ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
January 31, 2005
1:11 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

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."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 56
SHORT TITLE: CRIMINAL LAW/PROCEDURE/SENTENCING
SPONSOR(S): SENATOR(S) THERRIAULT

01/14/05	(S)	READ THE FIRST TIME - REFERRALS
01/14/05	(S)	JUD, FIN
01/18/05	(S)	JUD AT 8:30 AM BUTROVICH 205
01/18/05	(S)	Heard & Held
01/18/05	(S)	MINUTE(JUD)
01/19/05	(S)	JUD AT 8:30 AM BUTROVICH 205
01/19/05	(S)	Heard & Held
01/19/05	(S)	MINUTE(JUD)
01/20/05	(S)	JUD AT 8:30 AM BUTROVICH 205
01/20/05	(S)	Moved CSSB 56(JUD) Out of Committee
01/20/05	(S)	MINUTE(JUD)
01/21/05	(S)	JUD RPT CS 3DP 1NR SAME TITLE
01/21/05	(S)	LETTER OF INTENT WITH JUD REPORT

01/21/05	(S)	DP: SEEKINS, HUGGINS, THERRIAULT
01/21/05	(S)	NR: FRENCH
01/21/05	(S)	FIN REFERRAL WAIVED
01/26/05	(S)	TRANSMITTED TO (H)
01/26/05	(S)	VERSION: CSSB 56(JUD)
01/28/05	(H)	READ THE FIRST TIME - REFERRALS
01/28/05	(H)	JUD, FIN
01/28/05	(H)	LETTER OF INTENT
01/31/05	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

LINDA WILSON, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 56, relayed the PDA's concerns with Sections 1, 7, 11, 26, and 30-31, and spoke in support of proposed changes.

TODD SHARP, Lieutenant
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 56, testified in support of the bill, provided comments regarding Sections 26 and 30-31, and responded to questions.

JOSHUA FINK, Public Advocate
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 56, relayed the OPA's concerns with Sections 1, 6-7, and 11, and suggested changes.

SIDNEY K. BILLINGSLEA, Attorney
Alaska Academy of Trial Lawyers (AATL)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 56, relayed her concerns with the bill, and suggested eliminating Section 2.

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director

Alaska Court System (ACS)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of SB 56.

PORTIA PARKER, Deputy Commissioner
Office of the Commissioner - Juneau
Department of Corrections (DOC)
Juneau, Alaska
POSITION STATEMENT: Testified in support of SB 56 and in the removal of Section 6, and responded to questions.

SUSAN PARKES, Deputy Attorney General
Criminal Division
Office of the Attorney General
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of SB 56.

REPRESENTATIVE RALPH SAMUELS
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of SB 56, spoke as the sponsor of HB 78, companion bill to SB 56.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:11:05 PM. Representatives Dahlstrom, Gara, [Gruenberg], Anderson, Coghill, Kott, and McGuire were present at the call to order.

SB 56 - CRIMINAL LAW/PROCEDURE/SENTENCING

[Contains reference to HB 78, companion bill to SB 56.]

1:12:00 PM

CHAIR McGUIRE announced that the only order of business would be 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."

CHAIR McGUIRE noted that SB 56 would become the vehicle in lieu of the companion bill, HB 78, which had been heard at a prior House Judiciary Standing Committee meeting.

1:13:15 PM

REPRESENTATIVE ANDERSON moved to adopt CSSB 56(JUD) as the working document. There being no objection, CSSB 56(JUD) was before the committee.

1:13:56 PM

LINDA WILSON, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), after noting that she'd previously provided comments on HB 78, relayed that with regard to SB 56, she wanted to talk about a problem with Section 11 that was overlooked as the bill moved through the Senate and about a proposed amendment that should fix it. As written currently, Section [11] would eliminate the opportunity to get a Suspended Imposition of Sentence (SIS), a tool commonly used for first time class B and C felony offenders. She remarked that the good thing about an SIS is that if a person convicted of that type of felony succeeds in meeting all the conditions set forth in his/her sentencing, the felony will be taken of his/her record. Referring to the aforementioned proposed amendment, she offered her belief that adoption of it will allow an SIS to be granted to those convicted for the first time of a class C felony or some class B felonies. She relayed that the PDA is in support of that proposed change, but cautioned that if the legislature moves too quickly on complex legislation, it won't get the attention it deserves.

MS. WILSON mentioned that she'd submitted a memorandum to the committee regarding the PDA's constitutional concerns regarding Sections 1, 7, 26, and 30-31. Offering her understanding that the representative from the Office of Public Advocacy (OPA) would be addressing Sections 1 and 7, she pointed out that Sections 26 and 30-31 would authorize a police officer to detain a parolee/probationer on suspicion of recent violations of parole/probation without getting any directions to do so from the individual's parole/probation officer. She opined that these sections will engender constitutional problems because, even though exceptions to the constitutional protection against unreasonable searches and seizures have been carved out for parole/probation officers, these exceptions have not been extended to police officers.

MS. WILSON, in conclusion, made reference to the 1977 Alaska Supreme Court case, Roman v. State - cited in her memorandum - as illustrative of the potential constitutional problems with

Sections 26 and 30-31, specifically that it would be unconstitutional to allow a police officer to detain or arrest a parolee/probationer for a believed violation if that violation did not constitute an independent crime or if the officer was not acting at the direction of the person's parole/probation officer. She then relayed that she was available to answer questions.

REPRESENTATIVE ANDERSON, surmising that the PDA would prefer that those sections of the bill be removed, asked whether the Division of Alaska State Troopers would prefer that they remain in the bill.

TODD SHARP, Lieutenant, Division of Alaska State Troopers, Department of Public Safety (DPS), said yes.

REPRESENTATIVE GARA noted that in Alaska, an SIS requires that a person admit to the conviction but can relay that it has been suspended. In other states, however, a person can claim to never have been convicted as long as he/she meets certain criteria. He suggested that if the legislature would like to change Alaska's current SIS statute to be more like that of other states in that regard, then such might be done via a change to SB 56.

