ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
January 18, 2005
8:33 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Charlie Huggins, Vice Chair
Senator Gene Therriault
Senator Hollis French
Senator Gretchen Guess

MEMBERS ABSENT

None

COMMITTEE CALENDAR

SENATE BILL NO. 56
"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."
HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 56
SHORT TITLE: CRIMINAL LAW/PROCEDURE/SENTENCING
SPONSOR(s): SENATOR(s) THERRIAULT, SEEKINS

01/14/05	(S)	READ THE FIRST TIME - REFERRALS
01/14/05	(S)	JUD, FIN

WITNESS REGISTER

Ms. Heather Brakes
Staff to Senator Therriault
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Presented SB 56 for the prime sponsor

Ms. Susan Parkes
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Described the contents of SB 56

Ms. Portia Parker
Department of Corrections
431 N. Franklin, Suite 400
Juneau, AK 99801
POSITION STATEMENT: Described the sections of SB 56 that pertain to the Department of Corrections

Ms. Barbara Brink
Public Defender Agency
Department of Administration
900 W 5th Ave. Suite 200
Anchorage, AK 99501-2090
POSITION STATEMENT: Believes SB 56 is over-sweeping

ACTION NARRATIVE

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:33:56 AM. Present were Chair Seekins and Senators Gene Therriault, Charlie Huggins and Gretchen Guess (participating on-line).

CHAIR SEEKINS announced that Senator Guess was unable to be physically present indefinitely so would be participating via teleconference. He requested a legal opinion from Tam Cook of the Division of Legal and Research Services about the extent of Senator Guess's participation via teleconference. Ms. Cook determined that Senator Guess can vote on any action taken on legislation except passing a bill out of committee. He also announced that as chair of the Senate Judiciary Committee, he will require 3 affirmative votes to pass a bill out of committee and that the committee would meet on Tuesdays, Wednesdays and Thursdays at 8:30 a.m. He welcomed Senators Huggins and Guess to the committee and announced the committee would take up SB 56.

SB 56-CRIMINAL LAW/PROCEDURE/SENTENCING

8:37:44 AM

SENATOR THERRIAULT, prime sponsor of SB 56, told members that Heather Brakes would give an overview of the bill and then DOL and DOC would speak to specific sections of the bill.

MS. HEATHER BRAKES, staff to Senator Therriault, said SB 56 was drafted in response to a U.S. Supreme Court ruling in June of 2004 that has affected Alaska's sentencing structure. Alaska's presumptive sentencing scheme was developed in the 1970s. The

current system limits judicial discretion to a single definite term unless the judge finds that aggravating or mitigating factors exist, allowing for departure from the set term. In June of 2004, the U.S. Supreme Court struck down the State of Washington's sentencing structure, which is functionally equivalent to Alaska's law, as unconstitutional. The court found that under the Sixth Amendment, a defendant has the right to have a jury, not the judge, determine whether aggravating circumstances exist to justify increasing a sentence above the statutorily prescribed term. The Blakely v. Washington decision has created confusion for the Alaska Court System and other states. SB 56 will make it easier for judges to consider all factors in sentencing and to impose probation in all felony cases. It will make probation supervision more effective by giving police greater arrest authority over probationers. Chair Seekins and Senator Therriault drafted SB 56 in conjunction with DOL.

CHAIR SEEKINS disclosed that his son works for Ms. Parkes at DOL as an assistant district attorney in Fairbanks.

MS. SUSAN PARKES, Deputy Attorney General, Criminal Division, Department of Law (DOL), told members the Blakely decision has created turmoil in several states. She appreciated the quick introduction and hearing of SB 56. DOL believes SB 56 is a balanced approach to the Blakely problem.

MS. PARKES gave the following history of Alaska's sentencing scheme. Pre-1970, Alaska had open sentencing, which gave judges wide-open discretion for sentencing. The legislature found a large disparity among sentences for the same crime across the state existed; therefore presumptive sentencing was introduced. The legislature decided to create a presumptive sentence presumed to be the appropriate sentence for the typical offender committing the typical offense. The legislature wanted to provide some flexibility to individualize sentences. That's where the aggravators and mitigators came in. Judges make findings on aggravators and mitigators by clear and convincing evidence. The aggravators and mitigators are clearly defined in statute and judges are not required to use them.

