HOUSE FINANCE COMMITTEE
February 15, 2005
1:42 p.m.

CALL TO ORDER

Co-Chair Meyer called the House Finance Committee meeting to order at 1:42:20 PM.

MEMBERS PRESENT

Representative Mike Chenault, Co-Chair
Representative Kevin Meyer, Co-Chair
Representative Bill Stoltze, Vice-Chair
Representative Eric Croft
Representative Richard Foster
Representative Mike Hawker
Representative Jim Holm
Representative Reggie Joule
Representative Mike Kelly
Representative Carl Moses
Representative Bruce Weyhrauch

MEMBERS ABSENT

None

ALSO PRESENT

Laura Glaiser, Director, Division of Elections, Office of the Lieutenant Governor; Loren Leman, Lieutenant Governor, Office of the Lieutenant Governor; Senator Gene Therriault; Representative Ralph Samuels; Susan Parks, Deputy Attorney General, Criminal Division, Department of Law; Portia Parker, Deputy Commissioner, Department of Corrections; Doug Wooliver, Alaska Court System

PRESENT VIA TELECONFERENCE

Linda Wilson, Deputy Director, Public Defender Agency; Captain Allen Storey, Alaska State Troopers, Department of Public Safety

SUMMARY

SB 62 "An Act making a supplemental appropriation for increased operating costs of the division of elections; and providing for an effective date."

SB 62 was REPORTED out of Committee with a “do pass” recommendation.

CS SB 56 (JUD)

"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

CS SB 56 (JUD) was heard and HELD in Committee for further consideration.

#sb62
SENATE BILL NO. 62

"An Act making a supplemental appropriation for increased operating costs of the division of elections; and providing for an effective date."

1:42:34 PM

LOREN LEMAN, LIEUTENANT GOVERNOR, OFFICE OF THE LIEUTENANT GOVERNOR, related that he did not like requests for supplemental funds when he was a legislator, nor does he like them now; however, there are times when conditions change and they are needed. He emphasized that not all supplemental requests are due to failure, but rather due to additional costs. This past election set a new record in voter turnout; twice as many people requested absentee ballots, twice as many people voted by fax, and the number of special events ballots increased sevenfold. He pointed out that there were also missteps that caused costs to increase, such as the court ruling, which resulted in the reprinting of ballots. He expressed disagreement with the judiciary summary, but rather than appealing and further jeopardizing the ability to distribute absentee ballots throughout the world, he chose to move on. He noted that he is still waiting for the court opinion.

Lieutenant Governor Leman related that the Division of Elections conducted itself admirably in spite of difficult challenges. He maintained that the supplemental request would help recover costs and enable the Division to keep functioning.

LAURA GLAISER, DIRECTOR, DIVISION OF ELECTIONS, OFFICE OF THE LIEUTENANT GOVERNOR, explained that SB 62 is identical to HB 79, which has already appeared before the committee. She offered to answer questions.

Co-Chair Meyer asked what the time constraint is. Ms. Glaiser replied that the Division is in the red right now.

1:50:37 PM

Representative Croft moved to adopt Amendment #1:

Page 1, after line 3, insert:

"**Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE FINDINGS AND INTENT. (a) The legislature finds that Alaska law requires that the Division of Elections and the Lieutenant Governor write a "a true and impartial summary of the proposed law" (AS 15.45.180) for each initiative on the ballot; and for an initiative on the 2004 general election ballot, the Lieutenant Governor prepared a summary that was found by the Anchorage Superior court to be biased and inaccurate; and at great expense to the state, the Lieutenant Governor's decision eventually forced the Division of Elections to reprint thousands of ballots with the proper, impartial summary of the proposed law; and if the Lieutenant Governor had followed the law set out in AS 15.45.180, the State of Alaska would not have incurred this great cost.

It is the intent of this Legislature to appropriate the supplemental funds to cover the costs incurred by the state for only the specific instance described in (a) of this section; and to put the Division of Elections and the Lieutenant Governor on notice that the legislature expects true and impartial ballot language; and not to appropriate additional funds to the Division of Elections for costs incurred by the State of Alaska due to the failure of the Lieutenant Governor to adhere to election laws in the future."

Renumber accordingly.

Co-Chair Meyer OBJECTED for discussion purposes.

