ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 15, 2006
1:13 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Bob Lynn

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 20(JUD)
"An Act relating to offenses against unborn children."

- HEARD AND HELD

HOUSE BILL NO. 353
"An Act relating to sentences for sexual offenses."

- HEARD AND HELD

HOUSE BILL NO. 276
"An Act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: SB 20
SHORT TITLE: OFFENSES AGAINST UNBORN CHILDREN

SPONSOR(S): SENATOR(S) DYSON

01/11/05	(S)	PREFILE RELEASED 12/30/04
01/11/05	(S)	READ THE FIRST TIME - REFERRALS
01/11/05	(S)	STA, JUD
03/01/05	(S)	STA AT 3:30 PM BELTZ 211
03/01/05	(S)	Heard & Held
03/01/05	(S)	MINUTE(STA)
03/15/05	(S)	STA AT 3:30 PM BELTZ 211
03/15/05	(S)	Moved CSSB 20(STA) Out of Committee
03/15/05	(S)	MINUTE(STA)
03/16/05	(S)	STA RPT CS 1NR 4AM SAME TITLE
03/16/05	(S)	AM: THERRIAULT, ELTON, WAGONER, HUGGINS
03/16/05	(S)	NR: DAVIS
03/16/05	(S)	FIN REFERRAL ADDED AFTER JUD
03/31/05	(S)	JUD AT 8:30 AM BUTROVICH 205
03/31/05	(S)	Scheduled But Not Heard
04/04/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/04/05	(S)	Heard & Held
04/04/05	(S)	MINUTE(JUD)
04/12/05	(H)	JUD AT 8:00 AM CAPITOL 120
04/12/05	(S)	Heard & Held
04/12/05	(S)	MINUTE(JUD)
04/19/05	(S)	JUD RPT CS FORTHCOMING 3DP 1NR
04/19/05	(S)	DP: SEEKINS, THERRIAULT, HUGGINS
04/19/05	(S)	NR: GUESS
04/19/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/19/05	(S)	Moved CSSB 20(JUD) Out of Committee
04/19/05	(S)	MINUTE(JUD)
04/20/05	(S)	RETURNED TO JUD COMMITTEE
04/21/05	(S)	JUD CS RECEIVED SAME TITLE
04/26/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/26/05	(S)	Moved CSSB 20(2nd JUD) Out of Committee
04/26/05	(S)	MINUTE(JUD)
04/27/05	(S)	JUD RPT CS(2D JUD) 3DP 2AM SAME TITLE
04/27/05	(S)	DP: SEEKINS, THERRIAULT, HUGGINS
04/27/05	(S)	AM: FRENCH, GUESS
04/27/05	(S)	FIN REFERRAL ADDED AFTER JUD
04/28/05	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/28/05	(S)	Moved CSSB 20(JUD) Out of Committee
04/28/05	(S)	MINUTE(FIN)
04/29/05	(S)	FIN RPT CS(JUD) 2DP 3NR
04/29/05	(S)	DP: GREEN, DYSON
04/29/05	(S)	NR: WILKEN, HOFFMAN, OLSON
05/01/05	(S)	JUD CS ADOPTED Y11 N5 E3 A1
05/03/05	(S)	TRANSMITTED TO (H)
05/03/05	(S)	VERSION: CSSB 20(JUD)

05/04/05	(H)	READ THE FIRST TIME - REFERRALS
05/04/05	(H)	JUD, FIN
05/05/05	(H)	JUD AT 1:00 PM CAPITOL 120
05/05/05	(H)	Scheduled But Not Heard
05/07/05	(H)	JUD AT 3:30 PM CAPITOL 120
05/07/05	(H)	Meeting Postponed to 12 noon 5/8/05
05/08/05	(H)	JUD AT 12:00 AM CAPITOL 120
05/08/05	(H)	Meeting Postponed
05/09/05	(H)	JUD AT 0:00 AM CAPITOL 120
05/09/05	(H)	<Bill Hearing Canceled>
02/15/06	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 353
SHORT TITLE: SENTENCING FOR SEXUAL OFFENSES
SPONSOR(S): REPRESENTATIVE(S) NEUMAN, LYNN

01/09/06	(H)	PREFILE RELEASED 1/6/06
01/09/06	(H)	READ THE FIRST TIME - REFERRALS
01/09/06	(H)	JUD, FIN
02/03/06	(H)	JUD AT 1:00 PM CAPITOL 120
02/03/06	(H)	<Bill Hearing Canceled>
02/08/06	(H)	JUD AT 1:00 PM CAPITOL 120
02/08/06	(H)	Heard & Held
02/08/06	(H)	MINUTE(JUD)
02/13/06	(H)	JUD AT 1:00 PM CAPITOL 120
02/13/06	(H)	Heard & Held
02/13/06	(H)	MINUTE(JUD)
02/15/06	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR FRED DYSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of SB 20.

MICHAEL "WES" MACLEOD-BALL, Executive Director
Alaska Civil Liberties Union (AkCLU)
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to SB 20.

KAREN VOSBURGH LEWIS, Executive Director
Alaska Right To Life
Palmer, Alaska
POSITION STATEMENT: Testified in support of SB 20.

BRENDA STANFILL

Interior Alaska Center for Non-Violent Living
Fairbanks, Alaska
POSITION STATEMENT: Expressed concerns with SB 20.

MICHAEL SMITH
University of Alaska - Fairbanks Students for Life
Fairbanks, Alaska
POSITION STATEMENT: During hearing of SB 20, related support of any legislation that would criminalize the destruction of an unborn child and any legislation that would strengthen the penalties against a violent individual who would commit such an act.

PAMELA MARSCH
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with the language, "intent to kill an unborn child" in SB 20.

KENNETH JACOBUS, Attorney at Law
Kenneth Jacobus PC
Anchorage, Alaska
POSITION STATEMENT: During the hearing of SB 20, opined that Alaska needs to enact a law to protect the rights of unborn children and protect them from being harmed knowingly or negligently by third parties.

DEBBIE JOSLIN
Eagle Forum Alaska
Delta Junction, Alaska
POSITION STATEMENT: Testified in support of SB 20.

CLOVER SIMON, CEO
Planned Parenthood Alaska
(No address provided)
POSITION STATEMENT: Testified in opposition to SB 20 as currently written.

REPRESENTATIVE MARK NEUMAN
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as one of the prime sponsors of HB 353.

REX SHATTUCK, Staff
to Representative Mark Neuman
House Special Committee on Economic Development, International Trade and Tourism

Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided comments at the request of Representative Neuman, one of the prime sponsors of HB 353.

SENATOR CON BUNDE
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: As the sponsor of SB 218, assisted with the presentation of HB 353, Version F.

SENATOR GRETCHEN GUESS
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: As the sponsor of SB 223, assisted with the presentation of HB 353, Version F.

SUSAN A. 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 HB 353, Version F.

GINGER BRYANT
South Peninsula Haven House
Homer, Alaska
POSITION STATEMENT: Urged passage of HB 353.

LESLIE A. HIEBERT, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to the sentencing provisions of HB 353, Version F.

PHILLIP E. SHANAHAN, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 353, Version F, provided comments and responded to questions.

SIDNEY K. BILLINGSLEA, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 353, Version F.

SUE CHRISTIANSEN
Bearing Sea Women's Group

Nome, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 353, Version F.

MEGHAN GAUGHAN
Tundra Women's Center (TWC)
Bethel, Alaska
POSITION STATEMENT: Testified in support of HB 353.

