

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 22, 2010

1:15 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative Carl Gatto
Representative Bob Herron
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 324

"An Act relating to the crime of failure to appear; relating to arrest for violating certain conditions of release; relating to release before trial, before sentence, and pending appeal; relating to material witnesses; relating to temporary release; relating to release on a petition to revoke probation; relating to the first appearance before a judicial officer after arrest; relating to service of process for domestic violence protective orders; making conforming amendments; amending Rules 5 and 41, Alaska Rules of Criminal Procedure, and Rules 206 and 603, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 324

SHORT TITLE: FAILURE TO APPEAR; RELEASE PROCEDURES

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/03/10	(H)	READ THE FIRST TIME - REFERRALS
02/03/10	(H)	JUD, FIN
03/19/10	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/10	(H)	Heard & Held

03/19/10 (H) MINUTE(JUD)
03/22/10 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SUSAN McLEAN, Division Director
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Testified and answered questions during discussion of proposed HB 324.

DOUG WOOLIVER, Administrative Attorney
Central Office
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: Testified and answered questions during discussion of the fiscal notes for HB 324.

DWAYNE PEEPLES, Deputy Commissioner
Office of the Commissioner
Department of Corrections (DOC)
Juneau, Alaska

POSITION STATEMENT: Testified and answered questions during discussion of the DOC fiscal notes on HB 324.

JEFFREY MITTMAN, Executive Director
American Civil Liberties Union of Alaska (ACLU)
Anchorage, Alaska

POSITION STATEMENT: Testified and answered questions during discussion of HB 324.

ACTION NARRATIVE

[1:15:47 PM](#)

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:15 p.m. Representatives Ramras, Dahlstrom, Herron, Gatto, and Lynn were present at the call to order. Representatives Gruenberg and Holmes arrived as the meeting was in progress.

HB 324 - FAILURE TO APPEAR; RELEASE PROCEDURES

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CHAIR RAMRAS announced that the only order of business would be HOUSE BILL NO. 324, "An Act relating to the crime of failure to appear; relating to arrest for violating certain conditions of release; relating to release before trial, before sentence, and pending appeal; relating to material witnesses; relating to temporary release; relating to release on a petition to revoke probation; relating to the first appearance before a judicial officer after arrest; relating to service of process for domestic violence protective orders; making conforming amendments; amending Rules 5 and 41, Alaska Rules of Criminal Procedure, and Rules 206 and 603, Alaska Rules of Appellate Procedure; and providing for an effective date."

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SUSAN McLEAN, Division Director, Legal Services Section, Criminal Division, Department of Law (DOL), explained that Section 8 of HB 324 rewrites the provision addressing appeal from the conditions of release, and she noted that there was not any dispute about this section.

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MS. McLEAN summarized Section 9 which addresses the temporary release for emergency, such as the death of a family member. She explained that this allowed certain people to be released prior to bail for certain reasons, but requires information from the Department of Corrections prior to release. She noted that this would require the individual to appear back in court at the end of the release, and she confirmed that there was not any dispute from DOL.

REPRESENTATIVE HERRON asked why this section of the bill was necessary.

[Chair Ramras passed the gavel to Vice Chair Dahlstrom.]

MS. McLEAN explained that Section 9 clarifies who could qualify for temporary release.

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MS. McLEAN reported that Section 10 addresses release of persons found guilty but not yet sentenced or pursuing an appeal. She pointed out that it requires clear and convincing evidence to

assure both the safety of the community and the appearance by the person. She explained the similarity to current law, but that HB 324 attempts to correct a provision of existing law by now prohibiting release of a person found guilty of all sexual felonies.

REPRESENTATIVE GATTO asked if sexual felonies could be Class A, B, or C.

