ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
January 24, 2005
1:12 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Nancy Dahlstrom
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

Representative Pete Kott

COMMITTEE CALENDAR

HOUSE BILL NO. 78
"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 78
SHORT TITLE: CRIMINAL LAW/PROCEDURE/SENTENCING
SPONSOR(S): REPRESENTATIVE(S) SAMUELS

01/18/05	(H)	READ THE FIRST TIME - REFERRALS
01/18/05	(H)	JUD, FIN
01/24/05	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

VANESSA TONDINI, Staff
to Representative Lesil McGuire
House Judiciary Standing Committee
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 78, provided background information regarding the 2004 U.S. Supreme Court case, Blakely v. Washington.

SARA NIELSEN, Staff
to Representative Ralph Samuels
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented HB 78 on behalf of the sponsor, Representative Samuels, and discussed the changes incorporated in the proposed CS, Version G.

TODD SHARP, Lieutenant
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 78, provided comments regarding Sections 26, 30, and 31, and responded to questions.

SUSAN PARKES, Deputy Attorney General
Criminal Division
Office of the Attorney General
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 78, provided comments and responded to questions.

LINDA WILSON, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 78, shared the PDA's concerns, responded to questions, and suggested a change.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:12:19 PM. Representatives McGuire, Dahlstrom, Gara, Gruenberg, Anderson, and Coghill were present at the call to order.

HB 78 - CRIMINAL LAW/PROCEDURE/SENTENCING

[Contains reference to changes made in the Senate to the companion bill to HB 78, SB 56.]

1:12:51 PM

CHAIR McGUIRE announced that the only order of business would be HOUSE BILL NO. 78, "An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date." [In members' packets was a proposed committee substitute (CS) for HB 78, Version 24-LS0391\G, Luckhaupt, 1/21/05.]

1:14:16 PM

VANESSA TONDINI, Staff to Representative Lesil McGuire, House Judiciary Standing Committee, Alaska State Legislature, provided background information regarding the U.S. Supreme Court case, Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004). She began by quoting an excerpt from an article in members' packets by Benjamin Wittes titled "Suspended Sentencing", which read in part [original punctuation provided]:

> For most of the nation's history sentencing was a matter for judges alone. Congress set the range of punishments a crime could carry, and judges decided how, within that range, to impose those punishments. The result was huge racial, regional, and other disparities in sentences for comparable offenses - disparities that often reflected the oddities of individual jurists. Congress responded with the Sentencing Reform Act of 1984, which sought to make sentencing more predictable. Under the sentencing guidelines that resulted, judges were compelled to plug a variety of factors into a complex formula that would provide a sentencing range. ...
>
> The counterrevolution began in 2000, with a case called Apprendi v. New Jersey. Apprendi involved a state hate-crimes law that allowed judges to impose sentences beyond the usual maximum if racial animus lay behind the crime. In this case, a man who had fired a gun into a black family's house was sentenced to twelve years in prison - two years more than the maximum for firearm possession. The Court, however, struck down the sentence, because the defendant's racial motivation had not been proved to the jury; rather, it had been found by a judge. "Other than the fact of a prior conviction," the Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must by submitted to a jury, and proved beyond a reasonable doubt."

> The theory behind Apprendi seems both simple and attractive: a fact that pushes a sentence above the statutory maximum for the offense is really an element of a more serious crime, and every element of a crime has traditionally had to be proved to a jury. But judges have always considered facts in sentencing that were not proved to the jury. So Apprendi forced the question of which sentencing factors must count as elements and which judges could still consider on their own. In Blakely the Court answered that question: anything that increases a sentence beyond the "standard range" set by law is by definition an element, so a judge may not consider it in sentencing unless it has been proved to the jury.

