ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
January 30, 2008
1:09 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Ralph Samuels
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Bob Lynn
Representative Max Gruenberg

COMMITTEE CALENDAR

HOUSE BILL NO. 323
"An Act relating to the crimes of assault in the fourth degree and of resisting or interfering with arrest; relating to the determination of time of a conviction; relating to offenses concerning controlled substances; relating to issuance of search warrants; relating to persons found incompetent to stand trial concerning criminal conduct; relating to probation and to restitution for fish and game violations; relating to aggravating factors at sentencing; relating to criminal extradition authority of the governor; removing the statutory bar to prosecution of certain crimes; amending Rule 37(b), Alaska Rules of Criminal Procedure, relating to execution of warrants; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 323
SHORT TITLE: CRIMINAL LAW/PROCEDURE: OMNIBUS BILL
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/17/08	(H)	READ THE FIRST TIME - REFERRALS
01/17/08	(H)	JUD, FIN
01/30/08	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

RICK SVOBODNY, Deputy Attorney General
Central Office
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Presented HB 323 on behalf of the administration and responded to questions.

RODNEY DIAL, Lieutenant, Deputy Commander
A Detachment
Division of Alaska State Troopers
Department of Public Safety (DPS)
Ketchikan, Alaska
POSITION STATEMENT: Testified in support of HB 323 and responded to questions.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 323.

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 323.

STEPHEN WEST, District Attorney
1st Judicial District (Ketchikan)
District Attorneys
Department of Law (DOL)
Ketchikan, Alaska
POSITION STATEMENT: Provided testimony during discussion of HB 323 and responded to a question.

QUINLAN G. STEINER, Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Provided a comment during discussion of HB 323.

JOSHUA FINK, Director
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Provided a comment during discussion of HB 323.

ACTION NARRATIVE

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:09:56 PM. Representatives Samuels, Holmes, Dahlstrom, Coghill, and Ramras were present at the call to order. Representatives Lynn and Gruenberg were excused.

HB 323 - CRIMINAL LAW/PROCEDURE: OMNIBUS BILL

1:10:36 PM

CHAIR RAMRAS announced that the only order of business would be HOUSE BILL NO. 323, "An Act relating to the crimes of assault in the fourth degree and of resisting or interfering with arrest; relating to the determination of time of a conviction; relating to offenses concerning controlled substances; relating to issuance of search warrants; relating to persons found incompetent to stand trial concerning criminal conduct; relating to probation and to restitution for fish and game violations; relating to aggravating factors at sentencing; relating to criminal extradition authority of the governor; removing the statutory bar to prosecution of certain crimes; amending Rule 37(b), Alaska Rules of Criminal Procedure, relating to execution of warrants; and providing for an effective date."

1:12:14 PM

RICK SVOBODNY, Deputy Attorney General, Central Office, Criminal Division, Department of Law (DOL), relayed that HB 323 was introduced by the House Rules Standing Committee at the request of the governor, and acknowledged that almost every year the governor comes forth with legislation pertaining to Alaska's criminal laws. Sometimes the legislation creates new laws, sometimes it changes Alaska's sentencing structure, and sometimes it addresses procedural matters. This year the governor has chosen to do all three, but has attempted to make

the bill very discrete. House Bill 323 proposes to establish three new crimes - though they aren't really new crimes, he remarked. Section 4 proposes a change to AS 11.56.700(a) - which pertains to the crime of resisting arrest - addressing circumstances in which people are truly resisting arresting but aren't fighting back; they are instead just acting like a lump thus requiring several officers to remove them from the scene.

MR. SVOBODNY indicated that [Section 5] will affect the crime of driving under the influence (DUI) [in that two new substances are being added to the list of schedule IVA controlled substances in AS 11.71.170(b)]; driving under the influence of these new substances creates the same effect and danger as driving under the influence of alcohol. Sections 11 and 18 aren't really creating new laws as such, he noted, but are being proffered because it has become the trend with some judges to come up with a new interpretation of the laws pertaining to fish and game violations. He opined that it was clearly the legislature's intent several years ago to make fish and game crimes misdemeanors, or sometimes felonies, and allow some of those offenses to be reduced to mere violations. This is a tool that had often been used in such cases; the person would be found guilty of a violation, the court would give him/her a fine, suspend a portion of that fine, and put him/her on probation. Some [magistrates], however, have since decided that what the legislature really meant is that if a person has been found guilty of a violation, he/she can't be put on probation or have the "ill-gotten" game forfeited.

