

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 10, 2006

2:19 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. 258

"An Act relating to aggravating factors at sentencing."

- MOVED CSHB 258(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 413

"An Act relating to the burning capability of cigarettes being sold, offered for sale, or possessed for sale; and providing for an effective date."

- MOVED CSHB 413(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 325

"An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure."

- MOVED CSHB 325(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 482

"An Act relating to harassment, intimidation, and bullying in schools."

- BILL HEARING POSTPONED TO 4/12/06

HOUSE BILL NO. 424

"An Act relating to mortgage lenders and persons who engage in activities relating to mortgage lending; and providing for an effective date."

- BILL HEARING POSTPONED TO 4/18/06

PREVIOUS COMMITTEE ACTION

BILL: HB 258

SHORT TITLE: SEXUAL ASSAULT BY PERSON WITH HIV/AIDS

SPONSOR(S): REPRESENTATIVE(S) LYNN

04/06/05	(H)	READ THE FIRST TIME - REFERRALS
04/06/05	(H)	HES, JUD
02/23/06	(H)	HES AT 3:00 PM CAPITOL 106
02/23/06	(H)	<Bill Hearing Rescheduled to 2/28/06>
02/28/06	(H)	HES AT 3:00 PM CAPITOL 106
02/28/06	(H)	Scheduled But Not Heard
03/21/06	(H)	HES AT 3:00 PM CAPITOL 106
03/21/06	(H)	Moved CSHB 258(HES) Out of Committee
03/21/06	(H)	MINUTE(HES)
03/24/06	(H)	HES RPT CS(HES) 7DP
03/24/06	(H)	DP: CISSNA, GATTO, GARDNER, KOHRING, ANDERSON, SEATON, WILSON
04/10/06	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 413

SHORT TITLE: BURNING CAPABILITY OF CIGARETTES

SPONSOR(S): REPRESENTATIVE(S) JOULE

02/01/06	(H)	READ THE FIRST TIME - REFERRALS
02/01/06	(H)	STA, JUD, FIN
02/09/06	(H)	STA AT 8:00 AM CAPITOL 106
02/09/06	(H)	Moved CSHB 413(STA) Out of Committee
02/09/06	(H)	MINUTE(STA)
02/13/06	(H)	STA RPT CS(STA) 6DP
02/13/06	(H)	DP: GARDNER, LYNN, ELKINS, RAMRAS, GRUENBERG, GATTO
03/31/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/31/06	(H)	Heard & Held
03/31/06	(H)	MINUTE(JUD)
04/07/06	(H)	JUD AT 1:00 PM CAPITOL 120
04/07/06	(H)	Heard & Held
04/07/06	(H)	MINUTE(JUD)
04/10/06	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 325

SHORT TITLE: POST-CONVICTION DNA TESTING
SPONSOR(S): REPRESENTATIVE(S) LEDOUX

01/09/06	(H)	PREFILE RELEASED 12/30/05
01/09/06	(H)	READ THE FIRST TIME - REFERRALS
01/09/06	(H)	JUD, FIN
03/22/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/22/06	(H)	<Bill Hearing Postponed to 03/24/06>
03/24/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/24/06	(H)	<Bill Hearing Postponed to 03/27/06>
03/27/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/27/06	(H)	<Bill Hearing Postponed to 03/29/06>
03/29/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/06	(H)	Scheduled But Not Heard
04/05/06	(H)	JUD AT 1:00 PM CAPITOL 120
04/05/06	(H)	Heard & Held; Assigned to Subcommittee
04/05/06	(H)	MINUTE(JUD)
04/10/06	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE BOB LYNN
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 258.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: During discussion of HB 258, spoke in support of the bill and responded to questions; during discussion of HB 325, responded to questions and expressed concern regarding certain language.

MICHAEL SICA, Staff
to Representative Bob Lynn
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During discussion of HB 258, provided comments and responded to questions on behalf of the sponsor, Representative Lynn.

MIKAYLA SAITO, Intern
to Representative Reggie Joule
Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Provided comments on behalf of the sponsor of HB 413, Representative Joule.

REPRESENTATIVE REGGIE JOULE

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 413.

KIMBERLY WALLACE, Staff

to Representative Gabrielle LeDoux

House Special Committee on Fisheries

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: During hearing of HB 325, answered questions on behalf of the sponsor, Representative LeDoux.

REPRESENTATIVE GABRIELLE LeDOUX

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Spoke as the sponsor of HB 325.

MARY ANNE HENRY, Director

Office of Victims' Rights (OVR)

Alaska State Legislature

Anchorage, Alaska

POSITION STATEMENT: Expressed concerns with HB 325.

STEPHEN SALOOM, Policy Director

Innocence Project

New York, New York

POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 325.

ACTION NARRATIVE

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at [2:19:46 PM](#). Representatives McGuire, Wilson, Gara, Kott, and Coghill were present at the call to order. Representatives Gruenberg and Anderson arrived as the meeting was in progress.

HB 258 - SEXUAL ASSAULT BY PERSON WITH HIV/AIDS

[2:19:57 PM](#)

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 258, "An Act relating to aggravating factors at sentencing." [Before the committee was CSHB 258(HES).]

2:20:01 PM

REPRESENTATIVE BOB LYNN, Alaska State Legislature, sponsor, offered his understanding that HB 258 would make having human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) when committing a rape or sexual assault an aggravating factor at sentencing. Specifically, the perpetrator would have to have been previously diagnosed as having or having tested positive for HIV or AIDS. He remarked that how a perpetrator comes to have HIV or AIDS is not the issue; instead the issue is whether a convicted rapist or sexual predator previously diagnosed with HIV or AIDS should be subject to an aggravating factor at sentencing.

REPRESENTATIVE LYNN offered his understanding that HIV and AIDS are incurable, potentially fatal, and primarily transmitted through "sexual behavior," which can include rape and sexual assault. In such cases, not only does a victim of rape and sexual assault suffer the horrific consequences of the attack, but he/she must also suffer the effects of a life-threatening disease that could essentially be a delayed death sentence. It is a sobering fact that some of those infected with HIV or AIDS have shorter lives than some criminals condemned to a prison's death row.

REPRESENTATIVE LYNN said that he has received tremendous support for HB 258 from law enforcement officials and agencies providing services to victims of sexual assault. He relayed that Susan Sullivan - Executive Director, Victims for Justice, Inc. - wrote in part, "adding months of terror, and possibly years of illness and shortened life, to the horror of a rape, makes an attack by an HIV-AIDS positive rapist a horrendous assault"; that Walt Monegan - Chief of Police, Anchorage Police Department (APD) - has described a rapist or sexual offender with HIV or AIDS as an assailant with an insidious weapon that can be used to further strike out against victims and the victims' loved ones; and that Gerad Godfrey - Chair, Violent Crimes Compensation Board (VCCB) - urges passage of HB 308 "as a sign of respect, compassion, and understanding of the trauma experienced by victims of serious sexual offenses."