1:22:47 PM

JOSHUA FINK, Public Advocate, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), opined that overall, SB 56 greatly ratchets up sentences and increases disparity among them, and that the (indisc. - problems with teleconference sound) sentencing structure was set up to avoid the latter. He suggested that the legislature should consider establishing a sentencing commission to look at how Alaska sentences its defendants compared to other states. Nonetheless, he remarked, he does support a presumptive-range approach, but thinks the current presumptive terms should have been used as the midpoint of the proposed ranges, not as the low end. As currently written, SB 56 gives judges the discretion to increase sentences upward from the current presumptive sentence without finding any aggravators, but must find mitigators in order to decrease sentences. Such will result in longer sentences across the board, and violates the spirit of Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004), he opined.

MR. FINK offered his belief that in Blakely, U.S. Supreme Court Justice Anthony Scalia has said that the jury should find the

facts that increase one's sentence, because that is the people's check on the judiciary. By only allowing judges to increase sentences over the current presumptive terms without any aggravating factors but not allowing them to decrease them, SB 56 does an end run around Blakely and usurps the function of the jury as envisioned and announced by the U.S. Supreme Court under Justice Scalia's opinion, he remarked. Moreover, he predicted, giving what he characterized as a wide range of sentences will result in greater disparity in sentencing.

MR. FINK suggested that the solution would be to create much narrower ranges of sentences using the current presumptive terms as the midpoint. Such will result in a much fairer approach, and will decrease disparity in sentencing and grant judges the discretion to move either upward or downward from the current presumptive term based on the "Chaney criteria" - statutory guidelines based on the 1970 Alaska Supreme Court case, Chaney v. State - which are statutorily set out in 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.

MR. FINK offered his thought that the proposed sentencing ranges currently listed in SB 56 are simply a starting point, and asked the committee to take a hard look at those ranges and consider narrowing them as he's suggested. He then offered his belief that Section 1 is potentially unconstitutional for a number of reasons, and quoted from the 2002 Alaska Supreme Court case, Malloy v. State [original punctuation as provided by Mr. Fink]:

> Donlun accurately presaged Apprendi's holding aggravating facts must be charged [in the indictment]

> and proved beyond a reasonable doubt to the jury when their existence would allow or require the court to impose a sentence exceeding the maximum otherwise authorized.

MR. FINK therefore surmised from this statement and from another of Justice Scalia's statements in Blakely that if a judge wants to go outside a presumptive sentencing range, then the justifying factors must be included in the indictment and proved to the jury, and that to do otherwise would violate both Malloy and Blakely. With regard to Section 6, he opined that it constitutes an unconstitutional delegation of power from the judicial branch to the executive branch. With regard to Section 7, he opined that it is also unconstitutional as currently drafted, because currently, under AS 12.55.120 and Rule 215 of the Alaska Rules of Appellate Procedure, a defendant may not seek a sentence review as of right if his/her sentence is under two years. However, the defendant may petition the [Alaska] Supreme Court for discretionary review.

MR. FINK went on to note that that statute has been upheld in Rozkydal v. State, a 1997 Alaska Court of Appeals case, and that the court did so by making a distinction between the right to review and a discretionary petition for review. Thus, if a sentence is under two years, one doesn't have the right to appeal but does still have the right to petition, and so there would be no violation of due process. However, the court in that case went on to say that if a jurisdictional statute was construed as prohibiting the court from reviewing any ruling in a criminal case except those rulings expressly made appealable, then that statute would raise serious constitutional problems under Article IV, Section 2, of the Alaska State Constitution, which states that the supreme court is the highest court in the state with a final appellate jurisdiction.

MR. FINK characterized Section 7 as attempting to take away that appellate jurisdiction by taking away the right to petition, and predicted that for this reason, Section 7 will be found to be fairly unconstitutional. Also with regard to Section 7, he offered his understanding that the Department of Law (DOL) has stated that it wants to make minimal changes to Alaska's sentencing structure so as to preserve it as much as possible while complying with Blakely. If that is the case, however, why change the current statute regarding when a sentence can be appealed? That statute is not tied to presumptive sentencing and thus does not need to be amended to comply with Blakely, he opined, since it simply provides a right to appeal for

excessiveness if one's sentence is over two years. He asked the committee to consider deleting Section 7. Referring to Section 11, he offered his belief that it eliminates the court's ability to impose a suspended sentence or grant an SIS, and that the DOL has a proposed amendment that would change that.

MR. FINK then suggested that the committee consider amending the bill to provide the courts with a mitigator when [the defendant] suffers from a mental defect - for example, fetal alcohol spectrum disorder (FASD). He recommended the following language, "If one has a mental defect, such as fetal alcohol syndrome, that is insufficient to constitute a complete defense but would significantly affect the defendant's conduct, the court may consider it in sentencing", and then adjust the sentence downward. He offered his belief that many judges want this type of mitigator because it would allow them to more justly sentence the mentally ill, of which there are many in Alaska and who are not as culpable as those with full mental faculties. He relayed that his suggested amendment is modeled after the language currently in AS 12.55.155(d)(3) with some modification so that it pertains to "mental defect", and characterized it as providing an important mitigator.

1:33:47 PM

MR. FINK also suggested that the committee consider amending the bill to provide a mitigator for a defendant who is actively participating in or has completed treatment relevant to the offense before sentencing; for example, substance abuse treatment or anger management courses. Actively participating in treatment prior to sentencing indicates the defendant's willingness to be reformed, and this should be encouraged as a matter of public policy. To some extent, obtaining such treatment is now recognized by the courts; when a defendant enters a residential treatment program prior to sentencing, he/she can count that time against his/her jail time. This is a recognition that treatment should be encouraged, and is a better way than incarceration to address many of the state's crime problems. To address the argument that defendants can simply receive treatment at Department of Corrections' facilities, he pointed out that such treatment opportunities are very limited and are only available after sentencing, and characterized that argument as mixing apples and oranges. Making treatment a mitigating factor rewards defendants who seek help on their own before sentencing, and should be encouraged, he concluded.

