ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 23, 2005
1:59 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Nancy Dahlstrom
Representative Pete Kott

COMMITTEE CALENDAR

HOUSE BILL NO. 124
"An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample from persons convicted of or adjudicated delinquent for certain crimes."

- MOVED HB 124 OUT OF COMMITTEE

HOUSE BILL NO. 132
"An Act relating to sentencing for certain crimes committed against the elderly; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 131
"An Act increasing the criminal classification of theft of an access device and of obtaining an access device or identification documents by fraudulent means; increasing the criminal classification for certain cases of fraudulent use of an access device; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 124
SHORT TITLE: COLLECTION OF DNA/USE OF FORCE
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/02/05	(H)	READ THE FIRST TIME - REFERRALS
02/02/05	(H)	JUD, FIN
02/23/05	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 132
SHORT TITLE: CRIMES AGAINST ELDERLY
SPONSOR(S): REPRESENTATIVE(S) STOLTZE

02/09/05	(H)	READ THE FIRST TIME - REFERRALS
02/09/05	(H)	JUD, FIN
02/23/05	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 124 and responded to questions; responded to questions during discussion of HB 132.

CHRIS BEHEIM, Crime Lab Supervisor
Scientific Crime Detection Laboratory
Division of Statewide Services
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 124, provided comments and responded to questions.

PORTIA PARKER, Deputy Commissioner
Office of the Commissioner - Juneau
Department of Corrections (DOC)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 124.

TONY NEWMAN, Program Officer
Division of Juvenile Justice (DJJ)
Department of Health and Social Services (DHSS)
Juneau, Alaska
POSITION STATEMENT: Provided comments and responded to a question during discussion of HB 124.

SCOTT CALDER
Fairbanks, Alaska

POSITION STATEMENT: During discussion of HB 124, expressed concerns and encouraged the committee to use caution regarding the issue of collecting DNA samples.

BEN MULLIGAN, Staff
to Representative Bill Stoltze
Alaska State Legislature
POSITION STATEMENT: Presented HB 132 on behalf of the sponsor, Representative Stoltze.

MARIE DARLIN, Coordinator
Capital City Task Force
AARP
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 132 and HB 131, and responded to questions.

SAM TRIVETTE, AARP;
President
Retired Public Employees of Alaska (RPEA)
Alaska Public Employees Association/Alaska Federation of Teachers (APEA/AFT)
Juneau, Alaska
POSITION STATEMENT: Responded to a question and provided comments during discussion of HB 132, and testified in support of HB 132 on behalf of the AARP.

LINDA GOHL, Executive Director
Alaska Commission on Aging (ACoA)
Department of Health and Social Services (DHSS)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 132 and responded to questions.

RANDY RUARO, Assistant Attorney General
Legislation & Regulations Section
Office of the Attorney General
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 132 and responded to questions.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:59:17 PM. Representatives McGuire, Anderson, Coghill, and Gruenberg were present at the

call to order. Representative Gara arrived as the meeting was in progress.

HB 124 - COLLECTION OF DNA/USE OF FORCE

2:00:13 PM

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 124, "An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample from persons convicted of or adjudicated delinquent for certain crimes."

REPRESENTATIVE ANDERSON, speaking as the sponsor, provided some background information on the current laws regarding the collection of deoxyribonucleic acid (DNA) samples, as well as some examples of how such samples are used. He noted that two gaps have been discovered in the current law: one regarding the collection of DNA samples for assaults in violation of municipal laws similar to the state laws for which a DNA sample may be collected; and one regarding felons who refuse to give a sample even though such behavior will result in further felony charges. He said that 11 other states allow for "reasonable force and immunity from liability" in collecting a DNA sample from an offender, characterized the bill as straightforward, and commented on the zero fiscal notes.

2:03:21 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said that the DOL supports HB 124, and concurred with Representative Anderson's summary. She remarked that it seems reasonable to close the loophole regarding collecting DNA samples from those who commit assaults that are prosecuted by municipalities.