REPRESENTATIVE LYNN mentioned that 24 states currently have some type of law that specifically criminalizes exposure or

transmission of HIV, and offered his belief that it is long past time that Alaska joins them, particularly given that Alaska has the highest per capita rate of rape in the nation. In conclusion, he characterized HB 258 is a proactive measure that acknowledges the additional pain and suffering caused by rapists and sexual assailants who expose their victims to a life threatening disease.

REPRESENTATIVE LYNN in response to comments, offered his understanding that the proposed sentencing aggravator would only apply in cases of rape and sexual assault wherein the perpetrator has been previously diagnosed with HIV or AIDS.

REPRESENTATIVE GARA pointed out, however, that the statutes referred to in the bill - AS 11.41.410 through AS 11.41.455 - also include felony crimes involving sexual contact through clothing and consensual conduct between certain persons of certain ages. He offered his belief that the sponsor doesn't really want to have the proposed sentencing aggravator apply to such crimes, and suggested that the sponsor's intent could still be honored by adding a clause that says, "that creates the risk of a transmission of HIV or AIDS"; by definition, then, the bill would only address those crimes wherein [such transmission is possible].

CHAIR MCGUIRE noted that such language would not preclude the bill from applying in situations involving consensual conduct between [certain persons of certain ages] when the conduct includes sexual penetration.

[2:29:35 PM](#)

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said that the DOL supports HB 258. She acknowledged that Representative Gara is correct in that crimes wherein only "touching" has occurred can rise to the level of felony conduct. She pointed out, however, that it would still be up to the court to decide whether applying an aggravator in a particular case would be appropriate, and surmised that the court would not apply such an aggravator in instances where there was no exposure.

REPRESENTATIVE GARA suggested perhaps adding to page 1, line [6], the words, "and the conduct creates the risk of transmission of HIV or AIDS".

MS. CARPENETI suggested using the term, "exposure".

2:31:12 PM

MICHAEL SICA, Staff to Representative Bob Lynn, Alaska State Legislature, sponsor, relayed on behalf of Representative Lynn that part of the problem is that the additional pain and suffering for victims begins with the exposure, because within 72 hours, and preferably within 24 hours, victims must subject themselves to aggressive prophylactics for a 28-day period, prophylactics that that can make them sick. Furthermore, it can take up to 6 months to determine whether a victim has contracted the disease.

CHAIR MCGUIRE surmised, then, that Mr. Sica is speaking in favor of using the term, "exposure".

MR. SICA concurred.

REPRESENTATIVE GARA said he agrees with the concept but is not sure what the wording would look like for such a change. He reiterated his concern that the bill, as currently written, would apply in instances that involve sexual contact through clothing.

MR. SICA noted that plenty of sexual assault crimes involving sexual penetration are "plead down" to "non penetration" offenses; in such cases, penetration has occurred and so has exposure.

REPRESENTATIVE GARA offered his belief that even in such cases, the aggravator would still apply because it would be based on the underlying conduct.

MR. SICA argued that it would be up to the court to decide whether such was the case; the language pertaining to sentencing aggravators currently says in part, "The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range".

MS. CARPENETI, in response to a question, suggested perhaps adding language that said, "a felony specified in these sections which exposed the victim to ...".

REPRESENTATIVE GARA finished: "potential risk of AIDS or HIV transmission".

MS. CARPENETI said, "Or to the exposure, ... because that's the fear."

CHAIR McGUIRE suggested making the change conceptual, with the concept being that there is the potential for exposure, regardless of whether the victim actually contracts the disease.

REPRESENTATIVE GARA concurred.

MS. CARPENETI said the DOL would be happy to work with Representative Gara and the sponsor on this issue.

[2:34:44 PM](#)

CHAIR McGUIRE said they would set HB 258 aside until later in the meeting so that appropriate language could be developed.

REPRESENTATIVE GRUENBERG asked that consideration also be given to possibly narrowing the title so that it specifically reflects what the bill entails. He also asked whether the applicability provision is even necessary.

MS. CARPENETI said that when she is drafting legislation, she generally doesn't include applicability provisions, but the DOL's editor adds them in. Having an applicability provision doesn't hurt, she remarked, even though criminal laws that increase one's potential punishment are always applied prospectively.

REPRESENTATIVE GRUENBERG then pointed out that AS 11.41.452 - Online enticement of a minor - and AS 11.41.455 - Unlawful exploitation of a minor - are also referenced in HB 258 and are both felony crimes, but don't require there to have been any physical contact between the victim and the perpetrator; if such contact did occur, he surmised, then the perpetrator would be charged with a separate, higher crime. He suggested to [the sponsor that he also] give consideration to possibly eliminating those statutes from HB 258 as well.

MS. CARPENETI offered her belief that the forthcoming suggested conceptual change will address that issue as well. She indicated that it is simply common to reference AS 11.41.410 - AS 11.41.455 when writing legislation pertaining to sexual offenses. She said she agrees that it's unlikely that under AS 11.41.452 or AS 11.41.455 there would be physical contact resulting in any exposure to HIV or AIDS.

REPRESENTATIVE GRUENBERG mentioned that he may propose an amendment to eliminate the reference to AS 11.41.452 and AS 11.41.455. He then expressed the concern that a perpetrator may have only been diagnosed as having HIV or AIDS but yet not notified of that fact before he/she committed a crime for which the proposed aggravator would apply. As currently written, there is no requirement that the perpetrator knew he/she had been diagnosed with HIV or AIDS. Therefore, he opined, there should be some kind of knowledge or recklessness [standard] included in the bill; without such being included, a constitutional problem might arise.

[2:39:37 PM](#)

REPRESENTATIVE GARA offered his belief that with the forthcoming conceptual change, the fact that a perpetrator was concerned enough to even get tested for HIV or AIDS would be sufficient. In response to a comment, he opined that application of the proposed aggravator would be justified even if the perpetrator doesn't yet know the results of that testing.

REPRESENTATIVE WILSON and CHAIR McGUIRE, in response to a question, explained that one is not routinely tested for HIV or AIDS; instead, a specific consent form for such testing is required.

CHAIR McGUIRE indicated that [CSHB 258(HES)] would be set aside brought back up later in the meeting.

HB 413 - BURNING CAPABILITY OF CIGARETTES

[2:42:48 PM](#)

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 413, "An Act relating to the burning capability of cigarettes being sold, offered for sale, or possessed for sale; and providing for an effective date." [Before the committee was the proposed committee substitute (CS) for HB 413, Version 24-LS1495\F, Bannister, 4/5/06, which had been adopted as the work draft on 4/7/06; also included in members' packets was another proposed committee substitute (CS) for HB 413, Version 24-LS1495\Y, Bannister, 4/10/06.]

CHAIR McGUIRE recalled that the Department of Revenue (DOR) had expressed some concerns with Version F because it did not include all of the DOR's recommendations, and offered her

understanding that the new proposed committee substitute (CS) in members' packets does incorporate all of those recommendations.

