

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 5, 2012

1:07 p.m.

MEMBERS PRESENT

Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes
Representative Mike Hawker (alternate)

MEMBERS ABSENT

Representative Carl Gatto, Chair

COMMITTEE CALENDAR

SENATE BILL NO. 173

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

- MOVED SB 173 OUT OF COMMITTEE

HOUSE BILL NO. 359

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 173

SHORT TITLE: 2012 REVISOR'S BILL

SPONSOR(S): RULES BY REQUEST OF LEGISLATIVE COUNCIL

01/23/12 (S) READ THE FIRST TIME - REFERRALS
 01/23/12 (S) JUD
 01/30/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 01/30/12 (S) Heard & Held
 01/30/12 (S) MINUTE(JUD)
 02/01/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
 02/01/12 (S) Moved SB 173 Out of Committee
 02/01/12 (S) MINUTE(JUD)
 02/03/12 (S) JUD RPT 5DP
 02/03/12 (S) DP: FRENCH, COGHILL, WIELECHOWSKI,
 PASKVAN, MCGUIRE
 02/24/12 (S) TRANSMITTED TO (H)
 02/24/12 (S) VERSION: SB 173
 02/27/12 (H) READ THE FIRST TIME - REFERRALS
 02/27/12 (H) JUD
 03/05/12 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 359

SHORT TITLE: SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE
 SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/22/12 (H) READ THE FIRST TIME - REFERRALS
 02/22/12 (H) JUD, FIN
 03/05/12 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

KATHRYN KURTZ, Assistant Revisor of Statutes
 Legislative Legal Counsel
 Legislative Legal and Research Services
 Legislative Affairs Agency (LAA)
 Juneau, Alaska

POSITION STATEMENT: As an assistant revisor of statutes,
 presented SB 173 on behalf of the Senate Rules Standing
 Committee, sponsor by request of Legislative Council.

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

POSITION STATEMENT: Presented HB 359 on behalf of the
 administration.

QUINLAN STEINER, Director
 Central Office
 Public Defender Agency (PDA)

Department of Administration (DOA)
Anchorage, Alaska

POSITION STATEMENT: Expressed concerns with provisions of
HB 359.

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

POSITION STATEMENT: Provided comments during discussion of
HB 359.

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 359.

NANCY MEADE, General Counsel
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of
HB 359.

ACTION NARRATIVE

[1:07:08 PM](#)

VICE CHAIR STEVE THOMPSON called the House Judiciary Standing Committee meeting to order at [1:07] p.m. Representatives Thompson, Gruenberg, Lynn, Keller, and Hawker (alternate) were present at the call to order. Representatives Pruitt and Holmes arrived as the meeting was in progress. Representative Gatto was excused.

SB 173 - 2012 REVISOR'S BILL

[1:08:02 PM](#)

VICE CHAIR THOMPSON announced that the first order of business would be SENATE BILL NO. 173, "An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

[1:08:36 PM](#)

KATHRYN KURTZ, Assistant Revisor of Statutes, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), mentioning that a revisor's bill is introduced each year to address deficiencies, conflicts, and obsolete provisions in statute, explained that this year, SB 173 primarily addresses obsolete provisions. Specifically, Sections 1 and 2 would remove references to dates long past; Section 3 would remove a reference to now-obsolete federal law; Section 4 would make conforming changes regarding the name of a grant fund that was statutorily changed last year; and Sections 5 and 6, respectively, would delete a reference to a definition scheduled to be repealed next year, and add that definition to the pertinent statute, with Section 5 additionally replacing a reference to an effective date with the date itself.

MS. KURTZ went on to explain that Section 7 would replace a reference to a since-repealed definition with the definition itself, with Sections 8-12 making conforming changes to statutes that reference that definition; Section 13 would delete a now-no-longer-necessary exemption regarding electronic notification of proposed regulatory changes; Section 14 would repeal a statutory provision pertaining to since-repealed statutes; and Section 15 would provide for an immediate effective date. In response to a question, she assured the committee that no other issues need to be addressed via SB 173.

