ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 11, 2012
1:18 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 (deceased April 10, 2012)

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 210(FIN)
"An Act relating to crimes against children; and providing for an effective date."

- HEARD & HELD

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 122(L&C)
"An Act relating to research on and examination of titles; relating to residency requirements for title insurance limited producers; relating to real estate transfer fees; and providing for an effective date."

- MOVED HCS CSSB 122(L&C) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 210
SHORT TITLE: CRIMES AGAINST CHILDREN/SUPPORT/CINA
SPONSOR(S): SENATOR(S) MCGUIRE

02/21/12	(S)	READ THE FIRST TIME - REFERRALS
02/21/12	(S)	JUD, FIN
02/27/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/27/12	(S)	Heard & Held
02/27/12	(S)	MINUTE(JUD)
03/16/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

03/16/12	(S)	Scheduled But Not Heard
03/21/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/21/12	(S)	Scheduled But Not Heard
03/23/12	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/23/12	(S)	Moved CSSB 210(JUD) Out of Committee
03/23/12	(S)	MINUTE(JUD)
03/26/12	(S)	JUD RPT CS 3DP 1NR NEW TITLE
03/26/12	(S)	DP: FRENCH, WIELECHOWSKI, PASKVAN
03/26/12	(S)	NR: COGHILL
04/02/12	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/02/12	(S)	Heard & Held
04/02/12	(S)	MINUTE(FIN)
04/03/12	(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/03/12	(S)	Moved CSSB 210(FIN) Out of Committee
04/03/12	(S)	MINUTE(FIN)
04/04/12	(S)	FIN RPT CS 7DP NEW TITLE
04/04/12	(S)	DP: HOFFMAN, STEDMAN, THOMAS, EGAN, MCGUIRE, OLSON, ELLIS
04/06/12	(S)	TRANSMITTED TO (H)
04/06/12	(S)	VERSION: CSSB 210(FIN)
04/09/12	(H)	READ THE FIRST TIME - REFERRALS
04/09/12	(H)	JUD, FIN
04/11/12	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 122
SHORT TITLE: REAL ESTATE TRANSFER FEES/TITLE INSURANCE
SPONSOR(S): LABOR & COMMERCE

04/08/11	(S)	READ THE FIRST TIME - REFERRALS
04/08/11	(S)	CRA, L&C
01/24/12	(S)	CRA AT 3:30 PM BELTZ 105 (TSBldg)
01/24/12	(S)	Heard & Held
01/24/12	(S)	MINUTE(CRA)
01/31/12	(S)	CRA AT 3:30 PM BELTZ 105 (TSBldg)
01/31/12	(S)	Moved CSSB 122(CRA) Out of Committee
01/31/12	(S)	MINUTE(CRA)
02/01/12	(S)	CRA RPT CS 4DP NEW TITLE
02/01/12	(S)	DP: OLSON, KOOKESH, MENARD, WAGONER
02/02/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/02/12	(S)	Heard & Held
02/02/12	(S)	MINUTE(L&C)
02/21/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/21/12	(S)	-- MEETING CANCELED --
02/23/12	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
02/23/12	(S)	Moved CSSB 122(L&C) Out of Committee
02/23/12	(S)	MINUTE(L&C)
02/24/12	(S)	L&C RPT CS 5DP NEW TITLE

02/24/12	(S)	DP: EGAN, GIESSEL, DAVIS, PASKVAN, MENARD
03/14/12	(S)	TRANSMITTED TO (H)
03/14/12	(S)	VERSION: CSSB 122(L&C)
03/15/12	(H)	READ THE FIRST TIME - REFERRALS
03/15/12	(H)	L&C, JUD
04/04/12	(H)	L&C AT 3:15 PM BARNES 124
04/04/12	(H)	Heard & Held
04/04/12	(H)	MINUTE(L&C)
04/06/12	(H)	L&C AT 3:15 PM BARNES 124
04/06/12	(H)	Scheduled But Not Heard
04/09/12	(H)	L&C AT 3:15 PM BARNES 124
04/09/12	(H)	Moved HCS CSSB 122(L&C) Out of Committee
04/09/12	(H)	MINUTE(L&C)
04/10/12	(H)	L&C RPT HCS(L&C) 6DP
04/10/12	(H)	DP: THOMPSON, SADDLER, JOHNSON, HOLMES, MILLER, OLSON
04/11/12	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

AMY SALTZMAN, Staff
Senator Lesil McGuire
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented portions of SB 210 on behalf of the sponsor, Senator McGuire.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Assisted with the presentation of SB 210 and responded to questions.

DOUGLAS MOODY, Deputy Public Defender
Criminal Division
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Testified during the hearing on SB 210.

JOSHUA DECKER, Staff Attorney
American Civil Liberties Union of Alaska (ACLU of Alaska)

Anchorage, Alaska
POSITION STATEMENT: Testified during the hearing on SB 210.

DANA OWEN, Staff
Senator Dennis Egan
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented SB 122 on behalf of the sponsor, the Senate Labor and Commerce Standing Committee, which is chaired by Senator Egan.

