ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 4, 2013
1:34 p.m.

MEMBERS PRESENT

Senator John Coghill, Chair
Senator Fred Dyson
Senator Donald Olson
Senator Bill Wielechowski

MEMBERS ABSENT

Senator Lesil McGuire, Vice Chair

COMMITTEE CALENDAR

SENATE BILL NO. 22
"An Act relating to the commencement of actions for felony sex trafficking and felony crimes involving child pornography or indecent materials to minors; relating to the human trafficking; relating to the crime of sexual assault; relating to the crime of referral of sexual felonies to a three-judge panel; relating to the definition of 'sexual unlawful contact; relating to forfeiture for certain crimes involving prostitution; relating felony' for sentencing and probation for conviction of certain crimes; relating to the to the time in which to commence certain prosecutions; relating to release for violation definition of "sex offense" regarding sex offender registration; relating to protective of a condition of release in connection with a crime involving domestic violence; relating orders for stalking and sexual assault and for a crime involving domestic violence; to interception of private communications for certain sex trafficking or human relating to the definition of 'victim counseling centers' for disclosure of certain trafficking offenses; relating to use of evidence of sexual conduct concerning victims of communications concerning sexual assault or domestic violence; relating to violent certain crimes; relating to procedures for granting immunity to a witness in a criminal crimes compensation; relating to certain information in retention election of judges proceeding; relating to consideration at sentencing of the effect of a crime on the victim; concerning sentencing of persons convicted of felonies; relating to remission of sentences relating to the time to make an application for credit for time served in detention in a for certain sexual felony offenders; relating to the subpoena power

of the attorney treatment program or while in other custody; relating to suspending imposition of general in cases involving the use of an Internet service account; relating to reasonable sentence for sex trafficking; relating to consecutive sentences for convictions of certain efforts in child-in-need-of-aid cases involving sexual abuse or sex offender registration; relating to mandatory reporting by athletic coaches of child abuse or neglect; making conforming amendments; amending Rules 16, 32.1(b)(1), and 32.2(a), Alaska Rules of Criminal Procedure, Rule 404(b), Alaska Rules of Evidence, and Rule 216, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD & HELD

SENATE JOINT RESOLUTION NO. 6
Urging the United States Congress not to relinquish to the office of the President of the United States the legislative duty to safeguard our most fundamental right; and urging the President of the United States to refrain from any further efforts to restrict ownership of firearms.

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 22
SHORT TITLE: CRIMES; VICTIMS; CHILD ABUSE AND NEGLECT
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/16/13	(S)	READ THE FIRST TIME - REFERRALS
01/16/13	(S)	JUD, FIN
01/30/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
01/30/13	(S)	Heard & Held
01/30/13	(S)	MINUTE(JUD)
02/04/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SJR 6
SHORT TITLE: OPPOSE EXECUTIVE ORDERS ON GUN CONTROL
SPONSOR(s): DYSON

01/25/13	(S)	READ THE FIRST TIME - REFERRALS
01/25/13	(S)	JUD
02/04/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
Criminal Division
Legal Services Section
Department of Law
Juneau, AK
POSITION STATEMENT: Provided information related to SB 22.

PEGGY BROWN, Executive Director
Alaska Network on Domestic Violence and Sexual Assault
Juneau, AK
POSITION STATEMENT: Raised questions about the electronic monitoring provisions in SB 22.

JEFFREY MITTMAN, Executive Director
ACLU of Alaska
Anchorage, AK
POSITION STATEMENT: Raised concern about several provisions in SB 22.

QUINLAN STEINER, Director
Public Defender Agency
Department of Administration
Anchorage, AK,
POSITION STATEMENT: Testified about unintended consequences of the language in SB 22.

NANCY MEADE, General Counsel
Administrative Staff
Office of the Administrative Director
Alaska Court System
Anchorage, AK
POSITION STATEMENT: Discussed the fiscal note for SB 22 and highlighted potential problems for the Court System.

ACTION NARRATIVE

1:34:13 PM
CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:34 p.m. Present at the call to order were Senators Dyson, Wielechowski, and Chair Coghill.