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REPRESENTATIVE KELLER moved to report SB 173 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, SB 173 was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 1:23 p.m. to 1:25 p.m.

HB 359 - SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE

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VICE CHAIR THOMPSON announced that the final order of business would be HOUSE BILL NO. 359, "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in

prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

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ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), explained that the majority of HB 359 - [Sections 1, 2, 7-11, 14, 17-19, 21-24, and 27] - addresses changing the name of the crime of promoting prostitution to the crime of sex trafficking; this proposed name change applies to first, second, third, and fourth degree crimes, would ensure that victims of sex traffickers are viewed as victims rather than as prostitutes, and reflects current law-enforcement vernacular. The other sections of the bill, she proffered, reflect good public policy. Specifically, Section 3 would add the class A felony crime of human trafficking in the first degree and the class A and unclassified felony crimes of sex trafficking in the first degree to AS 11.31.120(h)(2), which outlines what constitutes a serious felony offense under the statutes pertaining to the crime of conspiracy, which [generally] warrants a felony charge one level below that of the underlying felony offense. Section 4 would narrow AS 11.61.128 - which pertains to the crime of distribution of indecent material to minors - in response to a federal district court ruling that the existing statute is unconstitutionally overbroad; under Section 4, the state would have to prove both that the person intentionally distributed, or possessed with intent to distribute, prohibited material to someone he/she knew or believed to be under 16 years of age, and that the person knew the material depicted prohibited conduct.

REPRESENTATIVE HOLMES expressed favor with Section 4's proposed change to AS 11.61.128, offering her recollection that the issue of unconstitutionality was raised the last time the committee addressed that statute.

MS. CARPENETI, in response to questions, relayed that Section 4's proposed changes have been vetted; noted that a letter from the American Civil Liberties Union of Alaska (ACLU of Alaska) in members' packets doesn't express any concern with Section 4; and offered her belief that the court's concern with existing AS 11.61.128 is that a person could unwittingly violate it. Section 4's proposed changes would ensure that that statute applies only to those who intend to distribute materials in knowing violation of the law.

MS. CARPENETI, in response to another question, clarified that in addition to changing the name of the crime of promoting prostitution to the crime of sex trafficking, Section 1 of HB 359 would add to AS 04.06.110 - a provision in the statutes pertaining to the Alcoholic Beverage Control Board ("ABC Board") - a reference to the fourth degree crime, AS 11.66.135, which, due to an oversight, she surmised, wasn't included in that statute when the legislature first established that particular crime back in 2007.

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MS. CARPENETI went on to explain that Sections 5 and 6 would [together] raise the penalty for being the patron of a prostitute who is under 18 years of age - from a class B misdemeanor to a class C felony - and provide that the prostitute's age is not a circumstance that requires proof of a culpable mental state. In response to questions and comments, she confirmed that under those provisions of the bill, it won't matter what age the "patron" thinks his/her victim is; furthermore, comments received from the Public Defender Agency (PDA) indicate that perhaps Section 6 ought to be changed in order to clarify that the proposed increase in penalty only applies to the patron. Changing existing law as Sections 5 and 6 are proposing is one way of addressing people who prey on children, and the point is to discourage such behavior, she added, noting that up until as recently as 2007, it wasn't a crime in Alaska to be the patron of a prostitute.

MS. CARPENETI then explained that Section 12 of HB 357 would add the fourth degree crime - AS 11.66.135 - to the list of crimes for which corroboration of certain testimony is not required; this proposed conforming change, addressing another oversight, would ensure that for all degrees of the crime of sex trafficking, the victim's testimony regarding his/her victimization need not be corroborated. Section 13 would add the crime of prostitution - AS 11.66.100 - to the statute stipulating that property used to institute, aid, or facilitate, or property received or derived from, a violation of the law shall be forfeited. In response to questions regarding what kind of property could be subject to forfeiture under Section 13's proposed AS 11.66.145, she indicated that the state would have to show a nexus between the property in question and the crime.