[2:43:41 PM](#)

REPRESENTATIVE GARA made a motion to adopt the proposed committee substitute (CS) for HB 413, Version 24-LS1495\Y, Bannister, 4/10/06, as the work draft. There being no objection, Version Y was before the committee.

[2:44:03 PM](#)

MIKAYLA SAITO, Intern to Representative Reggie Joule, Alaska State Legislature, relayed on behalf of the sponsor, Representative Joule, that the legislative findings and intent section of Version Y updates the finding that nearly 3,000 injuries have resulted from fires caused by cigarettes, and that Version Y corrects some grammatical errors and closes some loopholes. Additionally, Version Y provides the DOR with the ability to seize cigarettes that are not in compliance with this proposed law. Page 6 now includes language specifying that the markings approved for Alaska must be the same markings as those used in and approved for the state of New York; this requirement could smooth the way for the introduction of national legislation, since states would already be using the same markings.

MS. SAITO offered her understanding that Version Y also contains language encouraging the concept that this issue should be viewed as a national issue, and that the DOR has been provided with the authority to promulgate or amend regulations regarding seizure.

CHAIR McGUIRE noted that Ms. Saito is referencing the memorandum dated 4/10/06 from Representative Joule.

REPRESENTATIVE GARA offered his understanding that the substantial changes incorporated in Version Y expand the DOR's authority so that it can enforce this new proposed law.

MS. SAITO concurred.

REPRESENTATIVE KOTT referred to page 1, line 14, and noted that the language appears to include Canada as a state; furthermore, there is no other reference to Canada in the remainder of the findings and intent language section.

2:47:54 PM

REPRESENTATIVE KOTT made a motion to adopt Amendment 1, to delete the reference to Canada from page 1, line 14. There being no objection, Amendment 1 adopted.

REPRESENTATIVE ANDERSON said he appreciates the spirit of the legislation, but noted that the tobacco industry has expressed to him the concern that having to manufacture different types of cigarettes for different states will be very expensive. He remarked, however, that as a matter of public policy, the fire-safety concerns addressed via HB 413 outweigh the tobacco industry's concern regarding cost.

MS. SAITO, in response to a question, offered her understanding that manufacturers will produce the same type of cigarettes for Alaska that are being produced for New York, and that the tobacco industry has told officials at the national level that it is amenable to the type of change proposed by HB 413 in that it wants to get similar national legislation passed. However, the sponsor, she relayed, feels it is important to start the process at the state level instead of waiting for national legislation. She again offered her understanding that the type of cigarettes that HB 413 requires for Alaska are already being manufactured for other states.

REPRESENTATIVE GARA indicated that that information alleviates his one concern.

CHAIR McGUIRE suggested that this requirement could serve as a model for the federal government or other states.

REPRESENTATIVE KOTT asked whether there will be a restriction on the number of packs of cigarettes a person can buy over the Internet.

2:53:06 PM

REPRESENTATIVE REGGIE JOULE, Alaska State Legislature, sponsor, offered his understanding that if the purchase of cigarettes over the Internet is for private consumption, it would be difficult to enforce what type of cigarettes are bought. However, aspects of the bill do attempt to address situations in which Internet purchases are made for the purpose of resale. He suggested that as the concept embodied in HB 413 catches on nationally, Internet sales will become less of an issue.

CHAIR McGUIRE asked whether manufactures will charge more money for cigarettes with a reduced ignition capacity.

REPRESENTATIVE JOULE said no.

CHAIR McGUIRE surmised, then, that one wouldn't be able to save money by purchasing non-compliant cigarettes over the Internet.

REPRESENTATIVE JOULE, in response to questions, said that fire-safe cigarettes won't taste any different than non-compliant cigarettes. No extra chemicals would be used; instead, there will be thicker bands of paper at regular intervals along the cigarette and it will be packed a little differently, and these changes are what will help the cigarette extinguish itself if it is not actively being smoked.

REPRESENTATIVE GARA noted that language beginning on page 2, line 19, makes it illegal for someone to sell, offer to sell, or possess for sale cigarettes in Alaska that don't meet the requirements proposed via HB 413.

REPRESENTATIVE JOULE, in response to a question, indicated that the bill provides for a transition period during which retailers can sell any non-compliant cigarettes that they have bought prior to the enactment of HB 413. He noted that the other states that have enacted similar legislation have experienced smooth transitions.

[2:56:26 PM](#)

REPRESENTATIVE ANDERSON remarked on the issue of non-compliant cigarettes being brought into Alaska by tourists.

REPRESENTATIVE GARA pointed out that the bill only criminalizes those who bring non-compliant cigarettes into the state with the intent to sell them.

REPRESENTATIVE WILSON remarked on the fact that Alaska is number one in the nation with regard to alcohol-related problems, and on the tendency of some people to smoke when they've been drinking; she characterized HB 413 as a wonderful bill.

REPRESENTATIVE JOULE concurred, and mentioned that when he was a smoker he would sometimes smoke in bed.

CHAIR McGUIRE acknowledged that [the bill addresses] a safety issue.

3:01:11 PM

REPRESENTATIVE WILSON moved to report the proposed CS for HB 413, Version 24-LS1495\Y, Bannister, 4/10/06, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 413(JUD) was reported from the House Judiciary Standing Committee.

HB 258 - SEXUAL ASSAULT BY PERSON WITH HIV/AIDS

3:01:40 PM

CHAIR McGUIRE announced that the committee would return to the hearing on HOUSE BILL NO. 258, "An Act relating to aggravating factors at sentencing." [Before the committee was CSHB 258(HES).]

3:02:11 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), explained that her supervisor, Susan Parkes, has expressed a preference for leaving [CSHB 258(HES)] as it is currently drafted for a couple of reasons, one of which is that all the factors about risk and exposure would require the DOL to have expert witnesses testify. As currently written, the judge can simply factor in the elements of exposure and risk if he/she does decide to apply the proposed sentencing aggravator. Ms. Carpeneti mentioned that the DOL does have some compromise language, but reiterated that the DOL would still prefer to leave the bill as is. She added that she does have a suggestion for narrowing the title.

REPRESENTATIVE GRUENBERG said he'd like to hear the compromise language; having to have an expert witness is less important, he opined, than potentially sentencing someone unjustly. The cost of hiring expert witnesses is simply part of the cost of doing business.

MS. CARPENETI offered the following language as a possible title change: "An Act relating to an aggravating factor at sentencing for sexual assault and sexual abuse [of a minor]."

REPRESENTATIVE GRUENBERG said he would like the title to be even tighter than that, and indicated that he would be offering language to that effect later.

MS. CARPENETI said that the aforementioned compromise language would involve adding, after "AIDS" on line 6, the words: ", and the offense involved penetration". Such additional language address Representative Gara's concern regarding sexual contact [through clothing], and Representative Gruenberg's concern regarding AS 11.41.452 and AS 11.41.455. She, reiterated, however, that Ms. Parkes would prefer to keep the language [in Section 1] as is.