SB 22-CRIMES; VICTIMS; CHILD ABUSE AND NEGLECT

CHAIR COGHILL announced the consideration of SB 22.

1:35:16 PM

ANNE CARPENETI, Assistant Attorney General, Criminal Division, Department of Law, reminded the committee that she finished the sectional analysis during the previous hearing. She noted the discussion with Senator Wielechowski about Section 42 to amend Rule 404(b)(2)(i), Alaska Rules of Evidence. Sections 43 and 44 amend Rule 216(a) and (b) to reflect the change in the procedure for a witness requesting Fifth Amendment protection and the court determining whether or not to grant that immunity.

CHAIR COGHILL said he noticed a proposal for an amendment regarding a domestic violence issue and wearing a monitoring device under protective custody.

MS. CARPENETI said that amendment, which was prepared by her office, would move the matter out of the civil protective order arena and make it a condition of bail, in the discretion of the court, for cases involving crimes involving domestic violence and stalking.

CHAIR COGHILL asked if she had reviewed the language on page 2, lines 24-25 and page 3, lines 1-2 for redundancy.

MS. CARPENETI responded that the difference between the two sentences is that one addresses the defendant and the other addresses the court.

1:38:06 PM
SENATOR OLSON joined the committee.

CHAIR COGHILL referenced Section 9 and asked if she wanted to modify the language in paragraph (8) on page 6, lines 29-31.

MS. CARPENETI suggested removing the language after "class B felony" on page 6, line 30 because it was redundant.

SENATOR DYSON asked for help [understanding the difference] between the language at the bottom of page 2 and top of page 3.

MS. CARPENETI explained that the language [on page 2, lines 23-25] says that the legislature in 2013 believes that the legislature in 2006 did not intend, nor does it now, to create an additional means for a defendant convicted of sexual felony to obtain referral to a three-judge panel. The language that begins on page 3, line 1, is similar, but it talks about a court not creating additional means for a defendant convicted of a sexual felony and sentenced under AS 12.55.125(i) to obtain referral to a three-judge panel.

CHAIR COGHILL asked what the standard would be for unusual or extreme circumstances if the majority decision in *Collins* were reversed.

MS. CARPENETI said the intent of the proposed language is to return to the court's interpretation of the jurisdiction of a three-judge panel before the decision in the *Collins* case. In that decision, the sentencing court applied standards for referring sex offenders to a three-judge sentencing panel according to the same standards as the sentencing for every other defendant. That standard is if manifest injustice would result from the application of sentencing within the range that the legislature has set, then sentencing would be transferred to a three-judge panel

CHAIR COGHILL asked if a person seeking transfer to a three-judge panel would have to show a manifest injustice.

MS. CARPENETI explained that there were two ways to get to a three-judge panel. One is if the application of the aggravating and mitigating factors already in statute would lead to a sentencing result that is manifestly unjust according to the sentencing court. The other way is if the sentencing court believes there is a non-statutory mitigating factor to consider, and without that consideration the sentence would be manifestly unjust.

CHAIR COGHILL offered his understanding that in the *Collins* case the appeals court thought the case should go to a three-judge panel because it was a single offense and the prospects for rehabilitation were good. There was no mitigater.

MS. CARPENETI agreed that in the *Collins* case there wasn't a non-statutory mitigater that would apply. She explained that the sentencing court judge determined he would not send the case to a three-judge panel, because manifest justice did not result from application of a sentence within the range. The judge sentenced the defendant to 25 years with five years suspended so he would serve the lowest possible term of 20 years.

The majority decision of the Court of Appeals was that the legislative intent in 2006 was that there should be a mitigating factor that the defendant has extraordinary prospects for rehabilitation.

The *Collins* decision found that for this sex offense, since the ranges were higher than for other offenses, the legislature must have intended the court to send a sex felony case to a three-judge panel if the defendant had prospects for rehabilitation that were merely good, not extraordinary. Extraordinary potential for rehabilitation is one of the two non-statutory mitigating factors that the courts have recognized in the past.

1:44:23 PM
CHAIR COGHILL asked for assurance that including this language would not preclude somebody from having a mitigating factor; it's just that the bar would be very high.