KIMBERLY GLISSEN, General Manager
Alaska Escrow & Title Insurance Agency, Inc.
Ketchikan, Alaska
POSITION STATEMENT: Testified in favor of SB 122.

CHRIS NEWBILL, Manager
Ketchikan Title Agency, Inc.
Ketchikan, Alaska
POSITION STATEMENT: Testified in favor of SB 122.

MICHEAL PRICE, Co-Owner
Mat-Su Title Insurance Agency, Inc.;
Co-Owner
Fidelity Title Agency of Alaska
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 122.

ROGER FLOERCHINGER, Owner
President & CEO
Yukon Title Company, Inc.
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of SB 122 as currently written.

STEPHAN ROUTH, Attorney at Law
Routh Crabtree Olsen, P.S.
Anchorage, Alaska
POSITION STATEMENT: Testified during the hearing on SB 122.

CRYSTAL PELTOLA, Vice President & General Manager
Alaska USA Title Agency
Anchorage, Alaska
POSITION STATEMENT: Testified in support of Section 3 of SB 122 but expressed concern regarding the constitutionality of Section 2.

TERRY BRYAN, Vice President & State Manager
First American Title Insurance Company
Anchorage, Alaska
POSITION STATEMENT: Testified during the hearing on SB 122.

HOWARD HANCOCK, Chief Title Officer
Fidelity Title Agency of Alaska
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 122.

LINDA HALL, Director
Anchorage Office
Division of Insurance
Department of Commerce, Community & Economic Development (DCCED)
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the hearing on SB 122.

JERRY REED, President
Alaska USA Mortgage Company, LLC.
Anchorage, Alaska
POSITION STATEMENT: During discussion of SB 122, testified in support of Section 3 and in opposition to Section 2.

ACTION NARRATIVE

1:18:31 PM

VICE CHAIR STEVE THOMPSON called the House Judiciary Standing Committee meeting to order at 1:18 p.m. Representatives Thompson, Lynn, Pruitt, Holmes, and Hawker (alternate) were present at the call to order. Representatives Keller and Gruenberg arrived as the meeting was in progress.

[The committee observed a moment of silence in honor of the late Representative Carl Gatto, whose passing occurred the previous day.]

SB 210 - CRIMES AGAINST CHILDREN/SUPPORT/CINA

[Contains brief mention that provisions of SB 186 and SB 212 have been incorporated into a proposed House committee substitute for SB 210, Version O.]

1:19:19 PM

VICE CHAIR THOMPSON announced that the first order of business would be CS FOR SENATE BILL NO. 210(FIN), "An Act relating to crimes against children; and providing for an effective date."

VICE CHAIR THOMPSON noted that a proposed House committee substitute (HCS) for SB 210 in members' packets now encompasses three bills, with Sections 1-4 pertaining to SB 210, Sections 5-17 and 20 pertaining to SB 186, and Sections 18-19 pertaining to SB 212.

1:21:42 PM

REPRESENTATIVE HAWKER moved to adopt the proposed House committee substitute (HCS) for SB 210, Version 27-LS1362\O, Wayne, 4/10/12, as the working document.

VICE CHAIR THOMPSON objected for the purpose of discussion.

1:22:34 PM

AMY SALTZMAN, Staff, Senator Lesil McGuire, Alaska State Legislature, relayed, on behalf of the sponsor, Senator McGuire that she would be discussing the portions of Version O that incorporate the provisions of SB 210. She explained that on 2/8/12, the Alaska Children's Justice Act Task Force presented findings to a joint meeting of the Senate Judiciary Standing Committee and the Health & Social Services Standing Committee, and recommended improvements to Alaska's statutes addressing crimes against children. According to statistics, in 2008, approximately 12,400 children were likely the victim of an incident of maltreatment, and one out of every five children's deaths was related to maltreatment. She then offered a couple of examples of recent [heinous] crimes perpetrated against children to illustrate how existing law is inadequate for purposes of appropriately punishing those who do such harm to children. Via SB 210, she relayed, the sponsor is seeking to implement three of the recommended changes in order to address shortcomings in existing law.

MS. SALTZMAN explained that [Section 1 of Version O] would raise the child-victim's age threshold in AS 11.41.220(a) - addressing the crime of assault in the third degree - from 10 years of age to 12 years of age. [Sections 2 and 3 together, in amending AS 11.51.100(a) and (f) respectively,] would make the behavior of recklessly failing to provide adequate food or liquids to a child sufficient to cause protracted impairment of his/her health a Class C felony; AS 11.51.100 addresses the crime of

endangering the welfare of a child in the first degree. [Section 4] would modify the definition in AS 11.81.900(56) regarding what constitutes a "serious physical injury"; Section 4's proposed AS 11.81.900(56)(C) reads:

> **(C) physical injury to a person under 12 years of age that causes**
> **(i) serious disfigurement;**
> **(ii) impairment of health, by serious bruising or other injury, that reasonably requires medical evaluation or treatment by a health care professional;**
> **(iii) loss or impairment of the function of a body member or organ; or**
> **(iv) serious impediment of blood circulation or breathing;**

MS. SALTZMAN added that in Section 4's proposed AS 11.81.900(56)(C), sub-subparagraph (ii) focuses on the impairment of the child's health sufficient to require medical evaluation or treatment - and, as currently worded, could apply in situations where, for example, a child develops anemia because of being subjected to serious bruising or other injury; and that sub-subparagraph (iv) is intended to address strangulation crimes in which the strangulation itself could not be proven but bruising was evident.

