ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 18, 2013
1:31 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

CONFIRMATION HEARING

Select Committee on Legislative Ethics
Gary J. Turner

- CONFIRMATION ADVANCED

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 AND 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)
02/04/13	(S)	Heard & Held
02/04/13	(S)	MINUTE(JUD)
02/11/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/11/13	(S)	Heard & Held
02/11/13	(S)	MINUTE(JUD)
02/15/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/15/13	(S)	Heard & Held
02/15/13	(S)	MINUTE(JUD)
02/18/13	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
Criminal Division
Legal Services Section
Department of Law (DOL)
Juneau, AK
POSITION STATEMENT: Presented a sectional analysis for Version U of SB 22.

QUINLAN STEINER, Public Defender
Office of the Public Defender
Department of Administration (DOA)
Anchorage, AK
POSITION STATEMENT: Commented on SB 22, Version U.

GARY J. TURNER, Appointee
Select Committee on Legislative Ethics
Soldotna, AK
POSITION STATEMENT: Testified as appointee in confirmation hearing.

ACTION NARRATIVE

1:31:23 PM
CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present at the call to order were Senators Dyson, Olson, and Chair Coghill.

SB 22-CRIMES; VICTIMS; CHILD ABUSE AND NEGLECT

1:31:35 PM
CHAIR COGHILL announced the consideration of SB 22 and noted that CSSB 22, Version U, was before the committee. He informed members that the packets contained the questions and concerns from the ACLU of Alaska and the comments by the drafter.

1:32:13 PM
ANNE CARPENETI, Assistant Attorney General, Criminal Division, Legal Services Section, Department of Law (DOL), said the CS reflects the discussions that took place with the committee and the public defender. She reported that the Alaska Supreme Court recently accepted DOL's petition for review of the *Collins* case, which is addressed in Sections 1, 21, and 22. Because it is not unusual for a year to pass before a case is decided, it is DOL's judgment that it is still a good idea to keep these sections in the bill.

SENATOR DYSON asked if the controversy had to do with whether the law followed the legislative intent and if the court interpreted it correctly.

MS. CARPENETI said yes, the issue is whether the court of appeals correctly interpreted the legislative intent in 2006.

SENATOR DYSON asked if she agreed that the administration's bill makes a strong assumption of what the legislative intent was in 2006.

MS. CARPENETI said that was her belief.

SENATOR DYSON asked how this legislature could weigh in on what it believes the legislative intent was in 2006.

MS. CARPENETI explained that the approach this bill takes is to adopt a statement of legislative intent and findings saying that this legislature believes that the court of appeals misinterpreted the intent of the legislature in 2006. The bill also specifically excludes consideration of the two mitigating factors that the court of appeals adopted when it rendered that decision.

Section 2 removes the statute of limitations for a victim of felony sex trafficking or felony human trafficking to bring a cause of action for civil damages. Ms. Carpeneti relayed that the Department of Law's response to Mr. Mittman's comments in this area would be that there are other crimes for which there is no statute of limitations - felony sexual abuse of a minor, felony sexual assault, and unlawful exploitation of a minor. The victims of these crimes and the crimes of sex trafficking and human trafficking are in a similar, less powerful position in relation to the offender.

1:36:29 PM
SENATOR DYSON questioned why a defendant who has paid the criminal penalty should spend the rest of his life worrying that the victim may file a civil action.

MS. CARPENETI said that victims of sex trafficking, like victims of sex abuse of a minor, have been in an incredibly powerless position compared to the defendant and may need time to make a decision about bringing a civil suit. She pointed out that it won't be any easier to bring a law suit 10 or more years later, whether it's criminal or civil. The point of removing the

statute of limitations is that when the evidence is still available, there is no good reason for limiting a victim's ability to get reparation from a defendant who caused the victim significant harm.

SENATOR DYSON asked why a successful prosecutor wouldn't ask the judge to order restitution at trial.

MS. CARPENETI said that's what happens, but it doesn't necessarily mean that the order of restitution will be fulfilled.