DANIEL E. LIBBEY, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 353, Version F, testified in opposition to the sentencing provisions.

MICHAEL A. MOBERLY, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 353, Version F, testified in opposition.

CYNTHIA KARLSON
Women in Safe Homes (WISH)
Ketchikan, Alaska
POSITION STATEMENT: Testified in support of HB 353.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:13:27 PM. Representatives McGuire, Wilson, and Coghill were present at the call to order. Representatives Kott, Anderson, Gruenberg, and Gara arrived as the meeting was in progress. Representative Lynn was also in attendance.

SB 20 - OFFENSES AGAINST UNBORN CHILDREN

1:13:56 PM

CHAIR McGUIRE announced that the first order of business would be CS FOR SENATE BILL NO. 20(JUD), "An Act relating to offenses against unborn children."

1:14:09 PM

SENATOR FRED DYSON, Alaska State Legislature, sponsor, informed the committee that CSSB 20(2d JUD) includes an amendment from Senator Guess that he said added value. Senator Guess's amendment, he explained, clarifies that a woman who stays in an

abusive domestic relationship could not be charged with reckless behavior. Therefore, he said that he would support that provision being added back into the legislation.

CHAIR McGUIRE pointed out that the language of Senator Guess's amendment is located on page 3, lines 14-19, of CSSB 20(2d JUD).

SENATOR DYSON noted that the aforementioned language also appears [on page 2, lines 5-10, of CSSB 20(2d JUD)]. Senator Dyson then explained that SB 20 establishes that the damaging or killing of an unborn child is a separate crime from the harm that might have occurred to the mother. The federal government has passed the Unborn Child Protection Act, he noted. However, the federal Act only applies on federal lands or in the prosecution of federal crimes. Much of what happens in Alaska, with regard to assault, murder, and manslaughter is prosecuted in state court by state prosecutors. After discussions with the attorney general's office, Senator Dyson relayed, the attorney general made it clear that this legislation would allow such cases to be brought forth in state court.

SENATOR DYSON related that approximately 30 other states have [enacted provisions] similar to what is being proposed via SB 20. He then informed the committee that in 1969, California police entered the wrong apartment during a drug bust and mistakenly [shot a pregnant] woman and killed her unborn child. Although it was a mistake, as the matter was addressed it was realized that there were no statutes that allowed recourse for the [unborn] child. Nothing in California law established the value of the [unborn] child that was lost. At that time, the California legislature passed one of the first [provisions] that established the value of a wanted, unborn child. After obtaining model legislation from various sources and help from the Department of Law (DOL) and Legislative Legal and Research Services, SB 20 was crafted in order to insert "unborn child" in several places in statute and addresses specific incidents that are particular to an unborn child.

1:19:04 PM

SENATOR DYSON noted that the committee will likely hear testimony that SB 20 can be construed to be anti-abortion. However, he offered to provide the committee with [written documentation] from several legal experts and law school faculty establishing stating that the legislation is not anti-abortion. Senator Dyson clarified that SB 20 doesn't speak to abortion or damage to an unborn child that may occur during diagnostic or

therapeutic processes; however, it does establish an unborn child as an entity worthy of protection and recognition in the law.

SENATOR DYSON then turned to the question of what happens if one harms a pregnant woman that one didn't know was pregnant. The law is clear that if the individual had evil intentions toward the woman and carried those out, then those intentions are "transferable." He offered an example of a situation wherein a man attacked another who was carrying a child under his coat and thus the attacker could be charged for the damage to the child. Senator Dyson explained that the actions for which one can be charged under the bill are the same as if the child has been born. In order to have a crime, there has to be demonstrable harm, intention, and an instrument to cause the harm.

CHAIR McGUIRE asked if the only difference between [CSSB 20(2d JUD)] and CSSB 20(JUD) is the deletion of the domestic violence provisions.

SENATOR DYSON said, "To the best of my knowledge." He offered to research that issue further to be sure.

CHAIR McGUIRE requested a motion to adopt CSSB 20(2d JUD) as the work draft.

1:24:07 PM

REPRESENTATIVE WILSON moved to adopt CSSB 20(2d JUD) as the work draft.

The committee took an at-ease from 1:25 p.m. to 1:26 p.m.

CHAIR McGUIRE, in response to questions, recapped the difference between CSSB 20(JUD) and CSSB 20(2d JUD), and suggested that by adopting CSSB 20(2d JUD) as the work draft, the committee could save time.

CHAIR McGUIRE, upon determining that there were no objections to Representative Wilson's motion, announced that CSSB 20(2d JUD) was before the committee.

1:26:17 PM

MICHAEL "WES" MACLEOD-BALL, Executive Director, Alaska Civil Liberties Union (AkCLU), spoke in opposition to SB 20, although he clarified that the AkCLU fully supports the efforts to punish

acts of violence against women that would harm or terminate a wanted pregnancy. However, this legislation would do so in such a way that diminishes the woman, the intended victim, by separating the fetus from the woman in the eyes of the law. He relayed that the AkCLU supports alternate approaches, including enhanced penalties for cases in which a woman suffers harm to herself or her wanted pregnancy.

MR. MACLEOD-BALL informed the committee that according to certain statistics and studies, one-third of female murder victims are killed by their intimate partner; 4-8 percent of the women in the nation are battered by the men in their lives, with the highest rate pertaining to pregnant adolescents; and homicide is the number one killer of pregnant women. This information illustrates that the intent of the perpetrator is to harm the woman, not the child, though the pregnancy of the woman heightens the likelihood of battery. Although he confirmed that [the AkCLU's] desire is to do something about this problem, the issues associated with doing so need to be addressed further.

MR. MACLEOD-BALL expressed concern that the current legislation doesn't exempt the pregnant woman from criminal liability. He pointed out that the privacy right guarantees a woman the right to control her own body in the absence of compelling state interest. Furthermore, the U.S. Supreme Court case, Roe v. Wade, interprets that right as protecting the right to abortion. However, SB 20 criminalizes activity, with respect to the fetus, that is less harmful than abortion. He indicated that if a woman has the right to abort under constitutional standards, then it stands to reason that a pregnant woman ought to have the right to do other things during her pregnancy that fall short of abortion. However, [under SB 20] the pregnant woman would be put at risk of incurring criminal liability.

MR. MACLEOD-BALL then said that SB 20 will encourage more abortions if a woman is anxious that some activity in which she is engaged during pregnancy may result in harm to her fetus. Why would a woman risk criminal liability under SB 20 when she could simply abort the fetus? Furthermore, SB 20 unfairly penalizes wholly innocent and legal behavior, and a woman who doesn't know that she is pregnant and engages in high-risk activity might be exposed to criminal liability under this proposed legislation. There are also a host of proof and legal procedural issues that are raised by SB 20.

MR. MACLEOD-BALL said that although proponents could say that it's not the intent of SB 20 to subject women in some of these

hypothetical situations to criminal liability, the language does support doing so, and therefore there will be a prosecutor who will bring a case against a woman who will then have to defend herself. Moreover, there will be additional costs to the state that aren't being considered, including the various costs necessary to scientifically prove or disprove the various elements of such cases.

1:31:35 PM

MR. MACLEOD-BALL concluded by reiterating the AkCLU's opposition to SB 20, which he characterized as bad legislation. However, he noted that the AkCLU is in favor of heightening penalties against those who would harm pregnant women, particularly when there is damage to the fetus. He said that he believes the sponsor of SB 20 is concerned with children, fetuses, and abortions. However, he said he didn't believe that the proponents are concerned with finding a consensus on these issues because if that were truly the case, the numerous references to "unborn children" in the legislation would be deleted and there would be more of an attempt to agree upon the common ground of heightening sentencing for those engaging in activities that harm fetuses.

