ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 22, 2006
2:09 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

COMMITTEE CALENDAR

HOUSE BILL NO. 414
"An Act relating to allowing a parent or guardian of a minor to intercept the private communications of the minor and to consent to an order authorizing law enforcement to intercept the private communications of the minor."

- MOVED CSHB 414(JUD) OUT OF COMMITTEE

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

- HEARD AND HELD

HOUSE BILL NO. 439
"An Act relating to authorizing the state to join with other states entering into the Interstate Insurance Product Regulation Compact and authorizing the compact to supersede existing statutes by approving standards, rules, or other action under the terms of the compact."

- BILL HEARING POSTPONED TO 3/24/06

HOUSE BILL NO. 308
"An Act relating to false caller identification."

- BILL HEARING POSTPONED TO 3/24/06

HOUSE BILL NO. 325
"An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure."

- BILL HEARING POSTPONED TO 3/24/06

PREVIOUS COMMITTEE ACTION

BILL: HB 414
SHORT TITLE: INTERCEPTION OF MINOR'S COMMUNICATIONS
SPONSOR(S): REPRESENTATIVE(S) KOTT

02/01/06	(H)	READ THE FIRST TIME - REFERRALS
02/01/06	(H)	HES, JUD
02/14/06	(H)	HES AT 3:00 PM CAPITOL 106
02/14/06	(H)	Moved CSHB 414(HES) Out of Committee
02/14/06	(H)	MINUTE(HES)
02/17/06	(H)	HES RPT CS(HES) 4DP 1NR 2AM
02/17/06	(H)	DP: GARDNER, KOHRING, SEATON, WILSON;
02/17/06	(H)	NR: CISSNA;
02/17/06	(H)	AM: ANDERSON, GATTO
02/23/06	(H)	JUD AT 10:00 AM CAPITOL 120
02/23/06	(H)	Scheduled But Not Heard
02/24/06	(H)	JUD AT 2:00 PM CAPITOL 120
02/24/06	(H)	Heard & Held
02/24/06	(H)	MINUTE(JUD)
03/15/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/15/06	(H)	-- Meeting Canceled --
03/20/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/20/06	(H)	-- Meeting Canceled --
03/22/06	(H)	JUD AT 1:00 PM CAPITOL 120

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 AT 8:30 AM BUTROVICH 205
04/19/05	(S)	Moved CSSB 20(JUD) Out of Committee
04/19/05	(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
04/20/05	(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
02/15/06	(H)	Heard & Held

02/15/06	(H)	MINUTE(JUD)
02/22/06	(H)	JUD AT 2:30 PM CAPITOL 120
02/22/06	(H)	<Bill Hearing Postponed to 2/23/06>
02/23/06	(H)	JUD AT 10:00 AM CAPITOL 120
02/23/06	(H)	Scheduled But Not Heard
03/15/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/15/06	(H)	-- Meeting Canceled --
03/20/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/20/06	(H)	-- Meeting Canceled --
03/22/06	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

MICHAEL O'HARE, Staff
to Representative Pete Kott
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided information regarding HB 414 on behalf of the sponsor, Representative Kott.

DAVID W. BARANOW, Attorney at Law
Law Office of David W. Baranow
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with HB 414.

ALLEN M. BAILEY, Attorney at Law
Law Offices of Allen M. Bailey
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with HB 414.

MICHAEL C. KRAMER, Attorney at Law
Cook, Schuhmann & Groseclose, Inc.
Fairbanks, Alaska
POSITION STATEMENT: Testified in opposition to HB 414.

SENATOR FRED DYSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 414; spoke as the sponsor of SB 20.

LINDA L. LAYNE, Ph.D.
Troy, New York
POSITION STATEMENT: During discussion of SB 20, expressed concerns with provisions of the bill and suggested that it be changed.

TILOMA JAYASINGHE, Esq., Staff Attorney
National Advocates for Pregnant Women (NAPW)
New York, New York
POSITION STATEMENT: During discussion of SB 20, expressed concerns with provisions of the bill.

ALLISON GOTTESMAN, Co-Chair
Social Action Committee
Alaska Chapter
National Association of Social Workers (NASW)
Soldotna, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed concerns with provisions of the bill and suggested a change.

BRENDA STANFILL
Interior Alaska Center for Non-Violent Living
Fairbanks, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed her organization's concerns with the bill on behalf of herself, Kate Axelarris, and Jessica Stossel.

CLOVER SIMON
Planned Parenthood of Alaska (PPA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed concerns with the bill and suggested a change.

JOELLE HALL
Eagle River, Alaska
POSITION STATEMENT: During discussion of SB 20, provided comments and suggested that the bill be changed.

MICHAEL "WES" MACLEOD-BALL, Executive Director
Alaska Civil Liberties Union (AkCLU)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed concerns with provisions of the bill.

ROBIN SMITH
Alaska Pro-Choice Alliance (APCA)
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 20, provided comments and suggested that the bill be changed.

KATE BURKHART
Douglas, Alaska

POSITION STATEMENT: During discussion of SB 20, expressed concerns with provisions of the bill.

AMANDA "MANDY" O'NEAL
Douglas, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed concerns with the bill.

SARALYN TABACHNICK, Executive Director
Aiding Women in Abuse and Rape Emergencies (AWARE Inc.)
Juneau, Alaska
POSITION STATEMENT: During discussion of SB 20, expressed concerns with the bill.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of SB 20.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 2:09:49 PM. Representatives McGuire, Wilson, Gruenberg, Gara, Kott, Coghill, and Anderson were present at the call to order.

HB 414 - INTERCEPTION OF MINOR'S COMMUNICATIONS

2:10:05 PM

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 414, "An Act relating to allowing a parent or guardian of a minor to intercept the private communications of the minor and to consent to an order authorizing law enforcement to intercept the private communications of the minor." [Before the committee was CSHB 414(HES).]

2:10:32 PM

MICHAEL O'HARE, Staff to Representative Pete Kott, Alaska State Legislature, sponsor, said on behalf of Representative Kott that they've had an opportunity to research one of the issues raised at the bill's last hearing by Representative Gruenberg, that of how a parent's ability to intercept a minor's communication - as

provided for via HB 414 - could impact family law disputes pertaining to divorce and child custody, and that members' packets now contain responses from questions posed to the Alaska Bar Association on that issue. Some responses predict unbridled eavesdropping, recording, and interference in wholly appropriate communications between children and visitation or custodial parents, while others predict violations of privacy.

MR. O'HARE relayed that the sponsor has attempted to establish a balance between the [right of] privacy and the need to protect [Alaska's] children. Mr. O'Hare mentioned that the aforementioned responses come from attorneys with a lot of experience in family law, though he characterized those responses as simply speculations regarding what might happen should HB 414 pass. The sponsor, he noted, also requested information from Legislative Legal and Research Services on this issue, and the resulting memorandum [by Chuck Burnham, Legislative Analyst, dated March 21, 2006 - included in members' packets -] states that in the six years that a similar law in Georgia has been in place there has been no evidence that that law has been abused. Mr. O'Hare said he would be willing to speculate that passage of HB 414 may actually encourage parents involved in divorce and child custody proceedings to be civil to each other.

MR. O'HARE said that the goal of HB 414 is to provide parents with a way of monitoring their children without breaking the law and without them spending time and money arguing the legality of intercepting their communications.

[Following was a brief discussion regarding what version of the bill was before the committee.]

The committee took an at-ease from 2:15 p.m. to 2:16 p.m.

CHAIR McGUIRE clarified that both [CSHB 414(HES)] and a forthcoming amendment were before the committee; [later labeled Amendment 1], that proposed amendment read [original punctuation provided]:

> Page 4, after line 5, add:
> (12) "parent" means a natural person who is not prohibited by court order from communicating with the minor and is the minor's natural or adoptive parent of the minor's legally appointed guardian; "parent" does not include a person whose parental rights toward the minor have been terminated by court order.