SENATOR DYSON asked if the judge wouldn't order the restitution to continue until it was fulfilled.

MS. CARPENETI responded that the law wouldn't allow a victim to collect restitution and also receive damages for the same injury. She reiterated that this simply leaves open the possibility for this kind of law suit. She offered to look for data on how often victims of sexual abuse of a minor or sexual assault bring cases after the criminal case is finished. If there was proof and it was a valid cause of action, it would be a shame to have it cut off by the statute of limitations.

1:41:31 PM
CHAIR COGHILL asked what a person would have to prove in this circumstance to get a court hearing.

MS. CARPENETI said the burden of proof in a civil case is by a preponderance of the evidence, but she would defer further explanation to someone from the Civil Division.

SENATOR DYSON asked her to entertain the idea of putting some sidebars on the provision.

MS. CARPENETI clarified that the victim has to show how he or she was harmed and the damages that were suffered.

SENATOR DYSON indicated that he'd like to hear from someone from the Civil Division.

1:43:52 PM
MS. CARPENETI continued the sectional analysis of Version U. Section 3 is unchanged. It prohibits sexual penetration between a probation or parole officer and a person on probation or parole. It also prohibits sexual penetration between a juvenile

probation officer or a juvenile facility staff and a person either on juvenile probation or in the facility.

SENATOR DYSON suggested that it should apply when a probation or parole officer is supervising a person on probation or parole.

MS. CARPENETI responded that the justification is the same as for correctional officers and police officers; the power of the office itself is the concern.

SENATOR DYSON asked if it would apply to a teacher.

MS. CARPENETI said she believes so; a teacher has power over a student.

SENATOR DYSON asked about a counselor.

MS. CARPENETI said it would be appropriate as long as the counselor or teacher knew that the child was a student in the school it would be appropriate to prohibit penetration and contact.

SENATOR DYSON opined that there was something wrong with that logic.

1:47:22 PM
SENATOR WIELECHOWSKI said he agreed with the intent, but this unintentionally criminalizes other relationships. He asked if the prohibition should extend to supervisors of probation or parole officers.

MS. CARPENETI responded that the bill talks about probation and parole officers, but there could be coercion in the situation of a supervisor of a probation officer just by the office.

SENATOR WIELECHOWSKI reiterated his belief that the provision criminalizes relationships and maintained that it was bad public policy and probably unconstitutional.

1:49:04 PM
MS. CARPENETI pointed out that there is a culpable mental state on the defendant's part, he or she has to be reckless as to whether the person is on probation.

SENATOR DYSON asked if a parole officer could have sexual relations with his wife if she is on parole and under the supervision of another parole officer.

MS. CARPENETI said no; there is a marriage defense in current statute that would apply to penetration and Version U adds a marriage defense to fourth degree sexual assault for contact.

SENATOR DYSON asked if the marriage defense applies to people in long-term, committed relationships.

MS. CARPENETI said no, but she had an amendment that would address a preexisting relationship.

CHAIR COGHILL noted that Mr. Steiner was available to answer questions. He asked Ms. Carpeneti to continue the sectional analysis.

MS. CARPENETI said Section 4, the definition section for probation and parole officers, is unchanged.

SENATOR DYSON observed that Section 4 creates a different statute of limitations for parole and probation officers compared to DHSS employees or police and correctional officers.

MS. CARPENETI clarified that it was a definitional section that applied to sexual assault in the third and fourth degree. The definition for "peace officer" is the same as in existing law and the definition for "probation officer" is the same as the definition in Title 33. It is a person appointed by the commissioner of corrections and includes probation officers in specialty courts. She noted that this issue arose last summer when a probation officer at a therapeutic court in Anchorage was having sexual relations with someone on probation.

SENATOR DYSON indicated that he would return to the topic later.

1:53:00 PM
CHAIR COGHILL asked if the reference to "18 or 19 years of age" is specific to a juvenile facility.

