

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 29, 2012

1:41 p.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 212

"An Act relating to crimes of human trafficking; establishing the Human Trafficking Task Force to evaluate services available to victims of human trafficking; and relating to the recommendations and report of the task force."

- HEARD AND HELD

SENATE BILL NO. 218

"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 AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 212

SHORT TITLE: HUMAN TRAFFICKING TASK FORCE

SPONSOR(S): SENATOR(S) MCGUIRE

02/21/12 (S) READ THE FIRST TIME - REFERRALS

02/21/12 (S) JUD, FIN
02/29/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 218

SHORT TITLE: SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/22/12 (S) READ THE FIRST TIME - REFERRALS
02/22/12 (S) JUD, FIN
02/29/12 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

JAMES DOLD, Policy Council
Polaris Project
Washington, D.C.

POSITION STATEMENT: Testified in support of SB 212.

ANNE CARPENETI, Assistant Attorney General
Criminal Division
Department of Law (DOL)
Juneau, AK

POSITION STATEMENT: Introduced SB 218 and provided a sectional analysis.

KATHRYN MONFREDA, Chief of Criminal Records
Division of Statewide Services
Department of Public Safety (DPS)
Anchorage, AK

POSITION STATEMENT: Provided information related to SB 218.

QUINLAN STEINER, Public Defender
Public Defender Agency
Department of Administration
Anchorage, AK

POSITION STATEMENT: Voiced concern with SB 218.

ACTION NARRATIVE

1:41:59 PM

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:41 p.m. Present at the call to order were Senators McGuire, Wielechowski and Chair French. Senators Paskvan and Coghill arrived soon thereafter.

SB 212-HUMAN TRAFFICKING TASK FORCE

[1:42:20 PM](#)

CHAIR FRENCH announced the consideration of SB 212.

SENATOR LESIL MCGUIRE, sponsor of SB 212, explained that the bill establishes a task force to look at the issue of human trafficking. It will consist of representatives from the Department of Law (DOL), the Department of Public Safety (DPS), and the Department of Health and Social Services (DHSS). The attorney general or their designee will serve as chair. The task force will report, by January 15, 2013, the following to the Legislature: 1) the number of human trafficking cases reported to state and local law enforcement agencies since 2007; 2) the number of human trafficking cases prosecuted under Alaska law; 3) the number of human trafficking cases state and local law enforcement agencies have investigated in cooperation with federal agencies; and 4) the services currently available to victims of human trafficking for medical or psychological counseling, emergency shelter, translation services, and other assistance related to safe housing and legal services.

SENATOR MCGUIRE expressed hope that the task force would also reflect on the possibility of a civil remedy to aid victims and deter criminals that might have a financial incentive to run sex trafficking rings.

CHAIR FRENCH said he liked the approach, and would be thinking about the intersection between trafficking and prostitution.

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SENATOR PASKVAN and Senator Coghill joined the committee.

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JAMES DOLD, Policy Counsel, Polaris Project, Washington, D.C., explained that this organization works to stop human trafficking primarily doing three things. First, it offers survivors of labor and sex trafficking offering holistic case management, group therapy session, and transitional housing. Second, it operates the national human trafficking resource center and hotline for the U.S. Department of Health and Human Services. Finally, it engages in policy advocacy to help build strong legal frameworks so communities and states can more adequately respond to human trafficking.

He said two types of activity occur under the federal definition of trafficking. One type involves individuals who use force, threats and other coercive tactics to compel or induce another person to engage in a commercial sex act or forced labor of

services. The other type involves facilitators that recruit, entice, solicit, harbor, or transport individuals knowing they will be in a forced labor of services or commercial sex exploitation situation. He noted that federal law makes a distinction when a child is under age 18. All children under age 18 who are engaged in commercial sex - regardless of whether there is a third-party controller - are viewed as victims of trafficking under federal law. Some states, too, have recognized how vulnerable children may be and have responded by passing safe-harbor laws so that these children are viewed as victims of a crime instead of prostitutes.

