ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 4, 2005
1:15 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative John Coghill

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."

- MOVED HCS CSSB 56(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 88
"An Act relating to certain weapons offenses involving minors; to aggravating factors in sentencing for certain offenses committed against a school employee; and providing for an effective date."

- BILL HEARING POSTPONED TO 2/7/05

HOUSE BILL NO. 41
"An Act relating to minimum periods of imprisonment for the crime of assault in the fourth degree committed against an employee of an elementary, junior high, or secondary school who was engaged in the performance of school duties at the time of the assault."

- BILL HEARING POSTPONED TO 2/7/05

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
01/31/05	(H)	Heard & Held
01/31/05	(H)	MINUTE(JUD)
02/02/05	(H)	JUD AT 1:00 PM CAPITOL 120
02/02/05	(H)	Heard & Held
02/02/05	(H)	MINUTE(JUD)
02/04/05	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JOSHUA FINK, Public Advocate
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of proposed amendments to SB 56.

LINDA WILSON, Deputy Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of proposed amendments to SB 56.

PORTIA PARKER, Deputy Commissioner
Office of the Commissioner - Juneau
Department of Corrections (DOC)
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of proposed amendments to SB 56.

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 proposed amendments to SB 56.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:15:44 PM. Representatives Dahlstrom, Gara, Gruenberg, Anderson, Kott, and McGuire were present at the call to order. Representative Coghill was excused.

SB 56 - CRIMINAL LAW/PROCEDURE/SENTENCING

1:16:23 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." [CSSB 56(JUD) had been amended twice on 1/31/05, and the question of whether to adopt a proposed Amendment 3 was left pending on 2/2/05.]

CHAIR McGUIRE asked Representative Gara to withdraw 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"

1:17:02 PM

REPRESENTATIVE GARA withdrew Amendment 3.

1:17:20 PM

REPRESENTATIVE GARA made a motion to adopt Amendment 4, which read [original punctuation provided]:

Section 7 of the bill should be deleted and replaced with the following:

*** Sec. 7.** AS 12.55.120 is amended by adding a new subsection to read:

(e) A sentence within an applicable presumptive range set out in AS 12.55.125, or a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127, may not be appealed to the court of appeals under this section or AS 22.07.020 on the ground that the sentence is excessive. However, such a sentence may be reviewed by the supreme court on the grounds that it is excessive through a petition filed under rules adopted by the supreme court.

CHAIR McGUIRE objected for the purpose of discussion.

REPRESENTATIVE GARA explained that Amendment 4 would leave the current findings provisions of law as is, and would provide the supreme court the discretion, through petition, to review sentences on the grounds that they are excessive. He indicated that if Amendment 4 is adopted, he would be amenable to considering alternative language that accomplishes the same things.

1:18:49 PM

CHAIR McGUIRE relayed that she and Representative Gara have been working together with others on Amendment 4 and arrived at a proactive approach, to say that the supreme court, rather than the court of appeals, may accept a petition based on an appeal of excessiveness.

CHAIR McGUIRE withdrew her objection.

REPRESENTATIVE GRUENBERG indicated that he had questions.

1:19:52 PM

REPRESENTATIVE GARA said that the language in Amendment 4 appears to do what he and Chair McGuire want it to do, which is to leave the discretionary review authority with the supreme court instead of with the court of appeals. He added that he and Chair McGuire feel that the Alaska Supreme Court already has this discretionary review authority, but if that court feels that it does not currently have that authority, Amendment 4 will clarify that it does.

REPRESENTATIVE GRUENBERG said he objects to Amendment 4, and offered his belief that it will merely create an additional step in the process without changing the outcome of any cases.

REPRESENTATIVE GARA asked for clarification.

1:22:32 PM

REPRESENTATIVE GRUENBERG said that if what is wanted is a prohibition against any court reversing on the grounds of excessiveness, such cannot be done, because the Alaska Supreme Court, via a petition for review, always has the authority to review sentences.

CHAIR McGUIRE pointed out, however, that she and Representative Gara want to ensure that the Alaska Supreme Court does have that authority, that they want what Representative Gruenberg has just described to occur, which is for the Alaska Supreme Court to accept petitions for review of sentences that are claimed to be excessive.

REPRESENTATIVE GRUENBERG opined that Amendment 4 does not accomplish that goal, that it will have the opposite effect.

CHAIR McGUIRE disagreed.

1:25:39 PM

REPRESENTATIVE ANDERSON offered his belief that Amendment 4 will limit the number of appeals.

REPRESENTATIVE GRUENBERG, after further review of Amendment 4, concurred that it will force defendants to use the Alaska Supreme Court petition process.

1:27:44 PM

REPRESENTATIVE GARA pointed out that the Alaska Supreme Court has the right to review what the Alaska Court of Appeals does, but does so only a few times a year. He said that ideally what he wanted to do was to say that the discretionary review would be done by the Alaska Court of Appeals and not the Alaska Supreme Court. However, according to the [Alaska State] Constitution, the Alaska Supreme Court still has the authority to conduct an additional review afterward, and thus he didn't feel that he could get consensus from the committee to change Section 7 as he would prefer; Amendment 4 seeks to build consensus.

REPRESENTATIVE GRUENBERG said he'd be more comfortable having the language in Section 7 reflect Representative Gara's ideal concept because it would be more efficient, though they might have to amend a court rule.