Representative Croft stressed the importance of being careful with "the power to influence" when writing language on the ballot. He emphasized that fights about how words might influence voters should take place away from the ballot. He stated that this should be taken very seriously, whether we agree with the court ruling or not. He disagreed with Lieutenant Governor Leman's assertion that there wasn't enough time to work on the ballot language when the litigation was in process. He deemed it appropriate to say that the Division of Elections very carefully follows the law.

Representative Weyhrauch opined that Amendment 1 is irrelevant to the bill. Representative Croft maintained that it is completely appropriate because $243,000 of the supplemental appropriation is costs incurred for having inaccurate and biased language on the ballot. He said that it is a statement of intent so this does not happen again in the future.

1:55:35 PM

Representative Weyhrauch asked Ms. Glaiser if some of the supplemental requests were incurred from recount expenses after the general election. Ms. Glaiser replied that some were recount costs and some were unanticipated personnel and management costs. She pointed out that the Division does not draft the ballot language nor have control over the mission of the language. Representative Weyhrauch asked if the cost of the extra work after the general election was related to a court decision. Ms. Glaiser replied that it was not. Representative Weyhrauch asked if any of the expenses were due to the actions of the Lieutenant Governor. Ms. Glaiser replied that they were not; one was driven by a candidate and one by a group of citizens.

Co-Chair Meyer thanked Ms. Glaiser for her hard work on the election. He voiced opposition to Amendment 1.

Vice-Chair Stoltze asked Lieutenant Governor Leman whether he had grounds to appeal and chose not to in order to protect the integrity of the election. Lieutenant Governor Leman replied that whenever one is in court, judgment calls relating to time and money must be made. He explained that he had to ask himself if it was worth risking the votes of Alaskans who were abroad by further stalling the election. He said he also had to consider the chances of winning an appeal, and ultimately chose not to appeal. He stated that he does not like additional costs and takes his job of writing ballot language very seriously. He emphasized the writing of the language was done very deliberatively with the Department of Law, as well as with proponents and opponents of the initiatives. He stressed that he can't write language based on proponents' or opponents' wishes. He opined that the language, as written, was accurate, and the election demonstrated that.

Lieutenant Governor Leman commented on point number three of Amendment 1. He disagreed with the interpretation of "proper, impartial summary of the proposed law."

A roll call vote was taken on the motion to ADOPT Amendment 1.

IN FAVOR: Moses, Croft
OPPOSED: Holm, Joule, Kelly, Stoltze, Weyrauch, Foster, Hawker, Meyer, Chenault

The MOTION FAILED (2-9).

Representative Foster MOVED to report SB 62 out of Committee. There being NO OBJECTION, it was so ordered.

SB 62 was REPORTED out of Committee with a "do pass" recommendation.

2:03:14 PM

At ease

2:06:12 PM
#sb56
CS FOR SENATE BILL NO. 56(JUD)

"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

SENATOR GENE THERRIAULT, as sponsor, explained that the United States Supreme Court ruling in June 2004, in the case of Blakely v. State of Washington, struck down Washington's sentencing law finding that under the Sixth Amendment a defendant has the right to have a jury, not a judge, determine whether aggravating circumstances exist to justify increasing a defendant's sentence above the statutorily prescribed term. The requirements of Blakely created confusion in the courts and directly affected Alaska's sentencing law. He pointed out that both SB 56 and HB 79 were put into the system to correct this confusion.

Senator Therriault explained the major provisions of the bill:

BLAKELY PROVISIONS

Amends current presumptive sentencing of felony offenders, from a set term to a range of terms, to bring Alaska laws into conformity with the decision.

Requires aggravators to be taken to a jury for an upward departure of sentence above the range.

Provides clarification that aggravating factors of a crime do not have to be presented at Grand Jury.

Allows for more discretion of judges to impose probation. (aggregate of active imprisonment and probation must be within given range.)

Limits frivolous appeals for sentences that fall within the legislative mandated ranges – but allows for petitions for review. (rt of appeals for substantive or procedural mistakes is preserved)

OTHER PROVISIONS

Allows for an additional aggravator in sentencing when a defendant has prior criminal convictions of five or more class A misdemeanors.

Allows an upward departure of the range in consideration of a lengthy misdemeanor history.

Adopted in House Judiciary

Allows for a sentence to be mitigated if the judge finds a defendant suffers from a mental disorder or disability including fetal alcohol spectrum. This excludes crimes against a person and crimes of arson.