MS. CARPENETI explained that people who are age 18 or 19 would still be under juvenile probation or are in juvenile facilities. A different and more serious statute would apply to the prosecution of a person if the child were under age 18.

Section 5 is unchanged from the original bill. It prohibits sexual contact between a probation or parole officer and a person on probation or parole. The prohibition also applies to

juvenile facilities. The marriage defense would apply as would the affirmative defense of a preexisting relationship.

Section 6 is unchanged from the original bill. [It is the definitional section for "juvenile facility staff," "juvenile probation officer," "parole officer," "peace officer," and "probation officer."]

Section 7 adds sexual assault in the fourth degree to the defenses that are currently available to sexual assault in the third degree. She noted that this currently applies to police officers and correctional officers.

Section [8] clarifies that it is the court that orders a person not to contact a victim or witness as a condition of sentence, bail release, or while the person is under official detention; and it is the parole board that orders a person on parole not to contact a victim or witness.

Section 9 amends [Section 8] of the original bill. At the suggestion of this committee, it leaves forfeiture discretionary with the court and requires the defendant to be convicted.

1:55:49 PM
SENATOR DYSON raised the question of equal protection. "Why are we seizing property from the john and not the hooker," he asked.

MS. CARPENETI said that the rational is that patrons of prostitutes are generally in a position to have property and they make the crime happen according to their power. A prostitute is generally controlled by somebody else and whatever property she has isn't necessarily hers to be seized.

SENATOR DYSON declared that the law absolutely should not speak to the money a person has or does not have and also treat them differently.

MS. CARPENETI responded that the administration would certainly entertain making this apply to all people convicted of prostitution.

1:58:02 PM
SENATOR WIELECHOWSKI asked what the standard is for equal protection differences among gender.

MS. CARPENETI offered her understanding that gender differences are the highest scrutiny.

SENATOR WIELECHOWSKI suggested she return with a list of the strong reasons for doing this. He recalled it was the intermediate standard.

MS. CARPENETI agreed to follow up.

CHAIR COGHILL asked - pertaining to forfeiture - how to distinguish between those trafficking on their own for profit and those who are being trafficked.

MS. CARPENETI explained that a person who is on his or her own and acting as a prostitute is not considered a sex trafficker; he or she is considered a prostitute and is prosecuted under AS 11.66.100. Sex traffickers force other people to submit to prostitution, and they are prosecuted under AS 11.66.110 - AS 11.66.135.

CHAIR COGHILL asked if there was a way under the forfeiture law to get at the person who is driving the prostitution.

MS. CARPENETI explained that under current law the person who does the trafficking could have their property forfeited.

CHAIR COGHILL observed that a prostitute working on his or her own would be the only one who does not fall under the forfeiture law.

MS. CARPENETI agreed, under the current drafting.

2:00:27 PM
SENATOR WIELECHOWSKI said his concern centered on women who are forced into prostitution or are put in situations where they have little choice other than prostitution. It was not his intent to criminalize that behavior or to seize what little assets they may have. He added that he had no problem applying the forfeiture statute to a woman who was running a call girl center.

MS. CARPENETI responded that there was progress toward that goal by making the forfeiture discretionary, and the court wouldn't do it without the prosecution asking.

2:01:48 PM
Section 10 removes the statute of limitations for criminal prosecution of distribution of child pornography, felony sex

trafficking (unclassified, class A or class B felonies), and human trafficking (class A or class B felonies).

CHAIR COGHILL asked why the statute of limitations for prosecution for the distribution of child pornography was included with kidnapping or murder.

MS. CARPENETI responded that a person who distributes child pornography does something that will victimize that child for the rest of his or her life. For that reason, DOL wants the ability to prosecute that offender any time the victim comes forward provided the evidence is still available and the prosecution can prove the case beyond a reasonable doubt.

SENATOR DYSON asked if the prosecution would have to know the victim.

MS. CARPENETI answered no, just that the victim was a child.

SENATOR DYSON asked how the prosecution would determine that the victim was a child if his or her identity wasn't known.