1:27:14 PM

REPRESENTATIVE HOLMES referred to Section 2's proposed new AS 11.51.100(a)(4), which read:

> **(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health**.

REPRESENTATIVE HOLMES asked whether the phrase, "**adequate food or liquids**" refers to the quantity of the food or liquids, or to its nutritional value.

MS. SALTZMAN explained that the key wording in that provision is, "causing protracted impairment of the child's health"; in other words, if the food or liquids provided were inadequate - in terms of either quantity or nutritional value - to the point of causing the protracted impairment of the child's health, then that provision would apply.

1:29:17 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), cited Blakely v. Washington, 124 S. Ct. 2531 (U.S., 2004), which held that if the finding of a fact could increase the possible maximum penalty for a person charged with a crime, that fact needs to be found by the jury by proof beyond a reasonable doubt. She said that decision made a huge impact on Alaska's sentencing law, because Alaska had a procedure regarding a presumptive term and aggravating, mitigating factors, which the court at sentencing had to find by clear and convincing evidence. She said one exception to the Blakely ruling is if the aggravating factor is a prior conviction that has been found by a previous jury. She related that mitigating factors are still found by clear and convincing evidence to a court at sentencing.

MS. CARPENETI said the fallout from the Blakely decision has been long and drawn out because of many factors not anticipated by the state when it rewrote its sentencing law in 2005. She said SB 210 addresses many of those provisions and clarifies procedures in statute that have been enunciated in case law.

1:32:58 PM

MS. CARPENETI stated that Sections 5, 6, and 7 pertain to people who are found guilty but mentally ill. She explained that Alaska law provides that a person who is found guilty but mentally ill is not entitled to mandatory parole - sometimes called, "good time" - until that person has been found to no longer be a danger to the public. She said the possibility that a person convicted of a crime and found to be guilty but mentally ill would not be given good time like other defendants means that the maximum term rises, thus requiring the issue to be submitted to the jury, which must find proof beyond a reasonable doubt in order for that person to be found guilty but mentally ill. She stated that a person no longer has a right to good time; he/she may or may not qualify.

1:33:56 PM

REPRESENTATIVE HOLMES surmised that a finding of guilty but mentally ill could be considered to increase the penalty by not allowing good time.

MS. CARPENETI said yes.

REPRESENTATIVE HOLMES asked, "In other sentences doesn't it also decrease the penalty?"

MS. CARPENETI answered no. She said under current law a person found guilty but mentally ill is treated for that illness, but a person found guilty for the crime is entitled to good time unless he/she has problems in the correctional system - he/she is entitled to one-third of his/her sentence off for good time. A person found guilty but mentally ill may not qualify for that good time, because he/she still may present a danger to the public.

MS. CARPENETI, in response to a question, explained that people who are found not guilty by reason of insanity are generally in a situation where their illness prevented them from forming the culpable mental state to commit the crime. People who are found guilty but mentally ill are found to have committed all the elements of the crime, but they have an illness that may have affected their behavior.

1:36:26 PM

MS. CARPENETI, returning to her presentation, explained that Section 8, on page 5, is a "catchall" provision. Under sentencing law, as originally formulated in the 1980s, most factual findings were found by a preponderance of the evidence. As a result of the changes in law that have been made, there are many sections besides those currently accepted in Section 8 that have a different burden of proof. She said it is better to have a general catchall so that factual issues in Title 12, Chapter 55, are decided by a preponderance of evidence unless the statute itself says something else, which many statutes do as a result of the Blakely decision.

MS. CARPENETI said Sections 9 and 10 address a situation that arose most recently in State v. Henry. She explained that the Henry decision by the Court of Appeals allowed the court to reduce the period of probation in cases where the defendant was convicted as the result of a negotiated plea, and Section 9 and 10 would disallow that reduction unless both parties agree to the change. The reason for this is that when the state and the defense enter into plea negotiations, both sides give up things and gain things in exchange. She offered her understanding that in the Henry case, the defendant was sentenced under the plea agreement, violated his probation, and came back to court and asked for the period of probation to be reduced. She said the state opposed the request, because he had agreed to that amount

of time and the state had reasons for requiring that amount of probation to protect the public. The court found that the sentencing court should reevaluate the Chaney criteria [from the Alaska v. Chaney case, codified in AS 12.55.005] and resentence the person. She said the DOL's position was that the court should look at the criteria, but should not reduce the period of probation that the defendant and state have reached through bargaining and agreement. In response to Representative Holmes, she confirmed that Sections 8 and 9 are a policy call.

1:40:30 PM

REPRESENTATIVE GRUENBERG surmised that the key language is that the court may not reduce the period of probation, and he suggested that may be an infringement on the judicial prerogative. He asked if that is constitutional.