MR. DOLD stated that SB 212 is a much-needed first step to begin addressing the overall needs of victims of human trafficking in Alaska. He mentioned the importance of getting the right people to the table and suggested expanding the task force to include non-governmental organizations and service providers that are based in Alaska and to encourage the task force to develop legislative recommendations.

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SENATOR COGHILL asked what agencies the Polaris Project works with horizontally.

MR. DOLD said it is part of a national working group called The Alliance to End Slavery and Trafficking (ATEST) and works closely with Shared Hope International. Polaris also works with domestic and sexual violence coalitions in individual states.

SENATOR COGHILL stated support for using the expertise from organizations like Shared Hope International.

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SENATOR PASKVAN asked if it would be appropriate for a task force to look into state or region-specific predictors of where trafficking might arise.

MR. DOLD said yes, and Alaska Natives appear to be a particularly vulnerable population.

CHAIR FRENCH closed public testimony and announced he would hold SB 212 in committee.

SB 218-SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE

[2:08:39 PM](#)

CHAIR FRENCH announced the consideration of SB 218.

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ANNE CARPENETI, Assistant Attorney General representing the Criminal Division, Department of Law (DOL), said SB 218 deals with sex trafficking and other sex offenses. The bill proposes a change in terminology for the crime of promoting prostitution sex trafficking. The offense is the same; it is a person victimizing another person and inducing him or her to engage in prostitution. Law enforcement officers already use the new terminology so this statutory change will facilitate better communication. It is also good policy to refer to people who are trafficked, especially children, as victims rather than as prostitutes. She provided the following sectional analysis.

Section 3 adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as "serious felony offenses" under the conspiracy law, AS 11.21.120. This will enable the state to investigate and potentially prosecute offenders who work with other people to plan or engage in human trafficking or sex trafficking.

The penalty for conspiracy to commit this crime is one level below the crime itself. Sex trafficking in the first degree of a child under age 18 is currently an unclassified felony, so conspiracy to commit sex trafficking in the first degree of a child under age 18 would be a class A felony under SB 218.

CHAIR FRENCH asked if it would be a class B felony if the victim was not under age 18.

MS. CARPENETI said yes. She added that human trafficking in the first degree is a class A felony, so conspiracy to commit human trafficking in the first degree would be a class B felony.

CHAIR FRENCH asked if there was any age differentiation in human trafficking.

MS. CARPENETI answered no.

Section 4 amends the crime of distribution of indecent materials to minors, AS 11.61.128. This change is in response to a recent decision by a federal district court judge who held the current statute unconstitutional in violation of the First Amendment, because it applies to constitutionally protected conduct by adults. Responding to the decision, the bill requires the state prove that the defendant intentionally distributed or possessed with intent to distribute harmful material to another person

that the offender knows is under age 16 or believes is under age 16. DOL is confident that these changes will answer the concerns of the court in finding the statute to be overbroad.

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SENATOR WIELECHOWSKI asked if it would be a crime for a 30-year-old to intentionally distribute material to someone he or she believes is under age 15 even though the person is actually 25 years old.

MS. CARPENETI replied it would be a crime if they believed the person to be under age 16. This is to allow investigators to find perpetrators in an Internet context.

MS. CARPENETI said the next changes occur in Sections 5-6. These sections raise the penalty for being a patron of a prostitute who is a minor under age 18, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state. The Legislature can do this if it is clear that the particular circumstance is one that the state does not have to prove culpable mental state. She reminded the committee that in 2007 it put portions of Senate Bill 157 into House Bill 90 making it a crime to be a patron of a prostitute. This raises the penalty when the prostitute is under age 18.

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CHAIR FRENCH asked if she had any concern that in Alaska the age of consent is 16.

MS. CARPENETI replied DOL is confident that this is defensible because the sex trafficking statutes deal with minors under age 18.

CHAIR FRENCH asked if it was aimed at the patron or the prostitute.