MR. SVOBODNY posited that the changes proposed by Sections 11 and 18 will allow the State to reduce a misdemeanor offense to a violation, suspend a portion of the accompanying fine, and put the person on probation on the condition that he/she doesn't violate any fish and game laws. He characterized the changes proposed by [Sections 4, 5, 11, and 18] as changes in substantive law.

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MR. SVOBODNY, with regard to HB 323's proposed changes to procedural law, noted that members will later be hearing testimony about one of the cases that's engendered proposed changes to the procedures pertaining to a person's competency to stand trial. He observed that when considering whether a person is competent to stand trial, a lot of people think that that means considering whether the person has a mental disease or defect. That's not the case, however. Instead, a person is not

competent to stand trial if he/she can't communicate with his/her lawyer, can't aid in his/her own defense, or simply doesn't understand what the proceedings are. And although that may be caused by some mental illness or disease, it may also be that the person is just not smart enough to do/know those things, or chooses not to do/know those things.

MR. SVOBODNY explained that there is therefore a procedure whereby, if there's a question about whether a person is competent to stand trial, he/she is evaluated by the Alaska Psychiatric Institute (API), and the API makes a determination regarding whether the person actually is competent to stand trial. There are a couple of problems with this, however, because even if the person is not competent to stand trial, he/she may still pose a danger to the community [if released back into it]. For example, there was a recent arson case in Anchorage wherein a 16-year-old was charged with the crime of arson, was found not competent to stand trial, was released from the API, and then committed another arson crime. There is also a similarly-situated person in Ketchikan who's committed seven or eight arson crimes, and who keeps being returned to the community.

MR. SVOBODNY said that HB 323 does a couple of things to address such situations. [Section 20, along with conforming Section 19,] requires that the district attorney be notified that the person's going to be released back into the community; hopefully this will provide the DOL with an opportunity to contact the victims of the crime and inform them that the perpetrator is being released. [Section 8, along with conforming Section 9,] requires that if a person is found not competent to stand trial, then a proceedings will be filed to determine whether the person presents a danger to himself/herself or the community - to determine whether he/she is committable under Title 47. This does not mean that the person will be committed, since he/she may not pose a danger to himself/herself or the community, but the court will be required to determine whether such is actually the case.

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MR. SVOBODNY relayed that in the Anchorage case, the 16-year-old was waived into adult court, where he was found to be not competent, and was then released from API because he was found to not be an immediate danger to himself or the public - [this latter determination was based on the fact that] he'd signed a paper saying he promised not to commit arson again. In response

to a question, Mr. Svobodny explained that at issue is that the question of whether there should be a "mental commitment" is different than the question of whether a person is competent to stand trial, and under the bill, after it has been determined that a person is not competent to stand trial, there shall then be a separate determination made regarding whether the person should be committed. Currently, one of the standards used to determine if a person can be released is whether he/she poses an immediate danger to himself/herself or others, and although it can be disputed what "immediate danger to others" means, in the Anchorage example the person simply said [inaccurately] that he wasn't going to commit any more arson. In addition, [Section 10] provides that when looking at the aforementioned standard, the judge may also look at the underlying crime in determining whether the person really isn't an immediate danger.

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MR. SVOBODNY, referring to the other two procedural changes proposed by HB 323, indicated that [the changes proposed by Section 21 will in part repeal] the existing bar against the state going forward with a criminal prosecution if the federal government has already done so. This change will not result in double jeopardy because the state is a separate sovereign. The last type of procedural changes proposed pertains to the issuance of search warrants. One problem that exists with the issuance of search warrants that the bill aims to address pertains to the crime of online enticement of children. Currently, Internet providers won't release information to law enforcement unless presented with either a subpoena or a search warrant, but a subpoena can't be issued when there isn't an actual ongoing case, and some judges in the state have refused to issue a search warrant because they believe they don't have jurisdiction since the information being sought exists outside the state. So [Section 6] would allow for the extraterritorial issuance of a search warrant, one that Internet providers will honor.

MR. SVOBODNY indicated that [Section 7, along with conforming Section 21] provides that the search warrant provisions be changed to mirror those of other states and the federal government in allowing "telephonic" search warrants. Currently, law enforcement can obtain a search warrant via telephone only if the officer is able to present evidence that the evidence being sought via the search warrant will be lost or destroyed if the time is taken to obtain the search warrant in person. This proposed change will bring the state into the 21st century,

recognizes that the territory of the state is vast, and will save the state money. He offered an example wherein two Alaska state troopers were at Devils Elbow [Yukon River] investigating a marijuana "grow," and instead of traveling eight hours by boat to obtain a search warrant, they chose to use a satellite phone to obtain a search warrant but then didn't meet the requirement of proving that the evidence was likely to be destroyed in the time it would have taken them to get back up the river had they sought to obtain the search warrant in person.