MS. CARPENETI answered that she believes it is because it is the result of a negotiated plea that the court has accepted.

REPRESENTATIVE GRUENBERG said Ms. Carpeneti is impugning the principles of contract law into sentencing and saying that trumps the right of the sentencing judge to apply his/her independent judgment, which is based on his/her independent role as the final interpreter of laws. He asked if Ms. Carpeneti has authority to support whether that is constitutional.

MS. CARPENETI said she would provide it.

REPRESENTATIVE GRUENBERG said he questions the constitutionality, particularly if Ms. Carpeneti is saying that the court has the authority to increase the sentence, but not the authority to consider factors in mitigation that might reduce the probation. He offered his understanding that Ms. Carpeneti had said that the court could increase the sentence because of the probation [violation].

MS. CARPENETI confirmed that is correct.

REPRESENTATIVE GRUENBERG opined that if the court can do that based on the circumstances that led to the probation violation, then it should be equally free to consider factors in mitigation.

MS. CARPENETI said she would provide backup information.

REPRESENTATIVE GRUENBERG said he would like to see the Henry case that goes opposite to the DOL's position, as well as to hear from "the other side."

MS. CARPENETI said it is a policy call. She said the DOL entered into an agreement, in the process of which it dropped some charges, which it is no longer in a position to reinstate. She reiterated her statement that the defendant violated the conditions of his probation and that the court, under those circumstances, should not be able to reduce the terms that were already agreed upon by the parties for what is a violation of probation.

1:45:30 PM

MS. CARPENETI stated that Section 11 addresses the sentencing provisions for murder in the first degree and the mandatory term of imprisonment for certain offenses. Currently, statutes provide that the court can find, by clear and convincing evidence, that the defendant subjected the victim to substantial physical torture and that the defendant is a peace officer who used his/her authority in facilitating the murder. She said this is no longer the law. Under Blakely v. Washington, the state has to prove these factors by proof beyond a reasonable doubt to get a mandatory 99-year term of imprisonment. Section 11 would change Alaska statute to comply with what the law already is.

MS. CARPENETI said Section 12 sets out procedures already required by the Blakely v. Washington decision, such that the facts that establish and justify a 99-year mandatory term, which is not eligible for good time, have to be determined by a jury beyond a reasonable doubt. She directed attention to subsection (p), on page 6, and talked about ranges within the presumptive sentencing law. For example, she said the presumptive range is 7-11 years for a Class A felony if the person possessed a fire arm at the time he/she committed the felony. She said there are various factors already in law in terms of increasing the range; Section 12 clarifies that those factors have to be proven to the fact finder by proof beyond a reasonable doubt.

REPRESENTATIVE GRUENBERG referred to "procedures set by the court", shown on page 6, line 27, and he asked if that means the procedures are set by the trial court or set by court rule.

1:50:36 PM

MS. CARPENETI answered that the language recognizes that when the verdict is reached is the time when the court may make arrangements if the same jury must, at that point, deliberate over whether or not aggravating factors have been found. She stated, "It's hard to set out with ... a lot of detail how a judge, under the circumstances, should do it; it just recognizes that a judge will ... adopt whatever procedures work in terms of that jury and that ... case." In response to a question, Ms. Carpeneti said she does not see this as a legal decision, but rather as a practical consideration of, for example, whether there is room for a jury to go back and deliberate aggravating factors or the judge could let them go home for the night and deliberate the next day. She said the language is intended to recognize the fact that certain decisions and procedures need to be made in the moment.

1:52:57 PM

MS. CARPENETI stated that Section 13, subsection (i), addresses one particular aggravating factor, which is that when the conduct of the defendant when he/she committed the crime was among the most serious, as defined by the court, the jury shall make an assessment of the facts by proof beyond a reasonable doubt. In response to questions from Representative Gruenberg, she explained that the court would give the jury the opportunity to determine whether the state has proven these facts by proof beyond a reasonable doubt, and once that has happened, if the jury decides the factors are present, then the court would apply those factors to a consideration of whether or not they are the most serious.

1:56:56 PM

REPRESENTATIVE GRUENBERG asked whether that provision would raise constitutional problems.

MS. CARPENETI attempted to clarify that this language pertains to the time after which the jury has found the defendant to be guilty, directly after the verdict is returned, and to a situation in which the state says it would like to establish the aggravating factor that the defendant's conduct was the most serious in the definition of the offense. She offered an example. She said DOL thinks that Blakely requires the state to submit to the jury, directly after the verdict is read, the factors it claims would justify defining the conduct as the most serious in the definition of the defense, for example, that the defendant caused the victim an injury that made the victim

unable to walk for the rest of his/her life. Consideration of those facts would be submitted to the trial jury, which would determine whether the state had proven them beyond a reasonable doubt. The court would then make the legal decision based on that information. She agreed to provide cases. She confirmed that the ultimate finding of fact must be left to the jury, but said whether the conduct was the most serious, within a range, is a question of law. She said, for example, that there are several ways that a person can commit assault in the first degree, and the judge would be able to evaluate that law and apply the facts that are found by the jury to all the definitions of assault in the first degree or by all the definitions of theft in the second degree.