CHAIR McGUIRE said that there is a concern that by instituting the presumptive ranges as proposed via SB 56, the Alaska Court of Appeals will be overrun with appeals regarding sentence length. She characterized such as transforming the court of appeals into a sentencing court. In response to comments, she suggested that the committee conclude its discussion of Amendment 4.

REPRESENTATIVE ANDERSON offered his belief that Amendment 4 will prevent excessive appeals, will allow scrutiny via the petition process, and will afford due process.

1:32:28 PM

A roll call vote was taken. Representatives Kott, Dahlstrom, Gara, Anderson, and McGuire voted in favor of Amendment 4. Representative Gruenberg voted against it. Therefore, Amendment 4 was adopted by a vote of 5-1.

1:33:10 PM

REPRESENTATIVE GRUENBERG [made a motion to adopt] Amendment 5, labeled 24-LS0308\L.5, Luckhaupt, 2/1/05, which read:

Page 17, line 1, following "behavior":
Insert "; **(17) the defendant, at the time of sentencing, is actively participating in or has successfully completed treatment that is relevant to the offense and that was begun after the offense was committed**"

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE GRUENBERG relayed that the concept of Amendment 5 was suggested by the Office of Public Advocacy (OPA), to provide a mitigating factor if a defendant, at the time of sentencing, is actively participating in or has successfully completed treatment relevant to the offense and that treatment began after the offense was committed. Amendment 5 will encourage people to actively and in good faith participate in treatment. Consideration of this mitigating factor will be optional, not mandatory.

REPRESENTATIVE ANDERSON surmised that the mitigator proposed via Amendment 5 won't ever be applied in situations where the defendant is indigent, because treatment is costly, and therefore this proposed mitigator will only be applied in cases where the defendant can afford to pay for treatment before sentencing.

JOSHUA FINK, Public Advocate, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), pointed out, however, that there are a lot of programs that indigent defendants can participate in and thereby qualify for consideration of this proposed mitigator.

REPRESENTATIVE GARA said he agrees with Representative Anderson in concept, but supports Amendment 5 nonetheless. On the issue of treatment, he offered his belief that not enough is being done in that regard, that a lot of programs have suffered as a result of legislative budget cuts, and characterized this trend as the wrong way to go; if a person is willing to receive treatment, it shouldn't matter whether he/she has money. He opined that [alcoholism/drug abuse] is one of the biggest problems the state faces, that it's one of the reasons there are

so many prisoners in state facilities, and that it's one of the reasons for the state's high incidence of family abuse; "to save a couple of bucks by rolling back treatment programs for people who can't afford them" is the wrong way to go, he reiterated.

1:37:27 PM

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 5. Representatives Kott, Dahlstrom, Anderson, and McGuire voted against it. Therefore, Amendment 5 failed by a vote of 2-4.

1:38:07 PM

CHAIR McGUIRE referred to Amendment 6, which read [original punctuation provided]:

> Page 17, line 1, following "behavior":
> Insert ";
> **(17) the defendant committed the offense while suffering from a mental disorder or disability, including fetal alcohol spectrum disorder, that was insufficient to constitute a complete defense, but that significantly affected the defendant's conduct"**

CHAIR McGUIRE noted that Amendment 6 proposes a mitigator based on the fact that the defendant committed the offense while suffering from a mental disorder or disability, including fetal alcohol spectrum disorder (FASD).

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 6.

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE GRUENBERG explained that the concept of Amendment 6 was suggested by the OPA, and that the term "mental disorder" was suggested by the Alaska Mental Health Trust Authority (AMHTA). He remarked that there is a constitutional question regarding whether people suffering from the conditions referred to in Amendment 6 can, constitutionally, receive the same punishment as those who do not suffer from such conditions. Amendment 6 will allow the court to consider such conditions as a mitigating factor when determining a sentence.

LINDA WILSON, Deputy Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), in response to questions, explained that fetal alcohol spectrum disorder (FASD)

is the term currently used to describe what was once known as fetal alcohol syndrome (FAS) and includes a range of similar diagnoses.

REPRESENTATIVE ANDERSON used examples to point out that the victim won't care if the defendant has a mental disorder. Therefore, the question becomes one of how much latitude should be afforded to those who commit crimes against a person. He said he would reject amendment 6 for that reason.

1:41:31 PM

CHAIR McGUIRE asked Representative Gruenberg whether he would be amenable to amending Amendment 6 to say, "the defendant has committed an offense other than an offense under [AS] 11.41".

REPRESENTATIVE GRUENBERG said yes.

REPRESENTATIVE ANDERSON said, "Or arson."

CHAIR McGUIRE made a motion to amend to Amendment 6 such that it would contain the language, "the defendant has committed an offense other than an offense under [AS] 11.41 or arson".

REPRESENTATIVE GRUENBERG suggested making the amendment to Amendment 6 a conceptual amendment.

CHAIR McGUIRE indicated that the question of whether to adopt Amendment 6, as amended, was before the committee.

REPRESENTATIVE ANDERSON removed his objection to Amendment 6, as amended.

CHAIR McGUIRE asked whether there were any further objections. There being none, Amendment 6, as amended, was adopted.

