ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 22, 2017
1:04 p.m.

MEMBERS PRESENT

Representative Zach Fansler, Vice Chair
Representative Jonathan Kreiss-Tomkins
Representative Gabrielle LeDoux
Representative David Eastman
Representative Chuck Kopp
Representative Lora Reinbold

MEMBERS ABSENT

Representative Charisse Millett (alternate)
Representative Louise Stutes (alternate)

OTHER MEMBERS PRESENT

Representative Tammie Wilson

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
01/23/17	(H)	Heard & Held
01/23/17	(H)	MINUTE (JUD)

03/01/17	(H)	JUD AT 1:00 PM GRUENBERG 120
03/01/17	(H)	Heard & Held
03/01/17	(H)	MINUTE (JUD)
03/13/17	(H)	JUD AT 1:00 PM GRUENBERG 120
03/13/17	(H)	Scheduled but Not Heard
03/22/17	(H)	JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

JOHN SKIDMORE, Director
Legal Services Section
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: During the hearing of HB 42, explained changes within committee substitute, Version U.

ACTION NARRATIVE

1:04:21 PM

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:04 p.m. Representatives Claman, Eastman, Reinbold, Kreiss-Tomkins, and Kopp were present at the call to order. Representatives LeDoux and Fansler arrived as the meeting was in progress.

HB 42-FORFEITURE & SEIZURE: PROCEDURE; LIMITS

1:05:00 PM

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 reported that the United Fishermen of Alaska submitted a letter of support, dated 3/1/2017, directed to Chairman Matt Claman. He related that the United Fishman of Alaska subsequently asked that the letter be withdrawn due to errors and misconceptions contained within that letter.

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REPRESENTATIVE KREISS-TOMKINS moved to adopt CSHB 42, Version 30-LS0193\U, as the working document. There being no objection, Version U was before the committee.

1:07:01 PM

JOHN SKIDMORE, Director, Legal Services Section, Criminal Division, Department of Law (DOL), offered that Version U addresses the concerns of the Department of Law (DOL) and provides clarity to the law.

MR. SKIDMORE explained that Sections 1-7, are conforming amendments that point back to the new procedures being codified for forfeiture procedures, of which will be discussed in Secs. 8 and 10.

MR. SKIDMORE referred to Sec. 8, and advised that it adds the following statutes: AS 12.35.200, 12.35.210, and 12.35.220. Continuing, he explained that AS 12.35.200 codifies protections for property by requiring a court order to seize property subject to forfeiture, as opposed to simply evidence in the case. The procedures put in place for the court order requires appropriate probable cause in order to believe that the property to be seized was in fact subject to forfeiture. He explained that the only way it would not require a court order was if the property was seized incident to a lawful arrest, if there was a previous judgement for that property, or if there was concern the property was subject to destruction.

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MR. SKIDMORE explained that AS 12.35.210 requires that the property be kept by the custodian for the law enforcement agency seizing the property in a manner that protects its value. In the event the property was ultimately returned to the person from whom it was taken, it would still be worth the same value as at the time it was seized.

MR. SKIDMORE advised that AS 12.35.220 allows the owner of seized property to request return of the property under certain conditions, such that the person is able to prove they are the lawful owner, the property is not subject to forfeiture, and it is not illegal to possess. The only way in which it would not be returned was if it was needed for evidence in addition to being subject to forfeiture, he said.

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MR. SKIDMORE referred to Section 9, page 5, and advised it amends AS 12.36.020(a) which discusses the return of property, it previously existed in statute. He explained that this bill amends to add a couple of references to other statutes, AS 12.35.220 previously discussed and AS 12.36.320 would be discussed momentarily.

1:11:28 PM

MR. SKIDMORE referred to Section 10, page 6, and advised it adds six new statutes: [AS 12.36.300, 12.36.310, 12.36.320, 12.36.340, and 12.36.350]. AS 12.36.300(a) lays out which property is subject for forfeiture after conviction of an offense, and it increases the burden to clear and convincing evidence from preponderance of the evidence. AS 12.36.300(b) requires that the property be acquired through the commission of the offense, or directly traceable to property acquired through the commission of the offense, or it was an instrumentality used in the offense.

AS 12.36.300(c) read that property is subject to forfeiture if it is illegal to possess. AS 12.36.300(d) read that a plea agreement can forfeit property as well. AS 12.36.300(e) refers back to the change in the law last year that civil in rem proceedings should not be used instead of a criminal prosecution, and clarifies that this is only meant to apply in criminal matters and does not apply to other civil matters.