2:03:57 PM

MS. CARPENETI directed attention to subsection (j), which would allow the court to increase the term of imprisonment to the potential maximum so that the remaining factors in aggravation can be proved by clear and convincing evidence to a jury.

MS. CARPENETI said Sections 14 and 15 are conforming to the proposed change in Sections 9 and 10, regarding the change of a sentence as a result of a probation violation. Section 16 is the indirect court rule amendment. She explained that when changes are made in sentencing provisions, care is taken to note court rules that might be changing. She said the provisions in the previously discussed subsection (p) "may have the effective change in the court rule," although she said she does not think so. She briefly mentioned the applicability section [Section 17]. She said Section 18 addresses human trafficking and requires the DOL to establish a task force with representatives of the DOL, the Department of Public Safety, and the Department of Health & Social Services, and two members, appointed by the governor, representing nongovernmental health and social services providers. She explained the purpose of the task force is to study the prevalence of human trafficking in Alaska, including: how many cases have been submitted to law enforcement, how many cases have been prosecuted, how many times the state has cooperated with the federal government in prosecuting or investigating human trafficking, and which services are available to victims of these offenses. She opined that it would be good to have a clear idea of where Alaska stands regarding human trafficking in the state, and this information would help the legislature decide whether the state's laws need to be changed or if anything else needs to be done to address the issue.

REPRESENTATIVE GRUENBERG suggested consideration be given to include legislators on the task force.

2:08:04 PM

MS. SALTZMAN offered her understanding that the intent of the proposed task force is to advise the legislature, at which point the legislature could make decisions based on that information. Notwithstanding that, she agreed to provide that suggestion to the sponsor.

2:09:19 PM

REPRESENTATIVE GRUENBERG referred to the language on page 9, line 23, which states that the task force "shall hold at least one public meeting". He expressed concern that that may result in the task force holding only one meeting.

MS. SALTZMAN surmised that that language could be changed; however, she pointed out that the task force may want the majority of its meetings to be private, because it discusses private issues.

MS. SALTZMAN, in response to Representative Keller, confirmed that the required minimum one public meeting would occur within a year, because the task force expires after one year.

REPRESENTATIVE LYNN remarked that he thinks the language regarding at least one meeting is clear.

2:11:27 PM

REPRESENTATIVE GRUENBERG questioned whether the proposed task force would be subject to the Open Meetings Act, and he asked under what conditions Ms. Saltzman anticipated the meetings would not be public.

MS. SALTZMAN agreed to conduct further research on the issue.

REPRESENTATIVE GRUENBERG suggested that the task force may be able to keep the identities of the people being discussed confidential, while allowing the public to attend the meetings.

REPRESENTATIVE HOLMES emphasized the need to keep victims safe.

2:13:53 PM

DOUGLAS MOODY, Deputy Public Defender, Criminal Division, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), referred to Section 4, in which subparagraph (C) is proposed as new language to amend AS 11.81.900(56). He pointed out that the term "**serious disfigurement**" is used in subparagraph (C), sub-subparagraph (i), [page 4, line 3], and he said he does not know if that term is intended to have a definition different from "protracted disfigurement", which is the standard definition used in Section 4, subparagraph (B), [on page 3, line 29]. Mr. Moody referred to the phrase, "**reasonably requires medical evaluation or treatment by a health care professional**", which is in reference to "**impairment of health, by serious bruising or other injury**" - further proposed language of subparagraph (C), [as shown in sub-subparagraph (ii), on page 4, lines 4-6]. He said his experience has shown that parents with good health insurance take their children to the doctor all the time, while parents without good health insurance are more reticent about taking their children to see a doctor. He said the parents without the good insurance are not necessarily putting their children in danger, but it is "a different decision tree."

2:16:48 PM

REPRESENTATIVE HOLMES, regarding "**reasonably requires medical evaluation or treatment by a health care professional**", expressed concern regarding stiff penalties being set for a low bar. She then referred to the phrase, "**physical injury to a person under 12 years of age**", and she asked about the age of the perpetrator and whether consideration had been given to children hurting each other while playing in a playground, for example.

MR. MOODY responded that that could be an issue. He said in one of the definitional provisions, "serious physical injury" is an element of assault. He said Assault 1 is an automatic waiver statute. He relayed that a high school student who is 17 years of age could end up automatically waived on felony assault charges, whereas a child 12 years of age, in junior high school, could end up charged with Assault 1, but within the juvenile system. He added, "It would apply to a juvenile, because this is just the definition of 'serious physical injury', not the definition of the offense."

2:19:37 PM

REPRESENTATIVE GRUENBERG disclosed that when he was a child, he assaulted another child who had kicked him, and he said he would not have wanted to be charged with a felony as a result.

2:20:40 PM

MR. MOODY directed attention to language on page 3, lines 19-20, which read: "**(4) recklessly fails to provide adequate food or liquids to a child, causing protracted impairment of the child's health**." He said he had viewed this language as referring to starvation prevention until he heard Representative Holmes ask about the adequacy of the type of food provided. Now, he said, he questions whether someone might be charged with a crime for giving too much soda pop and sweets to his/her child, who then becomes fat and gets Type II Diabetes. He said that is a protracted health impairment, which "would appear to follow from that."