MS. PARKES told members the current system has worked well to remove sentencing disparities. A 1999 felony sentencing study by the Alaska Judicial Council found that all disparities in non-presumptive ranges have decreased. DOL is proposing in SB 56 to keep the best parts of the current system, do away with disparity, provide judges with flexibility, and comply with

Blakely in a balanced way that will not eat up Alaska's criminal justice resources.

8:44:49 AM

MS. PARKES referred to a chart and said that instead of one set appropriate sentence, SB 56 proposes a range that a judge can use without having to find aggravators or mitigators. Alaska's presumptive scheme is fairly simple compared to other states; it is based on one criterion - prior felony convictions. A sentence can be increased for a sex felony with prior sex offenses, use of a weapon, or for causing serious physical injury. Essentially it is based on prior felonies. She described how to read the chart; the bolded language is the range being proposed.

8:46:01 AM

MS. PARKES said that to go beyond the range, aggravators must be noticed by the state and presented to a trial jury. The jury must find aggravators beyond a reasonable doubt. The judge has the discretion to impose an increased sentence.

Mitigation remains the same under SB 56 and Blakely. A judge still has the discretion to make findings on mitigators with clear and convincing evidence and decide whether to reduce the sentence below the proposed presumptive range. DOL hopes to maintain flexibility for the judge. Taking aggravators to a jury trial will be more resource intensive. SB 56 will avoid the grand jury requirement. Currently, to indict for a felony offense in Alaska, one must go to a grand jury. One judge ruled that aggravators must go to the grand jury as well. SB 56 only requires notice to the defense before trial. A grand jury often happens early in a case when aggravating factors are unknown.

8:48:34 AM

MS. PARKES said the next change pertains to the fact that currently there are no presumptive sentences for first felony offenders for B and C felonies, and only for people with priors and for class As and unclassifieds. For uniformity, SB 56 proposes a presumptive range for people convicted of B or C felonies without priors. Some people have expressed concern that by creating these ranges, sentences will be increased across the board. One concern is that judges will automatically go to the top of the range. DOL proposed ranges starting at the current presumptive level and going up because mitigation hasn't changed. She has not had that experience with judges and that is

not DOL's intent. DOL's intent is to maintain the flexibility that judges currently have in being able to increase sentences. If that is of concern to the committee, DOL will work on intent language that says it is not the legislature's intent to increase sentences across the board but to maintain the current system in a way that complies with Blakely.

8:50:48 AM

MS. PARKES said another highlight in the bill is an added statutory aggravator in Sec. 19.

CHAIR SEEKINS specified that the committee is working on version F.

MS. PARKES referred to page 15 and said that aggravator 31 is based on a prior criminal history of misdemeanors. The question is if the legislature decides to create presumptive sentences for first felony offenders, should someone with no prior felonies but a lengthy history of misdemeanors be treated differently than someone with no prior criminal history at all. Aggravator 31 recognizes that a lengthy criminal history is defined as 5 or more class A misdemeanors and allows a judge to aggravate the sentence if appropriate.

MS. PARKES described the other proposed changes as:

> On section 2, page 2, regarding periodic sentencing - currently judges can impose periodic sentencing, which can be a nightmare for DOC, i.e., a one-year sentence could be served on weekends only. This creates safety and paperwork problems. In this section, the ability to allow periodic sentencing would be limited to a situation where a judge was authorized to order such sentencing. It must be for an employment obligation that pre-existed to sentencing and that will create extreme hardship and prevent the defendant from paying fines or restitution. Judges have been giving periodic sentencing for employment, illnesses, funerals, or births to the point where people come and go, creating a hardship for DOC. The legislature may want to restrict this provision further to sentences that are of a certain length.
>
> Section 6(a)(7) on page 4 - currently, judges often delegate to probation officers the ability to impose appropriate probation conditions as circumstances

change. Someone may be sentenced, do 3 or 4 years, then be on probation. Circumstances can change dramatically for that person once he/she is on parole. Since the judge won't know the appropriate conditions, he/she will delegate authority to a probation officer. A recent Court of Appeals decision questioned whether judges have legal authority to delegate. This provision would codify that practice and allow judges to have that flexibility. She deferred to Deputy Commissioner Parker for further explanation.

