ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 24, 2010
1:34 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

Senator Dennis Egan

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 186(FIN) AM
"An Act declaring that certain firearms and accessories are exempt from federal regulation."

- MOVED CSHB 186(JUD) am OUT OF COMMITTEE

SENATE JOINT RESOLUTION NO. 21
Proposing amendments to the Constitution of the State of Alaska relating to and increasing the number of members of the house of representatives to forty-eight and the number of members of the senate to twenty-four.

- MOVED SJR 21 OUT OF COMMITTEE

SENATE BILL NO. 265
"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

- MOVED CSSB 265(JUD) OUT OF COMMITTEE

SENATE BILL NO. 252
"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 AND HELD

SENATE BILL NO. 241
"An Act relating to post-conviction DNA testing, to the preservation of certain evidence, and to the DNA identification registration system; relating to post-conviction relief procedures; relating to representation by the public defender; amending Rule 35.1, Alaska Rules of Criminal Procedure; and providing for an effective date."

- HEARD AND HELD

SENATE BILL NO. 257
"An Act relating to funding for youth courts; and relating to accounting for criminal fines."

- MOVED SB 257 OUT OF COMMITTEE

SENATE BILL NO. 209
"An Act providing the Alaska State Council on the Arts the authority to adopt regulations relating to its statutory powers and duties; and providing for an effective date."

- BILL HEARING POSTPONED

SENATE BILL NO. 239
"An Act relating to ignition interlock devices, to refusal to submit to a chemical test, and to driving while under the influence."

- BILL HEARING POSTPONED

SENATE BILL NO. 244
"An Act providing that, during the governor's term of office, the duty station of the governor is Juneau, and prohibiting payment of certain travel allowances for use of the governor's personal residence."

- BILL HEARING POSTPONED

PREVIOUS COMMITTEE ACTION

BILL: HB 186
SHORT TITLE: AK FIREARMS EXEMPT FROM FED. REGULATION
SPONSOR(s): KELLY

03/12/09	(H)	READ THE FIRST TIME - REFERRALS
03/12/09	(H)	JUD, FIN
04/06/09	(H)	JUD AT 8:00 AM CAPITOL 120
04/06/09	(H)	Moved CSHB 186(JUD) Out of Committee
04/06/09	(H)	MINUTE(JUD)
04/07/09	(H)	JUD RPT CS(JUD) 4DP 2NR
04/07/09	(H)	DP: LYNN, COGHILL, GATTO, RAMRAS
04/07/09	(H)	NR: GRUENBERG, HOLMES
04/11/09	(H)	FIN AT 9:00 AM HOUSE FINANCE 519
04/11/09	(H)	Moved CSHB 186(FIN) Out of Committee
04/11/09	(H)	MINUTE(FIN)
04/13/09	(H)	FIN RPT CS(FIN) 5DP 5NR
04/13/09	(H)	DP: KELLY, AUSTERMAN, FAIRCLOUGH, HAWKER, STOLTZE
04/13/09	(H)	NR: THOMAS, GARA, CRAWFORD, SALMON, JOULE
04/16/09	(H)	TRANSMITTED TO (S)
04/16/09	(H)	VERSION: CSHB 186(FIN) AM
04/17/09	(S)	READ THE FIRST TIME - REFERRALS
04/17/09	(S)	JUD, FIN
02/01/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/01/10	(S)	Heard & Held
02/01/10	(S)	MINUTE(JUD)
02/17/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/17/10	(S)	Heard & Held
02/17/10	(S)	MINUTE(JUD)

BILL: SJR 21
SHORT TITLE: CONST. AM: INCREASE NUMBER OF LEGISLATORS
SPONSOR(s): COMMUNITY & REGIONAL AFFAIRS

04/09/09	(S)	READ THE FIRST TIME - REFERRALS
04/09/09	(S)	STA, JUD, FIN
02/02/10	(S)	STA AT 9:00 AM BELTZ 105 (TSBldg)
02/02/10	(S)	Moved SJR 21 Out of Committee
02/02/10	(S)	MINUTE(STA)
02/03/10	(S)	STA RPT 5DP
02/03/10	(S)	DP: MENARD, FRENCH, MEYER, PASKVAN, KOOKESH
02/08/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/08/10	(S)	Scheduled But Not Heard
02/12/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/12/10	(S)	Heard & Held

02/12/10 (S) MINUTE(JUD)
02/22/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/22/10 (S) -- MEETING CANCELED --
02/24/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 265
SHORT TITLE: 2010 REVISOR'S BILL
SPONSOR(s): RULES BY REQUEST OF LEGISLATIVE COUNCIL