Limits the ability of judges to order "periodic" sentences in which the offender periodically leaves prison and then returns to prison – amounting to unsupervised release of offenders.

Allows correctional facilities to better manage the prison population and better supervise offenders
Change allows for periodic sentencing only if not more than 2 years to serve *and* an employment obligation preexisted sentencing.

Improves public safety by stipulating the authority of police officers to detain or arrest offenders for violating probation and parole conditions.

Allows Parole Board to deny further consideration for *DISCRETIONARY* parole when it has already found that the offender is not a candidate for parole.

In response to a question by Co-Chair Meyer, Senator Therriault addressed the fiscal impact of the bill. He pointed out that the Senate zeroed out the Public Defender Agency's fiscal note because the argument that the bill might trigger litigation could apply to any piece of legislation.

Representative Weyhrauch asked if there would be problems if the bill does not pass. Senator Therriault replied that there would be appeals and uncertainty in the court system. He maintained that SB 56 would take away the uncertainty.

2:15:24 PM

REPRESENTATIVE RALPH SAMUELS, sponsor of companion bill HB 79, in response to Representative Weyhrauch's question, replied that right now, to determine whether aggravating circumstances exist, there would have to be a separate jury trial. He explained that for mitigators, judges can still

go down without a separate trial, but they cannot go up from the presumptive sentence, so there is now a set range to allow for some leeway.

Co-Chair Chenault asked if there could be a positive fiscal note or a cost savings as a result of the bill. Representative Samuels agreed that could happen "from where we are standing today" because separate jury trials would be eliminated.

SUSAN PARKS, DEPUTY ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF LAW, in response to Representative Weyhrauch's question, noted that the biggest problem right now is that the current statutory scheme is unconstitutional because of the Blakely decision. She termed SB 56 a balanced approach to complying with Blakely, but argued that it would not create positive fiscal notes. She explained that their current workload had increased enormously. There are hundreds of motions dealing with illegal sentences due to the Blakely decision. Passage of the legislation would restore the workload to a more manageable level. Contradictory interpretations from trial judges resulting from this decision have also created problems. There is chaos and uncertainty in the system, which would be alleviated by the legislation.

Ms. Parks explained that current presumptive terms were developed in the late 1970s because, previous to that time, judges could sentence as they saw fit. That equaled extreme disparity in sentences for the same offense. Presumptive sentencing was found to be a success, so in SB 56, presumptive sentencing is preserved, but with some discretion on the part of the judge. It is a burden on the system to take aggravators to a separate jury trial.

Ms. Parks pointed out that the Department of Law has a zero fiscal note because it believes that once the system is in place there should be no additional costs. She noted that sentencing ranges give judges a lot of discretion, and only in the very exceptional case where aggravators would be proposed, would a jury trial be necessary. Some aggravators will be inherent within the case; others will require bifurcation of the case. Where the jury finds the defendant guilty of the underlying offense, evidence would be presented on aggravators, and a verdict on the aggravators would be needed.

2:23:28 PM

Ms. Parks echoed the comment that the bill has had a lot of scrutiny in the Senate and House Judiciary Committees. She acknowledged a concern regarding increased costs due to increased sentences. She emphasized that the intent of bill is not to increase costs by increasing sentences, but to

preserve current sentencing levels while complying with Blakely. The Senate Judiciary Committee passed a clearly stated letter of intent, which was incorporated into the bill by the House Judiciary Committee.

Vice-Chair Stoltze inquired if there would be a triage of the most extreme cases in order to pursue the aggravators. Ms. Parks related that she anticipated prosecutors would look at the available ranges, aggravators, and strength of evidence. Currently, aggravators only have to be proven by clear and convincing evidence, but under this bill they have to be proven beyond a reasonable doubt, which will require a new analysis.

Representative Holm asked Ms. Parks for her opinion about the memorandum from Linda Wilson of the Alaska Public Defender Agency (copy on file), which found Sections 1, 26, 30, and 31 of the bill unconstitutional. Ms. Parks explained that the memorandum was debated in the House Judiciary Committee. Section 1 states that aggravators should have to go to grand jury. She disagreed with this opinion. She argued that the grand jury in Alaska was created to insure that people were not held in jail pending trial when there was no evidence to support the charges. Taking aggravators is not required to insure that the grand jury is doing its job. She emphasized that Blakely is a United States Supreme Court case, which requires that aggravators go to a jury trial. Alaska's grand jury requirement is a State Constitutional requirement, not a United States Supreme Court requirement.