MS. McLEAN, in response, agreed. She relayed that she was aware that some defense attorneys have objected to this provision, but that the basis of objection was that release should always be available pending appeal.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

MS. McLEAN directed attention to Section 11, which clarifies changes for the retention or release of material witnesses. She explained that a material witness could be detained for enough time to take a deposition, and added that the court retains the authority, in the interest of justice, to detain a material witness for longer.

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MS. McLEAN pointed out that Section 12 specifies that a person who is in custody in connection with a petition to revoke probation does not have a right to release under AS 12.30, which is the same as current law, but may request release under AS 12.30, with the assurances of appearance and safety discussed earlier.

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MS. McLEAN, in response to Representative Gruenberg, explained that proposed AS 12.30.011 detailed all of the conditions of release.

REPRESENTATIVE GRUENBERG, referring to Section 11, asked for an explanation to the changes from the current statute.

MS. McLEAN replied that it specifically says that a judicial officer may order the arrest of a person.

REPRESENTATIVE GRUENBERG asked if an arrest as a material witness would be on an individual's record.

MS. McLEAN replied that this would not be on a criminal record, but would be on a police record.

REPRESENTATIVE GRUENBERG expressed concern that an individual would have a police record solely for arrest as a material witness.

MS. McLEAN clarified that the police have to make a record for anyone taken into custody, but that this record is not made available.

REPRESENTATIVE GRUENBERG asked if a person would have to reveal their arrest as a material witness.

MS. McLEAN surmised that this would depend on the employer.

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REPRESENTATIVE GRUENBERG surmised that under current law a person was taken into custody as a material witness, and not arrested.

MS. McLEAN clarified that being taken into custody was the same as being arrested, as an arrest warrant has been issued by the court. In response to a question, she said that Section 11 ensures that a recalcitrant witness is available for testimony.

CHAIR RAMRAS asked that Ms. McLean identify any sections in proposed HB 324 which related to sexual assault and domestic violence.

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REPRESENTATIVE DAHLSTROM asked whether, if she is a material witness, she would be aware that she is one. She also asked if it was necessary to arrest her in order for her to give a statement.

MS. McLEAN replied that this section addressed those who had refused to come testify.

MS. McLEAN, in response to Representative Gruenberg, suggested that it might be necessary to reveal this police record of arrest during the application for a job with a very high security clearance.

REPRESENTATIVE GRUENBERG opined that many job applications asked if the applicant had been arrested. He suggested an amendment to address this.

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REPRESENTATIVE HERRON asked whether there were different categories of material witnesses.

MS. McLEAN explained that a material witness was an individual with information about a case, and an arrest warrant would only be issued if a material witness indicated that they would not appear to testify. She pointed out that most employers are not asking about arrests but are asking about convictions for a crime.

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REPRESENTATIVE GATTO asked if there is a connection between being placed in protective custody and being arrested.

MS. McLEAN explained that protective custody pertains to mental illness, or debilitation, as defined in AS 47, and was confidential. She specified that this was an example of being on the police record. In response to a question, she said she can't envision a situation for the arrest of a material witness during an investigation, but can envision the arrest of a material witness during a trial for refusal to appear.

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REPRESENTATIVE GRUENBERG, referring to HB 324, page 14, line 19, "that it may be impracticable to secure the presence of the person by subpoena" stated that this was a considerably different standard than Ms. McLean had referenced earlier.

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MS. McLEAN, in response, said that this did track the language of the current statute.

REPRESENTATIVE GRUENBERG opined that the language needed "to be tightened."

MS. McLEAN pointed out that this has been the language since 1966. She noted that material witness warrants for arrest were very rare.

REPRESENTATIVE GRUENBERG allowed that the practice could be different than the technical language in the bill.

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MS. McLEAN moved on to address Section 13, which she explained is a conforming amendment to current law. She stated that Section 14 provides that, for purposes of the bail statutes, a conviction occurs at the time a person is found guilty, either by verdict or by plea. She explained that Section 15 adds definitions into the bill, and that Sections 16-18 are conforming amendments.