The last substantive change is in Sections 26, 30, and 31 on pages 19 and 23. A recent Court of Appeals opinion was issued in Rickle v State. That case involved a situation during which the City of Homer police officers were doing a bar check in Homer and saw a felony DUI convict in a bar that was either on probation or parole. They knew that person should not be in a bar. The police officers detained the person, called his probation officer and confirmed that he was on parole. They were authorized to arrest the person for a parole violation and did a pat down search, during which they found cocaine and arrested him. The Court of Appeals found the police did not have the authority to do an initial stop and detain to investigate. DOL believes it is appropriate for a police department to investigate possible parole violations. This change allows a police department to stop if there is reasonable suspicion; if probable cause of probation conditions exists, the police have the authority to arrest that person.

8:58:43 AM

MS. PARKES said the Blakely problem required changes be made for parole and probation, so those changes are addressed in this bill.

CHAIR SEEKINS asked if Section 30 gives a parole officer without a warrant the ability to also arrest a parolee for violation and whether that exists now.

MS. PARKES said yes but it does not exist now for certain violations.

8:59:33 AM

SENATOR THERRIAULT asked how the court would have the police officer handle such a situation and whether the police officer

would just report to the parole officer that the person was in the bar and let the system handle it.

MS. PARKES said yes. The court ruled the police could not detain based only on the belief that the parolee should not have been in a bar. The parole officer would have had to file a parole violation and made an arrest at a later time.

9:00:12 AM

SENATOR THERRIAULT asked if the police had picked him up, would they have to follow the same procedures for questioning anyone and in the meantime check with the parole officer.

MS. PARKES said yes. Right now police officers must have reasonable suspicion to stop and investigate. They would have to follow the same procedures under the bill.

SENATOR THERRIAULT asked if the defendant would have the same right to remain silent and request legal counsel.

MS. PARKES said absolutely.

9:01:00 AM

SENATOR GUESS said the opinions issued by the Supreme Court two weeks ago on mandatory sentencing and guidelines are difficult to understand. She asked if the mandatory sentencing provision in SB 56 could conflict with the latest Supreme Court decision.

MS. PARKES said those decisions were very confusing. The Supreme Court's FanFan-Booker decisions looked at the federal sentencing guidelines and how Blakely affected them. That decision consisted of 125-pages of majorities, dissents, joinings and not-joinings. DOL does not believe that ruling affects SB 56. The federal sentencing guidelines are significantly different from the way Alaska's presumptive sentencing is set up. They are much more complicated and require more factual findings from the judge to get the defendant on the grid. For the most part, Alaska's grid is based essentially on prior felony convictions. The court is clear that the judge can still make that kind of a finding. The factual findings beyond prior convictions require a jury. She believes the upshot of the FanFan-Booker decisions were that the federal guidelines would be voluntary. They ordered judges to consult them but judges are not required to follow them.

9:03:25 AM

SENATOR GUESS said Section 6 was described as codifying current practice. She asked if any literacy/communication issues might arise if new conditions are put on a probation officer when a parolee is not English proficient.

MS. PARKES deferred to Deputy Commissioner Parker but said the proposal indicates the additional condition be provided in writing to the defendant. She presumed the probation officer would talk to a defendant to make sure the conditions are clear. She recognized that concern and explained that to enforce a new condition, there must be a finding that the person clearly understood it.

CHAIR SEEKINS asked Ms. Parkes to standby for future questions.

9:05:20 AM

MS. PORTIA PARKER, Deputy Commissioner, Department of Corrections (DOC), said she would expand on sections that affect the DOC. Periodic sentencing can be very problematic when managing populations with overcrowded facilities. DOC is at 100 to 103 percent capacity all of the time. She is aware of two cases where judges ordered periodic sentences to be served. In one, a prisoner with a long sentence served the sentence on weekends - for over one year the prisoner had to be discharged every week. That process is costly and time consuming. The other case involved a 7-year sentence. The prisoner was released during the summers with no supervision. Long-term prisoners are often sent to Arizona so prisoners have to be transported back and forth when released. That creates a disparity among sentences for other inmates. DOC sees philosophical and logistical problems. Short prison sentences are not as much of a problem because prisoners might spend their time in a halfway house.

9:07:29 AM

MS. PARKER said in regard to Section 6 - the general condition of probation - the number 12 condition is an extremely important condition for probation officers to do their jobs effectively. Number 12 is the delegation of some authority to a probation officer by a judge. It preserves the current practice. This condition has been used in Alaska and almost every other state and jurisdiction. Generally, the court would order that the probationer abide by any special instructions given by the court

or any of its duly authorized officers, including probation officers of DOC. This allows the probation officer the flexibility to respond to things as they come up - some common occurrences are substance abuse issues not reported during the sentencing phase. If those issues did not come up at sentencing, the probation officer can intervene later and require treatment. That avoids going back to court to request additional conditions and keeps people out of prison. Returning to court would place a huge burden on the court system. This would be used as an intermediate sanction.