MR. O'HARE, in response to questions, explained that although the original Legislative Research Report written by Mr. Burnham - Report Number 06.130, - made use of an annotated version of the aforementioned Georgia statute, the aforementioned follow-up memorandum of March 21, 2006, is based on information gathered from several databases and conversations with the state of Georgia.

REPRESENTATIVE GRUENBERG pointed out that although the March 21, 2006, memorandum says in part, "We found no evidence that the Georgia court system has been inundated with vicarious consent recordings in divorce proceedings since the state's wiretapping laws were amended in the year 2006 to allow parents to record their child's conversations in certain circumstances", it doesn't state what research steps were taken to arrive at that conclusion. His concern, he relayed, is that that conclusion could be based only on the reported cases the publisher chose to list in the Georgia law's annotations, and therefore won't include information found in even just "the digests," which themselves only contain those cases in which that specific issue was taken to the appellate court and which subsequently issued a publishable opinion.

REPRESENTATIVE GRUENBERG said:

> A lot of the opinions in most of these courts, now, including Alaska, are ... Memorandum Orders and Judgment; they're never published, they do not find their way into the reported decisions at all. And what I am saying and what these other lawyers are saying [is] ..., what happens in the actual trials that would never show up unless you really made an extreme investigation of the entire Georgia bar and the superior court benches. ... Unless [Mr. Burnham] has done that, he does not have the kind of evidence that these lawyers who have dozens of year's experience have, and ... we are all unanimous in finding problems with this.

REPRESENTATIVE GRUENBERG then mentioned that he would be making a motion to strike "the final section of the bill and the conforming thing" because "this" is going to find its way into divorce courts all over the state.

CHAIR McGUIRE observed that a consensus on this issue has not been reached.

2:20:15 PM

DAVID W. BARANOW, Attorney at Law, Law Office of David W. Baranow - after relaying that he has two children, has sent Mr. O'Hare an e-mail containing his comments on the bill, and that he practices family law - assured the committee that he and other family law attorneys are not speculating when they speak to the issue of either intentional or inadvertent eavesdropping occurring [in situations involving divorce and child custody]. He elaborated:

> Hundreds if not thousands of times over my 26- year career we are faced with [a] superior court judge admonishing, ordering, [and] holding people in contempt for intentionally interfering with telephonic communication between children and divorced parents. I think that the intent of this bill to provide a tool to avoid predation on our children is laudable, and I applaud it. From ... a family law practitioner's perspective, it is rife with a great deal of problems and concerns. The language of the bill itself, the version that I was able to review, is couched in very broad terms: "good faith", "best interests of the child", [and] "good faith belief".
>
> In practice what that means is that we're going to have parents that are going to be restricting communications. It is not speculation. I deal with this all the time. And ... in another context, intercepting, monitoring this kind of communication between other third parties would be a class C felony in our state. Why is it not the same for parents and children? Taking it to its worst extreme: What about the child that is abused or is being abused in the household and the only place that they can turn is to the noncustodial parent. If they know that their conversations are going to be taped, monitored, interfered with, it's a huge chilling effect on the ability of that child to be able to relate the problems that are going on in the home.
>
> And certainly there are other places they can go - teachers, medical-care providers, and the like - but it is a mistake, in my opinion, to chill that communication avenue for the child and the noncustodial parent. There is abuse - it's rampant -

and I certainly would join in [Representative Gruenberg's] opinions, here. I don't know where the research was from; if you look at the annotations, that's not going to tell what happens down here in the trenches.

And that's why I wanted to take the time ... [to say] that if this bill needs to go forward, ... I suggest strongly that you look into the issue of custodial parent interference with communications, and either fashion some protection in that regard or take another look at the practical impact of this bill. Thank you very much.

2:23:50 PM

ALLEN M. BAILEY, Attorney at Law, Law Offices of Allen M. Bailey, after noting that he's provided Mr. O'Hare and Representative Gruenberg with an e-mail containing his comments, opined that there are two problems with HB 414, adding that he is not sure whether either of them can be easily solved. He elaborated:

The first problem I see as a lawyer ... is that if we have a court issuing ... what amounts to a private search warrant to intercept the communications of another person, the court is granting a search warrant without probable cause to believe that a crime has been committed, and I believe that would be ... a violation of both the [U.S. Constitution] as well as the Alaska State Constitution's even higher privacy guarantees. ... I've been a lawyer in Alaska for 32 years, and the majority of my clients are victims of domestic abuse, and there are many [children] in these families that are also abused.

I'm concerned that an abusive parent would, in essence, remove the ability of a child to report domestic violence or sexual abuse that is occurring in the home whether there has been a divorce or not. There are many victims of domestic violence who have not yet left their partners; some of them are too frightened to do so because the research shows that the likelihood of domestic violence and severe domestic violence increases dramatically at about the time of separation. So these may be in so called "in-

tact families" where one of the parents is abusing the other and possibly one of the children.

This would permit such a parent to maintain absolute control over all communications leaving the home, and in essence enable that parent to prohibit the child from calling for help. I think it's a bill that was drafted for a good reason, because of problems that have occurred across the country with minors being victimized by people they meet through electronic communications, but I don't think this is how that problem is solved. Thank you.

CHAIR McGUIRE said she hopes that people can see that the bill is motivated in part by a desire to do what's in the best interest of the child. She asked Mr. Bailey what he would suggest to address the perceived problem. Ought they, for example, preclude the interception of private communications between children and parents that are involved in custody hearings or divorces?

2:28:30 PM

MR. BAILEY said he shares concerns about children being drawn into inappropriate relationships and contacts via telephone or Internet communications, but he has not been able to come up with a solution that could be easily incorporated into the bill.

CHAIR McGUIRE, surmising that members are struggling with the fact that the concept of the bill is in part appealing, also acknowledged the problem as Mr. Bailey presented it.

REPRESENTATIVE GRUENBERG, referring to the Fourth Amendment and the Alaska State Constitution's right of privacy, asked Mr. Bailey and Mr. Baranow whether they see any constitutional problems with Section 3 of the bill, the section that allows a parent to intercept phone calls between a child and a third party without a warrant.

MR. BAILEY opined that if a court is allowed to grant private search warrants on less than probable cause to believe that a crime is being committed, "we are in perilous constitutional waters." If the bill were drafted to permit the issuance of some sort of court order upon a higher degree of showing that there is reasonable cause to believe that someone is attempting to commit a crime against a child, then that might eliminate the possibility of a constitutional challenge to the bill.

REPRESENTATIVE GRUENBERG indicated that he is concerned that the language in proposed AS 42.20.320(a)(9) will allow an interception to take place without any search warrant at all.

2:32:28 PM

MICHAEL C. KRAMER, Attorney at Law, Cook, Schuhmann & Groseclose, Inc., noting that he is a family law attorney, indicated that he would be testifying in opposition to HB 414 for a number of reasons. He predicted that the bill will mostly be utilized by parents involved in separations, divorces, or child custody battles as free rein to surreptitiously record contacts between their child and the other parent, and result in those recordings being used [and abused] in court without prohibition and to children being directly involved in such disputes. Although the bill has the stated intent of giving parents a tool with which to protect children, it goes too far and will cause many problems without addressing the one problem that the bill seeks to solve.

MR. KRAMER mentioned that he also has concerns about the bill from a civil libertarian perspective, in that it will authorize parents to intrude upon the privacy of anyone under the age of 18; parents could routinely record conversations a child has whether it be with the other parent or with peers or with a counselor notwithstanding the provision precluding such. He opined that children do have a reasonable expectation of privacy that their phone calls will not be monitored or that their parents will not authorize law enforcement to put a tap on their phones and Internet e-mails; such use of HB 414 will lead to a breakdown in trust between parents and children, thus leading children to believe that they can't trust their government. Although the bill has a noble purpose, he remarked, it goes too far, erodes the constitutional rights of everyone involved, and would be misused and abused in the legal system, particularly in divorce and domestic violence proceedings.