02/08/10 (S) READ THE FIRST TIME - REFERRALS
02/08/10 (S) STA, JUD
02/16/10 (S) STA AT 9:00 AM BELTZ 105 (TSBldg)
02/16/10 (S) Moved SB 265 Out of Committee
02/16/10 (S) MINUTE(STA)
02/17/10 (S) STA RPT 2DP 1NR
02/17/10 (S) DP: MENARD, MEYER
02/17/10 (S) NR: FRENCH
02/22/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/22/10 (S) -- MEETING CANCELED --
02/24/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 252
SHORT TITLE: FAILURE TO APPEAR; RELEASE PROCEDURES
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/03/10 (S) READ THE FIRST TIME - REFERRALS
02/03/10 (S) JUD
02/12/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/12/10 (S) <Bill Hearing Postponed>
02/15/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/15/10 (S) Scheduled But Not Heard
02/19/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/19/10 (S) Heard & Held
02/19/10 (S) MINUTE(JUD)
02/22/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/22/10 (S) -- MEETING CANCELED --
02/24/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 241
SHORT TITLE: POST-CONVICTION DNA TESTING; EVIDENCE
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/27/10 (S) READ THE FIRST TIME - REFERRALS
01/27/10 (S) JUD, FIN
02/22/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/22/10 (S) -- MEETING CANCELED --
02/24/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 257
SHORT TITLE: YOUTH COURTS AND CRIMINAL FINES
SPONSOR(s): EGAN

02/05/10	(S)	READ THE FIRST TIME - REFERRALS
02/05/10	(S)	JUD, FIN
02/19/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/19/10	(S)	Heard & Held
02/19/10	(S)	MINUTE(JUD)

WITNESS REGISTER

KATHRYN KURTZ, Assistant Revisor of Statutes
Legislative Legal Services
Legislative Affairs Agency
Juneau, AK
POSITION STATEMENT: Introduced SB 265.

SUE MCLEAN, Director
Criminal Division
Department of Law (DOL)
Anchorage, AK
POSITION STATEMENT: Provided supporting testimony to SB 252.

DOUG WOOLIVER, Administrative Attorney
Alaska Court System
POSITION STATEMENT: Testified on SB 252 that the court sees an impact with respect to the bail provision.

DWAYNE PEEPLES, Deputy Commissioner
Department of Corrections (DOC)
POSITION STATEMENT: Testified as to why DOC submitted a zero fiscal note on SB 252

JEFFERY MITTMAN, Executive Director
ACLU-Alaska
Anchorage, AK
POSITION STATEMENT: Testified on SB 252 focusing on constitutional rights and civil liberties.

QUINLAN STEINER, Public Defender
Public Defender Agency
Department of Administration (DOA)
Anchorage, AK

POSITION STATEMENT: Testified on SB 252 and agreed that constitutional challenges are likely, primarily because the burden of production is shifted to the defense.

ANNE CARPENETI, Attorney
Criminal Division
Department of Law (DOL)
Juneau, AK
POSITION STATEMENT: Introduced SB 241.

ACTION NARRATIVE

1:34:19 PM
CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:34 p.m. Senators Coghill, Wielechowski and French were present at the call to order. Senator McGuire joined the committee soon thereafter.

HB 186-AK FIREARMS EXEMPT FROM FED. REGULATION

1:34:46 PM
CHAIR FRENCH announced the consideration of HB 186. It was heard previously. [CSHB 186 (FIN) am was before the committee.

1:35:08 PM
SENATOR WIELECHOWSKI moved to report HB 186 from committee with individual recommendations and attached fiscal note(s). There being no objection, CSHB 186(JUD) am moved from the Senate Judiciary Standing Committee.

SJR 21-CONST. AM: INCREASE NUMBER OF LEGISLATORS

CHAIR FRENCH announced the consideration of SJR 21. It was heard previously.

1:35:58 PM
SENATOR WIELECHOWSKI moved to report SJR 21 from committee with individual recommendations and attached fiscal note(s). There being no objection, SJR 21 moved from Senate Judiciary Standing Committee.

SB 257-YOUTH COURTS AND CRIMINAL FINES

1:36:12 PM
CHAIR FRENCH announced the consideration of SB 257. It was heard previously and appears to be noncontroversial.