9:10:33 AM

SENATOR THERRIAULT asked Ms. Parker to read that language again.

MS. PARKER reads probation condition number 12, which refers to delegating some authority to a probation officer by a judge:

> Abide by any special instructions given by the court or any of its duly authorized officers, including probation officers of the Department of Corrections.

SENATOR THERRIAULT referred to Senator Guess's concern about non-English speakers and asked Ms. Parker to suggest language to make that clear.

MS. PARKER said a parole officer would make sure a non-English speaking prisoner understands the conditions of probation or parole. She offered to look into adding a provision to have the person sign a statement saying he/she understands.

9:12:46 AM

MS. PARKER explained that Sections 26, 30, and 31 affect parole by giving the police officer authority to stop and detain someone who might be violating parole conditions, which is important in smaller villages without probation offices. DOC has statutory authority to work with VPSOs, who can serve as parole agents. In those areas, DOC provides training. In larger cities, law enforcement calls the on-duty supervisor and DOC works collaboratively with law enforcement. DOC believes this will improve the working relationship with law enforcement and intervene to keep offenders from violating.

Sec. 29 codifies the current practice of the parole board by making clear that the board has the authority to deny a prisoner

consideration for parole, once the board has considered discretionary parole and the prisoner was denied release.

SENATOR HUGGINS asked if, regarding Arizona and periodic imprisonment, prisoners sent to Arizona go back and forth to Alaska.

MS. PARKER said DOC tries not to send prisoners with periodic sentences to Arizona because of the increased transportation costs. DOC tries to send only prisoners with long sentences to Arizona, although DOC gets ordered by the court to transport prisoners back for other reasons. She said although DOC tries to keep prisoners with periodic sentences in the state, it puts pressure on DOC's ability to move prisoners around, even within the state.

9:16:32 AM

SENATOR THERRIAULT asked Ms. Parker to describe the specific circumstances that led the court to allow the one prisoner with a periodic sentence to be released during the summers.

MS. PARKER said the court released that prisoner to commercial fish. She said she doesn't know how many of those types of cases exist and the overall impact on the system. She noted those two examples were in Juneau.

SENATOR THERRIAULT asked if that person had a 7-year sentence and what the crime was.

MS. PARKER said she would find out.

9:17:33 AM

CHAIR SEEKINS asked if, under this proposal, the same commercial fishing scenario could occur but more explanation would be required and the process would be tougher.

MS. PARKER said yes, and DOC's concern is that if judges use this to a greater extent, DOC would have a very serious problem managing that population. She explained that serving time in prison is a hardship on every inmate who has to serve time in prison when it comes to supporting their families.

CHAIR SEEKINS said he is unaware of the extent of periodic sentencing and asked if SB 56 would create a new cottage industry in the sentencing process, i.e. requiring studies,

surveys, more lawyers, etc. He asked if the number of periodic sentences is significant.

9:19:02 AM

MS. PARKER offered to find out.

CHAIR SEEKINS asked if DOC believes using periodic sentencing for short sentences may be worthwhile.

MS. PARKER said DOC doesn't oppose periodic sentences for short sentences of 60 to 90 days and noted that they are granted most often. DOC doesn't oppose them for first time offenders either. DOC's concern is imposing periodic sentences for felony convictions or long-term sentences.

9:20:21 AM

CHAIR SEEKINS asked if DOC has a parameter it is comfortable with.

MS. PARKER said for sentences of less than one year. DOC prefers to have the authority to make decisions based on DOC's matrix. DOC does not want to expand the use of periodic sentences but understands why they are necessary at times.

CHAIR SEEKINS asked if SB 56 would eliminate a judge's ability to use periodic sentences.

MS. PARKER believed the current language [allows periodic sentences] for more than one year.

9:21:37 AM

CHAIR SEEKINS asked Ms. Parkes if this language fits within a particular time parameter.

MS. PARKER said the draft does not limit the sentence length for periodic sentencing. The current statute allows periodic sentencing with no limits at all. The proposal limits it to employment situations but not to certain sentences.