MS. CARPENETI said the prosecutor would have to evaluate the case and look at the pictures to try to determine the victim's age. Sometimes there is no question that the victim is a child and sometimes it's too close to tell, so the person probably wouldn't be prosecuted in that circumstance. However, when it is clear that the victim is a child and the evidence is available, it would be a shame not to be able to prosecute the person even after the general 10-year statute of limitations.

2:05:01 PM
CHAIR COGHILL asked what the standard of proof would be in these cases.

MS. CARPENETI answered that the burden of proof in criminal prosecution is beyond a reasonable doubt.

CHAIR COGHILL asked why, in paragraph (8) relating to sex trafficking in violation of AS 11.66.110 - 11.66.130, the victim is under 20 years of age.

MS. CARPENETI explained that last year when the legislature raised the penalties for sex trafficking to an unclassified felony, the testimony persuaded legislators that an 18 or 19-year-old girl or boy deserved the highest level of protection

for this crime, so they raised the age limit to under 20 years of age. Previously it was under 18 years of age.

SENATOR DYSON commented that that was problematic.

MS. CARPENETI said it was included here because of the change the legislature made, but it was certainly open for discussion.

She explained that Sections 11 and 12 move electronic monitoring by a global positioning system (GPS) device from the civil protective order arena to the bail statute. These sections give the court the discretion, in releasing on bail a person in connection with a crime involving domestic violence or stalking, to require GPS tracking of the defendant according to guidelines adopted by the Department of Corrections (DOC) in consultation with the Department of Public Safety (DPS).

CHAIR COGHILL noted that this was permissive.

MS. CARPENETI agreed, and added that the judge considers the safety of the victim, the victim's family, and the community and then sets standards that are reasonable under the circumstances.

SENATOR WIELECHOWSKI asked if the guidelines currently require active or passive.

MS. CARPENETI said DOC has not adopted guidelines, but her understanding was that it probably would be active monitoring.

SENATOR WIELECHOWSKI said he would only recommend active monitoring if the purpose was to protect people from stalking.

MS. CARPENETI said Section 13 requires a person arrested for a violation of a condition of release in connection with a domestic violence crime to appear in person or by telephone in front of a court before that person can be released from custody.

Section 14 authorizes the attorney general to make written application to a court for a warrant to do a wiretapping investigation for potential sex trafficking in the first or second degree, or human trafficking in the first degree.

2:10:12 PM
SENATOR DYSON commented on the balance between protecting public safety and over-criminalizing behavior, and the issue of privacy. He noted that this section authorizes the attorney

general to intercept telephone calls without first obtaining a warrant.

MS. CARPENETI clarified that to place a wiretap a warrant from the court is required.

SENATOR DYSON asked if in the past it was possible to get a wiretap on a pimp or sex trafficker.

MS. CARPENETI said no; only those crimes listed in [AS 12.37.010] are available for the attorney general to make a request for a wiretap.

SENATOR DYSON asked if a police officer could get a warrant.

MS. CARPENETI replied that a police officer could get a Glass warrant, but not for wiretapping.

Section 15 expands the rape shield law to apply to sexual conduct by the complaining witness to both before and after the alleged crime. It would require a defendant to request permission to use this evidence five days before a trial, unless the information was learned after the deadline occurred.

SENATOR WIELECHOWSKI voiced concern that the requirement to apply five days before trial clashes with a defendant's constitutional rights. If an attorney makes a mistake and makes the request four days before trial, the client will be punished and will not be able to introduce that evidence.

MS. CARPENETI opined that the judge would use his or her discretion in considering the request.

SENATOR WIELECHOWSKI pointed out that the language says, "the defendant shall apply for an order of the court five days before trial." There is no good cause language and judge has no discretion, which causes the constitutional problems.

MS. CARPENETI said the idea is to encourage both the prosecution and defense to raise the issue early so that a complaining witness knows the parameters of the evidence that will be introduced. This benefits all parties.