1:36:35 PM
SENATOR WIELECHOWSKI moved to report SB 257 from committee with individual recommendations and attached fiscal note(s). There being no objection, SB 257 moved from the Senate Judiciary Standing Committee.

At ease 1:36 p.m. to 1:37 p.m.

SB 265-2010 REVISOR'S BILL

1:38:24 PM
CHAIR FRENCH announced the consideration of SB 265.

KATHRYN KURTZ, Assistant Revisor of Statutes, Legislative Legal Services, said SB 265 corrects deficiencies, deals with obsolete provisions, and addresses mistakes in the statutes. She said that the Department of Law (DOL) has determined that this bill makes important technical changes.

1:39:49 PM
CHAIR FRENCH said he has no questions because he looked closely at the bill in a previous committee. He noted that there is a proposed amendment based on comments made in that previous committee. Finding no questions, he moved Amendment 1, labeled 26-LS1220\S.1.

AMENDMENT 1

OFFERED IN THE SENATE
TO: SB 265

Page 3, line 27, through page 4, line 1:
Delete all material and insert:
"*** Sec. 6.** AS 08.48.341(10) is amended to read:
(10) "limited liability partnership: means **a limited liability partnership or a foreign limited liability partnership, as those terms are defined in AS 32.06.995** [AN ORGANIZATION REGISTERED UNDER AS 32.05.415 OR A FOREIGN LIMITED LIABILITY PARTNERSHIP; IN THIS PARAGRAPH, "FOREIGN LIMITED LIABILITY PARTNERSHIP: HAS THE MEANING GIVEN IN AS 32.05.990];"

SENATOR COGHILL objected for an explanation.

1:41:02 PM

MS. KURTZ explained that the previous committee thought that the language in Section 6 was overly complex and awkward. The amendment makes no substantive change to the meaning of the bill or to the underlying statute.

SENATOR COGHILL removed his objection.

CHAIR FRENCH announced that without further objection, Amendment 1 is adopted.

SENATOR MCGUIRE joined the committee.

CHAIR FRENCH closed public testimony and asked the will of the committee.

1:42:50 PM
SENATOR MCGUIRE moved to report SB 265 from committee with individual recommendations and attached fiscal note(s). There being no objection, CSSB 265(JUD) moved from the Senate Judiciary Standing Committee.

At ease 1:43 p.m. to 1:44 p.m.

SB 252-FAILURE TO APPEAR; RELEASE PROCEDURES

1:44:12 PM
CHAIR FRENCH announced the consideration of SB 252. He asked Ms. McLean to remind the committee where she stopped last hearing.

SUE MCLEAN, Director, Criminal Division, Department of Law (DOL), replied she introduced SB 252 and provided a sectional analysis. She said she was prepared to take up the provision regarding the burden of proof.

CHAIR FRENCH asked her to remind the committee of the current law and what the bill proposes in that regard.

MS. MCLEAN said that Mr. Mittman with the ACLU raised the issue in a letter and if there was no objection she would take up the issue by talking about his letter.

CHAIR FRENCH agreed.

MS. MCLEAN explained that in Section 4, page 7, line 19, the bill proposes, for persons charged with specific crimes, that there is a presumption that no condition of release or amount of bail can assure the person's appearance or the safety of the

community. But it does not deny or attempt to deny the right to bail, which is ensured under the U.S. Constitution and the Alaska Constitution. This provision tracks the federal statute that has been examined closely by federal courts and found constitutional.

The important distinction is that the right to bail does not mean that the defendant has the right to release. This provision sets up a framework for what the court might consider when it discusses bail in certain cases. The rationale is that in certain cases there is either an enhanced risk that the person will flee, or that he or she presents an obvious risk to the community.

1:48:29 PM
MS. MCLEAN said it's important to remember that the burden here is not the burden of proof; it is the burden of going forward. The person has the burden of going forward with a preponderance of the evidence to show what conditions of bail might be imposed that will assure that he or she will appear and that the community will be safe. In response, the state has the burden of proof to show by clear and convincing evidence that the person is a danger to the community or that there is no bail amount that will assure his or her appearance.

CHAIR FRENCH asked if she is saying that the list of crimes on page 7, line 23 [through page 8 line 5] is analogous to those in the federal bail statute.

MS. MCLEAN replied the federal bail statute includes the crimes listed in SB 252 and some other offenses, many of which are drug offenses and RICO crimes.

1:50:08 PM
CHAIR FRENCH mentioned a recent case of a woman on release for DWI who killed an Anchorage citizen while under the influence. He asked if the woman would have had to overcome a rebuttable presumption that she could not be released under this proposal.