REPRESENTATIVE HAWKER observed that Section 12's proposed AS 11.66.140 references AS 11.66.110 - AS 11.66.135, whereas Section 13's proposed AS 11.66.145 references AS 11.66.100 - AS 11.66.135.

MS. CARPENETI acknowledged that perhaps the proposed references in those two sections could be changed to mirror one another.

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MS. CARPENETI went on to explain that Section 16's proposed addition of a new subsection (h) to AS 12.47.100 - one of the provisions in Alaska's code of criminal procedure pertaining to insanity and competency to stand trial - would allow, in the pretrial hearing to determine a defendant's competency to stand trial, testimony from a witness by contemporaneous two-way video conference [in situations in which the witness would be required to travel more than 50 miles to court, or lives in a place from which people customarily travel by air to reach the court]. To date, neither Alaska's courts nor the U.S. Supreme Court have specifically addressed this issue, though courts in other jurisdictions have and do allow for such testimony. The rationale for doing so, she relayed, is that competency hearings, which, again, are pretrial proceedings, deal with issues that don't have criminal penalties attached; furthermore, the evidentiary standard used when determining competency is merely that of a preponderance of the evidence - [the standard required in most civil cases].

MS. CARPENETI opined that it makes practical sense to allow for such testimony in jurisdictions that have the technology; under Section 16, a psychiatrist at the Alaska Psychiatric Institute (API), for example, could testify and be cross examined as if he/she were in the courtroom. The potential issue raised by Section 16, she remarked, is that of "confrontation" - whether the proposed statutory change would still provide for a person's constitutional rights to be confronted with the witnesses against him/her, and the DOL believes that it would. Furthermore, the courts have already held that competency hearings are different from criminal trials and thus the full panoply of constitutional rights associated with criminal trials do not necessarily apply. However, she relayed, the aforementioned letter from the ACLU of Alaska expresses disagreement on that point.

MS. CARPENETI, in response to a question, offered her belief that Section 16's proposed AS 12.47.100(h) would be upheld by

the court because it's discretionary in nature rather than mandatory. Such testimony and subsequent cross examination would be "almost face-to-face," she remarked, adding that although Alaska's courts have held that "face-to-face" is very important at trial, it's not necessarily that important at a pretrial proceeding. She suggested that in its written comments regarding Section 16, the ACLU of Alaska is perhaps confusing the jurisprudence addressing trial issues with that addressing pretrial issues. Again, under Section 16, it would be as if the witness were in the courtroom with the defendant.

REPRESENTATIVE HOLMES observed that Section 16 is proposing to define the term, "contemporaneous two-way video conference" as used in proposed AS 12.47.100(h) as being a conference among people at different places by means of transmitted audio and video signals and includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously. She expressed concern regarding the broadness of that definition - specifically it's use of the phrase, "all communication technologies" - and with the potential for the witness to be coached by someone off camera, not visible to the court. The aforementioned letter from the ACLU of Alaska, she noted, suggests some possible "sideboards" to add to the bill; for example, changing the bill such that the only person who would be allowed to be in the room with the witness would be the audio/video-conference technician.

MS. CARPENETI noted that the issue of who shall be allowed in the room with such a witness is addressed in Section 25, which is proposing a direct court rule change to Rule 38 of the Alaska Rules of Criminal Procedure. She expressed a willingness to add language from Section 25 to Section 16 in order to address the concern, such as the language which provides that either party may object to having anyone else in the room other than the witness and the audio/video-conference technician.

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MS. CARPENETI then explained that Section 20 of HB 357 would add to AS 12.63.100(6) - which defines the term, "sex offense" for purposes of requiring a person in Alaska to register as a sex offender or child kidnapper - a new subparagraph (D) that would additionally define a sex offense as being a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that other jurisdiction. The DOL's position is that for the safety of Alaska citizens, if a person who is physically present in Alaska is required to

register as a sex offender or child kidnapper in another jurisdiction, he/she should also have to register in Alaska, at least for the period of time during which he/she is required to register in that other jurisdiction. That latter point could perhaps be clarified further in the bill, she acknowledged, and mentioned that the administration receives several calls every month from sex offenders in other jurisdictions wanting to know if they could avoid having to register as a sex offender if they moved to Alaska. "We don't necessarily want to be the place where people come so they don't have to register as a sex offender," she added, but also acknowledged that sometimes behavior constituting a sex offense in another jurisdiction might not constitute one in Alaska.