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MS. TONDINI explained that in Blakely, the petitioner, after kidnapping his estranged wife [and son], was charged with [kidnapping in the first degree], but reached a plea agreement reducing the charge to kidnapping in the second degree involving domestic violence and use of a firearm. Mr. Blakely entered a guilty plea, admitting the elements of kidnapping in the second degree and the domestic violence and firearm allegations, and the case proceeded to sentencing. In Washington, the crime of kidnapping in the second degree is a class B felony, which has a maximum sentence of 10 years. Other provisions of Washington state law, however, further limit the range of sentences that a judge may impose; for example, Washington's "Sentence Reform" Act specifies that for the crime of kidnapping in the second degree involving the use of a firearm, the standard sentence range is 45-53 months, but the judge is allowed to impose a sentence above the standard range if he/she finds substantial and compelling reasons justifying an exceptional sentence. Furthermore, the Act lists aggravating factors that justify such a departure, though that list is intended to be illustrative rather than exhaustive, and the justification must include factors other than those used in computing the standard sentencing range.

MS. TONDINI said that in Blakely, pursuant to the plea agreement, the state recommended a sentence within a standard range of 49-53 months. However, after hearing the wife's description of the kidnapping, the judge rejected the state's recommendation and imposed an exceptional sentence of 90 months - 37 months beyond the standard maximum - and justified it on the grounds that the petitioner acted with deliberate cruelty, a

statutorily enumerated ground for departure in domestic violence cases. The petitioner appealed, arguing that the sentencing procedure deprived him of his federal constitutional right to have a jury determine, beyond a reasonable doubt, all facts legally essential to his sentence. Washington's State Court of Appeals "affirmed" and the Washington Supreme Court denied discretionary view, and so the U.S. Supreme Court granted certiorari.

MS. TONDINI relayed that the U.S. Supreme Court considered what she termed the Sixth Amendment implications of the case, looking at whether the judge's consideration of the facts showing that the petitioner acted with deliberative cruelty for the purpose of justifying a longer sentence was a violation of the petitioner's Sixth Amendment right to a trial by jury. The U.S. Supreme Court, in applying Apprendi, held that there was a violation because the facts supporting the exceptional sentence were neither admitted by the petitioner nor found by a jury; in other words, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt, with the relevant statutory maximum for Apprendi purposes being the maximum that a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.

MS. TONDINI noted that the U.S. Supreme Court also said that the Blakely case is not about the constitutionality of determinate sentencing, but rather about how such can be implemented in a way that respects the Sixth Amendment. She explained that Alaska's current felony sentencing statutes use the phrase, "presumptive term" to establish a specific, fixed term of imprisonment that in essence acts as both the minimum and maximum sentence that can be imposed unless the court finds specific statutory mitigating or aggravating factors; thus, current law attempts to specify one presumptively "right" sentence for all felony crimes within each class of offense. In conclusion, she noted that the Blakely case was very controversial - engendering a 5:4 split with some of the dissenting opinions exceeding the majority opinion in length - and has left state courts in a quandary with regard to how to proceed with sentencing.

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SARA NIELSEN, Staff to Representative Ralph Samuels, Alaska State Legislature, sponsor, relayed on behalf of Representative

Samuels that HB 78 amends Alaska's current presumptive sentencing scheme from a set term to a range of terms in order to comply with Blakely; allows a probation officer to impose additional terms of release or supervision without further court proceeding; allows for an additional aggravator when a defendant has five or more class A misdemeanor convictions; limits the ability of judges to order what are called periodic sentences, in which the offender periodically leaves prison and then returns; stipulates the authority of police officers to detain or arrest probationers and parolees for certain types of violations of conditions imposed by the courts or the State Board of Parole.

MS. NIELSEN relayed that the sponsor feels that the changes proposed by HB 78 will improve sentencing by giving judges more discretion, will simplify sentencing, will remove confusion engendered by the Blakely decision, will allow the Department of Corrections (DOC) the ability to better manage its prison population by limiting the abuse of periodic sentencing, will improve public safety by clarifying that police officers have the authority to arrest violators of parole or probation, and will improve supervision of offenders by clarifying that probation officers have the authority to impose additional terms. Referring to Version G, the proposed CS in members' packets, she indicated that it mirrors changes made in the Senate to the Senate version of the bill.

MS. NIELSEN highlighted four changes encompassed in Version G. Page 2, lines 6-7, now says in part, "and the defendant receives a composite sentence of not more than 2 years"; this change attempts to address the concern that those who've been sentenced for two years or less would still be allowed to have periodic sentencing on the basis of financial hardships. Page 3, line 14, now says, "lower than", rather than "within"; this change fixes a drafting error. Page 4, line 6, now contains the words, "orally and"; this change attempts to ensure that the defendant understands that additional conditions of probation are being imposed. The final change, to page 24, line 10, provides for an immediate effective date.