REPRESENTATIVE GARA indicated that although he originally shared Mr. Kramer's concerns, he is now leaning towards the sponsor's view that a parent's desire to protect his/her child outweighs the child's desire to have independence. He said he would like it if an amendment could be crafted that would protect a child from vindictive parents going through a divorce, but if such parents are already at the point where they are willing to be vindictive, then merely telling them they can't be vindictive through recording their child's conversations with the other

parent won't make them good parents - those parents have already crossed the line between protecting a child's best interests and not doing so, and therefore the recording of a child's conversations won't be the child's biggest problem. Perhaps an amendment later on in the process will be helpful, but he is unable to conceive of one at this time, he concluded.

2:39:27 PM

REPRESENTATIVE GRUENBERG offered his understanding that the courts have said that as a health issue, children have a constitutional right to certain medical procedures without consulting with his/her parents - a right of privacy in their own bodies so to speak. So if a child whose parents are warring is caught in the middle because his/her telephone conversations are intercepted, it could have a real effect on that child's health and mental wellbeing, and therefore, from a constitutional right of privacy point of view, it seems that the courts would rule on this issue in the same way.

MR. BAILEY concurred, reiterating his belief that the bill will run afoul of the privacy guarantees of both the [U.S. Constitution] and the Alaska State Constitution. The right of privacy is an important right not to be taken lightly.

MR. BARANOW said he would echo the comments of both Mr. Bailey and Representative Gruenberg, that the bill would be abridging the privacy rights guaranteed by both the [U.S. Constitution] and the Alaska State Constitution. The point of [his concerns] is to preserve an essential privacy link between parent and child. He predicted that the adoption of HB 414 will generate significant appellate litigation, and that privacy rights will prevail.

CHAIR McGUIRE offered her recollection that the court looks at privacy rights a bit differently when they pertain to children. She went on to say that she keeps envisioning a situation in which there is a predator or a drug dealer - a very real situation that occurs all the time - in communication with one's child, and the parent is going to want to go through the law enforcement process in order to obtain evidence and prosecute that person; that's the sort of situation that sways her in favor of the bill. She offered her hope that judges and parents will exercise some discretion.

MR. KRAMER offered his understanding that a "Glass warrant" is routinely used in situations where the police believe that

someone is going to make an incriminating statement over the phone; the police can go to a judge, present probable cause that such a conversation is going to occur, and they can then record that phone conversation pursuant to a Glass warrant. He suggested that Glass warrants could be used as an alternative to what's being proposed in HB 414, which he characterized as an "entirely new invasion of privacy and abrogation of parental rights." There are already many entirely legal tools available for parents to monitor their children, he opined: a parent can get a child's cell phone records, and read and review all the web sites that the child is perusing. "I don't agree that this bill is going to strengthen families or ... effectively prevent criminals from contacting our children," he stated, and reiterated his suggestion that Glass warrants could be used to address the concerns about predators communicating with children.

2:47:13 PM

CHAIR McGUIRE agreed, but pointed out that most parents aren't aware of the existence of Glass warrants; furthermore, a Glass warrant would only be suitable in situation where there is a likelihood that the communications will be ongoing.

REPRESENTATIVE GRUENBERG suggested that one way of curing [his and others' concerns] would be to delete section 3 - which, he remarked, allows rampant wiretapping - and then simply focusing on Section 1, which, in the context of a criminal case, allows the court to consider an application asking for authorization to intercept a communication. He indicated that he would be willing to offer a conceptual amendment "to allow a warrant to issue on probable cause," and to allow the [underlined] language to constitute probable cause. In other words, if the parent, in good faith and with an objectively reasonable belief that it's necessary, signs an affidavit, then that "may" constitute probable cause; leave it up to judicial discretion, but specifically state that that may, in an appropriate case, constitute probable cause. Recognize, however, that if there is an emergency - for example, a parent overhears his/her child being told by someone to meet him/her down the street and bring a [suitcase] - then the "law of warrant-less searches" would allow the parent to contact the police and have the police take action. He suggested that reference to that "law," could also be incorporated into the bill.

2:51:03 PM

SENATOR FRED DYSON, Alaska State Legislature, concurred with the comments expressed by Representative Gara, and opined that it is important to protect a parent's right to know what his/her children are doing and what they're involved in. He pointed out that some children are actually perpetrators, and so being able to know that about one's children is valuable. He relayed a personal example wherein unbeknownst to him a foster daughter living in his home embezzled money from two men she was "servicing" as a prostitute, and another situation wherein a young girl living with his daughter was selling OxyContin at school and in the neighborhood and was "hooking" and bringing "johns" into his daughter's home. A parent's ability to know about this sort of behavior, whether conducted by a foster child or a birth child, is critical, particularly if there are younger children in the home. He encouraged the committee to come down on the side of letting parents have the ability to know what their children are doing, and to realize that children themselves will do very bad things including molesting younger children and setting homes on fire.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 414.

2:54:01 PM

REPRESENTATIVE KOTT made a motion to adopt Amendment 1 [text provided previously]. There being no objection, Amendment 1 was adopted.

2:55:10 PM

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 2: on page 1, line 8, after "order", add the words, "based upon probable cause"; and on page 1, line 9, after, "application," add the words, "that there is probable cause, which may include a finding".

REPRESENTATIVE GRUENBERG explained that his intent is to specify in the bill that the underlined language may in and of itself constitute probable cause, that the court may find that that is the only probable cause, and, if so, that would be legally sufficient; the underlined language being, "a parent or guardian of a minor has consented to the interception of a communication of the minor in good faith and based on an objectively reasonable belief that it is necessary for the welfare of the minor and in the best interest of the minor or that".

CHAIR McGUIRE surmised, then, that the intent of Conceptual Amendment 2 is to allow judicial discretion in a situation involving a contentious divorce battle or a contentious child custody battle.

REPRESENTATIVE GRUENBERG concurred.

REPRESENTATIVE GARA objected for the purpose of discussion.

REPRESENTATIVE GRUENBERG, in response to a question, explained that via Conceptual Amendment 2, the standard of probable cause would apply as would the underlined language, and that underlined language could be sufficient, in and of itself, to constitute probable cause. He said the reason he is not being more specific with the language in the bill is that he wants the judge to be able to question the reasoning behind the request on a case-by-case basis. In response to another question, he said he intends for the judge to have the discretion to turn down the request if the facts in the affidavit are insufficient, but if it can be established via the affidavit that an interception is necessary for the welfare of the minor and in the minor's best interest, it will be allowed.

CHAIR McGUIRE offered her understanding, however, that Conceptual Amendment 2 would mandate the issuance of an order authorizing the interception of the minor's communication as long as the application is made in good faith and based on an objectively reasonable belief that an interception is necessary for the welfare of the minor and in the minor's best interest.

REPRESENTATIVE GRUENBERG offered that under the bill's current language, there is no requirement of probable cause even though that is a constitutional requirement. The concept of probable cause means that the jury could find, based upon the facts of the affidavit, a certain fact. And under that constitutional requirement, there must be judicial discretion. He said he is only proposing to put that requirement in there, that there must be a finding of probable cause such that there is some underlying fact that could be supported in a court of law.

CHAIR McGUIRE said she is fine with that concept, but suggested that Representative Kott follow how the courts end up using the proposed language in order to see whether that use conforms to his intent. She posited that adoption of Conceptual Amendment 2 will help the bill meet constitutional muster better and allow for judicial discretion. She added that her intent is that as long as all the criteria outlined in Section 1 as amended by

Conceptual Amendment 2 are met, then an order would be authorized.

REPRESENTATIVE GRUENBERG said that is his intent as well.