MR. SVOBODNY mentioned that some of the bill's proposed changes to Alaska's sentencing structure are technical and "go back" to the court's decision in Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004). One substantive proposed change to sentencing, however, provides that a third crime of assault in the fourth degree - which is currently a class A misdemeanor - would instead be considered a class C felony offense. There are some limitations, though: one, the "look-back" period is only ten years; and, two, the provision would not apply to a "fear" type of assault wherein no physical injury is caused. On the latter point, he explained that prior to 1978, Alaska had two separate crimes: assault, and battery. The crime of battery involved injury to a person, whereas the crime of assault didn't. In proposing this substantive change, he relayed, the DOL feels that it would be better public policy to eliminate the assaults that don't involve physical injury; only those assaults that do may be subject to the higher penalty.

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RODNEY DIAL, Lieutenant, Deputy Commander, A Detachment, Division of Alaska State Troopers, Department of Public Safety (DPS), said the department fully supports HB 323, particularly Section 4 - pertaining to resisting arrest - and Sections 6 and 7 - pertaining to search warrants. With regard to Section 4, law enforcement officers statewide somewhat frequently face situations in which a person has been informed that he/she is under arrest but he/she passively resists arrest by not moving when directed to; this behavior forces the officer to use a higher level of force which in turn increases the chances of injury for everyone. Currently, law enforcement must prove that a person resisted arrest by showing that the person's actions created a substantial risk of physical injury to someone; under the bill, a person could be charged with resisting arrest for disobeying an order by an officer who has informed the person that he/she is under arrest, or for noncompliance. He surmised that this proposed change will be most effective with repeat

offenders - those who have passively resisted arrest in the past - because it will have the potential of encouraging them to comply in the future.

LIEUTENANT DIAL, on the issue of search warrants, noted that Section 6 would allow the court to issue a search warrant for locations outside the state. This proposed change is important, he remarked, when investigating crimes involving Internet technology or in situations involving interactions with the Royal Canadian Mounted Police (RCMP). An example of the latter type of situation involved law enforcement officers in Ketchikan investigating a person in Hyder who had a serious accident while DUI and seriously injured [himself and] a number of people; people in Hyder who are seriously injured are generally transported to Stewart, Canada, for treatment, and in this particular case, the officers were able to find a local [Alaska] judge who issued a search warrant for the medical records of the perpetrator to illustrate his blood alcohol concentration (BAC), and this warrant was honored by the Canadian government. However, law enforcement officers in this case were lucky to have found a judge that was willing to issue the warrant, since there is no requirement in state law that a judge do that, and many judges might not have. Section 6 would ensure that if law enforcement is able to meet the probable-cause standard, the judge could not refuse to issue a warrant solely on the grounds that the evidence being sought is located in another jurisdiction.

LIEUTENANT DIAL characterized Section 7 - pertaining to search warrants issued via telephone - as especially important for law enforcement officers working in remote areas of Alaska far away from the nearest courthouse. He elaborated:

> We've all experienced ... cases like the one that was mentioned by Mr. Svobodny, where we're spending significant amounts of time [to] travel and to stand before a judge to provide essentially the same information that we can provide telephonically. ... We'll still have to meet those same standards - we'll still have to ... convince the judge that we have probable cause for the issuance of the search warrant - it just will allow us to get more of those telephonically, and it really is, we think, better for all involved.

LIEUTENANT DIAL, in conclusion, again relayed that the DPS supports HB 323.

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REPRESENTATIVE HOLMES, referring to Section 6, said she is concerned about the enforceability of search warrants across [jurisdictional] lines. Would Alaska law enforcement personnel honor a search warrant issued in Kansas, for example?

LIEUTENANT DIAL said that if he received a request from another agency to assist in the execution of a search warrant that was issued in another jurisdiction, he would attempt to serve that warrant; it would be the intent of the Division of the Alaska State Troopers to honor a search warrant issued in another jurisdiction.

REPRESENTATIVE HOLMES said she is concerned about putting something in statute that won't be honored by those in other jurisdictions.

CHAIR RAMRAS, referring to the proposed change to the resisting arrest statute, asked at what point does an arrest begin for purposes of having to obey the order of a peace officer.