REPRESENTATIVE GARA said that he has concerns with the bill, although he is supportive of its concept. He posited that the great value of DNA evidence is that it can be used to solve crimes that involve blood. He asked whether meaningful DNA evidence is obtainable through other mediums.

MS. CARPENETI said that such is obtainable through other mediums; noted that the bill will allow [law enforcement] to use force to collect an oral sample, via a mouth swab, for inclusion into the DNA registration system; and suggested that Mr. Beheim, from the state's Scientific Crime Detection Laboratory ("Crime

Lab"), could better address the issue of what mediums can be used to obtain a DNA sample. In response to another question, she indicated that in cases of sexual assault, any semen that is found can be used to obtain a DNA sample.

REPRESENTATIVE GARA asked why the bill does not just address crimes against a person, and relayed that he has a concern regarding the concept that force can be used.

MS. CARPENETI pointed out that with regard to using force, the bill uses the term "reasonable", which she characterized as a common term, surmising that it would be interpreted to mean the least amount of force needed and that as long as a prisoner is immobilized, a mouth swab can be taken. With regard to why HB 124 doesn't just address crimes against a person, she noted that the committee considered that issue very carefully when the originating legislation was before it, and suggested that Mr. Beheim could again provide examples of why the current bill should address more than just crimes against a person; for example, it is very important to get DNA samples from people who commit forgery because there is a correlation between forgery and other crimes.

2:09:51 PM

REPRESENTATIVE GRUENBERG referred to AS 41.41.035(k) - which says, "(k) The provisions of this section apply to a person from another state that this state has accepted under any interstate corrections or probation agreement or compact, regardless of whether the person is confined or released, if the person was convicted of an offense that is similar to an offense described in (b) of this section" - and suggested that there is a conflict between this language and the language currently on page 1, lines 8-11, of the bill - which reads in part "**in this state** of a crime against a person or a felony under AS 11 or AS 28.35 **or a law or ordinance with elements similar to a crime against a person or a felony under AS 11 or AS 28.35**, (2) a minor 16 years of age or older, adjudicated as a delinquent **in this state**".

MS. CARPENETI relayed that the bill drafter has assured her that there isn't a conflict, adding that after further review, she agrees because subsection (k) includes the language, "if the person was convicted of an offense that is similar to an offense described in (b) of this section". If the state is taking a prisoner on an interstate compact basis, the state can take a DNA sample if the crime the prisoner was convicted of is similar to one of the crimes listed in proposed subsection (b). In

response to a question of whether the state can take a DNA sample from someone who is facing extradition for crimes committed in another state, she pointed out that the DNA identification system is based on convictions. But for investigation purposes in such a situation, the state might be able to get a search warrant allowing the collection of a DNA sample if there is probable cause that a crime has been committed in Alaska.

2:14:03 PM

REPRESENTATIVE GRUENBERG asked whether there are any constitutional problems with taking a DNA sample from everyone.

MS. CARPENETI, noting that fingerprints can be taken from people who have been arrested, pointed out that the U.S. District Court in Anchorage has just held that the state cannot take a DNA sample from a person who is on the sex-offender registration list if that person is completely disconnected from parole or probation. She surmised that there might be some constitutional problems with taking a DNA sample from everyone, just as there are with taking fingerprints.

REPRESENTATIVE GRUENBERG offered his understanding that a person is fingerprinted whenever he/she is arrested and "booked," and asked why a DNA sample couldn't be taken at the same time.

MS. CARPENETI indicated that the state has [decided] not to meet that issue head on, by simply requiring that a person be convicted before taking a DNA sample. She suggested that there is a good argument that there isn't any difference between taking fingerprints and taking a DNA sample - that a DNA sample is merely a much better fingerprint.

REPRESENTATIVE GRUENBERG concurred, and opined that being able to take a DNA sample at the time of arrest would greatly assist law enforcement.