REPRESENTATIVE GARA pointed out that the proposed statute already provides for judicial discretion because language on page 1, line 7, says "may", not "shall". He offered his belief, however, that Conceptual Amendment 2 - specifically, the language that is being proposed as an addition to page 1, line 9 - will allow the courts to grant wiretaps even more often than the sponsor intends.

REPRESENTATIVE GARA suggested that Conceptual Amendment 2 be limited to the change proposed to line 8 and not include the change proposed to line 9.

REPRESENTATIVE GRUENBERG pointed out, though, that currently under a Glass warrant, there could be probable cause that doesn't involve the testimony of a parent at all, and he doesn't want to eliminate that possibility.

3:06:51 PM

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

3:07:03 PM

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 3, to delete the all the language beginning on page 2, line 18, onward.

CHAIR McGUIRE sought clarification that it is Representative Gruenberg's intent to delete the definition [provided for via Section 4 and Amendment 1].

REPRESENTATIVE GRUENBERG indicated that he did intend to do so because [it is his understanding] that that definition would only apply to Title 42 as a conforming change.

CHAIR McGUIRE clarified, then, that Amendment 3 would delete Sections 3 and 4 of HB 414.

REPRESENTATIVE KOTT objected, adding his belief that without Sections 3 and 4 of the bill, there will still be parents

recording their children's conversation but they would be doing so illegally. With regard to communications occurring over the Internet, although there is software available that would allow a parent to monitor his/her child's Internet usage, such software would not be usable for most parents. He pointed out that the bill was engendered by a custodial situation in which the child's behavior was changing dramatically, and when the parent [recorded] the conversations the child was having with the other parent, the parent found that there was a "lot of mischief going on," and had that gone on any longer, there would have been irreparable psychological damage done to the child.

REPRESENTATIVE KOTT opined that from the standpoint of the child's welfare, the parent ought to have the ability to monitor his/her child's conversations regardless of whether they are with a predator or the other parent.

REPRESENTATIVE GRUENBERG said he is very troubled about the constitutional issue raised by the bill, but acknowledged that perhaps the situation that engendered the legislation did warrant the recording of the child's conversations. He suggested that perhaps one way of solving the issue would be to have some sort of requirement that there be an application to the court for an order - perhaps ex parte, perhaps not - either in advance or at least immediately after a recording is taken - in other words, asking that the court issue a retroactive order - authorizing the recording.

REPRESENTATIVE KOTT said he would be willing to work with Representative Gruenberg on that idea before the bill goes to the House floor.

REPRESENTATIVE GRUENBERG withdrew Amendment 3.

3:15:24 PM

REPRESENTATIVE ANDERSON moved to report CSHB 414(HES), as amended, out of committee [with individual recommendations and the accompanying fiscal notes].

CHAIR McGUIRE stated that there was an objection for the purpose of discussion.

REPRESENTATIVE WILSON asked that Representative Kott also give consideration to possibly adding language that would prevent situations in which these recordings are used to put the child

in the middle of a divorce [or custody battle], because she would like protect the child from such misuse.

REPRESENTATIVE GRUENBERG suggested that Representative Wilson assist he and the sponsor in developing such language.

REPRESENTATIVE KOTT pointed out that regardless of whether the bill progresses, there will still be parents who will put their children in the middle of their fights with each other.

3:17:51 PM

REPRESENTATIVE WILSON removed her objection.

CHAIR McGUIRE asked whether there were any further objections to the motion to report CSHB 414(HES), as amended, from committee. There being none, CSHB 414(JUD) was reported from the House Judiciary Standing Committee.

SB 20 - OFFENSES AGAINST UNBORN CHILDREN

3:18:09 PM

CHAIR McGUIRE announced that the final order of business would be CS FOR SENATE BILL NO. 20(JUD), "An Act relating to offenses against unborn children." [Adopted as the work draft on 2/15/06 was CSSB 20(2d JUD).]

SENATOR FRED DYSON, Alaska State Legislature, sponsor, relayed that he agrees that the language on page 3, lines 23-25, and page 4, lines 3-5, is of dubious value, and therefore he won't object to the deletion of that language; that language read:

> (b) In a prosecution under this section, except for a multiple birth, 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.

3:20:35 PM

LINDA L. LAYNE, Ph.D., relayed that she is a medical anthropologist whose specialty is pregnancy law; that she has published a book on the subject, [Motherhood Lost]; and is producing an educational television series advocating for better care of women who miscarry or suffer still birth. She said:

Each year in the U.S. there are nearly a million pregnancy losses, [and] the vast majority of these losses occur before 37 weeks gestation. The bill you're considering essentially criminalizes pregnancy loss. My research shows that the loss of a wished-for pregnancy is often very traumatic, and even in cases such as miscarriage clusters because of toxic exposure, women have a tendency to self-blame. So the last thing women need after a loss is to be confronted by an interrogating police officer.

Although the bill quite rightly exempts the nearly 1 million women who have elective abortions, it leaves the equal number of women who suffer spontaneous abortions vulnerable to criminal investigation. Such investigations clearly increase the stress, and it exacerbates the grieving process. I'm afraid this law would also undermine maternal and fetal health by discouraging women from seeking prenatal care or hospital-based births if they're afraid of arrest. And that's why every leading medical and child welfare group that's addressed this issue has unanimously opposed laws like these that would hold women legally responsible for the outcomes of their pregnancies.

Furthermore, I'm afraid a bill like this would ... have an unfair effect on racial minorities. Black women have significantly higher rates of pregnancy loss, preterm births, and very-low-birth-weight babies, and in the states that have similar laws, it's overwhelmingly black women who are being arrested for poor reproductive outcomes. I'm in favor of reducing violence against pregnant women, but I urge you ..., rather than focusing on unborn victims, to keep the focus on pregnant women and adopt enhanced penalties for violence against them.

It may be helpful to think of them [in terms] ... of an analogy with police officers, as a specially protected category. Like police officers, pregnant women provide an essential service to society, and, like the police, they risk their lives in so doing. Although much less common than in earlier eras, pregnancy still brings with it the risk of death - several hundred American women die every year because of complications during pregnancy and childbirth. And homicide of pregnant women is an even greater risk.

So I support your efforts to deter such crimes, but urge you to do so by adopting legislation that enhances penalties for attacks on pregnant women, rather than opening the door for making women criminally liable for the outcomes of their pregnancies. Thank you.

3:23:39 PM

REPRESENTATIVE ANDERSON offered a hypothetical situation in which a pregnant women drinks alcohol and then has a spontaneous abortion. He asked whether such a woman could be prosecuted under the bill.

DR. LAYNE explained that under proposed AS 11.41.280(b) and AS 11.41.282(b), such a woman would be subject to a felony charge because the very fact that a child is born before 37 weeks gestation with weight at birth of 2,500 grams or less is prima facie evidence of serious physical injury. Thus a woman, on top of having to endure her own feelings of grief for the loss of a wanted pregnancy, would be subject to a criminal investigation.

REPRESENTATIVE ANDERSON noted that the sponsor is amenable to eliminating those provisions. He asked Dr. Layne whether the deletion of those provisions would address her concern.

DR. LAYNE said that overall, her preference would be for the bill to go in the direction of providing for enhanced penalties for violent crimes against pregnant women, rather than focusing on the outcome of a pregnancy, because no pregnancy is guaranteed a healthy outcome.

REPRESENTATIVE ANDERSON mentioned that he too has concerns about the bill as it is currently written.

3:27:24 PM

REPRESENTATIVE GARA made a motion adopt Conceptual Amendment 1, to delete the language on page 3, lines 23-25, and page 4, lines 3-5. There being no objection, Conceptual Amendment 1 was adopted.