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MR. SKIDMORE referred to AS 12.36.310, and advised that it originally listed all of the other statutes that authorized the seizure and forfeiture of property, and advised that this statute could be eliminated. He explained that to have it authorized here in AS 12.26.310 and in another place, the criminal division did not want to be in a situation now where it missed one statute, and in the future if legislatures were to decide it wanted to authorize forfeiture in a particular place, or eliminate the ability to forfeit property in a particular place, the criminal division did not want to have to go to two different places in order to do that, so this statute itself could be eliminated.

MR. SKIDMORE referred to AS 12.36.320, and noted the remission statute was added in Sec. 9, and explained that the remission statute discusses the return of property to innocent third parties. Remission means that forfeiture is forgiven, it comes from a U.S. Supreme Court case in the 1800s. He explained that remission says, if there is an innocent third party, which is someone with a legal right, title, or interest in the property they acquired in good faith, did not participate in the crime, didn't know the property would be used in the crime, and are a bone fide purchaser of that property for fair value, they are able to have the property returned to them. He noted that AS 12.36.320 uses the exact language as in AS 12.36.050, that solely discusses firearms. He explained that this remission statute, using the same procedure found in AS 12.36.050, expands it to all properties, and offered that in the event the committee preferred, AS 12.36.050 could be eliminated.

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MR. SKIDMORE referred to AS 12.36.320, and advised that it provides that the claim for remission must be filed within 120 days, the same as AS 12.36.050, and it also allows for the property to be bonded out.

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MR. SKIDMORE referred to AS 12.36.330, and advised that the state is authorized to seek forfeiture of substitute property if the property subject to forfeiture is unavailable for some reason. It limits the substitute property in being the same value as the property originally forfeited, he said.

MR. SKIDMORE referred to AS 12.36.340, regarding disposition of property requiring that within 30 days of criminal charges being declined, the property is to be returned to its rightful owner. He acknowledged that it does not specify all charges, but that is the appropriate reading of this statute in that it would require all charges to be disposed of either through declination, acquittal, or dismissal, of criminal charges.

MR. SKIDMORE referred to AS 12.36.350, and noted that an annual report is required by law enforcement to provide others a sense of what property had been seized within the state and forfeited in a particular calendar year.

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MR. SKIDMORE explained that Secs. 11-19 are conforming amendments to currently existing statutes in which forfeiture was authorized for a particular type of case. He explained that each of those amendments simply point an individual back to the procedures in AS 12.35.200 - 12.35.220 and 12.36.300 - 12.36.350.

MR. SKIDMORE referred to Sec. 20, and explained that it gives the Court of Appeals appellate jurisdiction over forfeiture proceedings, which is appropriate because the Court of Appeals deals solely with criminal cases.

MR. SKIDMORE explained that Section 21, deals with appeals in a slightly different manner in that it allows a party to appeal a judgment of the district court to the superior court in a forfeiture proceeding.

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MR. SKIDMORE pointed to Secs. 22-28, and explained these sections make conforming amendments for forfeiture, AS 12.35.200 - 12.35.220 and AS 12.36.300 - 12.36.350. These amendments simply direct folks back to the statutes previously discussed which say that forfeiture is authorized for those types of cases, he said.

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MR. SKIDMORE referred to Sec. 29, and advised that it read that the Act applies to forfeitures occurring on or after the effective date to avoid confusion to cases currently moving through the court system.

MR. SKIDMORE advised that Sec. 30 provides an effective date [of July 1, 2017].

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REPRESENTATIVE KOPP referred to Version U, page 5, lines 8-10, which read as follows:

> (c) The court may order the return of seized property subject to forfeiture upon finding that the item has no evidentiary value and establishing that the property owner has posted a secured monetary bond equal to the fair market value of the property.

REPRESENTATIVE KOPP asked Mr. Skidmore to imagine a situation wherein a court decided that [an item] did have evidentiary value," but the person seeking return of the property was able to provide satisfaction to the court that the item would be kept in storage, photographs taken, or a promise not to transfer, sell, or otherwise lose track of the property. He said he was thinking of heavy equipment as a result of a DUI accident involving a drilling rig, and so "you have a lot of equipment maybe that's part of that rig tied up in a yard somewhere," and the court could decide that the agency could release it upon certain conditions and that it does have evidentiary value and put stipulations on that.

