

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 16, 2018

1:01 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Jonathan Kreiss-Tomkins, Vice Chair
Representative Louise Stutes
Representative David Eastman
Representative Lora Reinbold

MEMBERS ABSENT

Representative Gabrielle LeDoux
Representative Chuck Kopp
Representative Charisse Millett (alternate)
Representative Tiffany Zulkosky (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 387

"An Act relating to scheduled substances; relating to the Controlled Substances Advisory Committee; and authorizing the attorney general to schedule substances by emergency regulation or repeal an emergency regulation that scheduled a substance."

- HEARD & HELD

HOUSE BILL NO. 75

"An Act relating to gun violence protective orders; relating to the crime of violating a protective order; relating to a central registry for protective orders; relating to the powers of district judges and magistrates; requiring physicians, psychologists, psychological associates, social workers, marital and family therapists, and licensed professional counselors to report annually threats of gun violence; and amending Rules 4 and 65, Alaska Rules of Civil Procedure, and Rule 9, Alaska Rules of Administration."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 387

SHORT TITLE: AG SCHEDULE CONTROLLED SUBSTANCES

SPONSOR (s) : REPRESENTATIVE (s) CLAMAN

02/21/18 (H) READ THE FIRST TIME - REFERRALS
02/21/18 (H) JUD, FIN
03/16/18 (H) JUD AT 1:00 PM GRUENBERG 120

BILL: HB 75

SHORT TITLE: GUN VIOLENCE PROTECTIVE ORDERS

SPONSOR (s) : REPRESENTATIVE (s) TARR

01/23/17 (H) READ THE FIRST TIME - REFERRALS
01/23/17 (H) JUD, FIN
02/28/18 (H) JUD AT 1:00 PM GRUENBERG 120
02/28/18 (H) Heard & Held
02/28/18 (H) MINUTE (JUD)
03/12/18 (H) JUD AT 1:00 PM GRUENBERG 120
03/12/18 (H) Heard & Held
03/12/18 (H) MINUTE (JUD)
03/12/18 (H) JUD AT 7:00 PM GRUENBERG 120
03/12/18 (H) Heard & Held
03/12/18 (H) MINUTE (JUD)
03/14/18 (H) JUD AT 1:00 PM GRUENBERG 120
03/14/18 (H) Heard & Held
03/14/18 (H) MINUTE (JUD)
03/16/18 (H) JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

KACI SCHROEDER, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law
Juneau, Alaska

POSITION STATEMENT: During the hearing of HB 387, answered questions.

ROBERT HENDERSON, Deputy Attorney General
Criminal Division
Office of the Attorney General
Department of Law
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 387, answered questions.

SEAN MOORE, Director
State and Local Government Affairs
Consumer Healthcare Products Association

Washington, DC

POSITION STATEMENT: During the hearing of HB 387, answered questions.

SEAN MOORE, Director
State & Local Government Affairs
Consumer Healthcare Products Association
Washington D.C.

POSITION STATEMENT: During the hearing of HB 387, offered an amendment.

MICHAEL DUXBURY, Captain
Deputy Commander
Statewide Drug Enforcement Unit (SDEU)
Division of Alaska State Troopers
Department of Public Safety
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 387, answered questions.

DARIO BORGHEGAN, Assistant Attorney General
Opinions, Appeals, & Ethics Section
Civil Division (Anchorage)
Department of Law
Anchorage, Alaska

POSITION STATEMENT: During the hearing of HB 75, answered questions.

STACIE KRALY, Chief Assistant Attorney General
Statewide Section Supervisor
Human Services Section
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: During the hearing of HB 75, answered questions.

KACI SCHROEDER, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law
Juneau, Alaska

POSITION STATEMENT: During the hearing of HB 75, answered questions.

ACTION NARRATIVE

[1:01:02 PM](#)

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 1:01 p.m. Representatives Claman, Stutes, Kreiss-Tomkins, Reinbold, and Eastman were present at the call to order.

HB 387-AG SCHEDULE CONTROLLED SUBSTANCES

[1:01:31 PM](#)

CHAIR CLAMAN announced that the first order of business would be HOUSE BILL NO. 387, "An Act relating to scheduled substances; relating to the Controlled Substances Advisory Committee; and authorizing the attorney general to schedule substances by emergency regulation or repeal an emergency regulation that scheduled a substance."

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KACI SCHROEDER, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law, explained the Sectional Analysis, as follows:

Section 1 makes the president of the Board of Pharmacy the chairman of the Controlled Substances Advisory Committee.

Section 2 makes a conforming change in conforming with the change in Section 1 and removes the attorney general as the chair and makes the chair the president of the Board of Pharmacy.

Section 3 adds a new duty to the Controlled Substances Advisory Committee and that duty is to advise the attorney general of the need to schedule substances by emergency regulation.

Section 4 is the meat of the bill, and Section 4 allows the attorney general to schedule substances by emergency regulation and then outlines a number of things that must be considered before the substance can be scheduled. Among them are that the attorney general must assess the actual or probable abuse of the substance; the attorney general must consider whether the substance has been already scheduled on a temporary basis under federal law; the attorney

general must consult with the Controlled Substances Advisory Committee; and the attorney general must also consult with the chief medical officer in the Department of Health and Social Services.

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Section 5 adds to the definition of controlled substances that are scheduled on an emergency basis by the attorney general.

Section 6 adds the definition of substance and that substance means a drug, controlled substance, or immediate precursor included in the schedules that are set out in statute, as well as substances that are scheduled on an emergency basis by the attorney general.

Section 7 adds to the duties of the attorney general to schedule substances on an emergency basis.

Section 8 says that notice of scheduling a substance on an emergency basis must be put on the Alaska Online Public Notice System.

Section 9 says that the notice must include a summary of compliance with the considerations that I just outlined in Section 4.

Section 10 exempts the attorney general's emergency scheduling process from the normal emergency regulation scheduling process. So, this is a different emergency regulation scheduling process that we're setting up.

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Section 11 adds the new process that we are establishing to the emergency regulation statute. So, if you looked up that statute you would find both the normal emergency regulation process and the one for the attorney general.

Section 12 exempts the process that we are establishing for the attorney general from the timelines that are in place for the current emergency regulations. Currently, they are only in effect for

120-days and we're exempting the attorney general's process from that timeframe.

Section 13 says that a regulation -- a substance that is scheduled by an emergency regulation by the attorney general is in effect for 720-days. It will expire unless the attorney general follows the normal regulation process and makes the regulation permanent.

Section 14 is the state policy that emergencies are held to a minimum and exempts the attorney general's ability to schedule on an emergency basis from that statute.

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ROBERT HENDERSON, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law, advised that as Ms. Schroeder described, this bill creates a new emergency regulation process that is unique to controlled substances and unique to designer drugs. It is different from the regular regulatory process and the current emergency regulation process, he advised. It is well known that designer drugs come on the market quickly, and the state as a whole, is not nimble, flexible, or quick enough to address these drugs as they arrive on the market. He related that the Department of Law (DOL) has heard this information from law enforcement, prosecutors, public health, and different venues. The legislature would then take up the issue and make a decision as to whether to schedule that controlled substance, and where on the list the drug should be scheduled. Currently, he offered, a bill can take several years to pass, the DOL has found that during that time period, people are getting hurt and abusing the substance, and law enforcement is without the tools necessary to interdict those new drugs. He pointed out that depending upon the circumstance, once the drug is scheduled by statute, the makers of that drug may change its chemical compound. This legislation, he described, allows the department to be nimbler as those new chemical compounds come up and the DOL can quickly and appropriately respond.