MS. CARPENETI responded that the bar should be the same; a non-statutory mitigater of extraordinary potential for rehabilitation should be applied in the same manner for a sex felon as it is for any other felon.

1:45:49 PM
At ease

1:46:12 PM
CHAIR COGHILL reconvened the meeting and opened public testimony. He noted that Major Matt Leveque, Kathy Monfreda, Billy Houser, and Kaci Schroeder were available to answer questions.

PEGGY BROWN, Executive Director of the Alaska Network on Domestic Violence and Sexual Assault ("Network"), noted that she submitted written testimony. She thanked the executive branch and legislature for addressing the issues of domestic violence and sexual assault and the efforts to protect victim safety. She said the Network approves many of the provisions in the bill, but not GPS monitoring as a possible condition of bail or a possible condition in a civil protective order. The preference would be for post-conviction GPS monitoring. She informed the committee that all of the reports she'd read agree that GPS should never be ordered absent victim consent, yet for a variety of reasons few victims are present during a bail hearing.

MS. BROWN expressed concern that the Department of Public Safety was designated the lead agency for the electronic monitoring program, and highlighted that most states recommend the Department of Corrections as the lead agency. This would probably improve response times for domestic violence calls and enhance Section 40 of the bill.

MS. BROWN again extended her thanks to the legislature and administration and expressed confidence that everyone has the best intentions in trying to work on victim safety and accountability of respondents.

1:54:06 PM
SENATOR DYSON asked if in her letter she really meant to say that GPS monitoring eliminates the safety zones. He referenced the following paragraph of her letter:

> For GPS monitoring to work, victims must disclose these safety zones so that they can be set as zones of exclusion from which the abuser is not allowed to enter. These locations must be disclosed to the abuser in order for him to comply with this civil court order. This not only eliminates safety zones for victims but puts victims, their children and family and friends who are providing safe haven at risk.

MS. BROWN agreed it could have been said more artfully, and noted that the letter was addressed when GPS was in civil matters and it appears as though that has been alleviated.

SENATOR DYSON asked what she would say if it was a criminal case.

MS. BROWN said the discussion would be how to maintain victim safety while holding the offender accountable, but the Network is supportive if the legislature or the administration wants to try GPS monitoring.

SENATOR DYSON offered his belief that the Department of Corrections currently is responsible for electronic monitoring.

MS. BROWN agreed.

1:57:30 PM
SENATOR WIELECHOWSKI offered his belief that giving judges the discretion to order electronic monitoring could provide some benefit and protection. He asked if she was saying judges should not have that ability.

MS. BROWN said no. The point is that there are two times when a victim is in serious danger. One is when she is trying to leave the abuser, and that generally starts with a civil protective order. The second time is when she is pregnant. Research from other states has shown that GPS monitoring is not for civil

matters, because the civil protective order time is critically dangerous for the victim. The risk is too high. It's also dangerous post-conviction, but it may be less so.

SENATOR WIELECHOWSKI said he couldn't imagine that a judge would order electronic monitoring if a woman went to court and voiced opposition. He added that it just seems that it's another tool that judges could use.

MS. BROWN responded that the evidence from other states indicates that electronic monitoring early in the process is not successful. The street knowledge is that a person who is served with a protective order often reacts very negatively when ordered to wear an electronic monitoring device. "In this state, we don't want victims not to report because of something that we tried to do to help them," she warned.

CHAIR COGHILL summarized that electronic monitoring escalates the potential for a violent reaction under a civil order, but it has already escalated when there is a criminal prosecution. He said he also heard that establishing exclusion zones gives a little information about the location of the victim and that could be even more dangerous for the victim.

SENATOR DYSON asked if it was a criminal matter to violate a restraining order.

MS. BROWN replied it could be.

SENATOR DYSON asked if there were alternatives.

MS. BROWN expressed support for a pilot project to see how GPS monitoring might work in the state.

SENATOR DYSON asked if in domestic violence cases a third-party custodian is ever required pretrial or presentencing.

MS. BROWN replied some states have addressed that.

SENATOR DYSON asked if it works.

MS. BROWN replied she would have to check.