REPRESENTATIVE GARA referred to a proposed change he'd written and given to Ms. Carpeneti; that proposed change read [original punctuation provided]:

At line 4 page 1

After .455 insert

"that involves penetration, or that otherwise involves exposure to the victim to a risk, or a reasonable fear, that the conduct could potentially result in the transmission of HIV (or AIDS,)"

MS. CARPENETI relayed that Ms. Parkes has the same concern with that proposed change.

REPRESENTATIVE GARA offered his belief that it is such common knowledge as to what causes HIV or AIDS that an expert witness wouldn't be needed.

[3:06:19 PM](#)

REPRESENTATIVE GRUENBERG, referring to the proposed compromise language offered by the DOL, opined that the issue that that raises is whether that language would require the involvement of an "extra" expert witness. He opined that it wouldn't because the question of whether penetration occurred would have been proven in the main case.

MS. CARPENETI concurred, and clarified that the compromise language would also involve deleting the word, "and" from line 5. She noted, however, that the compromise language would raise concerns regarding situations in which the crime does involve penetration but is plead down to an offense that doesn't involve penetration. For example, situations wherein a charge

of sexual assault in the first degree is plead down to a charge of sexual assault in the second degree.

REPRESENTATIVE WILSON posited that if a struggle occurs, contact between open wounds could also create the risk of exposure.

REPRESENTATIVE GRUENBERG agreed, but offered his belief that the question is whether there will be many such cases that would require the presence of an expert witness. He indicated that he would not be offering the DOL's compromise language as an amendment, and then asked Representative Gara whether his suggested written change would require the use of an expert witness.

REPRESENTATIVE COGHILL observed that the specific crime will have already been proven and the person convicted by the time the court has to decide whether to apply the proposed sentencing aggravator. At that point, the question will be whether the defendant had been diagnosed with HIV or AIDS, and anybody who'd already signed a consent form to be tested for such diseases probably shouldn't attempt to plead ignorance. He suggested that the current language in the bill is adequate.

REPRESENTATIVE GARA, referring to his suggested written change [text previously provided], offered his understanding that adoption of that change would address everyone's concerns.

[3:12:02 PM](#)

MICHAEL SICA, Staff to Representative Bob Lynn, Alaska State Legislature, sponsor, expressed on behalf of Representative Lynn a preference for including the phrase, "conduct that could result in the transmission ...".

REPRESENTATIVE GARA noted that his suggested written change already includes the phrase, "the conduct could potentially result in the transmission".

MS. CARPENETI and REPRESENTATIVE GARA paraphrased the suggested written change further.

MS. CARPENETI suggested that for clarity, it might be better to draft this suggested written change such that it contains a paragraph (1) and a paragraph (2).

REPRESENTATIVE GARA said, "Sure."

MS. CARPENETI, in response to questions, noted that because of the U.S. Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004), sentencing would occur as a separate procedure, and that the original form of the aggravator would be the most simple form for the DOL to deal with. She acknowledged that cases involving penetration would not require an expert witness during the sentencing procedure, though such might be required for cases involving other forms of potential exposure.

REPRESENTATIVE COGHILL noted that if the suggested written change is adopted, there will also have to be a "reasonable fear" test as well as [expert testimony] regarding what would constitute exposure. He opined, therefore, that that language will significantly complicate the issue.

MS. CARPENETI mentioned that it would be up to the sentencing court to decide what weight to give each of the factors present.

[3:15:40 PM](#)

REPRESENTATIVE GRUENBERG indicated that he supports the suggested written change, particularly given that the majority of the cases to which this proposed aggravator may be applied will involve penetration. He opined that the expense of having an expert witness is minimal when compared with the cost of housing and feeding a prisoner.

REPRESENTATIVE GARA said he did not think that just because the prosecution would be required to do more in the course of discharging its duty is a sufficient reason to not adopt an amendment. He acknowledged that cases involving some other form of potential exposure might require the testimony of an expert witness during the sentencing trial. Another circumstance in which the proposed aggravator might be applied is if the victim has a reasonable fear that he/she was subjected to the risk of contracting HIV or AIDS. In conclusion, he opined that without his suggested written change, [the bill] will get struck down by the courts because it doesn't make sense to charge somebody who has AIDS or HIV with an additional sentence if the crime he/she committed doesn't result in a risk that HIV or AIDS could have been transmitted to the victim.

REPRESENTATIVE WILSON suggested that perhaps they should amend the suggested written change such that it would read:

At line 4 page 1
After .455 insert

"that involves penetration, or that otherwise involves exposure to the victim where the potential result could be the transmission of HIV (or AIDS,)"

REPRESENTATIVE GARA said that would be fine.

CHAIR McGUIRE indicated a preference for leaving the language [in Section 1] as is; in other words, simply leave it up to the judge to decide the issues raised. She mentioned that although she is sensitive to Representative Gara's point, she believes that most judges won't apply an aggravator in situations where the perpetrator poses no risk of transmitting HIV or AIDS. She assured members that she does not want to create a "status aggravator"; instead, the aggravator should be related to the risk the behavior poses.

3:22:00 PM

MS. CARPENETI suggested instead that the committee alter [Section 1 of the bill] by deleting the word, "and" from line 5, and inserting after the word, "AIDS" the following language: ", and either (1) involves penetration or (2) the offense exposed the victim to a risk or fear that the offense could result in the transmission of HIV". She characterized this language as clearer than the aforementioned suggested written change. In response to a question, she offered her belief that using the term, "fear" would be sufficient, because even a small risk of exposure can terrify a victim and that is a form of harm. She also said she doesn't think that the behavior referenced in the bill would be considered a status offense; this proposed aggravator would be applied in situations where a person is convicted of sexual assault and has caused or potentially caused more harm to the victim. That's what aggravating factors address - things that make the crime worse. She, too, noted that the prophylactic treatment is very serious.

CHAIR McGUIRE acknowledged that point.

REPRESENTATIVE GARA opined that the current wording in the bill could make the behavior referenced a status crime because some of that behavior includes behavior that poses no risk of transmitting HIV or AIDS.

REPRESENTATIVE GRUENBERG concurred, again referring to AS 11.41.452 and AS 11.41.455 as examples of such behavior. He said he supports Ms. Carpeneti's latest suggested change.

REPRESENTATIVE COGHILL opined that the potential for harm is significant even in situations that don't involve penetration or other potential forms of exposure. He expressed a preference for allowing the judge to make the determination on some of these issues, and for allowing the aggravator to possibly apply regardless of whether there was penetration or other potential forms of exposure.

[3:26:55 PM](#)

REPRESENTATIVE WILSON raised the issue of saliva exchange.

CHAIR MCGUIRE offered her understanding that an aggravator could only pertain to the crime that was plead to rather than the crime that was charged.

MS. CARPENETI concurred, reiterating that this is of concern to the DOL.

CHAIR MCGUIRE asked whether other states have similar language, and whether Ms. Carpeneti knows of any legal challenges to such language.