REPRESENTATIVE GRUENBERG, referring to Section 14, asked if this was now defining when someone was technically guilty.

MS. McLEAN clarified that this was now defining conviction.

REPRESENTATIVE GRUENBERG reflected that, in a civil case, liability was not established until a judge signed the judgment. He noted that this was also the case in a criminal case. He asked if this was moving the conviction forward, as a jury verdict or a plea would be prior to sentencing. He questioned if this is a change from current law.

MS. McLEAN agreed that the definition of conviction varied and said that Section 14 explains conviction for the purposes of the bail bill.

REPRESENTATIVE GRUENBERG asked what changes Section 14 would make to current law.

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MS. McLEAN replied that current law made no provision for conviction for purposes for bail statutes.

REPRESENTATIVE GRUENBERG asked to clarify that if a person was found guilty of a charge yesterday, and today pleads guilty to another charge, would this be considered a second offense, as the judge has not yet signed the judgment of conviction.

MS. McLEAN replied that this was one of the most litigated issues. She asked to research other examples, and, in response to Representative Gruenberg, offered to answer in writing.

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MS. McLEAN discussed Section 19, which "provides that service of domestic violence protective orders on respondents need not be made by law enforcement officers if the respondent has already been served with the protective order on the record in court." She said that the current statutes require that the defendant be served by a law enforcement officer, but if a defendant is already in court for a crime, it is not necessary for them to be served again.

REPRESENTATIVE GRUENBERG directed attention to proposed HB 324, page 16, line 15, and asked whether there is any technical difference between the terms "process" and "court's order." He explained that civil law defined "process" as served with a packet of documents, including complaint, summons, pre-trial order, and assignment order. He allowed that a judicial domestic violence order that wouldn't necessarily be totally served "within the meaning of (Alaska) Civil Rule 4." He opined that this point should be clarified, adding that he supports it "if all the documents under process are served on the person in court."

MS. McLEAN replied that she would investigate this, but she explained that the documents in a domestic violence case are often just an injunction.

REPRESENTATIVE GRUENBERG pointed out that Section 19 just required a copy of the court order, and not a copy of the domestic violence petition. He asked that the phrase "court's order" be completely inclusive, so that a person in court would receive the same documents as when a policeman came to their home.

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MS. McLEAN asked to further research the issue. She opined that this was for expediency, but she agreed with Representative Gruenberg that it was also necessary to maintain due process.

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MS. McLEAN examined Sections 20-21, which amend Rule 5, Alaska Rules of Criminal Procedure. She elaborated that current law requires a person who has been arrested to be brought before a judicial officer within 24 hours of being arrested, but the bill would change this to 48 hours, in order to allow more time to

gather information, and more time to inform the victim of the right to be present at release procedures.

REPRESENTATIVE GATTO, referring to page 17, line 4, asked if this should instead say "exceeding forty-eight hours after arrest."

MS. McLEAN replied that this would be the same.

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REPRESENTATIVE GRUENBERG said that he could envision circumstances to support the change, but he is "loath to change existing law generally, in something like this." He noted that extraordinary circumstances could necessitate more time, but he would prefer to keep it at 24 hours unless the judicial officer makes a finding that 48 hours was necessary.

MS. McLEAN, in response to Representative Gatto, offered to amend the earlier referenced wording on page 17, line 5, to "necessary delay does not exceed forty-eight hours."

REPRESENTATIVE GATTO asked if an amendment was necessary.

REPRESENTATIVE GRUENBERG agreed that the new wording was reasonable.

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MS. McLEAN continued, and said that Sections 22 and 23 are conforming amendments. She explained that Section 24 amends Rule 41(c), Alaska Rules of Criminal Procedure, by providing that a court may not change or add to a bond requirement without the agreement of the surety. She said this arose from complaints from sureties. She went on to state that Section 25 was also a conforming amendment. She declared that Section 26 amends Rule 603(b), Alaska Rules of Appellate Procedure, to clarify that release of a person whose conviction is being appealed may be allowed as provided by the provisions of AS 12.30. She affirmed that Sections 27-29 include the repealers of the laws in the interest of streamlining, the applicability sections, and the effective date of the law.