MS. MCLEAN said yes, under subparagraph (C) on page 7, line 29. She was charged with an offense that she committed while on release for a charge or conviction of another offense.

CHAIR FRENCH asked if this proposed bail statute would have made it more difficult for the woman to get out of jail in the first place.

MS. MCLEAN answered no.

CHAIR FRENCH asked what bail decisions are being made in the state that caused DOL to propose this statutory change.

MS. MCLEAN replied she hears anecdotally that some courts regard the right to bail as analogous to the right to release. The most common is a person who has been released OR (on his/her own recognizance) and is again release OR even though the new charge is far more serious. She is personally aware of a case in which a person was released OR after having been charged with a sexual abuse of a minor felony crime. That person was returned to the village of 50 people where the crime occurred. In this sort of situation it's extremely difficult to protect the victims and DOL is asking the court to look at the subject of bail from this context. The court should consider the factors and presume that the defendant is dangerous or that the community can't be protected. The defendant should have the burden of explaining to a judge why he or she will show up or will not be a danger if released. She emphasized that the bill makes no attempt to set any kind of rules about the kind of evidence that may be proposed.

1:54:11 PM
SENATOR COGHILL asked for an explanation of the timeframe and the difference in bail for these higher class felonies and other crimes.

MS. MCLEAN explained that when a person is arrested he or she is immediately brought before a judicial officer who sets bail. If the offense is serious the bail will typically be quite high or the conditions will be difficult to meet. A person charged with a felony has the right to a preliminary hearing or an indictment within 10 days if they remain in custody. She noted that Anchorage has a pre-indictment program so it's a little different, but most DOL offices try to get the case to a grand jury or preliminary hearing within 10 days at which time the subject of bail is revisited before the superior court. By the time 10 days has passed, the person may have come up with a plan to assure that people are safe or that he or she will appear as ordered. Often the bail that was set at the magistrate court is continued.

SENATOR COGHILL asked if this is what occurs after the indictment.

MS. MCLEAN clarified that it actually applies to an initial bail setting.

SENATOR WIELECHOWSKI questioned how the bill could possibly have a zero fiscal note. "I imagine you're going to have huge numbers of people who are all of a sudden denied bail and sitting in our corrections facilities or small jails…," he said.

MS. MCLEAN replied she can't speak to the Department of Corrections fiscal note, but this won't change what DOL does with respect to going to bail hearings.

CHAIR FRENCH deferred the question about the fiscal impact of the provision until the committee hears from the court and corrections. He clarified for the record that bail is set when a person is charged with a crime and it continues until the person is found innocent or guilty.

MS. MCLEAN agreed and added that for minor offenses the person is sometimes released OR and is given some conditions.

1:57:11 PM
SENATOR WIELECHOWSKI asked if any thought has been given to providing victims the statutory right to a timely disposition of a case.

MS. MCLEAN replied the constitutional provision includes something like that.

SENATOR WIELECHOWSKI noted that some states have more specific definitions of "timely disposition" than is provided in the overly broad constitutional provision. He asked if she has a position on including something like that.

MS. MCLEAN replied she is happy to discuss that, but the state always assumes that it will go to trial in 4 months. She recognizes that when cases drag on it can be extremely difficult for the victims, but it's often because the defendant has waived the time so that the defense has more time for discovery and preparation.

CHAIR FRENCH commented that it's frustrating for victims when a defendant waives the time to trial, but the courts are reluctant to push that because of concerns about being overturned on appeal.

CHAIR FRENCH asked how many cases per year this fairly significant change in the bail statute might pertain to.

MS. MCLEAN offered to provide the information.

CHAIR FRENCH asked her to send the information to his office. He added that he recognizes that the federal government made this change, but the U.S. Eighth Amendment isn't the same as Article 1, Section 12 of the Alaska Constitution.

2:00:43 PM
DOUG WOOLIVER, Administrative Attorney, Alaska Court System, said the court isn't taking a position on the bail issue, but it does have a different view on the impact. The Department of Law, the Public Defender Agency, and the Office of Public Advocacy have submitted zero fiscal notes, but the court sees that this will add a fair amount of time to bail hearings in a significant number of cases. Most of the comments he's received from judges indicate that bail hearings will take a lot more time. "Maybe they should, but there is a fiscal impact on that." The court hasn't submitted a fiscal note largely because it is working with DOL to address concerns and questions. Their fiscal analysis might change depending on what happens to the bill.