1:34:52 PM

CHAIR McGUIRE confirmed that there is an amendment forthcoming regarding Section 6, and surmised that there will be further discussion regarding section 7. She said she agrees with Mr. Fink on the issue of having a mitigator for a mental defect, and asked him whether he wanted to define mental defect in any way.

MR. FINK suggested that perhaps others may be able to better address that issue, but suggested making any definition somewhat broad and then allowing the judge discretion.

CHAIR McGUIRE noted that judges are not required to consider mitigating factors when sentencing. On the issue of providing a mitigating factor for those seeking treatment, she relayed a concern she's heard that after hearing about such a mitigator, a defendant might simply get treatment in order to lower his/her sentence, though such might not necessarily be a bad thing. She mentioned her concern with regard to defining "treatment", indicating that she wouldn't want a defendant have his/her sentence mitigated for participating in a program that doesn't meet certain criteria.

MR. FINK acknowledged that point, and suggested that an amendment regarding this issue could reflect that one must be actively participating in a recognized treatment program and must remain in compliance with it. Judges must be convinced that the defendant is doing everything possible to receive treatment, he remarked, and mentioned that such is done now with regard to alcohol related crimes.

CHAIR McGUIRE said she is inclined to support Mr. Fink's suggested amendments, since they would simply be putting current policy into statute. She remarked that a staggering number of people in the DOC system are mentally ill. On the issue of providing a mitigator for seeking treatment, she pondered whether such a mitigator should be written so as to make it clear that treatment received before a crime is committed would not qualify.

MR. FINK acknowledged that point.

1:39:53 PM

REPRESENTATIVE GARA asked Mr. Fink his opinion with regard to whether requiring a judge to issue a finding when increasing a sentence will help keep sentences closer to what they are under the current sentencing scheme.

MR. FINK opined that it would, and offered his understanding that judges currently are required to make findings under the Chaney criteria. He surmised that the drafter, in using the language currently in Section 7, is attempting to avoid the problem of a judge making "aggravator-like" findings. He elaborated: "If that's the case, maybe that could be more specific if this language is kept, because I don't think you can get away from requiring that the judge make Chaney criteria findings; ... you have to make findings so that it would be reviewable on a petition (indisc.)."

REPRESENTATIVE GARA asked whether it would be constitutional for the law to say that a judge could use Chaney criteria findings to increase a sentence.

MR. FINK opined that such wouldn't create a Blakely problem.

REPRESENTATIVE GARA surmised that such would keep the law similar to what is now with regard to sentence lengths.

1:43:19 PM

SIDNEY K. BILLINGSLEA, Attorney, Alaska Academy of Trial Lawyers (AATL), mentioned that her comments would echo those of Ms. Wilson and Mr. Fink, and characterized SB 56 as an end run around the intent of Blakely and the "follow up" cases - United States v. Booker and United States v. Fanfan, which deal with federal sentencing guidelines - in that it is about increasing penalties to convicted people while decreasing the government's burden of proof to accomplish those increases in penalties. As currently written, she opined, SB 56 strips appeals of sentences, denies SISs, and denies periodic sentencing in some cases. With regard to the accompanying letter of intent, she remarked that although it denies that the effects of the [legislation] are intentional, the effects clearly are not accidental, since "the numbers" were deliberatively placed in the bill.

MS. BILLINGSLEA opined that the sentencing ranges currently proposed in SB 56 don't take into account the minimum range of presumptive sentencing; in fact, she added, they don't appear to be addressed at all. Currently under [proposed] AS 12.55.155, the sentencing court can decrease the presumptive terms down by 50 percent in instances where the presumptive terms are more than four years, but must prove statutory mitigators by clear and convincing evidence. In contrast, however, the sentencing

court, under proposed AS 12.55.155, can impose four-year and two-year increases - depending on the crime - using only a preponderance of the evidence standard or a finding under the Chaney criteria. She opined that if SB 56 were to not increase penalties and only comply with Blakely, it should have a sentencing range that goes down to the statutorily mitigated minimum, which would be 50 percent of current presumptive sentences exceeding four years, and goes up one to two years above current presumptive sentences.

MS. BILLINGSLEA, offering an example, referred to Section 8, and suggested that the language being changed in subsection (c)(1) should set a range of two and half years up to five, six, or seven years. She said she recognizes, however, that that may be somewhat distasteful to those who want to increase penalties, but it would be consistent with the concept that findings of fact will no longer be required in order to increase penalties by a certain number of years. She suggested, though, that it would be a good idea to put in Section 7 language specifying that the court needs to make [Chaney criteria] findings, as has just been discussed by Representative Gara and Mr. Fink.

MS. BILLINGSLEA then referred to Section 2, specifically the language being added regarding periodic sentencing that says: "**, but only if an employment obligation of the defendant preexisted sentencing and the defendant receives a composite sentence of not more than two years to serve**". She said that she is not particularly opposed to the latter half of that language, but opined that if the goal is to encourage rehabilitation, then it is not necessary to add the stipulation that the employment obligation preexisted sentencing. Sometimes people, especially young people, need a wakeup call, and so when they're arrested and charged with a crime and prosecuted for one, that's sometimes what it takes to wake them up and make them responsible citizens. And sometimes bail conditions and the restrictive living that they go through pre-sentencing causes them to clean up their lifestyles and get jobs. Such people shouldn't be penalized for getting a job during the course of their prosecution, and by allowing them to stay employed, it also encourages the payment of fines and penalties; she therefore suggested that the language regarding preexisting employment obligations should be eliminated.