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MR. HENDERSON explained that HB 387 has several protections to ensure that the attorney general exercises that authority appropriately. He highlighted examples of where this issue was recently seen and why there is a need now for this legislation and he referred to the new drug "tramadol." He explained that

it is an opioid derivative, a mild pain killer, that is currently a Schedule IVA controlled substance, and the members of the Controlled Substance Advisory Committee (CSAC) started hearing about tramadol from community members of Bethel in 2014. Tramadol, he explained, was purchased on the internet, sent to Western Alaska, was abused, and sold illegally as a substitute for other opioids in the region. Tramadol was introduced to the 2015 Alaska State Legislature, and for several reasons it was not actually enacted until later and added to the controlled substances schedule, he offered. During that time, he commented, there was a two and one-half year window where the CSAC knew from law enforcement and public health that the drug was being purchased illegally, distributed illegally, and abused, but there was nothing state law enforcement could do about tramadol. The federal government passed an emergency regulation and it started to take on the large cases, and this bill is designed, in part, based upon how the federal government schedules drugs. He advised that another good example is the drug "spice" wherein law enforcement was unable to address enforcement. This body dealt with the issue of spice several years ago and shortly after it was added to the controlled substances schedule, the chemical compound changed, he advised. Ultimately, he explained, the way spice is handled under current law is through packaging, wherein there is certain packaging that someone engages in, represents it to be something that it is not, and that person can be held liable. He described that it is not an effective means of interdicting some of these drugs that result in real life public health consequences.

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MR. HENDERSON explained that HB 387 creates permission to pass emergency regulations. The legislation provides that the attorney general will provide 30-days public notice on the Alaska Online Public Notification System, and the attorney general shall also consider the various factors that go into determining whether a substance should be controlled. Broadly, he offered, it relates to the pattern of abuse such as, whether the substance is dangerous, addictive, and subject to abuse. The code in the proposed bill is more specific in that the CSAC goes through the degree of danger or probable danger, the way the drug is abused, the type, the severity, the duration, the scope, and the CSAC talks to its public health partners. He pointed out that those are the issues the attorney general would have to access and make written findings as to all of those factors. The attorney general would have to consult the Controlled Substance Advisory Committee, which was created by

statute and contains a unique group of skill sets where people have come together who are all subject matter experts in the realm of controlled substances, but for different purposes and different reasons, he explained. The current makeup of the advisory committee has nine members and Mr. Henderson then listed all of the members of the CSAC. He described the committee as a unique and robust group of individuals who all have an expertise in controlled substances and are looking at the issues through their particular areas of expertise. The group then comes together to discuss these drugs in order to determine whether it is necessary to schedule a certain drug. Under current law, the CSAC evaluates those drugs and makes a recommendation to the governor. Under this legislation, that recommendation would be made to the attorney general and the attorney general would then consider that recommendation, he explained. When offering written findings and making a recommendation, the CSAC would have taken testimony, sought out public input as it is subject to the Open Meetings Act, and it moves through the public notice process. Under this proposed bill, he offered, an abbreviated version of the public participation would occur at the attorney general level.

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MR. HENDERSON advised that in addition to the Controlled Substance Advisory Committee and in addition to reviewing all of the previously listed factors, the attorney general must consult with the chief medical officer as to the public health aspect, in addition to receiving information from the Controlled Substance Advisory Committee. Once all of those steps have occurred, the attorney general can issue an emergency regulation scheduling a new designer drug at one of six controlled substance schedules in Alaska. He advised that the information would be forwarded to the Lieutenant Governor's Office and posted on the Alaska Online Public Notification System, wherein that regulation would be in effect for 720-days. The intent of the bill, he described, is that during that 720-days, the legislature would then have adequate time to consider the regulation and possibly enact legislation to annul that regulation. Within that 720-days, if the attorney general decides to move to make that regulation permanent, the attorney general would follow the regular regulation process wherein public notice is posted to solicit comments and then responds to the comments and questions the public posted online. The regulation must be reviewed by the Department of Law (DOL), and it then goes back to the Lieutenant Governor's Office and becomes effective 30 days after receipt of the regulation.

Under the proposed bill, he advised, if the attorney general did not move to make the regulation permanent, the emergency regulation would automatically be repealed and the attorney general would not be permitted to re-issue that emergency regulation.

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CHAIR CLAMAN asked what takes place if the attorney general decided to schedule a particular substance on a different schedule than the federal government had already ready scheduled the substance.

MR. HENDERSON responded that the attorney general, under this proposed bill, would have that authority, "and we do that already." He explained that currently, there are several controlled substances that the State of Alaska schedules differently than the federal government.

CHAIR CLAMAN interjected that that was done by the legislature at the current time.

MR. HENDERSON added that the manner in which the bill is drafted, the attorney general would have the authority to make a determination as to where this new designer drug goes in the one of six schedules. The most obvious example of where this state is dramatically different than the federal government, is marijuana. Marijuana, he explained, under federal law is a Schedule I drug, meaning that it has no medical purpose and it cannot be prescribed. In Alaska, it is a Schedule VIA Controlled Substance and legalized as recreational under certain circumstances. There are other examples, he offered, such that the state's Schedule IA Controlled Substances, generally speaking, are opiate or opiate derivatives, such as heroin, morphine, fentanyl, and so forth, and the federal government schedules opioids and opioid derivatives under Schedule II, the state defines its schedules differently.

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CHAIR CLAMAN asked whether the state could schedule a substance that the federal government had chosen not to schedule, or does this bill require that first the federal government must take action before the state can take action to schedule a substance.

MR. HENDERSON answered that the bill does not require the attorney general to follow the path of the federal government,

but it does require the attorney general to consider what actions the federal government had taken.

[1:20:18 PM](#)

CHAIR CLAMAN suggested that one option would be to have a regulation sunset after two or three years or whatever period if the legislature chose to not take action to make it a controlled substance by act of the legislature. This legislation removes any legislative authority to take that action, and he asked why not start the process and then "kick it over" to the legislature to determine, whether it is 720-days or a longer period of time.

MR. HENDERSON replied that that is how some other states address the issue, for example, the State of Florida's attorney general is authorized to schedule drugs on an emergency basis, and then that action must be ratified by the legislature within a certain amount of time. The Controlled Substance Advisory Committee discovered, when researching this issue, that the 1980 Alaska Supreme Court had already spoken, generally, as to how to annul or take action against a regulation. The Alaska Supreme Court found that for the legislature to annul a regulation, the legislature must follow the constitutional mechanics of bill passage, meaning that there must be three readings and a majority vote in the House of Representatives and the Senate. He offered that it is the opinion of the Controlled Substances Advisory Committee that the ratification procedure is not possible given the interpretation of the Alaska Supreme Court as to how it interprets the regulation and annulment practice.

[1:22:19 PM](#)

CHAIR CLAMAN asked Mr. Henderson to cite the decision from the Alaska Supreme Court upon which he was relying.

MR. HENDERSON responded that the decision the CSAC reviewed is State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (1980).

[1:22:56 PM](#)

REPRESENTATIVE KREISS-TOMKINS asked whether Mr. Henderson had reviewed the 3/16/18 letter submitted by the Consumer Health Care Products Association regarding HB 387.

MR. HENDERSON answered that he saw the letter this afternoon and briefly reviewed it, but he has not had a chance to analysis the letter in depth.

[1:23:13 PM](#)

REPRESENTATIVE KREISS-TOMKINS explained that the crux of the letter was adding language to HB 387, Sec. 4. [AS 11.71.125(e)], page 3, lines 28-30, which would read as follows:

(e) The attorney general may not adopt an emergency regulation under this section that schedules an alcoholic beverage as defined in AS 04.21.080, marijuana as defined in AS 17.38.900, non-narcotic drugs if such drugs may [under the Federal Food, Drug, and Cosmetic Act, 921 USC 301 et seq] be lawfully sold over the counter or behind the counter without a prescription, or tobacco.

REPRESENTATIVE KREISS-TOMKINS asked the department's perspective on this suggestion.