MS. CARPENETI replied the increased penalty is aimed only at the patron.

CHAIR FRENCH observed that if the prostitute is age 15 the defendant has also committed the crime of sex abuse of a minor.

MS. CARPENETI agreed and noted that Quinlan Steiner suggested redrafting the provision to clarify that the heightened penalty applies only to the patron.

CHAIR FRENCH said he looked forward to seeing a suggestion from DOL about that language.

MS. CARPENETI explained that Section 12 amends the corroboration provision for sex trafficking. Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third degrees. This provision was adopted in 1978 when the criminal code was written. In 2007, the Legislature addressed the promoting prostitution statutes, but did not change the corroboration to apply to the new crime of promoting prostitution for sex trafficking in the fourth degree. It was an oversight and the bill fixes that.

Section 13 provides for forfeiture of property gained or used in promoting prostitution or sex trafficking and it also applies to prostitution itself.

CHAIR FRENCH asked if APD was seizing the cars of pimps or johns.

MS. CARPENETI deferred the question to Sergeant Lacey with the Anchorage Police Department (APD), and continued the sectional.

Section 16 allows contemporaneous two-way video conference testimony of a witness in a hearing addressing the competency of a defendant. It allows this testimony if the witness would be required to travel more than 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site. She reminded the committee that a person cannot be tried for a crime if, because of mental disease or defect, he or she is unable to understand the nature of the charges or proceedings or assist his or her attorney in their defense.

MS. CARPENETI explained that this is unlike a criminal trial in the sense that the full panoply of constitutional rights do not apply. If the defendant is claiming incompetence, the burden is on him or her to prove that by a preponderance of the evidence, whereas those burdens are generally for the prosecution to disprove.

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CHAIR FRENCH asked if under the current rules an objecting party can effectively force an in-court discussion.

MS. CARPENETI replied that is generally the case.

CHAIR FRENCH asked if any other state had this provision.

MS. CARPENETI offered to follow up with the list. She added that the Ninth Circuit Court of Appeals approved a similar proceeding. It clearly saves expert witnesses time and effort if they do not have to fly to a remote area to testify in a case.

SENATOR PASKVAN asked if there was an implied requirement for the expert to be licensed in Alaska.

MS. CARPENETI said no.

Section 20 adds a new provision to the sex offender registration law that requires a person present in Alaska, who has been convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a similar criminal provision. A person would be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

Section 25 adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. The U.S. Supreme Court approved this kind of testimony in Maryland v. Craig. For this to occur, the court must find that its use is necessary to further an important public policy and the witness is unavailable. The testimony is given under oath and is subject to cross-examination. The fact-finding has to be by clear and convincing evidence.

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SENATOR PASKVAN asked how many courtrooms have this capacity.

MS. CARPENETI replied there are several, but the real necessity is to have a facility where the witness can go and testify.

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CHAIR FRENCH asked if video conference testimony is done now with the consent of both sides.

MS. CARPENETI said yes, and the proposed rule allows the court to order it when both sides do not consent. Responding to a further question, she explained that 50 miles applies to the contemporaneous testimony in competency hearings. Contemporaneous testimony means it has to happen live as if the

person were in the courtroom. The child witness provision that passed in 1994, and was amended in 2004, allows closed circuit television of a child witness. Under that provision, the child is not required to face the defendant, whereas this provision requires the witness to testify under circumstances as if he or she were in the courtroom.

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SENATOR WIELECHOWSKI asked if other states do this.

MS. CARPENETI replied other states are starting to, and it makes sense with current technology.

SENATOR WIELECHOWSKI asked if there was a way to ensure that the witness is not referring to documents or being coached by another person.

MS. CARPENETI said yes; the proposed rule provides that either party could request the court to exclude everyone other than the video operator.

SENATOR WIELECHOWSKI asked if the video operator would be licensed.

MS. CARPENETI said she was not aware of a licensing procedure for video operators but she would find out.