CHAIR COGHILL asked Ms. Brown if she had closing comments.

MS. BROWN thanked the committee for its due diligence on the GPS provision and expressed appreciation for many of the other

provisions. She specifically mentioned eliminating the civil and criminal statute of limitations for sex trafficking, closing the gap in the unlawful contact statute, prohibiting probation and parole officers from engaging in sexual activity with someone on probation or parole, expanding the authority of the Violent Crimes Compensation Board to include claims for compensation from victims of sex trafficking, and expanding the rape shield law.

CHAIR COGHILL said she was welcome to give additional testimony based on what she heard.

2:09:34 PM
JEFFREY MITTMAN, Executive Director, ACLU of Alaska, Anchorage, AK, said the ACLU has concern about several provisions in the bill and would submit written testimony with detailed case cites and analyses. He specifically mentioned three examples to illustrate areas of concern. First, the provision (Sections 2 and 9) to eliminate the statute of limitations for bringing a civil suit for victims of felony sex trafficking and felony human trafficking has constitutional and civil rights implications for age majority victims. Second, the ACLU continues to have concerns with expanding the ability of the attorney general's office to issue administrative subpoenas. (Sections 32-35) This diminishes the court's ability to control warrants, increases executive department authority, and chips away at constitutional protections against unreasonable search and seizures. Third, the ACLU has continuing concerns with regard to the sex trafficking law generally, and is hoping to work on language changes with Senator Coghill's office.

MR. MITTMAN expressed support for the provisions (Sections 3-6) that recognize that probation officers and other employees can be liable for sex assault. In conclusion, he reiterated his preference to submit written testimony and meet with staff to raise specific concerns rather than trying to cover everything in the allotted time today.

CHAIR COGHILL said he looked forward to hearing his more pointed comments when he came to town.

2:12:38 PM
QUINLAN STEINER, Director and Public Defender, Public Defender Agency, Department of Administration, Anchorage, AK, said his comments would center on the unintended consequences of some of the language in the bill.

He said Sections 1, 20, and 21 were intended to overrule *Collins*, but the specific language could potentially do more and result in the exclusion of certain typical factors that are considered when evaluating whether manifest injustice will result. He pointed out that the language in Section 20 says certain factors such as youthfulness and no prior record cannot be considered "singly or in combination," but they often are considered along with other things. What the *Collins* decision did was lower the standard for getting referral in those cases where rehabilitation is merely ordinary rather than extraordinary and manifest injustice might result. He opined that it would be simple to fix if that was not the intent of the legislature.

CHAIR COGHILL asked the page and line.

MR. STEINER pointed to Section 20, page 10, line 29 through page 11, line 3. He said that could be read to mean that none of the factors could be used in combination with any other factors to draw the conclusion that somebody has extraordinary prospects for rehabilitation, and that sentencing within the presumptive range would be manifestly unjust. That's not what *Collins* does; it requires referral when those factors are present and there is less than extraordinary prospects for rehabilitation. The language in SB 22 goes further than overruling *Collins*, it' more restrictive. It would be simple enough to overrule *Collins* without creating these unintended effects, he said.

CHAIR COGHILL questioned why he believes that "singly or in combination" creates a higher standard.

MR. STEINER explained that it creates a higher burden than existed before. It says those factors cannot be considered alone or in combination with any other factors and that could be read to mean that someone being a youthful offender could not be considered with all the other circumstances of the case in determining whether referral is appropriate, even though you might want the standard to remain that the person has extraordinary prospects for rehabilitation and sentencing would be manifestly unjust. It could potentially be read as isolating that as something that could never be considered in referral. That isn't what existed before *Collins*.

Before *Collins,* the factor of being a youthful offender could be considered in the circumstances of the case, but the conclusion still must be that sentencing within the range must be manifestly unjust. *Collins* just makes it easier to get a

referral, it doesn't change that outcome. Read that way it would be more restrictive than pre-*Collins.*

CHAIR COGHILL said the committee would consider that.

MR. STEINER added that *Collins* essentially lowered the bar to get the referral. The proposed language both raises the bar and excludes certain factors from consideration. He reiterated that *Collins* could be overruled and the bar raised for getting a referral without creating the possible elimination of the factors for consideration. He offered to follow up with further explanation.