MR. HENDERSON responded that he is not prepared to analyze that suggestion at this time, although he said he does understand what the proposed language it attempting to do. Wherein, he related, if something has been reviewed, monitored, and accepted, by the Federal Food, Drug, and Cosmetic Administration, and it is permitted to be an over the counter drug, should the attorney general be allowed to schedule that on an emergency basis. He advised that he could not speak to the effect of the breadth of that type of amendment at this time.

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REPRESENTATIVE KREISS-TOMKINS asked whether Mr. Henderson was aware of any over the counter drugs and not over the counter drugs that have been approved by the Federal Food, Drug, and Cosmetic Act that can be dramatically abused. He asked whether Mr. Henderson was aware of any currently abused legal drugs in Alaska "that could be for which emergency regulations could be adopted."

MR. HENDERSON answered, "Not at this point." There are certain over the counter drugs that are abused, but he could not speak to whether there are drugs that would be scheduled that are sold over the counter. After reading the subject suggestion, he advised that that is one of the first things he would want to review as well.

[1:25:44 PM](#)

REPRESENTATIVE REINBOLD asked why the emergency regulation process was not working currently, and why not simply fix the system rather than passing a bill.

MR. HENDERSON responded that, in part, it is because the legislature has not given the attorney general the authority to regulate on this precise issue. When the Alaska Supreme Court reviewed the Delegation Doctrine, meaning the legislature delegating certain authority to the executive branch, the court determined that the delegation must be clear, precise, with standards, and specific to the topic, he offered. Currently, the attorney general does not have that authority to pass emergency regulations, he explained.

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REPRESENTATIVE REINBOLD commented that Mr. Henderson had said that there was a procedure in place for emergency regulations, so why is this bill necessary.

MR. HENDERSON responded that there is a procedure for emergency regulations. Currently, he explained, the first step is that an agency must have been given authority to pass regulations. For example, he offered, the Alaska Department of Fish & Game (ADF&G) has been given the authority to pass regulations. The agency can then pass an emergency regulation if, under the current law, the regulation is necessary for public peace, health, safety, and general welfare. He explained that the interpretation [of public peace, health, safety, and general welfare] is different for every agency, such that the ADF&G's interpretation of an emergency is different than another agency. He offered that when the ADF&G issues an emergency regulation to close the Little Susitna River for king salmon, for example, that decision is based upon its express authority to pass regulations "that has been delegated to the legislature." In this instance, the attorney general has not been delegated that authority so they do not have the authority to pass an emergency regulation.

CHAIR CLAMAN commented that currently, no one in the executive branch has the authority to schedule controlled substances, only the legislature has that authority today.

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REPRESENTATIVE REINBOLD asked why [the authority would not be given to the] Department of Health and Social Services (DHSS) because it employs medical professionals.

MR. HENDERSON replied that some states have this authority in DHSS or the Board of Pharmacy, and every state's authority process is a little different. The model used for this legislation was crafted after the federal government which delegated that authority to the United States Attorney General, and it is modeled after the State of Florida of which delegated that authority to the state attorney general. For example, he offered, the State of Indiana delegated that authority to the Board of Pharmacy because every state's process is a little different.

[1:29:26 PM](#)

REPRESENTATIVE REINBOLD asked whether the attorney general would oversee the Board of Pharmacy.

MR. HENDERSON explained that the delegation of authority to pass emergency regulations can be delegated to a specific body or individual within the executive branch. This bill, as proposed, delegates the authority to the attorney general, but the legislature could delegate that authority to another executive body.

[1:30:05 PM](#)

REPRESENTATIVE REINBOLD referred to HB 387, Sec. 1 [AS.71.100(c)] page 1, lines 6-7, which read as follows:

(c) the president of the Board of Pharmacy or the president's designees [ATTORNEY GENERAL] is the chair [CHAIRMAN] of the committee.

REPRESENTATIVE REINBOLD asked Mr. Henderson to describe the relationship between the Board of Pharmacy and the attorney general because it appears to be a diversion from normal practice.

CHAIR CLAMAN asked whether part of this statute is to take the attorney general off of the Board of Pharmacy so the attorney general would not be involved in those decisions, or is it just removing the attorney general as chair of the Board of Pharmacy.

MR. HENDERSON answered, "No," the bill changes the chairman of the Controlled Substance Advisory Committee from the attorney general to the Board of Pharmacy. The attorney general is not on the Board of Pharmacy, and the bill makes the Board of Pharmacy designee as the chairman of the Controlled Substance Advisory Committee. Under current law, the attorney general is the chair of the Controlled Substance Advisory Committee, he explained.

REPRESENTATIVE REINBOLD commented that his explanation was extremely helpful.

[1:31:09 PM](#)

REPRESENTATIVE REINBOLD asked Mr. Henderson how many people, in general, are using, abusing, and trafficking controlled substances.

MR. HENDERSON deferred to the Department of Public Safety (DPS) because he does not know the answer to that question.

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REPRESENTATIVE REINBOLD requested a ballpark number because she was trying to determine how many of the general population is affected by this bill, and whether a lot of substances are being abused, and that trafficking is taking place.

MR. HENDERSON advised that he could not answer the question of how many substances are being abused because he does not have that data. Over the last several years, he advised, there have been only two new drugs, tramadol-U47700 and pink, that the Controlled Substance Advisory Committee recommended be scheduled.

CHAIR CLAMAN noted that there is broad recognition that the state does have substance abuse issues and that prosecutions are taking place every week for controlled substance violations.

[1:32:30 PM](#)

REPRESENTATIVE REINBOLD noted that it would be helpful to know how many people are using and abusing controlled substances outside of their doctor's recommendation, and how much trafficking is taking place in Alaska.

CHAIR CLAMAN advised Mr. Henderson that he could do his best to provide the information that is available. While it is interesting information, he opined that many of the questions of use versus abuse is pretty tough to get answers to, particularly on a statewide level.

[1:33:21 PM](#)

REPRESENTATIVE REINBOLD noted that there are one through six schedules of drugs, and asked the current law when dealing with them, such as possession, use, abuse, and trafficking.

CHAIR CLAMAN pointed out that this question is far beyond the scope of this bill.

MR. HENDERSON answered that generally speaking, there are six schedules and five different categories of classifications of drug offenses of misconduct involving a controlled substance, one through five, found under Title 11.71.

[1:34:16 PM](#)

REPRESENTATIVE REINBOLD asked the law when people are using, abusing, and trafficking controlled substances.

MR. HENDERSON answered that it depends on the circumstances, for example, someone merely possessing a schedule IA controlled substance, such as heroin, would be misconduct involving Schedule IV Controlled Substances.

CHAIR CLAMAN advised Representative Reinbold that her questions are regarding the general criminal law, a subject within which she previously offered a lot of opinions. Chair Claman noted that this is not a hearing for her to receive a basic explanation of the law because Representative Reinbold already understands the law.

[1:35:11 PM](#)

REPRESENTATIVE REINBOLD commented that this bill will "do a little emergency regulation" and put it up on the Alaska Online Public Notification System. She said that she would like to know whether it is being criminalized, or getting substance abuse programs, or is this "just another little posting?"

MR. HENDERSON answered that if the attorney general were to pass an emergency regulation and schedule a drug, for example,

tramadol as a schedule IVA, that depending upon the circumstances, possession and distribution of that drug would be a criminal offense.

[1:35:51 PM](#)

REPRESENTATIVE REINBOLD asked whether he had said "possession and use?"

MR. HENDERSON clarified that he had said possession and distribution.

REPRESENTATIVE REINBOLD asked Mr. Henderson to repeat his response.

MR. HENDERSON replied that the law classifies possession or distribution of a controlled substance based upon its severity, depending on what the person is doing and what type of drug the person has in their possession. In the event a drug was scheduled as IA, the distribution of the drug could either be a class B or a class C felony depending upon the circumstances. Possession of that drug would be a misdemeanor.