LIEUTENANT DIAL said that once the person is notified that he/she is under arrest, that's when the arrest begins, and so at that point, under the bill, a refusal to comply would be considered resisting arrest. In situations involving DUI, for example, mere refusal to comply with an officer's request to get out of the car or take a field sobriety test would not constitute resisting arrest because at that point the person hasn't been arrested. Again, the arrest procedure only starts when the person is advised that he/she is under arrest; at that point, if the person then does something to prevent the arrest, or if another person then does something to interfere with the remainder of the arrest procedure, the crime of resisting arrest will have occurred.

CHAIR RAMRAS expressed a desire to have the language of Section 4 clarified regarding that point. He asked whether taking pictures of someone being arrested could be construed to be interfering with the arrest of another as outlined in AS 11.56.700(a).

LIEUTENANT DIAL explained that "outside actions" such as taking pictures or yelling and screaming aren't considered to be interference; only physical interference constitutes interference.

CHAIR RAMRAS said he is concerned that below-average law enforcement officers won't take the same view.

REPRESENTATIVE SAMUELS asked whether taking flight after being informed that a police officer is present would be considered resisting arrest.

LIEUTENANT DIAL said it would not.

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ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), concurred, reiterating that the person would first have to be informed that he/she is under arrest.

REPRESENTATIVE SAMUELS said that the new language in Section 4 - "**(4) disobeying an order of a peace officer**" - strikes him as being overbroad, regardless that subsection (a) specifies when proposed paragraph (4) would be applied.

MR. SVOBODNY, in response to comments and a question, explained that the term "arrest" means something different under search and seizure law than it does for purposes of providing someone a "Miranda" warning or when taking him/her into custody. For purposes of AS 11.56.700 - the statute Section 4 proposes to alter - an arrest is defined in AS 12.25.050 as: "An arrest is made by the actual restraint of a person or by a person's submission to the custody of the person making the arrest". In comparison, for purposes of a Miranda warning, the standard is, does a reasonable person under those circumstances feel that he/she has the right to leave. Furthermore, under Alaska's search and seizure law, it depends upon how long the person is being detained. The word "arrest" is used in different contexts in the same incident; for example, somebody may be arrested for Miranda purposes at a different time in the event of a DUI "arrest" than he/she is when actually restrained.

MR. SVOBODNY, in response to another question, opined that being asked to get out of a vehicle by a police officer is merely a request, and that the courts would agree. He acknowledged, though, that according to case law, the question of whether someone is under arrest may have to determined by using the standard of whether a reasonable person believes that he/she will be allowed to leave the vicinity; for example, if an officer blocks someone's car so that it can't be moved, then

perhaps that person has been "arrested" for Miranda purposes but not for "resisting arrest" purposes because the officer has not yet "restrained" the person. Again, even if a person flees a scene in which an officer has identified himself as being a police officer and is shouting to the person that he/she is under arrest, the person is not under arrest, under common law, until the officer has touched the person. Again, for purposes of Section 4, arrest must involve actual restraint.

REPRESENTATIVE SAMUELS asked whether he would be required to pull over if an officer in a patrol car driving behind him turns on its lights and siren.

LIEUTENANT DIAL said yes, a person would be required to pull over if an officer has probable cause to make a traffic stop. To not pull over would be a violation.

REPRESENTATIVE DAHLSTROM asked whether she could be construed to be resisting arrest if, while driving alone on a deserted roadway, she was instructed by someone who appeared to be an officer to pull over, but she instead kept driving until she felt she was in a safer location.

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LIEUTENANT DIAL said that in those situations the officer is expected to use some discretion and apply a reasonable standard; if there is a valid reason for the person not pulling over immediately, the officer should consider that point. He noted, too, that the prosecuting attorney also has some discretion with regard to whether to prosecute such a person for the crime of resisting arrest.

CHAIR RAMRAS referred to Section 7, and asked whether it would give more power to police officers without providing judicial oversight, and whether there would be a record of the officers' telephonic testimony. He indicated that he is in favor of this proposed change.

LIEUTENANT DIAL said Section 7 would not give law enforcement any additional power or any leeway in acquiring a search warrant. Rather, it just makes it easier to present evidence telephonically, and the officer still has to meet a very high standard in order to obtain a search warrant. He said it is his impression that the court does record conversations in which an officer is seeking a search warrant, whether that conversation occurs telephonically or in person; the officer is also put

under oath in both circumstances. In response to a question, he said that with a telephonic request for a search warrant, the officer does have to indicate verbally that he has raised his/her hand and is making a sworn statement, though there may not be a witness present.

REPRESENTATIVE SAMUELS indicated that he is in favor of this proposed change.