CHAIR FRENCH asked if someone with the court is working on a fiscal note.

MR. WOOLIVER replied it's his responsibility.

CHAIR FRENCH asked him to describe what he hopes will come from the conversations regarding the bail provision.

MR. WOOLIVER replied the court doesn't really care if this provision is there or not; it just wants to make sure it has resources available to deal with it because the court sees a big impact. The other departments see none so we need to figure it out, he said..

2:04:32 PM
CHAIR FRENCH asked him to provide the following information:

- How many bail hearings the court currently conducts statewide.
- How many of those bail hearings would be subject to these new rules if they were adopted.

MR. WOOLIVER agreed to provide information and noted that one judge estimated there are as many as 15,000 bail hearings per year.

SENATOR WIELECHOWSKI asked him to include an estimate of the additional time for each hearing because he believes that each hearing has the potential to go on for hours if not days.

CHAIR FRENCH asked what other provisions the court has concerns about.

MR. WOOLIVER directed attention to Section 3, page 4, lines 14-16, which is a provision directing the clerk of the court to do a criminal background check using court records before a second bail review hearing. The court would very much like to see this provision removed because it is redundant and would be very expensive and time consuming, he said. The prosecution and defense should have already presented all the criminal background information that's relevant to any bail decision at the first hearing. Even if the court were to do this the record would be incomplete because it would not include any out-of-state cases.

2:08:29 PM
DWAYNE PEEPLES, Deputy Commissioner, Department of Corrections (DOC), introduced himself.

CHAIR FRENCH asked what fiscal impact the proposed change in the bail statute will potentially have on the Department of Corrections.

MR. PEEPLES replied it's difficult to determine until they know how the courts will handle the change. DOC submitted a zero fiscal note because the number of "mandays" of incarceration probably wouldn't change. However, there will be a shift of burden from prisons to state or community jails. An accused person who is unable to get bail would be in jail until the adjudication process is completed. The sentence that is passed down includes the time served during the un-adjudicated phase.

2:10:50 PM
SENATOR WIELECHOWSKI suggested that it would be more appropriate to submit an indeterminate fiscal note. There's a fiscal impact if people are found innocent after serving time, he said.

MR. PEEPLES said whether it says zero or indeterminate, it means that at this point they can't figure it out. They may get a better handle on it once they see what the court is producing.

CHAIR FRENCH asked if the concern is that individuals who used to be released back into the community awaiting the resolution of their trial would now be kept in jail and transported to a longer-term regional facility such as in Juneau.

MR. PEEPLES replied that could happen. Many small communities have jails, but each has a limitation on how long somebody can be held. The range is one week to three weeks to 30 days. If the local court or magistrate denies bail, the person would at some point be transported to the regional facility such as Lemon Creek. That would primarily be done by the Department of Public Safety.

CHAIR FRENCH said Ms. McLean would point out that these are people who have been charged with high level, and sometimes repeat, felony offenses.

2:13:34 PM
JEFFERY MITTMAN, Executive Director, ACLU-Alaska, said he submitted written testimony focusing on constitutional rights and civil liberties. He and others analyzed the bill to see if the proposed statutes would be in compliance with both the U.S. and Alaska constitutions. The leading case on this matter is Martin v. State. In that 1974 case the Alaska Supreme Court noted that in that appeal it was not necessary to decide whether appellants were entitled to bail under the Eighth Amendment to the U.S. Constitution. The court then reviewed the Alaska Constitution and stated that under Article 1, Section 11 every accused person is guaranteed the right to be released on bail except in capital offenses where proof is evident. It further notes that in Alaska an implied limitation would contravene the language of the constitution and its intended purpose as stated at the Constitutional Convention.

Overall, the ACLU is taking the orientation that the Alaska Supreme Court has been fairly clear in interpreting a specific provision of the state constitution. This is of greater import and protection than the federal standard, he said.

MR. MITTMAN said the issue here is that a person accused of a crime is presumed innocent and essentially has the presumption to liberty that an un-accused person would have. In a bail hearing the court certainly should consider information

regarding the safety of the community and whether or not the accused is a flight risk. But the overall effect of this bill is to unconstitutionally reverse the intention of the constitution.

2:16:57 PM
CHAIR FRENCH asked if he's aware that this proposal parallels a provision in the federal criminal code.

MR. MITTMAN said yes and the comments of constitutional delegate Vick Fischer about narrowing the limitations on granting of bail make it clear that the bail provision was of specific import to the drafters of the Alaska Constitution. That there is a federal bill that may allow for stricter limitation on bail hearings or the granting of bail, in this case is rendered moot by the Alaska Constitution and the decision in Martin v. State, he said.