2:16:26 PM

REPRESENTATIVE ANDERSON noted that when he introduced the originating legislation pertaining to the collection of DNA samples, issues were raised regarding privacy and confidentiality because there are other uses to which DNA samples can be put, and so steps were taken to ensure confidentiality. He said he agrees with Representative Gruenberg, but has chosen to take a more conservative approach

and make changes to the law over time - "baby steps dictate that maybe we keep it to this level" and just address those who refuse to provide a DNA sample.

REPRESENTATIVE GRUENBERG, offering his belief that DNA sampling is just a more modern form of fingerprinting, suggested that the issue of taking a DNA sample at time of arrest be addressed further, either through HB 124 or through another bill.

CHAIR McGUIRE opined that Representative Anderson is correct in his summation that current law, which pertains to convictions for crimes against a person, is a compromise - it is more expansive than the law in some states, and less expansive than in others.

MS. CARPENETI concurred, clarifying that current law pertains to all felonies in Titles 11 and 28.

REPRESENTATIVE GRUENBERG asked whether the crime of arson in the first degree is included.

MS. CARPENETI said it is.

CHAIR McGUIRE, in response to a question, said she would like to confine testimony to HB 124.

MS. CARPENETI, in response to a question regarding the aforementioned U.S. District Court decision which said that the state may not take a DNA sample from a person who is on the sex-offender registration list if that person is completely disconnected from parole or probation, said that that decision is not yet finalized, and offered to get the committee more information on it.

2:21:39 PM

CHRIS BEHEIM, Crime Lab Supervisor, Scientific Crime Detection Laboratory, Division of Statewide Services, Department of Public Safety (DPS), said that although he is not an expert regarding individuals who refuse to give a sample, he can relay that the state's DNA database has been extremely successful in that 71 investigations have been aided and there are over 200 unsolved crimes that are just waiting for a match. He mentioned that law enforcement officials have told him that those inmates who refuse to provide a DNA sample have probably committed crimes that are already in the database, and predicted that being able to take samples from such individuals could solve those crimes.

MR. BEHEIM, in response to a question, said that a DNA sample can be gotten from toothbrushes, from blood, from the inside of latex gloves, from saliva, from bottle caps, and from weapons. He added, "We've linked up, now, five different unsolved burglaries showing that the same perpetrator was involved in each one of these cases; at this point we don't have the perpetrator matched up to anybody specifically, but we hope to as the database expands and we get more offender profiles entered." In response to further questions, he said that either a mouth swab or a blood sample would suffice for obtaining a DNA sample except in circumstances where there has been a bone marrow transplant, and that there the DNA markers that are utilized the crime lab uses are strictly for law enforcement identification purposes and have absolutely no value in determining the propensity for a person to get a certain disease or in determining anything else about the person.

MR. BEHEIM noted that the originating legislation made it a felony to misuse DNA information. In response to another question, he reiterated that mouth swabs - "the buckle (ph) samples" - are sufficient to obtain a DNA sample, and relayed that such samples are what are normally collected for the DNA database.

2:27:44 PM

REPRESENTATIVE GRUENBERG said he supports moving rapidly on the bill, but has received a list of questions from someone, and so he would like to submit this list to agency personnel and request that their responses to the questions therein be provided to the committee in writing.

2:28:46 PM

PORTIA PARKER, Deputy Commissioner, Office of the Commissioner - Juneau, Department of Corrections (DOC), said that the DOC supports HB 124. Referring to Section 2 of the bill, she said that generally there is not a problem collecting DNA samples from offenders; most offenders are very compliant, particularly those on probation/parole. The DOC has been using the kits provided to it by the DPS, and has worked closely with the DPS in developing policies and procedures regarding how to handle DNA samples; these policies and procedures have been implemented statewide. There are, however, a couple of problem inmates who refuse to give an oral swab, which is currently the only way the DOC collects a DNA sample, and there is no mechanism in place by

which to force compliance. She surmised that if inmates had no choice but to provide a sample, then even problem inmates would voluntarily comply. She posited that adoption of Section 2 would be very helpful even though it would be used rarely.

REPRESENTATIVE GRUENBERG raised the issue of a possible technical change.

