number 1929

REPRESENTATIVE GARA predicted that once this legislation passes, many of these motions will be filed in superior court. He predicted that. If this is allowed too liberally, it could delay the court process further. He asked whether the "unreasonable delay" language could be maintained with additional language specifying a minimal amount of time [that would have to pass] before the relief in court could be filed.

REPRESENTATIVE WEYHRAUCH indicated that the timeline should be on a case-by-case basis. Furthermore, having exemptions will make it difficult to establish a state policy with regard to which agencies should issue decisions quickly.

REPRESENTATIVE GARA acknowledged that perhaps such language isn't necessary. He noted that a provision [in Version D] allows one to request an alternative dispute-resolution process in superior court.

REPRESENTATIVE WEYHRAUCH clarified that the intent of the legislation is to provide a method by which to force an agency to issue a decision once it has been pending for an unreasonable time. He went on to say:

> I think that the key point here is ... the judicial inquiry that's going to have to take place in this kind of thing. When was the case filed before an administrative agency; how complex was the record; how

> long has the case been under advisement; is this the best forum to re-litigate this case ...; or do we need time for the administrative agency to cook on this; and let's hear from the agency, on some sort of affidavit, that they're diligently working on this. [The judge will say], "I'm going ... to deny this and I'm going to put ... the case under advisement for six months from today, and I want a notice from the parties [regarding where the case is at that point; If it's still ... being delayed at that point, then we'll have another hearing in this court ... to hear from the agency and the parties about the delay, and then I'll make a decision at that point."
>
> So I think it's in the reasonable discretion of the superior court judge not to clutter the calendar with these kind of agency appeals, but to ... [let] the agency act on these kind of appeals [in] ... a relatively timely way .... I think that every reasonable judge knows that these agencies are going to have some backlog of cases to deal with, just like they do.

REPRESENTATIVE OGG remarked that this provides a nice escape valve. He further remarked that he wishes there was a way to urge the federal judiciary to such quick action.

REPRESENTATIVE WEYHRAUCH said he has worked with administrative agencies who say they can't help and specify that the agency has to be asked for an expedited decision, but that doesn't go anywhere. He concluded by stating that he agrees with Representative Ogg.

CHAIR McGUIRE recalled dealing with the regulations surrounding shellfish farming. In 1984, the Aquatic Farm Act was adopted; it made it clear that aquatic farming was allowed so long as certain criteria were met. However, in 2002, some issues were still not resolved. Chair McGuire characterized [HB 533] as a good tool, but said she hopes that it doesn't have to be used often.

Number 2324

DAVID STANCLIFF, Staff to Senator Gene Therriault, Alaska State Legislature, on behalf of Senator Therriault, the sponsor of SB 333, companion bill to HB 533, informed the committee that he has some statistics that might provide some comfort. He pointed

out that [the legislation] is building standards with regard to a reasonable timeframe in order to provide guidance to the courts. There is a diversity of timeframes that range from those that are required by statute, those that are required by federal law, and others that are open-ended.

Number 2345

JAN DeYOUNG, Assistant Attorney General, Labor and State Affairs Section, Civil Division (Anchorage), Department of Law (DOL), informed the committee that she handles employment and administrative law issues at the DOL. She noted her previous experience as a hearing officer for the state for seven years. Ms. DeYoung mentioned that the DOL has been working with the bill sponsor to address some of the department's concerns. The DOL is pleased to see some of that work incorporated into [Version D], she remarked, because a chief concern with the original legislation was the absence of notice to the administrative agency that an individual involved in the hearing was going to go to court to seek a remedy for delay.

TAPE 04-47, SIDE B
Number 2380

MS. DeYOUNG relayed, however, that the DOL had also recommended a minimum of 30 days before the individual could go to court after providing notice; that 30-day timeframe would allow the agency the opportunity to do respond to the concern and to discover the particular harm being caused to the individual by the delay in the hearing. She pointed out that the judicial process isn't going to be fast, so if a remedy could be obtained within 30 days, the individual would probably fair much better than through assistance from the court. Ms. DeYoung said she doesn't believe the 15 days specified in Version D is enough time to allow the agency to "clean house"; the [15-day timeframe] will be a problem, particularly for those agencies whose decision makers are volunteers on boards and commissions. In the aforementioned situation, it could simply take the entire 15 days to get in touch with and poll the members.

MS. DeYOUNG reiterated the DOL's appreciation for the notice provision, as well as for the change in language from "significant" to "immediate" because it will provide guidance with regard to what might be required for the courts to intervene.

Number 2273

MS. DeYOUNG then turned to the actual remedies [on page 2, lines 20-25] that the judge would be able to award if it appeared that there was unreasonable delay. Enjoining the administrative proceeding and determining the matter would be unusual for the court to do, and it remains unclear how the court would substitute itself for the agency. She questioned what procedures the court would follow if there is already a hearing. In many cases, the courts don't have the power to do some of the things agencies do.

MS. DeYOUNG turned to the ability of the judge to order an administrative matter to be handled by another form of dispute resolution. Normally, alternate dispute resolution is voluntary. Furthermore, parties often agree to share the expense when there is agreement to proceed with an alternate form of dispute resolution. She inquired as to how a compulsory alternate dispute resolution would actually work and who would bear the expense of it.