LIEUTENANT DIAL, in response to another question, offered his belief that Section 7 will just apply in the few situations in which the officer is not able to satisfy the court that the evidence will be lost or destroyed if the officer takes the time to obtain a search warrant in person. Furthermore, officers will still have to meet the existing probable cause standard. A search warrant issued telephonically is filled out by the officer while he/she is speaking with the judge, a copy is given to the individual at the scene, and a copy is filed with the court at the first opportunity; once the document is signed by the court, it is then provided to the individual along with an inventory of the items seized.

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DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), in response to a question, pointed out that the courts can already issue a search warrant telephonically, and that although the legislature felt the need to add some sideboards regarding when such a search warrant could be issued, the existing statute pertaining to telephonic search warrants was requested by the Alaska Supreme Court several years ago. He said that from the ACS's perspective, the procedure for obtaining a search warrant is essentially the same regardless of whether it is issued telephonically or in person; the officer contacts the judge, goes on the record, is sworn in, and [provides the required information and findings]. Section 7 merely removes the current restrictions but doesn't create any new procedures.

REPRESENTATIVE SAMUELS surmised, then, that with the adoption of Section 7, an officer will no longer have to show that evidence might be lost or destroyed if he/she had to seek the search warrant in person. He asked whether telephonic search warrants are sought by officers in urban areas of the state as well.

MR. WOOLIVER clarified that the existing statute regarding telephonic search warrants originated from a "valley" case; the officers were posted outside of a "drug house" and didn't want to leave the post attended by just one officer in order to obtain a search warrant in person because they feared that the evidence and/or suspects would disappear during that time. So although existing law is referred to as applying in rural areas of the state, it was prompted by some cases in urban areas of the state.

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REPRESENTATIVE HOLMES surmised, then, that if Section 7 is adopted, AS 12.35.015(a) could be used for any search warrant at any time.

MR. WOOLIVER said that is how he would read Section 7. Pointing out that the ACS doesn't take a position on HB 323, he offered his understanding that although technically an officer could call the court from across the street, both judges and police officers feel that a person can be more persuasive in person than over the phone.

REPRESENTATIVE HOLMES asked whether, with the adoption of Section 7, it could be expected that officers would stop seeking search warrants in person, and, if so, would that create a problem.

MR. WOOLIVER posited that in general judges prefer to have people come before them because otherwise it is difficult to assess credibility - that's why arraignments are done either in person or via videoconference. In response to a question, he said that the ACS relies enormously on telephonic testimony in all kinds of proceedings.

CHAIR RAMRAS, referring to [Section 9], asked whether there are due-process issues raised by allowing the court to recommit an incompetent defendant for an additional 90 days without a civil [commitment] hearing.

MR. SVOBODNY said no, and pointed out that the language in [Section 9] authorizing such recommitment is part of existing law. In such cases, the person has already been arrested and bail has been set, and 90 percent of the time the proceedings to determine competency take place in jail.

MR. SVOBODNY, in response to a question, indicated that [mentally ill] people are actually placed in the custody of the commissioner of Department of Corrections (DOC) and put in jail, generally in Anchorage, and it is the API's staff that goes to the jail and conducts the necessary tests and interviews. This is not in always the case, however; sometimes people are placed in other facilities, and so technically the aforementioned interviews and tests could be done in those other locations. Also, technically, such people don't have to be in custody - the court could release them on their own recognizance - but then sometimes they can't be found again; in such instances, although the staff at API might have determined that such people aren't competent, they are then left to fend for themselves.

MR. SVOBODNY - in response to a question regarding Section 17, proposed AS 12.70.280(2) [expanding the definition of who may perform extradition duties] - explained that the U.S. Constitution allows the governor of one state to have the governor of another state issue a warrant to return a particular person to the state in which he/she committed the crime for which he/she is being sought. He offered his understanding that Alaska's governor is currently the only governor who personally signs such extradition papers, and noted that Section 17's proposed language is patterned after language in other states' statutes, one such state being Oregon. Indicating that he is the person who "deals with extraditions," he relayed that this proposed change is being suggested because he feels it would be better to have this point reflected in statute.

REPRESENTATIVE SAMUELS noted that the language in Section 17 doesn't specify which of the governor's staff could be delegated these duties - so it could be that the person the governor appoints might not be qualified for such duties.

MR. SVOBODNY said that he reviews every potential extradition, and sends the governor a written memorandum regarding whether a particular extradition meets all the qualifications. He offered his belief that the governor would like the ability to delegate extradition duties to someone on her staff; that person would be identified in writing and the information filed with the lieutenant governor.

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CHAIR RAMRAS, referring to Sections 11 and 18, which pertain to fish and game violations, asked when the last time AS

16.05.925(a) was updated, and what incident engendered these two sections of the bill.