2:18:45 PM
CHAIR COGHILL stated that this discussion was not finished.

MR. STEINER expressed concern with the unintended consequences of Sections 3-6. These provisions would make it a sex felony for a parole or probation officer to have sexual contact with a spouse or partner if the spouse or partner was on probation or parole. The intention probably was to deal with the situation where a parole or probation officer had influence or used their position to induce somebody's conduct.

CHAIR COGHILL asked about the wisdom of inserting the exception.

MR. STEINER responded that a problem like that could be addressed by putting in exceptions or inserting language about using a position of authority.

He said that Section 7 was unclear that the no contact has to stem from a court order. It could potentially be read to mean a comment from a parole officer. He suggested that it would be an easy drafting fix to ensure that the intention was that the order flow from a court order.

He highlighted the unintended consequences of the GPS sections of the bill. If the court were to order GPS monitoring in a civil case when the person was out of custody, there was no remedy in the event that the person failed to comply. There was also a drafting problem with respect to the sexual assault protective orders. They could be ordered in ex parte situations and the respondent could potentially be in violation without any opportunity to respond.

CHAIR COGHILL asked if he was talking about the civil protective order and the questions it raises under civil monitoring.

MR. STEINER answered yes.

He said Section 13 has two unintended consequences. He explained that in a defense case it is generally the best practice to seek pretrial application, but sometimes it's a strategic decision not to admit the evidence. This provision will encourage holding those hearings regardless of the trial strategy and may needlessly increase the number of filings. The second unintended consequence is that the bar on admissibility is so strict it may potentially have constitutional issues. He opined that subtle rewording could take care of that unintended consequence.

CHAIR COGHILL asked if the five-day limit was a logistical problem, not the principle problem.

MR. STEINER responded that the five days isn't the problem; the issue is what happens when evidence is made known after that deadline has lapsed. The compulsory language [on page 8, lines 17-18] would presumably create a bar to admitting evidence that is legally relevant. It's potentially a constitutional problem if the court doesn't relax the rule and admit the evidence. He said that subtle language change could address the problem.

CHAIR COGHILL asked if he had looked at the scope of what could be subject to forfeit under Section 8, because it appeared to be fairly broad.

MR. STEINER agreed, because the term "facilitate" could mean a lot of different things. He noted the example of somebody using their home or car and said that on the face of the statute those would clearly be implicated. The phrase "shall be forfeited" doesn't leave much discretion should the state apply, he said.

CHAIR COGHILL commented that he put a question by that provision and the new statutory reference made it a much larger question.

MR. STEINER said the language in Section 14 requiring the court to conduct a direct personal inquiry of a witness deserves some attention because Alaska has transactional immunity on testimony. The language in this statute says the privileged testimony is not admissible for any other purpose after the witness provides it, but that language may not be sufficient protection. The reason is that sealed testimony doesn't necessarily stay sealed and while it might not be admissible for a purpose, it could get out and be used for another purpose. This could create transactional immunity by accident. The client

potentially may have a right to speak through his attorney rather than putting testimony on the record about their criminal exposure. That may create a constitutional concern.

CHAIR COGHILL asked if the constitutional question centered on the principle of attorney client privilege or the Fifth Amendment privilege.

MR. STEINER replied it would be the Fifth Amendment privilege.

CHAIR COGHILL observed that security of information is a big deal in that section.

MR. STEINER agreed. He added that the current practice is for the attorney to give a proffer outlining what the witness will say if ordered to testify. The court can use that proffer and the circumstances of that situation to determine whether there is criminal liability exposure.

Sections 16-17 require a defendant to make application 10 days before a disposition hearing in order to claim credit for time spent in a treatment program. This is sometimes referred to as Nygren credit. He said his concern is one of practical application. This would create more work up front and potentially slow the process. He said these cases can move very fast and are sometimes resolved by negotiation and plea at disposition without any discussion of Nygren credit. In discussions with DOL, he recommended a better practice would be to dispose of the case and worry about the Nygren issue within 60 or 90 days.