MS. CARPENETI said she not aware of any, but acknowledged that her research on that issue has been limited.

MR. SICA noted that other states have made it a crime for a person with HIV or AIDS to have consensual sex without disclosing his/her status with regard to those diseases. He therefore characterized HB 258 as a "narrowly focused sexual assault law."

CHAIR MCGUIRE said she would prefer for the bill to be drafted such that it favors the victim.

REPRESENTATIVE GARA expressed concern that someone could have an aggravator applied to his/her sentence even though he/she never poses a risk of transmitting HIV or AIDS. In response to comments, he opined that without a change to the current language, the bill would still also reference crimes that do not involve penetration, or a risk of transmitting HIV or AIDS in some other fashion, and crimes that are somewhat consensual in nature.

REPRESENTATIVE GRUENBERG again raised the issue of the bill referencing AS 11.41.452 and AS 11.41.455; for the crimes listed in those statutes, the perpetrator may never even see the minor.

In response to a comment, he pointed out that a more serious crime than is referenced in AS 11.41.452 could be charged if the victim does come into physical contact with the perpetrator.

REPRESENTATIVE KOTT asked the sponsor to comment on the suggested change.

REPRESENTATIVE BOB LYNN, Alaska State Legislature, sponsor, said that he would prefer to leave the bill as is, but acknowledged that the committee process is meant to fix flaws in proposed legislation; therefore, if the suggested change would make the bill better he would be comfortable it.

[3:33:28 PM](#)

REPRESENTATIVE GARA made a motion to adopt Conceptual Amendment 1, to alter [proposed AS 12.55.155(c)(33)] such that it would read:

the offense was a felony specified in AS 11.41.410 - 11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and either

- (1) involves penetration or
- (2) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS

REPRESENTATIVE COGHILL objected.

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

[3:35:38 PM](#)

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 2, to narrow the title such that it would read: "An Act relating to an aggravating factor at sentencing for sexual assault and sexual abuse [of a minor]."

REPRESENTATIVE GRUENBERG indicated that he was considering adding more language to that title change. He asked about AS 11.41.452 and AS 11.41.455.

MS. CARPENETI offered her belief that those would be considered within the title.

REPRESENTATIVE GRUENBERG asked whether the title should include the terms HIV and AIDS.

[No answer was audible.]

REPRESENTATIVE GRUENBERG said, "Yes," and relayed that he would accept a friendly amendment.

CHAIR McGUIRE remarked that typically a title is tightened when there is concern that unwanted items will be added to the bill. She said she can't envision that such could occur in this case.

REPRESENTATIVE GRUENBERG offered an example.

CHAIR McGUIRE surmised, then, that the proposal is to have Conceptual Amendment 2 say: "An Act relating to an aggravating factor at sentencing for sexual assault and sexual abuse [of a minor] that involves HIV or AIDS."

REPRESENTATIVE GRUENBERG said yes.

CHAIR McGUIRE objected to the motion.

REPRESENTATIVE GARA suggested altering Conceptual Amendment 2 such that it would say in part, "that involves a person diagnosed with HIV or AIDS." He pointed out, though, that the current title is already limited to aggravating factors at sentencing.

CHAIR McGUIRE, in response to a question, said she would remove her objection if Conceptual Amendment 2 does not contain the terms HIV and AIDS.

REPRESENTATIVE GRUENBERG stated, then, that Conceptual Amendment 2 would alter the title such that it would only read: "An Act relating to an aggravating factor at sentencing for sexual assault and sexual abuse [of a minor]."

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

[3:38:37 PM](#)

REPRESENTATIVE KOTT moved to report CSHB 258(HES), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 258(JUD) was reported from the House Judiciary Standing Committee.

HB 325 - POST-CONVICTION DNA TESTING

3:39:45 PM

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 325, "An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure." [Before the committee was the proposed committee substitute (CS) for HB 325, Version 24-LS1222\I, Mischel/Luckhaupt, 4/5/06, which had been adopted as the work draft and assigned to a subcommittee on 4/5/06; also included in members' packets was the proposed committee substitute (CS) for HB 325, Version 24-LS1222\S, Luckhaupt, 4/10/06.]

REPRESENTATIVE KOTT, speaking as chair of the subcommittee, relayed that the proposed committee substitute (CS) for HB 325, Version 24-LS1222\S, Luckhaupt, 4/10/06, captures most of the concerns that could be addressed within the scope of the legislation.

3:43:00 PM

REPRESENTATIVE COGHILL moved to adopt the proposed CS for HB 325, Version 24-LS1222\S, Luckhaupt, 4/10/06, as the work draft. There being no objection, Version S was before the committee.

3:43:14 PM

KIMBERLY WALLACE, Staff to Representative Gabrielle LeDoux, House Special Committee on Fisheries, Alaska State Legislature, spoke on behalf of the sponsor, Representative LeDoux. Ms. Wallace expressed the hope that the changes encompassed in Version S will garner the committee's support for Version S. She then informed the committee that throughout the legislation the term "petitioner" and "defendant" was replaced with "applicant". Page 1, line 9-10, of Version S now contains the language, "The applicant shall serve a copy of the application on the attorney general". On page 2, line 6-7, language was inserted such that the sentence now reads: "Stating that the applicant was innocent of the crimes for which the applicant was convicted and any lesser included offense".

MS. WALLACE explained that there is now language on page 2, line 8, that reads: "(3) an affidavit from trial counsel stating the reasons DNA testing, or more discriminating DNA testing, was not sought before trial, or a statement by the applicant explaining why this affidavit was not obtained". Also in Version S, proposed AS 12.72.200(c) no longer includes the language, "The court may deny a second or subsequent application requesting relief under this section". The language, "under (c) of this section" was added to page 2, lines 15-16, in order to provide some clarity. Proposed AS 12.72.200(d) of Version S no longer includes the language, "The court shall forward a copy of the application for DNA testing to the attorney general". On page 2, line 24, of Version S, the time limit was increased from 30 days to 45 days per the request of the Department of Law (DOL).

REPRESENTATIVE GRUENBERG recalled that the question was whether the time allowed for the attorney general to respond to the application should be 30 days or 60 days. He further recalled that Ms. Carpeneti was going to review that matter. He expressed concern that 45 days might not be enough, given the attorney general's schedule.

[3:46:53 PM](#)

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said she had suggested 60 days, but hadn't had a chance to further research that issue.

MS. WALLACE continued reviewing the changes encompassed in Version S. She informed the committee that Version S no longer includes a subsection (h) in proposed AS 12.72.200. On page 2, line 28, of Version S, the title of AS 12.72.210 has been changed to read "Standards for DNA testing." Furthermore, it now stipulates a standard of clear and convincing evidence.

REPRESENTATIVE COGHILL noted the abundant use of the word, "reasonable" in proposed AS 12.72.210(1). He asked how that provision will work.