CHAIR COGHILL noted that one concern is whether this creates another procedural hurdle for the defendant.

MS. CARPENETI suggested the committee ask the public defender if this answers his concerns, because it came at his suggestion.

2:15:56 PM
QUINLAN STEINER, Public Defender, Office of the Public Defender, Department of Administration (DOA), acknowledged that he suggested the current language, and agreed that adding good cause language would help safeguard against due process violations.

CHAIR COGHILL asked if the five-day language could be deleted if good cause language were added.

MR. STEINER said that including both the five-day requirement and the good cause language would push defense lawyers into making a timely application and the good cause language would allow them to argue that they had made a mistake in not filing ahead of time.

2:18:00 PM
MS. CARPENETI said Sections 16 and 17 require the court to personally interview a witness who is claiming a Fifth Amendment privilege not to testify. The court must then make written findings of fact and conclusions of law in a sealed order.

CHAIR COGHILL noted that legislative legal highlighted a potential Fifth Amendment issue.

MS. CARPENETI explained that current law says that the information proffered from that closed hearing is inadmissible and privileged. It cannot be used for any other purpose.

CHAIR COGHILL offered his understanding that the bill requires the witness to talk directly to the judge; the information isn't proffered.

MS. CARPENETI agreed and explained the reasoning for the proposed change is that when the attorney proffers the information and the witness doesn't speak or even appear it's not possible for the court to evaluate the credibility of that witness.

2:20:13 PM
SENATOR WIELECHOWSKI asked if this would apply only when a witness is seeking immunity or in other situations where a witness is invoking their Fifth Amendment rights.

MS. CARPENETI replied that it applies to a witness who is invoking their Fifth Amendment right not to testify and if the court finds that they do have a Fifth Amendment privilege, the state would have to give immunity to that person in order for them to testify. Alaska has transactional immunity, which means that the person granted immunity could not be prosecuted for what they say even if the information might be available from another source.

SENATOR WIELECHOWSKI asked if any Alaska courts had agreed to this, because requiring a person to testify in front of a judge when they've claimed a Fifth Amendment privilege changes a bedrock constitutional right.

MS. CARPENETI said she believes that a court that is talking to a witness could ask questions that do not require a person to say they committed a particular crime. In this setting, the court is trying to evaluate the credibility of both the witness and the proffer offered by their attorney, and that is very difficult if the court can't talk to that witness. Sometimes the witness doesn't even appear at these proceedings.

SENATOR WIELECHOWSKI reiterated that this was a dramatic change of Alaskans' constitutional rights not testify against themselves. That is the philosophical underpinning of the Fifth Amendment. However, this provision changes that right and says that a person has to testify to a judge and then possibly before an entire court if their Version of the facts if found not credible.

MS. CARPENETI clarified that this pertains to a witness who is asking for immunity not to testify in a prosecution against another person. She agreed that it would raise a challenge, but it was an effort to find a way that is both constitutional and fair that gives a judge as much information as possible to make a reasonable determination about the credibility of the witness. Section 17 provides the state the ability to bring an interlocutory appeal that decision to the court of appeals.

She offered to work on language that may raise less constitutional concern before reminding members that only the judge, the attorney for the witness, and possibly the court of appeals sees or hears the witness's information.

2:26:03 PM
SENATOR WIELECHOWSKI pointed out that if the judge finds the witness not credible, he or she would be forced to testify in a

case that could potentially lead to the witness going to jail. He posed a hypothetical example to illustrate the concern that it's the judge that determines a witness's credibility and whether or not they get to exercise their constitutional rights.

MS. CARPENETI clarified that it's whether the person gets to exercise their constitutional rights and then get immunity for it. The person could not be forced to testify otherwise.

SENATOR WIELECHOWSKI asked if she was saying that if this were to become law that the state could not force the witness to testify before a jury.

MS. CARPENETI confirmed that the state can't force people to talk.

SENATOR WIELECHOWSKI asked if this provision would apply only when a witness seeks immunity.