1:49:34 PM

REPRESENTATIVE GRUENBERG asked her to comment on the letter of intent.

MS. BILLINGSLEA said she'd not yet read it but has listened to Ms. Parkes's comments regarding it.

REPRESENTATIVE GRUENBERG said his concern is that since it is only letter of intent, judges, lawyers, prosecutors, and defendants will seldom see it, thus he intends to offer an amendment inserting the intent language into the bill so that it goes into the uncodified section of law.

MS. BILLINGSLEA replied:

> If, in fact, the letter of intent says what Ms. Parkes suggested that it says, which is, this bill is intended to address Blakely and not intended to increase the sentences, I think that ... sets up a cognitive dissonance, in my mind, because it doesn't say what it does. ... The fact of the matter is, it increases sentences across the board for people convicted of crimes in Alaska and it removes some of the rights and remedies that they have.

REPRESENTATIVE GRUENBERG mentioned that he'd be offering other amendments as well.

1:51:47 PM

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), remarked that there are a variety of solutions to "the Blakely problem" that the legislature could consider. He relayed that the ACS does have concern with Section 6 - which grants probation officers the authority to set conditions of probation - in that it constitutes a significant departure from current practice, but he is expecting that concern to be addressed via a forthcoming proposed amendment which would delete Section 6. He noted that Section 11 also gives the ACS concern in that it appears to contain a drafting oversight, one that would eliminate the authority to grant SISs in a whole variety of cases for which the courts still wish to able to grant SISs; he offered his belief that that concern, too, will be addressed via a forthcoming proposed amendment.

MR. WOOLIVER mentioned that the ACS does not yet know what impact SB 56 will have on the ACS, noting that the Blakely decision is responsible for most of the impact the ACS will experience. He remarked that it's hard to gage the bill's

fiscal impact. Without the bill, under Blakely, all cases involving aggravators would go to trial; with the bill, there will be a presumptive range, and so the ACS might still see cases involving aggravators that it would not previously have seen pre-Blakely. He suggested that under the bill, there might be incentives to settle because the penalties will be greater, though there might also be fewer incentives to settle for the same reason.

MR. WOOLIVER noted that years ago, when the state first got rid of all plea bargaining, the Alaska Judicial Council (AJC) conducted a study on the impact of that change and, according to his understanding, determined that initially there was a statistically significant increase in trials, but that changed within a year or so, with the number of trials decreasing to what it was before the change. He suggested that something similar might occur after the adoption of SB 56. He relayed that if the ACS does see a significant increase in the number of trials as a result of SB 56, it will seek additional funds via the regular budget process in order to offset costs.

1:55:00 PM

LIEUTENANT SHARP noted that he'd recently spoken in support of HB 78 and provided testimony regarding the 2004 Alaska Court of Appeals case, Reichel v. State, which he characterized as illustrative of the need for the changes proposed via Sections 26 and 30-31 of SB 56. He said that the DPS supports SB 56. Sections 26 and 30-31 address a police officer's role in detaining probationers/parolees. The proposed language outlines a good standard, he opined, for police officers to follow in instances such as presented in the Reichel case; the proposed language specifies that a police officer "may" - rather than "shall" - detain a probationer/parolee but would first be required to have a "reasonable suspicion" that a violation of probation/parole conditions has occurred. Also, the proposed language specifies that a police officer must have probable cause before he/she can arrest a probationer/parolee without a warrant.

LIEUTENANT SHARP said that unfortunately, many probationers/parolees violate conditions of their release. Police officers are on the street every day in Alaska, and often serve as the eyes and ears of parole/probation officers. He offered his belief that SB 56 provides a helpful tool for police officers as they strive to protect the communities and citizens of Alaska, and that it will aid probation/parole officers in

their efforts to have probationers/parolees meet conditions of release. A quick revocation of probation/parole is many times exactly what is needed to help with rehabilitation - it gets the person to rehab quickly, it gets them off the street, and it sends a message that they must comply with their conditions of release or they will have the privilege of probation/parole taken from them.

REPRESENTATIVE ANDERSON surmised that Sections 26 and 30-31 provide police officers with flexibility under reasonable parameters.

LIEUTENANT SHARP concurred with that summation.

REPRESENTATIVE GRUENBERG asked whether Sections 26 and 30-31 are grounded in Blakely.

LIEUTENANT SHARP offered his understanding that they are not.

CHAIR McGUIRE acknowledged that these sections constitute a fundamental policy change that doesn't come under Blakely.

2:00:12 PM

PORTIA PARKER, Deputy Commissioner, Office of the Commissioner - Juneau, Department of Corrections (DOC), said that the DOC supports the legislation. With regard to Section 6, she said that it was intended to codify the DOC's current practice, but the language goes too far and is problematic, so the DOC supports its removal at this time so as to give the DOC an opportunity to work with other members of the criminal justice system in creating proper language. The DOC does not want to substantially change [its current practice] or increase its authority, she assured the committee; rather, it merely wants to enforce conditions of probation as officers of the court.

MS. PARKER referred to the section pertaining to periodic sentencing [Section 2], and said that that section is very important to the DOC because, from a management point of view, one of the problems with periodic sentencing is that it requires the DOC to "book in, release, book in, release," whenever the court orders periodic sentencing. It is basically a court-ordered furlough, and the DOC is not involved in assessing the risk the offender presents when released into the community nor is he/she under any supervision. Periodic sentencing is very problematic from a population management perspective and is also very disparate between offenders.

MS. PARKER noted that the Alaska Court of Appeals has narrowed the aforementioned problem substantially via the 2002 State v. Felix decision. However, because some judges are still imposing periodic sentencing, Section 2 will help further limit its imposition. She said that it is not a huge problem but does occur 2-10 times a year. In conclusion, she said that the DOC strongly supports Section 2, as well as Sections 26 and 30-31, which pertain to police officers' ability to detain and question probationers, because it thinks that those proposed changes will benefit the community as a whole, particularly in rural communities where Village Public Safety Officers (VPSOs) - under special statutory authority - work closely with probation/parole officers to provide supervision of probation/parolees.