MR. SVOBODNY said that because one training judge for magistrates interpreted the law a certain way, now all magistrates use the same interpretation and aren't imposing probation or requiring the forfeiture of the game via the setting of a monetary amount of restitution. Prior to this interpretation being advanced by the training judge, prosecutors specializing in fish and wildlife cases would charge a person with a misdemeanor crime, allow the person to "plea to a violation" and to pay a fine - a portion of which would be suspended - and to pay restitution for the game, and the court would then put the person on probation for two years on condition that he/she doesn't have any further fish and game violations.

MR. SVOBODNY explained that this is how the vast majority of such cases were dealt with. The aforementioned training judge, however, at a training session last year, told the magistrates in training that for game violations, they couldn't put someone on probation or order forfeiture in the form of restitution. The DOL doesn't get to litigate that point or appeal such decisions. The fix offered by Sections 11 and 18 will make it clear that in cases involving violations, the court can put a person on probation and order forfeiture of the game.

MS. CARPENETI surmised that perhaps the training judge's interpretation stemmed from the fact that existing AS 12.55.090(a) uses the word "crime" and technically - in Title 11 - a crime doesn't include a violation. The goal is to clarify that when a good resolution can be found for both the defendant and the State, that the statute defining probation recognize that probation can be ordered for a violation as well as a crime.

CHAIR RAMRAS, remarking on the low amounts outlined in Section 18, asked whether the schedule of restitution is the same for residents and nonresidents, and whether, if it is, the legislature could establish a different schedule for nonresidents.

MS. CARPENETI said she would research when those amounts were last updated, whether the same schedule applies to both residents and nonresidents, and whether the legislature would be able to establish different penalties for nonresidents. In response to another question, she confirmed that Section 18 only

illustrates restitution amounts, and that there are also fines that can be imposed.

REPRESENTATIVE SAMUELS asked her to also research whether the fine schedule is the same for both residents and nonresidents.

MS. CARPENETI agreed to do so.

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REPRESENTATIVE SAMUELS referred to Section 21 [which in part repeals the existing bar against the State going forward with a criminal prosecution if the federal government has already done so] and asked whether a conviction in federal court could be used as evidence in a state prosecution.

MS. CARPENETI said no, the federal conviction cannot be used as evidence of the bad act itself.

REPRESENTATIVE SAMUELS asked whether, if the State also convicted the person, the state sentence could be postponed until after the federal sentence was served.

MR. SVOBODNY indicated that it would depend on the circumstances and what the federal and state sentences were. Although the State could convict the person and impose a state sentence, the [Alaska Court of Appeals] has ruled that the length of both sentences must be considered in order to ensure that the total sentence doesn't exceed the maximum sentence that could be imposed under Alaska law.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

MR. SVOBODNY, in response to the question of why the State would want to prosecute someone who is also being prosecuted in federal court, offered that the state might wish to pursue prosecution if the person is acquitted in federal court.

MS. CARPENETI added that there it might also be done in situations where the state wishes to impose state fines, for example, for environmental crimes.

MR. SVOBODNY, in response to questions, said that the federal government isn't precluded from prosecuting someone in federal court just because he/she is already being or has been prosecuted in state court, but that he isn't sure whether the federal courts would consider the length of a state sentence.

To clarify an earlier statement, he noted that although Alaska's courts would consider the amount of the federal sentence as a basis for the state sentence, it could be that the person does end up serving substantially more time.

VICE CHAIR DAHLSTROM asked whether the change proposed via Section 11 would affect offenses other than fish and game offenses that are punishable by both fines and imprisonment.

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MR. SVOBODNY said litter offenses.

REPRESENTATIVE COGHILL offered his understanding that failure to have a CO2 detector is also such an offense.

MR. SVOBODNY noted that a person's first or second minor consuming offense is as well.

MS. CARPENETI added that minor consuming is a violation and the statute specifically provides for probation for a first or second offense.

MR. SVOBODNY, in response to a question, noted that for minor consuming offenses there is a mandatory fine for a first or second offense.

VICE CHAIR DAHLSTROM asked that the question of which other offenses would be impacted by Section 11 be researched further.

VICE CHAIR DAHLSTROM returned the gavel to Chair Ramras.

MS. CARPENETI, in response to comments and a question regarding Section 10, explained that a rebuttable presumption is an evidentiary presumption that the finder of fact takes into consideration and weighs in favor of wherever the presumption has directed [the court] to go. For example, under current law, a defendant is rebuttably presumed to be competent when the court is deciding whether he/she is competent to be tried. If enough evidence is presented to overcome the presumption, then the person is found to incompetent, and at that point the incompetent person is rebuttably presumed to also be civilly committable under Title 47. However, this doesn't preclude the admittance of evidence that could "weigh the scale back in opposition to the presumption." Under Section 10, a person who is found to be incompetent to stand trial for a crime is [considered] mentally ill and subject to civil commitment.