[1:36:33 PM](#)

REPRESENTATIVE REINBOLD referred to the "Distribution Sheet" in front of her, and paraphrased as follows:

Heroin is a class B felony if it is more than one ounce, and a class C felony if less than one ounce; if it is cocaine or meth, it is a class B felony in any amount if it is more than 2.5 ounces; and a class C felony if it is less than 2.5 ounces; and possession of a hard drug is class C felony and a misdemeanor jailtime is generally not authorized.

REPRESENTATIVE REINBOLD asked whether this will just be an Alaska Online Public Notification System posting or whether it will figure out how many people are using, abusing, and trafficking, and the state actually do something to penalize and help these people, or is this just a "simple little" online posting.

MR. HENDERSON responded that once the emergency regulation is passed, the possession and use would become a criminal action and the state could prosecute that offense; therefore, it would be more than just a posting.

1:37:48 PM

REPRESENTATIVE REINBOLD asked Mr. Henderson to carefully explain whether it will be a class C felony with no jailtime.

MR. HENDERSON reiterated that it depends upon the classification in which the drug is scheduled and it depends on what the person is doing with that drug. In the event it is a schedule IA controlled substance, possession would be a misdemeanor; distribution over one gram would be class B felony; and distribution of under one gram would be a class C felony.

REPRESENTATIVE REINBOLD asked whether this bill addresses anything other than posting or will there be efforts to understand what is taking place in the communities and causing the crime.

MR. HENDERSON reiterated that this would be an important tool to law enforcement, prosecutors, and public health because the tool allows the state to be quick and nimble when new drugs hit the market. Once the new drugs hit the market, they can be scheduled, get a search warrant, and have the people prosecuted, he advised.

1:39:44 PM

REPRESENTATIVE EASTMAN surmised that HB 387 would give the attorney general the ability to take a substance which is currently legal and make it illegal with the potential of being a felony.

MR. HENDERSON reiterated that depending upon the sentence, yes.

1:40:11 PM

REPRESENTATIVE EASTMAN said that in the event the attorney general believed a substance was misclassified and a class C felony was not high enough, could the attorney general, through this bill, then reclassify the substance and put it on a new schedule and turn that previous class C felony into a class B felony.

MR. HENDERSON answered "No," and he reiterated that the bill only allows the attorney general to add new controlled substances, it does not allow the attorney general to reschedule or delete existing scheduled drugs.

[1:40:48 PM](#)

REPRESENTATIVE EASTMAN referred to HB 387, [AS 44.62.260(c)(1) and (2)], page 7, lines 4-14, and asked the specifics within which the 720-day limit can be extended.

MR. HENDERSON asked whether Representative Eastman was asking, "can the 720-day limit be extended?"

REPRESENTATIVE EASTMAN asked when the regulation can continue to be in effect past the 720-day limit, and referred to HB 75, page 7, lines 4-14.

MR. HENDERSON answered that a drug could remain in regulation and extend past the 720-days if the attorney general followed the standard and normal regulation process.

[1:41:48 PM](#)

REPRESENTATIVE EASTMAN surmised that the language states that simply because [a drug was identified] in this emergency status, it would not need to continue in this emergency status. Basically, he said, sometime before the 720-days, [the regulation] would leave emergency status and be concurrent with the attorney general's current authority without this bill.

MR. HENDERSON clarified that if the attorney general followed the Administrative Procedures Act before the expiration of the 720-days, the regulation could remain.

[1:42:26 PM](#)

REPRESENTATIVE EASTMAN asked whether the attorney general can currently follow the Administrative Procedures Act, or whether this bill is necessary.

MR. HENDERSON reiterated that currently, the attorney general does not have the authority to schedule controlled substances under the Administrative Procedures Act.

[1:42:50 PM](#)

REPRESENTATIVE EASTMAN asked Mr. Henderson to describe, under the Administrative Procedures Act, the role of the legislature.

CHAIR CLAMAN pointed out that the Administrative Procedures Act relates to the executive branch, and the legislature has a process in which to schedule controlled substances.

REPRESENTATIVE EASTMAN asked Mr. Henderson to respond to his question for the record.

MR. HENDERSON replied that the Administrative Procedures Act effects and requires the executive branch and the state agencies to follow a specific procedure when enacting a regulation. The legislature has the authority, which cannot be taken away under this bill, to enact a proper bill to annul a regulation, he explained.

[1:43:45 PM](#)

REPRESENTATIVE EASTMAN surmised that with the passage of this bill there could be a legal substance, and if the attorney general followed this procedure with absolutely no action by the legislature, that substance could become illegal in perpetuity.

MR. HENDERSON reiterated, "Depending on the substance, yes."

[1:44:13 PM](#)

REPRESENTATIVE EASTMAN noted that Mr. Henderson testified that tramadol was being purchased and used illegally, and there was nothing the state could do about the issue. He asked what laws were being violated if it was purchased and used illegally, and why could the state not take action.

MR. HENDERSON answered that the federal government temporarily scheduled tramadol via emergency regulation and at that point it became illegal under federal law. Alaska's prosecutors and law enforcement are charged with enforcing state law. Therefore, he pointed out, it was illegal under federal law but not illegal under state law because it was not a controlled substance.

[1:45:07 PM](#)

REPRESENTATIVE EASTMAN referred to Sec. 4. [Sec. 11.71.125(a)] page 2, lines 26-30, which read as follows:

(a) The attorney general may, by regulation, schedule a substance under this chapter regardless of whether the substance is substantially similar to a controlled substance listed in AS 11.71.140 -

11.71.180, if the attorney general finds that scheduling the substance on an emergency basis is necessary to avoid an immediate hazard to public safety.

REPRESENTATIVE EASTMAN asked whether there is a definition of public safety the attorney general must follow or is public safety subjective on their part.

MR. HENDERSON answered that public safety is not a defined term under Title 11.81, meaning that the definition of immediate hazard to public safety would be defined by the attorney general under this proposed bill, taking into account the factors listed on page 3.

[1:46:14 PM](#)

REPRESENTATIVE EASTMAN asked whether there is anything in this bill that would prohibit the attorney general from deciding that high fructose corn syrup, for example, was an immediate hazard to public safety. Thereby, scheduling that syrup, making that syrup illegal for 720-days, and then go through the regulatory process of making it illegal in perpetuity.

MR. HENDERSON answered, in theory, that could occur. Although, he offered, given what the attorney general must consider, the individuals with whom the attorney must consult, whether it had been temporarily scheduled by federal law, and whether there was clandestine importation, manufacture, and distribution of the substance, it is highly unlikely.

[1:47:20 PM](#)

REPRESENTATIVE EASTMAN said that if the Controlled Substance Advisory Committee were to unanimously recommend to the attorney general to not schedule high fructose corn syrup, whether anything in the bill would require the attorney general to act upon that recommendation or could the attorney general simply decide not to take that recommendation.

MR. HENDERSON replied that the attorney general has the authority to not follow the recommendations of the Controlled Substance Advisory Committee. Except, he pointed out, by doing so, the attorney general would have to articulate the reason in writing and post it on the Alaska Online Public Notification System for the public.

[1:48:17 PM](#)

REPRESENTATIVE EASTMAN noted that because the attorney general would be given this greater and increased authority, does the department have a position on making the department's seat on the Controlled Substance Advisory Committee a non-voting member status.

MR. HENDERSON responded that that is not anything that had been considered at this point. Under the proposed bill, the attorney general would no longer be the chair of the Controlled Substance Advisory Committee in order to address that precise issue. The Controlled Substance Advisory Committee can meet only at the call of the chair and by removing the attorney general as chair, the bill requires the Board of Pharmacy to call a meeting, he explained.

[1:49:16 PM](#)

REPRESENTATIVE REINBOLD noted that she had misspoken and would like to put her clarification on the record.

REPRESENTATIVE CLAMAN pointed out that he was trying to get to public testimony and that this discussion has been well over the usual 15 minutes for questions.

REPRESENTATIVE REINBOLD related that it is a point of clarification.