2:05:15 PM

MS. PARKER, in response to questions, relayed that the DOC has submitted zero fiscal notes for the first five years under SB 56; that when considering a bill's fiscal impact, the DOC looks at the potential overall impact on the entire department; and that the DOC cannot predict how many cases will be subject to charge bargaining and thus result in a sentence of fewer years, and so therefore it cannot determine whether the sentences imposed under SB 56 will be substantially different than those imposed currently.

REPRESENTATIVE GARA referred to the language change proposed on page 6, line 26 - "**12 to 16** [10] years" - and noted that the low end of the proposed range is two years more than the current sentence. He asked whether that is a typo. If it isn't a typo, he questioned, why isn't the DOC anticipating an increase in costs associated with this increase in sentence length.

MS. PARKER offered her belief that that language is not a typo, and suggested that the DOL could better address that issue.

CHAIR McGUIRE mentioned that the bill's fiscal impact will be further considered in the House Finance Committee.

2:09:27 PM

SUSAN PARKES, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law (DOL), explained that the language change proposed on page 6, line 26, is not a typo. She referred to a chart in members' packets that compares the current presumptive terms with the presumptive ranges proposed

in SB 56. In general, the proposed presumptive ranges start with the current presumptive terms, but in instances where the DOL felt that logically the sentences should be more substantial to begin with - such as for a first time conviction of an unclassified felony sex offense involving the use of a weapon or resulting in a serious injury, as referenced on page 6, line 26, or a second conviction of a class A felony sex offense, as referenced on page 7, line 18 - the ranges start two years higher than the current presumptive term. In both the aforementioned instances, and in only those two, the presumptive term is 10 years, but the bill proposes a range of 12-16 years; she indicated that the DOL felt that these changes would provide consistency within the new sentencing scheme, and that the current lower presumptive terms for those two types of convictions didn't seem to make sense and were thus the result of an oversight.

REPRESENTATIVE GARA characterized the increase in sentences for those two types of convictions as a policy call, but indicated that the increase doesn't make sense.

MS. PARKES agreed that the increase is a policy call, and suggested reviewing the chart to gain a better understanding of why the DOL felt the proposed increase to be in order given that both the current presumptive term and the proposed range for a first time conviction of a class A felony sex offense involving the use of a weapon or resulting in a serious injury - as referenced on page 7, line 16 - is 10 years and starts with 10 years, respectively.

2:17:22 PM

MS. PARKES turned attention to Section 7, and opined that it does not deny the right to appeal, that instead it just says that if one's sentence falls within the legislatively-designated standard range, then the sentence may not be reversed as excessive. She suggested that the language is attempting have the legislature, rather than the court of appeals, set sentencing ranges. She went on to say:

> The concern here ..., and the concern with some of the language that's been offered regarding findings, is that we will in fact find ourselves in another Blakely situation. We're setting up ranges, and the new scheme gives the judge the discretion to set within the range. Now, we anticipate [that] anyone who gets higher than the bottom of the range may want their

> sentence reversed as excessive. And we believe ..., in drafting this, that it is constitutional for the legislature to say, "If your sentence falls within our standard range, it's not excessive; we've made that policy call." If you set up language to say to a judge, "You must make findings [in order] to go higher in this range than the very bottom," I do believe you are possibly creating a Blakely problem, and I think that was in some other testimony.

REPRESENTATIVE COGHILL asked under what circumstances a person could [appeal a sentence].

MS. PARKES said that a review would be possible if there was some procedural error, if there was an argument that the judge considered information that wasn't properly presented, if the judge wouldn't consider information that the defendant felt should have been considered, or if the defendant proposed a mitigator that the judge didn't find. In other words, any appellate issue other than excessiveness can be raised. She mentioned that Rozkydal v. State, a 1997 Alaska Court of Appeals case, would not be affected by the language in Section 7.

CHAIR McGUIRE pointed out that a judge already has to make findings that are consistent with the Chaney criteria, and remarked that there is a concern that if it is not made abundantly clear that a sentence falling within the range set by the legislature cannot be reversed on the grounds that it is excessive, then the state could find itself dealing with another Blakely problem.

2:22:27 PM

REPRESENTATIVE COGHILL asked whether Chaney criteria can be appealed.

MS. PARKES offered her belief that under current law, judges do make findings pursuant to the Chaney criteria, and so requiring something generic like that to justify the sentence should not run afoul of Blakely. A problem would only arise, she suggested, if findings are required in order to go above the bottom of the proposed ranges.

2:23:32 PM

REPRESENTATIVE GRUENBERG surmised, then, that under the language in Section 7, a sentence cannot be reversed as excessive even if one claims that it is excessive under Chaney criteria.

REPRESENTATIVE GARA remarked that there are two parts to Section 7, and offered his belief that one part says that a person can no longer appeal a sentence as excessive if it falls within the range established by the legislature, and that the other part says that a judge no longer has to issue findings to justify an increased sentence as long as it falls within that range. The appeal right being taken away is the right of person to say, "I think my sentence [is] too long"; however, that really is a person's main reason to appeal a sentence - it's the crux of the appeal. He mentioned that he will be offering an amendment to delete section 7, and that the drafter has relayed to him that even without Section 7, the bill will still comply with Blakely.