MS. DeYOUNG stated that there are already other opportunities, at least for some administrative agencies, to address concerns about delay. Therefore, she said, the DOL questions possible duplication and inconsistencies with some of those remedies. For example, the administrative procedure that provides the superior court the authority to enjoin an administrative action beyond the scope of the agency's administrative powers also has the ability to order the administrative agency to act or initiate action when it's withholding that action. At least for Administrative Procedure Act (APA) agencies, there is some recourse already in statute to address some of the concerns raised. For those agencies not subject to the APA, statute has provisions addressing delay and undue delay. Therefore, it would be ideal if this legislation could coordinate [with those statutes] in order to make sure that the remedies fit together without overlap.

MS. DeYOUNG, recalling an earlier comment that it's not always in the interest of an individual or a non-government party for the proceeding to be decided quickly, she said she found it interesting to note that this legislation is limited to non-government parties, because state and political subdivisions do appear as parties before state agencies. Ms. DeYoung expressed her appreciation to the sponsor and the committee.

Number 2098

REPRESENTATIVE GRUENBERG offered his belief that legislation [on page 2, line 31, through page 3, line 3] changes the Alaska Rules of Appellate Procedure because it makes the judicial decision not to issue an order and keeps the proceeding in the administrative agency a final "appealable" order. The aforementioned will have a major impact on the practice of appellate law in so far as this involves appeals from administrative agencies. He suggested that if this provision [necessitates] an amendment to one of the appellate rules, the bill ought to be held over in order to obtain information on this matter from someone practicing in this area. Representative Gruenberg posited that the real question is: What is a final, "appealable" order from an administrative agency?

MR. STANCLIFF noted his appreciation for the DOL's suggestions. He explained that the 15-day limit is based on the fact that with most administrative communications with the public, the agency reserves 30 days and requires the public to respond within 15 days. In a memorandum laying out concerns, it was brought out that it shouldn't take an agency 30 days to agree to work on a matter once a party has approached the agency saying it will exercise this option if [no action is taken]. He agreed that the language change from ["significant"] to "immediate" is a good change. Mr. Stancliff said, "On some of the other issues, we don't think that the court system will have a problem interpreting how they want to deal with the dispute at hand." He remarked that Mr. Wooliver testified in a Senate committee that in most cases, it's anticipated that the courts are simply going to say they agree that it's taking a long time, and ask the agency to hurry things up.

MR. STANCLIFF opined that knowing this legislation is in place will change the way agencies do business. Regarding a possible court rule change, he said that the drafters were instructed to not include anything in the bill that would require a court rule change.

CHAIR McGUIRE asked if the 15-day standard to which Mr. Stancliff referred was 15 business days or just 15 days.

MR. STANCLIFF explained that the 15 days would begin on the day that the envelope goes into the postal system. He relayed his belief that [Version D] met in the middle with the DOL and met its primary goals in this compromise, but acknowledged that it's the committee's prerogative to choose to go further.

Number 1854

CHAIR McGUIRE asked whether there is any concern that once notice is given, there could be a threat of retribution.

MR. STANCLIFF said he hopes such wouldn't occur. He also said that he could see how 30 days could allow the department to prepare a case, knowing it was going to court. He said it would also allow time to poll the boards and commissions, though in today's electronic world, 30 days seems more than adequate.

REPRESENTATIVE GARA opined that if the intent is to send a message to the agency to obtain a decision, then a 15-day limit would probably back the agency into a corner. He pondered whether 30 days would, in a more complex case, provide time for the agency to issue a decision.

MR. STANCLIFF acknowledged that to be a consideration.

REPRESENTATIVE GRUENBERG noted that Rule 42(c)(3) of the Alaska Rules of Civil Procedure reads in part:

> Notice of change of judge is timely if filed before the commencement of trial and within five days after notice that the case has been assigned to a specific judge.

REPRESENTATIVE GRUENBERG recalled that the courts have ruled that a person looses his/her right if he/she hasn't actually filed the document in court on that date. Therefore, it's not enough to put it in the mail on that date. This legislation refers to providing the state agency written notice, which he pointed out may be read as having filed the document with the agency on that date. This is a very ambiguous term, he said. Therefore, if the intent is to have mailed the [document], then that should be specified so that there is no question.

REPRESENTATIVE GRUENBERG referred to Mr. Stancliff's testimony that there is no intent to impact the court rules. He offered his belief that the language on page 2, line 31, through page 3, line 3, seems problematic because it may be saying, "appealing the failure of the court to provide relief". Therefore, the language, "as if the person had not filed a petition" is meaningless because the appeal is occurring because of a decision by the superior court.

Number 1634

REPRESENTATIVE OGG said the language on page 2, line 31, through page 3, line 3, seems to say that if the superior court decides the party isn't eligible for judicial relief under subsection (a) of Section 2, then the party has the right to continue the administrative procedure and make any other appeal it has to the court. He surmised that Representative Gruenberg is saying that if the superior court makes a decision that is improper under this statute, then the party would also have the right to take the superior court decision through the [supreme] court route. He emphasized that [the party] isn't denied anything, and therefore he finds the language to be clear.

REPRESENTATIVE GRUENBERG highlighted the use of the term "right of appeal", and said, "You wouldn't necessarily be taking a right of appeal from that, you'd be taking a petition for a review." The decision of the superior court to allow the administrative agency to go forward isn't a final decision, and therefore "you can't quote appeal from that, you can only take a petition for review," he added.

MR. STANCLIFF offered to research this issue, and noted that he is open to a better way of achieving the earlier-stated intent.

[HB 533, Version D, was held over.]

ADJOURNMENT

Number 1555

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:00 p.m.