CHAIR CLAMAN said that he understands, but Representative Stutes is next for questions, and then the committee will turn to public testimony.

REPRESENTATIVE STUTES indicated that she would not ask questions at this point.

[1:49:34 PM](#)

REPRESENTATIVE CLAMAN opened public testimony.

[1:50:07 PM](#)

SEAN MOORE, Director, State and Local Government Affairs, Consumer Healthcare Products Association, said he is testifying today on behalf of the Consumer Healthcare Products Association (CHPA), and reiterated that this bill would provide the attorney general authority to schedule a substance under emergency rule.

The CHPA is the national trade association representing leading manufacturers and marketers of over the counter (OTC) medicine as well as dietary supplements, he offered. The CHPA's member companies appreciate the intent of this legislation as it is something several other states have grappled with, and the CHPA is sympathetic to the difficulties in the ever-revolving nature of synthetic drugs that are used and distributed by criminals. He referred to his [previously discussed] written comments and pointed out that the CHPS is concerned that this bill may unintentionally threaten access to over the counter medications that are certified through the Federal Food and Drug Administration for use and are actually used by hundreds of thousands of Alaskans. The CHPS proposed one minor amendment to address those concerns and specially, the CHPS would like to see Sec. 4, page 3, lines 28-30 amended on such a manner that the bill excludes marijuana and tobacco from the scope of this expanded authority, and the CHPS would like to see OTC medication included in that exclusion. It is the CHPS's belief, he described, that this amendment is a straight forward fix and a fix that has been adopted in several other states that have delegated this authority to their attorneys general or another body. He offered that the amendment would maintain the sense of the bill and ensure that Alaskans' access to FDA approved OTC's is not interrupted, and it would ensure that the CHPS' member companies are able to operate in a predictable regulatory environment. For these reasons, he said, the CHPA respectfully encourages the committee to amend HB 387, and it appreciates the committee's consideration of CHPA's position.

[1:52:21 PM](#)

CHAIR CLAMAN, after ascertaining that no one wished to testify, closed public hearing on HB 387.

REPRESENTATIVE REINBOLD pointed to "a chart in front of me" and asked Captain Duxbury, Alaska State Troopers, to clarify where it read, and she paraphrased as follows: "Heroin distribution per Senate Bill 91 [passed in the Twenty-Ninth Alaska State Legislature] was an A felony in any amount. And, post-Senate Bill 91, it was a B felony if more than one-ounce. And then, heroin distribution post-Senate Bill 91 was a C felony if less than one-ounce." She asked Captain Duxbury to describe how much heroin people are allowed to possess because she believed it was 2.5 grams and it was enough to kill 25 people. Her overall point, she offered, is whether this is simply allowing the attorney general "a whole lot more authority or are we actually

going to do something with this bill to actually improve public safety?"

[1:54:10 PM](#)

MICHAEL DUXBURY, CAPTAIN, Deputy Commander, Statewide Drug Enforcement Unit (SDEU), Division of Alaska State Troopers, Department of Public Safety, responded that the key to HB 387 is its responsiveness and agile ability for law enforcement to go after, especially in the deadly era of opioids such as fentanyl and car-fentanyl, something that could be another version of that drug. As is known, these drugs are deadly, he said. Recently, he offered, another drug called "preydom" has come up and it is another drug sold in smoke shops with a contamination of salmonella that the country is "trying to get a hold on." In response to Representative Reinbold's question as to what amount of heroin people are able to have, he pointed out that heroin is illegal and possession is illegal. However, the committee would do well to re-address, with the deputy attorney general, some of the issues that are taking place. There has been some movement ...

CHAIR CLAMAN advised Captain Duxbury that his testimony is limited to the topic matter of HB 387, this is not a forum in which to debate the past acts of the legislature.

[1:55:48 PM](#)

CAPTAIN DUXBURY advised that possession of heroin is not (audio difficulties) trying to adjust that and he has been working with the attorney general. Also, he related, the amount of heroin and the other linked aspects are not necessarily part of this, but what is part of this bill is the response and agile aspect that will help law enforcement enforce laws, especially on things that are coming which are unknown at this time.

REPRESENTATIVE REINBOLD noted that previously the possession and distribution of cocaine and meth was a class B felony. She then reiterated her previous description of the current classifications. She added that prior to Senate Bill 91, possession was a class C felony and now it is a class A misdemeanor with almost no jailtime, and "I had the Department of Law budget and basically they were dismissing about 7,000 misdemeanors and that's all that possession is right now." Her concern, she offered, is whether the legislature is actually going to be doing something with this bill to address the drug issue or is this simply giving the attorney general more

authority and simply posting the drug classification. She asked whether Captain Duxbury supports HB 387, and whether the Alaska State Troopers are taking a position on this bill.

CHAIR CLAMAN advised Captain Duxbury that these questions and statements are about the fourth time Representative Reinbold has asked the same question and Captain Duxbury is not to answer her questions. Chair Claman pointed out that Captain Duxbury testified that the point of this bill is to give more flexibility within which to schedule controlled substances, and Representative Reinbold's concerns with past acts of the legislature are not the topic of this bill.

[HB 387 was held over.]

HB 75-GUN VIOLENCE PROTECTIVE ORDERS

[1:58:02 PM](#)

CHAIR CLAMAN announced that the final order of business would be HOUSE BILL NO. 75, "An Act relating to gun violence protective orders; relating to the crime of violating a protective order; relating to a central registry for protective orders; relating to the powers of district judges and magistrates; requiring physicians, psychologists, psychological associates, social workers, marital and family therapists, and licensed professional counselors to report annually threats of gun violence; and amending Rules 4 and 65, Alaska Rules of Civil Procedure, and Rule 9, Alaska Rules of Administration."

CHAIR CLAMAN advised that this is the fifth hearing of HB 75 in the House Judiciary Standing Committee. In recap, Chair Claman offered that on Wednesday the committee heard from the Department of Law (DOL) and the Alaska Court System (ACS) regarding constitutional issues, how the gun violence protective order structure compares to domestic violence protective orders, the structure in existing statutes, and how the gun violence protective order compares to civil commitment motions. The committee learned the following: individuals do not have a right to counsel in a domestic violence protective order proceeding because it is a civil proceeding and not a criminal proceeding; there may not be a right to counsel on a gun violence protective order proceeding because it is also a civil proceeding and the committee will learn more about a right to counsel today; the difference between a civil commitment under Title 47 based on a civil court finding that a person suffers from a mental disease or defect and a procedure to address a criminal defendant's

competency to stand trial in a criminal case; the criminal competency proceeding addresses whether a person is able to understand the proceeding against them or to assist in their own defense under AS 12.47.100 and there are no competency hearings if there are no criminal charges.

CHAIR CLAMAN noted that during the last hearing, Dario Borghesan, Department of Law, indicated that he would perform research on the right to counsel in civil matters, the status of the State of Indiana law and that court's review of that particular gun violence protective order.

[2:00:05 PM](#)

DARIO BORGHESAN, Assistant Attorney General, Opinions, Appeals, & Ethics Section, Civil Division (Anchorage), Department of Law, responded that on the issue of whether HB 75 would trigger the right to a court-appointed counsel, the short answer is that possibly in a relatively rare case and if they had a publicly funded attorney, there might be an obligation to provide the respondent with a court-appointed attorney. He explained that the right to court-appointed counsel typically attaches in criminal prosecutions, and HB 75 is a civil proceeding that does not entail any threat of jailtime. Typically, civil proceedings do not require court-appointed counsel; however, the Alaska Supreme Court ruled that in child protection proceedings and in private child custody proceedings, if one parent has a publicly funded attorney through the Alaska Legal Services Corporation, the parent on the other side is entitled to court-appointed counsel under the Flores v. Flores, 598 P.2d 893 (1979) decision and the Alaska Supreme Court reaffirmed that principle in 2011. As to HB 75, there is the right to parent your children and the right to bear arms. Although both are constitutionally protected rights, it does not mean that a person receives the same constitutional protections against a temporary seizure of a person's firearms, then a person would receive if there was a risk of a person's children being removed from their custody. He pointed out that those are different constitutional rights and the parties might be entitled to different judicial protections. It is important to advise, he offered, that it is "pretty rare" that the party seeking a domestic violence protective order does so with the help of an attorney. Therefore, in the case of the gun violence protective order it would also be fairly rare that someone would seek that order with the help of an attorney. He remarked that only if a person was seeking a gun violence protective order with the help of a

publicly funded attorney, there might be some obligation to have court-appointed counsel on the other side.