CHAIR FRENCH remarked that it's a pleasure to have the opportunity to talk to a drafter of the Alaska Constitution. He asked Mr. Mittman if he had further comments.

MR. MITTMAN said the rebuttable presumption on page 7 tries to reverse through statute the presumption that an accused person has a right to bail, and that's not permissible. It would be subject to almost immediate litigation and given the decision in Martin v. State there's little question about the result.

2:19:28 PM
SENATOR MCGUIRE suggested that if the committee can't agree on this because of questions about constitutionality, it might instead consider looking at conditions that might be set at the bail hearing itself.

CHAIR FRENCH said it's a good conversation to have. Clearly, the public is protected the most when someone is kept in jail, but there are costs and risks associated with that. There isn't a simple answer.

He asked Mr. Steiner to provide his perspective on the proposed change in the presumption regarding release on bail.

2:22:35 PM
QUINLAN STEINER, Public Defender, Public Defender Agency, Department of Administration (DOA), said he agrees with Mr. Mittman that constitutional challenges are likely, primarily because the burden of production is shifted to the defense. In a bail hearing the defense can rely on the state having to meet

its burden of proving that bail isn't sufficient, but here the defense may have to meet some burden of going forward in order to put the state to its burden. That may require the defense to disclose its view of the case, which is problematic in terms of the constitutional arguments and the time that these hearings would take. This is really the only distinction because this burden is juxtaposed against the way a person is charged and the crime he or she is charged with so it puts the state's case directly at issue in rebutting it in the bail hearing. That is not the case at present.

MR. STEINER noted that this also appears to cover not just the higher level felony cases but also the lowest level misdemeanors. Even a repeat criminal trespass would be subject to this bail hearing if a person were to commit a subsequent trespass while on conditions of release.

CHAIR FRENCH suggested he contact Rich Kurtner to see if federal bail hearings are more complex and lengthy.

MR. STEINER agreed, and added that their zero fiscal note reflects that it's not predictable whether or not this will drag out bail hearings or how many cases this will apply to. Getting numbers from the court or corrections will help in evaluating that, he said.

2:26:48 PM
CHAIR FRENCH said he was surprised to see that the Public Defender Agency also submitted a zero fiscal note because it would seem that it would create more work for the agency.

MR. STEINER replied it's a matter of predictability; at this point there's no way to come up with a defensible number.

SENATOR COGHILL said that since statehood Alaska hasn't had the death penalty so this is trying to figure out bail for those most egregious crimes. At the Constitutional Convention it was supposed that for those kinds of cases there would be reasonable cause to hold somebody. He opined that except for subparagraph (C), there might be a good case; Article 1, Section 24, of the constitution supports that. It says that crime victims have the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court. That puts two constitutional provisions in the test so he wouldn't out of hand call it unconstitutional.

CHAIR FRENCH clarified that Senator Coghill was reading from the victims' rights amendment.

He asked Ms. McLean what other provisions the committee needs to address.

2:28:58 PM
MS. MCLEAN said Mr. Mittman's second point was that Section 4, subsection (b) proposes to improperly expand the court's authority, but she would point out that most of the conditions already exist and are being imposed under current law. The ACLU was specifically concerned about the condition requiring the person to maintain employment or, if unemployed, to actively seek employment. She relayed that DOL doesn't see that this is different than telling the person not to leave town. DOL frequently hears that the person needs to be out with no bail or they'll lose their job only to have the person quit their job once they're out if there wasn't a condition to keep the job. It's a mockery and it's not unreasonable for the court to require someone to do what they said they'd do, she said.

MS. MCLEAN agreed that the ACLU interpretation of subsections (b)(15) and (b)(16) sounds draconian, but the bill is specific that this applies to people who are already on medication. She argued that it's a reasonable condition of release that is aimed at making sure that the person can be released. A lot of people in the criminal justice system are mentally ill and they commit crimes that they wouldn't otherwise commit when they don't take their medication. The aim is to both protect the public and make sure the person can be released, she said.

2:31:26 PM
MS. MCLEAN said Mr. Mittman next addresses failure to appear, which has been a crime since 1966. He stated that changing the crime of failure to appear would somehow increase the number of parole violators in jail. She suggested the committee might want to question his understanding because parole violators are not being charged with failure to appear. They have been sentenced and released either on mandatory or discretionary parole and allegedly have violated their parole by committing new crimes or doing what they were told not to do.

