ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 19, 2014
1:32 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. 110
"An Act relating to the authority of the victims' advocate to request a hearing for the release to a crime victim under certain conditions of certain property in the custody of a law enforcement agency."

- HEARD & HELD

SENATE BILL NO. 128
"An Act relating to the crime of harassment."

- HEARD & HELD

SENATE JOINT RESOLUTION NO. 2
Commending and supporting actions taken by the Office of the Governor, the attorney general, and the commissioner of natural resources to protect the state from federal government incursion into the care and management of state resources and to promote the economic prosperity of the state; and urging the United States Congress and the President of the United States to limit federal government overreach into management of state resources.

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: SB 110
SHORT TITLE: RETURN OF SEIZED PROPERTY
SPONSOR(s): SENATOR(s) DYSON

01/22/14	(S)	PREFILE RELEASED 1/10/14
01/22/14	(S)	READ THE FIRST TIME - REFERRALS
01/22/14	(S)	JUD
02/19/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 128
SHORT TITLE: ELECTRONIC BULLYING
SPONSOR(s): SENATOR(s) MEYER

01/22/14	(S)	READ THE FIRST TIME - REFERRALS
01/22/14	(S)	JUD
02/17/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/17/14	(S)	Scheduled But Not Heard
02/19/14	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

CHUCK KOPP, Staff
Senator Fred Dyson
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Introduced SB 110 on behalf of the sponsor.

ANNE CARPENETI, Assistant Attorney General
Criminal Division
Legal Services Section
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Offered suggestions on SB 110 and SB 128.

NANCY MEADE, General Counsel
Administrative Staff
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Commented on SB 110.

DAISY MAY BARRARA, representing herself
Bethel, Alaska
POSITION STATEMENT: Testified in support of SB 110 and SB 128.

TAYLOR WINSTON, Executive Director
Office of Victims' Rights
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 110.

EDRA MORLEDGE, Staff

Senator Kevin Meyer
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Introduced SB 128 on behalf of the sponsor.

ARELENE BRISCOE, Alaska Nurses Association
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 128.

QUINLAN STEINER, Director
Public Defender Agency
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Commented on SB 128.

ACTION NARRATIVE

1:32:57 PM
CHAIR JOHN COGHILL called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Senators Wielechowski, Olson, Dyson, and Chair Coghill were present at the call to order.

SB 110-RETURN OF SEIZED PROPERTY

1:34:02 PM
CHAIR COGHILL announced the consideration of SB 110. "An Act relating to the authority of the victims' advocate to request a hearing for the release to a crime victim under certain conditions of certain property in the custody of a law enforcement agency."

1:34:14 PM
SENATOR DYSON explained that the bill addresses the issue that property that is seized as evidence of a crime often is not returned to the victim after the case has been adjudicated. This is contrary to the goal of restorative justice, which is to make the victim whole. In 2012 legislation was passed that expedited this process, but since then he's been asked to revise a few of the details. He deferred to Mr. Kopp to explain the changes.

1:36:02 PM
CHUCK KOPP, Staff, Senator Fred Dyson, sponsor of SB 110, explained that in 2012 the Department of Law issued a memo expressing uncertainty about the intent regarding who would request, on behalf of the crime victim, a hearing before the court if the law enforcement agency decided not to return the

victim's seized property. The Department of Law thought the Office of Victims' Rights (OVR) was supposed to request the hearing in that circumstance. The Court Rules Analyst reviewed the committee testimony and concluded that it was the responsibility of the law enforcement agency or the Department of Law to ask for the hearing if the agency decided against giving the property back to the crime victim.

Everyone agreed that it would be helpful to amend the law to give the victim advocate the authority to come before the court and ask for the hearing if the law enforcement agency doesn't act upon the request within the deadline set in statute.

MR. KOPP provided the following sectional analysis:

> Section 1 amends AS 12.36.070 by adding a new subsection (f) to provide that the Office of Victims' Rights may request a hearing before the court if a law enforcement agency fails to act within 10 days after receipt of a request from the Office of Victims' Rights on behalf of a crime victim who is the owner of property to either a) return the property to the crime victim or b) request a hearing before the court to determine if the property shall be released to the crime victim.
>
> Section 2 amends AS 24.65.115 extending authority to the Office of Victims' Rights to request a hearing before the court under AS 12.36.070(f).

MR. KOPP noted that the Court System, OVR, and DOL requested another small amendment and the sponsor agrees with the suggestion.

1:39:23 PM
CHAIR COGHILL noted that Anne Carpeneti, Quinlan Steiner, and Taylor Winston were available to testify.