1:42:46 PM

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 7, labeled 24-LS0308\L.4, Luckhaupt, 2/1/04, which read:

> Page 2, lines 5 - 6:
> Delete "**an employment obligation of the defendant preexisted sentencing**"
> Insert "**the defendant has an employment obligation**"

REPRESENTATIVE GRUENBERG recalled that Sidney K. Billingslea, Alaska Academy Of Trial Lawyers (AATL), suggested that the current language should be changed because the employment obligation could be periodic or could occur at the time of sentencing or afterward, so the court should have the discretion to allow periodic sentencing if it determines that such is necessary.

REPRESENTATIVE ANDERSON objected. He opined that Amendment 7 will lead to uncertainty, that the Department of Corrections (DOC) won't approve of it, and that the legislature shouldn't give defendants that much latitude. He suggested that they keep the language in the bill as is.

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REPRESENTATIVE GARA posited that the provision on page 2, lines 5-7, is only there because people assume that the courts are doing something that they're not. He said that he has a problem with the provision Amendment 7 would change, because it's very rare for the court to allow someone to leave jail in order to go to work. He offered his belief that the only time it's used is in situations where not using it could cause a family to go on public assistance or become homeless, and so the courts will let someone out only on very stringent conditions and with a third party custodian. The current language in the bill will take away the court's discretion to help keep families together, he opined, and said he would prefer to just delete that provision of the bill entirely.

1:47:48 PM

PORTIA PARKER, Deputy Commissioner, Office of the Commissioner - Juneau, Department of Corrections (DOC), relayed that periodic sentencing was a serious problem for the DOC, but was partially fixed via the 2002 Alaska Court of Appeals' ruling in State v. Felix. She offered an example of an offender who was booked in and out of jail every weekend so that he could work during the week. Periodic sentencing is very time intensive and requires a lot of manpower, and the court realized this and so limited its use quite a bit. However, there are still instances where judges are ignoring the Felix decision, and the people they are releasing are not being supervised at all, either by third party custodians or otherwise. This results in offenders being treated differently, and creates a serious management problem. So even though periodic sentences are only being imposed 2-10

times a year now, it still creates public safety problems and puts a burden on the DOC.

1:50:08 PM

REPRESENTATIVE GARA offered his belief that the language in the bill only affects those that are to be incarcerated for more than two years. He indicated a reluctance to accept the language in the bill just because the DOC is experiencing a management problem; rather, a determining factor for him would be whether the discretion to impose periodic sentences is being significantly abused.

CHAIR McGUIRE said she thought that the language in bill that Amendment 7 proposes to change is merely codifying the Felix decision.

1:51:30 PM

SUSAN PARKES, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law (DOL), offered her belief that [Section 2] does codify the Felix decision, but the stipulation that periodic sentencing be imposed only on those who've been sentenced for not more than two years was added in the Senate. She said there are instances of [abuse of] this court-ordered furlough; for example, one of the reasons used recently was for a dental appointment because the prisoner didn't feel she was getting adequate dental care in the DOC facility. Having the Felix decision codified in statute as currently proposed in the bill will be very helpful to both the DOC and the DOL, she opined, particularly given that it will most likely only be applied to those convicted of a lesser crime.

1:54:42 PM

REPRESENTATIVE GRUENBERG argued that Amendment 7 attempts to make the language in the bill more reasonable in the few cases that periodic sentencing is granted. He offered his belief that the language being added via page 2, lines 5-7, could potentially create significant equal protection problems, particularly in Bush areas of the state, because it will create two classes of citizens.

1:56:18 PM

A roll call vote was taken. Representatives Gruenberg and Gara voted in favor of Amendment 7. Representatives Anderson, Kott, Dahlstrom, and McGuire voted against it. Therefore, Amendment 7 failed by a vote of 2-4.

1:57:01 PM

REPRESENTATIVE GRUENBERG [made a motion to adopt] Amendment 8, labeled 24-LS0308\L.2, Luckhaupt, 2/1/05, which, along with an attached reasoning statement from the PDA [original punctuation provided], read:

Page 1, lines 4 - 7:
Delete all material.

Renumber the following bill sections accordingly.

Page 24, line 4:
Delete "Sections 1, 4, 6, 26, and 29 - 31"
Insert "Sections 3, 5, 25, and 28 - 30"

Page 24, lines 5 - 6:
Delete "Sections 2, 3, 5, 7 - 25, and 27-28"
Insert "Sections 1, 2, 4, 6 - 24, 26, and 27"

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

REASONING:

Section 1 of the bill is unconstitutional because it seeks to eliminate the right to indictment by the grand jury of an aggravating factor that essentially becomes an element of the crime charged. Article I, Section 8 of the Alaska Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

In Blakely the U.S. Supreme Court required that its ruling in Apprendi be applied, that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The prescribed statutory maximum is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Justice Scalia in his majority opinion reminded that "the

Constitution limits States' authority to reclassify elements as sentencing factors.." 124 S.Ct. 2531, 2537, fn. 6. He also reiterated the point made by J. Bishop in a treatise that "every fact which is legally essential to the punishment" **must be charged in the indictment** and proved to the jury. 124 S.Ct. at 2536, fn. 5. Justice Scalia criticized the challenged practice of labeling elements as sentencing factors as a regime "in which the defendant, with **no warning in** either **his indictment** or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment." 124 S.Ct. at 2542.