REPRESENTATIVE KOPP paraphrased AS 12.36.070, Return of property by hearing, as follows: "The court would say that the property -- the court may impose reasonable conditions upon the return of the property to the owner that they have to, you know, keep it in some condition, take photos, or et cetra," and related that there is a good example of that in the law. The way this is written, it seems like it is saying that "the court has to find that it has no evidentiary value when ... a literal reading of that, the court may say, 'Well, it does have evidentiary value so I'm -- I'm sorry ... even with proper conditions, I can't turn it back over.'" He asked whether Mr. Skidmore read it in the same manner.

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MR. SKIDMORE said he was looking at AS 12.36.070, and the initial part of the statute does talk about whether or not there is evidentiary value to the property that a victim wants returned, and it would not allow the return of that. Although, he pointed out, subsection (d) is possibly what Representative Kopp was referring to and paraphrased "if the court orders the return of the property to the crime victim the court may impose reasonable conditions on the return. Those conditions may include that the crime victim retains, stores the property so that the property is available for future court hearings." He explained that the issue presented in that scenario is ensuring that the evidence is available at a criminal trial, for either the defense or the prosecution, if it is important in that trial. The evidentiary value would need to be preserved so that in returning it to [its rightful owner] there needs to be an assurance that if it is returned, the evidentiary value is preserved and not compromised by returning it.

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MR. SKIDMORE advised that in reading this subsection, he opined that Representative Kopp's question was, would that be possible. Mr. Skidmore explained that his interpretation was that if the court made arrangements to preserve that evidentiary value, whether through photographs or some other manner, the property could be returned. Although, he said, if the evidentiary value cannot be preserved, the property should not be returned. The manner in which this statute was drafted does not conflict with Representative Kopp's concern, he advised.

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REPRESENTATIVE KOPP referred to that section, and noted it appears to be asking the court to make a finding that the item has no evidentiary value. The language he was just proposing there, he explained, is that the court is able to look at a preponderance of the evidence that the property must be retained by the agency for evidentiary purposes or otherwise impose reasonable conditions to preserve the property. He said that as long as the committee is dealing with this draft, it is something that could be caught now to make sure it's not a problem for the court later on.

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CHAIR CLAMAN referred to Sec. 8, AS 35.200(c), page 4, lines 11-12, and noted this may be an area in which to propose an amendment on Monday.

1:26:17 PM

REPRESENTATIVE KOPP referred to AS 12.36.320(a)(4), page 7, line 5, which read as follows:

> (4) was a bona fide purchaser for fair value.

REPRESENTATIVE KOPP offered that it adds a qualifier for those who would be able to receive remission of property, and the fourth qualification is a bone fide purchaser for fair value. He asked Mr. Skidmore that if a person had received property as a gift or inheritance whether paragraph (1) covers that scenario, page 6, lines 30-31, which read as follows:

> (1) holds a legal right, title, or interest in the property seized, acquired in good faith;

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MR. SKIDMORE advised that in speaking about property being transferred as a gift or inheritance, the question is whether it was gifted or left to someone in inheritance to avoid the forfeiture. Paragraph (1) read "... acquired in good faith," and if it is inherited or gifted in good faith and not to avoid the forfeiture, then there is no problem. Although, for example, in the event a defendant's daughter was gifted an airplane to avoid forfeiture after the commission of a crime [is not in good faith]. He related that it is fact driven, and opined that Representative Kopp's concern is addressed by paragraph (1), on page 6.

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REPRESENTATIVE LEDOUX said that she understands Mr. Skidmore's good faith response in terms of a gift, but she was unsure she understood it in terms of an inheritance wherein someone has to die. She asked whether that means if they make out their will prior to being indicted the devisee inherits the property and everything is good. On the other hand, if the will is signed after that indictment, that is not good.

MR. SKIDMORE clarified that in an inheritance situation this issue is exceedingly rare because it would require someone to die and they would have had to give the property to someone else to avoid it from having been forfeited. Generally, he commented, if someone died prior to the conviction, the case is dismissed because the criminal division does not prosecute people who are dead.

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REPRESENTATIVE LEDOUX humorously asked whether he was absolutely firm that the criminal division doesn't prosecute people that are dead.

MR. SKIDMORE responded that in his 20 years of experience, that decision is "pretty firm."