2:21:51 PM

MR. MOODY directed attention to Section 6, on page 4, regarding guilty but mentally ill (GBMI) provisions, which he said currently do not affect many clients. He explained that a defense council will do everything possible to avoid a GBMI verdict, because it results in greater punishment for the client, since they don't get paroled and are not eligible for early release to a halfway house. He suggested that a review provision be added to the bill in order to ensure the opportunity for someone with a GBMI verdict to show that he/she should be eligible for parole. Currently, he explained, a person found GBMI at a trial or change of plea hearing has no opportunity to have the finding reviewed, even if the person ends up medicated, stabilized, and a model prisoner.

2:23:36 PM

MR. MOODY directed attention to Section 10, on page 5, and said this is the provision that prohibits the court from adjusting the sentence at all if someone comes back on a probation revocation. He said the basic premise of the 2010 case, State v. Henry, to which Ms. Carpeneti referred, was that whenever a defendant who is on probation comes back before the court for a probation violation, the court must reevaluate the sentence and impose the proper sentence based on the Chaney criteria, given the original conduct and all the intervening conduct, rather than just impose all the suspended time. He said that has been the law in Alaska since at least the 1980s. He said he thinks

the provision has potential constitutional issues, because there will never be a situation where there will be direct appellate review of a sentence. He explained that currently the Court of Appeals does not review suspended time in sentences, but takes the position that it will review a sentence only to determine whether it was appropriate under Chaney criteria once the time is imposed, because if it is never imposed, it is never an issue. He said, "With this change in the law, it would never ... get presented, because the court would never reduce it and decide whether the entire sentence - suspended time and unsuspended time - was appropriate in light of Chaney."

MR. MOODY said the constitutional issue is in trying to remove the ability of the court to evaluate the sentence as a whole. As a matter of policy, most sentences are negotiated so that both the state and the defense end up giving up something. He said a defendant is offered jail time, but with a lot of suspended time; it is not an equal bargaining position between the state and the defendant. He stated that all defendants think they will do well on probation. Without the evaluation of the appellate court, clients will enter into bad deals against the advice of counsel, because "whatever happens on the road, they're getting out today."

2:27:59 PM

REPRESENTATIVE GRUENBERG asked Mr. Moody to confirm that currently the Court of Appeals does not review the imposition of a suspended sentence, because the suspension is still "out there" and may never be imposed; therefore, that issue would not, in a legal sense, be ripe for decision at the time the court enters it.

MR. MOODY said that is correct. For example, he said if a defendant gets five years with two years suspended, an appeal could be made related to the excessiveness of the three years imposed, but the court would not address whether the extra two years were excessive until they are imposed, because they might never be imposed. In response to Representative Gruenberg, he said he thinks the decision of whether a person is adhering to his/her suspended sentence probation schedule or should have the suspended portion of the sentence imposed should be left up to the judge to determine, which is current practice.

2:33:02 PM

MR. MOODY stated that Section 13, on page 7, would split the aggravating factor finding for most serious conduct into two parts. He said he disagrees with the DOL's interpretation of this provision. He said the U.S. Supreme Court in Blakely said that factual findings that increase a sentence need to be found by the trial jury beyond reasonable doubt. He said the factual finding is that this conduct was amongst the most serious within the class, and he said he thinks that can be tried to a jury. He said there is a range of injury that the state is fully capable of presenting the evidence to show. He said he thinks the splitting of the aggravating factor finding would be found unconstitutional.

REPRESENTATIVE GRUENBERG referred to Section 18 and asked Mr. Moody if he thinks someone from the Office of the Public Defender should be represented on the aforementioned taskforce.

MR. MOODY said he thinks the PDA would be a valuable member of the task force, but said that that is the call of the legislature.

REPRESENTATIVE GRUENBERG questioned whether a member of the judiciary branch should be invited, as well.

2:37:46 PM

JOSHUA DECKER, Staff Attorney, American Civil Liberties Union of Alaska (ACLU of Alaska), noting that the ACLU of Alaska has submitted written testimony, explained that the ACLU of Alaska's concern with SB 210 is its proposal to expand the definition of the term, "serious physical injury" because doing so could have ramifications throughout criminal law. Regarding Representative Holmes' previously stated example of children hurting each other on the playground, he said the ACLU of Alaska thinks that those types of juvenile criminal antics could result in criminal liability. Further, he said if the child injured on the playground goes to the school nurse and the nurse fails to report the incident to the police, she could be guilty of a Class A misdemeanor. In the context of domestic violence, Mr. Decker said changing the definition could open up new defenses for domestic abuses. Alaska currently permits use of justifiable deadly force to avoid imposing serious physical injury on oneself or another, and Mr. Decker said the ACLU of Alaska can foresee a circumstance where an individual abuses his/her spouse and then takes the position that the abuse was necessary to protect the children from imminent physical danger. He said the ACLU of Alaska does not think that is the intent of

the drafters and recommended a new approach be taken to narrowly target the specific instances of child abuse, endangerment, and neglect, rather than modifying such a fundamental part of Alaska criminal law that would have far reaching consequences.

