

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

January 23, 2017

1:32 p.m.

**MEMBERS PRESENT**

Representative Matt Claman, Chair  
Representative Zach Fansler, Vice Chair  
Representative Gabrielle LeDoux  
Representative David Eastman  
Representative Chuck Kopp  
Representative Lora Reinbold

**MEMBERS ABSENT**

Representative Jonathan Kreiss-Tomkins  
Representative Louise Stutes (alternate)

**COMMITTEE CALENDAR**

HOUSE BILL NO. 42

"An Act relating to seizure of property; relating to forfeiture to the state; relating to criminal law; amending Rules 3, 4, 11, 12, 16, 32, 32.2, 32.3, 39, 39.1, and 42, Alaska Rules of Criminal Procedure, Rules 501, 801, and 803, Alaska Rules of Evidence, and Rules 202, 209, and 217, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD & HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HB 42

SHORT TITLE: FORFEITURE & SEIZURE: PROCEDURE; LIMITS

SPONSOR(s): REPRESENTATIVE(S) WILSON

01/18/17	(H)	PREFILE RELEASED 1/13/17
01/18/17	(H)	READ THE FIRST TIME - REFERRALS
01/18/17	(H)	JUD, FIN
01/23/17	(H)	JUD AT 1:00 PM GRUENBERG 120

**WITNESS REGISTER**

REPRESENTATIVE WILSON  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Presented HB 42 as prime sponsor.

PETER SANDBERG, Attorney  
Garvey, Schubert, Barer  
Anchorage, Alaska

**POSITION STATEMENT:** During the hearing of HB 42, testified and offered technical assistance.

JOHN SKIDMORE, Director  
Legal Services Section  
Criminal Division  
Department of Law (DOL)  
Anchorage, Alaska

**POSITION STATEMENT:** During the hearing of HB 42, answered questions.

MARK RICHARDS, Executive Director  
Resident Hunters of Alaska  
Fairbanks, Alaska

**POSITION STATEMENT:** During the hearing of HB 42, spoke in support of the legislation.

THESHIA NAIDOO, Legal Director of Criminal Justice  
Drug Policy Alliance  
Oakland, California

**POSITION STATEMENT:** During the hearing of HB 42, spoke in support of the legislation.

KENT SULLIVAN, Assistant Attorney General  
Natural Resources Section  
Civil Division  
Department of Law  
Juneau, Alaska

**POSITION STATEMENT:** During the hearing of HB 42, addressed the Department of Law, Civil Division's concerns.

## **ACTION NARRATIVE**

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**CHAIR MATT CLAMAN** called the House Judiciary Standing Committee meeting to order at 1:32 p.m. Representatives Eastman, Reinbold, Kopp, LeDoux, Fansler, and Claman were present at the call to order.

### **HB 42-FORFEITURE & SEIZURE: PROCEDURE; LIMITS**

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CHAIR CLAMAN announced that the only order of business would be HOUSE BILL NO. 42, "An Act relating to seizure of property; relating to forfeiture to the state; relating to criminal law; amending Rules 3, 4, 11, 12, 16, 32, 32.2, 32.3, 39, 39.1, and 42, Alaska Rules of Criminal Procedure, Rules 501, 801, and 803, Alaska Rules of Evidence, and Rules 202, 209, and 217, Alaska Rules of Appellate Procedure; and providing for an effective date."

CHAIR CLAMAN advised that last year, as part of the Criminal Justice Reform efforts, AS 09.55.700 specifically stated that common law civil in rem forfeiture actions are abolished if used instead of a criminal proceeding. He pointed out that Representative Wilson's HB 42 is a follow up on the legislature's actions taken last year.

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REPRESENTATIVE WILSON, Alaska State Legislature, read the sponsor statement as follows: [original punctuation provided]

Modern civil forfeiture laws hold that property can be guilty of a crime and; therefore, may be seized and forfeited even if the property's owner never faces criminal charges. For two centuries, American Civil Forfeiture Law was largely restrained to custom's enforcement. In the 1980s, Congress and the states turned to civil forfeiture to combat rampant drug distribution and organized crime. Civil forfeiture became a mainstream law enforcement tool and Congress and the states encouraged its use by allowing law enforcement agencies to retain the proceedings of successful property forfeitures. Once authorities seized private property, the resulting civil proceeding differs dramatically from the customary standards of American criminal law.

First, the proceedings target the property, rather than the owner. Under forfeiture law at the federal level, and in Alaska, the evidentiary standard required a preponderance of the evidence, not the criminal law standard of beyond a reasonable doubt. Thus, prosecutors needed proof only that it is more

likely than not that the property is tied to crime and is, thus, forfeitable.

Second, the prosecution need not prove that an owner used the property to commit a crime or was willfully blind to its use. As in the case in ordinary criminal trials in a forfeiture proceeding, the burden falls on the owner to disprove these facts by demonstrating that he neither knew of, nor consented to, the properties illicit use.