In Alaska our Supreme Court in State v. Malloy, 46 P.3d 949 (Alaska 2002) upheld the Court of Appeals' pre-Apprendi view in its earlier opinion in the case, based on Donlun v. State, 527 P.2d 472 (Alaska 1974), that general principles of fairness and notice, grounded in our constitutional guarantees of due process, right to trial by jury, and the **guarantee of grand jury indictment**, **require that aggravated circumstances that provide for increased punishment be set forth in the indictment** and proven at trial. 46 P.3d at 952. The Supreme Court stated: "Donlun accurately presaged Apprendi's holding that 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." 46 P.3d at 954.

Eliminating the need to present an aggravating factor to a grand jury is unconstitutional because it violates a defendant's constitutional right to grand jury indictment for what is essentially an element of the charged offense.

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE GRUENBERG explained that Amendment 8 would delete Section 1 of the bill and make conforming changes; offered his belief that Amendment 8 is constitutionally based; and read from two handouts he said were from the U.S. Supreme Court case, Blakely v. Washington, and the Alaska Supreme Court case, Malloy v. State, to illustrate that every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury, and that there must be a warning in either

the indictment or the plea regarding what the ultimate sentence will be.

REPRESENTATIVE GRUENBERG went on to note that in the Malloy case, the Alaska Supreme Court case, Donlun v. State, was discussed and interpreted to mean that Alaska's guarantee of grand jury indictment derives from Article I, Section 8, of the Alaska State Constitution and requires that the charging document specify the pertinent aggravating factors. He pointed out that the Malloy decision recognized, via the Donlun case, that the U.S. Supreme Court case, Apprendi v. New Jersey, also holds that facts must be charged 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. In conclusion, he offered his belief that it is constitutionally required that if [the prosecution] is going to seek an aggravating factor, that fact must be presented to the grand jury and be contained in the indictment.

2:00:34 PM

REPRESENTATIVE ANDERSON offered his understanding that currently, the state gives the defense attorney notice, pretrial, of aggravating factors. He opined that Amendment 8 will change things such that aggravating factors must go to the grand jury, and predicted that the DOL won't be in favor of such a change. He offered an example using AS 12.55.155(d)(22) as illustrative of how Amendment 8 would "harm the current system" because the prosecution would have to go before a second grand jury if additional aggravating factors are discovered, for example, 10 days after the original grand jury indictment. With regard to the purpose of grand jury indictments, he read as follows from the "Notes to Decisions" - located in Volume 1 of the Alaska Statutes published by the Alaska Legislative Counsel and annotated and printed by LexisNexis - regarding Article I, Section 8, of the Alaska State Constitution:

> The purpose served by grand jury indictment is to give one accused of a serious offense the benefit of having private citizens judge whether there is a probable cause to hold the accused for trial.

REPRESENTATIVE ANDERSON said he interpreted this note to mean that if Amendment 8 passes, it would be giving the grand jury a responsibility it was never intended to have.

MS. PARKES remarked that Representative Anderson has pointed out the practical problem with Amendment 8, that of having to go back to the grand jury every time an additional aggravating factor is discovered; such a requirement would not result in an efficient use of resources. She said she disagrees with Representative Gruenberg that going before a grand jury is clearly required. This is a question that will ultimately be decided by the Alaska Court of Appeals and the Alaska Supreme Court, she predicted, and clarified that the state is currently taking aggravators to grand jury simply out of an abundance of caution because it is not clear what judges would do during the interim. The DOL does not believe that going before a grand jury is constitutionally required, she relayed, and pointed out that Donlun was decided before the current statutory scheme was put into place. At the time of Donlun, crimes were not differentiated by degrees; there were only the basic crimes, and then aggravating factors were used to determine what range sentences could be.

MS. PARKES opined that Donlun doesn't apply to the current statutory scheme, and that Malloy doesn't support [the claim that going before the grand jury] is necessarily constitutionally required. She pointed out that Malloy dealt with aggravating factors that increased the mandatory minimum sentences, and noted that the state prevailed in that case, which held that if there is a range of sentences and there's a minimum sentence, then the judge has the discretion to make the findings; thus Malloy is distinguishable from the situation being discussed. She said that it is important to first look at the fact that many states don't have a grand jury, and opined that Blakely won't require such states to create a grand jury; therefore, just because a state does have a grand jury, it doesn't logically follow that that state would be constitutionally required to indict on aggravators. She surmised that each state will be allowed to make the decision of how it wants to use a grand jury if it has one.

MS. PARKES said that the important issue is whether notice is being given to the defendant, and the bill does provide for that. She offered her belief that the notice provision in the bill will be found to be constitutional, and relayed her preference for having that issue decided by the courts. From a public policy point of view, she opined, having aggravators go to the grand jury doesn't make sense.

2:10:07 PM

REPRESENTATIVE GARA asked where that notice provision is located.

MS. PARKES indicated that the notice provision is contained in Section 21, subsection (f)(2), and says in part:

> **written notice of the intent to establish a factor in aggravation must be served on the defendant and filed with the court**
>
> **(A) 10 days before trial, or at another time specified by the court;**
>
> **(B) within 48 hours, or at a time specified by the court, if the court instructs the jury about the option to return a verdict for a lesser included offense; or**
>
> **(C) five days before entering a plea that results in a finding of guilt, or at another time specified by the court.**

REPRESENTATIVE GARA offered his belief that it is incumbent on those who are changing the law to come up with a proper proposal; that to spring an aggravator on someone 10 days before trial is unfair; and that if the language provides for either 10 days or another period of time specified by the court, it will effectively result in notice being given 10 days prior to trial.