MS. CARPENETI said yes.

SENATOR WIELECHOWSKI said this person seeks immunity and then the judge tries to decide whether the person is eligible or not.

MS. CARPENETI said yes.

SENATOR WIELECHOWSKI asked if under current law the prosecutor decides whether to grant immunity to a person.

MS. CARPENETI explained that the prosecutor who evaluates these issues makes a decision about granting immunity based on limited information from the court about whether it's a low-level felony, a high-level felony, or a misdemeanor. If the prosecutor grants immunity, the witness would testify and be immune from any prosecution based on what he or she said. If the state decided against granting immunity, the witness would be unavailable and would not have to testify.

2:28:58 PM
SENATOR WIELECHOWSKI asked for confirmation that the state would not be able to compel somebody to testify.

MS. CARPENETI agreed and reiterated that the prosecution wants the witness to appear in person so that the judge can evaluate his or her credibility.

SENATOR WIELECHOWSKI asked if the witness would appear before the judge after the prosecutor has granted immunity.

MS. CARPENETI answered that the witness would appear before the grant of immunity, unless the prosecution has already decided that it's fair to grant immunity without a hearing.

SENATOR WIELECHOWSKI asked if the prosecution brings a person before a judge to see whether that person should receive a grant of immunity.

MS. CARPENETI clarified that the prosecution doesn't bring anyone in; the witness claims a Fifth Amendment privilege and that person and their attorney goes in camera in front of the court.

SENATOR WIELECHOWSKI posed the hypothetical situation that the prosecution wants a witness to a crime who is potentially an accomplice to testify in that case. The witness claims his or her Fifth Amendment privilege and declines to testify. He asked if she was saying that the witness could not be forced to appear before a judge who would administer an oath and make a determination about the Fifth Amendment claim.

2:30:56 PM
MS. CARPENETI replied that it would depend on the circumstances, but if the person claimed a Fifth Amendment right to not testify in the case, the judge would probably sua sponte appoint an attorney and set up a hearing.

SENATOR WIELECHOWSKI asked if the procedure under current law is that the prosecution would subpoena the witness to testify and when on the stand and under oath that witness would claim their Fifth Amendment right and refuse to testify. With this proposed change, the witness could be forced to appear before a judge who would decide whether he has a Fifth Amendment right not to testify.

MS. CARPENETI disagreed; this pertains to a situation where a person does not want to testify and makes a Fifth Amendment claim. The judge schedules a hearing in camera and appoints an attorney to represent the witness. The prosecution does not call the witness to the hearing.

SENATOR WIELECHOWSKI asked if under current law the person would refuse to testify claiming their Fifth Amendment right while on

the stand, but under this bill the person would be required to testify in the judge's chambers.

MS. CARPENETI clarified that this procedure is already under current law. The bill only requires the person claiming the Fifth Amendment privilege to appear in person at the hearing to answer questions so the judge can evaluate their credibility.

2:32:43 PM
CHAIR COGHILL set SB 22 aside until later in the hearing.

CONFIRMATION HEARING
Select Committee on Legislative Ethics

2:33:28 PM
CHAIR COGHILL announced the next order of business would be a confirmation hearing to reappoint Gary J. Turner to the Select Committee on Legislative Ethics.

GARY J. TURNER, appointee, Select Committee on Legislative Ethics, said he was the director of the Kenai Peninsula College and had served on the ethics committee for six years.

CHAIR COGHILL asked if he had anything to share about his experience serving on the ethics committee.

MR. TURNER relayed that he enjoyed serving on the committee and particularly appreciated what Joyce Anderson had done to educate Alaskans about the work the committee does.

CHAIR COGHILL noted that he served on the committee with Mr. Turner and they had many robust conversations. Finding no questions, he asked for a motion.

2:35:53 PM
SENATOR DYSON moved to forward the name Gary J. Turner to the full body for consideration.

CHAIR COGHILL reminded members that signing the report in no way reflects any intent to vote for or against the appointee. Finding no objection, he announced that the name Gary J. Turner would be forwarded to the full body for consideration.