REPRESENTATIVE GARA, referring to the part of Section 7 pertaining to a judge no longer having to issue findings in order to increase sentences within the range, said:

> I think what people are saying is, we don't want judges to go on the record and say why they increased a sentence, because they might say something that the United States Supreme Court has said they're not allowed to consider. And by putting it on the record, we might see that they violated Blakely. And so we'll just let them not say why they're increasing a sentence; we'll let them keep that secret. As long as they keep it secret, nobody will be able to say they considered something that the [U.S.] Supreme Court said they weren't allowed to consider ... [under] Blakely.
>
> I think that would be an awful thing for us to do, to say judges can secretly violate the United States Constitution by not telling us why they're going to increase a sentence and, therefore, "We're going to relieve you of the burden of putting your findings on the record." In this range, between 5-8 or 7-11 [years], the [U.S.] Supreme Court has said judges can consider certain factors - they're generally the Chaney factors - [but] they can't consider any of those 30 factors in our aggravators. If you want to use any of those aggravators, you have to go and do a jury trial.

> But you [can consider] these limited things that don't require these extra aggravator findings. So the United States Supreme Court really came in and they said, "Look, the easy way to do this is, anything over the presumptive term, go to a jury if you want something more." We're going to say to judges, "Well, you can do more than the presumptive term," we're going to give them some flexibility - and that's okay, I don't mind doing that - but they're still not allowed to consider these extra factors that the United States Supreme Court has said you have to go to a jury to prove. [Judges will only be able to use] the Chaney factors.
>
> So I think the subtext of what's going on is, I think people are worried that if a judge is required to put their findings on the record to increase a sentence, then the court of appeals might find out they considered things they weren't allowed to consider. Well I think that's the exact reason why they should put that on the record; they shouldn't be considering things they're not allowed to consider. They should let us know what they're considering. If they're considering factors the United State Supreme Court said you're not allowed to look at, well that's now on the record.

CHAIR McGUIRE pointed out that it is the legislature's prerogative as policy makers to decide what presumptive sentence they might choose to assign to a particular crime. And so it would be perfectly compliant with Blakely as well for the legislature to forgo using the proposed ranges and simply use the highest number in those proposed ranges, to simply say, for example, "We find that for a first offense felony with a weapon it's going to be 12 years." The legislature could then also put the onus on judges to look at mitigators in order to reduce the sentence. She offered her belief that there is not some insidious plot [to increase sentences]; rather, the legislation offers a way to comply with Blakely and still get at the underlying policy goals that this legislature has set. She surmised that members would agree that having a separate trial for every aggravator is impractical from a fiscal standpoint.

REPRESENTATIVE GARA agreed with that point, but said the committee should consider that one of the purported goals of the bill is to not increase sentences, to come up with, as much as possible, something that looks like the existing sentence

structure. Therefore, he indicated, even though the legislature has the authority to increase sentences, it should forgo doing so without careful individual consideration of each proposed sentence increase. He suggested that they delete section 7, surmising that doing so will add accountability to the system because it is better for judges to say why they are [increasing/decreasing] a sentence. Deleting Section 7 will leave the current appeal rights in place, particularly the basic right to appeal a sentence on the grounds that it is too long. With the deletion of Section 7, he remarked, he would [be willing to] give the DOL what it wants with regard to increasing sentences as the bill currently proposes, since accountability protections will be in place.

REPRESENTATIVE GARA relayed that he'd spent several days working with Legislative Legal and Research Services, the OPA, and the PDA to come up with a way to accomplish "these two goals and not violate Blakely," and the response he got from all he talked with was that Blakely won't be violated by requiring courts to issue findings and by allowing the right to appeal [a sentence as excessive].

2:31:58 PM

MS. PARKES said she supports Chair McGuire's comments regarding the legislature's authority to set ranges, and offered her belief that once ranges are set, no further findings are required, that in fact, if the bottom of the range is set as the standard without findings of any type, [then issuing findings] would be running afoul of Blakely.

2:32:48 PM

REPRESENTATIVE RALPH SAMUELS, Alaska State Legislature, speaking as the sponsor of HB 78, companion bill to SB 56, made comments regarding the original version of SB 56 and current law. He opined that CSSB 56 provides judges with a lot of latitude, and that if [Section 7 is removed], then every single case will be appealed, which will engender fiscal repercussions. [Victims] have rights too with regard to sentencing issues, he pointed out. Representative Samuels said he would oppose any amendment deleting Section 7, and offered his belief that the sponsor of SB 56, Senator Gene Therriault, Alaska State Legislature, would oppose it as well.

2:34:07 PM

REPRESENTATIVE COGHILL offered his belief that a lot of cases are "charge bargained," that such is troublesome because victims also feel the weight of charge bargaining, and that it's a huge issue. He relayed his understanding that charge bargaining doesn't even occur until a person has been found guilty, and that at that time a judge has the ability to find mitigators.

MS. PARKES concurred.

REPRESENTATIVE COGHILL said it seems like under SB 56, a defendant has significant rights all during the process.

MS. PARKES, in response to a question, said that if the state has entered into a plea agreement with a defendant, the judge can reject it.

REPRESENTATIVE COGHILL opined that the proposed sentencing range does not seem excessive as long as the right to appeal is not done away with except on the grounds that a sentence is excessive.

MS. PARKES concurred with Representative Coghill. She pointed out that if a judge finds aggravators and imposes a sentence above the standard range, then the limitation proposed in Section 7 regarding appeals would not apply.

2:38:02 PM

REPRESENTATIVE ANDERSON opined that the bill doesn't have to address only Blakely.

REPRESENTATIVE GRUENBERG said he doesn't have a problem with "these" provisions being in the bill as long as there is adequate opportunity to consider the ramifications of each particular section.

CHAIR McGUIRE mentioned that the committee would soon be addressing proposed amendments. She relayed that one of her concerns about the letter of intent is that it should reflect that the bill is doing more than just complying with Blakely. She posited that this is an opportunity as policy makers to look at what they want to set as appropriate sentencing ranges for judges to consider.

2:43:13 PM

REPRESENTATIVE GRUENBERG suggested that perhaps they should establish a sentencing commission to consider all the ramifications of raising sentences, and provide that commission with a due date by which it must report its findings to the legislature. He expressed concern about rushing the bill through the process, and posed the question, "Aside from a Blakely fix, why are we not taking the time to do this in a really comprehensive manner?"