SENATOR THERRIAULT asked if the proposed language does not take into consideration the hardship on the family. It says if the system has imposed a requirement on the individual, the system should not prevent the person from meeting that requirement.

MS. PARKES believed that was the intention.

SENATOR THERRIAULT said he would consider adding language to differentiate between shorter and longer terms of imprisonment. He added the general public would want those sentences to apply only to crimes of lesser severity. With regard to economic hardship, he said any person who gets himself thrown in jail imposes an economic hardship on his family. A deterrent to crime is the hardship one might impose on any relationships.

9:23:55 AM

CHAIR SEEKINS liked Senator Therriault's suggestion and asked participants to work together to figure out a cut-off point. He thought the embarassment factor could be as great as the economic factor. He expressed concern that a large number of the prisoners are indigent. The state arrests them, defends them, houses them in prison and supports their families on welfare. People need to be punished for crimes they commit but the state needs to be cognizant of the cost. He said his concern is that sentencing is effective in deterring crime.

SENATOR GUESS referred to Section 6 and asked if any history of abuse by current probation officers exists and whether an appeals process for additional conditions exists.

9:26:29 AM

MS. PARKER believed they could appeal to the court because the court orders probationers to comply with certain conditions. She said the conditions were challenged in court and appealed, which is one reason for the current situation.

SENATOR GUESS asked if that is implied in the language.

MS. PARKER said that is correct.

SENATOR HUGGINS asked if Ms. Parker wants a cut-off of one year for a periodic sentence.

MS. PARKER said yes and that DOC prefers the restriction for employment only. In addition, the crime would have to be a misdemeanor if the sentence is less than one year.

9:28:32 AM

SENATOR HUGGINS asked what the procedure is to revoke periodic imprisonment.

MS. PARKER said a warrant would be issued. She said she would have to look into how many times that happens.

SENATOR HUGGINS asked for the cost to DOC and the man hours required. He expressed concern that revoking periodic sentences is "turning DOC upside down."

MS. PARKER said that is not a big problem because those prisoners have a good arrangement. If they violate the arrangement, they will not get a periodic sentence.

9:30:09 AM

CHAIR SEEKINS noted that Lt. Todd Sharp was available to answer questions.

MS. BARBARA BRINK, Public Defenders' Agency, informed members she had been with the agency almost 23 years.

9:32:20 AM

MS. BRINK thanked DOL and DOC for consulting the Public Defenders' Agency when drafting the bill. She traveled with staff from DOC and DOL to a Denver "think tank" on sentencing. She told members that SB 56 is a broad, sweeping fix to what might not be a major problem and expressed concern about the magnitude of changes it will make. In 2000, the U.S. Supreme Court issued an opinion on Apprendy (ph), which says that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Blakely defined the maximum sentence as what a judge can impose based on a jury verdict.

She said eight or nine states are in the same position as Alaska and repeated that SB 56 is too broad for Alaska's purposes. Alaska adopted presumptive sentencing in 1978 to create uniformity in sentencing. A 1997 Supreme Court Advisory Committee on Fairness and Access suggested that a study of presumptive sentencing be undertaken. The Alaska Judicial Council then issued its report, which said that presumptive sentencing had been a success.

9:35:51 AM

MS. BRINK said the Alaska Judicial Council also found some ethnic variations in drug sentences and variations depending on gender, location in state, and whether a public or private attorney represented the offender. She repeated that the remedy in SB 56 is too broad if Alaska's goal is to maintain uniformity. SB 56 proposes to increase the ranges for sentencing so it increases the possibility for greater disparity. SB 56 satisfies the requirements of Apprendy and Blakely but too broadly. Now any judge can sentence anyone to an aggravated sentence without a finding of aggravators, specific facts, or the right for a sentencing court to have that reviewed by another court. She likened it to taking a chainsaw approach to a problem that required a scalpel. The Alaska Judicial Council estimated that aggravated sentences are applied to between 105 and 122 cases each year.

MS. BRINK suggested some alternative proposals. One would provide the right of a jury trial. That would only affect cases that are aggravated. That is not the most expedient way to address the problem but sometimes expediency must take a back seat to constitutional rights. She said the point of the Blakely and Apprendy decisions was to increase the reliability in the fact-finding process. A jury, not a judge, usually determines facts. She read from the Supreme Court decision on Fan Fan-Booker:

> The framers of the Constitution wouldn't have thought it too much to demand that before depriving a man of 10 more years of his liberty, the state should suffer the modest inconvenience of submitting its accusations to the unanimous suffrage of 12 of its equals and neighbors rather than a lone employee of the state.