MS. McLEAN, in response to an earlier request by Chair Ramras to point out the provisions which effect domestic violence and sexual assault, said that Section 1 does to some degree, as

failure of the offender to appear does not allow for prompt disposition, and may present a threat to the victim.

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MS. McLEAN shared that Section 2 is a conforming amendment and that Section 3 is very directly related to domestic violence and sexual assault. She said that it requires that the court must consider the comments of the victim regarding release of the offender.

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REPRESENTATIVE GRUENBERG asked if there was a statute giving the court the ability to appoint a guardian for a minor in a criminal case.

MS. McLEAN offered her recollection that the court had quite a bit of discretion, but she was not aware of a specific statute that allowed it in a criminal case.

REPRESENTATIVE GRUENBERG pointed to the Alaska Rules of Civil Procedure, 90.7, which discussed the appointment of a guardian in child custody proceedings. He did not recall any rules governing the appointment of a guardian in a criminal case. He offered several examples of necessary circumstances, including the child as a victim and the child as a material witness. He asked Ms. McLean to research the extent of the authority of the court to make this appointment.

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MS. McLEAN moved on to summarize that many subsections of Section 4 have a direct impact on sexual assault and domestic violence, as proposed AS 12.30.011 would synthesize all the current conditions of release into one statute. She stated that many of the Section 4 provisions pertain either directly or indirectly to conditions of release to protect a victim from further violence.

CHAIR RAMRAS, noting that the ACLU has objections to Section 4, asked Ms. McLean to compare "safety for the public versus liberty for the accused."

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[Chair Ramras passed the gavel to Vice Chair Dahlstrom.]

MS. McLEAN replied that almost all of the conditions in the statute already exist. She pointed out that the ACLU objection was to a "suspicion-less search." She noted that the differences were that the court could now order someone to continue to take medication and to maintain or seek employment.

REPRESENTATIVE GRUENBERG, referring to an earlier question by Representative Gatto, surmised that another need for protective custody was to ensure the individual's safety. He pointed out that Section 11 seems to be limited to the circumstance that an individual would not respond to a subpoena. He opined for the need of a provision that allows this.

REPRESENTATIVE GATTO concurred of the need to protect the victim, without arresting them.

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MS. McLEAN offered her belief that no current statute in Alaska allows the court to order that the victim of an offense be taken into any custody to protect the victim. She described the system of support for shelters, but allowed that this was completely voluntary.

REPRESENTATIVE GRUENBERG expressed the necessity for a means to protect the witness.

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[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

REPRESENTATIVE GRUENBERG, in response to a question, expressed necessity for protecting an individual, not just placing them in a shelter.

MS. McLEAN replied that there was not a source for funding. She expressed hesitation for taking a victim into involuntary custody.

REPRESENTATIVE GRUENBERG stated a need for authorization, and this would allow for funding.

REPRESENTATIVE DAHLSTROM relayed the need for a fiscal note for HB 324.

MS. McLEAN continued her discussion of domestic violence and sexual assault issues within Section 5, which provides standards for the appointment of a third-party custodian for a person released before trial and specifies that an offender will only be released into a situation in which they are kept away from the victim.

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REPRESENTATIVE HERRON asked whether the law was being written as a "one size fits all."

MS. McLEAN explained that in the vast majority of cases, the prosecution agrees to a release on own recognizance with simple conditions, and that won't be changed by the bill. She stated that it is seeking to protect against the situation where a third party custodian is not capable of protecting the victim. She emphasized that the state was most concerned with release during domestic assault and sexual violence cases, in order to keep the offender away from the victim.