CHAIR McGUIRE offered that as she read the legislation, if the perpetrator is using a dangerous instrument, the mental intent of reckless enters [the equation]; otherwise, it's "intentionally" or "knowingly." Therefore, she said that she only sees "reckless" as a mental intent when in combination with a dangerous instrument.

MR. MACLEOD-BALL said that while there may be an understanding of what particular terms mean, how that is carried out in practice is a different matter. Furthermore, there is no specific exemption for a woman's own actions, and such an exemption should be included in the bill. He offered to provide more specific suggestions in writing.

REPRESENTATIVE GARA pointed out that in the current criminal code, AS 11.89.100, serious physical injury that a defendant causes includes an injury that unlawfully terminates a pregnancy. However, it seems that there are aggravating factors that can change the sentence. Therefore, it would be appropriate, he opined, to have an aggravator that makes clear that if serious physical injury is caused, including the termination of a pregnancy, it will lead to a higher sentence.

The aforementioned may be an appropriate way to address situations in which someone recklessly causes a miscarriage.

MR. MACLEOD-BALL said there is probably some merit to that approach as perhaps all sides on this issue could agree on it.

1:36:30 PM

KAREN VOSBURGH LEWIS, Executive Director, Alaska Right To Life, began by informing the committee that currently 32 states recognize the killing of an unborn child as a homicide in some circumstances. Of those states, there are 20 states with homicide laws that recognize unborn children as victims throughout the entire prenatal development period. Furthermore, she related, it's well established that legislation such as SB 20 doesn't conflict with the Supreme Court's pro-abortion decisions such as Roe v. Wade. Criminal defendants have brought many legal challenges to the state's unborn victim laws based on Roe v. Wade and other constitutional arguments, but all such challenges have been rejected by the courts. In fact, in the 1989 case of Webster v. Reproductive Health Services, the U.S. Supreme Court refused to invalidate a Missouri statute that declares the life of each human being begins at conception and that unborn children have protectable interests in life, health, and well being. Furthermore, the [U.S. Supreme Court stated] that all state laws shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all rights, privileges, and immunities available to other persons, citizens, and residents of the state to the extent permitted by the constitution and U.S. Supreme Court rulings.

MS. VOSBURGH LEWIS informed the committee that a scientific poll by Newsweek released in June 2005 asked whether someone who killed a fetus in the womb should face a homicide charge for the act, either throughout the pregnancy, from the point at viability, or not at all. She relayed her understanding that 56 percent of those responding to the poll said there should be a homicide charge for the act throughout pregnancy while 28 percent said a homicide charge should be allowed at the point of viability, which amounts to 84 percent favoring homicide charges in these cases. Only 9 percent said there should be no such thing as a fetal homicide charge. In May 2005 a Fox News poll found that 84 percent of the nation favored a double homicide charge in the Laci Peterson murder case in California. Ms. Vosburgh Lewis concluded by characterizing SB 20 as common sense legislation, and urged the committee to pass it.

1:40:01 PM

BRENDA STANFILL, Interior Alaska Center for Non-Violent Living, reminded the committee that a lot of time was spent on SB 20 last year and many [concerns] remain. However, she said she appreciated the work to exempt charging victims of domestic violence who stay in a relationship with homicide based solely on staying in the relationship. "But it still goes back to ..., until we do a better job of protecting a woman, we're not going to be able to protect her child," she remarked. Although she said she understands the need for additional crimes, SB 20 approaches it in the wrong way, and noted her agreement with earlier testimony that there will still be prosecutorial discretion and so this bill could be used against a pregnant woman. Ms. Stanfill said that she is most concerned with crimes against a woman whose own child has been lost.

MS. STANFILL expressed further concern that SB 20 may lead to a woman not seeking help or health care when she has been beaten repeatedly. Therefore, the community and the state would be better served by establishing a crime against a woman with aggravating factors and additional penalties when an unborn child is involved. She relayed that many women at the shelter experienced their first incidence of physical assault when they were pregnant. She opined that it's very important to keep this in context in that this is a crime against a woman and the penalties should be placed there so that women can be made safe. She further opined the penalties for men who are abusing pregnant women need to be increased. Ms. Stanfill said that a [pregnant] woman should not be in danger of being prosecuted for a crime.

REPRESENTATIVE GRUENBERG asked Ms. Stanfill whether she saw any need for additional crimes to protect those who are abused during pregnancy.

MS. STANFILL replied yes, and pointed out that a man can abuse a woman with his fists over and over again and only be charged with fourth degree assault, a misdemeanor charge engendering little to no jail time. The laws don't do an adequate job of ensuring that women are protected via the imposition of the jail time that fits the crimes perpetrated against them.

CHAIR McGUIRE, in response to a question, informed the committee that amendments to SB 20 would be considered at the bill's next hearing, and mentioned that the title may need to be amended.

1:44:51 PM

MICHAEL SMITH, University of Alaska - Fairbanks Students for Life, relayed that he supports any legislation that would criminalize the destruction of an unborn child and any legislation that would strengthen the penalties against an individual who would commit such an act.

1:45:39 PM

PAMELA MARSCH turned attention to the language, "intent to kill an unborn child" and posed a situation in which a pregnant woman was advised to have bed rest, but the woman needed to work to feed her other children. In such a case, would the woman in such a situation who decided to work be prosecuted under SB 20? Although everyone would probably say no, the "intent to kill an unborn child" language could be interpreted that way because the woman was advised to have bed rest. Furthermore, she pondered whether a woman who abuses drugs or alcohol may simply choose not to obtain help because of the fear of prosecution under SB 20.

REPRESENTATIVE GRUENBERG recalled that an earlier version of SB 20 included a provision that exempted actions taken by the pregnant woman. He said that he may offer an amendment that would cure Ms. Marsch's concern.

1:48:40 PM

KENNETH JACOBUS, Attorney at Law, Kenneth Jacobus PC, opined that Alaska needs to enact a law to protect the rights of unborn children who are being harmed knowingly or negligently by third parties. He said that he is less concerned about folks being prosecuted when they shouldn't because there is prosecutorial discretion. With regard to exempting actions undertaken by a pregnant woman herself, he opined, such an exemption would be too broad because there are certain things that a woman could do to herself that should be criminalized.

REPRESENTATIVE GRUENBERG referred to Senator French's amendment offered on the Senate floor to the language on page 2, line 13, and requested that Mr. Jacobus fax him any suggestions for change.

1:51:09 PM

DEBBIE JOSLIN, Eagle Forum Alaska, relayed her support for SB 20 and urged the committee to pass the bill. Ms. Joslin opined, "In a society where we're supposed to value human life and protect women, women are increasingly the victims of violence." She offered the following statistics: 32 percent of nonpregnant women were victims of homicide; while 43.3 of pregnant women were victims of homicide, 74 percent of which died from gunshot trauma; and 3 out of 4 of women with evidence of pregnancy were victims of homicide within the first 20 weeks of pregnancy. She opined that the aforementioned statistics suggest that women aren't always the primary victim but rather it's often the unborn child.