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REPRESENTATIVE COGHILL characterized that as a significant shift in policy. He asked how that differs from what currently occurs.

MS. CARPENETI said she would disagree with the assertion that Section 10 constitutes a substantial change in Alaska law. The presumption included therein arises after the court has found that the person is incompetent to be tried. Furthermore, under current statutes, one has to be severely impaired to be found incompetent to be tried for the crime he/she is charged with, and the judge will have just made that determination. At that point, when civil commitment procedures are being considered, there will be some weight given to that prior conclusion, that the person is too impaired to be tried, and the person will therefore also be presumed to be mentally ill or a danger to himself/herself or others. But, again, that presumption doesn't preclude the person from presenting evidence to the contrary.

REPRESENTATIVE COGHILL urged caution regarding this presumption, and offered an example of a man who suffered a head injury, assaulted someone, was deemed mentally incompetent, and was placed in a psychiatric ward; although the injury later healed, the label stuck with the man and he suffered because of it. This type of incident already occurs under existing law, he observed, but acknowledged that the presumption outlined in Section 10 won't be assumed at the beginning of the process. He then asked how "mentally ill" will be defined for purposes of Title 12.

MS. CARPENETI offered that the bill provides that if a person has been found to be incompetent to be tried for the crime he/she is charged with committing, then he/she is referred to an institution such as API that will evaluate the person to see whether he/she should be civilly committed, and that would be the procedure for which the DOL would then look at Title 47 - civil commitment procedures - and to which the evidentiary presumption provided for in Section 10 would apply.

REPRESENTATIVE HOLMES surmised that under the bill, the burden is being shifted; instead of the State having to prove that the person is mentally ill and a danger, the person would have prove that he/she is not, even though he/she has already been determined to be incompetent to stand trial and is therefore probably least likely to be able to defend himself/herself.

Just because a person is found to be incompetent, does that also mean he/she is dangerous? She noted that the second sentence in Section 10 - proposed AS 12.47.110(e) - says that the court is allowed to consider the conduct that the defendant was charged with, even though, at that point, the person hasn't been convicted of any crime.

MS. CARPENETI offered her understanding that in the arson prosecution in Anchorage, the person was starting fires and was found incompetent and was committed to API for evaluation and treatment. During such evaluations, where staff is trying to determine whether a person should remain committed, the standard procedure presently is to look at how the person is currently acting under medication rather than how he/she was acting when he/she committed the crime, and in the aforementioned case, the person wasn't starting fires while he was committed and he promised not to start any fires again [though upon release he did]. When public safety is an issue, the DOL feels it is reasonable, when considering whether to release a person who starts house fires, to look at his/her past behavior when evaluating whether he/she is a danger to the public.

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CHAIR RAMRAS referred to Sections 1 and 2 and to the attorney general's letter that accompanied HB 323, and noted that under the bill, a person may commit assault in the fourth degree twice without being subject to a felony.

MS. CARPENETI concurred with that summation.

MR. SVOBODNY, in response to a question, explained that under the bill, a third crime of assault in the fourth degree wherein the perpetrator recklessly causes physical injury to another person or with criminal negligence causes physical injury to another person by means of a dangerous instrument would be considered a class C felony offense, and that physical injury means causing pain or impairment of bodily functions. In response to another question, he said that currently assault in the fourth degree is a misdemeanor regardless of how many times a person commits that crime.

REPRESENTATIVE COGHILL offered his understanding that shoving someone could be considered assault in the fourth degree, and noted that fear cause by repeated intimidation can sometimes drive someone to suicide.

MS. CARPENETI, in response to questions and comments, explained that expert testimony heard during the Senate's crime summit meetings has indicated that Alaska's laws are good but could tolerate some improvements, small changes that will make significant differences in public safety and the enforcement of law in Alaska, and HB 323 incorporates some of the changes suggested at those meetings. As Mr. Svobodny explained during his opening statement, Ms. Carpeneti remarked, HB 323 addresses several problems in three areas: substantive law, procedural law, and sentencing. She, too, relayed that forthcoming testimony will detail one of the cases that has engendered the proposed changes to the procedures pertaining to a person's competency to stand trial.