[2:12:52 PM](#)

MS. McLEAN stated that Section 6 conforms the language that pertains to domestic violence.

REPRESENTATIVE GATTO asked how the provision would be enforced without stipulating an exact numerical distance.

MS. McLEAN replied that this was often a condition of release. She offered her belief that there could not be a guarantee of "no danger." She reflected that often a third party custodian will add to the security of the victim.

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REPRESENTATIVE GRUENBERG asked if a third party custodian has ever been put in danger as a result of accepting the duty.

MS. McLEAN offered one example, and explained that it was important for the qualifications of the custodian to be examined.

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MS. McLEAN continued and stated that Section 7 is directly related to domestic violence release and aimed at ensuring there is a cooling off period.

MS. McLEAN explained that Section 8 declared that everyone should have the right to appeal the conditions of release. She stated that Section 9 is not directly related to domestic violence and sexual assault, but tangentially, as a temporary release can allow contact between offender and victim. She pointed out that Section 10 protects the victim from retribution by the convicted offender.

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REPRESENTATIVE GRUENBERG directed attention to Section 8, page 13, line 4, which stated that "the appeal shall be determined promptly" and asked whether the Alaska Rules of Appellate Procedure would need to be amended.

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MS. McLEAN said that Section 11 deals with witnesses who did not want to appear, and that Section 12 pertains to petitions to revoke probation. She opined that sexual assault and domestic violence crimes would often lead to arguments about conditions of release for people in violation.

MS. McLEAN discussed Section 13, noting that it was a conforming amendment to current law. She said that Section 14 only related to sexual assault and domestic violence to the extent that these crimes were included, that Section 15 defined sexual felony and stalking, and that Sections 16-18 were conforming amendments. She reported that Section 19 is directly related to the interplay of service of a domestic violence protective order.

MS. McLEAN reviewed Sections 20 and 21, which amend Rule 5, Alaska Rules of Criminal Procedure to allow prosecutors 48 hours to bring someone before a judicial officer.

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MS. McLEAN pointed out that Section 22 dealt with release pending appeal, and gave the courts criteria to consider. She explained that the remaining sections were all conforming amendments.

CHAIR RAMRAS asked if this revision of bail restriction would result in more jail time.

MS. McLEAN replied, yes.

CHAIR RAMRAS said he would be questioning the Department of Corrections (DOC) about its submitted zero fiscal note.

[2:26:00 PM](#)

REPRESENTATIVE HOLMES added that the Alaska Court System is the only department that has submitted something other than a zero fiscal note.

MS. McLEAN said that anyone who is in jail has a bail hearing, and that the Alaska Court System is projecting that the bail hearings would be longer, but that the DOL did not agree. She opined that the increase of criteria would allow prosecutors to move more swiftly, and she expressed her disagreement with the time estimates presented in the fiscal note.

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DOUG WOOLIVER, Administrative Attorney, Central Office, Office of the Administrative Director, Alaska Court System, declared that his department has worked closely with other departments to create the fiscal note. He expressed the Alaska Court System concerns with the bill, which include the requirement of court clerks to submit a criminal history report to the judges, which was redundant to the prosecutorial presentation, as outlined on page 4, lines 14-16. He pointed out that it was not a responsibility of the court to do independent fact research, and the department would ask for that to be removed from the bill.

[2:33:28 PM](#)

MR. WOOLIVER expressed concern with page 11, lines [21-23], discussing the third party custodian, and he pointed out the extreme difficulty of finding third-party custodians using a blanket rule.

[2:35:19 PM](#)

MR. WOOLIVER asked for clarification regarding Section 24, page 18 lines 25-27, which stated that "the court may not change or add to a bond requirement that was ordered in a previous proceeding unless the surety agrees to the change or addition."

He expressed an understanding with the DOL's concern of current practices, but he pointed out that any change to the bond requirement could be stopped, simply because the surety did not respond. He agreed that the concern with concurrent bail should be clarified.