[2:03:11 PM](#)

CHAIR CLAMAN asked Mr. Borghesan to respond to the question about the State of Indiana case addressing the Indiana gun violence protective order. He commented that the committee had received a copy of the Indiana Court of Appeals opinion via email.

MR. BORGHEGAN answered that under Redington v. State of Indiana, 997 N.E.2d 356 (2013) decision a particular individual was observed by law enforcement to be acting strangely and potentially dangerously. The State of Indiana law enforcement obtained a warrant to remove Mr. Redington's firearms and then, ultimately received a court order removing all of his firearms from his possession. In turn, Mr. Redington challenged the Indiana statute on constitutional grounds arguing that it violated the constitutional provision of the Constitution of the State of Indiana guaranteeing the right to bear arms. The State of Indiana Court of Appeals ruled that "No," the protective order statute was constitutional and it did not violate the Constitution of the State of Indiana's right to bear arm.

[2:05:03 PM](#)

CHAIR CLAMAN asked Stacie Kraly, DOL, to describe the consequences of a civil commitment pursuant to Title 47, and the full range of rights and privileges a person loses as a result of a civil commitment.

[2:05:46 PM](#)

STACIE KRALY, Chief Assistant Attorney General, Statewide Section Supervisor, Human Services Section, Civil Division (Juneau), Department of Law (DOL), answered that when a person is civilly committed, the most obvious consequence is the loss of their liberty interest because they are being held by court order in a psychiatric hospital for treatment and evaluation. She reiterated her previous testimony and advised that the initial period of commitment is up to 30-days and the 30-days can be extended to 90-days, and to 180-days, but at any point during that time period when the person no longer meets the commitment criteria, they must be released. She related that there are also collateral consequences to a civil commitment which include: under federal law the loss of gun rights; the

social stigma of a civil commitment, and on different occasions the person may have to identify that civil commitment as a part of an application for employment or healthcare, or applied in future legal proceedings to identify that the person does have a mental illness, which is a predicate to being civilly committed; it could also be used in other proceedings such as judicial notice; and there is a potential consequence of having to pay for the services they received at [the institution]. The cost of the person's period of commitment is borne by the State of Alaska, but there is a mechanism by which the state can seek recovery of some or all of that cost if the person has insurance or a third-party recovery. Those collateral consequences of a civil commitment were discussed under In re Joan K. v. Alaska, 273 P.3d 594 (2012), she advised.

[2:08:50 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Kraly to describe the difference between the civil confinement of 2-3 days versus the 30-days, 90-days, and 180-days.

MS. KRALY reiterated that under the civil commitment statute there is a preliminary evaluation period which, in nomenclature common parlance, is called ex parte. An ex parte allows for a person to be taken into custody and evaluated to determine whether a civil commitment should be granted and that ex parte order expires after 72-hours. The civil commitment, she explained, is when it was determined that the person had not stabilized and truly did need additional commitment, or to be committed in order to get better. The facility has the ability to petition the court for an initial period of civil commitment of 30-days. In that circumstance, two mental health professionals and a psychiatrist identify that the person is suffering from a mental illness, is a threat to self or others, or is gravely disabled, she explained. There is then a full evidentiary hearing in front of a superior court judge or a magistrate, the person is given court-appointed counsel, and other individuals could also be appointed to assist the judge in determining whether the person met the above criteria.

[2:10:24 PM](#)

REPRESENTATIVE REINBOLD asked the success rate, for example, the state had [committed] 100 people, how many of those people get better, what are the treatment programs, and what are the outcomes.

MS. KRALY clarified that the collateral consequences only apply after the 30-day civil commitment, they do not attach during the 72-hour hold.

[2:11:27 PM](#)

REPRESENTATIVE REINBOLD surmised that the gun cannot be removed during the first 72-hour hold.

CHAIR CLAMAN clarified that typically the guns would not go with a person [to a psychiatric hospital] so the guns would be left behind.

REPRESENTATIVE REINBOLD stated that that is her point, that the person loses their liberties.

MS. KRALY responded that there are consequences, but the collateral consequences to which the chairman requested information only attach after the civil commitment, and the federal law that a person cannot possess or own a firearm becomes effective upon the civil commitment. When applying for a job, the application may ask whether the person has been civilly committed, and the answer does not require a "yes" unless the person had gone through a 30-day commitment hearing. The answer does not require a "yes" if the person had only gone through a 72-hour hold.

[2:12:39 PM](#)

REPRESENTATIVE REINBOLD asked whether Ms. Kraly was referring to 18 USC 922(g)(1-9).

MS. KRALY answered in the affirmative.

[2:12:59 PM](#)

REPRESENTATIVE REINBOLD commented that it is appropriate to discuss that code because Ms. Kraly mentioned the cite.

CHAIR CLAMAN interjected that the point of hearing about civil commitments is because people have asked a lot of questions and Ms. Kraly can answer to some extent, but Ms. Kraly is not here as an expert in criminal law, she is here from the DOL civil division.

[2:13:22 PM](#)

REPRESENTATIVE REINBOLD said that she is not an expert but she can certainly read the law.

MS. KRALY advised that she did not have a copy of the law in front of her and was unable to recite the sub-sections.

REPRESENTATIVE REINBOLD said that she has the law in front of her.

CHAIR CLAMAN asked the relevance because Ms. Kraly testified that there are federal laws requiring that a person committed to a psychiatric hospital have their guns rights taken away. He further asked whether there was anything ambiguous about that statement.

[2:14:03 PM](#)

REPRESENTATIVE REINBOLD noted that it is important that people understand how the federal law works with this because the discussion is about civil confinement, a federal rule comes into play ...

CHAIR CLAMAN advised Representative to read the statute and the committee would then move on.

[2:14:16 PM](#)

REPRESENTATIVE REINBOLD referred to 18 USC 922(g)(1-9), which read as follows:

18 USC 922(g)(1-9) prohibits the following from possessing, shipping, transporting, or receiving firearms or ammunition

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[2:15:58 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Kraly whether it is true that civil confinement interacts with this code and whether they are related to one another.

CHAIR CLAMAN pointed out that her questions have been asked and answered, and her reading of the United States Code makes clear that Ms. Kraly had referred to paragraph (4) and she does not need to answer that question because Representative Reinbold answered it for herself.

[2:16:27 PM](#)

REPRESENTATIVE EASTMAN referred to the collateral consequences Ms. Kraly had offered and asked whether there were further collateral consequences.

MS. KRALY answered that "that a pretty exhaustive list of the collateral consequences" was identified by the Alaska Supreme Court in the In re Joan K. matter.

REPRESENTATIVE EASTMAN surmised that these collateral consequences would not attach to an ex parte 72-hour hearing.

MS. KRALY answered that Representative Eastman was correct.

[2:17:02 PM](#)

REPRESENTATIVE EASTMAN noted that he was finding it difficult to understand whether Ms. Kraly was saying that the collateral consequences would not interact with an ex parte 72-hour hearing.

MS. KRALY explained that she had been discussing the collateral consequences for employment and reiterated that a person would not have to disclose that they were subject to an ex parte 72-hour hold petition on an employment application. There is the social stigma and potentially the financial consequences of the 72-hour hold, and those two collateral consequences may attach to a 72-hour hold or an ex parte proceeding. A person must be civilly committed in order for the remaining collateral consequences to attach and a civil commitment does not occur until a 30-day petition is filed, she reiterated.