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TODD SHARP, Lieutenant, Division of Alaska State Troopers, Department of Public Safety (DPS), provided comments regarding Sections 26 and 30-31, which pertain to detaining and arresting parolees and probationers. He relayed that contrary to what many believe, police officers do not now have the ability to

immediately arrest parolees and probationers whom they witness violating the terms of parole/probation, or immediately revoke parole/probation privileges. Changes proposed by the bill would authorize such. He went on to detail the 2004 Alaska Court of Appeals case, Reichel v. State - which pertained to a person who was detained and later arrested after having been seen in a bar by a police officer who knew the person was violating his conditions of parole by being in a bar - and indicated that this case illustrates why police, when witnessing a person violating the conditions of his/her parole/probation, need to be able to take action without going through extra procedures.

REPRESENTATIVE GRUENBERG asked whether the term, "police officer" is defined.

LIEUTENANT SHARP said he believes it is, and noted that the bill also uses the phrase, "a police officer certified by the Alaska Police Standards Council", and thus he believes that all types of law enforcement officers would be covered under the bill.

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SUSAN PARKES, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law (DOL), noted that [HB 78] represents a critical issue for the Department of Law and has been in the making since the Blakely decision came out. Since that time, Alaska's felony sentencing law has been in chaos, she remarked, adding that there have been conflicting rulings from superior court judges across the state, that there have been multiple appeals, and that defendants and victims are not experiencing certainty or finality with regard to sentences. She characterized HB 78 as well thought out and as offering a balanced approach to Blakely that will bring Alaska's current sentencing structure into compliance with that decision. Noting that under Blakely, once a presumptive sentence is set, aggravating factors must go before a jury, she opined that maintaining non-disparity with regard to sentencing is a good thing and that the bill accomplishes that while giving some discretion to judges.

REPRESENTATIVE GARA asked for clarification with regard to when a longer sentence may be imposed in cases where aggravators are present.

MS. PARKES offered her understanding that the defendant's expectations play a role in when a longer sentence can be imposed without further review by a jury. She elaborated:

> Once the legislature sets sentences that [give] a defendant an expectation that this sentence is the sentence he or she will get absent additional factual findings, then you run into a "Blakely" problem. ... In Washington, ... there was a range that this defendant had an expectation [of, that] this was the maximum sentence that he could get, based on the plea he entered. And if [there are] facts that allow you to go beyond that expected range - or set sentence, in our case - then it has to be a jury finding. If the expectation of the defendant is, it's wide open sentencing - zero to twenty [years], the judge can give you anything - then that's the expectation and you don't have a Blakely problem.

MS. PARKES, in response to a further question, said that HB 78 proposes to give judges a range of sentences much like other states have, adding her belief that when setting any sentence, judges should look for guidance in Title 12, which lays out what she called the "Chaney criteria" - statutory guidelines based on the 1970 Alaska Supreme Court case, Chaney v. State. For example, currently for misdemeanors there are no presumptive sentences, nor are there presumptive sentences for the crime of murder in the first degree. Instead, judges are supposed to look at the declaration of purpose - found in AS 12.55.005 - regarding a particular sentence, and then set a sentence within the range available that meets the purpose. To illustrate, she paraphrased AS 12.55.005(1)-(7):

> (1) the seriousness of the defendant's present offense in relation to other offenses;
>
> (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
>
> (3) the need to confine the defendant to prevent further harm to the public;
>
> (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
>
> (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;
>
> (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and
>
> (7) the restoration of the victim and the community.

MS. PARKES remarked that under HB 78, rather than having to make factual findings regarding aggravators and mitigators, judges are given a range and can then look to the aforementioned guidelines when deciding an appropriate sentence.

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REPRESENTATIVE GRUENBERG, referring to Section 26, on page 19 of Version G, asked why can't police, under current law, arrest a person for violating his/her conditions of parole/probation. Referring to paragraph (6) of Section 26 - which says, "other conduct that creates an imminent public danger or threatens serious harm to persons or property" - he asked whether there's a reason "for going beyond conduct that would necessarily create a public danger."