SENATOR WIELECHOWSKI recalled the earlier legislation and asked if this issue came up at the time or was something the committee didn't contemplate during the process.

MR. KOPP replied it was a missed opportunity in the initial legislation.

CHAIR COGHILL asked Mr. Kopp if he could speak to how the process works once the advocate requests a hearing.

MR. KOPP explained that the current law provides that a crime victim may request through the Office of Victim's Rights (OVR) the return of their property that was seized as evidence. Once OVR determines that the claim is valid, it files that request on behalf of the crime victim. The law enforcement agency then has 10 days to return the property or request a hearing before the court to determine if the property should be released to the crime victim. The law states the jurisdiction of the court and establishes the burden of proof as a preponderance of the evidence for both the crime victim showing ownership of the property and the objecting party proving the property must be retained by the agency. The law further established that if the court decided to return the property to the crime victim, the court could put conditions on the return of that property to maintain the evidentiary integrity of the property.

SB 110 builds on the original law by giving the victim advocate the authority to request the hearing from the court if the law enforcement agency failed to act in the required amount of time.

1:44:50 PM
SENATOR WIELECHOWSKI read AS 12.36.070(a) and (b) and questioned where the problem arises. Subsection (a) provides a mandatory investigation by OVR and subsection (b) says that, within 10 days of the request under (a) and following reasonable notice, the agency shall request a hearing before the court.

ANNE CARPENETI, Assistant Attorney General, Criminal Division, Legal Services Section, Department of Law (DOL), Juneau, Alaska, replied she wasn't familiar with any problems with the procedure, but this is a failsafe because law enforcement agencies aren't accustomed to requesting hearings. The Office of Victims' Rights has already investigated the matter, so it makes sense that OVR also should have the authority to request the hearing from the court.

MR. KOPP added that the intention of the bill is to clarify that "law enforcement agency" included the Department of Law and would be the entity that would request the hearing before the court. To Senator Wielechowski's question, he directed attention to the letter in the packets from Mr. Winston, the director of the Alaska Office of Victims' Rights. The letter identifies the problem and states that SB 110 provides a resolution.

1:48:45 PM

SENATOR WIELECHOWSKI maintained that the AS 12.36.070(b) already requires the victims' rights agency to go to court within 10 days.

MS. CARPENETI responded she interprets the term "agency" to mean the law enforcement agency that has custody of the property, which is why it's good to specifically allow OVR to request a hearing too.

SENATOR WIELECHOWSKI said his interpretation is that there's a law already on the books and it's not being enforced.

MS. CARPENETI agreed there is a duty set out in statute, but the culpable mental state would probably be difficult to establish if anybody were to bring a cause of action based on that.

1:50:23 PM
CHAIR COGHILL questioned whether the "agency" referenced in Section 1 of the bill refers to the public safety agency.

MS. CARPENETI replied she reads it that way, but it's a good clarification.

MR. KOPP suggested the court speak to the matter.

1:51:20 PM
NANCY MEADE, General Counsel, Administrative Staff, Alaska Court System, Anchorage, Alaska, agreed with previous testimony that the issue in the bill is that it requires the agency holding the seized property to file a request for a hearing, and agencies aren't equipped to do that. The clarification in SB 110 is that it gives somebody with expertise standing to go enforce the intent of the legislation that [passed in 2012]. The court believes this clarifies the process.

CHAIR COGHILL asked if the current statute was unworkable and in need of modification or if the exception provided in SB 110 addresses the problem.

MS. MEADE said she didn't have a position on what the better practice would be but the bill would address the problem. She continued to say that the court has a form on its website that agencies can use to file a request for a hearing, and the fact that it hasn't been used much in the last two years might be an indication that the agencies aren't equipped to do that. The court's perspective is that leaving the provision in statute is

streamlined, and it would work to add the victims' advocate as an alternative.

SENATOR WIELECHOWSKI continued to point out that this is already a statutory mandate and the agencies aren't following the law. He expressed concern about creating an exemption as proposed by the bill, and suggested that one alternative would be to impose a fine on the agency if it doesn't comply.

MR. KOPP said there was this discussion two years ago, and the definition of "law enforcement agency" is found in paragraph (2) of Sec. 12.36.090. He paraphrased the following definition and stated that the primary role of the Department of Law is the enforcement of the criminal law. He said DOL is part of that law enforcement agency and there was never a discussion in any of the committee hearings that DOL would be the legal entity asking for the hearing.

> (2) "law enforcement agency" means a public agency that performs as one of its principal functions an activity relating to crime prevention, control, or reduction or relating to the enforcement of the criminal law; "law enforcement agency" does not include a court.