2:12:37 PM

REPRESENTATIVE GRUENBERG remarked that it may always happen that a fact becomes known after the initial indictment and thus lead to another charge. This is not a big deal, he opined, because the grand jury is already sitting, and it is not uncommon for the state to bring that other charge to the grand jury so that it can be melded in for the trial, and the case then proceeds to trial. Such additions are not much of a burden, particularly given that the prosecution has the discretion to decide whether pursuing additional charges will be worth the effort. He then referred to a recent memorandum from the Alaska Judicial Council (AJC) - dated February 3, 2005 - and offered his understanding that it indicates that only 2.5 percent of all cases involve aggravators. He opined that Donlun and Blakely are secondary to Malloy.

2:15:50 PM

REPRESENTATIVE GRUENBERG read the following from the Malloy decision:

> This holding, directly binding on states under the Fourteenth Amendment, lays to rest any controversy over the accuracy of the court of appeals's view that Donlun is grounded on constitutional principles. The court of appeals's explanation of Donlun's state constitutional roots accords with Apprendi. And as the state now recognizes, Donlun accurately presaged Apprendi's holding that aggravating facts must be charged 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.

REPRESENTATIVE GRUENBERG offered his belief that Section 1 says that an indictment need not specify aggravating factors. He asked Ms. Parkes whether the issue of indictment is currently being appealed by the state.

MS. PARKES relayed that the state has petitioned the Alaska Court of Appeals for a ruling on that issue.

REPRESENTATIVE GRUENBERG said he would be amenable to altering Section 1 of the bill such that it is effective if and only if the Alaska Court of Appeals or the Alaska Supreme Court holds that the indictment is not constitutionally required; in other words, to put a conditional effective date on Section 1. Such a change would deal with both his concern and the constitutional issue, he opined.

MS. PARKES said that her concern with such a change is that it could be years before a ruling comes forth or that the Alaska Court of Appeals could decide not to make a ruling in this particular case; therefore, the legislature should go ahead and make the call on this issue.

REPRESENTATIVE GRUENBERG, in conclusion, reiterated his belief that the language in Malloy on this issue is quite clear.

2:19:54 PM

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 8. Representatives Anderson, Kott, Dahlstrom, and McGuire voted against it. Therefore, Amendment 8 failed by a vote of 2-4.

REPRESENTATIVE GARA made a motion to adopt Amendment 8A, to change, on page 17, line 26, "10" to "30". This would result in written notice of aggravating factors being given 30 days prior to trial.

REPRESENTATIVE ANDERSON objected for the purpose of discussion.

2:21:49 PM

MS. PARKES asked for clarification regarding whether the language "or at another time specified by the court" would remain in Section 21. She said the DOL's concern is that it doesn't want to be precluded from being able to give notice of facts that are discovered late. Noting that the DOL had picked 10 days because "that's currently how it is prior to sentencing, she offered her belief that giving notice 30 days before trial would not be an unreasonable requirement; however, she remarked, 20 days would probably be a good middle point.

CHAIR McGUIRE asked Representative Gara whether he would accept that as friendly amendment to Amendment 8A.

REPRESENTATIVE GARA said he would not, adding that he considers 30 days to be fair amount of notice.

REPRESENTATIVE GARA, in response to questions, pointed out that in any trial, the prosecution is allowed to charge a person, in good faith, with a crime without necessarily having any objective evidence that the person actually committed that crime; the prosecutor might believe that he/she can prove the person committed the crime or that the person did commit the crime, but may not have any documentary evidence or testimony. So a person being charged with a crime won't necessarily know that an aggravating factor will be brought forth. He remarked:

> We often approach these criminal bills from the perspective of the defendants who are trying to get away with things that they did that are bad. And my experience as a criminal attorney is that most of the cases where I defended people - and I didn't do it very long, I did it for three months at the [Public Defender Agency] - was that most of the people who were charged did do something wrong, and [so] ... the charges made sense. I will also say that in many of the cases, people were charged well beyond the things that they did. ... I remember a woman who was charged with kidnapping who didn't engage in kidnapping - she

was providing a safe home for troubled kids. ... There are times where the prosecution issues charges that are overcharges or wrong charges, and I often ... look at these bills with those cases in mind. ... And so it's the overcharge situation that ... I'm worried about.

2:29:06 PM

A roll call vote was taken. Representatives Kott, Gara, and Gruenberg voted in favor of Amendment 8A. Representatives Dahlstrom, Anderson, and McGuire voted against it. Therefore, Amendment 8A failed by a vote of 3-3.

2:29:56 PM

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 8B, to change, on page 17, line 26, "10" to "20".

REPRESENTATIVE ANDERSON objected.

CHAIR McGUIRE asked Ms. Parkes to elaborate on her earlier comment regarding why the DOL originally decided on a 10-day notice provision.

MS. PARKES said that currently under the system that Blakely says is unconstitutional, notice of either aggravating factors or mitigating factors must be given 10 days prior to sentencing.