Third, property owners in forfeiture cases, unlike defendants in criminal cases, have no guaranteed right to counsel. Consequently, if an owner cannot afford an attorney he must navigate an excessively, lengthy, and complex legal landscape alone. Oftentimes, the cost of hiring a lawyer exceeds the value of the seized property or currency. Hence, a large number of defendants opt not to retain counsel even though they can afford the expense. With such low odds of victory in forfeiture cases, many innocent property owners simply walk away.

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House Bill 42 would require that an individual be convicted of an actual crime before forfeiture proceedings can take place, and would protect guiltless spouses and family members from property loss as a result of the process. The bill would also impose transparency and accountability for civil asset seizures and reduce financial incentives for abuse by providing that any revenues that do flow back to the state, as a result of federalized proceedings, are deposited in the general fund.

This bill affirms our confidence in local law enforcement, as well as the most basic tenets of constitutional law and values. Convicted criminals will still see the fruits of their crimes confiscated by the state, but innocent Alaskans can rest easy knowing they will no longer be deprived of property without due process.

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REPRESENTATIVE WILSON related that HB 42 is about due process for those individuals not involved in a crime. She said, contained with the member's packets are diagrams titled "Current Law," and she described how to navigate the chart, and also noted there are two different processes for "arrest" and "non-arrest." She continued that HB 42 attempts to put all forfeiture laws in one place within the Alaska Statutes.

CHAIR CLAMAN posed a question to attorney Peter Sandberg, noting the law change approved last year, asked what the bill does and how it is different from last year's bill.

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PETER SANDBERG, Attorney, Garvey, Schubert, Barer, said he had provided technical legal consultation to Frank Bickford in terms of making certain the statute was workable. He pointed to the first entry on the flowchart "Current State Law," and clarified that the first entry should be AS 16.05.723, Misdemeanor fishing violations. He explained that in the event a fisherman commits a violation, the state can seize items up to and including the vessel for a misdemeanor. He further explained that the abolishment statute from last year did not erase anything off the books, it simply read that it was abolished. When a person is accused of negligently taking fish illegally, vessels, fish, and tackle are forfeited unless the defendant can prove the fish were lawfully taken. He said he is unaware whether the state is still taking vessels under that statute, but as things stand, currently there is no other prescribed method. He offered that it does not fit within what is normally thought about how criminal defendants are punished, in particular, misdemeanors. Mr. Sandberg continued that the items on the far left side of the flowchart are current statutes, and commented that it is confusing even for a lawyer in terms of how this is going to work.

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REPRESENTATIVE LEDOUX referred to AS 16.05.723, and posited the amount of the fine and/or penalty for a person convicted of negligently taking fish illegally.

MR. SANDBERG answered that under AS 16.05.723 the fine is not more than \$15,000, but the court can force a person to forfeit any vessel, fishing gear, tackle, or any other device employed to take the fish commercially.

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REPRESENTATIVE LEDOUX surmised that if a person is convicted of the misdemeanor the highest fine would be \$15,000 and yet, conceivably, the person could lose their fishing vessel which could be valued upwards of \$500,000 for something the state has said is a misdemeanor of \$15,000.

MR. SANDBERG agreed, and he related that the same principle applies to hunting guides, and various other statutes, in which a person could negligently "screw up and lose million dollar airplanes." With regard to the new statute, he opined that no one is arguing the state shouldn't be able to obtain forfeiture, and that is not what the statute is designed to do. The idea behind the new law is to create a single source in which people can determine how this will apply to them, and provide a prescribed procedure by which they are protected if their items should not be forfeited. Although, he said, if the items should be forfeited, the state can still obtain the items, "they just have to work a little harder."

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CHAIR CLAMAN noted that the chart references negligently taking fish, and asked whether the standard is criminal negligence or negligence.

MR. SANDBERG opined that it would probably have to be criminal negligence because it's a misdemeanor.

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REPRESENTATIVE LEDOUX noted that Mr. Sandberg said he provided Victor Bickford with technical legal advice on these statutes. She pointed out that Mr. Bickford is a lobbyist and asked the name of Mr. Bickford's client.

MR. SANDFORD replied the client is Drug Policy Alliance.

CHAIR CLAMAN asked whether it wasn't the Resident Hunters of Alaska.

MR. SANDBERG opined that Resident Hunters of Alaska are in favor of this legislation. He explained that Kevin Fitzgerald and he became involved because many of Mr. Fitzgerald's hunting clients have lost large items through various violations. Mr. Sandberg continued that the proposed statutory framework is designed to

simply have a hearing after the conviction. He explained that he tried to model it off of punitive damages in the civil context, whereby there is a short hearing quickly after the conviction. Hopefully, he related, the defendant has the same lawyer and it is a matter of ascertaining whether the property is actually tied to the crime so people cannot lose their property outside of a criminal conviction. The intent of HB 42 is to put all forfeiture statutes in one place with one process that protects Alaskans while they stand to lose large amounts of money for rather small violations, he explained.