SB 22-CRIMES; VICTIMS; CHILD ABUSE AND NEGLECT

2:37:11 PM

CHAIR COGHILL returned attention to SB 22 and asked Mr. Steiner if he had any comments on Sections 1-16.

MR. STEINER said his first concern relates to the structure of the defense in Sections 3-7 which deals with probation and parole officers in fourth degree sexual assault. The problem is that the marriage exception does not accommodate long-term relationships or gay couples who are prohibited from marrying, which opens it to a constitutional challenge. He suggested that narrowly focusing on the specific conduct of a parole officer who is using his or her position of authority to coerce somebody would eliminate the need for exceptions and avoid the potential of unintentionally criminalizing certain behavior.

2:41:17 PM
MR. STEINER said he suggested the language in Section 15, which requires a defense lawyer to seek permission to introduce certain evidence five days before trial, but also including good cause language would ensure against due process violations that would hurt the defendant through no fault of their own. Responding to a request for further clarification, he said it would mitigate potential harm to the defendant if it said the defense could apply for an order during trial if the request is based on information learned after the deadline, during the trial, or for other good cause.

MR. STEINER said his concern with Section 16 centers on the statement on page 10, lines 5-6. It says that the proffer in the testimony of the witness is privileged and inadmissible for any other purpose, but it doesn't say how that information should be handled. If for whatever reason the court unsealed that in camera hearing and the information got out it could unintentionally create transactional immunity for that person. What's discussed is the need to have the person testify before a judge to determine credibility, but what's at stake is what the person would testify to.

2:44:57 PM
SENATOR WIELECHOWSKI asked for an explanation of the current procedure and how the bill would change it.

MR. STEINER explained that if the state calls a witness to testify and the person asserts a Fifth Amendment privilege, the state can seek an order from the court ordering that person to testify. If the state seeks that order, a hearing is held to determine the validity of the privilege. If the court determines

the privilege is valid, it rests upon the state to make a determination of whether or not to grant immunity.

SENATOR WIELECHOWSKI offered his understanding that the witness who is seeking the privilege can't be compelled to testify, but the bill would compel the witness to provide testimony in an in camera interview.

MR. STEINER said the current procedure is to have a proffer by the person's attorney regarding the substance of the testimony, and there is often argument about how that might implicate somebody in a crime. The witness currently does not provide testimony to the judge in camera.

SENATOR WIELECHOWSKI described Section 16 as a fairly dramatic change in the treatment of Fifth Amendment issues because it virtually forces a person to testify, albeit in camera.

MR. STEINER agreed that was what it would do.

SENATOR WIELECHOWSKI commented that it was a big change.

CHAIR COGHILL asked Ms. Carpeneti to continue the sectional review of Version U.

2:49:13 PM
MS. CARPENETI said Section 17 allows the state to bring an interlocutory appeal of the court's decision that the witness has a valid claim of privilege to the court of appeals.

Section 18 requires a defendant who claims credit for time spent in a treatment program as a condition of bail to file written notice 10 days before the sentencing hearing on that offense. The notice must include the number of days the person is claiming. A court may not consider a request for credit that is made more than 90 days after the deadline except for good cause.

She explained that the intent is to avoid the situation of having to litigate the issue years after the treatment ended.

CHAIR COGHILL stated that the 10 days before and 90 days after are hard boundaries unless there is good cause.

MS. CARPENETI said the public defender suggested adding a provision to address the situation where a person may be in treatment while pending appeal. Paragraph (l) in Section 18 addresses this situation and requires the defendant to request

credit for the time spent in a treatment program pending appeal within 90 days after the case is returned to the trial court following appeal. She suggested inserting a good cause exception in this provision as well.

CHAIR COGHILL asked if the good cause language would fall on page 11, line 7.

MS. CARPENETI said she wasn't sure where is should appear in the section.