REPRESENTATIVE GARA offered his belief, however, that a sentencing hearing is much easier to prepare for than a trial, and that judges are more lenient with regard to the kinds of evidence that can be presented at a sentencing hearing; thus a 10-day notice provision would not be suitable for a trial.

2:32:34 PM

A roll call vote was taken. Representatives Kott, Dahlstrom, Gara, Gruenberg, and McGuire voted in favor of Amendment 8B. Representative Anderson voted against it. Therefore, Amendment 8B was adopted by a vote of 5-1.

CHAIR McGUIRE said she supports Amendment 8B because the PDA, much like the DOL, is overburdened and understaffed, and it is incumbent upon [the state] to give people a fair trial.

2:33:57 PM

REPRESENTATIVE GRUENBERG referred to Amendment 9, labeled 24-LS0308\L.3, Luckhaupt, 2/1/05, which, along with an attached reasoning statement from the PDA [original punctuation provided], read:

Page 19, lines 11 - 30:
Delete all material.

Renumber the following bill sections accordingly.

Page 23, lines 19 - 31:
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, and 28"

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

REASONING:

These sections of the bill seek to allow police officers to detain and arrest probationers and parolees, without being directed to do so by the supervising probation or parole officer, based upon their reasonable suspicion or probable cause to believe that they have recently violated or are about to violate a condition of probation or parole even though the believed violation is not a crime in and of itself, or one that creates an imminent public danger or threatens serious harm to persons or property.

Article I, Section 14 of our state constitution protects against unreasonable searches and seizures. Article I, Section 22 protects our right to privacy. In Roman v. State, 570 P.2d 1235 (Alaska 1977) our Supreme Court held as a matter of Alaska Constitutional law that prisoners released on parole have the same protections against government searches and seizures as other citizens, except when reasonably conducted searches and seizures are performed by probation/parole officers, or police

officers acting under the direction of the probation/parole officer. This constitutional ruling was codified in AS 33.16.150(b)(3) that requires a parolee to submit to reasonable searches and seizures by a parole officer or a police officer acting under the direction of a parole officer.

It would therefore be unconstitutional to allow a police officer to detain or arrest a parolee/probationer for a believed violation that did not constitute an independent crime or if the officer is not acting at the direction of the probation/parole officer. That is exactly what these sections of the bill seek to do, rendering them unconstitutional.

REPRESENTATIVE GRUENBERG explained that Amendment 9 would delete Sections 26 and 30-31, and make conforming changes. These sections would allow a police officer to arrest a probationer/parolee on the basis of probable cause - for violating a condition of probation/parole - without first getting authorization from the person's probation/parole officer. He recalled testimony from the PDA indicating that the 1977 Alaska Supreme Court case, Roman v. State, says that it is constitutionally required that prisoners released on probation/parole have the same protection against [unreasonable] searches and seizures as other citizens.

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 9.

REPRESENTATIVE ANDERSON objected.

2:36:07 PM

MS. WILSON, responding to a question, reminded members that Sections 26 and 30-31 were included in SB 56 as a result of the 2004 Alaska Court of Appeals case, Reichel v. State.

REPRESENTATIVE GARA sought clarification that Sections 26 and 30-31 propose to give police officers the same authority, using the same standards, to detain probationers/parolees as is currently held only by probation/parole officers.

REPRESENTATIVE GRUENBERG concurred, reiterating that there is a constitutionally based argument regarding whether such authority can be given to police officers.

2:37:45 PM

MS. WILSON concurred as well, noting that an exception has been carved out for probation/parole officers, but opined that that exception does not extend to police officers; instead police officers can only detain and arrest a probationer/parolee if they do it at the direction of the person's probation/parole officer. Thus the argument is that granting police officers such authority runs afoul of the constitution.

2:38:50 PM

CHAIR McGUIRE recalled that there has been substantial debate on Sections 26 and 30-31 during prior hearings.

REPRESENTATIVE KOTT asked Ms. Parkes to comment on the constitutionality issue being raised.

MS. PARKES relayed that she has read both the Roman and Reichel cases and recognizes that they do raise constitutional concerns. She also acknowledged that there has been an exception carved out for probation/parole officers to be able to enforce conditions of probation/parole that are not normally crimes in and of themselves. Sections 26 and 30-31 would give a police officer the right to detain a person based on a reasonable suspicion that he/she is violating an enumerated condition of probation/parole; also, after detaining the person, if the police officer has probable cause to suspect that the person is in fact violating a condition, the police officer can arrest the person.

MS. PARKES opined that this is not giving police the same authority as probation/parole officers, since probation/parole officers can perform unannounced searches and seizures in a person's home. She said that the DOL believes that as a matter of public policy, the legislature can, via statute, create a special relationship, so to speak, between police officers and probation/parole officers, thus giving police officers the ability to assist in the enforcement of probation/parole conditions, which are presumably in place to protect the public. This relationship would not come from the constitution, she remarked, noting that it doesn't provide for the current exception regarding unreasonable searches and seizures by probation/parole officers either. She opined that the adoption of Sections 26 and 30-31 would constitute good public policy.

REPRESENTATIVE ANDERSON offered his understanding of the Reichel case, and opined that it shouldn't matter that the defendant in

that case was arrested by a police officer instead of his probation officer. The language in the bill will set it in stone that violations of probation/parole conditions can be dealt with by police officers as well as by probation/parole officers.