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STEPHEN WEST, District Attorney, 1st Judicial District (Ketchikan), District Attorneys, Department of Law (DOL), noted that he would be speaking to Sections 8-10 and 19-20, all of which deal with persons found incompetent to stand trial. He relayed that the proposed changes arose out of a case involving a defendant who, in 2004, was charged with five counts of arson in the first degree and one charge of assault in the third degree. Between 2003 and 2004 the defendant burnt five different buildings, three of which were residences, two of which were totally destroyed. At the time [of the fourth fire], an individual living in the neighborhood saw the defendant leaving the [burning] building and told the police - who took the defendant into custody whereupon he admitted to burning four buildings - but two weeks later this individual found the same defendant starting another fire and ended up burning his hands attempting to put that fire out.

MR. WEST explained that the defendant was adjudged to be incompetent and was sent up to Anchorage, where the psychiatrist at API determined that the defendant was incompetent "to proceed" but had he been competent it would not have been a case of temporary insanity; in other words, the defendant knew that what he was doing was wrong, but he simply didn't understand how the court process worked. Since the criminal case was being dismissed, Mr. West contacted the API about possibly having the defendant civilly committed. The API contacted the defendant, who was still in Anchorage at the time, and determined that the defendant wasn't committable because, by promising that he wouldn't start any more fires, it was felt that he didn't pose an immediate danger. That criminal case was dismissed on 3/20/06 and the defendant was released; then, on 7/21/06,

another building in Saxman was burnt down, and the defendant was found on the scene and so was again charged with arson in the first degree after only being out of the API for four months.

MR. WEST said that again the defendant was adjudged incompetent, was sent up to Anchorage, and the API did another evaluation. Initially a different psychiatrist determined that the defendant was incompetent to stand trial but thought that perhaps he could made competent by educating him with regard to court procedures. That worked, and so the defendant was found to be competent to stand trial. Mr. West relayed that his office is now proceeding with the 2006 arson case and will re-indict the defendant on the 2004 arsons. However, the defense has hired an expert and is trying to reopen the issue of incompetence. If that attempt is successful, then the charges will again be dismissed, and Mr. West said he is sure that the same thing will happen again: the API will go through the same process, the defendant will again promise not to start any more fires, and he'll be released.

MR. WEST pointed out that the defendant is someone who has admitted to starting several fires and is clearly extremely dangerous, but under existing law, he can't be committed because he agrees not to set any more fires. This defendant has proven himself to be incompetent, and there is at least probable cause to believe that he is a harm to others, and so it is not as if the prosecution is attempting to get a competent person committed; rather, the defense has already proven in court that it's more likely than not that the defendant is mentally incompetent.

MR. WEST offered that [Section 10] merely establishes a mandatory presumption that such a defendant is incompetent and is a danger and therefore needs to be civilly committed unless he/she can prove either that he/she is not a danger or that he/she is no longer mentally ill. The proposed change would address situations in which currently an individual found incompetent to proceed with a criminal trial is simply turned loose in the community because he/she is deemed to not be committable; currently such a person faces no consequences for his/her actions, and there is no way to protect the public from such a person. In conclusion, he opined that the aforementioned provisions should be enacted so that this problem doesn't arise anymore.

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REPRESENTATIVE SAMUELS asked how competency is determined.

MR. WEST explained that in a criminal case, the law provides that the defendant is presumed competent, and so it is the defendant that has to prove that he/she is instead incompetent. Both the defense and the prosecution bring in expert witnesses, and the judge then makes the determination of whether the person is incompetent.

REPRESENTATIVE DAHLSTROM said it is amazing to her that a person who is competent enough to plan a crime and to know that what he/she is doing is wrong can then be found to be incompetent with regard to being held accountable for his/her actions. In the examples provided, she suggested, the defendants appear to be psychopathic and without conscience, rather than incompetent. Referring to the defendant from Ketchikan, she said it would be interesting to know whether he is gainfully employed or is on the public welfare system.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

MR. WEST expressed concern that if the individual in Ketchikan is again found to be incompetent, without the proposed changes being enacted, he will simply continue to set fires and eventually someone will die as a result. He offered his belief that under the bill, the defendant would be kept locked up since even the psychiatrist who found the defendant incompetent in 2004 opined that the defendant should be kept locked up with 24-hour supervision because he is dangerous.

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QUINLAN G. STEINER, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), said that the PDA has no position of HB 323, and that he is available for questions.

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JOSHUA FINK, Director, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), said that the OPA has no position on HB 323 but does have some concerns regarding the commitment provisions.

VICE CHAIR DAHLSTROM, in conclusion, surmised that the goal of the bill is to make existing law better and make communities safer places to live. She relayed that HB 323 would be held over.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:58 p.m.