MS. WALLACE explained that the sponsor didn't want to make the hurdle too high for the applicant, though this seemed to engender disagreement from interested parties.

REPRESENTATIVE COGHILL asked about the tension between the "clear and convincing" language and the "reasonable" language in proposed AS 12.72.210(1).

REPRESENTATIVE GRUENBERG acknowledged that a clear and convincing evidence standard could seem to be at odds with the reasonable language, but pointed out that one can never really show much more than that because of the speculative nature of the evidence. The question, he surmised, is: "If we allow this testing, is it going to make a difference." He highlighted that at this point all that is being asked is whether to allow the testing. In further response to Representative Coghill, Representative Gruenberg reminded members that this standard would apply even if the testing is not ordered.

[3:55:45 PM](#)

MS. WALLACE continued with her review by noting that Version S no longer contains the word "reliable" in proposed AS 12.72.210(2), because the [subcommittee and sponsor] don't want the judge to decide whether the DNA was reliable or not. Furthermore, in Version S, proposed AS 12.72.210(3) no longer contains the language, "conclusive DNA test results were not available before the petitioner's conviction", and proposed AS 12.72.230(a) no longer contains the language "Collection of". Also, proposed AS 12.72.230(a) now says in part, "DNA samples shall be tested at a laboratory operated or approved by the Department of Public Safety", rather than, "Testing of the samples shall be performed at a laboratory operated or approved by the Department of Public Safety". She then pointed out that proposed AS 12.72.230(a) of Version S now contains the language "other than samples collected under (a) of this section,".

MS. WALLACE relayed that Version S no longer contains a definition of the term, "actual innocence", and that the definition of the word, "incarcerated" was changed to read simply, "'incarcerated' means physically housed in a correctional facility following a felony conviction." She noted that the aforementioned change was requested by the Division of Juvenile Justice. Ms. Wallace then informed the committee that this morning there was discussion regarding the notion that those who are proven innocent shouldn't have their DNA placed in a database. She noted that the committee has been provided with an amendment to address the aforementioned. Ms. Wallace also noted that the committee may want to address the issue of preservation of evidence.

3:59:18 PM

REPRESENTATIVE GARA referred to page 2, lines 6-7, and offered his understanding that it specifies that DNA evidence can't be used if it shows that the individual is innocent of the crime that he/she was convicted of but doesn't also show that he/she is innocent of lesser included offenses. Offering a hypothetical example, he asked whether the language, "any lesser included offense" is really necessary.

MS. WALLACE noted that Representative Gara's concern was debated [in the subcommittee]. She relayed that although Legislative Legal and Research Services didn't feel that language was necessary, the DOL felt strongly that it should be included.

REPRESENTATIVE GABRIELLE LeDOUX, Alaska State Legislature, sponsor, explained that the DOL requested that language because it didn't believe that HB 325 should be about fine-tuning legal convictions. She further explained that HB 325 should target an individual who hadn't been involved at all in a crime and it was simply a case of mistaken identity. Representative LeDoux said that the DOL made an excellent argument and thus she agreed to include that language in the bill. She said that she is most concerned about an individual who wasn't present when the crime was committed, rather than an individual who should be in jail for 25 years but was instead sentenced to 35 years.

REPRESENTATIVE GARA questioned whether there are lesser included offenses that may justify a small sentence while the broader included offense - that the individual didn't commit - would result in a long sentence. Although a couple of years of difference in the sentence is wrong, he said that it's of less concern than situations in which an individual is sentenced for twice as long as he/she should have been.

REPRESENTATIVE COGHILL opined that this could be a matter of degree of guilt. He expressed his frustration with the ability of an offender to plea bargain, because the victims are always left on the short end. He said that he shares a bit of the DOL's concern, so although he struggles with the possibility of an innocent individual not having an opportunity [to prove himself innocent], the reality of the system as he perceives it makes him comfortable with the language.

REPRESENTATIVE GRUENBERG said that he isn't entirely satisfied that the language, "and any lesser included offense" should be

included. He asked that Ms. Carpeneti be allowed to comment on this issue.

CHAIR McGUIRE passed the gavel to Representative Wilson.

4:05:42 PM

MARY ANNE HENRY, Director, Office of Victims' Rights (OVR), Alaska State Legislature, specified that her major concern is with regard to why another system is being created when there is already a post-conviction relief (PCR) system that was put in place 10 years ago. She asked why a request for a DNA sample can't simply be part of a PCR request. Without finality, victims will continue to be traumatized and closure will be disrupted. Ms. Henry highlighted that HB 325 doesn't seem to include a time limit like there is for a PCR request, and that she would like it to.

MS. HENRY expressed the same concern with regard to the burden of proof - the clear and convincing [evidence provision] - and the references to "reasonable". She questioned why the same standard isn't being used for both DNA sample requests and PCR requests. Ms. Henry suggested that when counsel is appointed, he/she should be required to submit additional information as well as a document stating that there are no meritorious claims.

REPRESENTATIVE GRUENBERG suggested that proposed AS 12.72.210 only raises the question of whether one can get a test and whether the DNA could exculpate the defendant. That is why a lesser standard is used. With regard to whether the new counsel could file a brief stating that there is no meritorious claim, Representative Gruenberg offered his understanding that the language on page 2, lines 18-22, of Version S covers this matter.

REPRESENTATIVE KOTT highlighted that the committee seems to be wrestling with the same language that the subcommittee did.

MS. CARPENETI, in response to the issue raised by Representative Gruenberg, said that the DOL prefers to include the language, "any lesser included offense" because an individual who makes an application for further testing has been convicted beyond a reasonable doubt, has had an appeal that has been overturned, and is now in jail. Therefore, the aforementioned individual has had several chances to litigate the validity of the crimes for which he/she has been convicted. She offered her understanding that the procedure being established in HB 325 is

meant to provide a wrongfully accused and convicted individual with another chance in a case where there has been a huge mistake. The department doesn't view such a procedure as being a fine-tuning of whatever sentence the convicted individual received. She indicated that the language, "and lesser included offense" is meant to clarify that this proposed statute should be used only in cases of misidentification.

REPRESENTATIVE GARA indicated that he has two concerns with regard to DOL's position. He said the entire point of DNA evidence is that it could show that the jury made a huge mistake and that the individual [being convicted] didn't do what he/she is being charged with. Therefore, if DNA testing shows that an individual is innocent, the [DNA sample] should be able to be used. By included the language "any lesser included offense", there could be a situation in which two people assault an individual in order to rob that individual. One of the assailants assaults the individual to the point of murdering or raping the individual, and yet it is the other assailant who is convicted of that crime. He again highlighted that the advantage of DNA testing is that the individual who really committed the murder/rape is charged rather than the individual who didn't. Representative Gara specified that by including the language that an individual can't use DNA testing if the individual does some lesser included offense than he/she is convicted of, then the true perpetrator is let free and another has been wrongfully convicted.

[Representative Wilson returned the gavel to Chair McGuire.]