CHAIR FRENCH commented that the Alaska Career Academy could potentially offer that certification.

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SENATOR PASKVAN informed the committee that the civil rules have announcement requirements for taking a video deposition.

SENATOR COGHILL asked if both parties would have to agree to accept this type of testimony.

MS. CARPENETI clarified that this allows the court, under certain limited circumstances, to allow this type of testimony even if one party does not agree.

SENATOR COGHILL asked if the court would be the facilitator.

MS. CARPENETI replied this allows the trial court to set up the procedure in each case, and it will vary depending on the circumstances.

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MS. CARPENETI directed attention to Section 19 on page 12 and explained that it conforms the terminology and corrects an omission in a statute that passed last year. That statute put online enticement of a minor into the category of sex offenses in AS 12.55.125 for heightened penalties, but that particular crime was not added to the definition of most serious felony in the definitional section of Sec. 12.55.

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KATHRYN MONFREDA, Chief, Criminal Records and Identification Bureau, Department of Public Safety (DPS), said her duties include management of the sex offender registry.

CHAIR FRENCH asked her to discuss Section 20 dealing with sex offender registration, and describe the crimes that Alaska statutes do not cover or for which there is some substantial difference.

MS. MONFREDA provided some examples. Washington has a state law about communicating with a minor for immoral purposes and a crime called assault with sexual motivation. The elements of those crimes do not meet the requirement to register as a sex offender in Alaska. In addition, some of the offenses under the U.S. code of military justice do not have the elements that would require someone to register in this state.

CHAIR FRENCH asked if she receives inquiries on a monthly basis about registering as a sex offender in Alaska for crimes committed in other jurisdictions.

MS. MONFREDA replied her office receives on average three or four inquiries a month.

CHAIR FRENCH asked how many were asking about crimes for which Alaska does not have an analog.

MS. MONFREDA explained that there were no immediate answers for most of the inquiries.

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SENATOR WIELECHOWSKI questioned the possibility of laundering a registerable crime by moving from state to state before coming to Alaska.

MS. MONFREDA offered her interpretation of the language. If the offender has to register in the state where the offense occurred, he or she would have to register in Alaska.

SENATOR MCGUIRE asked if the people making the inquiries were considering a move to Alaska or were already here.

MS. MONFREDA replied most are considering a move, but some are already here.

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SENATOR MCGUIRE said she supports the provision because she wants Alaska to be the last place a sexual predator would consider moving to.

SENATOR WIELECHOWSKI asked if someone would have to register for an offense that is not illegal in Alaska if he or she had to register in the jurisdiction where it occurred.

CHAIR FRENCH said that's why the committee has grappled with the issue.

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QUINLAN STEINER, Public Defender, Public Defender Agency, Department of Administration (DOA), articulated two concerns with SB 218. The first is that a victim could potentially be prosecuted as a prostitute for a class C felony under Section 6. The other concern relates to the confrontation clause in Section 16 regarding video conferencing. The issue is still up in the air as to whether or not the full confrontations right applied to a pretrial hearing. He opined that a constitutional challenge was a certainty because of the public interest and that there was no limitation on unavailability.

SENATOR WIELECHOWSKI expressed interest in knowing how DOL would define "unavailable." He asked if the language was broad enough for a court to allow a video conference from Hawaii where a witness was vacationing and therefore unavailable.

MR. STEINER said theoretically yes, but he would hope the court would not do that. Unavailability is referred to narrowly in the rules of evidence and is broadly stated elsewhere. He reviewed the definition on page 17, lines 22-28.

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CHAIR FRENCH called a point of order to clarify that Section 16 does not have an unavailability component.

MR. STEINER agreed, and added that Section 16 was a concern because it allows the court to order [contemporaneous two-way video conferencing] without the limitations of a compelling interest. He described a competency hearing in a rural location to illustrate the problem. It is time consuming to travel to remote locations and experts often prefer to testify telephonically. If a physician testifies telephonically that a person is competent and the statement is contested, cross-examination to test the veracity and validity of the statement is very difficult.