REPRESENTATIVE GARA offered his belief that there is a consensus among many members of the committee that the penalties against those who assault pregnant women ought to be enhanced. He made mention of a proposed amendment that would enhance the penalties

for those who cause a miscarriage or harm a pregnant women, surmising that a lot of the debate will be on the question of whether this type of penalty enhancement should be done via a bill that uses the term, "unborn child" or whether the bill should [also] be altered so as to avoid a Roe v. Wade debate.

3:30:09 PM

TILOMA JAYASINGHE, Esq., Staff Attorney, National Advocates for Pregnant Women (NAPW), remarked that although many may believe that SB 20 will protect pregnant women and their fetuses from abuse, because it is not clear that the bill is not intended to be used as a basis for arresting pregnant women and new mothers, it will, in fact, undermine the health of pregnant women and be very bad for babies. She elaborated:

> We know that similar bills have been used as a justification to arrest literally hundreds of pregnant women. For example, in Utah ... Melissa Roland gave birth to twins, one of whom was stillborn; Melissa was arrested for murder for not consenting to a [cesarean section] ... two weeks earlier. What this bill says in effect is that women have to guarantee a healthy birth outcome. Pregnancy, as you all know, is a possibility and not a promise. No state legislature in this country has taken the step of requiring women to guarantee the outcome of their pregnancies under the threat of criminal penalties.
>
> This bill also suggests that with respect to women who are domestic violence [DV] victims, while it cannot be used alone, it can be used as a factor permitting arrest when it never should be used as a reason. Whether a woman's pregnancy is at risk because her employer won't provide her with a safer work station, or her community won't help reduce the level of mercury in the fish that she eats, or ... her boyfriend batterers her, none of those should be a basis for investigating and arresting her if she can't guarantee a healthy outcome of her pregnancy.
>
> Every leading public health and child welfare group unanimously [opposes] the prosecution of pregnant women and new mothers, even when bills specifically target pregnant women using illegal drugs, because they understand that the threat of arrest will deter these women from seeking the care that will help them

and their babies. If you are, in fact, concerned about pregnant women and their unborn fetuses, the last thing you would do is enact this bill as it's currently written because it opens the door to the possibility of arrest to any woman who decides to continue her pregnancy to term despite health concerns and other risks. It has, actually, the effect of coercing abortion rather than promoting ... continuing to term. ...

Enhancing punishment is the better the way to go. In North Carolina they address this issue in a really constructive manner by keeping the focus on the pregnant woman and acknowledging the additional loss she suffers when she and her unborn child are harmed, rather than [by] creating a separate victim status for her fetus. These models ... reflect the harmful effect the loss of a pregnancy has on the woman herself without bringing all [the] additional issues that arise when you make the fetus a separate victim. The way to protect the unborn and their mothers is not by opening the jailhouse door, but by promoting the alternatives that honor and protect them.

This bill [in its current draft] sends the message to women ... that if you are at risk for a premature birth, miscarriage, or stillbirth, or if you have any doubts about your ability to produce a perfectly healthy baby, abort or else face the prospect of being arrested and sent to jail. And I'm sure that is definitely not the message [the legislature wants to send]. Thank you.

3:34:15 PM

ALLISON GOTTESMAN, Co-Chair, Social Action Committee, Alaska Chapter, National Association of Social Workers (NASW), said that while [the Alaska Chapter] commends the thought behind the bill - stopping offenses against unborn children - it cannot support the bill as currently written. She went on to say:

I can only stress the importance that the only way to keep children safe is to keep their mothers safe. I appeal to you today to amend this bill to have enhanced penalties but not against the pregnant woman herself. ... There are serious fears that the way this bill is drafted, [it] would lock up more pregnant

women than their perpetrators. I am requesting that the language of the bill be either reworked or include a statement that reads: "Nothing in this Act is intended to grant personhood to the unborn child". I thank you very much for your time today.

3:35:30 PM

BRENDA STANFILL, Interior Alaska Center for Non-Violent Living, relayed that her organization cannot support the bill [as currently written], though is in support of enhanced penalties [for those who harm a pregnant woman] and the recognition that a woman has lost her child.

CHAIR McGUIRE noted that Ms. Stanfill's comments were also spoken on behalf of Kate Axelarris and Jessica Stossel - also from the Interior Alaska Center for Non-Violent Living.

3:36:54 PM

CLOVER SIMON, Planned Parenthood of Alaska (PPA), relayed that her main concern is that SB 20 does not contain an exemption for acts that a woman commits, and that in order for PPA to fully support the bill and even the enhanced penalties, it would definitely need to include an exemption for acts undertaken by a woman. She said that she has read through all the other states' laws pertaining to unborn victims, and the majority of those laws have an explicit exemption for acts that a woman commits, opining [that adding a similar provision] would be the best way to protect women from getting prosecuted under SB 20.

3:37:56 PM

JOELLE HALL relayed that she would be testifying as a woman who has had premature delivery and who would not have appreciated being the subject of an investigation, particularly given that her premature children have turned out just fine and that lots of babies with problems are born right on time. She urged the committee to find some way to prosecute people for these egregious crimes other than making them separate crimes.

3:39:00 PM

MICHAEL "WES" MACLEOD-BALL, Executive Director, Alaska Civil Liberties Union (AkCLU), referred to a question posed at the bill's last hearing regarding whether inclusion of a recklessness standard would protect a woman from prosecution for

her own behavior, and offered his understanding that under a recklessness standard, one would have to be aware of a risk but consciously disregard it, with that disregard being a gross deviation from the standards of a reasonable person. Because of this, he opined, the question of whether a woman's behavior is reckless while at the same time being innocent is really in the eye of the beholder. It is conceivable, therefore, that a zealous prosecutor could envision behavior as reckless while others might view the behavior as understandable under some circumstances.

MR. MACLEOD-BALL said that in such a case, a woman could be indicted and prosecuted, and even if the jury interprets the [recklessness] standard with the degree of reasonableness that he, for example, would apply, the woman would still have gone through a criminal prosecution and been subjected to all the stress and expense associated with it. Recklessness is an element of manslaughter as defined in the version of the bill before the committee, but it is not an element of the separate crime of criminally negligent homicide of a fetus. The standard for criminal negligence, he offered, is where the person fails to perceive the risk. And although there is a requirement that the harm be caused by a dangerous instrument, the definition for dangerous instrument is quite broad: anything under the circumstances that can cause death or injury. He opined that a fact question being interpreted differently by a zealous prosecutor than by a reasonable person could mean the difference between a prosecution and no prosecution.

MR. MACLEOD-BALL relayed that the AkCLU also believes that the language that would exempt a woman who remains in a violent domestic situation from the standard of extreme indifference has problems of its own. First, it says that the decision to remain in the violent situation cannot constitute extreme indifference. So what else beyond the decision to remain in that situation would allow a finding of extreme indifference? It seems to him, he remarked, that a mere scintilla of evidence added to the decision to remain in the violent situation would be enough for some prosecutors to bring a case. For example, what if there is evidence that the woman was not in favor of the pregnancy and wanted to have an abortion before then deciding to keep the pregnancy, or evidence that she decided to drink in addition to returning to the violent home? Are those additional items that could be added to the decision to return to that violent situation and thereby create that assertion of extreme indifference by the prosecutor?

MR. MACLEOD-BALL, continuing, remarked that second, the bill doesn't contain language that suggests that the decision to return or remain in a violent domestic situation can't be used as evidence of reckless behavior, nor is there language to suggest that it couldn't be used as evidence to establish criminal negligence. He asked the committee to consider those issues as the bill moves through the process. In conclusion, he said, "We reiterate our support of a different kind of bill that would include enhanced penalties."