MS. PARKES, regarding the first question, surmised that it probably wasn't a public policy decision to preclude police from making arrests pertaining to parole/probation violations; rather, the authority to make such arrests just wasn't specifically set out in statute; Version G specifically sets out that authority. Currently, she relayed, an officer can make an arrest after obtaining permission/authority from a person's parole/probation officer, and offered her belief that in the Reichel case, the problem was that the officer detained the defendant just for being in the bar, without there being any evidence that such behavior in and of itself created an imminent public danger. The goal of HB 78 regarding this issue is to allow initial contact if there is a reasonable suspicion of a violation; then, if there is probable cause to believe that there has been a violation of an item listed in Section 26, the officer can arrest the person.

MS. PARKES, in response to questions, relayed that "police officer" is defined in Title 18; that this definition includes airport police and state and municipal police; and that Village Public Safety Officers (VPSOs) have already been given similar authority through other statutory language.

REPRESENTATIVE ANDERSON noted that last year, legislation of his proposed adding another definition of "peace officers" to statute.

CHAIR McGUIRE mentioned that the committee could narrow the definition in the bill if necessary.

REPRESENTATIVE GARA surmised that the main goal of HB 78 is to change Alaska's current statutory sentencing scheme, which has been declared unconstitutional under Blakely, so that Alaska can have essentially the same sentences it has now.

MS. PARKES concurred with that summation.

REPRESENTATIVE GARA shared his fear that the changes proposed via HB 78 will increase basic sentences beyond what they are now.

MS. PARKES mentioned that the Senate Judiciary Standing Committee shared that concern and so drafted a letter of intent stating that such was not the legislature's goal, and suggested that the House Judiciary Standing Committee may want to draft a similar letter of intent. She said that under Blakely, the balance of power is being changed; judges used to have a lot of power and this bill seeks to give some of that power back to judges by providing ranges of sentences. Under the current scheme - which has been found to be unconstitutional - judges not only made the findings of fact themselves about aggravators, they made them only by clear and convincing evidence, and then they decided whether it justified increasing a sentence or not. Under Blakely, juries will have to make the finding and must do so beyond a reasonable doubt, though just because an aggravator or mitigator is found by the jury, a judge is not required to increase or decrease a sentence. She relayed her expectation that there will be fewer aggravators proposed because a range of appropriate sentences will be available.

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REPRESENTATIVE GARA suggested that another way to comply with Blakely would be to keep the current sentencing scheme and just go to a jury and let them decide issues of aggravators and mitigators whenever there is a desire to decrease or increase the sentence. He noted that Kansas has such a system.

MS. PARKES clarified that although Kansas does have such a system, it also has a system of presumptive ranges. She relayed that at the Vera Institute of Justice conference she attended, there was a presentation by a representative from Kansas who said that 100 out of 105 prosecutors in Kansas are not using aggravators anyway.

REPRESENTATIVE GARA suggested instead, then, that perhaps the discretion regarding mitigators and aggravators should be given

to judges but then also require them to issue a finding justifying increases or decreases in the presumptive sentence. He proffered that such a system will provide accountability and transparency and prevent disparity in sentencing.

MS. PARKES asked that if such a system were put in place, that only an oral finding be required so as not to place a burden on judges. Turning to Section 7 of bill, she said that it deals with appellate rights and says that if a judge imposes a sentence within a range established by the legislature, it can't be reversed on the grounds of being excessive.

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REPRESENTATIVE GRUENBERG said he is concerned that Section 7 violates the separation of powers doctrine.

MS. PARKES said she does not share that concern, and relayed that the DOL researched that issue because of concerns raised in the Senate Judiciary Standing Committee. Although judges impose sentences, it is the legislature that has the authority to set sentences for crimes; she noted that the Alaska Supreme Court, in Bear v. State, held that even it didn't have the authority to review sentences on the grounds of excessiveness unless the punishment would qualify as cruel and unusual. As a result of that ruling, the legislature gave the Alaska Supreme Court the authority to review cases, and created the Alaska Court of Appeals and gave it the statutory authority to review sentences. The legislature also passed a statute limiting felony sentencing appeals to only those involving felony sentences of two years or more; that statute was challenged and upheld - the legislature can determine appropriate sentences and can limit what sentences can be appealed.