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CHAIR CLAMAN referred to drug cases wherein drugs and cash are seized, and asked whether under HB 42 the state would need to have a separate proceeding to seize the cash or, if the state gets a conviction would it be able to have a forfeiture of the seized cash in the same hearing.

MR. SANDBERG opined that the cash is simply regarded as another form of property under the statute.

CHAIR CLAMAN followed up and asked whether the state would have to institute a second proceeding, or whether it could be dealt with in the criminal proceeding.

MR. SANDBERG answered that the cash would be part of that subsequent one-day proceeding if the state wanted to keep it, and it is not a problem if the state wants to seize it as evidence. At that point, this allows people to attempt to get some of the cash back to pay for their legal defense fees. He continued that if the state wants to keep the cash, it must show that the cash is reasonably tied to the crime from which the person is convicted.

CHAIR CLAMAN surmised that under this legislation, the state, in addition to the criminal conviction process would need to file a separate proceeding to forfeit the \$25,000 cash found next to the cocaine.

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MR. SANDBERG clarified that the state would not have to file a separate proceeding in that sense, and explained that after seizing the cash the state would have to give the person warning that it believes the cash is proceeds of an illegal activity for which forfeiture is possible. He explained the state would hold

the cash until after the trial and if the person is convicted there would be a hearing immediately afterwards. At which point, if the state showed that the money was actually tied to the crime, as opposed to being an inheritance or whatever, the state would be allowed to keep the money.

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REPRESENTATIVE REINBOLD pointed to the Constitution of the State of Alaska, [Article I], Sections 7, and 14, due process and search and seizures, respectively, and asked whether HB 42 will handicap Alaska's law enforcement, especially having to do with drugs, and whether law enforcement has weighed in.

MR. SANDBERG replied, as follows:

What we certainly don't think this will handicap either police officers, or prosecutors in being able to get these items. I suppose it's possible that, probable, that they will tell you something else. The objections that I've seen so far, at least I don't think are consistent with how they, in the past, have said they actually operate. And one of the kind of disturbing things that we've seen so far is they are still defending the use of civil in rem forfeiture while, you know, it was abolished last year. So, I don't want to put words in their mouth for you. But, I assume that they won't like this change.

MR. SANDBERG advised that the point of the change is not whether or not it will make it harder for the police to take items from people, but rather to provide a workable system that any Alaskan can review and determine what they need to do and how to do it if they believe their property was improperly taken.

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REPRESENTATIVE REINBOLD emphasized that she wants to know the opinions of drug enforcement and law enforcement because Alaska has a massive heroin and opioid problem and, yet a portion of the bill makes it harder to confiscate and prosecute. She advised she does support the streamlining of policy for the benefit of Alaskans, but she does not want one more loophole with regard to Alaska's serious drug issues.

REPRESENTATIVE WILSON responded to Representative Reinbold that the legislation is about the person who wasn't involved in the

crime. She used the example of a roommate borrowing her car to go to the store, and instead robs a liquor store using her car, is arrested, and items are seized because it was all part of robbing the liquor store. Representative Wilson explained that under current law, she must be able to prove she had no knowledge that her roommate intended to rob the liquor store. This legislation puts it back onto law enforcement to show that she was aware [her roommate was using her car to rob the liquor store]. The legislation offers a process to get her property back, without a lengthy proceeding and hiring an attorney, if it cannot be proven she had anything to do with the robbery.

CHAIR CLAMAN advised that individuals from the Department of Law (DOL), and the Alaska State Troopers are available to testify.

REPRESENTATIVE REINBOLD indicated that she understands the rhetorical question, and pointed out there is active organized crime in Alaska.

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JOHN SKIDMORE, Director, Legal Services Section, Criminal Division, Department of Law (DOL), said he is available to answer questions.

CHAIR CLAMAN requested a brief perspective of DOL's view on the bill.

MR. SKIDMORE advised that DOL supports the concept of consolidation of forfeiture statutes. Although, he explained, there are issues with the drafting of other provisions in the bill. He advised he met with Representative Wilson and intends to continue working with her to address concerns. He then referred to the chart titled "Current State Law" and noted that AS 16.05.732 reads that there is seizure and no requirement for a conviction, but that fails to reference the statute requiring a conviction before forfeiture can occur, AS 16.05.190, Disposition of equipment. He referred to a portion half way through AS 16.05.190, and he read: "'Upon the conviction of the offender,' that's when you get to actually forfeit the property." The requirement of the conviction, he explained, is something that DOL believes is found for most of the statutes. He said he just received the chart and could not speak to whether there were additional omissions or inaccuracies in the chart, but from the Criminal Division's perspective, convictions should be obtained before property should be forfeited in a criminal case.