1:52:33 PM

CLOVER SIMON, CEO, Planned Parenthood Alaska (PPA), informed the committee that PPA certainly shares the sponsor's goal of making a loss of pregnancy due to violence a greater crime. However, at this time the organization is unable to support the legislation as currently written. Furthermore, SB 20 is viewed as part of a national trend to erode the foundations of a woman's right to choose by elevating all stages of prenatal development under state law. Ms. Simon suggested that the legislature instead adopt a penalty enhancement approach that would make it one felony count higher to harm a pregnant woman when the result is miscarriage or stillbirth. The aforementioned approach is more likely to reach offenders because the language is cleaner and less likely for the two separate charges to be joined in prosecution, and it would be simpler to have the increased penalty come in the form of an aggravator. The resulting penalty would be as stiff as the penalties outlined in the current version of SB 20.

MS. SIMON echoed concern with regard to the lack of an exception for actions that a woman may undertake herself. She then urged the committee to review the following language of Section 2 [of CSSB 20(JUD)], which read:

> the birth of a child before 37 weeks gestation with weight at birth of 2,500 grams or less is prima facie evidence of serious physical injury.

MS. SIMON asked the committee to consider how a woman might be prosecuted under this section. In closing, Ms. Simon reminded the committee that the protection of the woman must come first because the woman's safety and well being allows there to be healthy a baby. The bill as currently written seems to have

left this part out, and therefore she urged the committee to work with PPA to develop legislation that everyone can support.

MS. SIMON, in response to a question, asked whether a woman who smokes during her pregnancy, which is a known cause of low-birth weight and pre-term labor, could be prosecuted under SB 20.

REPRESENTATIVE GRUENBERG pointed out that a low-birth weight baby may not necessarily have any physical injury.

CHAIR McGUIRE encouraged committee members to review the language regarding "a dangerous instrument." She said that she didn't know whether a cigarette would be a dangerous instrument. Therefore, perhaps the focus should be related to the definition of a dangerous instrument. The only place in the bill that reckless conduct is used is in concert with the use of a dangerous instrument; there is nowhere in the legislation where the reckless conduct and the use of a dangerous instrument aren't linked.

REPRESENTATIVE GRUENBERG argued, however, that the language on page 3, lines 14-19, seems to address the issue of pregnant women who intentionally smoke. Therefore, he questioned whether a cigarette might be considered a dangerous instrument under the facts of a particular case.

1:57:50 PM

CHAIR McGUIRE opined that she couldn't imagine a prosecutor making an argument that a woman intended to cause serious physical injury to her unborn child by smoking.

REPRESENTATIVE GARA noted that normally a dangerous instrument is a weapon, and that it's understandable that one would want to have an enhanced crime when someone misuses a weapon and causes a very serious injury. Therefore, he questioned whether the committee should consider substituting "weapon" for "a dangerous instrument." Currently, when the language, "a dangerous instrument" is used in conjunction with negligent homicide, then one could be talking about a bad car accident that causes a miscarriage; under the bill, in such a situation, the person could be charged with negligent homicide even though that might not be the sponsor's intention.

REPRESENTATIVE GRUENBERG pointed out that there are cases from the Alaska Supreme Court and the Alaska Court of Appeals that hold that a boot and a telephone are dangerous instruments.

CHAIR McGUIRE opined that Ms. Simon makes some good points and although the legislation may continue to have some places requiring further clean up, she wasn't convinced that a cigarette [would be viewed as a dangerous instrument].

2:00:10 PM

CHIP WAGONER, Executive Director, Alaska Conference of Catholic Bishops, relayed that the church believes life should be protected from conception to natural death. He further relayed that a person's dignity comes from God and as such the church believes that everyone has a right to life and a right to those things that make life truly human, such as food, clothing, housing, health care, education, et cetera. This legislation recognizes that a child in the womb deserves protection just as do other people. Those who are responsible for the loss of an unborn child should be held accountable just as they would be were the child in the mother's arms. The aforementioned is why the Alaska Conference of Catholic Bishops supports SB 20. He noted appreciation for the committee's adoption of CSSB 20(2d JUD), which includes Senator Guess's amendment regarding domestic violence situations.

2:02:24 PM

CHAIR McGUIRE announced that [CSSB 20(2d JUD)] would be set aside, and that she would leave public testimony open with the caveat that those who have already testified not do so again.

HB 353 - SENTENCING FOR SEXUAL OFFENSES

[Contains mention that the provisions of SB 218 have been incorporated into the proposed committees substitute (CS) for HB 353, Version F, and an indication that the provisions of SB 223 had previously been incorporated into SB 218; the sponsors of SB 223 and SB 218 assisted with the presentation of HB 353.]

2:03:01 PM

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 353, "An Act relating to sentences for sexual offenses." [Before the committee was the proposed committee substitute (CS) for HB 353, Version 24-LS1449\G, Luckhaupt, 2/2/06, which had been adopted as a work draft on 2/8/06.]

2:04:03 PM

REPRESENTATIVE MARK NEUMAN, Alaska State Legislature, one of the prime sponsors of HB 353, relayed that members' packets contain a new proposed committee substitute (CS) for HB 353, Version 24-LS1449\F, Luckhaupt, 2/10/06, that incorporates the provisions of SB 218 into HB 353.

2:04:36 PM

REPRESENTATIVE WILSON moved to adopt the proposed CS for HB 353, Version 24-LS1449\F, Luckhaupt, 2/10/06, as the work draft. There being no objection, Version F was before the committee.

REPRESENTATIVE NEUMAN relayed that incorporating the senate bill into HB 353 was done with the goal of protecting all Alaskans from sexual assault crimes and sexual abuse of a minor crimes, and that it is hoped that Version F will address some of the concerns previously raised in committee. He remarked on the work that he, Senator Con Bunde, and Senator Gretchen Guess have done in crafting the legislation currently before the committee.

2:06:15 PM

REX SHATTUCK, Staff to Representative Mark Neuman, House Special Committee on Economic Development, International Trade and Tourism, Alaska State Legislature, provided comments at the request of Representative Neuman, one of the prime sponsors of HB 353. He relayed that Representative Neuman, Senator Bunde, and Senator Guess have worked to try to "fix" the issue of presumptive sentencing. Mr. Shattuck then relayed that when he was 11 years old, he was the victim of what would now be considered the crime of sexual abuse of a minor in the second degree - a class B felony; he was fondled through clothing and solicited. Mr. Shattuck said he was there to put a face on the issue and to speak for those who won't typically come forward and speak for themselves. He went on to say:

> I was 11 when it happened and I'm now 49, and that's a sentence of 38 years and growing without parole. And I understand that we should have some recognition of the defendants, but the victims also are a key part of this. And I urge you to remember that as you're going through this, there's some big disparities between the sentencing of the defendant and [the sentences of] the victim.

2:08:35 PM

SENATOR CON BUNDE, Alaska State Legislature, speaking as the sponsor of SB 218, offered that the goal of [HB 353, Version F,] is to protect citizens without being "overly draconian" to sexual predators. Alaska has a reputation of having the highest sexual assault rate in the nation, actually 70 percent higher than the next highest state. Furthermore, just the reported cases make up that high rate - the reported cases are just the "tip of the iceberg" - and only a small percentage of perpetrators actually get convicted. He characterized [Version F] as a cooperative effort, and remarked on the need to press forward with a vehicle that will stop the creation of new victims, particularly given that it is very difficult for sexual offenders to change. Rehabilitation of sexual offenders is very unlikely, and so the only way to ensure the public's safety is to remove sexual offenders from society.