REPRESENTATIVE GRUENBERG asked why, from a policy standpoint, the legislature would want to limit the appellate court's discretion to determine whether a sentence is excessive. Are judges abusing that discretion now?

MS. PARKES surmised that the change proposing such a limit was included because of a concern that there might be a lot of frivolous appeals after the creation of presumptive ranges. So the question was one of, should the courts deal with all those potential appeals just because the legislature decided to establish ranges of sentences for particular crimes? It's a policy call; the legislature has the authority to say what it considers to be a frivolous appeal.

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REPRESENTATIVE GARA referred to a proposed amendment, labeled 24-LS0391\A.1, Luckhaupt, 1/24/05, which read:

Page 4, line 14:
Delete "within an"
Insert "the minimum in the"

Page 4, line 17, following "AS 12.55.127.":
Insert "If the court imposes a sentence above the minimum sentence in the applicable presumptive range, the court shall make findings that justify the decision under AS 12.55.005."

REPRESENTATIVE GARA - after relaying his understanding of current law and that the factors listed in AS 12.55.005 have always been appealable - said he would like to see the state get the benefit of being able to impose a longer sentence without having to go through an extra jury trial, but such sentences should be appealable. He asked what would be the objection to letting judges, if such a system were in place, review longer sentences on appeal.

MS. PARKES clarified that the bill doesn't say a person can't appeal a longer sentence; it just says that if the sentence is within the range established by the legislature, it cannot be reversed on the grounds that it's excessive. She acknowledged, however, that altering that provision in the future may be necessary if it doesn't prove satisfactory. She offered her belief that establishing sentencing ranges isn't for the benefit of prosecutors; rather, it's for the benefit of the public and is intended to bring back balance to the criminal justice system without imposing a burden on that system.

CHAIR McGUIRE remarked that if imposing a longer sentence requires a finding, it could engender questions regarding the appropriateness of the finding as well as possible litigation. She noted that at the bill's next hearing, the committee can decide the issue of whether to adopt a CS and focus on any proposed amendments, and mentioned a preference for written amendments.

MS. PARKES, referring to Section 21, which starts on page 17 of Version G, noted that it does not require aggravators to go to the grand jury, though it does require the state to give notice

10 days prior to trial or at another time set by the court if new information comes forth. Section 21 sets out both which aggravating factors don't have to go before a jury and what the timelines for giving notice are.

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REPRESENTATIVE GRUENBERG asked Ms. Parkes to research whether Section 21 proposes a change to court procedure and would thereby require a two-thirds vote and notice in the title. He suggested that researching this issue as soon as possible could prevent running afoul of the aforementioned requirements later.

MS. PARKES referred to Section 19, which starts on page 15 of Version G, and relayed that currently, Alaska's presumptive sentences are based on prior felony convictions, and so there isn't an aggravator for someone with a lengthy misdemeanor criminal history. Section 21 allows an aggravator to be found if a person has five or more class A misdemeanor convictions. Another change that the bill proposes pertains to limiting the kinds of sentences and circumstances that are eligible for periodic sentencing; she suggested that the DOC could better address this proposed change. Mentioning general condition of probation no. 12 from the Huskey v. State case, and referring to Section 6, page 4, she explained that it merely codifies current practice with regard to judges giving probation officers the authority, during the course of probation, to give special instructions or rules to probationers as new circumstances arise. She mentioned that Lieutenant Sharp has already addressed the proposed change giving police officers the authority to detain probationers and parolees based on a reasonable suspicion of probation/parole violation.

REPRESENTATIVE GRUENBERG asked whether any other sections of the bill are in response to particular cases.

MS. PARKES mentioned that the Huskey case, an "MOJ" (Memorandum Opinion and Judgment) from the Alaska Court of Appeals, prompted Section 6.

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LINDA WILSON, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), thanked the DOL for keeping the PDA abreast of DOL efforts after the Blakely decision. She commented that although the director of the PDA also participated in the aforementioned Vera Institute of

Justice conference in Denver, none of the PDA's suggestions with regard to the bill were incorporated into it.