MS. MEADE clarified that she didn't know if agencies have fallen down on their duty or if agencies haven't asked for hearings in courts because no citizens have taken advantage of this statute. She also clarified that her reading of the statute is that a victim would not need to appear and be involved in the hearing; the victim's advocate would represent the victim.

CHAIR COGHILL asked if the Department of Law would reasonably know that an application for the return of property should be made.

MR. KOPP replied the practice of any police agency would be to discuss with the prosecuting attorney whether or not the property can be released. Once the prosecutor knows a request has been made, there is a deadline to act on that request. If the prosecutor knows that they cannot release the property, and they cannot come to some agreement with the party interested in the property within the 10-day period, that agency would request it before the court. They would be the legal entity and the law enforcement agency requesting. All police departments have that relationship with the Department of Law when it comes to turning over property in a pending criminal case because it's evidence.

CHAIR COGHILL asked if he'd given any thought to clarifying the shared responsibility between the police agency and the Department of Law and the right of the victim's advocate to appeal.

MR. KOPP replied the court reviewed the committee testimony [on Senate Bill 30] and issued a memo that is in the packets. The conclusion was that the record is clear; it is the law enforcement agency that is supposed to ask for the hearing. However, this amendment is needed because the victims' advocate has said this is a problem.

CHAIR COGHILL said he'd like to hear from a police agency and the victims' rights advocate.

2:01:23 PM
DAISY MAY BARRARA, representing herself, Bethel, Alaska, stated support for SB 110. She related that some people living in rural areas don't know that by statute their property that was seized as evidence shall and will be returned. She also said she fully supports the Office of Victims' Rights being given the authority to intercede on behalf of an individual for two reasons: first, victims in the rural area often are not fluent in English; and second, the victim's advocate knows and understands the process and it will be more likely that the victim will have their belongings returned.

2:06:01 PM
At ease

2:06:08 PM
CHAIR COGHILL reconvened the hearing.

2:08:42 PM
TAYLOR WINSTON, Executive Director, Office of Victims' Rights (OVR), explained that she asked the sponsor to introduce SB 110 because OVR because of the confusion about the term "agency" and whether it referred to OVR or the law enforcement agency. The court did an analysis and their interpretation was that, in the statute, the term "agency" meant the law enforcement. The court did develop a form that any law enforcement agency throughout the state could use to request a hearing, but the statute doesn't allow any opportunity for recourse if the agency fails to act. That's been a problem.

The Office of Victims' Rights has found that victims are unable to get any further going through OVR than a request for the information. She described a particular case that has been pending for eight months. The statute says "shall" but it doesn't mean much when the agency - whether it's a police department or the DOL - makes a decision that it isn't going to file for a hearing, she said Currently, OVR isn't able to file anything with the court to move the process along, and nobody really knows when the law enforcement agency fails to comply with the law, because there isn't any court oversight until there's been a request or a filing.

MS. WINSTON said that SB 110 provides a mechanism for the Office of Victims' Rights to file a request for a hearing with the court if the law enforcement agency or the Department of Law fails to do so. Then the court can determine what will happen with the evidence.

2:13:47 PM
CHAIR COGHILL asked, according to the court rule, if the cost of getting the property back is borne by the agency alone or shared by the victim advocate, if they're involved.

MS. WINSTON explained that what OVR undertakes on behalf of a victim is a free service. She didn't know what the court may or may not charge, but if the court were to charge a filing fee her assumption is that OVR would assume that cost.

SENATOR WIELECHOWSKI asked how many requests for assistance have been made to OVR under this statute.

MS. WINSTON answered four.

SENATOR WIELECHOWSKI asked if OVR has sufficient resources if this bill were to pass.

MS. WINSTON answered yes.

SENATOR WIELECHOWSKI suggested that OVR hire an attorney to do the first couple of filings and track the charges, and then make a request if the agency doesn't comply with the law. That will send a message to agencies statewide that they should comply with the law, he said.

CHAIR COGHILL noted that the sponsor had an amendment.

2:18:51 PM

MR. KOPP explained that the court approached the sponsor with suggested language that has been approved by OVR and DOL. It adds qualifying language to subsection (f) in Section 1 that states:

> If the victims' advocate requests a hearing from the court under this subsection, the victims' advocate's appearance in the hearing is limited to advocating for the victim only for the return of the property; the victims' advocate would not be deemed an intervenor or party for any other purpose absent further order of the court.

CHAIR COGHILL suggested the sponsor bring the amendment on Friday.

SENATOR DYSON said he'd distribute the amendment before the hearing.

2:21:14 PM
CHAIR COGHILL announced he would hold SB 110 in committee for further consideration. Public testimony remained open.