She said that by expanding the judicial ranges for presumptive sentencing in this bill, she doubts any aggravators will come before the trial judge. She questioned why the state would bother trying to prove an aggravator if it could get 10 extra years on a defendant without proving anything.

9:40:30 AM

MS. BRINK said her first point was that the bill is too broad, considering the number of cases in Alaska. Her second point is that the proposed range is huge compared to the goal of uniformity. SB 56 will create lots of room for disparity. She believes increasing the range will increase sentences and pointed out that there is no range below the presumptive

sentence. She said another problem with the bill is that there is no right to be indicted on an aggravator so that leaves open the question of whether the grand jury also has to hear evidence on the aggravators. She explained that before a person can be held to trial on a felony case, the facts must be presented to a grand jury, which is a one-sided proceeding. The grand jury is to determine whether there is probable cause to believe a crime was committed. She noted over 90 percent of cases do not go to trial.

9:43:33 AM

MS. BRINK said 90 percent of cases don't go to trial, often because of the certainty of what the client is facing. By increasing the ranges, that certainty is eliminated. It will not be helpful to plea-bargaining because there will be a huge range the defendant will consider himself subject to. Often periodic sentencing is used when a family member is terminally ill or died and the offender's presence is necessary. She believes it is beneficial to the state to allow periodic sentences to proceed because strong family ties can be used to predict success upon release.

9:46:04 AM

MS. BRINK said the state can use 31 aggravators and 16 mitigators. She then discussed burglary sentences.

Her most strenuous objection was Section 7 because a judge can increase the sentence without having to find aggravators or make specific findings. She gave a further explanation of objections and said SB 56 will give too much discretion to judges.

She expressed the need for more judicial review of sentences if the goal is uniformity.

9:49:08 AM

MS. BRINK said the committee could consider better remedies that comply with the Sixth Amendment and preserve more determinate sentencing models. At the Denver meeting she learned that 8 or 9 states have similar problems to Alaska with regard to the Blakely decision. No one can agree on a remedy to comply. Indiana is following the Kansas model. Ohio is letting the courts sort out whether its procedures are compliant. The Department of Justice recommended to its prosecutors that it take aggravators before a grand jury. Minnesota has issued two

reports to its governor. SB 56 completely revises how sentencing will occur in Alaska. She suggested establishing a sentencing commission to look at disparity and what other states are doing.

9:51:47 AM

CHAIR SEEKINS announced a 5-minute at ease.

10:01:42 AM

CHAIR SEEKINS reconvened the meeting and opened the hearing to questions for Ms. Brink.

SENATOR THERRIAULT asked for the total number of sentences that were mitigated.

MS. BRINK said her statistics are from the Alaska Judicial Council and it has more data from 99 felonies. She offered to get the information and calculate the number.

SENATOR THERRIAULT wanted that information before going forward.

SENATOR HUGGINS asked about the detriments if aggravators were not considered by the grand jury.

MS. BRINK said the point of the grand jury is to act as a safety check. The second point of the grand jury is due process notice of what witnesses say about the offender's conduct.

SENATOR THERRIAULT said the grand jury would still be required to come up with the findings for the underlying case; this will only avoid a grand jury hearing on the potential aggravators. He could see a whole time continuum of charging someone on final sentencing.

CHAIR SEEKINS asked what happens in the course of a trial if an aggravating factor turns up.

MS. BRINK thought that was a legitimate concern for the state because often aggravators don't turn up until later. Often, a probation officer is not assigned or a pre-sentence report is not written until after convicted. She noted in the federal system, a lot of the investigative work happens on the front end.

CHAIR SEEKINS expressed concern that requiring a grand jury indictment on the aggravator factor will slow the process down or eliminate it as a sentencing factor.

10:06:31 AM

CHAIR SEEKINS noted that Ms. Brink said that less than 10 percent of people charged go to trial and that she believes an increase in the range of presumptive sentences decreases certainty to the penalty. He asked if she would attempt to negotiate with the district attorney an agreed-to range now or whether that would be left to the judge's discretion.

MS. BRINK said for the most part, she attempts to negotiate not only a charged certainty or adjustment, but also a sentence certainty or adjustment. She began to poll its agency attorneys statewide and found that estimates of agreed-upon sentences ranged from 60 percent to 80 percent. Most of the bargaining that goes on now includes certainty as to the sentence.