REPRESENTATIVE HAWKER expressed disfavor with Section 20's proposed change, specifically with the concept that under it, the legislature would essentially be abrogating its policy-making responsibilities to other jurisdictions with regard to what behavior constitutes a sex offense in Alaska.

REPRESENTATIVE HOLMES concurred.

MS. CARPENETI acknowledged that point. In response to a question, she indicated that certain crimes involving indecent exposure, for example, might sometimes require a person to register as a sex offender in another jurisdiction but not in Alaska. No one, she asserted, wants Alaska to become the place where sex offenders move so as not to have to register as sex offenders.

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MS. CARPENETI then explained that Section 25, proposing a direct court rule change to Rule 38 of the Alaska Rules of Criminal Procedure via the addition of a new Rule 38.3, would allow testimony from a witness by contemporaneous two-way video conference at trial. She indicated that because of a person's constitutional rights to be confronted with the witnesses against him/her, such testimony [at trial] would only be allowed in limited circumstances. "In very limited facts-specific circumstances, this procedure has been upheld by the United States Supreme Court in Maryland v. Craig, ... [which] dealt with ... child witnesses," she added, and noted that currently under Title 12, Alaska has a procedure addressing child witnesses, allowing for one-way closed-circuit televising of such witnesses when they are unable to face their abusers. The proposed new court rule, however, provides for a different,

narrower, procedure, she acknowledged, one involving a simultaneous two-way teleconference in which the witness - as if he/she were in the courtroom - can see everyone and everyone can see him/her, but for a particular reason he/she cannot be in the courtroom. Under Section 25, such a witness would have to be under oath and subject to cross examination, would have to be "unavailable" as defined therein - for example, if he/she were sick - and the use of his/her testimony must further an important public policy. Use of this type of procedure, she pointed out, was upheld by the [2nd Circuit Court of Appeals] in United States v. Gigante; in that case, the witness was dying of cancer, and his testimony was essential to the prosecution. This type of procedure has also been approved in cases in which the witness was out of the country or was otherwise unavailable for process by the State of Alaska. The use of Section 25's proposed procedure, she assured the committee, would be limited to certain, narrow circumstances, decided on a case-by-case, facts-specific basis.

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QUINLAN STEINER, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), referred first to Section 16 - stipulating that in the pretrial hearing to determine a defendant's competency to stand trial, testimony from a witness by contemporaneous two-way video conference may be allowed - and expressed concern that this provision of HB 359 would erode the reliability of the evidence the witness provides and would be found unconstitutional. Although the issue of competency isn't addressed in an actual criminal trial, the determination regarding competency is fundamental to the case, and many profound consequences flow from such a determination - sometimes having a greater impact on the defendant than the actual penalties associated with the underlying crime. In fact, he opined, Section 16 would erode the reliability of the fact-finding process in that it's much more difficult to conduct cross examination when it's not done face-to-face.

MR. STEINER said that the reality is, and what history has shown, and what the law relies upon, is the idea that [under face-to-face cross examination], it's much harder for a witness to persist in either false testimony or mistaken testimony or testimony that is given to cover up work that hasn't actually been done. Situations involving the latter type of testimony - where experts have failed to do the work necessary to render a valid opinion - are very significant in terms of competency hearings because without the face-to-face confrontation and

face-to-face questioning during cross examination, there is a risk that the court could draw an erroneous conclusion regarding the person's competency. And although the courts in other jurisdictions have differentiated between trial confrontation and pretrial confrontation, Alaska's courts have not - instead indicating strongly the value of confrontation in [both] settings.