2:31:44 PM

TONY NEWMAN, Program Officer, Division of Juvenile Justice (DJJ), Department of Health and Social Services (DHSS), relayed that the DJJ also collects DNA samples, and that this function is performed by juvenile probations officers, who are responsible for processing incoming police reports on juvenile crime and for preparing reports on juveniles for use in court. He said that after discussing the bill with a number of DJJ staff, he could not find a single instance wherein a youth did not volunteer to provide a DNA sample. He relayed that the DJJ believes the current laws pertaining to noncompliance regarding DNA sample collection are sufficient, since juveniles are generally incarcerated for only short periods of time and therefore have incentive to comply. In short, he concluded, the DJJ doesn't believe that HB 124 will have an effect on the management of juveniles within the juvenile justice system (JJS).

MR. NEWMAN, in response to a question, noted that AS 11.56.760 currently addresses violations of DNA testing requirements.

CHAIR McGUIRE paraphrased AS 11.56.760, which read:

> (a) A person commits the crime of violating an order to submit to DNA testing if, when requested by a health care professional acting on behalf of the state to provide a blood sample, oral sample, or both, or when requested by a juvenile or adult correctional, probation, or parole officer or a peace officer to provide an oral sample, the person refuses to provide the sample or samples and the person
>
> (1) has been ordered to submit to DNA testing as part of a sentence imposed under AS 12.55.015;
>
> (2) has been convicted of an offense that requires DNA testing under the provisions of AS 44.41.035; or
>
> (3) is required to register as a sex offender or child kidnapper under AS 12.63.

(b) In this section, "DNA testing" means the collection of a blood sample, oral sample, or both, for the deoxyribonucleic acid identification registration system under AS 44.41.035.
(c) Violating an order to submit to DNA testing is a class C felony.

2:34:48 PM

SCOTT CALDER expressed concern that DNA sampling requirements are being applied too often already, adding that it seems that a lot of people could be subject to the treatment the bill proposes to allow. He expressed concern regarding what might be considered, "reasonable force." For example, "reasonable" might be construed to mean just what has been done historically; it might be construed to mean that the official collecting the DNA sample is comfortable and not that the person from whom the sample is being taken is comfortable; or it might be construed to mean the least amount of force necessary. Why not just specify in the bill what that term involves, he asked, adding that he doesn't necessarily buy the argument that "suspicion" is an act of reason or that "force" is an act of reason.

MR. CALDER said, "Just because some people can ... parse words ... into ... a reason why it's okay for people to do whatever they want to ... under the color of law, I'm not sure that the public is well served by this type of ... rationalizing process." He encouraged the committee to use caution on this issue, to preserve the U.S. Constitution's mandate that no person "shall be compelled in any criminal case to be a witness against himself".

2:38:52 PM

REPRESENTATIVE GRUENBERG asked whether "reasonable force" is statutorily defined.

MS. CARPENETI [speaking too far away from the microphones to be picked up on the recording] indicated that that term is defined via decisional law.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 124.

REPRESENTATIVE GRUENBERG said he is wondering whether it would it be advisable to define "reasonable force" in statute.

REPRESENTATIVE ANDERSON said he did not think doing so is necessary, and would prefer to give correctional officers the latitude to decide what constitutes reasonable force.

2:39:55 PM

CHAIR McGUIRE asked Representative Anderson whether he would be comfortable with confining the sample referred to in [Section 2 of] the bill to a mouth swab.

REPRESENTATIVE GARA said that is the route he would like to take.

REPRESENTATIVE ANDERSON remarked that the bill refers to an "oral sample".

2:40:41 PM

REPRESENTATIVE GARA said he's heard examples of a DOC official physically abusing a prisoner, and so even though such might not happen often, he wants to ensure that the bill doesn't contain a loophole that a DOC official can use to abuse a prisoner. He suggested that this can be accomplished by altering the bill so that it uses the term "oral swab sample"; such a change would resolve his concerns regarding what constitutes reasonable force. He also noted that he would like to limit the bill so that it only applies to those convicted of crimes against a person.