3:43:02 PM

ROBIN SMITH, Alaska Pro-Choice Alliance (APCA), said that the APCA supports the intent of SB 20 - men who attack and sometimes kill their pregnant wives and girlfriends should be punished more severely if the fetus is injured or dies. The most appropriate method to punish these offenders, however, is to charge them with enhanced penalties, rather than creating a new, separate crime, and there are several reasons why enhanced penalties are preferable to creating a new crime. For example, enhanced penalties might result in longer prison terms, would avoid the problematic issue of when life begins, and would avoid the potential prosecution of pregnant women that could result in deterring them from seeking appropriate healthcare. She offered her hope that the bill will be changed to strictly address enhanced penalties rather than focusing on prosecuting pregnant women.

3:44:52 PM

KATE BURKHART relayed that she would be discussing two points, with the first building upon Mr. Macleod-Ball's testimony. She said:

> The breadth of certain portions of the bill as written rises to a level of ambiguity and vagueness which could lead to questions of constitutionality. The well-accepted standard for ambiguity in legislation is that if a law fails to give adequate notice of the conduct that is prohibited, or if its imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of its prohibitions, it will fail a test of constitutionality.
>
> I know there has been plenty of testimony about unintended situations where this bill could be

applied, where the conduct of a pregnant woman is actually criminalized. In South Carolina, where there is legislation similar to this in effect, so far there have been 80 women arrested on the basis of their conduct during their pregnancy. And so the fear that this bill will indeed lead to prosecution and incarceration of pregnant women for their conduct to themselves is not unreasonable.

Also, given the fact that [the phrase], "extreme indifference to the value of human life" is not actually defined but is instead evaluated based upon a series of factors - which include the social utility of the actor's conduct, the magnitude of the risk created, the ability to foresee harm and the likelihood of harm, and the actor's knowledge of the risk - there is a great deal of breadth to what will fall within the scope of the bill. And it's for those reasons that I do believe that certain aspects of the bill - especially those dealing with manslaughter, criminally negligent homicide, assault [in the first degree], and assault [in the second degree] - may fail [a] test of constitutionality.

The other issue that I would bring the committee's attention to is that a man who assaults his wife who is not pregnant will, if he is charged, most likely be charged with a misdemeanor whatever the extent of her injuries - that's just a fact of life, almost every legal advocate in this state would testify to that; however, if she's pregnant and she sustains the same injuries but there's an impact to the fetus, now it's a felony. So the public policy implications of this are that the fetus is more important than the woman, and it takes away the woman's value; the woman's value is no longer linked to her own inherent humanity but only to the fact that she has a womb, and that certainly cannot be the point of the bill.

The intent of the bill is to protect women from violence and to protect pregnant women from violence, and we know that they are twice as likely to be battered during their pregnancy as not. And so the intent is great, but as drafted, I think that the ambiguities lead to some serious constitutional questions, and, the way that the penalties are set,

what we're saying is, pregnant women are more important than just women. Thank you.

3:49:20 PM

AMANDA "MANDY" O'NEAL noted that she is five and a half months pregnant. After relaying that a lot of the points she'd intended to make have already been expressed, she pointed out that as a pregnant woman, she worries about a lot of things every day, and gave examples. She stated that she does not want to add to the stress of worrying about her [unborn] child the stress regarding whether she could be prosecuted for flying in a floatplane, for example, as she is required to do for her job. She also pointed out that there are a lot of women who have high-risk pregnancies, like herself, and that when this is the case, a variety of doctors and others will offer different recommendations regarding how she should behave and what actions she should take, and it is up to her to determine the best course of action while keeping in mind that there are risks in being pregnant and that there are no guarantees of a positive outcome.

MS. O'NEAL said that all she wants is for people to respect the fact that with a little education, she can make the proper decisions on her own, and ought to be able to do so without the fear of prosecution, particularly given that a fear of prosecution could keep her from seeking out further educational opportunities. In conclusion, she pointed out that without her, there is no baby - the baby would just be an idea; therefore, if the goal is for she and her baby to be safe, the best way to go about it would be to ensure that she is safe.

3:51:40 PM

SARALYN TABACHNICK, Executive Director, Aiding Women in Abuse and Rape Emergencies (AWARE Inc.), relayed the following concerns:

> This bill seems to carry greater concern for the unborn child than for the woman carrying the unborn child, as if the cargo has greater value than the vessel, and it puts pregnant women at risk for all sorts of consequences in the event she miscarries, delivers a stillborn child, or her baby is born with physical injury. This bill does not speak about the pregnant woman experiencing this loss. When pregnant women are injured during domestic violence, the intent

is often to cause physical and emotional harm to the pregnant woman. Crimes against pregnant women because they are pregnant, are crimes against women, and stopping violence against women stops violence against future children as well.

I wholeheartedly support legislation that protects pregnant women and their future children. I support legislation that enhances penalties on attacks of women who are pregnant. I support legislation that acknowledges and punishes the additional loss and harm experienced by pregnant women. I support legislation that prohibits the shackling of women who are pregnant and already in jail. I support legislation that promotes pregnant women's health through advocacy of healthy behavior, including the development of safe and available and effective services for women and families when substance abuse treatment and mental health services are necessary, and mandatory training for medical providers in miscarriage management, including interpersonal violence training and screening.

Pregnant women in safe shelter or in violent relationships are in highly stressful situations, and we work to support and encourage them with healthy coping alternatives. And we also understand that every woman survives violence in her own individual way; adding to her confusion and fear by threatening criminal prosecution will cut off more women from seeking the support they need.

I urge you to create legislation that protects pregnant women, rather than place them at risk. Please send the message that violence against pregnant women is unacceptable and that those who assault them will be aggressively punished, by instituting enhanced penalties for these crimes.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on SB 20.

3:55:55 PM

REPRESENTATIVE GARA, in response to a suggestion, made a motion to adopt Amendment 2 - labeled 24-LS0197\U.1, Luckhaupt, 2/20/06 - as amended to read:

Page 1, line 1:
Delete all material and insert:
"**An Act enhancing penalties for crimes committed against pregnant women.**"

Page 1, line 3, through page 7, line 18:
Delete all material and insert:
"*** Section 1.** AS 11 is amended by adding a new chapter to read:

Chapter 32. Enhanced Penalties.

Sec. 11.32.100. Penalties for crimes committed against pregnant women. (a) Notwithstanding another provision of this title or AS 12, if a person commits a crime defined in this title against a pregnant woman who the person knew or should have known to be pregnant that results in a miscarriage or stillbirth, the crime shall be punished in the following manner:

(1) a crime defined as murder in the first degree under AS 11.41.100 shall be punished by a sentence of 40 - 99 years;

(2) a crime defined as murder in the second degree under AS 11.41.110 shall be punished by a sentence of 30 - 99 years;

(3) a crime defined in this title as a class A felony shall be punished as an unclassified felony in the manner provided for unclassified felonies in AS 12.55.125;

(4) a crime defined in this title as a class B felony shall be punished as a class A felony in the manner provided for class A felonies in AS 12.55.125;

(5) a crime defined in this title as a class C felony shall be punished as a class B felony in the manner provided for class B felonies in AS 12.55.125;

(6) a crime defined in this title as a class A misdemeanor shall be punished as a class C felony in the manner provided for class C felonies in AS 12.55.125;

(7) a crime defined in this title as a class B misdemeanor shall be punished as a class A misdemeanor in the manner provided for class A misdemeanors in AS 12.55.135.

(b) The penalties in (a) of this section do not apply to acts committed

(1) during a legal abortion to which the pregnant woman, or a person authorized by law to act on the pregnant woman's behalf, consented or for which the consent is implied by law;

(2) during any medical treatment of the pregnant woman or the fetus; or

(3) by a pregnant woman against herself.

(c) In this section,

(1) "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth or by an induced abortion, resulting in the complete expulsion or extraction of the fetus from a pregnant woman;

(2) "stillbirth" means the death of a fetus before the complete expulsion or extraction from a woman, other than by an induced abortion, irrespective of the duration of the pregnancy.