SB 252 addresses a case in which the court of appeals defined an element in the crime of failure to appear that DOL didn't believe was there. DOL has always assumed that the elements of failure to appear were that the state had to prove that the defendant knew their conditions of release and that they failed

to appear at court. This proposal says that those are the elements and it gives the defendant the affirmative defense of saying that he or she could not appear for certain stated reasons. She related that in practice defendants are not being prosecuted for failure to appear when they call the court saying they can't show up; it's the defendants who simply disappear. The purpose of this provision is for the Legislature to clarify what its understanding was on the element of failure to appear.

2:33:24 PM
MS. MCLEAN said that Mr. Mittman next made the point that the change in time for a bail hearing in Section 3 was problematic. However, Section 3 deals with current law under AS 12.30.020, which says that if a person is held, the prosecution has 48 hours in which to ask that the person be detained so that the prosecution can come forward with evidence showing why the person should continue to be held. Subsection (f) currently provides that a person who remains in custody 48 hours after the original bail is set has the right to a bail review hearing. The new Sec. 12.30.006 does not change that.

MS. MCLEAN pointed out that Section 20 of the bill does ask for an amendment to Rule 5 of the Alaska Rules of Criminal Procedure to allow the state up to 48 hours to bring a person who has been arrested before a judicial officer for an initial appearance. The current rule allows the state just 24 hours' which in some cases is simply not possible.

2:35:00 PM
CHAIR FRENCH said he believes the majority of defendants are arraigned within 24 hours, but at a future hearing he'd like to know specifically how many jurisdictions embrace the "48 hour rule."

MS. MCLEAN agreed to provide the information.

MS. MCLEAN said that Mr. Mittman also argues that under the bill conditions of release encompass search, but those conditions exist already. Mr. Mittman cited a Ninth Circuit case that endorsed the right of pretrial defendants to be free of suspicionless searches and DOL also endorses that right. These conditions of release have been in effect for a very long time and they are reasonable, she said. Case law says there should be a nexus between conditions of release and the charge. The bill proposes alcohol conditions that apply to people charged with an alcohol offense and drug conditions that apply to a person charged with a drug offense.

The last point Mr. Mittman made is that the third party custodian provision in Section 5 would limit a pretrial defendant's liberty, but the court has always been permitted to require a third-party custodian in addition to other conditions, she said. Current law is AS 12.30.030(b). The change the bill proposes is to set qualifications for third-party custodians. DOL's concern is that at present there are no conditions or requirements for third-party custodians. The proposed requirements include not having a pending charge, being able to see and hear the defendant 24 hours a day, and not being on felony probation. They aren't unreasonable for someone who has taken on the responsibility of watching over a person who is on conditions of release from jail. Some people undertake this responsibility as a job, which is a concern because DOL's understanding has always been that the Legislature's vision was that the defendant would ask a friend or family member to be a third party

2:39:44 PM
MS. MCLEAN said that today she received a suggestion to change "electronic mail" to "electronic communication" on page 10, line 8.

CHAIR FRENCH made a note of the suggestion and announced he would hold SB 252 in committee for further work.

SB 241-POST-CONVICTION DNA TESTING; EVIDENCE

2:41:20 PM
CHAIR FRENCH announced the consideration of SB 241.

ANNE CARPENETI, Attorney representing the Criminal Division, Department of Law (DOL), related that the governor wanted SB 241 to include two parts. It reprises much of the evidence retention bill from last year and it establishes procedures for dealing with requests for post conviction DNA testing that are based on federal law. The intent is to achieve a balance to allow somebody who is innocent to bring a request for post conviction DNA testing because nobody wants an innocent person to remain in jail.

2:44:28 PM
MS. CARPENETI described the following differences between SB 110 - the evidence preservation bill - and SB 241:

- SB 241 clarifies that evidence that is not biological material must be kept until the end of all possible litigation in the particular case.
  SB 110 provides that evidence that is not biological material should be kept until the case is solved. This would work but it would depend on the meaning of "solved."
- SB 241 provides that for crimes of sexual assault in the first degree and sexual abuse of a minor in the first degree, the biological material has to be saved until the person is off probation, parole, or any other condition of their conviction. It does not extend to the time that they have to register as a sex offender.
  SB 110 provides that biological material should be kept for the period of time that the person is required to register as a sex offender. People convicted of sexual assault in the first degree and sexual abuse of a minor in the first degree were required to register for their entire life.
- SB 241 and SB 110 have similar remedies but SB 241 provides that a court cannot reverse or vacate a conviction solely on the basis that a police department has not followed the requirements of this new section. The rationale is that this is a new burden and a court shouldn't vacate a conviction because the police department didn't get it right.
- SB 241 envisions the task force as a group of people who would adopt standards of procedure for the safe storage and retention of evidence so that it is available for post-conviction relief. A member of the court is on the task force because the court sometimes keeps evidence.