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CHAIR CLAMAN related his understanding that if a person was convicted of a criminal offense and their appeal was pending,

and during the pendency of the appeal they died, then the conviction would be dismissed as well.

MR. SKIDMORE responded that is a possibility because when discussing a case on appeal, the criminal division would look at the issue being taken up on appeal as to whether or not that issue would provide legal clarity and significance for the state as a whole going forward. He said he was aware of cases wherein the state abandoned the appeal after someone died, thereby, undoing the conviction and undoing any forfeiture that had been ordered. Although, he related, he could also conceive of scenarios in which the state knew the person died and it continued to pursue the appeal and not for sanctions against the person who committed the crime, but rather to answer a question of law. He pointed out that he could not imagine the state seeking property if it was just trying to get clarification on a point of law.

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REPRESENTATIVE LEDOUX, in response to Mr. Skidmore's answer, said "suppose you wanted the property." She referred to the Enron Corporation scandal and said she was pretty sure the man was charged, convicted, appealed, and then died. His death had some effect on either a civil case being pursued against him hoping to receive his assets before the shareholders did, or it may have been a criminal proceeding, she opined. She further opined that the end result was supposed to have been forfeiture of his assets and when he died everything went away. She asked whether there would be cases in which the state would want to proceed even if the person was dead due to assets.

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MR. SKIDMORE offered that this scenario was less as forfeiture and more as restitution. He explained that the state would want to proceed and would not abandon its pursuit of restitution for defrauded victims. He added that once a person is deceased, the state would seek to collect it from that person's estate. An extra step could be taken to forfeit it to get it, but he pointed out that is not necessary. There are ways within the law to ensure that justice is achieved and restitution is obtained, and the statute does not present a problem in either direction for that, he remarked.

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REPRESENTATIVE FANSLER referred to AS 12.36.320(a)(1)(2)(3)(4), page 6. Lines 27-31, and page 7, lines 1-5, which read as follows:

> (a) A person seeking remission of the person's interest in property forfeited under AS 12.36.300 - 12.36.340 shall prove to the court by a preponderance of the evidence that the person
>
> (1) holds a legal right, title, or interest in the property seized, acquired in good faith;
>
> (2) did not knowingly participate in the commission of the crime in which the property was used;
>
> (3) did not know or have reasonable cause to believe that the property was used or would be used to commit a crime; and
>
> (4) was a bone fide purchaser for fair value.

REPRESENTATIVE FANSLER then specifically referred to [page 7, line 4], the word "and," and offered that it appears to indicate a person must meet all four of the requirements.

MR. SKIDMORE agreed that the word "and" means that all four conditions must be present. As to how to interpret a bone fide purchaser for fair value, he explained that in the event he purchased an item for fair value, then he paid someone else for it. Although, when an item is given as a gift or inheritance, a person cannot just give it to someone else to avoid the forfeiture. It doesn't prevent an innocent third party from seeking to have the forfeiture go through a remission and the property is not forfeited if the person asking for it received the property as a gift or through inheritance, he explained.

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CHAIR CLAMAN related a scenario of seeking return of his grandfather's favorite pistol that had been given to him ten years prior and he never paid a penny for it because his grandfather bought it many years ago, but it was stolen from his house. Now, he remarked, he is in court saying he wants his pistol back and, he offered, that he could see the judge looking at this currently drafted statute and deciding that Chair Claman qualified under paragraphs (1)-(3), but not paragraph (4) because he was not a bone fide purchaser and; therefore, the judge would not order remission of this property. He related

that he was unsure whether the currently drafted language addressed that.

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MR. SKIDMORE acknowledged that when it talks about the bone fide purchaser, "I honestly can't tell you that we sat down and said okay, what about inheritance what about gifts." He continued that they were looking at transferring property in the circumstances encountered in Alaska, which is people trying to sell valuable items to avoid those items being forfeited when used in a crime or acquired as the result of the crime they committed. He explained that in order for Chair Claman's grandfather's valuable pistol to have been forfeited, that pistol had to have been used in the commission of a crime. Under those circumstances, he opined that he did not think that necessarily makes Chair Claman an innocent third party who received it without any fault of his own. That pistol would still be subject to forfeiture because it was used in a crime, his grandfather knew it was used in a crime, and Chair Claman didn't acquire that interest until sometime later. He related that under those circumstances he was having difficulty fathoming the various circumstances members have described and exactly how it would play out. He said that the state's interest in forfeiture is only to ensure that justice is done. In the event there were circumstance in which the forfeiture didn't pursue justice, then he said he doesn't see the state pursuing it. He understands that the legislature is trying to write the statute so it doesn't rely on the state's discretion, and that policy call belongs to the committee, he reiterated.