SENATOR BUNDE noted that [Version F] essentially insulates society from sexual offenders, people who inflict lifelong wounds. Excessive alcohol use and drug abuse are sometimes touted as reasons for Alaska's high rate of sexual assault and sexual abuse of a minor cases, but he discounts that argument, he relayed, adding that the drive to commit such crimes is already there to begin with in certain people. Acknowledging that [adoption of Version F] will be a drastic and expensive step, he asserted that it is still a necessary step.

2:14:17 PM

SENATOR GRETCHEN GUESS, Alaska State Legislature, speaking as the sponsor of SB 223, noted that she and Senators Dyson, Elton, Kookesh, Green, Olson, Hoffman, and Seekins have signed on as co-sponsors of SB 218. She explained that although she'd introduced SB 223, she has since "joined forces" with Senator Bunde on SB 218, adding that she would be speaking to the specific changes she'd [had incorporated into SB 218 and then into HB 353, Version F]. To begin with, she opined that Version F is too lenient, because she has no tolerance for "this issue," and asked members to keep in mind that the vehicle that passed the Senate in no way represents the upper level [of possible sentences] and already contains compromises.

SENATOR GUESS said that her motivation for sponsoring a bill on this issue is one of values, rather than one of protecting people or addressing statistics. The legislature is a policy-making group whose decisions are meant to reflect the values of the members' communities. She proffered that her constituents

would be shocked to hear that currently a rapist serving a five-year sentence or a child molester serving a three-year sentence could be released after serving only two-thirds of his/her sentence, surmising that this type of sentencing structure doesn't represent the values of the people in her district. People count on the legislature to establish laws that reflect their values. Unfortunately, she remarked, sex crimes have never been given the scrutiny and treated as seriously as they deserve; for example, it wasn't until just three years ago that she was able to pass legislation stipulating that the Violent Crimes Compensation Board (VCCB) couldn't blame a rape victim for being raped.

SENATOR GUESS said that although some may question the dramatic increase in sentencing proposed via Version F, her view is, how can the legislature not institute such increases in sentencing and how can it not reflect the values of Alaskans. She went on to say that she dismisses the notion that some rapes and molestations are not serious; instead, she opined, all are serious and have serious consequences on the victim and on the community. She relayed that her interest is in making sure that for any given sexual assault crime or sexual abuse of a minor crime, the sentencing scheme reflects the values of her community; currently they don't match, and what is proposed via Version F comes closer to a match.

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SENATOR GUESS noted that Sections 1 and 2 of Version F of HB 353 were taken from SB 223. Section 1 will add new paragraphs (6) and (7) to AS 11.41.436(a) - sexual abuse of a minor in the second degree - and these new paragraphs pertain to penetration crimes that currently are listed as paragraphs (2) and (3) of AS 11.41.438(a) - sexual abuse of a minor in the third degree. She opined that penetration crimes involving minors should be either first or second degree crimes because they are serious crimes, and although some would like to dismiss such crimes as being of no consequence, the consequences of being in a position of authority and having sex with someone under the age of 18 are serious. With the adoption of Section 1 of Version F, all penetration crimes involving minors will be either first or second degree crimes.

SENATOR GUESS explained that Section 2 of Version F creates a new crime of failing to report a sex offender or a child kidnapper who has not registered as such, and a violation of this proposed statute - AS 11.56.767 - will be a class A

misdemeanor. This provision is in response to a [recent] Florida case involving a sex offender who was living with his sister; his sister knew he was sex offender, knew he hadn't registered, didn't do anything about it, and the sex offender went on to [abduct, rape, torture, and kill a little girl].

2:22:00 PM

REPRESENTATIVE GRUENBERG asked whether members of the clergy ought to be included in the exemption provided by proposed AS 11.56.767(b), which says:

> (b) In a prosecution under (a) of this section, it is a defense that the defendant was a licensed attorney and there existed, at the time of the offense, a bona fide attorney-client relationship between the attorney and the sex offender or child kidnapper.

SENATOR GUESS said she would not be comfortable adding members of the clergy to that exemption.

REPRESENTATIVE NEUMAN expressed a preference for keeping proposed AS 11.56.767(b) as is.

REPRESENTATIVE GRUENBERG noted that the Alaska Rules of Evidence contain an exemption for communications with members of the clergy.

SENATOR BUNDE mentioned that there is a difference between being aware of a fact and being a knowing participant in a crime.

REPRESENTATIVE GARA asked Senator Guess whether she would be amenable to a change that would ensure that proposed AS 11.56.767 doesn't apply in situations involving custodial interference.

SENATOR GUESS, in response to that question and other comments, pointed out that AS 11.56.767(a) only applies in situations where a person knows that someone must register as a sex offender or child kidnapper and hasn't yet done so, and therefore the provision won't apply in situations involving custodial interference.

REPRESENTATIVE GARA acknowledged that point.

CHAIR McGUIRE concurred.

REPRESENTATIVE GRUENBERG questioned whether proposed AS 11.56.767(b) might impact the other "privileges" in the Alaska Rules of Evidence, adding that he wants to ensure that the bill is constitutional with regard to possible court rule changes.

CHAIR McGUIRE offered her understanding that anytime a failure to report a crime is made a crime itself, unless otherwise specified, it won't automatically impact the privileges currently listed in the Alaska Rules of Evidence.

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SUSAN A. PARKES, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law (DOL), offered her understanding, however, that similar to the legislature's policy decision to make certain groups of people mandatory reporters of child abuse, via proposed AS 11.56.767, the legislature is making a policy decision that the privileges listed in the Alaska Rules of Evidence won't apply for "this kind of purpose." Therefore, the legislature would have to specifically exempt those that they don't wish proposed AS 11.56.767 to apply to, just as that provision does for attorneys of sex offenders and child kidnappers. She posited that a statute can override a privilege in an evidence rule.

REPRESENTATIVE GRUENBERG said his question initially had been whether the title ought to be changed to reflect a court rule change, but has since surmised that that won't be necessary because in-court procedures won't be affected.

CHAIR McGUIRE concurred.

MS. PARKES pointed out that the privileges in the Alaska Rules of Evidence pertain to evidence admissibility in court, whereas proposed AS 11.56.767(b) is essentially a policy call exempting a group of people from having to report certain information to [law enforcement agencies].

SENATOR BUNDE explained that Section 3 mandates regular periodic polygraph examinations as a condition of probation for a sex offense [as defined in AS 12.63.100]. Information gathered during these examinations will not be admissible in court, but it has been discovered that probationers and parolees are more likely to stay in compliance with their conditions of probation/parole because they know they will get caught if they lie during a polygraph examination; in fact, [statistics from other states indicate] that compliance improves almost 70

percent when regular periodic polygraph examinations are a condition of probation/parole.

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SENATOR BUNDE explained that Section 4 will increase the presumptive sentencing ranges. For example, under Version F, the presumptive sentencing range will be 25 to 30 years for a first felony conviction of first degree sexual abuse of a minor under the age of 13; will be 20 to 30 years for a first felony conviction of first degree sexual abuse of a minor 13 years of age or older; and will be 25 to 35 years for a first felony conviction of first degree sexual assault or first degree sexual abuse of a minor if the defendant used a firearm, a dangerous instrument, or caused serious physical injury during the commission of the crime. For a second felony conviction of first degree sexual assault or sexual abuse of a minor, the presumptive sentencing range will be 30 to 40 years if the first felony conviction was not for a sexual felony, and will be 35 to 40 years if the first felony conviction was for a sexual felony. For a third felony conviction of first degree sexual assault or first degree sexual abuse of a minor, the presumptive sentencing range will be 40 to 60 years if the first two felony conviction were not for sexual felonies, and will be 99 years if the first two felony conviction were for sexual felonies.