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MR. SKIDMORE explained that due to concerns this bill has the potential to impact forfeitures in civil proceedings, Mr. Sullivan is available to testify. He offered the example of a "flop house or an abandoned boat," and noted that the state must actually take possession of the boat to remove it as a nuisance because it impedes navigation or traffic on the waterways. This is not a criminal case, it is a separate civil proceeding and, he opined, people do not want to influence that.

MR. SKIDMORE related that while the bill discusses forfeiture, the criminal division has concerns it could be interpreted to not only impact forfeiture proceedings, but also seizures. Mr. Skidmore continued as follows:

A quick example is the notion that individuals would be able to get their property back before a criminal trial occurred, even if that property was evidence in the case.

Also, that the property could be returned to an individual to use to pay for a defense attorney if they said no other means was necessary to pay for that defense attorney. And yet, in getting that property back ... so if I'm the drug dealer, to use the example that Chair Claman used, if I'm the drug dealer and I have that cash, I get to say, 'Hey, that \$25,000, that's mine, I need that back to pay for my attorney.' But, then when it comes time to trial, you're not allowed to use that statement, that the drug dealer said that \$25,000 was mine. The drug dealer, in fact, gets to go into trial and say 'I don't know whose money that is. I don't know anything about that.' And the state is not allowed to use the statements made in getting the property returned to say 'Hey, wait a minute, that's not what you previously said.'

So, those are the sorts of issues that I really don't think are the intention of Representative Wilson. I don't think those are the things that she's trying to go after, but those are the sorts of things in the bill that we're interested in working with her to try and correct.

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REPRESENTATIVE KOPP noted that the 2014 legislature passed AS 12.36.070, Return of property by hearing. He related that it addresses a real ongoing problem wherein innocent people's property is seized, taken as evidence as a result of a criminal act, and they need their property back to continue running their business. He continued, there was no avenue in the law for innocent people to request a hearing with a judge with jurisdiction in the criminal case to make a ruling and decide whether the prosecution needed it, or whether the state's interest was overriding that of the property owner to get it back. The legislation unanimously passed the legislature, there has not been any significant fiscal impact, and people now have a right in the law to request their seized property back when they are not the criminal defendant themselves, he pointed out.

REPRESENTATIVE KOPP reminded the committee that there is currently an avenue in the law for some of the cases being discussed and there has not been a meltdown of the system. He related that many of the police officers he has spoken with about this subject advised they would like to return the property, but a party had objected. Alaska Statute 12.36.070, requires the person objecting [to the return of the property] to state the reason on the record, he advised.

REPRESENTATIVE KOPP asked whether there has been a burden on the DOL in having a process in the law for the return of a person's property when they are not the defendant.

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MR. SKIDMORE responded that the option to have property returned exists in criminal law, without HB 42 being there. Criminal Rule 37(c) reads that there is the possibility of a hearing and having property returned. There is also case law discussing forfeiture situations where an item is seized and perhaps it is something the person needs to conduct their living, for example, a fishing vessel. He continued, case law reads that a fisherman is entitled to a hearing to advise [the court] they need the boat to conduct their business and, he commented, such hearings have occurred and do occur. Those hearings do not create a burden on the DOL, and certainly no more burden than what should be there to be certain people's property interests are appropriately protected, he said.

MR. SKIDMORE pointed out that HB 42 does more than simply provide the opportunity for a hearing allowing the court to

address the issue, such that the department's additional concerns led to the fiscal note. He offered that he is hopeful that in working with Representative Wilson the fiscal note can be substantially reduced.

REPRESENTATIVE KOPP commented that the bill sponsor is getting at one of the most fundamental liberties Alaskans have, protection of property.

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REPRESENTATIVE LEDOUX expressed difficulty in accepting the concept of a crime with a possible \$5,000 penalty and the state can take someone's \$500,000 vessel, or other piece of equipment. She asked whether it would make more sense to have a law that reads that the penalty is anywhere from "X to XX", whatever is a reasonable penalty for a violation. She used the example of person A murdering person B in a home, the home may be seized because it belongs to person A. But, she asked, what if person A also had a home down the street that had nothing to do with a crime, the state would not be able to seize that home. She suggested looking at what is a reasonable penalty for any crime, and if it is something the legislature decides is worthy of a fine of between "zero and \$5,000," what's the purpose of allowing the seizure of the fishing vessel, she asked.