10:08:20 AM

CHAIR SEEKINS asked if one couldn't assume this will be left to the discretion of a judge.

MS. BRINK said with the current system, she has strong confidence about what her client is facing because the presumptive is a set number and not a range, although there may be some uncertainty about whether an aggravator can be proven. With SB 56, there will be no reason for the state to offer the low end of the presumptive range because there is no reason to believe the judge would give the low end.

CHAIR SEEKINS asked if one was trying to evaluate the number of cases that would go to trial, how the number of cases that would go to trial would affect workload on personnel of both the district attorney and public defender's offices.

MS. BRINK said the workload would increase if more cases went to trial but it is impossible to predict the percentage of those cases. She said it is up to the defendant to choose whether to go to trial or enter into a negotiated plea.

CHAIR SEEKINS asked if her concern is that the level of uniformity will be higher.

MS. BRINK said her concern is a loss of uniformity because this bill enlarges provisions and expands the discretion of a judge. She also expressed concern that SB 56 will jolt everything up a notch.

10:11:34 AM

SENATOR THERRIAULT asked, with regard to plea-bargaining and a client liking certainty, if the prosecutor plays into the role of whether the court will take up potential aggravators.

MS. BRINK said absolutely and that they make the initial decision of whether to charge the person with an aggravator.

10:12:13 AM

SENATOR THERRIAULT argued that the prosecutor would have to take the first step to trigger the aggravators but the court is required to look at the aggravators so that the current number in statute is not certain. He said he would imagine that in plea-bargaining, one of the first things that come into play is foregoing any aggravators.

MS. BRINK agreed and said that is one of the first things discussed. Often the deal is made for the presumptive sentence. She said that under SB 56, she would not be able to tell the client s/he has committed a two-year crime. Instead she will have to tell him it's a two to four-year crime.

10:13:46 AM

SENATOR THERRIAULT asked if she would discuss with a prosecutor the number of years within the range so that dynamic would not change all that much. He then asked if she is fearful that the court will automatically gravitate to the middle or higher end of the range without encouragement from the prosecutor.

MS. BRINK said she couldn't answer those questions but explained SB 56 will give the judge a big spread to pick from. There is no prioritization of what factors are important. The presumptive was designed to take all of those factors into account.

CHAIR SEEKINS asked Senator Guess if she had any questions.

SENATOR GUESS had no questions but asked for a response from Ms. Parkes later on her interpretation of Section 7.

SENATOR HUGGINS noted that Ms. Brink estimated that 90 percent of cases are plea-bargained. He asked if the potential of a higher sentence could increase that number to 91-92 percent.

10:16:20 AM

MS. BRINK thought the number could go either way and she could not make a prediction.

SENATOR FRENCH arrived.

SENATOR THERRIAULT noted the committee was considering the following changes: a change to the language in Sec. 2; adding language to ensure that a non-English speaking probationer understands directions given by the probation officer; and addressing issues raised with Sections 7 and 29.

CHAIR SEEKINS asked Ms. Brink if she believes that SB 56 threatens the constitutional rights of a defendant in any way.

MS. BRINK was not sure that it is constitutional to eliminate the right to an appeal.

CHAIR SEEKINS asked her to write a letter on that topic to the committee for further consideration.

10:18:41 AM

SENATOR THERRIAULT asked if that issue is in Sec. 7.

CHAIR SEEKINS said it is.

SENATOR THERRIAULT said the question on Sec. 29 has to do with Sec. 33, the applicability and retroactivity sections. He asked whether Sec. 29 would trigger an unconstitutional increase in punishment.

MS. PARKES said DOL does not believe any constitutional problems exist. DOL believes SB 56 will codify and make what is implicit explicit, regarding the parole board's powers. Right now this only applies to discretionary parole. She noted the problem now is that a person can come before the board to request discretionary parole repeatedly, which is time consuming for the parole board. SB 56 will allow the board to refuse to hear certain requests again.

10:20:42 AM

SENATOR FRENCH asked if this could trump a judge's restriction on parole because the parole board would not hear from the prisoner until the sentence imposed by the judge is completed.

MS. PARKES said that is correct.

CHAIR SEEKINS noted that other people want to testify on SB 56 but due to time constraints, the discussion would continue tomorrow. He then adjourned the meeting at 10:21:55 AM.