REPRESENTATIVE ANDERSON said he doesn't agree that the language should specify that DNA samples be taken with oral swabs, because future technology might allow for DNA samples to be taken another way. On the issue of whether the bill should only apply to those who are convicted of crimes against a person, he reminded members of testimony that Mr. Beheim gave during discussion of the originating statute, testimony regarding the number of links that are found when samples are taken from those who are convicted of so-called white-collar crimes. He opined that on the issue of whom HB 124 should apply to, it ought to parallel the current statute.

2:47:24 PM

REPRESENTATIVE GARA clarified that his concern is that a DOC official might want to extract a bit of personal justice by using a needle to extract an "oral sample", and reiterated his belief that adding the word, "swab" would resolve his concern.

REPRESENTATIVE ANDERSON pointed out, however, that regulations can address that issue, and expressed confidence that the DOC can promulgate regulations to ensure that prisoners are not abused.

REPRESENTATIVE GARA countered that if that is the intent, then they should specify it in the bill rather than relying on the department to specify it via regulations. With regard to the issue of limiting the bill only to those that commit crimes against a person, he pointed out that the bill will allow government officials to use force, which could involve inflicting pain, when collecting DNA samples, and opined that this should only be permitted for the most egregious crimes - those committed against a person.

2:51:10 PM

REPRESENTATIVE GRUENBERG referred to page 2, line 19, and suggested that the bill drafter insert the word "the" before "collection". He indicated that he did not think a committee substitute (CS) would have to be created; rather, perhaps the bill drafter could simply make this technical change.

REPRESENTATIVE ANDERSON indicated that he had no objections to such a change, but didn't think it was necessary.

2:51:54 PM

REPRESENTATIVE GARA made a motion to adopt Conceptual Amendment 1, "to limit Section 2, the provision dealing with reasonable force, to cases involving crimes against persons."

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE COGHILL said he objects to Conceptual Amendment 1 because he thinks the bill should apply to other felons in addition to those that commit crimes against a person.

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

REPRESENTATIVE GARA made a motion to adopt Conceptual Amendment 2, to change Section 2 to say in part, "oral swab sample, unless another method is necessary,".

REPRESENTATIVE ANDERSON indicated that he would not object to that change.

REPRESENTATIVE GRUENBERG questioned whether, if Conceptual Amendment 2 is adopted, other references to "oral sample" - both in the bill and in current statute - should be changed as well.

CHAIR McGUIRE objected to the motion, opining that Conceptual Amendment 2 has not been fully thought out; she suggested to Representative Gara that he get more specific language from Legislative Legal and Research Services.

2:54:21 PM

REPRESENTATIVE GARA opined that Conceptual Amendment 2 would work because elsewhere in the bill "oral sample" merely refers to one of several ways a DNA sample can be obtained. The language Conceptual Amendment 2 proposes to change deals with an oral sample being taken by force, he pointed out, and so he would like to limit such instances to the use of a swab.

2:55:07 PM

REPRESENTATIVE ANDERSON referred to a Legislative Legal and Research Services report, and said he did not see that any of the 11 states that allow reasonable force to be used when collecting a DNA sample specify the use of a swab. Notwithstanding his earlier statement that he would not object to Conceptual Amendment 2, he said he now feels that the committee should reject Conceptual Amendment 2 until more research is done.

2:55:47 PM

A roll call vote was taken. Representatives Gruenberg and Gara voted in favor of Conceptual Amendment 2. Representatives McGuire, Anderson, and Coghill voted against it. Therefore, Conceptual Amendment 2 failed by a vote of 2-3.

2:56:16 PM

REPRESENTATIVE COGHILL moved to report HB 124 out of committee with individual recommendations and the accompanying zero fiscal notes. There being no objection, HB 124 was reported from the House Judiciary Standing Committee.

HB 132 - CRIMES AGAINST ELDERLY

[Contains mention of support for HB 131.]

2:56:38 PM

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 132, "An Act relating to sentencing for certain crimes committed against the elderly; and providing for an effective date."