MS. CARPENETI reminded the committee that in such a case the defendant has already been sentenced and has had the opportunity to bring out such arguments and have them be considered. Furthermore, in the example provided earlier, the individual who did not actually commit the murder is an aider and abettor and thus is responsible under current law for the harm to the victim. Ms. Carpeneti opined that the post-conviction DNA testing procedures are really for those who are truly innocent and not participating at all, and that [the committee] should leave the sentencing considerations [as is]. She noted that there is a defense to felony murder for the individual who didn't actually [commit the murder] that can be brought to the court. Situations in which a person participates in a robbery but whose co-defendant went far beyond that are not what this bill should address.

REPRESENTATIVE LeDOUX recalled that this matter was extensively discussed in the subcommittee, but the subcommittee couldn't come up with anything to address members' concerns.

REPRESENTATIVE GARA posed a hypothetical situation in which two individuals attempt to rob someone, but one of the assailants decides to rape the victim while the other assailant attempts to stop the rape, but fails to do so. He further posed that the wrong individual is convicted of each crime. In such a situation, it doesn't make sense that the assailant who didn't commit the rape should sit in jail for the crime he/she didn't commit.

[4:24:52 PM](#)

STEPHEN SALOOM, Policy Director, Innocence Project, stressed the importance of allowing the courts the ability to review convictions, especially in cases wherein DNA evidence testing was in its infancy, in order to determine if such testing was utilized correctly. With regard to why there should be a new avenue for DNA testing after trial as opposed to other new evidence after trial, the laws are not set up to tell the court whether it's acceptable to test evidence for a new reason that can be probative in a case. He highlighted that 40 other states have adopted similar legislation, and surmised that they did so because it's important to review such cases with DNA evidence so as not wrongly victimize someone else.

MR. SALOOM then noted his agreement with [Representative Gara]. Furthermore, in 175 DNA exonerations, the jury had initially found an individual guilty beyond a reasonable doubt on every element of the crime despite the fact that the individual was actually innocent. Clearly, in those cases the prosecutor was able to convince the jury that the individual committed the crime when he/she hadn't. The question [this legislation is addressing] is whether [the DNA] evidence should even be reviewed to discover something that might be very probative. Here again, Mr. Saloom opined, the prosecutor can make a very good argument to the judge, based on the results of the initial case, to disallow testing, and this is of great concern.

REPRESENTATIVE GRUENBERG asked if any other states include the language, "any other lesser included offense".

MS. CARPENETI said she believes the backup material provided to members' indicates that other states do include such language.

[4:31:44 PM](#)

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 1, to change "45" to "60" on page 2, line 24. There being no objection, Amendment 1 was adopted.

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

The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material shall be preserved for the period of time that any person is incarcerated in connection with that case.

REPRESENTATIVE GRUENBERG indicated that this language comes from Michigan law.

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

[4:34:08 PM](#)

REPRESENTATIVE KOTT made a motion to adopt Amendment 3, which read:

Page 4, lines 9-11

(b) The testing laboratory shall not make the results of a DNA test ordered under AS 12.72.200 available to the DNA identification registration system under AS 44.41.035 [and] or to any other law enforcement DNA databases unless the DNA test results identify the applicant as the source of the DNA evidence for which testing was sought.

REPRESENTATIVE COGHILL objected for the purpose of discussion.

REPRESENTATIVE KOTT explained that under Amendment 3, once the judge has allowed a DNA test to be performed and that test exonerates the individual, then that DNA test result won't be included in the DNA databank. However, Amendment 3 doesn't address the swab taken when the individual was first brought into custody or entered the correctional facility.

MS. CARPENETI pointed out that AS 44.41.035(i) already includes a procedure to expunge DNA samples of an individual whose conviction has been overturned.

REPRESENTATIVE COGHILL surmised that Amendment 3 addresses the DNA sample for the particular crime [for which the conviction was overturned].

CHAIR McGUIRE recalled that some states allow DNA swabbing at the time of arrest. Although the aforementioned can be controversial, states that have done so have actually found links to other crimes. Chair McGuire stated that she isn't comfortable with Amendment 3.

MS. CARPENETI opined that the drafting of Amendment 3 is problematic. For example, in the Alaska Court of Appeals case, Osborne V. State, the defendant sought to test the condom that was found in the area of the crime 26 hours after the crime was committed; this area happened to be a common area for romantic trysts. Whether or not the semen in the condom was the defendant's wasn't dispositive of the case because the other evidence was overwhelming, and so the conviction would not have been overturned. Therefore, in that case, for example, the defendant's DNA shouldn't be taken out of the DNA databank, she opined. She reiterated that current law allows for DNA samples to be removed from the databank when the defendant has been found not guilty or when the conviction has been overturned upon appeal.

REPRESENTATIVE KOTT withdrew Amendment 3 with the intention of working further on this issue as the legislation moves through the process.

[4:39:12 PM](#)

REPRESENTATIVE GARA made a motion to adopt Amendment 4, to delete from page 2, line 7, the language, "and any lesser included offense".

REPRESENTATIVE COGHILL objected.

REPRESENTATIVE GARA suggested that committee members think about a situation in which a family member committed a crime that justifies a 10 year sentence but he/she is instead sentenced to a far longer period of time for a different crime, and 25 years into the much longer sentence the DNA evidence shows that the family member didn't commit that particular crime. That

individual will sit in jail for the rest of his/her life unless he/she is able to use DNA evidence to show that he/she didn't commit the crime for which he/she was sentenced. Representative Gara asked committee members to think about how they would feel if the law didn't allow the DNA evidence to illustrate that one of their family members was wrongly convicted.

REPRESENTATIVE GRUENBERG commented that he, too, is troubled with regard to this aspect of the legislation. He said he couldn't find any reason why someone who might have committed a lesser included offense should be disqualified from being tested. He highlighted that [the DNA evidence] may significantly shorten the sentence.

MS. CARPENETI characterized it as a special procedure to challenge a conviction that for all other reasons has been upheld by the appellate courts. The purpose [of the language "any lesser included offense"] is to address a mistakenly identified perpetrator - not an individual who feels that he/she should've been convicted of sexual assault in the second degree rather than sexual assault in the first degree, for example. This language, she further opined, is for the extraordinary case in which the individual is factually innocent.

[4:42:44 PM](#)

REPRESENTATIVE GARA relayed his belief that between now and the time he dies there will be at least one injustice done under this language, one injustice which is one too many. He pointed out that the law is written to reflect the notion that there are criminals with a conscience. In fact, there are instances in which the defendant is sentenced less if he/she attempts to prevent the continuation of the crime he/she had initially engaged in. He opined that there will be circumstances in which a perpetrator will be convicted of a murder when he/she simply assaulted someone and then tried to stop the murder.

[4:43:55 PM](#)

A roll call vote was taken. Representatives Gruenberg, Gara, and Kott voted in favor of Amendment 4. Representatives McGuire, Coghill, and Anderson voted against it. Therefore, Amendment 4 failed by a vote of 3-3.