2:44:15 PM

CHAIR McGUIRE relayed that there are concerns that certain situations might involve police harassment, and remarked that such situations should be avoided. She indicated that the legislature wants to give people the opportunity to succeed, and so a balance must be struck. She said she is swayed, however, by the fact that an exception has already been carved out for probation/parole officers, and so she supports [retaining Sections 26 and 30-31] with the caveat that they stipulate a standard of reasonable suspicion. In other words, she remarked, she does not want to give police officers carte blanche to harass probationers/parolees.

2:46:22 PM

A roll call vote was taken. Representative Gruenberg voted in favor of Amendment 9. Representatives Dahlstrom, Gara, Anderson, Kott, and McGuire voted against it. Therefore, Amendment 9 failed by a vote of 1-5.

2:46:58 PM

REPRESENTATIVE GRUENBERG relayed that he has possession of two other amendments suggested by the PDA, one of which read [original punctuation provided]:

> Page 4, line 24 delete "five to eight" and insert "four to six".
>
> Page 5, line 2 delete "seven to 11" and insert "six to eight".
>
> Page 5, line 10 delete "ten to 14" and insert "nine to eleven".
>
> Page 5, line 12 delete " 15 to 20" and insert "14 to 16".
>
> Page 5, line 19 delete "one to three" and insert "six months to two".

Page 5, line 21 delete "two to four" and insert "one to three".

Page 5, line 22 delete "four to seven" and insert "three to five".

Page 5, line 24 delete " six to 10" and insert "five to seven".

Page 6, line 1 delete "zero to two" and insert "zero to one".

Page 6, line 2 delete "two to four" and insert "one to three".

Page 6, line 4 delete "three to five" and insert "two to four".

Page 6, line 7 delete "one to two" and insert "zero to two".

Page 6, line 22 delete "eight to 12" and insert "seven to nine".

Page 6, line 26 delete "12 to 16" and insert "nine to 11".

Page 6, line 28 delete "15 to 20" and insert "14 to 16".

Page 6, line 30 delete "20 to 30" and insert "19 to 21".

Page 7, lines 1 and 2 delete "25 to 35" and insert "24 to 26".

Page 7, line 5 delete "30 to 40" and insert "29 to 31".

Page 7, line 12 delete "five to eight" and insert "four to six".

Page 7, line 16 delete " 10 to 14" and insert "nine to 11".

Page 7, line 18 delete "12 to 16" and insert "nine to 11".

Page 7, line 20 delete "15 to 20" and insert "14 to 16".

Page 7, line 23 delete "15 to 25" and insert "14 to 16".

Page 7, line 26 delete "20 to 30" and insert "19 to 21".

Page 8, line 1 delete "two to four" and insert "one to three".

Page 8, line 4 delete "five to eight" and insert "four to six".

Page 8, line 7 delete " 10 to 14" and insert "nine to 11".

Page 8, line 9 delete "10 to 14" and insert "nine to 11".

Page 8, line 12 delete "15 to 20" and insert "14 to 16".

Page 8, line 20 delete "one to two" and insert "zero to two".

Page 8, line 23 delete " two to five" and insert "one to three".

Page 8, line 26 delete "three to six " and insert "two to four".

Page 8, line 29 delete "three to six" and insert "two to four".

Page 9, line 1 delete "six to 10" and insert "five to seven".

[First amendment ends.]

and the other of which would make the following changes:

[Second amendment begins.]

Page 4, line 24, delete "eight" and insert "seven"
Page 5, line 2, delete "11" and insert "10"
Page 5, line 10, delete "14" and insert "13"
Page 5, line 12, delete "20" and insert "19"
Page 5, line 19, delete "three" and insert "two"
Page 5, line 21, delete "four" and insert "three"
Page 5, line 22, delete "seven" and insert "six"
Page 5, line 24, delete "10" and insert "nine"
Page 6, line 1, delete "two" and insert "one"
Page 6, line 2, delete "four" and insert "three"
Page 6, line 4, delete "five" and insert "four"
Page 6, line 7, delete "two" and insert "one and a half"
Page 6, line 22, delete "12" and insert "11"
Page 6, line 26, delete "16" and insert "15"
Page 6, line 28, delete "20" and insert "19"
Page 6, line 30, delete "30" and insert "25"
Page 7, line 2, delete "35" and insert "30"
Page 7, line 5, delete "40" and insert "35"
Page 7, line 12, delete "eight" and insert "seven"
Page 7, line 16, delete "14" and insert "13"
Page 7, line 18, delete "16" and insert "15"
Page 7, line 20, delete "20" and insert "19"
Page 7, line 23, delete "25" and insert "20"
Page 7, line 26, delete "30" and insert "25"
Page 8, line 1, delete "four" and insert "three"
Page 8, line 4, delete "eight" and insert "seven"
Page 8, line 7, delete "14" and insert "13"
Page 8, line 9, delete "14" and insert "13"
Page 8, line 12, delete "20" and insert "19"
Page 8, line 20, delete "two" and insert "one and a half"
Page 8, line 23, delete "five" and insert "four"
Page 8, line 26, delete "six" and insert "five"
Page 8, line 29, delete "six" and insert "five"
Page 9, line 1, delete "10" and insert "nine"