Ms. Parks commented on Sections 26, 30, and 31, which she termed a fix in a loophole of the law. She referred to a case in Homer where police officers were in a bar and recognized a person who was on probation or parole for a felony DUI. They contacted the person and his parole officer and discovered that he was on parole and not supposed to be in the bar. At the direction of the parole officer, they frisked the man and found cocaine. He was convicted, but the conviction was reversed on appeal. The court of appeals said that the police could not stop the man to inquire about parole conditions because it was not a public safety issue. Sections 26, 30, and 31 give police the authority to stop upon reasonable suspicion and to arrest on probable cause. She opined that this is a constitutionally allowed interpretation.

Vice-Chair Stoltze asked about the relationship between hate crimes and a second aggravator trial level. Ms. Parks responded that it would depend on how the judge ruled and the need for a second bifurcated trial after a conviction on an underlying offense.

2:3:36 PM

Representative Weyhrauch asked how a positive fiscal note would work. Ms. Parks clarified the Department of Law's fiscal note would still be zero. She acknowledged that passage of the bill would reduce the workload, but emphasized that Department of Law staff is currently overburdened by the Blakely decision.
In response to a question by Representative Weyhrauch, Ms. Parks replied that probation and parole officers are a creation of statute and are allowed to make unannounced searches and seizures. She suggested that if that is constitutional, the legislature should be able to make a public safety determination that police officers are like deputized probation officers.

Representative Croft referred to Roman v. State of Alaska in Sections 26, 30, and 31, and asked if parolees lose their ability to object to any searches. Ms. Parks replied that is not what the bill intends. Police must have reasonable suspicion in order to make contact with parolees who must be violating conditions enumerated in the bill.

Representative Croft opined that they are either constitutionally protected or not. He asked if, under the Roman decision, parolees would give up a category of their rights. He maintained that the bill opens up a new area of police search and seizures. Ms. Parks replied that everyone is protected by the Constitution, and police do not have the right to stop anyone unless there is reasonable suspicion. She related that the bill carves out a relationship between police officers and probationary parolees for certain violations of conditions that would not apply to other people. In response to a question from Representative Croft, Ms. Parks said she believes that a police officer can make contact with someone upon reasonable suspicion of any crime.

2:42:00 PM

Representative Croft read from the Memorandum from the Public Defender Agency, "every fact which is legally essential to the punishment must be charged in the indictment and proved to the jury." Ms. Parks replied that she does not agree with that assertion.

Representative Weyhrauch expressed a belief that parolees have given up constitutional rights because they have committed a crime and are devoid of certain protections. He related examples of West Point behavior requirements and restricted liberties of people on probation. Ms. Parks agreed. Representative Weyhrauch asked if the law agrees. Ms. Parks said she believes so, and the public expects police to be able to perform this task. Representative Weyhrauch pointed out the beneficial impact on society of

reduced costs due to probation requirements and re-incarceration laws. Ms. Parks noted that it is particularly important in Alaska for local law enforcement to have the power to detain parolees because a lot of communities are without probation offices.

PORTIA PARKER, DEPUTY COMMISSIONER, DEPARTMENT OF CORRECTIONS, in response to a question from Representative Holm, explained that the fiscal note is zero for the first six years, rather than an indeterminate note, because most sentences would fall within current ranges. She noted that the Department cannot predict what judges may do in the future.

DOUG WOOLIVER, ADMINISTRATIVE ATTORNEY, ALASKA COURT SYSTEM, related that the court system does not take a stand on the merits of legislation and will leave it up to the legislature to decide how to best address the problems created by the Blakely decision. He expressed a concern about Section 7, which he said he would address at the next meeting.

2:50:44 PM

LINDA WILSON, DEPUTY DIRECTOR, PUBLIC DEFENDER AGENCY (PDA), stood by the PDA's indeterminate fiscal note. She explained that the bill would have an impact because it will increase probationary sentences. The ranges imposed are quite broad. What was a five-year presumptive is now a range of five to eight. Most of the ranges are now larger. Even in best-case scenarios where there are no increases across the board, there will be more probation sentencing, revocation, an increase in caseloads, and more imposed probationary sentences. She emphasized that the PDA is not guessing that there will be protracted litigation. Ms. Wilson respectfully disagreed with the merits of State's argument regarding the right to an indictment. She predicted that there would be litigation concerning the bill in its present form.