REPRESENTATIVE GATTO offered to change the wording from "agrees" to "has been notified of the change."

MR. WOOLIVER opined that this would not be sufficient to remedy the concern of the DOL.

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REPRESENTATIVE GRUENBERG directed attention to page 4, lines 26-29, and asked whether the court now had the ability in statute to appoint a guardian in a criminal case.

MR. WOOLIVER said that when he read that provision, he was assuming that the victim already has a guardian, but offered to research that and the prompt appeal question in Section 8, which Representative Gruenberg had questioned earlier.

[2:40:13 PM](#)

DWAYNE PEEPLES, Deputy Commissioner, Office of the Commissioner, Department of Corrections (DOC), replied that DOC has been unable to accurately determine the fiscal impact of HB 324. He determined that HB 324 would be dependent upon the delays for a person being released from jail, and that the impact would be on the jails.

CHAIR RAMRAS offered his belief that more man-days in jail would generate a fiscal note.

[2:44:20 PM](#)

MR. PEEPLES, in response to Chair Ramras, deferred to Ms. McLean regarding HB 324 causing an increase of man-days in jail.

MS. McLEAN replied that the purpose of HB 324 is to protect the public, and the victim, while the offender is awaiting trial. She acknowledged that she could not know if this would result in longer sentences. She noted that there were parameters of sentencing that would not change.

[2:46:01 PM](#)

REPRESENTATIVE HERRON asked whether HB 324 would make it easier for DOC to request more funding.

MR. PEEPLES replied that it would.

CHAIR RAMRAS suggested that the DOC's fiscal note be revisited.

MR. PEEPLES ascertained that it would be difficult for an accurate estimate. He suggested that the committee view the DOC fiscal note as indeterminate, as the point of impact was difficult to forecast.

CHAIR RAMRAS asked for more thorough fiscal projections.

[2:50:01 PM](#)

[Chair Ramras passed the gavel to Representative Herron.]

JEFFREY MITTMAN, Executive Director, American Civil Liberties Union of Alaska (ACLU), explained that the ACLU was concerned with the constitutionality of some parts of HB 324. He pointed to page 2, lines 4-6, and explained that an individual could be convicted of a felony without a specific culpable mental state. He offered his belief that the court would find this to be unconstitutional.

MR. MITTMAN directed attention to page 3, lines 24-26, and said that "when a person is charged, there is, of course, a presumption of innocence." He offered his belief that holding a person for 48 hours could be unconstitutional.

[2:52:16 PM](#)

MR. MITTMAN referred to page 6, lines 2-4, and stated that it would not be constitutional for the court to "meddle in a person's personal affairs." He explained that bail is focused on the issues of flight risk and potential harm to the community. He offered his belief that should employment not be found to bear on either of these factors, then this would be "constitutionally suspect."

MR. MITTMAN moved on to discuss page 6, lines 22-26, and said that requiring the continued use of medication would be an invasion of an individual's medical privacy. He offered his belief that this could only be required to ensure their appearance in court or to lessen their threat to public safety.

MR. MITTMAN pointed to page 7, lines 19-22, and stated that the language to seek rebuttable presumption was "extremely constitutionally problematic" as it would seek to overturn the Alaska State Constitution.

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[Representative Herron returned the gavel to Chair Ramras.]

MR. MITTMAN moved on to discuss page 8, lines 18-22, and page 9, lines 7-12. He described this as the "warrantless search," and explained that the right of presumable innocence can't require that a person submit to a search without a warrant, as that would force them to agree to give up a constitutional right.

MR. MITTMAN referred to page 10, line 28, and shared that the imposition of third-party custodians was to ensure appearance and avoid the threats to public safety. He offered that third-party custodians were an alternative for individuals who could not afford bail, and not as an additional condition. He summarized that these changes needed to be addressed to avoid any constitutional challenges.

[HB 324 was held over.]

[2:57:32 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:57 p.m.