REPRESENTATIVE GRUENBERG asked the committee to first look at the aforementioned AJC memorandum, and offered his understanding that it indicates that passage of SB 56 as currently written will result in those convicted of class B felonies individually receiving 121 more days of incarceration, and will result in those convicted of class C felonies individually receiving 202 more days of incarceration. He then noted that an e-mail he's received from Ms. Parker indicates that the average prisoner-per-day cost amounts to approximately $113 per day in 2004-2005,

and approximately $110 per day in 2005-2006. Referring back to the AJC memorandum, specifically a chart on page 3, he surmised that approximately 287 cases out of 11,271 cases will involve aggravating factors, and that the remaining cases will be subject to the ranges proposed in SB 56. This could possibly result in each of the defendants in those remaining cases being subject to the aforementioned increases in days of incarceration, thereby incurring the aforementioned costs per day for those extended periods of time.

2:50:36 PM

REPRESENTATIVE GRUENBERG gave an example of how each amendment would alter the proposed sentencing ranges, and said he would be willing to offer either amendment as Amendment 10 if there were support.

REPRESENTATIVE ANDERSON said he objects to both amendments because he thinks they would be better addressed in the House Finance Committee and because he agrees with the ranges as currently proposed in the bill.

2:54:55 PM

REPRESENTATIVE GARA distributed an amendment - created by Representative Berkowitz - that he said might allow SB 56 to address a problem with the current ethics law, and said that although he would not be offering the amendment at this time, he wanted members to consider the language contained in it so that they might discuss it when the bill is heard on the House floor; the amendment read [original punctuation provided]:

AS 11.56.850 is amended to read:

(a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant

(1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; [OR]

(2) knowingly refrains from performing a duty which is imposed upon the public

servant by law or is clearly inherent in the nature of the public servant's office; or

(3) knowingly takes or withholds official action in order to affect a matter in which the public servant has a substantial interest.

(b) Official misconduct is a class A misdemeanor.

AS 11.81.900 is amended by adding the following:

"official action" means a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public servant;

"substantial interest" means any sole proprietorship, partnership, firm, corporation, trust or other entity through which business for profit or not for profit is conducted in which the public servant or the public servant's spouse is

(1) an officer, director, trustee, partner, employee, or holds a position of management; or

(2) a holder of stock exceeding $5,000 or 1% of any business, whichever is less;

REPRESENTATIVE KOTT, turning the committee's attention to the letter of intent that the Senate sent over with SB 56, asked Ms. Parkes if the DOL has a position regarding whether to include the language contained in the letter as a section of the bill.

MS. PARKES said that the DOL supports the language in the letter of intent, and suggested that the House may wish to adopt it as well.

REPRESENTATIVE KOTT offered his understanding that the language in the letter of intent was going to be inserted as a section of the bill. He said he would rather see that language as part of the SB 56.

MS. PARKES, noting that the Senate decided to use a letter of intent, acknowledged that the House might choose to do otherwise.

2:57:40 PM

REPRESENTATIVE ANDERSON opined that a letter of intent would be sufficient to guide the judicial branch.

REPRESENTATIVE GRUENBERG opined that judges don't see letters of intent, and so having the intent language in the bill would at least make it part of the uncodified law of the state.

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment [11], to put the language contained in the letter of intent in the bill as an intent section; Amendment [11] read [original punctuation provided]:

> Page 1 line 4 insert a new section 1
>
> Section1. Legislative Intent
>
> It is the intent of the legislature in passing this bill to preserve the basic structure of Alaska's presumptive sentencing system, which is designed to avoid disparate sentences. With this bill the legislature sets out a sentencing framework, subject to judicial adjustment for statutory aggravating or mitigating factors that are determined in a manner that is constitutional under the decision of the U.S. Supreme Court in Blakely v. Washington. The single, definite presumptive terms set out in current law can unduly constrain the sentencing process, particularly under the mandates of Blakely v. Washington. Although the presumptive terms are being replaced by presumptive ranges, it is not the intent of this bill in doing so to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather, the bill is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the considerations set out in AS 12.55.005 and 12.55.015.

CHAIR McGUIRE objected for the purpose of discussion.

2:58:57 PM

REPRESENTATIVE GARA asked whether the language is the same in both Amendment [11] and the letter of intent.

REPRESENTATIVE GRUENBERG said it is.

2:59:07 PM

REPRESENTATIVE ANDERSON said he is hesitant to enshrine intent language in statute, and prefers the letter-of-intent format.

REPRESENTATIVE GARA pointed out, however, that letters of intent end up in microphiche files, and so often are never seen. By placing the language in the bill as part of uncodified law, there is more likelihood that it will be noticed and be easier to find.

CHAIR McGUIRE removed her objection, and asked whether there were any further objections to Amendment 11. There being none, Amendment 11 was adopted.

REPRESENTATIVE GARA, in conclusion, asked the PDA and the OPA to review the language of Amendment 4 to ensure that it does what the committee intends it to do.

REPRESENTATIVE KOTT moved to report CSSB 56(JUD), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HCS CSSB 56(JUD) was reported from the House Judiciary Standing Committee.

CHAIR McGUIRE noted that Representative Kott would be excused from the next House Judiciary Standing Committee meeting.

ADJOURNMENT

3:02:01 PM

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:02 p.m.