MS. PARKES said she does not agree that there is a lot in the bill that doesn't pertain to Blakely.

REPRESENTATIVE GRUENBERG pointed out, however, that the bill takes away a person's right to appeal.

MS. PARKES reiterated her belief that the bill is not doing that; rather, the bill is simply saying that a sentence cannot be reversed on the grounds that it's excessive as long as it's within the range set by the legislature. Noting again that the bill is changing presumptive sentencing terms to presumptive sentencing ranges, she characterized the change with regard to appeals as an appropriate, responsive change. She remarked:

> I think the most important thing is ... [that] right now, our criminal justice system literally is in chaos: we have uncertainty with every [sentence]. That's the rush.

REPRESENTATIVE GRUENBERG countered, "But is it in chaos because of the right of appeal?"

MS. PARKES said no, that the criminal justice system is in chaos because of Blakely, which the bulk of SB 56 addresses. That's the urgency. Until something is in place, that chaos will continue. She went on to describe what some of that chaos entails:

> [We have] judges making opposite decisions; we have no certainty; everybody's appealing; we've got defense attorneys filing motions in one case saying we have to take aggravators to grand jury, and then in another case that same public defender's filing a motion saying we can't legally take them to the grand jury.

2:46:13 PM

REPRESENTATIVE GRUENBERG said he wants to focus just for the moment on the right of appeal, and characterized the provision pertaining to that as one of the weaknesses in the bill. Before taking away that right, he asked, why not ask a commission to consider the issue.

MS. PARKES acknowledged that the legislature has the authority to do that, as well as to take out any piece of the bill that it considers inappropriate. However, she asked that the committee continue to consider complying with Blakely expeditiously via SB 56 as a whole.

2:47:05 PM

CHAIR McGUIRE suggested that the committee begin considering proposed amendments.

REPRESENTATIVE GARA asked for clarification on the issue of bargaining.

MS. PARKES replied, "There are cases that are only charge bargained, there are cases that are charge and sentenced bargained, there are [cases] that are only sentenced bargained [and pled] as charged; so it can occur in all formations."

2:49:52 PM

CHAIR McGUIRE made a motion to adopt Amendment 1, which contained a purpose statement at the end and which read [original punctuation provided]:

> Page 5, line 19, following "**one to three years;**" insert:
>
> **a defendant sentenced under this subparagraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085 if, as a condition of probation under AS 12.55.086, the defendant is required to serve an active term of imprisonment within the range specified in this subparagraph, unless the court finds that a mitigation factor under AS 12.55.155 applies;**
>
> Page 6, line 9 - 14
>
> Delete all material and insert the following"

(g) If a defendant is sentenced under (c), [(d) 1] , (d) 2, **d (3), d (4),** [(e) 1], (e) 2, (e) 3, **(e) 4,** or (i) of this section, except to the extent permitted under AS 12.55.155 - 12.55.175,

[(1) imprisonment may not be suspended under AS 12.55.080;]

[(2) i] **(1) I**mposition of sentence may not be suspended under AS 12.55.085;

[(3)] **(2)** terms of imprisonment may not be otherwise reduced.

The purpose of this amendment is to maintain the court's ability to impose a Suspended Imposition of Sentence (SIS) for a first felony offender who commits an eligible C or B felony. The bill was not intended to make a change in current SIS practice; the amendments should restore the status quo.

CHAIR McGUIRE offered her belief that Amendment 1 would correct the language in the bill regarding Suspended Imposition of Sentence (SIS).

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

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 2, which read [original punctuation provided]:

Page 3 line 15 - page 4 line 9

Strike section 6

CHAIR McGUIRE asked whether there were any objections to Amendment 2. There being none, Amendment 2 was adopted.

REPRESENTATIVE GARA made a motion to adopt Amendment 3, labeled 24-LS0308\L.1, Luckhaupt, 1/28/05, which read:

Page 4, lines 10 - 17:
Delete all material.

Renumber the following bill sections accordingly.

Page 24, line 4:
Delete "Sections 1, 4, 6, 26, and 29 - 31"
Insert "Sections 1, 4, 6, 25, and 28 - 30"

Page 24, lines 5 - 6:
Delete "Sections 2, 3, 5, 7 - 25, and 27 - 28"
Insert "Sections 2, 3, 5, 7- 24, and 26 - 27"

Page 24, line 7:
Delete "secs. 8 - 21"
Insert "secs. 7 - 20"

REPRESENTATIVE COGHILL objected for the purpose of discussion.

REPRESENTATIVE GARA indicated that Amendment 3 deletes Section 7, thus retaining current law, which, he opined, provides that a judge must state on the record, either orally or in writing, his/her reasons for imposing a sentence, and provides that a defendant has the right to appeal a sentence as excessive. He offered his belief that the drafter is of the opinion that [adoption of Amendment 3] will not violate Blakely. He went on to say:

> The reason why judges issue findings when they sentence somebody is so you know that what they did was thought out. And it's so that other judges can see how similarly situated crimes have been sentenced in the past. So you have more sentence uniformity instead of sentence disparity. If you let judges keep their reasons secret, then you're going to not give future judges guidance on what kind of sentence a particular crime should get. So by issuing findings, you create this broad body of a record, so people know what kind of worst conduct justifies what kind of worst sentence. ...
>
> It's frankly also useful to people who observe the court proceedings, including victims, to have a judge go on the record and ... say, "I think this is a case that justifies a longer sentence because I think the conduct was particularly egregious." And I think ... a victim, I think the public, wants to hear somebody's sentenced and why somebody's being sentenced to what their being sentenced for; I think they want to hear the reasons for the punishment. And so it helps with the uniformity. Frankly, there is this aspect of fairness within the judicial process; you want to know

that you're dealing with people fairly, ... and so I think it's fairer.