2:21:40 PM
At ease

SB 128-ELECTRONIC BULLYING

2:22:34 PM
CHAIR COGHILL reconvened the hearing and announced the consideration of SB 128. "An Act relating to the crime of harassment." This was the first hearing.

2:23:09 PM
EDRA MORLEDGE, Staff, Senator Kevin Meyer, introduced SB 128 on behalf of the sponsor, speaking to the following sponsor statement:

> With advances in technology and social media, harassment by electronic means, or “cyberbullying,” has become increasingly prevalent. Our current statutes allow for some forms of bullying to be handled within the school system, however not all bullying occurs on or near school property. In some extreme cases, cyberbullying has led to suicide. SB 128 will allow for punishment outside of the school system, and makes harassment of a person under 18 years of age by electronic communication a class B misdemeanor.

MS. MORLEDGE noted that the bill had two zero fiscal notes.

SENATOR WIELECHOWSKI asked if there was a rationale for saying that it's legal to call or send a letter to a person that is insulting, taunting, or challenging, but it's illegal if it's put in an email.

MS. MORLEDGE offered her understanding that this simply adds to the current harassment laws that already cover written communication.

SENATOR WIELECHOWSKI expressed interest in hearing from the Department of Law.

2:27:42 PM
CHAIR COGHILL offered his understanding that electronic intimidation could be charged under AS 11.61.120(a)(1).

MS. MORLEDGE responded that was technically her understanding, but other states have not been able to charge unless the communication is specifically identified as electronic harassment.

CHAIR COGHILL opened public testimony.

2:28:31 PM
DAISY MAY BARRARA, representing herself, Bethel, Alaska, testified in support of SB 128. She explained that her Alaska Native culture has a belief that language can kill an individual if used improperly. She said she believes this applies to electronic communication as well. She thanked the committee for paying close attention to this critical issue.

2:31:06 PM
ARELENE BRISCOE, Alaska Nurses Association, Anchorage, Alaska, said she's been a nurse for 35 years and a board certified mental health nurse in Alaska since 1987. She reported that she works at an Anchorage hospital and daily sees the torment caused by cyberbullying through Facebook, Twitter, and now Snapchat. Children are the hardest hit population and suicides, suicide attempts, and suicide ideations are a daily occurrence and she sees the fallout at the hospital.

She highlighted that the bill doesn't address this, but bullies need to be treated too because they are just as affected by

mental health issues as the victims. Both are suffering and need help.

2:34:43 PM
CHAIR COGHILL expressed interest in knowing how a juvenile bully might be treated as opposed to a bully who is older than 18 years of age.

MS. BRISCOL discussed the importance of early intervention for kids who have been identified through the school system as having problems because they are doing some of the bullying. They need help before they get into the juvenile justice system, she said.

SENATOR WIELECHOWSKI asked if the age limitation should be removed, like in Illinois, so the application is much broader.

MS. BRISCOL said yes; women are bullied by their spouses. She added that this is different from a letter because once a communication is on Facebook it doesn't go away.

SENATOR WIELECHOWSKI expressed doubt that this would apply to Facebook because it says "sends."

SENATOR DYSON expressed concern about how people with significant disabilities would be affected if age 18 is left in the bill.

CHAIR COGHILL said his research shows that most states don't have an age restriction, but it appears that the sponsor is most concerned about youth bullying.

2:39:44 PM
ANNE CARPENETI, Assistant Attorney General, Criminal Division, Department of Law, discussed drafting concerns with SB 128. She stressed in this draft the importance of not making conduct a class B misdemeanor that might, under certain circumstances, be more serious. For example, fear assault is assault in the fourth degree, which is a class A misdemeanor, or even a class C felony if it's assault in the third degree.

She suggested modifying the language to say: "sends an electronic communication to a person under 19 years of age." She explained that to make it a crime to send this material, the culpable mental state for harassment in the second degree is with intent to harass or annoy another person. She said she

assumes the other person is the child, so it needs to be clear that the electronic communication is being sent to that person.

CHAIR COGHILL said he didn't believe that was the issue, because these communications sometimes are sent to a wide audience with the idea of denigrating a person's reputation. That person may not even see the communication.

MS. CARPENETI restated that the prosecution has to prove the culpable mental state of intending to annoy or harass another person and it would be easier to prove if the communication was to that person.

SENATOR WIELECHOWSKI observed that it's not clear whether the phrase "sends an electronic communication" includes telephone calls and Facebook and Twitter posts. He suggested the committee have a philosophical discussion about the question that the Chair raised because a person can do a lot of damage to another person by harassing them on their own Facebook page.