Ms. Wilson referred to Section 21, page 17, a list of eight aggravators that need to be proved by clear and convincing evidence. Of 31 total aggravators, 23 would need to go to a jury. She agreed with Ms. Parks that a jury trial would happen only in rare cases because "why would they go prove an aggravator when they can, in many circumstances, go to the max on a presumptive range without proving any aggravators." She maintained it would be a rare case where the State would propose an aggravator that would need to be proved to a jury beyond a reasonable doubt. She predicted that there would be a lot of questions about the eight aggravators listed; whether they should be proved to a jury or not, or whether keeping them before a judge complies with Blakely.

Ms. Wilson pointed out the challenges that would occur in Sections 26, 30, and 31. She argued that the Constitution provides for a right against unreasonable search and seizure, and a right to privacy. She cited the Roman case as support, and predicted there would be litigation over these sections. She opined that more cases would go to trial because of uncertainty in the ranges. She noted that the fiscal note does not address cases impacted since the Blakely decision.

In response to a question from Representative Croft, Ms. Wilson explained that of the eight aggravators, which are specifically listed on pages 12 and 13 of the bill, some involve the fact of a prior conviction, and some involve additional facts that have to be proved within those aggravators. Whether on not those additional facts need to be proved to a jury is the question and will require litigation. She listed several examples.

Representative Croft discussed the loss of constitutional rights of parolees and suggested putting conditions of probation, such as a search by police, in a waiver category.

3:01:24 PM

Ms. Wilson explained that a person on mandatory parole is not given a choice. Referencing page 19, she pointed out that conditions of probation are not necessarily crimes. She maintained that protection from unreasonable searches and seizures is still needed. The bill addresses detaining, arresting, and seizing, which runs into serious constitutional troubles.

Representative Croft asked for a definition of the “crime of violating probation or parole conditions”. Ms. Wilson referred to page 19, lines 27 and 28, and suggested that the wording could be changed to read, “and if the conduct creates imminent public danger or threatens serious harm to persons or property.” Representative Croft suggested that some parole violations are not dangerous. Ms. Wilson responded that it is a call for the probation officer to make, not the police officer.

Representative Croft asked why it is so important to mention reasonable doubt in the indictment when it has to be mentioned in the trial.

Ms. Wilson responded that people have the right to a grand jury, and there was a problem before Blakely because aggravators become elements. She related that if something is essential to the punishment, it should be charged in the indictment. This would give fair warning, and the grand jury should be deciding whether or not they meet all of the

elements of defense. They must be charged in the indictment regarding what they are facing.

3:07:44 PM

Vice-Chair Stoltze expressed confusion regarding police officers not being able to enforce probation conditions. Ms. Wilson responded that there are examples from both ends of the range, and sometimes it is a "hassle" to live within our Constitution.

3:10:37 PM
ALLEN STOREY, CAPTAIN, ALASKA STATE TROOPERS, DEPARTMENT OF PUBLIC SAFETY, (via teleconference), addressed sections 26, 30 and 31. He stated support for those concepts. He spoke of the benefits to society and to the person concerned due to enforcing conditions of probation. He pointed out that a lot of time is spent training police and probation officers about search and seizure issues. He indicated support for the bill in order to enhance the on-going relationship between law enforcement, and parole and probation officers.

Representative Hawker agreed with Captain Storey.

Representative Samuels, referring to the fiscal note, pointed out that 90 percent of cases referred to the system "get dealt" and very few go to trail. He emphasized that the discussion is not about the rights of the accused, but about the rights of the convicted, which is a huge difference. He related that when a sentence gets mitigated, a judge could go to half of the sentence, which balances the two sides. He clarified an example of a range mentioned by the PDA and maintained that the ranges are realistic.

Representative Kelly commented that it would very demeaning to a police officer to have to get permission to deal with a parole violation, because it implies that the officer does not have good judgment.

3:18:41 PM

Co-Chair Meyer closed public testimony.

SB 56 was heard and HELD in Committee for further consideration.
#
ADJOURNMENT

The meeting was adjourned at 3:19 PM