I think it results in more uniform sentences, because you would hate to have a whole bunch of people of one race always get the five-year sentence and a whole bunch of people of another race always get the eight-year sentence, and never know why. At least a judge should go on the record and say why, ... and it's not a burden on a judge to ask them; I think that's just doing their job. They're supposed to think things through, and I don't think it hurts them to make them say ... how they reached their conclusion.

REPRESENTATIVE GARA added:

The second part [of Amendment 3] is, requiring that the same appeal rights that we have today exist in the future. ... By issuing findings and letting things go up on appeal, the [Alaska] Court of Appeals, over time, will develop a body of law that people can rely on in issuing the proper sentence in the future; again, it helps with uniformity because you'll know you'll go up to the [Alaska] Court of Appeals, you'll see that certain kinds of conduct deserve a longer sentence, and, since you'll have this written record from the [Alaska] Court of Appeals, I think it will be helpful to everybody in issuing sentences. And I think it might actually help resolve cases more quickly also by forcing plea bargains.

So I don't think there's anything wrong with the historic process we've had in this nation of requiring judges to say why they're doing something and [of letting] ... somebody have their basic right to an appeal if they think their sentence is too long. ... My impression, at least from the limited work that I did in ... criminal law, was that [defendants] didn't win [their] sentence appeals too often, but at least it gives somebody the chance. And ... with those things, ... then I'll let the state change all ... sentences [as proposed in the bill]. ...

I think, frankly, I'm being pretty flexible on this. I'm letting you replace the strict term and I'm letting you implement this big range, and the reason I'm comfortable letting you do that, with my

amendment, is because I know at least the judges are forced to think things through, because that's what requiring them to put their findings on the record gets them to do, and at least there's this aspect of fairness that allows the appeal to go forward.

So ... I think, with my change, you can have your range and I don't think it will radically change the sentencing numbers from what we have today. But once you make the system less accountable and don't require findings to be put on the record and don't allow appeals, then I think the sentences are going to up and up and up. And if that's our intention, then I think we should just go crime by crime and decide what the appropriate sentence is with a new bill instead of doing it with a blanket bill like this.

2:57:55 PM

REPRESENTATIVE ANDERSON offered his belief that Amendment 3 could strip the heart of the bill, and asked the DOL to address Representative Gara's points.

MS. PARKES asked whether Amendment 3 would do anything other than delete Section 7.

REPRESENTATIVE GARA indicated that it would retain current law regarding issuing findings and appealing sentences on the grounds of excessiveness.

REPRESENTATIVE GRUENBERG offered his understanding that in addition to deleting the language of Section 7, Amendment 3 makes conforming changes to the rest of the bill.

MS. PARKES said the DOL's concern is that the legislature should be setting the sentencing range, rather than the [Alaska] Court of Appeals just because a judge doesn't say "the magic words". She offered an example of a case that was remanded back to court because the Alaska Court of Appeals felt that the judge didn't articulate his reasons for the sentence well enough. She opined that once sentence ranges are instituted, adoption of Amendment 3 will engender more appeals based simply on the fact that the defendant got sentenced at the top of the range instead of at the bottom.

2:59:57 PM

REPRESENTATIVE SAMUELS opined that 90 percent of cases are "dealt away anyway," and thus consistency will remain in those cases. He predicted that as soon as sentencing ranges are instituted, everyone will be appealing his/her sentence if it is above the bottom of the range. He went on to remark, "Justice delayed is justice denied," and offered his belief that even for what might be considered a simple case, the appeal process can last for years and years. He also opined that the entire bill provides a reasonable way of complying with Blakely.

REPRESENTATIVE COGHILL indicated that he would be maintaining his objection to the adoption of Amendment 3.

3:01:55 PM

REPRESENTATIVE GRUENBERG referred to State v. Browder, a 1971 Alaska Supreme Court case, and opined that both it and Rozkydal are on point. He offered his understanding that in Browder, the state sought appellate review of a lower court decision, with the question being whether that was permissible, since at that time the legislature had placed substantial statutory restrictions on the right of appeal. In that case, it was the state's right of appeal, which was much narrower than the defendant's right of appeal, that was at issue. The Alaska Supreme Court said that even though there was no statutory right of appeal, the state had a right to file a petition for review.

REPRESENTATIVE GRUENBERG surmised, therefore, that even though an appeal can be specifically limited, other forms of review could not be, and, thus, if a statute were construed as prohibiting the court from reviewing any ruling in a criminal case, except those rulings expressly made appealable, then that statute would raise serious constitutional problems under the supremacy clause, which, he opined, says that the highest court in the land is the supreme court.

REPRESENTATIVE GRUENBERG asked, "Does this not pose a significant constitutional question as to the constitutionality of the language ... on page 4, line 13?" He said that even though that language doesn't specifically use the term "appeal", he believes that the defendant retains the right to file a petition for review under the Browder line of authority. The more important question, he remarked, is whether that provision, if Amendment 3 is not adopted, will create an unconstitutional statute and thus engender the expenses associated with determining its constitutionality.

MS. PARKES offered her belief that the 1968 Alaska Supreme Court case, Bear v. State, is the ruling case; it says that the legislature has established, via statute, maximum and minimum sentences for each offense, and that such are not reviewable by [the Alaska Supreme Court]. In response to this ruling, the legislature, via statute, specifically gave the Alaska Supreme Court the authority to review sentences, and so this is the statutory right to review sentences that is referred to in the Rozkydal case. She concluded by saying that based on her understanding of the Bear case, she doesn't think that [the language in Section 7] presents any constitutional issues.

3:06:42 PM

CHAIR McGUIRE suggested to Representative Gara that in the interest of time, he withdraw Amendment 3 and move it again at the bill's next hearing.

REPRESENTATIVE GARA withdrew Amendment 3.

[CSSB 56, as amended twice, was held over.]

ADJOURNMENT

3:07:06 PM

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:07 p.m.