SENATOR BUNDE also explained that the presumptive sentencing range will be 20 to 25 years for a first felony conviction of [attempt, conspiracy, or solicitation to commit] first degree sexual abuse of a minor under the age of 13; will be 15 to 25 years for attempt, conspiracy, or solicitation to commit first degree sexual abuse of a minor 13 years of age or older; and will be 25 to 35 years for a first felony conviction of attempt, conspiracy, or solicitation to commit first degree sexual assault or first degree sexual abuse of a minor in the first degree if the defendant used a firearm, a dangerous instrument, or caused serious physical injury during the commission of the crime. For a second felony conviction of attempt, conspiracy, or solicitation to commit first degree sexual assault or first degree sexual abuse of a minor, the presumptive sentencing range will be 25 to 35 years if the first felony conviction was not for a sexual felony, and will be 30 to 40 years if the first felony conviction was for a sexual felony. For a third felony conviction of attempt, conspiracy, or solicitation to commit first degree sexual assault or sexual abuse of a minor, the presumptive sentencing range will be 35 to 50 years if the first two felony convictions were not sexual felonies, and will be 99

years if the first two felony convictions were for sexual felonies.

SENATOR BUNDE went on to explain that for a first felony conviction of second degree sexual assault, second degree sexual abuse of a minor, unlawful exploitation of a minor, or distribution of child pornography, the presumptive sentencing range will be 5 to 15 years; will be 10 to 25 years for a second felony conviction if the first felony conviction was not for a sexual felony; and will be 15 to 30 years for a second felony conviction if the first felony conviction was for a sexual felony. For a third felony conviction of second degree sexual assault, second degree sexual abuse of a minor, unlawful exploitation of a minor, or distribution of child pornography, the presumptive sentencing range will be 20 to 35 years if the first two felony convictions were not for sexual felonies, and will be 99 years if the first two felony convictions were for sexual felonies.

SENATOR BUNDE relayed that the last portions of Section 4 stipulate that for a first felony conviction of third degree sexual assault, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, second degree sexual abuse of a minor, unlawful exploitation of a minor, or distribution of child pornography, the presumptive sentencing range will be 1 to 12 years; will be 8 to 15 years for a second felony conviction if the first felony conviction was not for a sexual felony; and will be 12 to 20 years for a second felony conviction if the first felony conviction was for a sexual felony. For a third felony conviction of third degree sexual assault, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, second degree sexual abuse of a minor, unlawful exploitation of a minor, or distribution of child pornography, the presumptive sentencing range will be 15 to 25 years if the first two felony convictions were not for sexual felonies, and will be 99 years if the first two felony convictions were for sexual felonies.

SENATOR BUNDE offered his understanding that by the time a person has been convicted for sexual felonies three times, he/she has already created hundreds of victims. He then turned attention to Section 5 of Version F, and indicated that it stipulates that "habitual criminals" must serve half of their sentence before they may file a motion for sentence reduction. Section 6 stipulates that [certain] habitual criminals shall be

sentenced for 99 years. Section 7 provides that sexual offenders shall serve mandatory periods of probation as part of sentencing; currently, some sexual offenders will chose to serve their full sentence in order to avoid supervision when released. The proposed probation periods are 15 years for an unclassified sexual felony, 10 years for a class A or class B sexual felony, and 5 years for a class C sexual felony; again, these shall be mandatory periods of probation subject to all current conditions of probation as well as - with the passage of Sections 3 - regular periodic polygraph examinations, and may not be suspended or reduced.

SENATOR BUNDE turned attention to Sections 8 and 9, and characterized them as housekeeping alterations intended ensure that all sex offenders register [regardless of whether they were convicted of violating former laws rather than current laws]. Section 10 - similar to Section 3 - mandates regular periodic polygraph examinations as a condition of parole for a sex offense as defined in AS 12.63.100.

2:41:27 PM

SENATOR BUNDE relayed that Section 11 increases the penalty - from a class B misdemeanor to a class A misdemeanor - for failing to report [suspected incidences of child abuse, neglect, or child pornography]; this provision applies to those currently required to report such incidences. Section 12 conforms AS 11.41.438(a) with the change proposed via Section 1. Section 13 requires the Department of Public Safety (DPS) to provide [the public] with sex offender registry information on the Internet, specifically information regarding how to compile registry information in a geographic format. A portion of Section 14 extends the provisions of Sections 3 and 10 to apply to persons on probation or parole for offenses committed before, on, or after the effective date of this Act. Sections 15 and 16 are effective date clauses.

SENATOR BUNDE said that although the sentencing increases proposed in Version F are substantial, if there is even one mitigator, the judge can still chose to reduce the sentence substantially. Version F is setting a societal norm and the legislature must be able to provide the courts with the justification that some of the proposed sentences ought to be equal or greater than the sentence for the crime of manslaughter, for example. He reiterated that the only guarantee that a sexual offender will not reoffend is to remove

him/her from society, adding that the cost of doing so is one that the legislature should pay.

2:45:29 PM

GINGER BRYANT, South Peninsula Haven House, said it is imperative that the bill passes, and remarked how her organization often ends up serving a new set of victims from the same perpetrator. Currently, since there is no way to confirm that a perpetrator isn't re-offending when he/she is put back into a community, he/she will "just slip under the wires." Instituting polygraph examination requirements, establishing [longer] sentences, and holding perpetrators accountable are the only ways to protect people. She characterized HB 353 as a vital bill that needs to be passed.

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LESLIE A. HIEBERT, Attorney at Law, testified in opposition to the sentencing [provisions of the] bill. She said that in her practice as lawyer she has seen the facts of a case get distorted in predictable ways. She offered her understanding that presumptive sentencing ranges were established in order to avoid disparate sentences for similarly situated offenders, even sex offenders. But when the presumptive sentencing ranges become too broad, then some similarly situated offenders will instead get sentences that are widely different, a situation that the legislature was attempting to avoid. For example, one offender might be sentenced for 5 years and another might be sentenced for 15 years for the same behavior.

MS. HIEBERT also pointed out, for example, that sexual assault in the second degree - currently a class B felony - includes merely touching someone without his/her consent, and in such cases it usually comes down to each party arguing whether there actually was consent and then the jury believing one party over the other; with such a wide sentencing range, she posited, even innocent people will avoid having their case go before a jury because of the likelihood that they will get convicted. She offered her belief that the increased sentences [proposed by Version F] is just a reflection of society's interest in punishing sex offenders, but is written in such a way that innocent people will be caught up in it and might end up accepting a non-sex offense felony conviction in order to avoid a sex offense felony conviction and all if its "draconian" consequences.

MS. HIEBERT offered an example of just such a case, adding her belief that the proposed increases will result in a lot of unintended consequences. Furthermore, prosecutorial discretion will also result in disproportionate representation, investigation, [sentencing], and incarceration. In conclusion, she opined that there is no reason to increase the current presumptive sentencing ranges, since they were only recently adopted and so haven't been tried and tested.