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REPRESENTATIVE LEDOUX commented that if the legislature wanted to rely totally on discretion, there probably wouldn't be the remission portion at all, and that she does not feel comfortable relying totally on discretion. She said she can't imagine trying to meet the criteria before a judge when the person is simply not a bone fide purchaser because the item was inherited.

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REPRESENTATIVE FANSLER referred to AS 12.36.320(a)(4), page 7, line 5, [text previously provided], and asked whether there is a legal definition of fair value. He offered the scenario of a crafty person purchasing a nice antique pistol at a flea market

that is not even close to the price it should be, and asked how to determine that fair value aspect.

MR. SKIDMORE responded that fair value, fair market value, is the amount in which the property would change hands between a willing buyer and seller. He continued that that is Black's Law definition, the definition used in Alaska Statutes when discussing the value of property, the same manner in which the criminal division uses when assessing the element of a certain value to determine whether a crime is a misdemeanor or a felony, and the same manner in which Alaska courts would interpret fair value.

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REPRESENTATIVE REINBOLD referred to AS 12.36.320(a), page 7, lines 4-5, [text previously provided] and said that the word "and" must include paragraph (4) as well. She offered to work with people to add a friendly amendment that would read "legitimate owner or bone fide purchaser of fair value." She asked whether that suggestion would deal with Chair Claman and Representative Fansler's concerns.

CHAIR CLAMAN answered that he predicts this is an area in which an amendment would be drafted prior to Friday afternoon. There is a general sense on the committee that when subsections (1), (2), and (3) are satisfied and subsection (4) is not because the person received an item by gift or inheritance, that the person should have the same protections as the person who purchased it.

REPRESENTATIVE REINBOLD explained that her suggestion would be "legitimate owner."

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REPRESENTATIVE KOPP opined that Representative Reinbold was onto something and suggested that "or otherwise a legal recipient of the property" would probably cover it. That way, he explained, as long as the court found that the person was a "bone fide purchaser for value, or otherwise a legal recipient of the property" it should encompass every situation that would come into play.

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REPRESENTATIVE LEDOUX noted that she had seen the phrase "fair market value" in legal opinions, and that Mr. Skidmore

interpreted "fair value" to mean "fair market value." She asked whether there was a nuance in drafting where "fair value" was used as opposed to "fair market value."

MR. SKIDMORE explained that he wasn't the actual drafter, but the terms "fair market value" and "fair value" are synonymous for him. In the event the committee preferred using fair market value, that was a policy decision it could make.

1:46:23 PM

CHAIR CLAMAN referred to AS 12.35.220(c), page 5, lines 8-10, which read as follows:

> (c) The court may order the return of seized property subject to forfeiture upon finding that the item has no evidentiary value and establishing that the property owner has posted a secured monetary bond equal to the fair market value of the property.

CHAIR CLAMAN noted that his reading of subsection (c), was that after the court gets past the question of no evidentiary value, that this statute, as currently drafted, appears to require the court to order the posting of a monetary bond before returning the seized property. He asked whether this language gives the court any discretion about a monetary bond requirement.

MR. SKIDMORE responded that the only word within the statute that he see providing that discretion is the third word on line 8, which is "may." The court may order return of the property upon a finding of ... He said that he supposed it could be read that the monetary bond wouldn't necessarily have to be posted, but that is a policy call should the committee seek clarification. The purpose of the bond in that circumstance, he opined, is to say that this property doesn't have any evidentiary value so it could be returned, although the property itself could still be subject to forfeiture at the end of the case. He explained that that is the purpose of the bond itself, and it is less about the evidentiary value and more about whether or not the property ultimately is forfeited at the conclusion of the case.

1:48:21 PM

CHAIR CLAMAN referred to evidentiary value and said he could envision a situation in which there was an agreement that a car had evidentiary value, but the defendant was willing to waive

certain objections in exchange for getting the car back. In that scenario, pictures would be taken so that even though the car was not there, there would be more than enough pictures to show the car without having to require that no evidentiary value finding. He asked whether he was in the realm that Mr. Skidmore could imagine, or was he missing something.