MS. WILSON acknowledged that Ms. Tondini had gone over the history of the Apprendi and Blakely cases. She offered her belief that Blakely clarified that a maximum sentence should be based upon what the jury found or what a defendant admitted in his/her plea. She declared, "This is about honoring our Sixth Amendment right to a [jury] trial; ... the jury should be ... making those types of [findings]." She quoted from U.S. Supreme Court Justice Anthony Scalia's written opinion in the Blakely decision:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors" rather than a lone employee of the State.

MS. WILSON clarified that the man who had been sentenced to an additional three years was Mr. Blakely, and that the lone employee of the State in this case was the judge. She reiterated that the case was about respecting the right to a jury. She stated that, a 2005 U.S. Supreme Court case, [United States v. Booker], made it clear that the Blakely decision applied to federal sentencing guidelines. In the defense that came from Blakely, U.S. Supreme Court Justice Sandra O'Conner specifically mentioned Alaska's presumptive sentencing scheme and nine other states that became vulnerable after the Blakely decision. She remarked that dissenting members of the court were concerned that this decision would create chaos, cost more money, and cause inefficiencies. She then quoted U.S. Supreme Court Justice John Paul Stevens comments in Booker [original punctuation provided]:

> We recognize, as we did in Jones, Apprendi, and Blakely, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.

MS. WILSON again reiterated that Blakely is about honoring and respecting the Sixth Amendment right to have a jury decide the facts which could potentially expose one to a higher sentence.

MS. WILSON turned the committee's attention to Alaska's sentencing history. Prior to 1978, there was indeterminate sentencing in Alaska, resulting in disparity. In 1978 the state instituted a presumptive sentencing scheme to eliminate unjust disparity and make sentences reasonably uniform. She said that in 1997, the Alaska Supreme Court Advisory Committee on Fairness and Access recommended that the state assess the relationship between defendants' ethnicities and their treatment in the criminal justice system to determine if there is uniformity, proportionality, certainty, and fairness in the sentences for all defendants. The Alaska Judicial Council (AJC) examined felony cases from 1999 and produced a report which came out last year; the AJC found no systemic ethnic discrimination in the imposition of sentencing and not a lot of disparity in presumptive sentencing that would be associated with ethnicity, gender, type of attorney, and location. She concluded that [the state] was doing a good job of providing uniformity in presumptive sentencing.

MS. WILSON, referring to handouts in members' packets, pointed out that presumptive sentencing in Alaska has a certain degree of uniformity because the sentence is a specific number: four, five, eight years, et cetera. Therefore there is no opportunity for disparity for the 55 percent of defendants that face presumptive sentencing. Of the sentences that the AJC studied, there were some that were aggravated; this bill addresses those types of cases. The Blakely decision requires that a jury decide the aggravating fact that takes [the sentence] above the presumptive sentence.

MS. WILSON remarked that the state's proposal is "one solution to Blakely", and that another possible solution would be to return to indeterminate sentencing, though such would have its own problems. She mentioned a third possible solution: leave the presumptive sentencing the way it is, but provide for a jury trial for aggravators that require a factual finding not based on a prior conviction. She stated that there's disinclination towards this option because of the cost and lack of flexibility. She noted that flexibility gives the judge more discretion, adding: "and that's the worrisome part of this proposed bill - ... it's too broad - ... because now, what was a presumptive five, now is between five and eight, [and] what was a presumptive four is now a range of four to seven."

MS. WILSON commented that these ranges could be made narrower to allow for disparity. She said that Alaska is already "a state that overincarcerates in comparison to other states." She predicted that sentences will increase if the range is left broad, even with intent language that states that sentences should not increase. She voiced concern that Section 7 of the bill takes away the right to appeal, since, if the court can't reverse the sentence on the grounds that it was excessive, then there is no reason to appeal; it virtually takes away one's right to appeal because there's no remedy available and thus makes the appeal fairly meaningless.

MS. WILSON posited that HB 78 is too broad, and if the bill's goal is to keep the uniform sentencing scheme intact and to eliminate unjust disparity, "it does too much because there's now an opportunity to have greater disparity within that range." She opined that the bill tends to circumvent Blakely and works around honoring the Sixth Amendment right, and expressed concern that sentences in general will tend to go up because the judge would have a range of sentences to choose from.