MR. STEINER referred then to Section 25 and relayed that there are similar concerns with that provision of HB 359. Although the U.S. Supreme Court, in Craig, has permitted what he termed a "relaxation" of the right to confrontation under certain circumstances, and the proposed new-court-rule language appears to be crafted so as to comply with Craig, that language could be construed to be broader than intended in the sense that the provision doesn't also stipulate that the question of whether to allow such testimony must be determined on a case-by-case basis with an eye towards balancing the important public policies at issue in any given case. Furthermore, Section 25 attempts to define what would constitute a witness's being, "unavailable" in three different ways, but none are tied to a finding of furthering an important public policy - there is no requirement that there be a nexus between the two - and so it's hard to predict how the proposed new court rule would be applied, thereby raising the risk that it could be challenged as being unconstitutional. He mentioned that in Craig, the court does discuss the consequences of eroding one's constitutional right to confrontation, and suggested that a review of that discussion could assist members in understanding the policy implications of actual face-to-face confrontation.

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MR. STEINER referring then to Section 20 - proposing to additionally defining the term, "sex offense", for purposes of requiring a person in Alaska to register as a sex offender or child kidnapper, as being a crime in another jurisdiction that requires a person to register in that other jurisdiction - said the concern with that provision of HB 359 is that it could include conduct not currently considered "criminal" in Alaska or conduct that has already been determined in Alaska as not warranting registration. Furthermore, under Section 20, whether particular conduct would constitute an offense for purposes of also registering in Alaska could change from year to year if the laws in those other jurisdictions change, and such changes could be hard to keep track of.

MR. STEINER, in response to questions, offered his belief that Section 4 would address the constitutional concerns raised by existing law regarding the crime of distribution of indecent material to minors - AS 11.61.110 - in that it requires specific intent regarding the distribution, and knowledge regarding the age of the child; and indicated that Sections 5 and 6 - together raising the penalty for being the "patron" of a prostitute who is under 18 years of age from a class B misdemeanor to a class C felony - are enforceable regardless that the statute pertaining to prostitution [doesn't currently provide] for an affirmative defense regarding a reasonable mistake as to the age of the victim, because the underlying behavior - offering a fee in return for sexual conduct - is already illegal regardless of the victim's age.

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JEFFREY A. MITTMAN, Executive Director, American Civil Liberties Union of Alaska (ACLU of Alaska), explained that he's submitted written testimony to the committee outlining the ACLU of Alaska's concerns with [Sections 16, 20, and 25 of] HB 359. With regard to Section 16 - stipulating that in a pretrial hearing to determine a defendant's competency to stand trial, testimony from a witness by contemporaneous two-way video conference may be allowed - he additionally pointed out that if there are unique circumstances in a particular case, the court already has the authority to provide for such testimony. Because competency hearings have significant consequences that attach to findings of competency, the ACLU of Alaska contends that the statutory default should always be that an individual's rights are protected to the greatest extent possible. Furthermore, the ACLU of Alaska has not been able to find any cases in which the court specifically differentiates between pretrial competency hearings and actual trials with regard to witnesses' testimony. In conclusion, he urged the committee to either seek a more narrow solution to the perceived problem or leave the pertinent statute as is; again, the court already has the authority to provide for testimony by contemporaneous two-way video conference.

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RODNEY DIAL, Lieutenant, Deputy Commander, A Detachment, Division of Alaska State Troopers, Department of Public Safety (DPS), said simply that the DPS supports HB 359.

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NANCY MEADE, General Counsel, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), mentioning that the ACS takes no position on HB 359, explained that the ACS's indeterminate fiscal note reflects that Sections 16 and 25 may have some fiscal impact on the ACS, though the ACS doesn't view those provisions as either requiring the court to install audio/video-conference equipment capable of meeting the specifics outlined in Section 25, or requiring the court to provide such equipment outside the courtroom to potential witnesses.

VICE CHAIR THOMPSON, after ascertaining that no one else wished to testify, closed public testimony, and relayed that HB 359 would be held over.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:24 p.m.