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PHILLIP E. SHANAHAN, Attorney at Law, said that the problem he sees with the bill is that although the goal of punishing sex offenders more harshly could be a viewed as a laudable goal, the term "sex offender" as currently defined includes people who have committed very, very many different types of behaviors. He went on to say:

> I'm not here to tell you that every person convicted of a sex offense is not a dangerous person, but it's also very, very incorrect to assume that anybody who's convicted of a sex offense therefore poses a future danger. The repeat sex offender cases, perhaps those, yeah - I'm not here to tell you that they don't deserve lengthy jail terms. What I want to talk to you more about is the sentences that have been proposes for first time offenders. Traditionally, our sentencing scheme has punished first time offenders with lengthy jail time only for the most egregious acts - the penetration, the actual rapes, the molestations, the child molester cases. ...
>
> The bill ... [addressing the U.S. Supreme Court case, Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004)] then came along last year - just this same legislature - ... and it ... changed the old scheme and ... added some minimum penalties for the lower level conduct - the class B and the class C felonies. That went into effect in March of 2005. We're now, here, ... 11 months later, and that bill, itself, marked ... quite a change over the past 25-plus years in Alaska. Our presumptive sentencing laws didn't punish first time offenders for the lower level conducts with lengthy jail terms.
>
> The "Blakely bill" actually, in and of itself, changed that. And I heard Senator Bunde mention that this has

been worked on long before any of the national concern, but how long before could it have been when this same legislature just less than one year ago did a complete overhaul of our sentencing scheme and adopted new sentences for all or our ... felony crimes. And what ... this bill now does is change those sentences that were just increased in March without any chance to really see if they're going to have any positive impact, and [they are being] quadrupled in some cases, doubled in some cases, [and] in other cases just ... [having] huge ranges that didn't exist before.

MR. SHANAHAN continued:

I think ... [we're falling] into the trap of ... comparing the rapist to the person who tries to grab ... [his] girlfriend's breast through her clothing and she says no and then he does it again. Is that person in the same category as a person who violently rapes somebody? I don't think anyone's going to argue that they are, but this bill seems to assume that; this bill talks about increasing penalties for rapists and child molesters, but in fact the numbers that are being applied to first offenders convicted of the lower level crimes really doesn't make much of a distinction between the conduct.

And I agree with some of the testimony earlier that ... the broad ranges seem a bit different than we would expect. In the class C felony offense, just to ... briefly touch on that one, that can include the attempt to touch the breast through the clothing, and now we've got a range of 1 to 12 years for somebody who could be 50 years old and have done not a single thing wrong in their life. And our sentencing scheme has always addressed people's history by saying if you have a bad history you get treated worse later, but what this bill does is it takes away that sort of policy and it seems to say, "If you're a first offender and you do anything that constitutes, quote unquote, 'a sex crime,' you must have hundreds of victims and you must be very, very dangerous, so we're going to lock you up for a really long time."

That's a dramatic change in our law. Again, I don't quarrel with the idea of presumptive terms that are

> steep for people who are repeat sex offenders, but we shouldn't assume that every person's a repeat sex offender when they have their first offense. And, finally, Senator Bunde also mentioned that [the] finding of a single mitigator gives the judge lots of ability to reduce penalties, but a true understanding of the presumptive sentencing bill will defy that statement. ... First of all, the number of mitigators are extremely limited, and they continue to be limited over the years - more and more of them get deleted from the statutes - and also, depending upon what the start of the presumptive term is, a judge can only reduce the penalties so far. Just as an example, [for] the five-year minimum on the first [class B] felony ..., the lowest a judge could go is two and a half years with [a] mitigating factor.

MR. SHANAHAN, in conclusion, asked the legislature to take these issues into account when looking at the sentences for first time offenders.

CHAIR McGUIRE asked Mr. Shanahan to submit written comments as well.

2:58:22 PM

REPRESENTATIVE GARA expressed discomfort that neither a representative from the Public Defender Agency (PDA) nor a representative from the Office of Public Advocacy (OPA) has been present to comment on bills such as HB 353.

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

REPRESENTATIVE GARA offered his understanding that for a first time sex offender, the current presumptive sentencing range for an unclassified felony is 8 to 12 years but with aggravators can be increased to 99 years, and the current presumptive sentencing range for a class A felony is 5 to 8 years but with aggravators can be increased to 30 years. He noted that class B and class C felonies cover a huge range of conduct, one type being sexual contact, which is defined as touching someone through clothing. The current presumptive sentencing ranges are 2 to 4 years for a class B felony and 1 to 2 years for a class C felony, but with aggravators can be increased to 20 years and 10 years respectively. Thus the ranges are not the full picture; instead they merely provide the judge with sentencing parameters when aggravators are not part of the equation. Furthermore, some of

the aggravators that justify a higher sentence include crimes that cause physical injury and crimes that manifest deliberate cruelty to another person, and since both of those types of crimes constitute rape as [society] thinks of it, the sentences can be increased to the maximum.

REPRESENTATIVE GARA then asked whether aggravating factors are part of the main trial.

MR. SHANAHAN said it is hard to say whether they would be, because the "Blakely bill" is so new. According to his experience, however, even though aggravating factors do have to be proven to a jury because of the Blakely decision, the practice in many courts has been to do a "bifurcated trial" if the aggravating factor includes testimony that wouldn't be relevant to the "guilt or innocence" phase of the trial. In such instances, the jury wouldn't hear information about the aggravating factor until after - and only after - deciding guilt or innocence, and then the jury - usually the same jury - would be asked to decide whether the state has proven the aggravating factor beyond a reasonable doubt.

3:04:04 PM

SIDNEY K. BILLINGSLEA, Attorney at Law, relayed that she has been a criminal defense lawyer in Alaska for 20 years, and has substantial experience in defending people who have been accused of sex crimes, not all of whom have been guilty. And some of them she'd had the good fortune to represent before they were charged, and so she was able prevent them from being formally accused of committing a crime. Sometimes innocent people are accused of committing a sexual offenses, and those accusations are the most easily made accusations, but are the most difficult to defend because all a person has to do is say is that it happened, and there is generally no physical evidence available, no physical injury available, and no witnesses available other than the two individuals involved in the alleged behavior; therefore accusations can be easily made, for whatever reasons, by a person desiring to be a victim of these offenses, and they are very, very traumatic, difficult, expensive, and frightening to defend.

MS. BILLINGSLEA surmised that the value decision the legislature is attempting to make via this legislation is that as a policy of the state, the decision will be to "warehouse" sexual offenders regardless of their potential for rehabilitation, regardless, to some degree, of the level of offense they commit.

To do that, she also surmised, requires that the government dehumanize its own citizens to a degree - "you are choosing to put a citizen in the position that you ... would put an object to be stored in a box or a warehouse and instead just [incarcerating] them in prison." She went on to say:

> As a value decision, I think that paying attention to the factors that cause sexual offenses may be a better way to look. Some of the factors that cause ... at least two-thirds of the sexual offenses are substance abuse. I recognized very clearly that that's not an excuse for [sexual offenses] but it is a causing factor. ... If you address the substance abuse, which is rampant - especially in rural Alaska but the urban areas are no exception these days - ... you may very, very well find yourself with a steep decline in sexual offenses. ... One of the [other] large ... factors in causing people to grow up to be sex offenders is that they were once victims of sexual offense.
>
> So you're taking yesterday's victim, that you express a great deal of concern - and rightly so - about today, and then saying, "Okay, now that you're an adult and you've committed an offense ..., now you are somebody that we are no longer going to regard with compassion; we are going to regard you as somebody that needs to be warehoused for potentially ... the rest of you're productive years."