[2:18:25 PM](#)

REPRESENTATIVE EASTMAN asked Ms. Kraly to help him understand how that would work where someone took away a person's gun rights and their prospective employer asked whether they had ever been (audio difficulties). He further asked why the person does not have to disclose that information, and whether there is some legal protection that no one can come after the person if they lie and say they had not been involved in such a hearing.

MS. KRALY said she was unsure she understood Representative Eastman's question.

REPRESENTATIVE EASTMAN offered a scenario that if a person is party to an ex parte hearing and, for example, the person was a recipient of protective order request, they attended the hearing, and the judge decided that was a frivolous request, but at a future date a prospective employer asked whether the person had ever been party to that type of hearing. He noted that Ms. Kraly had testified that the person would not have to disclose that situation because it is an ex parte 72-hour hearing. He asked whether the law is giving the person an opportunity to lie to their prospective employer or whether there is some other protection so that the disclosure does not become affected.

CHAIR CLAMAN pointed out to Representative Eastman that his question has the whole process completely convoluted and confused. He presented an example wherein someone had requested an ex parte request to institutionalize a person regarding concerns about the person's mental state, and by being an ex parte hearing, the person is not present. In the event someone had related their concern that there was a problem with a person, the court would issue an ex parte order without the person present, which is what ex parte means in Latin. The contested hearing is for the 30-day commitment in which the person would have a right to be present and a right to counsel. He explained that the 30-day hearing is where the collateral consequences would attach, and if the person was committed based upon the judge's findings, the person would have to report that situation to a prospective employer. By the simple nature that the person is not party to an ex parte proceeding, there is nothing for the person to report, he pointed out.

MS. KRALY responded that Chair Claman was correct.

[2:21:04 PM](#)

[CHAIR CLAMAN and Representative Eastman discussed the rulings of the chair.]

2:21:28 PM

REPRESENTATIVE EASTMAN noted that during the last hearing the committee did not receive a definitive answer as to the situation of two people appearing at the courthouse at the same time with (audio difficulties) maybe a marriage dispute, that the judge could not choose to hear "both of those, you know, parties together individually in those respective petitions." Therefore, if the committee was not able to receive a firm answer that ex parte means that there is no way for a person to be involved, he would like to go under the possibility that someone could appear at a 72-hour proceeding.

CHAIR CLAMAN pointed out that Representative Eastman had changed his topic from a civil commitment under Title 47, which is what Ms. Kraly was discussing. Representative Eastman's questions to Ms. Meade during the last hearing were with regard to domestic violence protective orders. He further pointed out that that is not an area in which Ms. Kraly had provided testimony. He asked Representative Eastman to limit his questions to Ms. Kraly's expertise as to Title 47, civil commitments.

2:22:35 PM

REPRESENTATIVE EASTMAN offered a scenario wherein a person is the recipient of an ex parte 72-hour hold request, and a prospective employer asks whether they were involved in a 72-hour hold and asked how it is that the person does not have to disclose that 72-hour hold and he asked whether the law read that he is permitted to lie to his prospective employer and the person could not be legally affected.

CHAIR CLAMAN added "With respect to Title 47."

MS. KRALY pointed out that she is not an employment lawyer and is not able to answer Representative Eastman's specific questions as to the consequences of not disclosing. Although, she pointed out, as Chair Claman previously explained, when an ex parte 72-hour hold is granted, it is exactly as Chair Claman identified, the proceeding is ex parte and the person is not involved. She reiterated that a mental health professional, a friend of the family, a doctor, or a psychiatrist contacts the judicial officer, explains the circumstances and why they believe that the person is mentally ill, is a threat to self or

others, or is gravely disabled. Under that scenario, she offered, the judge can determine, based upon the evidence offered ex parte, that there is enough evidence for the person to be held for 72-hours to determine whether the person is truly mentally ill, truly a threat to self or others, or is truly gravely disabled. Under those circumstances, she reiterated, the person would not have the due process that would normally be afforded to a person to rebut or protect their liberty interests. Therefore, she further reiterated, that sort of information should not generally be required to be disclosed because the person did not have a chance to defend themselves in those proceedings. It is the 30-day commitment that becomes a collateral consequence because the person had the entire array of due process wherein the person was in front of a judge with their appointed counsel, the person's counsel can cross-examine, present their own witnesses, and defend against the petition alleging that the person is mentally ill, a threat to self or others, or is gravely disabled, she explained.

[2:25:21 PM](#)

REPRESENTATIVE EASTMAN asked whether Ms. Kraly is aware of any provision of law that would limit a prospective employer from being able to ask these types of questions dealing with an ex parte hearing setting.

CHAIR CLAMAN added, "Within the Title 47 context."

MS. KRALY said that she was not able to answer that question.

[2:25:48 PM](#)

REPRESENTATIVE REINBOLD referred to gun violence protective orders and surmised that questions could be asked "because she said something about ex parte and I think it's really important to get clarification there."

CHAIR CLAMAN reiterated that Ms. Kraly is available to discuss Title 47 civil commitments with an ex parte component. Representative Reinbold could ask questions regarding ex parte hearings in the civil commitment context, Ms. Kraly is not here to testify about either domestic violence protective orders or the proposed gun violence protective orders, which is a different subject in the area of Ms. Kraly's expertise.

[2:26:28 PM](#)

REPRESENTATIVE REINBOLD commented that with the ex parte proceeding, the person receives no representation and cannot defend themselves, "it went to the immediate family member who can petition and then it's reporting the evidence and then it - it says on this chart, 'expires 20-days unless ...'"

CHAIR CLAMAN pointed out that Representative Reinbold was asking questions about the gun violence protective order, which is the proposal of this statute. He further reiterated that Ms. Kraly is available to discuss civil commitments under Title 47, and this particular proposal has nothing to do with civil commitments. Ms. Kraly was asked to testify in order that the committee could understand the differences and she is not here to answer questions about the bill.

[2:27:08 PM](#)

REPRESENTATIVE REINBOLD said, "Basically, you were talking very specifically about ex parte" and mentally ill. She related that she was not sure whether Ms. Kraly had used the words "and" or "or" when describing the commitment criteria.

CHAIR CLAMAN advised that Ms. Kraly could answer in the context of Title 47, as she had answered the question three times and this is the last time she would answer that question.

MS. KRALY reiterated that in order to be civilly committed, under AS 47.30, the judge must find by clear and convincing evidence that a person is mentally ill, and is a threat to self or others, or is gravely disabled.

[2:28:30 PM](#)

CHAIR CLAMAN advised Kaci Schroeder, Department of Law, that the bill contains language on page 4, referring to "less restrictive alternatives."

[2:28:42 PM](#)

KACI SCHROEDER, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law, noted that "less restrictive alternatives" is an area in which Ms. Kraly could respond.

CHAIR CLAMAN noted that in this particular bill there is reference on page 4, line 13 that "less restrictive

alternatives" have been tried and were ineffective. He asked whether that is a question for Ms. Kraly to answer.

MS. KRALY responded that she performed research as to "less restrictive alternatives" and the term is used in approximately 15-16 different places in state law. There is no statutory definition of "less restrictive alternatives" and in the big scheme of things it is a fact specific question that would be evaluated by the agency, but in most cases, it would be evaluated by the judicial officer. For example, this comes up in civil commitment hearings, and before the person can be committed for up to 30-days, the criteria and predicate for commitment must be established. There must also be an evaluation that there are "no less restrictive alternative than placement in a secure psychiatric hospital." In doing so, she explained, it must be established on an evidentiary basis with the judge as to whether there is a means to provide care, custody, keep the person safe, the community safe, or keep them from harming themselves by not putting them into the hospital. In that regard, could the person go to, for example, the Juneau Alliance for Mental Health (JAMHI) Health & Wellness housing in Juneau, whether there is enough support at JAMHI housing that the person did not need to be civilly committed, can the person remain in their own home, can they remain in their parent's home, can they go to a non-locked secure facility for possible substance abuse treatment, and so forth. It must be established with the judge that an array of services had been considered and were discounted for purposes of maintaining health, safety, and welfare, she explained. When reviewing how "less restrictive alternatives" is used in other provisions in state law, she offered that the same sort of concept comes up, as to whether all of the other circumstances had been qualitatively and quantitatively evaluated in order for the judge to determine what has to happen in this circumstance because there are no less restrictive alternatives. In the context of a mental commitment, it would mean something that is less restrictive than being placed in a psychiatric hospital, she explained.