SENATOR WIELECHOWSKI asked him to talk about the difficulties of trying to cross-examine a witness over a video teleconference.

MR. STEINER said one problem is that it would be virtually impossible to confront someone with a document they did not have. Some cross-examination is conducted without prior presentation so it would reduce the effectiveness of that technique. There is also the separate question of what face-to-face confrontation means. The dissenting opinion in Craig talks about what persisting in testimony means when the person is not present. This arises in competency hearings when there is a question about whether the physician spent enough time with the patient to determine competency.

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CHAIR FRENCH asked how many competency hearings are held each year in Alaska.

MR. STEINER estimated it was more than 20.

SENATOR WIELECHOWSKI asked if expert witnesses were often presented with large volumes of evidence that they had not seen before the hearing.

MR. STEINER said that was a possibility.

SENATOR COGHILL asked if it was the professional testimony and therefore that professional's reputation that was at stake, not the person for which the competency hearing was held.

MR. STEINER said yes.

SENATOR COGHILL said he was less concerned about a professional who did not have all the paperwork ahead of time than a client who was under light representation.

CHAIR FRENCH said the question made him wonder about the difference in having a jury evaluate evidence as opposed to a judge. Here the competency hearing is a legal issue decided by a judge, whereas the second section is about testimony that takes place where the jury is the fact finder. He observed that there would be subtle differences in the confrontation rights before a judge versus before a jury.

MR. STEINER said the federal courts used that sort of analysis to draw a distinction between the confrontation that would apply pre-trial versus the confrontation that would apply at trial. He reiterated that Alaska courts have not specifically talked about the confrontational clause in pre-trial competency matters.

SENATOR COGHILL asked if there was a protocol that judges follow.

MR. STEINER said not under this statute, but they could look to the trial procedures.

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SENATOR WIELECHOWSKI commented that expert witness testimony in a competency hearing can be critical in determining whether or not a person is sent to prison for life. He suggested the committee tread lightly.

CHAIR FRENCH mused about the potential rise in stature of the video conferencing technician under these circumstances.

MR. STEINER agreed that there are instances where documents become relevant through questioning.

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SENATOR COGHILL asked if just one competency hearing would be allotted.

MR. STEINER replied even a simple competency hearing can go for more time than is allotted for a specific hearing.

SENATOR WIELECHOWSKI asked if confidential documents are presented at competency hearing, because this would place them in the hands of a video conference technician.

MR. STEINER replied it is all theoretically confidential.

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MR. STEINER said all the concerns about confrontation are raised in Section 25. The bill tries to comply with the requirements in the U.S. Supreme Court decision in Craig, but it broadly opens the question of unavailability. He agreed with Ms. Carpeneti that availability would probably be determined on a case-by-case basis, but that didn't mean the finding would pass constitutional muster. There is also the question about whether or not it is an important state interest. He opined that the analysis should be on a case-by-case, but the drafting opens it to a broad, single finding.

He suggested two potential fixes. One is to litigate pre-trial with an evidentiary hearing as to whether or not video conferencing is sufficient. The other recommendation is to require the video recording to be secured and preserved as part of the record.

CHAIR FRENCH asked if he saw a distinction between a central witness and a peripheral witness.

MR. STEINER replied cases can turn on a seemingly unimportant witness. He then referred to what Justice Scalia said in the dissenting opinion in the Craig case. He pointed out that the first time a child may see the accused parent is at trial, and if a false statement was made it is much easier to persist when not confronted by their parent.

CHAIR FRENCH said he looked forward to reading the case.

MR. STEINER turned to Section 20 regarding registration and confirmed it was a problem that someone would have to register for having engaged in conduct that is not criminal in Alaska. That problem will persist throughout the life of that section of statute, he said.

CHAIR FRENCH held SB 218 in committee.

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There being no further business to come before the committee, Chair French adjourned the meeting at 3:03 p.m.