2:57:14 PM

BEN MULLIGAN, Staff to Representative Bill Stoltze, Alaska State Legislature, sponsor, said on behalf of the sponsor that Alaska's elderly population, which is growing rapidly, is often the target of crime. The physical, emotional, and financial impacts of crime on the elderly can be more devastating than they would be on other people. House Bill 132 will increase the penalty one level for certain crimes listed therein; this is intended to deter the targeting of Alaska's elderly population.

2:58:14 PM

MARIE DARLIN, Coordinator, Capital City Task Force, AARP, mentioned that members' packets should contain a letter of support from the AARP; this letter also refers to the fact that crimes perpetrated against the elderly cause much more harm than they would if perpetrated against someone younger. With the increase in Alaska's elderly population, HB 132 provides one more way of ensuring that crimes perpetrated against the elderly are viewed as seriously as they deserve to be. In conclusion, she stated that the AARP supports HB 132 as written.

CHAIR McGUIRE asked whether the AARP approached the sponsor with the concept embodied in HB 132.

MS. DARLIN indicated that she did not know, but relayed that the AARP is very interested in the fact that seniors are now being targeted more and more in identity theft crimes as well as other crimes. In fact, the AARP has started a nationwide educational campaign to make "baby boomers" and the elderly aware of all the different types of scams and ID theft that are being perpetrated. She reiterated that HB 132 is another way of making people aware of the fact that such crimes will no longer be misdemeanors. She stated that the AARP supports HB 131 as well.

REPRESENTATIVE ANDERSON asked why the term "elderly" is used in the bill. Is it just the vernacular, meaning that one has reached the age of 65?

MS. DARLIN replied, "More or less, yes, and yet we know that not everybody is going to be at the same stage of their life ... at age 65 or even 75, and maybe more so in Alaska than other places; but, nevertheless, we so far support the bill ... [as an] idea that should be helpful."

SAM TRIVETTE, AARP; President, Retired Public Employees of Alaska (RPEA), Alaska Public Employees Association/Alaska Federation of Teachers (APEA/AFT), surmised that the sponsor probably used the age of 65 in the bill because that is the age at when the elderly usually start receiving social security benefits and is the age commonly used throughout the country. He relayed that the AARP is doing a lot of work educating folks on the issues surrounding HB 132, and characterized this education as an important component. Mentioning that he worked for many years in the field of corrections, he said his experience has shown that the impact of crime on the elderly, particularly those with fixed incomes, is severe. He opined that raising the crime to a felony level will attract attention, and pointed out that many of the crimes perpetrated against the elderly originate in other states, and that law enforcement agencies in other states are willing to provide more assistance when the crime is a felony. In conclusion, he said he thinks HB 132 makes sense, and stated, too, that the AARP supports it.

3:04:32 PM

LINDA GOHL, Executive Director, Alaska Commission on Aging (ACoA), Department of Health and Social Services (DHSS), said that the ACoA supports HB 132. She acknowledged Mr. Trivette and Ms. Darlin's comments, and surmised that should HB 132 pass, there might need to be more education efforts directed at informing people of all ages of the changes encompassed in the bill. With regard to terminology, she relayed that the federal Older Americans Act frequently uses the term "older Americans," and so many state documents use the term "older Alaskans"; additionally, the term "elders" is used in parts of rural Alaska.

3:06:22 PM

RANDY RUARO, Assistant Attorney General, Legislation & Regulations Section, Office of the Attorney General, Department of Law (DOL), relayed the DOL's support of HB 132 and offered to answer questions.

REPRESENTATIVE GARA said he thinks HB 132 is a good idea though perhaps a couple of the bill's [provisions] are a little bit overbroad. Section 2 of the bill enumerates crimes for which perpetrations against the elderly will result in more serious penalties; referring to page 2, line 24, he offered his understanding that proposed AS 12.55.136(b)(6) would make it a felony to intentionally cause damage to property in an amount of $500 or more - this could consist of using a key to damage the paint job on a car if the paint job costs $500 or more.