*** Sec. 2.** AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. **A defendant convicted of murder in the first degree enhanced under AS 11.32.100(a)(1) shall be sentenced to a definite term of imprisonment of at least 40 years but not more than 99 years.** A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture; or

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery.

*** Sec. 3.** AS 12.55.125(b) is amended to read:

(b) A defendant convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years. A defendant convicted of murder in the second degree **or a class A felony enhanced under AS 11.32.100(a)(3)** shall be sentenced to a definite term of imprisonment of at least 10 years but not more than 99 years. A defendant convicted of murder in the second degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years when **the sentence is enhanced under AS 11.32.100(a)(2) or when** the defendant is convicted of the murder of a child under 16 years of age and the court finds by clear and convincing evidence that the defendant (1) was a natural parent, a stepparent, an adopted parent, a legal guardian, or a person occupying a position of authority in relation to the child; or (2) caused the death of the child by committing a crime against a person under AS 11.41.200 - 11.41.530. In this subsection, "legal guardian" and "position of authority" have the meanings given in AS 11.41.470.

*** Sec. 4.** AS 12.55.155(c) is amended by adding a new paragraph to read:

(33) the defendant was convicted of an offense specified in AS 11.41. and knew ore reasonably should have known that the victim was pregnant"

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. AS 11.32.100, enacted by sec. 1 of this Act, and AS 12.55.125(a) and (b), as amended by secs. 2 and 3 of this Act, apply to crimes committed on or after the effective date of this Act."

REPRESENTATIVE GARA, in response to a question, explained that the intent of Amendment 2, as amended, is to impose stiffer penalties against a person who assaults or does worse to a pregnant woman thereby causing a miscarriage or stillbirth when the person knew or should have had reason to know that the woman was pregnant, with the stiffer penalties resulting in sentences

at least as long as is currently provided for in CSSB 20(2d JUD) because such crimes shall be punished as if they were a higher level crime. In similar situations that don't result in a miscarriage or stillbirth, the sentence shall be enhanced via an aggravator.

REPRESENTATIVE COGHILL objected to Amendment 2, as amended.

REPRESENTATIVE GARA opined that there should be enhanced penalties - more serious penalties, greater sentences - when one attacks, murders, or assaults a pregnant woman and causes a miscarriage, but indicated that he doesn't want the bill to include language that could later be used to reverse Roe v. Wade. Representative Gara surmised that the sponsor would prefer that the bill continue to use the term, "unborn child".

3:59:33 PM

REPRESENTATIVE ANDERSON surmised that the rationale for the bill is to respond to situations such as occurred to Laci Peterson, but pointed out that her husband didn't care that his wife was pregnant and so such a bill wouldn't have deterred him from killing her. Representative Anderson said he views the bill as intending to protect pregnant women from violence, but acknowledged that it does have a tendency to protect the unborn child over the mother. Representative Anderson opined that if one knowingly hurts a pregnant women, he/she should be punished more severely, but he does not want a woman prosecuted for actions she herself undertakes - such as participating in outdoor activities - that unintentionally result in a miscarriage.

REPRESENTATIVE GARA concurred. He opined that although current law does not go far enough with regard to protecting pregnant women from assault or worse, there are still a few problems with the bill, one of those being whether the term, "unborn child" could be used to challenge Roe v. Wade. He, therefore, has decided to create [language] that will protect women against assault while staying away from a Roe v. Wade debate. Another problem with the bill, he remarked, is that proposed AS 11.41.170 - which establishes the crime of criminally negligent homicide of an unborn child - will criminalize a pregnant woman if she causes the death of her fetus by means of a dangerous instrument, and the courts have already said that a car, for example, is a dangerous instrument; therefore, a woman could be criminalized for getting into a car accident that results in a miscarriage or stillbirth. He said: "I don't think it is right

for us to come up with a new way to criminalize conduct by a pregnant woman who does not intend to harm her [fetus]."

REPRESENTATIVE GARA reiterated his earlier comments and compared the sentencing scheme in the bill with the sentencing scheme in Amendment 2, as amended, characterizing those sentencing schemes as functionally equivalent. For example, for a crime committed against a pregnant woman that results in her death and in the death of her fetus, where the bill proposes two 20-year sentences, Amendment 2, as amended, proposes one 40-year sentence, and so on. Essentially, in each instance, the bill provides for two crimes with separate sentences, whereas Amendment 2, as amended, provides for one crime with one sentence, with that one sentence being at least as long if not longer than what the bill proposes via two sentences.

4:13:37 PM

SENATOR DYSON relayed that the original bill included language stating that nothing in it would allow a woman to be prosecuted for her own actions, but Senate members wanted to protect an unborn child from the mother's reckless conduct. He said he would not object to reinserting the language that protects the mother from prosecution, but indicated that he is strongly opposed to changing the bill such that it would no longer provide for two crimes - one for actions taken against the mother, and one for actions taken against the unborn child. One of the main points of SB 20, he indicated, is to establish that an unborn child is worthy of protection, and he went on to note that Ms. Carpeneti from the Department of Law would be able to explain why the bill's current language would make prosecuting a mother for her own actions highly unlikely.

SENATOR DYSON, in response to comments, again indicated that he would be strongly opposed to any amendment that would eliminate the bill's provisions establishing two separate crimes - one for actions taken against the mother, and one for actions taken against the unborn child - as that would defeat the purpose of SB 20, that purpose being to establish that an unborn child has intrinsic value of its own and is worthy of protection. He relayed that the original version of SB 20 stipulated that its provisions would "not apply to acts that ... (3) are committed by a pregnant woman against herself and her own unborn child".

REPRESENTATIVE ANDERSON indicated that he would not support a bill that has the potential to allow a pregnant woman to be prosecuted for her own actions.

SENATOR DYSON pointed out that if the committee wishes to reinsert the aforementioned language, it will also need to make other changes to the bill as well.

4:23:02 PM

REPRESENTATIVE GARA said:

> I don't mean any disrespect by not technically having a second crime with a second name for when you cause a miscarriage. That doesn't mean that we do not value a woman's pregnancy or the baby that she's carrying, just like it doesn't mean we don't value the lives of the victims who survive somebody who was killed in a murder. When you murder somebody - and, as you know, that has occurred in my family - ... the crime is murder. There is no separate crime because the victim had a son, a daughter - there is no separate crime for each victim in the family who remains alive - the crime is called murder. When we've developed the crime of murder, we meant no disrespect to the interests of those people who still survived, [people] who were in some way hurt almost as much as the person who died.
>
> So I do not agree with the argument that just because we don't have a separate named crime for every victim of a murder or assault, we somehow disrespects all of the victims - I don't buy it. And I say that in a manner that's a little bit emotional, A, out of my own experience, and, B, because I take some offense. I take some offense that you believe that I think one crime is just like another crime. So I would ask you to think about the fact that we impose the same sentences you want to impose and really our difference is one of language. But I don't ... disrespect the fact that a woman who has a miscarriage has lost a baby - I value that as a separate interest.
>
> And then this whole thing about what language you're using -- ... I'm sorry that we disagree about the use of the [words], "unborn child", ... [but] unfortunately I know that that language is being used, frankly, because of the broader abortion debate - maybe not because [of], but it's going to have an impact on the broader abortion debate. That's why I'm

> trying to avoid it. I don't consider somebody after they've been born, a born child; I consider them a child. And frankly I personally consider somebody that a woman is carrying during her pregnancy, a baby. That's what I consider it, because I don't look up my Black's Law Dictionary when I come up with these terms; I don't know what the technical word should be - I just know how I speak.
>
> So I don't think we need to have this fight about [how] you should technically have to call somebody, but ... when you tell me that I'm not properly recognizing the interest of a baby because I don't call it an unborn child, I would tell you, I also don't call a baby who is born, a born child. So I don't ... feel guilty for not calling a baby an unborn child.