MS. WILSON referred to Representative Gara's [proposed amendment], which would allow the defendant to appeal a sentence beyond the low end of the range as excessive so that the sentences don't increase overall. She voiced concern that Section 7 allows for no review of sentences; two people could receive different sentences for similar crimes but there would be no review and no accountability. She said that it's good for judges to be able to compare sentences. She also mentioned the importance of using the Chaney criteria as codified in AS 12.55.005.

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MS. WILSON called the committee's attention to a part of the bill that she found problematic. She referred to page 4 of Version G, lines 4-10, which read:

> (7) if ordered by the court, to abide by additional conditions of probation imposed by the defendant's probation officer; an additional condition imposed by the probation officer must be provided in writing to the defendant; the additional condition is binding upon delivery until modified by the court; this paragraph does not require written notice of conditions relating to the day-to-day management of

probationers, in which probation officers direct the activities of probationers to implement existing court-imposed conditions.

MS. WILSON focused on the language that would allow a probation officer to add additional conditions without having to go back to court. She relayed that Lee Jones, an attorney in the Anchorage PDA office and a former probation officer, told her that when a probation officer changes or adds a condition to the terms of probation, many times the defendant doesn't know that he/she has the ability to challenge that additional condition. Ms. Wilson noted that the Senate Judiciary Standing Committee has amended the Senate's version of the bill to say that the defendant must be notified orally as well as in writing, adding that she prefers that both methods be used. She recommended that a similar provision be added to HB 78 so that a probation officer is required to inform the defendant orally and in writing of an additional condition and to advise the defendant that he/she can request judicial review. She noted that this would give the defendant the opportunity to bring the issue back into court and let it decide if the additional condition is reasonable, though in the meantime that additional condition would be binding.

MS. WILSON returned attention to Section 7, the provision limiting the right to appeal a sentence as excessive. She suggested that if the committee chose not to [adopt] Representative Gara's proposed amendment [text provided previously], then perhaps the committee would consider making the ranges smaller to lessen disparity. She reiterated her preference for Representative Gara's suggestion to allow a review by a court of appeals, because under the current bill judges could impose sentences at the high end of the range without any review. She voiced her concern that people of color would receive sentences at the high end of the range while wealthy people who have private council would receive sentences at the low end of the range.

MS. WILSON referred back to the Huskey case, in which, she opined, the state conceded that it needed to get rid of what was being called in that case general condition of probation no. 12. She commented that it was interesting that in Huskey, the state conceded that it was perhaps an unfair delegation of authority, but yet now [the state] wants similar language to be included [in statute].

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REPRESENTATIVE GARA asked for clarification regarding [Section 6]: "Are we letting probation officers impose new conditions until a court says that wasn't proper, or are we waiting for there to be some court order justifying the new probation condition before it gets imposed?"

MS. WILSON surmised that it's a little bit of both. She explained that the aforementioned general condition of probation no. 12 was a probationary order in which the judge delegated authority to the probation officer. She indicated that that particular general condition of probation no. 12 read, "Abide by any special instructions given by the court or any of the duly authorized officers, including probation officers of the Department of Corrections", and suggested that the term "special instructions" had been interpreted to mean "additional conditions." She pointed out that currently, the defendant can always go back to the judge and try to modify or change the conditions of probation and its term length, and reemphasized the importance of notifying the defendant of any new conditions and of his/her right to request review of the conditions.

REPRESENTATIVE GARA asked Ms. Wilson if she wants the bill to say that if [additional conditions are added], the defendant should be told that he/she has a right to seek council and review.

MS. WILSON replied affirmatively.

REPRESENTATIVE GARA pointed out that at sentencing, the defendant is told that the probation officer might add new conditions. He asked whether the attorney also tells the defendant at the time of sentencing that he/she has the right to appeal any new conditions, and whether there is a need to tell the defendant that again.

MS. WILSON replied that if conditions are added a while after sentencing, the defendant often no longer realizes that he/she has the ability to go back into court and have it review the additional conditions. She remarked that [an amendment to the bill such as she suggested earlier] would allow the defendant to be informed [that] the probation officer is able to implement some special instruction that must be followed until such time as the defendant can get the court to review that instruction.