MR. RUARO pointed out that practically speaking, there are a few steps in between, the first of which is that the person would have to be found guilty of the action, and then it would have to be proven that the act was done with reckless disregard towards property owned by someone age 65 or older. In other words, it is not enough that the property owner is 65 or older; the state still has to prove that the perpetrator recklessly disregarded the fact that the property owner is 65 or older. He noted, however, that the stipulation regarding reckless does not appear in the bill. Instead it can be found in AS 11.81.610(b)(2), which says that when no mental state is specified, then "recklessly" is inferred for a circumstance - the circumstance in this case being that the property is owned by someone 65 or older.

[Chair McGuire turned the gavel over to Representative Anderson.]

3:10:13 PM

REPRESENTATIVE GARA pointed out, however, that the bill amends the sentencing statute - AS 12.55 - and opined that the element that the perpetrator knew that the victim is 65 or older doesn't have to proven at trial.

MR. RUARO relayed that that is not his understanding of the bill; rather, according to his reading of AS 11.81.610(b)(2), it requires that a reckless disregard for the age of the person the act is directed at must be proven in order for the penalty in the bill to apply.

REPRESENTATIVE GARA disagreed, adding that he doesn't think the bill has anything to do with the underlying elements of the crime.

MR. RUARO said that although that is one possible reading of the bill, it is not the intent to have the bill apply in the sense of strict liability; instead, the intent is to target the penalties proposed in the bill towards those that intentionally or recklessly commit acts against people 65 and older, to enhance the penalties once the perpetrator's reckless disregard for the victim's age is proven.

REPRESENTATIVE ANDERSON said he can see both arguments.

REPRESENTATIVE GRUENBERG offered his belief that HB 132, as currently written, could engender issues related to the U.S. Supreme Court case, Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004).

3:13:30 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), opined that Mr. Ruaro has given the committee the best answer the DOL has, and suggested that perhaps [committee members] might be more knowledgeable about the "Blakely issue."

REPRESENTATIVE GRUENBERG surmised that the state would have to show that the perpetrator knew the victim was 65 or older, and this would be another element of the crime.

MS. CARPENETI opined that Mr. Ruaro is correct in characterizing it as a circumstance for which recklessness would have to be proven.

REPRESENTATIVE GRUENBERG remarked that a perpetrator doesn't "card" his/her victim.

MS. CARPENETI said she would do some research and provide the committee with more information on the [issues raised].

REPRESENTATIVE GRUENBERG remarked that one cannot always tell how old a person is just by looking at him/her.

MS. CARPENETI concurred, adding that that is why the mental state of knowingly is a difficult one to prove.

REPRESENTATIVE GRUENBERG opined that even recklessness would be difficult to prove, particularly given that during the winter, people are bundled up against the cold and so a perpetrator might not be able to discern his/her victim's age at all.

REPRESENTATIVE ANDERSON returned the gavel to Chair McGuire.

3:15:30 PM

REPRESENTATIVE GRUENBERG recapped the issues raised in the Chair's absence, the Blakely issue and possible mistakes as to age. He offered his understanding that with regard to the crime of statutory rape, there is now a statute specifying that a reasonable mistake as to age is a defense.

MS. CARPENETI offered her understanding that the statute stipulates that one does not get to use that defense if the victim is under 13 years of age.

REPRESENTATIVE GRUENBERG asked: "How do they do this with ... the statutes dealing with elder abuse? Is there an age in there?"

MS. GOHL offered her understanding that the adult protective services statute just considers adults to be those who are 18 years of age and older, and doesn't make a distinction for older Alaskans.

REPRESENTATIVE GRUENBERG asked, "Don't we have statutes proving elder abuse?"

REPRESENTATIVE ANDERSON said he agrees with the DOL's representatives on the legal issues, but respects Representative Gara's points.

CHAIR McGUIRE, noting that the committee was losing its quorum, indicated that HB 132 would be held over to allow interested parties an opportunity to resolve members' concerns.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:17 p.m.