SENATOR DYSON said: "I mourned with my middle daughter, and we wept, when she lost two children. She and I believed she lost something of value - it wasn't just a pregnancy - there's another two more grandkids of mine I don't have." He then offered another example:

> This gal and her dead son, when she buried him. Her husband beat her until the child died within her and was born stillborn. When she finally crawled out of the home and got help, they took her to the hospital, [and] she delivered a dead child. She said: "My own injuries [were] life-threatening. I nearly died. I spent three weeks in the hospital. During the time I was struggling to survive, the legal authorities came and spoke to my sister; they told her something she found incredible, they told her [that] in the eyes of Wisconsin law, nobody had died on the night of February 8th."
>
> I don't know how we can say that it's not a Homo sapiens child that died. And if you choose to eliminate the second crime, here, that's a statement that people of this state get to make through their elected officials - that's your choice - but I feel very strongly about it; 28 other states have done it on one level and it's in federal law. Various polls run between 56 and 82 percent of how many people think that if you kill a child while you're assaulting its mother, [you've] got two victims. ...

REPRESENTATIVE WILSON asked for an explanation regarding the standards of reckless and negligent.

SENATOR DYSON, in response to a different question, reiterated his understanding that according to the Department of Law, the standards in the current bill are high enough to make it unlikely that a woman would be prosecuted for her own actions.

4:32:01 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), in response to a concern expressed earlier, said that [CSSB 20(2d JUD)] tracks a lot of the state's current murder and assault statutes. For example, the phrase, "extreme indifference to the value of human life" is an element of the crime of murder in the second degree, and so it is not language that a court would have difficulty applying or that a prosecutor would have difficulty making a reasonable decision about.

REPRESENTATIVE GRUENBERG asked whether a pregnant woman driving negligently could be prosecuted under the bill for criminally negligent homicide of an unborn child if she gets in an accident that causes her to have a miscarriage.

REPRESENTATIVE WILSON asked whether the same could be done in a situation involving a pregnant woman who goes skiing during her eighth month of pregnancy.

REPRESENTATIVE ANDERSON added a stipulation to Representative Gruenberg's example that the pregnant woman did not intend to cause any harm to her unborn child by her actions in driving negligently.

SENATOR DYSON offered his understanding that the charges a woman might face under the bill for what she does to her unborn child are no different than what she would face had she given birth to that child and it was sitting beside her in the car - his intention is for the standard to be the same.

MS. CARPENETI, in response to questions, said it is very unlikely that the woman would be charged, because the bill recites criminally negligent homicide the same way current law does, that is to say that a person acts with criminal negligence with respect to a circumstance, which would be the death of a child, when the person fails to perceive a substantial and

unjustifiable risk that the result will occur and that the circumstances exist. Furthermore, the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the circumstances. Therefore, she surmised, in the example about a pregnant woman driving too fast over icy roads, the DOL wouldn't bring a charge because the circumstances don't rise to the level of criminal negligence. She added, "Criminally negligent homicide - we ... often prosecute drunk driving [as that] when you kill somebody, or, depending on the circumstances, it could be [charged as] manslaughter because the conduct is reckless, or you could even get, sometimes, [a charge of] murder in the second degree for drunk driving that causes a wreck and kills someone."

4:37:04 PM

REPRESENTATIVE WILSON surmised, then, that SB 20 is simply saying that the death of an unborn child can be counted as a murder.

MS. CARPENETI explained that SB 20 would require that the harm occurred via the use of a dangerous instrument for that to be the case, whereas under current law, the crime of criminally negligent homicide does not have such a requirement.

SENATOR DYSON characterized [that requirement] as a higher standard.

REPRESENTATIVE GRUENBERG noted that a car is [considered] a dangerous instrument.

REPRESENTATIVE GARA offered his understanding, however, that currently, if a pregnant woman, while driving, gets into a car accident and a miscarriage results, her behavior would be considered negligent driving, whereas if Senator Dyson's bill passes, the same circumstance could result in the woman also being charged with murder.

MS. CARPENETI offered her belief that Representative Gara is correct in his understanding because current law regarding homicide doesn't consider a fetus a person.

REPRESENTATIVE GRUENBERG directed members attention to page 2, lines [26-30] - proposed AS 11.41.17 - and again pointed out that a car is considered a dangerous instrument and that a violation of this proposed statute would be a class B felony,

and offered his understanding that this would be equivalent to manslaughter; proposed AS 11.41.170 in CSSB 20(2dJUD) read:

> (a) A person commits the crime of criminally negligent homicide of an unborn child if, with criminal negligence, the person causes the death of an unborn child by means of a dangerous instrument.
> (b) Criminally negligent homicide of an unborn child is a class B felony.

MS. CARPENETI clarified that criminally negligent homicide is a class B felony, manslaughter is a class A felony, and murder is an unclassified felony.

REPRESENTATIVE GRUENBERG offered his understanding that in a situation involving a car wreck, the intent of the bill is to say that even if the baby is not yet born but dies, the person could be charged as if the baby had been born and dies; in other words, the person could be charged with criminally negligent homicide.

CHAIR McGUIRE remarked on the difficulty of struggling with where to draw line on this issue. She elaborated:

> We want to be careful that women aren't seen as mere vessels but that they are lives, and that they have their own life and their own worth and that the choices they make are worthwhile and important and difficult. You heard the pregnant woman that testified earlier - and I just experienced it - you do worry every single day that what you eat has enough nutrition and that you're not overworking yourself but then if you don't work how do you make a living and provide for your child. ...
>
> And so I sit here today, Senator Dyson, and I can ... feel the pain of my committee because in some ways, [Amendment 2, as amended, addresses] ... part of ... the concern but gets us away from this other, "respect of unborn life" as you referred to it, but then if we keep the bill the way it is, you end up in circumstances where I think you have women, hopefully acting in good faith, making choices that may lead to their imprisonment. I don't know that we want to see that, I don't even know if we have enough room in our jails as it is right now. There's testimony that in South Carolina, 80 women were arrested. ...

CHAIR McGUIRE relayed that she would hold the bill over and allow all parties to give the issues raised further consideration.

SENATOR DYSON offered the suggestion that the committee go back to the original language that ensured that a woman could not be prosecuted for her own actions. He surmised that there are people who are worried that adoption of CSSB 20(2d JUD) would recognize in law that an unborn human child has intrinsic worth on its own, and he acknowledged that this would produce a dichotomy in the way Americans view this issue. He reiterated his belief that it would be unlikely that a pregnant woman would be prosecuted for her own actions under the bill as currently written.

4:45:58 PM

CHAIR McGUIRE expressed an interest in discussing that issue further. Regardless of one's feeling for Roe v. Wade, it has achieved a civil balance in this country, she remarked, adding that she does not want the House Judiciary Standing Committee to be used a vehicle to go back to [the days prior to Roe v. Wade with regard to how abortion is viewed]. She surmised that Representative Gara is merely attempting to address that issue as it might relate to SB 20. She then asked Representative Gara to think about the "eggshell plaintiff" theory when giving further consideration to Amendment 2, as amended; that theory provides that when one causes harm to another, he/she is responsible for all the harm that is caused regardless of intent or awareness, and one of the problems with Amendment 2, as amended, she opined, is that it would only apply if the person knew or should have known that the victim was pregnant.

REPRESENTATIVE GARA said that's a very good point. He suggested that perhaps the best way to do it would be to enhance the penalties as has been discussed and then have an aggravator apply when a person causes a miscarriage, regardless of whether he/she intended that to happen and regardless of whether he/she knew the victim was pregnant. He indicated that he is convinced that such a situation will be taken seriously by the courts, and so would be amenable to an amendment or revision to amendment 2, as amended.

[CSHB 20(2d JUD), as amended, was held over with the question of whether to adopt Amendment 2, as amended, left pending.]

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:48 p.m.