MR. SKIDMORE said a fishing vessel used to catch fish illegally is the instrumentality by which the crime is committed. As to whether or not there is an excessiveness to the forfeiture of the vessel given the maximum penalty, he said there is case law supporting Representative LeDoux's concept. He related that a motor vehicle was seized and the question was whether or not the value of the vehicle exceeded the amount of fine that could have been imposed. In that case, the court found that the fine was greater than the value of the motor vehicle and; therefore, it did not violate the constitution. In the event it did exceed that amount, it would be an interesting question for the courts to determine. Mr. Skidmore related that there are many cases in which the instrumentality used has something unique about it which allows further illegal acts to be conducted. He referred to a case wherein a fishing vessel had been specifically modified to hide illegally taken fish and in that case simply fining the owner of the vessel would not stop the fisherman from committing future violations. He explained that the concept is that if there is something about the vessel that significantly allows the individual to continue to commit those crimes, forfeiture has to occur in order to stop it from happening again

in the future. He said he agrees with Representative LeDoux that forfeiture needs to be used, not as a first resort, but the last resort. Other steps can be taken and should be pursued, which is what DOL does in the vast majority of the time and, he acknowledged occasionally a prosecutor has done something not quite along the lines of DOL and Mr. Skidmore has dealt with it.

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REPRESENTATIVE LEDOUX offered an example of a gambling den in a house and said if premises A is running a gambling den, the house could be seized. But, if they also own something in Minnesota where they were not running a gambling den, it couldn't be seized. She reiterated that there should be a statute that reads if a person is doing "X" they can be fined anywhere to "A to Z." In the event the judge fines them "Z" and they don't have enough money to pay the fine, then just like any other case where there is a judgement and the person doesn't have the money, property can be seized.

MR. SKIDMORE answered that usually the state could not seize property B if the gambling den was at property A because it would have to be related to the gambling offense. The only way law enforcement would be able to get to property B is if they actually had evidence to show that all of the benefits of the illegal gambling allowed that person to buy property B, such that property B would not have been available to that individual but for their illegal activity. The requirement for prosecution is to show the connection between the two, and he said he was unsure the state could seize the other property without showing that connection. He related that he was certain the state would not be able to forfeit the property without the connection.

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REPRESENTATIVE LEDOUX expressed that that is her point, if they did something really bad and the state wanted to forfeit a property, why not just put that in the statute of what the penalty is going to be. The penalty can be anywhere from "A to Z" and if they can't pay it, then they are subject to having all of their properties seized. She asked why make it so that the gambling den in a nice home is seized by the state, but yet if the gambling den is in a little shack, the state only gets the little shack seized.

MR. SKIDMORE related that is a policy call if the legislature wants to simply have fines and not have forfeiture. However, in

trying to think of all of the possible fact scenarios that might come up, coming up with an appropriate range and trying to describe how it might be used could be difficult. During his 18 years as a prosecutor, there have been a vast array of cases and fact patterns, and it is hard to anticipate what each and every one of them will be, he said. He opined that forfeiture can be a tool to say, "Look, we don't know exactly where it's going to be, but if we require it to be reasonably related, then that allows itself to adjust to the circumstances that a particular case presents."

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REPRESENTATIVE EASTMAN requested the thought process of how the department makes decisions on what property to pursue for forfeiture, and asked whether there is a policy call the department makes on whether or not to leave property on the table. For example, a person may be out fishing all day and have a full boat of legally caught fish and then the fisherman tries to go after a different fish illegally. He asked whether the department tries to distinguish between the last fish obtained illegally.

MR. SKIDMORE advised there is a policy and also case law. He referred to a case, cited in the case notes in the statutes, that discusses fish and only those fish of which the person is convicted of taking illegally can be forfeited. He then moved to the example of [forfeiting] a fishing vessel and advised that the facts would be reviewed on a case-by-case basis. Using the above scenario, in the taking of a small number of fish illegally, the state would not seize the vessel. Although, the fact pattern changes if the fisherman has a history [of taking fish illegally], he said.

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REPRESENTATIVE EASTMAN asked, in the event the department identifies property that can be forfeited, does the department make a judgment call on whether or not it should based upon moral reasoning or a desire to appropriately render a punitive result to someone guilty of a crime. For example, the department identified that a law was violated and there was clear justification to forfeit \$100 of property, he asked whether the department views its role as pursuing \$100 for the sake of the state, or distinguishes some lesser amount in the situations because the department believes that may be excessive even though the department could legally go after the \$100.

MR. SKIDMORE answered yes. Prosecutors throughout the history of the United States have been given discretion to look at the circumstances and make judgment calls, and prosecutors do that every day. The only time in which the department wouldn't be making a judgment call would be a situation where the law requires the department to forfeit an item. For example, in a domestic violence case, in the event someone is injured by the use of a dangerous instrument, current law requires that instrument to be forfeited, which would be repealed under HB 42, he explained. In the realm of fishing cases, oftentimes a great deal of discretion is used, he said.

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REPRESENTATIVE FANSLER referred to the discretion discussion and said he wanted to draw a definitive line between large fishing vessels worth \$500,000 and the lower valued fishing vessels in his area. He continued that he is an advocate and appreciates the Department of Law (DOL) continuing to use discretion. He then asked that Mr. Skidmore drive the point home to Alaska's rural prosecutors to use that discretion when seizing boats and nets that families depend upon for their livelihood.