MS. CARPENETI returned attention to proposed AS 12.72.210(1), and opined that it's unclear because, among other things, it should instead provide that if the results of the DNA test are

as the claimant asserts, then no reasonable trier of fact would find the individual guilty. She characterized the language in proposed AS 12.72.210(1) as allowing a "fishing expedition" because it will allow those in jail to bring applications for post-conviction DNA testing on very slim grounds. She relayed her understanding that if the testing comes out as the applicant asserts, then it will be almost dispositive and therefore decide the case. The DOL has a major concern with the test and with the fact that no due diligence is required. This provision allows an individual to bring it up at any time, whereas the PCR applications have limits in which to bring them forth, and although there are exceptions for cases with newly discovered evidence, the individual must establish that he/she proceeded with due diligence.

CHAIR McGUIRE asked why the subcommittee decided not to adopt a due diligence standard.

REPRESENTATIVE GRUENBERG said he didn't know.

CHAIR McGUIRE said that she would be inclined to offer an amendment to adopt a due diligence standard.

REPRESENTATIVE GRUENBERG asked if there is a standard specifying a time limit.

MS. CARPENETI pointed out that the PCR statutes specify limits of either one year from when an appeal has been decided or two years from trial if there's no appeal. Those statutes further specify that under exceptional circumstances and in the interest of justice, there are circumstances that are envisioned for PCR, such as newly discovered evidence being brought after the aforementioned time period.

REPRESENTATIVE LeDOUX offered her recollection that the due diligence standard wasn't included because if DNA testing can actually prove someone's innocence, then no matter how much time has passed, [it should be allowed].

[4:48:16 PM](#)

CHAIR McGUIRE surmised that Ms. Carpeneti's concern is that there will be individuals making this claims all the time and thus it will be cumbersome.

MS. CARPENETI acknowledged that's one of the DOL's concerns. She then pointed out that the further away from the crime [the

evidence is brought forward], the greater the likelihood that the victims will have passed away and that the other evidence will have been scattered. Therefore, it's in the interest of everyone to resolve cases as soon as possible. She noted that most PCR applications require that persons, even those who don't meet the statutory deadlines, act with due diligence.

REPRESENTATIVE COGHILL relayed his belief that under proposed AS 12.72.210(1), there seems to be a "fairly decent vetting." Although he acknowledged that the continual use of the term "reasonable" makes it difficult to "nail it down," it still has to be clear and convincing. He said that the aforementioned is the reason he is willing to retain the language, "any lesser included offense". Furthermore, couldn't the court say that an individual's time to obtain DNA testing had expired because he/she already had multiple opportunities to do so? Also, isn't there a motivation to seek [DNA testing] earlier rather than later?

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

MS. CARPENETI replied yes, except that language on page 4, lines 4-5, says that the judge doesn't have to worry about the timeliness of the request.

MS. CARPENETI, in response to a question, suggested deleting the language on page 4, lines 4-5, which says, "Notwithstanding any law or rule of procedure that bars an application for post-conviction relief as untimely,". The hope, she opined, is that this change would negate the provision in Version S that takes away all requirements for due diligence for PCR applications.

REPRESENTATIVE ANDERSON [made a motion to adopt] Ms. Carpeneti's suggestion as Amendment 5, to delete from page 4, lines 4-5, the words, "Notwithstanding any law or rule of procedure that bars an application for post-conviction relief as untimely, an" and insert the word, "An".

[4:52:07 PM](#)

REPRESENTATIVE LeDOUX questioned how one could expect the typical prisoner to know whether he/she has a claim for relief via the use of DNA testing if the law is written such that he/she will be barred from relief because of a lack of due diligence.

REPRESENTATIVE ANDERSON opined that the public defenders are very competent and informed on such matters.

REPRESENTATIVE LeDOUX pointed out, though, that once an individual is convicted and is in jail, he/she no longer has the services of the public defender.

REPRESENTATIVE ANDERSON reiterated his belief that the public defender would still inform the [jailed person].

MS. CARPENETI clarified that it depends on the circumstance. She noted that the individual would be represented through appeals and PCR remedies. She also noted that determining whether there was due diligence depends on the circumstances; for example, when did the [evidence] come to light and how long did the individual wait after finding out about it. Therefore, if the individual [uncovered evidence] 20 years later, the court could find that the individual acted with due diligence because he/she proceeded without delay once that new evidence was discovered.

REPRESENTATIVE GARA expressed his hope that Representative Anderson would consider withdrawing the amendment. Drawing on his experience as an attorney, he relayed that it is the innocent person who will fight for his/her innocence the least while it is the guilty person who will fight the most to get released. When there is DNA evidence that shows someone's innocence, and the innocent person decides not to act on it immediately because he/she don't know what DNA is or he/she has lost all hope, that's the type of person that DNA evidence is supposed to protect.

REPRESENTATIVE GARA opined that the fact that the innocent individual didn't act on the evidence immediately is almost a testament to that individual's character, and yet those innocent individuals are being punished for having that character. He said that the reality is that DNA evidence exonerates innocent people, and so it would be very wrong to leave an innocent person in jail because he/she didn't act as quickly as the government specifies. Therefore, he opined, there is every reason not to impose this additional standard.

[Representative Anderson returned the gavel to Chair McGuire.]

MS. CARPENETI, in response to a question, explained that once an applicant is tested, the process returns to that used for PCR

under AS 12.72.010 through AS 12.72.040, which include the timeliness provisions.

CHAIR McGUIRE suggested that the committee move the legislation and members work further on it as it continues through the process.

REPRESENTATIVE GRUENBERG recalled testimony that the language of proposed AS 12.72.210(1) is confusing. Therefore, he suggested simplifying that language by deleting the words, "reasonable probability that a reasonable trier of fact would have a".

CHAIR McGUIRE asked if the aforementioned would defeat any compromises made in the subcommittee.

REPRESENTATIVE LeDOUX opined that there was no compromise reached on that particular language.

REPRESENTATIVE KOTT said that suggested change would probably work. However, in order to put this in the proper context, one must review what other states have done. He relayed that most other states use a reasonable probability standard.

[5:00:43 PM](#)

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 6, to delete from proposed AS 12.72.210(1) the words, "reasonable probability that a reasonable trier of fact would have a". There being no objection, Amendment 6 was adopted.

[5:01:03 PM](#)

CHAIR McGUIRE turned the committee's attention back to Amendment 5 [text provided previously].

A roll call vote was taken. Representatives Anderson, Coghill, and McGuire voted in favor of Amendment 5. Representatives Kott, Gara, Gruenberg, and Wilson voted against it. Therefore, Amendment 5 failed by a vote of 3-4.

[5:02:27 PM](#)

REPRESENTATIVE ANDERSON moved to report the proposed CS for HB 325, Version 24-LS1222\S, Luckhaupt, 4/10/06, as amended, out of committee with individual recommendations and the accompanying zero fiscal notes. There being no objection,

CSHB 325(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:03 p.m.