VICE CHAIR THOMPSON, after ascertaining that no one else wished to testify, closed public testimony on SB 210.

The committee took an at-ease from 2:41 p.m. to 2:43 p.m.

VICE CHAIR THOMPSON relayed that SB 210 would be held over [with the motion to adopt Version O as the work draft left pending].

SB 122 - REAL ESTATE TRANSFER FEES/TITLE INSURANCE

2:45:10 PM

VICE CHAIR THOMPSON announced that the next order of business would be CS FOR SENATE BILL NO. 122(L&C), "An Act relating to research on and examination of titles; relating to residency requirements for title insurance limited producers; relating to real estate transfer fees; and providing for an effective date." [Before the committee was HCS CSSB 122(L&C).]

2:45:57 PM

DANA OWEN, Staff, Senator Dennis Egan, Alaska State Legislature, on behalf of the sponsor of SB 122, the Senate Labor and Commerce Standing Committee, which is chaired by Senator Egan, explained that SB 122 would limit who may conduct searches and examinations of title to only licensed title insurance limited producers, would statutorily stipulate that only residents of Alaska may be issued such licenses, and would preclude the use of transfer fee covenants. On the latter point, he relayed that in 1852, the courts in New York outlawed transfer fee covenants, describing them as a vestige of feudalism, and that since then, 41 other states have also outlawed the practice. In addition to outlawing the use of transfer fee covenants in Alaska via Section 3, the bill is also intended to address concerns that future imperfections in title could result if title searches/examinations are performed by people who don't live in Alaska. Specifically, Section 1 of the bill would require that all title searches be done through licensed title insurance limited producers, and Section 2 would require that such licenses be issued only to residents of Alaska. He acknowledged, however, that the drafter has pointed out that Section 2 could potentially be ruled unconstitutional by the

court; each of the prior committees of referral discussed this issue but chose to retain Section 2 in the bill regardless.

REPRESENTATIVE GRUENBERG suggested that a severability clause be added to the bill if the aforementioned language remains.

MR. OWEN said the sponsor would not object to the addition of a severability clause, and noted that members' packets contain [memorandums] from Legislative Legal and Research Services addressing the issue of Section 2's constitutionality.

2:51:56 PM

KIMBERLY GLISSEN, General Manager, Alaska Escrow & Title Insurance Agency, Inc., said she is in favor of SB 122, specifically, Sections 1 and 2 because she believes steps must be taken to keep jobs local and prevent outsourcing, and Section 3 because of the savings it will provide to consumers. Overall, she opined, SB 122 will help protect jobs, consumers, and property owners in Alaska.

2:53:49 PM

CHRIS NEWBILL, Manager, Ketchikan Title Agency, Inc., testified in favor of SB 122 and said she concurs with the testimony of Ms. Glissen.

REPRESENTATIVE GRUENBERG noted that the aforementioned memorandums in members' packets are dated February 15, 2012, and March 15, 2012; and, in response to a question, explained that the term, "provision" as used in Section 3 of SB 122 refers to a provision in the document that conveys real estate.

2:57:17 PM

MICHEAL PRICE, Co-Owner, Mat-Su Title Insurance Agency, Inc.; Co-Owner, Fidelity Title Agency of Alaska, after mentioning industry-associated positions he's held within the Alaska Bar Association (ABA) and the Alaska Land Title Association (ALTA), testified in support of SB 122, and expressed disagreement with the drafter's comments in the aforementioned memorandums that Section 2's proposed residency requirement might be found unconstitutional. Noting that his company gets solicitations from people in foreign countries to conduct title searches/examinations of property in Alaska, concurred that the intent of the bill is to require those who conduct such searches/examinations of property in Alaska to be Alaska

residents and thereby be subject to Alaska law. He offered his understanding that 13 states have passed a similar residency requirement, and said he thinks Alaska has the right to do so as well since no waiting period is required in order to become a resident. In conclusion, he too noted that 41 states now ban [transfer fee covenants], and asked that Alaska do so as well.

3:06:06 PM

ROGER FLOERCHINGER, Owner, President & CEO, Yukon Title Company, Inc., testified in support of SB 122 as currently written and stressed the importance of providing for what he termed "Alaska hire."

3:08:07 PM

STEPHAN ROUTH, Attorney at Law, Routh Crabtree Olsen, P.S. - mentioning that he's owned title agencies in Washington, Oregon, Idaho, California, Nevada, Arizona, and Hawaii - said he has concerns about Section 2 of SB 122, but characterized Section 3's proposed ban on transfer fee covenants as something that should have been instituted long ago. With regard to Section 2, he noted that in the aforementioned memorandums, the drafter has said in part: "In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional". He said he appreciates the suggestion to insert a severability clause into the bill, but opined that a better approach - from a financial perspective, given the high cost associated with litigating constitutionality issues - would be to simply delete Section 2. Referring to an earlier comment, he said his research shows that only [8] states still have a specific residency requirement, and that the trend is for states to instead move away from having such a requirement. Regarding the concern about outsourcing title searches/examinations to people in other countries, he offered his belief that nothing in the bill would prevent that from occurring, because the bill addresses the issue of licensure - not the actual work itself. In conclusion, he again suggested that Section 2 be removed from SB 122.