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REPRESENTATIVE LEDOUX expressed concern and offered a scenario wherein a case is not quite a "slam dunk" but there is the possibility of seizing an item valued more than the fine someone may incur from pleading guilty. She asked whether the state would ever offer a deal to the defendant that the item would not be seized if the defendant pleads.

MR. SKIDMORE surmised that Representative LeDoux was asking whether the department sometimes offers to forego seizure and seeking forfeiture of an item in exchange for a person to plead guilty. He advised that he knows of no case in which anyone in the department engaged in a negotiation in which they say the state will forgo seizure. Although, he said he is aware of cases in which an item may have been seized and as part of the resolution of a case the department agrees to have an item returned. He opined that it is not done from a coercive standpoint, but rather the item was seized as evidence, the state was not intending to seek forfeiture, and it agreed as part of the resolution of the case that the item be returned to the person. He opined that if the case had gone to trial the state's position would have been that the person would get the

item back as well. He said he could not say that using property as leverage to get someone to plead has never happened, but that's certainly not the intent. He clarified that if the division believes it has a provable case, it negotiates from the standpoint that it can prove its case and the discussions are about how to resolve the case to avoid litigation in a way that is beneficial to both the state and defendant.

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REPRESENTATIVE KOPP said he believes the DOL sometimes uses seizure in lieu of prosecution, such that a case is closed out, it is dismissed, otherwise set aside, and the property was forfeited as part of the agreement. He asked whether he was correct.

MR. SKIDMORE explained that seizure and forfeiture have two different meanings. He surmised that Representative Kopp was asking about forfeiture and whether there are cases the department has resolved wherein it agrees for someone not to obtain a criminal conviction, but to simply forfeit property that had been used. He said that has been done with the rationale that the convictions in certain circumstances would cause someone to lose their license, such as a commercial guide, or a fishing permit. The department will engage in that sort of response in order that there is some penalty for illegal acts, but the department is also trying to find a way so it's beneficial and the person doesn't lose their license, he explained.

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REPRESENTATIVE KOPP commented that he is a commercial fisherman and there is a strict liability in the law wherein there is no culpable mental state before seizure on the commercial fishing penalties. He referred to AS 16.05.722(a)(b), which read:

(a) A person who without any culpable mental state violates AS [16.05.440](#) [16.05.690](#), or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than ...

(b) In addition, the court shall order forfeiture of any fish, or its fair market value, taken or

retained as a result of the commission of the violation. ...

REPRESENTATIVE KOPP reiterated that under current law the fisherman does not have to have a culpable mental state for fairly significant fines.

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MR. SKIDMORE related that when the fish are taken illegally, having possession of the illegally taken fish is a crime in and of itself. With strict liability, if it is proven the fish were taken illegally, the illegally taken fish are not returned to the fisherman. He agreed there is strict liability but in those circumstances forfeiture does not occur for a vessel, it is only the fish.

REPRESENTATIVE KOPP agreed that in those circumstances vessel forfeiture does not occur, but the fish forfeiture and fair market value does. He explained there are a host of ways fishermen can get caught up, for example, another boat cuts a fisherman's net in half and half of the net drifts over the line, that is not a crime.

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REPRESENTATIVE EASTMAN posited the question of when an attorney begins to believe there isn't grounds for a prosecution, whether that triggers the end of the conversation and everything is finished at that point. He commented that his impression is that just because an attorney might start to believe there are not grounds for a case, that doesn't mean the case is over and done with at that point. He asked whether he was correct.

MR. SKIDMORE asked whether he was referring to a prosecutor or a defense attorney when not thinking there is a basis for moving forward.

REPRESENTATIVE EASTMAN explained that in the event Mr. Skidmore begins to think there are not grounds for a case, whether more happens after that point.

MR. SKIDMORE answered that if the division does not think there are grounds to proceed on a prosecution, the case is dismissed and all of the seized property in evidence is returned whether subject to forfeiture, or not.

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REPRESENTATIVE FANSLER asked Mr. Skidmore to speak more to the department's fears that there may be possible effects upon seizures in that possibly HB 42 would allow a person's money returned to them and possibly used for their criminal defense. He asked whether Mr. Skidmore has alternative language he may like to propose.

MR. SKIDMORE advised the department does have alternative language, but it is not prepared to offer anything today because he wants to work with the sponsor on this issue. He said that specifically comes from a provision in the bill [Sec. 12.36.310(e)], page 9, line 11, and lines 16-17, which read:

(e) A court shall grant a claimant's motion if the court finds that

(3) the property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding.

MR. SKIDMORE explained that according to the bill's current language, if the court finds that the seized property is the only way the defendant can pay for their attorney, that property shall be returned.