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REPRESENTATIVE GRUENBERG, referring to page [2] of the handout pertaining to the Huskey decision, he pointed out that its general condition of probation no. 12 is set out in footnote 6 (FN 6), and that its special condition of probation no. 7 is set out in FN 4. He then turned to page [3] of that document, and pointed out that the text accompanying FN 15 states:

> Our supreme court has recognized that probation officers have common law authority, and decisions from other jurisdictions recognize that a probation officer has inherent discretion as long as the exercise of that discretion does not impinge on a judicial responsibility--that is, as long as the court has not improperly delegated its authority to the probation officer.

REPRESENTATIVE GRUENBERG said he interpreted this text to have constitutional underpinnings: If a judge imposes a sentence, only that judge can exercise his/her authority and cannot delegate it entirely away. He voiced concern that the language on page 4, lines 3-5 - which read in part, "if ordered by the court to abide by additional conditions of probation imposed by the defendant's probation officer" - does not in and of itself "contain any such limitation." He asked Ms. Wilson if she was concerned that that [language] could be unconstitutionally broad.

MS. WILSON replied that this does give [her] concern. She said that a probation officer cannot set restitution, which is an example of a responsibility that the court would not be able to delegate to the officer. The probation officer would be impinging on the judge's responsibility in the case if the officer were allowed to decide the amount of a fine or type of restitution. She acknowledged that there are risks [with adopting the aforementioned language], and asserted the importance of giving the defendant notice that he/she can go back to court [for review] of the conditions.

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MS. WILSON, referring to Section 21, specifically the language on page 17, lines 12-13, pointed out that that language lists the eight aggravators that the state would not require be proven by a jury beyond a reasonable doubt; rather, those aggravators would only need to be proven by clear and convincing evidence. She predicted that there would be a lot of dispute about whether all of these particular aggravating factors are really based on

a prior conviction, as required by Apprendi. Referring to [Section 18], she noted that subsection (c)(7), located on page 12, read, "(7) a prior felony conviction considered for the purpose of invoking a presumptive range under this chapter was of a more serious class of offense than the present offense". She offered her belief that this requires an extra finding that the prior offense was more serious than the present offense, and suggested that that factual finding may come under the Blakely purview and thus would need to be found by a jury beyond a reasonable doubt.

MS. WILSON, referring to page 12, then read [paragraph] (8), which is part of current statute and states: "(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior". She offered her belief that this is not an aggravator solely based on a prior conviction; it requires extra factual findings that there was aggravated conduct, repeat conduct.

MS. WILSON, still referring to page 12, then read [paragraph] (12), which is also part of current statute and states: "(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element". She offered her belief that under this provision, there would need to be extra factual findings that the defendant was on release from a prior conviction. She summarized that although several of the aggravating factors probably are based just on prior convictions, several of them require the finding of additional facts, including those described in paragraphs (20) and (21). She said that she does not think that this [provision] will comply with Blakely.

REPRESENTATIVE GRUENBERG noted that under [proposed subsection] (c)(7), located in Section 18, the determination of whether the past conviction was of a more serious class of offense than the present offense seems to be a question of law rather than a question of fact.

MS. WILSON responded that that summation is debatable, but agreed that it could also be a question of fact; for example, if the prior conviction was in a different state there would need to be a determination as to how that conviction would compare to Alaska's law.

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MS. WILSON, referring to Section 1, predicted that there will be challenges to this bill pertaining to the loss of the right to a grand jury regarding the aggravators. She also voiced concern about the disparity in the [sentencing] ranges; such could possibly result in higher sentences, in more people being on probation, and in more violations of probation. She predicted that with this proposed range, it would be very unlikely that a jury would decide an aggravating factor. She suggested that the bill does not follow the true intent of Blakely; rather, it does more than it needs to and circumvents the right to a jury trial. However, she remarked, she does think it's good that the legislature sets a "fixative" and makes it effective immediately.

CHAIR McGUIRE stated that the committee has a copy of the amendments that the OPA has offered, and will hear from the OPA at the bill's next hearing.

[HB 78 was held over.]

ADJOURNMENT

2:58:02 PM

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:58 p.m.