MS. CARPENETI said that's the problem with electronic communication; it's difficult to forbid in a way that doesn't impose on a person's First Amendment rights.

CHAIR COGHILL asked the principle of law for slander and how it might apply to cyberbullying.

2:44:22 PM
MS. CARPENETI explained that a person can claim damages for slander in a civil action; it wouldn't be a crime.

SENATOR WIELECHOWSKI added that challenging someone to a fight or threatening to kill them or their family would be harassment.

MS. CARPENETI said depending on the circumstances it could be a fear assault. She also suggested repeating the word "fear" to clarify that the person is in fear or physical injury, in fear of severe mental or emotional injury, or fear of damage to the person's property. This will keep it from being mixed with other crimes.

SENATOR WIELECHOWSKI asked her to talk about state of mind and whether it's objective or subjective and whether you know the person is fragile or not.

MS. CARPENETI said her assumption is it means reasonable fear, which is an objective standard, but she'd like to think about it.

CHAIR COGHILL questioned whether it ought to be explicit that it means reasonable fear.

MS. CARPENETI commented that it's difficult to draft in a way that captures the potential harm of the conduct while also protecting the constitutional right to expression.

SENATOR WIELECHOWSKI asked her to talk about the timeline for reasonable fear, because AS 11.61.120(a)(1) says the insults, taunts, or challenges have to provoke an immediate violent response.

MS. CARPENETI suggested he pose the question to the sponsor. She said she assumes it means an immediate reaction but it doesn't say that, and the other provisions do.

CHAIR COGHILL suggested the sponsor bring information about what other states have done in this area.

2:48:48 PM
QUINLAN STEINER, Director, Public Defender Agency, Department of Administration (DOA), Anchorage, Alaska, stated agreement with Ms. Carpeneti's suggestion that it would help the bill to clarify that the electronic communication is to a particular person. Without clarification of what's been criminalized, it's too vague and would likely result in different views of what's covered in different prosecutions. There's also a lack of an imminent requirement that is seen elsewhere in fear assault statutes and even earlier in this statute where the insulting, taunting, or challenges are likely to provoke an immediate response. There's an immediacy component to it that's important in terms of defining what ought to be criminalized. Without that, it could be broadly interpreted to apply to many things, he said.

MR. STEINER expressed concern with the suggestion to include the idea of fear of severe mental or emotional injury and instead suggested requiring some level of an imminent threat or imminent fear of physical injury. This would narrow the bill and eliminate risk an over broad application that unintentionally criminalizes certain conduct.

CHAIR COGHILL asked his perspective of limiting the application of this law to people under age 18 versus applying it broadly to all ages.

MR. STEINER replied his understanding is that the bill intends to target cyberbullying of juveniles, and that limitation eliminates the risk of prosecutions in areas where it doesn't make sense.

SENATOR WIELECHOWSKI asked if the phrase "damage to the person's property" is overly broad.

MR. STEINER agreed it is fairly broad and suggested amending the language to ensure that sending an email threatening to break another person's pencil wouldn't be criminal conduct. Juvenile conduct that you might not endorse shouldn't necessarily be subject to criminal penalties, he said.

Responding to a question, he confirmed that an electronic communication could be prosecuted under AS 11.61.120(a)(1) if it was delivered in a manner that was likely to provoke an immediate violent response. That's why the imminent component is helpful, he said, because you could theoretically send an email that's harassing or taunting about something that would happen far in the future.

2:56:05 PM
SENATOR WIELECHOWSKI asked if he sees any problems differentiating between electronic communication and written or verbal communication.

MR. STEINER opined that differentiating those types of communication relates to the immediacy of both the impact and response. For example, it's hard to threaten imminent physical injury through a letter, he said. Including those runs the risk of criminalizing things that aren't meant to be criminalized.

SENATOR WIELECHOWSKI asked if he sees any constitutional issues because threatening to damage a person's property in a letter inflicts the same amount of fear as making the threat in an email, but one person hasn't committed a crime and the other person has.

MR. STEINER replied it's a policy question. As currently drafted, it's fairly broad and opens the potential for prosecutions of cases that might not otherwise be prosecuted.

2:59:04 PM
CHAIR COGHILL asked the sponsor, the public defender, and the Department of Law to think about whether implementing this law might inadvertently cause further damage to a victim who has already been traumatized by bullying.

SENATOR WIELECHOWSKI said it's a good point and it appears that many other states require school districts to adopt policies. He questioned whether that might be a better approach.

CHAIR COGHILL held SB 128 in committee.

3:01:10 PM
There being no further business to come before the committee, Chair Coghill adjourned the Senate Judiciary Standing Committee meeting at 3:01 p.m.