[2:35:31 PM](#)

REPRESENTATIVE LEDOUX followed up on Representative Eastman's question and expressed appreciation that when the department makes the decision a person is innocent, it will simply drop the case. She asked what happens when the division has not necessarily made the decision that a person is innocent, but in looking at the evidence believes there is a good chance the state would not win the case even though it believes the defendant is guilty. Under those circumstances, she asked whether the state would never make a pact with the defense attorney about dropping the forfeiture aspect if the defendant would plead to the misdemeanor.

MR. SKIDMORE responded that her question strikes at the heart of the criminal division's policy when charging cases, wherein it believes the evidence will allow the state to prove beyond a reasonable doubt that the person is guilty. The division does not charge a case if it believes it does not have the evidence, and it is not supposed to pursue the case including the

negotiations Representative LeDoux was discussing. He related it is a higher standard than is set by the Alaska Bar Association (ABA), or any other legal ethical authority, but that's the standard the division follows.

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REPRESENTATIVE LEDOUX said she understands that may be the standard when the division begins the prosecution. She clarified that she would like to know what happens when the division considers a case a "slam dunk" but when getting closer to trial decides it may not be a slam dunk, whether the division would just drop the case.

MR. SKIDMORE responded that the standard the division follows is that it believes it can prove a case beyond a reasonable doubt, and the division's screening of cases and decisions to move forward is its ethical obligation. Although, he related, during the course of the litigation it discovers additional evidence suggesting the evidence is not there to prove the defendant committed the crime, the division's obligation as prosecutors and the policy of the division is to dismiss that charge and not try to plead it to something lower.

[2:38:43 PM](#)

REPRESENTATIVE REINBOLD asked whether the bill would be heard again because she would like to put something on the record, and asked whether Mr. Skidmore would be available.

CHAIR CLAMAN advised that the bill will be heard again and he is confident Mr. Skidmore will be available.

[2:39:55 PM](#)

MARK RICHARDS, Executive Director, Resident Hunters of Alaska, advised that Resident Hunters of Alaska sent a letter to the House Judiciary Standing Committee supporting HB 42, and asked the committee to pass the bill from committee.

REPRESENTATIVE LEDOUX asked whether he was aware of any cases involving resident hunters wherein the property that had been forfeited was significantly in excess of a fine that could have been levied.

MR. RICHARDS answered that the Resident Hunters of Alaska are aware of some cases with guides and subsistence boats. He

continued that a pilot had his aircraft seized with the wings taken off and transported, and the person was found innocent. Unfortunately, he commented, the aircraft was his livelihood and the aircraft was not available for his use for six months.

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REPRESENTATIVE LEDOUX asked whether he was aware of any cases wherein someone had been offered that their property would be returned if they plead to something.

MR. RICHARDS responded it was not so much that, but they are certainly aware of cases where guides will forfeit their property because they make a consent agreement not to have their license taken away.

REPRESENTATIVE LEDOUX asked whether, within the purview of not violating privacy considerations, he could send the House Judiciary Standing Committee a list of examples of property being seized wherein the property was worth quite a bit more than the fine that may have been levied.

MR. RICHARDS said he will look into it and email Representative LeDoux with the results.

2:43:37 PM

THESHIA NAIDOO, Legal Director of Criminal Justice, Drug Policy Alliance, read her testimony into the record, as follows:

I work with the Drug Policy Alliance, we're a national non-profit organization that has worked to reform asset forfeiture policy for many, many years. And, together with organizations across the political spectrum, we have succeeded at rolling back some of the harshest forfeiture laws in the country.

We are pleased to support HB 42, and would like to thank Representative Wilson for introducing this important legislation.

In considering this bill, Alaska is among a growing number of states to scrutinize the practice of civil asset forfeiture, which has eroded individual rights and incentivized the seizure of cash, cars, and other

property, even in the absence of any criminal wrongdoing.

There is national momentum for reforming the system with legislation backed by strong bipartisan support. In fact, in 2016 alone, there were bills that were introduced in 22 states across the nation. And, reform that have been -- reforms have been enacted in the past three years have been signed into law by Republican governors in states, including: Florida, Michigan, Maryland, Montana, Nebraska, and New Mexico, and a whole host of other states. As well as by Democratic governors in California, New Hampshire, Minnesota, and other similar states. The growing left-right coalition calling out this injustice includes groups as diverse as the ACLU and the Drug Policy Alliance, the Institute for Justice which is a libertarian-leaning group, the Heritage Foundation, American for Tax Reform, (indisc.) Crime, and dozens of other groups advocating for property rights, individual rights, and criminal justice reform. This is an area that has united groups of all political stripes. The laws that have been implemented at the state level vary in scope and include comprehensive proposals to overal -- to overhaul civil forfeiture, as well as state level procedural reforms to protect property owners, especially innocent owners, and those that increase transparency and reporting requirements. Many of these reforms were enacted despite local law enforcement opposition.

I'd be happy to answer questions about state law reforms. I know there is -- we're running into a time constraint, but I'm also willing to provide follow up with some testimony after this hearing.