[2:31:57 PM](#)

CHAIR CLAMAN asked, in the context of HB 75, that would mean some less restrictive alternative than removing a person's firearms.

MS. KRALY answered that Chair Claman was exactly correct, it would be a fact specific analysis to present to the court to advise that all of these other alternatives, such as locking the

guns, removing the guns, and putting them in another place, had been considered. There could be an array of less restrictive alternatives potentially presented to the court for the court to ultimately determine whether those were sufficient to maintain the safety of the situation, she related.

[2:32:32 PM](#)

CHAIR CLAMAN surmised that the less restrictive alternatives in HB 75, page 4, would be specific to the less restrictive alternatives for the guns at issue rather than removing the guns.

MS. KRALY noted that that is how she read the bill.

[2:32:56 PM](#)

REPRESENTATIVE REINBOLD surmised that the fact specific analysis (audio difficulties) more restrictive has to work. For example, it may be less of a burden to the state if the neighbor with a locked safe, locks up the person's guns, rather than law enforcement confiscating the guns. She commented that she was trying to think of effective and less burdensome alternatives for the state and possibly more comfortable alternatives "for the accused." (Audio difficulties throughout this testimony.)

MS. KRALY answered that that is exactly the type of evidence that would be presented to a judge. The judge would evaluate whether they believed locking a person's guns in a neighbor's locked safe was an appropriate disposition, such that the gun violence protective order was not necessary because the guns were safe.

CHAIR CLAMAN advised Representative Reinbold that in the evidentiary context, what would more likely arise would be that

"the person came to the court and said, 'I asked this person in my house 'Can I put your guns in the next-door neighbor's gun safe because I think you are a risk to yourself?' And, the person said, 'You can't -- no, I won't let you put the guns in the neighbor's gun safe.' So, the likelihood is that you're not going to get someone in court saying, 'the guns from the neighbor's gun safe' you are going to get the person saying, 'I tried to get them in the neighbor's gun safe and they wouldn't agree.'"

[2:34:48 PM](#)

REPRESENTATIVE REINBOLD asked whether an amendment should be proposed that would make certain this was an option, or whether the court would automatically determine whether there are any effective options other than law enforcement seizing the guns and the state having to manage the guns.

MS. KRALY responded that she is not in any position to make a recommendation on amendments. She offered her belief that the manner in which the statute is crafted, such as the requirement that the judge engage, identify, and make a finding as to whether there are no less restrictive alternatives, meets those needs because the judge would have to make a specific finding as to that evidence, she explained.

[2:35:54 PM](#)

REPRESENTATIVE REINBOLD surmised that the judge automatically must see the least restrictive options.

MS. KRALY related that that is how she reads the bill.

CHAIR CLAMAN added that that is what the bill clearly requires.

[2:36:11 PM](#)

CHAIR CLAMAN referred to HB 75, [Sec. 6. Sec. 18.65.845], page 8, lines 4-5, which read as follows:

In AS 18.65.815 - 18.65.840, "immediate family member" means a spouse, child, stepchild, parent, or stepparent.

CHAIR CLAMAN asked Kaci Schroeder, Department of Law, whether there was a particular reason it was limited to those individuals and why there would be limits on more people being identified, such as grandparents or domestic unmarried partners. He asked whether it was simply a choice made by the drafter.

[2:36:58 PM](#)

KACI SCHROEDER, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law, responded that the reason it is defined in this manner would be a question for the drafter or the sponsor. The Department of Law (DOL) views this as solely in the hands of the legislature as to how it wants to define that provision.

[2:37:12 PM](#)

CHAIR CLAMAN asked whether there are other statutes that allow these types of requests, other than those listed in this particular statute.

MS. SCHROEDER answered that the department had not looked at that issue, there are other statutes in the state code that define household member, and those definitions are broader, but it is not the same terminology of "immediate family member."

[2:37:34 PM](#)

CHAIR CLAMAN asked whether the domestic violence protective orders use a definition of household member or does it actually list the individuals.

MS. SCHROEDER responded that it is household member.

CHAIR CLAMAN asked who is determined to be a household member under the domestic violence protective order statute in contrast to this statute.

MS. SCHROEDER referred to AS 18.66.990(5), which read as follows:

(5) "household member" includes

(A) adults or minors who are current or former spouses;

(B) adults or minors who live together or who have lived together;

(C) adults or minors who are dating or who have dated;

(D) adults or minors who are engaged in or who have engaged in a sexual relationship;

(E) adults or minors who are related to each other up to the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law;

(F) adults or minors who are related or formerly related by marriage;

(G) persons who have a child of the relationship; and

(H) minor children of a person in a relationship that is described in (A) - (G) of this paragraph;

[2:39:50 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Schroeder to describe what this bill does that is not already in federal or state statutes.

MS. SCHROEDER replied that she cannot speak to that question and she could only speak to the state criminal aspects of HB 75.

[2:40:10 PM](#)

REPRESENTATIVE REINBOLD asked Ms. Schroeder what she could speak to on this bill.

MS. SCHROEDER answered that this bill establishes a gun violence protective order that is a civil proceeding and it is not something within which the criminal division would be involved. However, she said, under this bill, the violation of the order would become a crime which is when the criminal division would get involved and potentially prosecute for the violation of the protective order. She added that that would be the extent of the criminal division's involvement.

[2:40:37 PM](#)

REPRESENTATIVE REINBOLD asked why this would be a civil proceeding and not a criminal proceeding.

MS. SCHROEDER answered that protective orders, in general, are civil proceedings because the state is not involved, it is one party against another party. The violation of those orders generally, whether it be a domestic violence, sexual assault, or stalking protective order, is a crime wherein the state is involved so it is a criminal matter.

[2:41:08 PM](#)

REPRESENTATIVE REINBOLD asked when the United States Code, that she previously read, is invoked in this whole process.

MS. SCHROEDER advised that that question is outside of her area of expertise as she practices solely in state criminal law.

[2:41:46 PM](#)

REPRESENTATIVE REINBOLD asked whether the United States Code previously referenced, is applicable in the department and for Alaskans. Representative Reinbold commented that "I would say yes."

CHAIR CLAMAN pointed out to Representative Reinbold that Ms. Schroeder does not need to answer that question because the federal law applies to everyone. The authority to prosecute federal law is given solely to the federal government and state prosecutors do not have authority to prosecute federal crimes, which has been the law of the land for centuries.

[2:42:21 PM](#)

REPRESENTATIVE REINBOLD commented that there is currently a "big movement" wherein the Anchorage Police Department is working with the Alaska State Troopers and is also working with the federal government on all of the crime taking place in the state. It appears that, at some point, the USC cite would be invoked and she asked, at what point would the criminal division invoke this USC cite if collaborating.

CHAIR CLAMAN ruled that he would not ask Ms. Schroeder to answer that question, if the FBI, APD, the Alaska State Troopers cooperate, they make decisions about where folks will be charged. There will be crimes charged in federal court that have multi-agency obligations and they are charged only with federal crimes in federal court. The same is true with the cooperation between the state and the FBI in what becomes state prosecutions wherein the person is charged with state crimes in state courts because the particular codes are jurisdictional, he said.

[HB 75 was held over.]

[2:44:43 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:44 p.m.