CHAIR COGHILL asked if justice wouldn't be better served if the court knew the value of the Nygren credit ahead of time.

MR. STEINER agreed that more information is always helpful to the court, but the practical concern is whether it is possible to collect that information before disposition, because of the extra work upfront.

CHAIR COGHILL offered his understanding that the defendant would be responsible for making that information available.

MR. STEINER said yes, but it would implicate a number of agencies in trying to collect the information early.

CHAIR COGHILL asked Mr. Steiner to submit written comments with the issues identified by section and continue his testimony another time.

MR. STEINER agreed.

2:36:32 PM
NANCY MEADE, General Counsel, Administrative Staff, Office of the Administrative Director, Alaska Court System, Anchorage, AK, said she wanted to comment on the record about the provisions regarding domestic violence, extensions of statutes of limitations, and creating new crimes, because they all may have some impact on the court's caseload. Extending statutes of limitations and expanding the definitions of crimes are aimed to increase filings. There isn't an estimate of how many more that would be, but the assumption is that those won't result in a substantial impact.

She explained that the $20,000 fiscal note goes to Section 30, which would have the Judicial Council put out information about how well judges are following statutory requirements to consider certain victim information at sentencing hearings. At this point, it isn't clear what mechanism the council would use to collect good data. A provisional decision is to have judges provide the information on the judgment forms so it could be entered it into the case management system, which is called CourtView. The data about how well judges are doing in this regard would be sent to the Judicial Council and published every six years. The fiscal note reflects the potential modification to CourtView.

She added that this provision could be problematic to the Court System as a whole because there is a danger that the information about judges wouldn't be accurate. There's a strong sense among judges that victims at sentencings are always able to speak if they are present so in addition to this being mechanically difficult for the Judicial Council, there's a question as to how necessary it is. She reiterated that she wanted it on the record that it would possibly be difficult for the court to help the Judicial Council comply.

2:40:29 PM
SENATOR WIELECHOWSKI questioned who was responsible right now for compiling the potentially invasive information on a victim under AS 12.55.025(a)(5).

MS. MEADE replied the Department of Corrections (DOC) collects the information for the presentence report. That report is required to include a victim impact statement and the judge uses that information at sentencing. She said she wasn't sure how detailed the report might be regarding the financial and medical impact on the victim.

SENATOR WIELECHOWSKI assumed that the judge would be excused from using the data if the person declined to provide the information. He asked if she read it that way.

MS. MEADE replied she wasn't sure how to read it because that sort of data isn't precise. She supposed that the court could be considered compliant if the judge said he or she considered the statute. However, what the judge is supposed to do depends on the great variety of what victims want.

SENATOR WIELECHOWSKI said he could see the problems that might arise.

CHAIR COGHILL commented on the balance between protection in court and protection from the court. He asked Ms. Carpeneti if she had any closing comments.

2:44:36 PM
MS. CARPENETI said the comments were thoughtful and she had been discussing the bill with Mr. Steiner. His comments always make the bill better.

CHAIR COGHILL stated his intention to continue the discussion.

2:46:47 PM
CHAIR COGHILL announced he would hold SB 22 in committee.

SJR 6-OPPOSE EXECUTIVE ORDERS ON GUN CONTROL

2:46:53 PM
CHAIR COGHILL announced the consideration of SJR 6 and stated his intention to hold the bill.

SENATOR DYSON, sponsor of SJR 6, stated that the school shooting at Newtown, Connecticut was a tragedy and unfortunate, but following the usual pattern of overreacting was also unfortunate. He offered his belief that the 23 executive actions that President Obama subsequently issued were unconstitutional. He said that SJR 6 informs the Alaska delegation and other relevant officers in the U.S. Congress that the Alaska

Legislature considers those actions an unconstitutional and ill-advised intrusion on the state's authority.

CHAIR COGHILL summarized that the resolution fundamentally challenges the authority of the executive actions in limiting firearms.

2:49:23 PM
CHAIR COGHILL found no questions and stated that he would hold SJR 6 in committee and take public testimony on Friday.

2:51:14 PM
There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 2:51 p.m.