CHAIR FRENCH asked Ms. Carpeneti to start with Section 6 and walk through the new DNA testing procedure.

2:48:58 PM
MS. CARPENETI explained that the current post-conviction relief statutes are amended to say that a person seeking post-conviction DNA testing because of new evidence must proceed under the new chapter AS 12.73 rather than under the current law, AS 12.72.

Section 6 provides the following:

- A person convicted of a felony against a person who has not been unconditionally discharged may apply to the superior court for DNA testing. Unconditional discharge is defined in the bill as the release from disability arising under a sentence, including probation and parole, but not sex offender registration.
- A person who wants to make application for post-conviction relief must submit to the court an affidavit attesting:
    - He or she did not commit the offense for which they were convicted or a lesser included offense.
    - He or she did not solicit another person, or aid and abet the commission of the offense or any lesser included offense. She noted that the purpose of the bill is to allow relief for a person who has been mistakenly convicted.
    - He or she did not admit or concede guilt in any official proceeding for the offense that was the basis of the conviction.

MS CARPENETI suggested the committee amend the bill to say that a guilty plea or nolo contendere plea by itself is not an admission or concession of guilt. But if someone has stated under oath to a parole board that he or she was guilty that should preclude the person from getting post-conviction DNA testing. She cited the Osborne case when that happened and said that DOL thinks that people need to be held responsible for things they say under oath in a court of law.

2:53:40 PM
Section 6 further provides:

- The applicant must try to get an affidavit from his or her attorney explaining the reasons for not obtaining DNA testing initially. She noted that DOL looks at this as a way to encourage defendants to get DNA testing at the time that they are charged.
- Post-conviction DNA testing would be permanently waived if a person made a tactical decision at trial not to proceed with DNA testing. This requirement is similar to federal law. Other post-conviction remedies would continue to be available.

MS. CARPENETI described the findings required for the court to order post-conviction DNA testing.

- The evidence to be tested must be subject to a chain of custody and retained in a way that ensures that it hasn't been tampered with and is reliable.

- The testing must be reasonable and use accepted scientific practices.
- The applicant must identify a theory of defense to establish their innocence that is not inconsistent with the theory pursued at trial.
- The applicant was convicted and the identity of the perpetrator was an issue in the trial. She noted that this is related to the requirement that the theory the applicant is requesting is not inconsistent with the trial defense.
- There is a reasonable probability, in light of the evidence, that the requested DNA testing could conclusively establish that the person is innocent.

MS. CARPENETI said the bill also specifically allows the prosecution and defendant to agree to post-conviction testing if it's reasonable.

2:58:23 PM
MS. CARPENETI directed attention to page 10, Sec. 12.73.040, on timeliness. There is a presumption that the application is timely if it is brought within three years of the conviction. This may be rebutted if there has been previous application for post-conviction DNA testing. There is also a presumption of untimeliness if the application is brought after three years. This presumption can be rebutted if the applicant was incompetent and that contributed to the delay in filing the application, or for other good cause. She noted that the House bill says that the presumption can be rebutted for a good cause.

CHAIR FRENCH said the committee would take the suggestion.

MS. CARPENETI said the Innocence Project disagrees, but DOL continues to believe that there is a good reason for making the application sooner rather than later if it's reasonably possible.

She said that the bill also amends AS 44.41.035(b), the data bank. The suggestions came primarily from the Department of Public Safety; some is clarifying language. For example, current statutes do not specifically provide that a person who has been found innocent can get their DNA removed from the data bank. The federal government has said that change must be made.

MS. CARPENETI reiterated that the taskforce is somewhat different than in SB 110 because the focus was on technical issues rather than broader policy issues.

She concluded saying that it's a balancing act to ensure that innocent people aren't in jail and at the same time make sure that people don't get another bite at the apple and continue recreational litigation.

CHAIR FRENCH announced he would hold SB 241 in committee for further work.

3:01:38 PM
There being no further business to come before the committee, Chair French adjourned the meeting at 3:01 p.m.