1:49:10 PM

MR. SKIDMORE answered that Chair Claman was absolutely within the realm. For example, he said, many years ago he handled an Anchorage drive-by homicide case where two vehicles were involved and one vehicle drove off shooting at the other vehicle. The vehicle in which the person was shot and killed was held, there was a trial that resulted in a hung jury, and it was re-tried sometime later. During the intervening time that vehicle was reexamined and the bullet that actually went through the deceased's head had not previously been located, and it was located during the re-examination. He explained that that is the sort of thing the criminal division is always concerned about when looking at evidence seized, it wants to be certain there is no evidentiary value when people ask for the return of their property. In response to Chair Claman's example, he said, "Yes, I can conceive of a situation in which that evidence would be returned." It would be in the event there was a way to ensure that any evidentiary value was preserved such that the property no longer had the evidentiary value, but rather the photographs or some other stipulation was now the evidentiary value. He reiterated that it would be fact specific to any given case.

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REPRESENTATIVE EASTMAN asked Mr. Skidmore to speak to the timing of events, under Version U, where there was a determination of no evidentiary value because there appears to be little value in the state incurring the costs of storing the item. He asked, once the judge determined the property would be release, the amount of window space for someone to secure the bond and make the request. He further asked whether the determination was made prior to someone initiating a request for the property returned.n

1:51:44 PM

MR. SKIDMORE said that he believed his question was, if property was seized during an investigation, whether for forfeiture or

initially thought to be for evidence, if the state determined there was no evidentiary value in the property, at what point would the property be returned. He responded that if the property was not subject to forfeiture and there was no evidentiary value, he was unsure whether the state would automatically release the property. He advised there is another statute regarding property seized during an investigation, and it cannot be removed from law enforcement's possession unless there is a motion by the parties and the court ultimately authorizes it. Take the example Chair Claman offered a moment ago in the instance of that vehicle, and he offered the following scenario: Say for whatever reason that vehicle had some evidentiary value but the state decided it didn't have any value and returned it to its rightful owner. The defense goes to trial and advises the judge that it actually wanted that property, yet the prosecution failed to preserve it and that it had a duty to preserve it under case law. The defense then asks for a Thorne [jury] instruction. Under Thorne v. Department of Public Safety, State of Alaska, 774 P.2d 1326 (1989) the decision was that the state failed to preserve property in its possession; therefore, the defense was entitled to a jury instruction advising of the failure to preserve that evidence, and that the jury could then assume that the evidence was beneficial to the defense.

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MR. SKIDMORE referred to the timeline question and explained that the mechanism is that there has to be a motion with the court before property seized in a criminal investigation is released. The statute itself says that after the seizure occurred, the party desiring return of the property will make a motion at any time, and within 45 days of having made that motion there has to be a hearing to decide it.

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REPRESENTATIVE EASTMAN referred to property with no evidentiary value and remarked that certainly the state has an interest in minimizing the amount of property it pays in storage fees. He surmised that the criminal division would wait for the court to take some action releasing the state from any obligation to hold it, and asked whether anything would take place prior to that court action.

MR. SKIDMORE responded that in the event the state realizes it has property with no evidentiary value, it would file a motion,

the defense would then advise that it wants the property preserved for use in the future, or the defense would not assert a claim to the property and would not assert a claim that it has some evidentiary value. After the court makes its determination, the state would not be in the situation of the Thorne [jury] instruction because Thorne could not be asserted under those circumstances. Therefore, disposing of property requires a motion from either the state or some other party, and the court to ultimately rule on it.

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REPRESENTATIVE EASTMAN referred to the point in the process where the court releases its interest and the state determines there is no evidentiary value, and asked the timeline after that point.

CHAIR CLAMAN pointed out that the court has no interest in the property, the interest is with the state.

MR. SKIDMORE replied that he doesn't know that this bill puts a timeline on returning the property. The only timeline in the bill is found in the disposition of property subsection, AS 12.36.340, [page 7, lines 20-27], which is where charges are declined, dismissed, or an acquittal on all charges, and in that circumstance the property has to be returned within 30 days. He reiterated that as to the determination of no evidentiary value and release, he was unsure the bill specified a particular timeframe. Obviously, he pointed out, the interest of the law enforcement agency holding the property is to stop holding the property as quickly as possible because it incurs costs for storage.

[The committee treated public testimony as closed.]

[HB 42 was held over.]

2:00:09 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:00 p.m.