Section 19 requires a defendant claiming credit for time spent in a treatment program as a condition of probation or a condition of bail in connection with a petition to revoke probation to file notice of the request 10 days before the disposition hearing on the petition. The notice must include the number of requested days of credit. A court may not consider a request for credit made more than 90 days after the deadline except for good cause.

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Section 20 provides that a person convicted of a sex trafficking crime is ineligible for a suspended imposition of sentence.

Section 21 is unchanged from the original bill. It requires the court in sentencing a person convicted of two or more crimes of distribution of child pornography, possession of child pornography, or distribution of indecent material to minors to give at least one day of consecutive time for each crime or attempted or solicited crime for which the defendant is being sentenced.

Sections 22-23 were previously discussed in connection to the *Yako Collins* decision.

SENATOR DYSON worried that these sections would continue the pattern of removing judicial discretion. He offered his understanding that these sections would eliminate the possibility of referral to a three-judge panel.

MS. CARPENETI said that's not correct. The *Collins* decision lowered the standards for referring sex felony cases to a three-judge panel compared to other cases that can be referred. It did not eliminate the possibility of referral.

SENATOR DYSON pointed out the language on page 12, line 10, that says a court may not refer a case to a three-judge panel.

MS. CARPENETI added that it's based on the criteria in paragraphs (1) or (2).

CHAIR COGHILL asked her to restate the standard the *Collins* case set.

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MS. CARPENETI explained that a case can be referred to a three-judge panel under circumstances where the imposition of the sentence would be manifestly unjust. In addition to factors in mitigation and aggravation that the legislature has adopted, the courts have recognized two types of aggravating factors that they call nonstatutory aggravators. One is that the defendant has extraordinary prospects for rehabilitation. The other is that the defendant's post discovery conduct was exemplary. The *Collins* case addressed itself to the legislature that raised the sentencing ranges for sex felonies in 2006 and had introduced a Letter of Intent stating the reasons for increasing the ranges. The court still has discretion within the ranges to sentence a person to imprisonment. According to the Letter of Intent, the legislature did that because of the finding that sex predators are more likely to reoffend, less likely to be rehabilitated, cause serious life-long injury to the victims of their crimes and various other things so to justify the reasons for raising these ranges that the court has discretion within the ranges to sentence a person.

CHAIR COGHILL summarized that a case can be referred to a three-judge panel if the defendant shows extraordinary prospects for rehabilitation and does not have a history of behavior that is prosecutable for sex offenses.

MS. CARPENETI said that the courts currently recognize that it can be a reason to send a defendant to a three-judge panel if that person has extraordinary prospects for rehabilitation. The *Collins* decision said that in sex felonies that a defendant can be referred to a three-judge panel if the person has normal prospects for rehabilitation. That is not what the legislature intended when it made the sentencing changes in 2006. She said DOL can find nothing in the legislative minutes or Letter of Intent that would indicate that the legislature had any intention of changing the standards that currently exist for sending a sex felony case to a three-judge panel. That's what the dissent in the court of appeals said.

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CHAIR COGHILL summarized that the three-judge panel is still available but it has to be for extraordinary prospects for rehabilitation and the person must not have a history of unprosecuted, undocumented, or undetected sexual offenses.

MS. CARPENETI responded that the second one is that a mitigating factor that the *Collins* court recognized. It plays into whether or not a person is a first felony offender, a second, or a third felony offender. There was nothing in the legislative hearings in 2006 that would indicate that should be a non-statutory mitigater.

CHAIR COGHILL suggested the committee carefully consider making it very clear that the intent in this bill is to overturn the *Collins* decision and replace it with these standards.

MS. CARPENETI reiterated that it was the intent of the Department of Law to return to pre *Collins, which* is that the court would evaluate a defendant in a sex felony case according to the same standards as for other felonies.

CHAIR COGHILL said the committee would start at this point at the next hearing. [SB 22 was held in committee.]

3:01:19 PM
There being no further business to come before the committee, Chair Coghill adjourned the meeting at 3:01 p.m.