3:14:20 PM

CRYSTAL PELTOLA, Vice President & General Manager, Alaska USA Title Agency, concurred with Mr. Routh's testimony and stated support of Section 3 of SB 122, but expressed concern regarding the constitutionality of Section 2. She pointed out that Section 2, in addition to perhaps being unconstitutional, seems

to contradict itself in that it says both that a title insurance limited producer shall be licensed in the manner provided for in AS 21.27 - which provides for the licensure of both residents and nonresidents - and that a title insurance limited producer may not obtain a license unless [he/she] is a resident of the state. In conclusion, she said Alaska USA Title Agency would support SB 122 if Section 2 were deleted.

REPRESENTATIVE GRUENBERG noted that Section 2 addresses what's required to obtain a license, not what's required to maintain such licensure; in other words, a resident could obtain a license to be a title insurance limited producer, and then move out of state and still be licensed in Alaska.

3:17:32 PM

TERRY BRYAN, Vice President & State Manager, First American Title Insurance Company, characterized SB 122's proposed residency requirement as disruptive to the flow of commerce and inconsistent with common sense, particularly given that the end product - the title insurance policies themselves - all originate outside of Alaska, and given that no other segment of the real estate industry in Alaska operates under such a residency requirement. With regard to the concern that future imperfections in title could result if title searches/examinations are performed by people who don't live in Alaska, he predicted that the marketplace would remedy any such problems that actually do arise.

3:22:06 PM

HOWARD HANCOCK, Chief Title Officer, Fidelity Title Agency of Alaska, relayed that he was testifying in support of SB 122. He offered his understanding that the current practice of the Division of Insurance - as stated on its web site - is to grant licenses to residents only, even though AS 21.27.150(5) appears to allow for the issuance of what's called a nonresident limited producer license. The intent of SB 122, he surmised, is to correct what industry feels to be conflicting statutory provisions and provide guidance to the division in light of its existing practices. Further, it would help protect the jobs of title examiners in Alaska, who understand the industry laws unique to the state. In conclusion, he reiterated his support for SB 122, and urged the committee to pass it.

3:24:44 PM

LINDA HALL, Director, Anchorage Office, Division of Insurance, Department of Commerce, Community & Economic Development (DCCED), in response to questions, indicated the administration's attorneys have reviewed the aforementioned memorandums from the drafter and have concurred that Section 2 might potentially be found unconstitutional, though she's not yet received a written legal opinion on the issue.

3:26:15 PM

JERRY REED, President, Alaska USA Mortgage Company, LLC, said that generally his company is in support of Section 3 of SB 122, but is not in support of Section 2, believing that it would limit both consumer choice and market competitiveness.

VICE CHAIR THOMPSON, after ascertaining that no one else wished to testify, closed public testimony on SB 122.

The committee took an at-ease from 3:28 p.m. to 3:29 p.m.

3:29:57 PM

REPRESENTATIVE GRUENBERG made a motion to delete Section 2.

REPRESENTATIVE HOLMES objected, and said she'd prefer that Section 2 be left in the bill.

REPRESENTATIVE GRUENBERG cautioned against adopting a potentially unconstitutional provision, spoke about the cost of litigating Section 2's constitutionality, and predicted that that provision isn't going to work as intended anyway because merely having an office in Alaska would suffice for purposes of obtaining licensure even though the actual work gets conducted elsewhere by nonresidents. He too noted that in the aforementioned memorandums, the drafter has said in part: "In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution".

REPRESENTATIVE HAWKER expressed disfavor with Amendment 1, and offered his belief that it remains unclear what the ultimate consequences of adopting Section 2 will be.

A roll call vote was taken. Representatives Lynn, Keller, and Gruenberg voted in favor of Amendment 1. Representatives

Holmes, Pruitt, Thompson, and Hawker voted against it. Therefore, Amendment 1 failed by a vote of 3-4.

3:33:30 PM

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 2, to add a severability clause to SB 122.

REPRESENTATIVE HAWKER objected and pointed out that all legislation is automatically severable [under AS 01.01.030].

REPRESENTATIVE PRUITT concurred, and said he does not see the necessity of adding a severability clause to the bill.

REPRESENTATIVE GRUENBERG argued that including a severability clause wouldn't do any harm and would be prudent.

3:37:16 PM

A roll call vote was taken. Representatives Gruenberg and Lynn voted in favor of Conceptual Amendment 2. Representatives Holmes, Keller, Pruitt, Thompson, and Hawker voted against it. Therefore, Conceptual Amendment 2 failed by a vote of 2-5.

3:37:54 PM

REPRESENTATIVE KELLER moved to report HCS CSSB 122(L&C) out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HCS CSSB 122(L&C) was reported from the House Judiciary Standing Committee.

3:39:00 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:39 p.m.