In conclusion, I'd like to respectfully urge committee members to vote in favor of this important piece of legislation and protect due process rights of Alaskans. The bill contains important protections for property owners that would help ensure the fundamental fairness of the asset forfeiture system in Alaska. I will stop there and I'm happy to answer any questions.

[2:47:06 PM](#)

KENT SULLIVAN, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, said the concerns of the Civil Division include in rem actions used in a purely civil context and completely unrelated to criminal proceedings. For example, he said it would include instances in which property needs to be named in a lawsuit in order to proceed against that property, such as quiet title actions, condemnation actions, probate actions, nuisance property, or abandoned mining equipment. Those are all in rem proceedings - proceedings against personal or real property. Oftentimes, he explained, defendants in those situations can't be identified and the state will initiate a legal proceeding against the real property. An issue with this bill is that it is so broad it purports to limit when in rem forfeitures can happen to a narrow set of circumstances, he pointed out. It would arguably exclude the above circumstances and that would be a problem because obviously the state initiates quiet title actions, condemnation proceedings often and it wants the ability to pursue abandoned and nuisance property, and those type of proceedings. He related that it is important the language of the bill isn't so broad that it arguably precludes those types of actions. He related that the civil division and Mr. Skidmore are working with Representative Wilson's office and recommending changes to avoid those problems.

[2:49:24 PM](#)

CHAIR CLAMAN asked Mr. Skidmore how much time is needed to provide input to Representative Wilson and ascertain whether she agrees with the changes.

MR. SKIDMORE answered that they do have language that needs to be circulated because the Department of Law (DOL) represents other state agencies, it would probably take a week to pull together all of their comments and feedback.

CHAIR CLAMAN surmised that holding the bill for two or three weeks would work for everyone.

MR. SKIDMORE agreed.

[2:50:43 PM](#)

REPRESENTATIVE REINBOLD asked Mr. Skidmore to estimate the percentage of crimes not prosecuted in Alaska.

MR. SKIDMORE related that he has been working on pulling together those sorts of numbers for the subcommittee hearing on the budget. He said he does not know the numbers for last year, but during the prior year the division saw a six percent increase in cases it had declined for budget reasons. He said he could not give the committee the numbers today, but he knows there is a percentage that varies depending upon the level of the crime and type of crime for the cases that are declined.

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REPRESENTATIVE REINBOLD commented that the Department of Law (DOL) fiscal note appears to be a "win for defense attorneys" if the defendant is able to get the forfeiture money back to pay for their defense. In the areas of Anchorage and Eagle River there have been over 2,000 stolen vehicles, which is a dramatic increase. She expressed concern that, according to FBI reports, there is growing number of organized crime, and currently it appears to be a double-edged sword. For example, she said, her home is robbed and the offenders use someone else's vehicle to get to her property to commit a crime. Therefore, it is "their property versus my property, you know, and they're -- they are the likely ones at the defense." She opined that the committee needs to take a step back, for example, "if a vehicle -- a vessel is being used to take the state's property, the fish, you know, whose property are we defense. This whole thing about the constitution." She continued that the committee needs to be careful of whose property is being discussed, and reiterated that the bill needs to be slowed down a bit because when criminal activity affects her property it inhibits her ability for life, liberty, and the pursuit of happiness because she has to go through many criminal hearings. She stressed that the committee needs to identify whether it is the defendant's property, "or is this the, you know, the other -- the other end."

REPRESENTATIVE REINBOLD referred to DOL's 12 million fiscal note over five years and said it will affect murders, drug cases, child sex exploitation, and sex trafficking. She said she would like to know whether the fish and game issues, drug enforcement policies need to be isolated. She related that she does not want to give people allegedly involved in criminal activity an upper hand, especially organized crime, and that she looks forward to listening to Mr. Skidmore and receiving help understanding the fiscal note.

[2:55:41 PM](#)

CHAIR CLAMAN, in response to a prior question of Representative LeDoux, noted that in federal court it was a common question when there were people with asset forfeitures at issue. He continued that the prosecution never brought it up but the defendants often brought it up and wanted to know if they pled to such and such an offense would they be allowed to keep the car. He explained that it never came up with respect to the cash in that there was a kind of recognition that a big bag of opioids and \$25,000 sitting next to the opioids that the cash was going with the opioids. The car and a house would come up when there were large criminal enterprises going on, which rarely happens in state court, he said.

CHAIR CLAMAN referred to the hypothetical drug case with a bag of opioids and \$25,000 in cash, and said the query was always with defendants coming and looking for private counsel with the \$25,000 cash. He opined there are a number of ethical issues about whether a defense attorney could take that \$25,000, or could take the case on a contingency basis wherein the defense attorney would be paid after the \$25,000 was recovered.

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CHAIR CLAMAN advised that public testimony was not closed.

[HB 42 was held over.]

[2:58:41 PM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:58 p.m.