3:07:57 PM

MS. BILLINGSLEA opined that the bill will greatly impact native Alaskans and rural Alaskans for a couple of reasons, one being the high level of substance abuse in small towns. Additionally, there are some cultural norms in rural communities, such as younger people being involved with older people - for example, a 14-year old and an 18-year old, or a 15-year old and a 19-year old - and if someone comes in from outside of that community and sees this type of relationship occurring, it could result in the older person being charged with a class A or class B felony. She went on to say:

> I don't think increased sentences will deter sex offenses any more than the death penalty deters murder - ... that's proved. I think that what might be a good idea to think about, if you really want to take the great leap forward on this bill, is put a sunset

on it. And [then], if you don't have a decrease in sexual offenses in "fill in the blank years" - three years, five years - if you don't have a marked decrease in the percentage of sex offenses prosecuted in this state, you should sunset it. There's an idea. Otherwise, you're just running up your fiscal note warehousing people and you're not having the desired effect.

3:10:09 PM

SUE CHRISTIANSEN, Bearing Sea Women's Group, said that as a victim of incest, she wanted to provide the committee with information about her personal experience:

I don't know exactly when it began, but I would say around 8 years old and it went on until I was 14 years old. The point of this was that it warped my whole outlook on life. It was not until I was 47 years old ... and got sober that I realized the impact of what it had done to my life. It gave me a life sentence. I am now almost 62 years old, I have never forgotten, I have never gotten over it, and I never will. The point is, I'm managing it. But why are we so intent on focusing on the poor old perpetrators, and not valuing and protecting our innocent children?

Now, we've lumped all these kids in there, from the 17-year olds or 16-year olds, and then we've lumped them in with the 13-year olds. I want a separate bill that manages our children from birth to 13, the target age of pedophiles. If you penetrate a 2-year old, it's a lot different than penetrating a 17-year old, and that's where we get all muddled up in here because people are looking at it and going, "Well, she was 14 or 15." But nobody can quibble with children under 13. Or even under 10 - how about limiting it [to] between the ages of birth and 10? I've seen ... 3-year olds and 5-year olds with STD's [sexually transmitted diseases].

Now, there is no excuse for that culturally or ... [otherwise], not now and not ever. ... Thank you very much.

[Representative Wilson returned the gavel to Chair McGuire.]

3:12:14 PM

MEGHAN GAUGHAN, Tundra Women's Center (TWC), said she would be testifying in support of HB 353. She said she would like to echo the alarms regarding the high numbers of sexual assaults and sexual abuse of minor cases in Alaska. In her work, she relayed, she sees the same offenders over and over and over again, and many of the same victims - victimized from the same perpetrators and from different perpetrators. She concurred with the notion that no one wants to see victims getting victimized more than once. She said that in Bethel and outlying villages she is meeting people who are afraid to be in their home towns because offenders are being released early or are only serving short sentences; this places the responsibility for a victim's safety back on the victims and their families. This sends the wrong message to the community, that being that perpetrators can get away with sexual offenses without serving much jail time. This also puts the blame back on the victims, she opined. She thanked [the legislature] for its efforts to provide consistency in sentencing and its efforts to place the responsibility for these crimes on the offenders.

3:14:27 PM

DANIEL E. LIBBEY, Attorney at Law, relayed that he would be testifying in opposition to the sentencing provisions of HB 353. He offered that there's definitely not a disagreement about serious sexual offenders, but he believes that as a group, first time offenders can include those who are innocent of the charges. He offered an example of a case in Juneau that involved a man who was charged with sexual abuse of a minor in the first degree based on his position as a babysitter of a girl under the age of 13. The girl later admitted that her friend's mother had "put her up to the trial testimony," and further discovery revealed that the mother was seeking custody of the girl so as to receive money from the state. The judge reversed the conviction and the district attorney dismissed the charges, but not before the defendant had served more than three years of jail time.

MR. LIBBEY offered his belief that that case illustrates that in a number of these type of cases there simply is no physical evidence, there are no other witnesses, and there is no injury; in such cases, it simply "becomes the evidence of a testifying witness alone," and the jury system doesn't provide for the ability to recognize wrongful charges as often as might be preferred. Under the proposed legislation, someone in the

aforementioned defendant's position would be subject to a jail sentence of 25 to 30 years, and that case was a very difficult case to defend. Mr. Libbey suggested that members take such examples into account by providing a lower presumptive sentencing range for first time felony offenders and allowing the judge to examine the credibility of the evidence so as to be able reverse a conviction in cases where people have been wrongfully charged.

MR. LIBBEY noted that under [Version F], a mitigating factor might only reduce a sentence to 12 years, adding that it is frightening to think that someone in the aforementioned defendant's situation would be sentenced to 12 years. He asked that the legislature consider changing the bill for first time offenders such that they would be given the opportunity to "get on the right track," suggesting that such people are not in the same class as serious offenders, who should be targeted by the bill.

MR. LIBBEY, in response to questions, provided a few more details about the aforementioned case.

REPRESENTATIVE GRUENBERG mentioned the crime of suborning perjury.

3:21:26 PM

MICHAEL A. MOBERLY, Attorney at Law, relayed that he would be speaking in opposition to "Version F." Mentioning the issue of proportionality, he offered his belief that the focus of the bill is to target a small subset of offenders and determine whether such broad sweeping increases in the overall sentences is absolutely necessary. He opined that it may not be necessary to make the proposed changes, since people haven't yet had an opportunity to see the effects of the "2003 and 2005 changes to the law," characterizing those recent changes as already addressing those offenders that everyone is most concerned about; those recent changes include parole ineligibility for repeat offenders, and enhanced sentences.

MR. MOBERLY opined that those recently enacted provisions need to be given an opportunity to demonstrate whether they have the effect the proposed bill is aiming for. Furthermore, the fiscal impacts of the recently passed legislation are not yet known, and so it will be difficult to gage the additional fiscal impacts of the proposed legislation. He said that another concern of his centers on the proposed language pertaining to

the failure to report someone who has not registered as a sex offender or child kidnapper. Although certain groups of professionals and licensed individuals have mandatory reporting requirements placed on them, "common lay citizens" generally don't have those same obligations under the law. Therefore, he remarked, he does not believe that notifying the authorities of a person's failure to register is necessarily the type of conduct that regular citizens should be obligated to undertake.

MR. MOBERLY, in conclusion, characterized the bill as premature and unnecessary, and suggested that the legislature should postpone any action on these issues until after it has had a chance to review the effects of the recently enacted changes.

3:24:59 PM

CYNTHIA KARLSON, Women in Safe Homes (WISH), said that she is testifying in support HB 353, and that she has the perspective of both a victim and a victim's advocate. She relayed that she has seen the effects of sexual assault, on both adults and minors, adding that [the legislature] needs to send the message that society will no longer tolerate such crimes. Sex offenders reoffend when they are released from jail, the effects of their crimes on the victims are long lasting, and so they need to be held accountable. A victim must go through counseling, he/she will have to learn how to trust other people again, and some of the damage done by sexual offenders is lifelong, leaving the victim to pick up the pieces.

MS. KARLSON said: "Those of us in Ketchikan want this bill to pass. We cannot any longer let sex offenders continue to reoffend and reoffend. Our children are precious to us, and we need to hold [sexual offenders] ... accountable. ... A light sentence sends a message to the victim that what happened isn't that bad." When victims go to court, they have to relive their assaults all over again, and so to have offenders only get light sentences makes victims lose trust in the criminal justice system and question whether it is worth the effort to go to trial.

[HB 353, Version F, was held over.]

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:28 p.m.