

**ALASKA STATE LEGISLATURE**  
**HOUSE JUDICIARY STANDING COMMITTEE**

March 25, 2019

1:04 p.m.

**MEMBERS PRESENT**

Representative Matt Claman, Chair  
Representative Gabrielle LeDoux, Vice Chair  
Representative Chuck Kopp  
Representative Louise Stutes  
Representative Adam Wool  
Representative Laddie Shaw  
Representative David Eastman

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

HOUSE BILL NO. 49

"An Act relating to criminal law and procedure; relating to controlled substances; relating to probation; relating to sentencing; relating to reports of involuntary commitment; amending Rule 6, Alaska Rules of Criminal Procedure; and providing for an effective date."

- HEARD & HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HB 49

SHORT TITLE: CRIMES; SENTENCING; MENT. ILLNESS; EVIDENCE

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/20/19	(H)	READ THE FIRST TIME - REFERRALS
02/20/19	(H)	JUD, FIN
03/22/19	(H)	JUD AT 1:30 PM GRUENBERG 120
03/22/19	(H)	Heard & Held
03/22/19	(H)	MINUTE(JUD)

**WITNESS REGISTER**

ROB HENDERSON, Deputy Attorney General  
Criminal Division  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** Introduced HB 49 on behalf of Governor Dunleavy, the prime sponsor.

**ACTION NARRATIVE**

[1:04:16 PM](#)

**CHAIR MATT CLAMAN** called the House Judiciary Standing Committee meeting to order at 1:04 p.m. Representatives Eastman, Stutes, Shaw, Kopp, Wool, LeDoux, and Claman were present at the call to order.

**HB 49-CRIMES; SENTENCING;MENT. ILLNESS;EVIDENCE**

[1:04:56 PM](#)

CHAIR CLAMAN announced that the only order of business would be HOUSE BILL NO. 49 "An Act relating to criminal law and procedure; relating to controlled substances; relating to probation; relating to sentencing; relating to reports of involuntary commitment; amending Rule 6, Alaska Rules of Criminal Procedure; and providing for an effective date."

[1:05:28 PM](#)

ROB HENDERSON, Deputy Attorney General, Criminal Division, Department of Law (DOL) said the overarching theme of HB 49 is the restoration of discretionary options to law enforcement, prosecutors, and judges for the purpose of addressing criminal behavior. He stressed that no two offenders are the same, no two circumstances are the same, and no two crimes are the same. He said judges and prosecutors need options to address each case

individually and to fashion a sentence that is unique to the offender.

MR. HENDERSON said HB 49 would return drug crime sentencing laws to what they were before 2016. In 2016, he explained, a tiered system was enacted that effectively lowered most drug trafficking penalties, including the amount of incarceration that can be imposed for drug trafficking. He said these changes hampered efforts to combat drug trafficking in Alaska.

MR. HENDERSON offered an example to illustrate this point. He said that, before 2016, a person trafficking 5 grams of heroin - about 50 individual doses - was guilty of a class A felony offense subject to a sentencing range of 5 to 8 years, assuming no prior criminal history. Now, he said, that same person would be guilty of a class B felony offense subject to a sentencing range of 0 to 2 years.

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MR. HENDERSON said that, prior to 2016, the amount of drugs someone was dealing was just one factor used to determine the severity of the offense. Now, he explained, the tiered system makes the amount of drugs the central focus. He listed other factors used prior to 2016: the manner of trafficking, the commercial value of the drug, and the availability of the drug in the community. He clarified that 5 grams of heroin in Kotzebue is very different from 5 grams of heroin in Anchorage. He said that, prior to 2016, the court would consider all these factors when imposing an appropriate sentence. Now, he said, the amount of drugs a person has when he/she is arrested for trafficking is the primary factor for determining whether the crime is a class B or class C felony.

MR. HENDERSON said if a person today is arrested for trafficking under 1 gram of heroin or under 2.5 grams of a Schedule II or IIIA controlled substance, like methamphetamine or cocaine, that person is guilty of a class C felony offense. If the amount of heroin is over 1 gram or the amount of the Schedule II or IIIA controlled substance is over 2.5 grams, that person is guilty of

a class B felony. He said HB 49 would return drug classification and sentencing schemes to pre-2016 levels.

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MR. HENDERSON said HB 49 would also revert possession of the most serious drugs like heroin, cocaine, fentanyl, carfentanil, and methamphetamine to a class C felony offense. He explained that changes made in 2016 rendered possession of most drugs a misdemeanor offense. Those changes, he noted, also prohibit active jail time until the third offense. He said this means a person convicted of possessing heroin for the first time now faces a maximum sentence of 90 days with 90 days suspended, so no active incarceration. He said a second offense nets a 180-day sentence with 180 days suspended. It is not until the third offense, he said, that active incarceration is permitted.

MR. HENDERSON stated that the 2016 sentencing changes had two impacts. The first, he said, was a deprioritizing of enforcement and prosecution for drug trafficking and drug possession. He noted that law enforcement and prosecutors always prioritize felonies over misdemeanors and violent cases over nonviolent cases. He said that when drug possession was reclassified to a misdemeanor offense, it became less of a prosecutorial priority. As a result, he said, "felony drug possessions" dropped approximately 70 percent from 2015 to 2017. He said the Department of Public Safety (DPS) describes this phenomenon as "institutional inertia." He said returning to the pre-2016 drug classification and sentencing scheme would restore priority, which he described as "important given the drug epidemic we're seeing across the state."

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REPRESENTATIVE WOOL asked for Mr. Henderson to repeat what dropped between 2015 and 2017.

MR. HENDERSON answered that felony drug prosecutions dropped approximately 70% between 2015 and 2017.

REPRESENTATIVE WOOL noted that the pre-2016 laws were in effect when the drop began in 2015. He posited that the decrease in felony prosecutions is not attributable to changes in sentencing.

MR. HENDERSON said he does attribute the decrease to statutory changes. He said that DOL prosecuted approximately 900 felony drug cases in 2016 but only about 320 in 2017.

REPRESENTATIVE WOOL suggested that it is reasonable to expect felony drug prosecutions to decrease when crimes that were previously felonies get reclassified.

MR. HENDERSON said that is correct. He reported that misdemeanor drug prosecutions have not increased, but rather decreased. He said DOL prosecuted 750 misdemeanor drug cases in 2015, approximately 180 in 2016, and then approximately 500 in 2007. He stressed that the priorities of law enforcement and prosecution have been refocused on offenses outside of drug trafficking and drug possession.

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REPRESENTATIVE LEDOUX asked why it is deemed necessary to return to pre-2016 laws rather than simply instructing DOL to prosecute more drug cases.

MR. HENDERSON said DOL only prosecutes the cases that are referred to it. Thus, he said, if law enforcement has deprioritized those investigations, that impacts referrals which in turn decreases prosecutions.

REPRESENTATIVE LEDOUX asked why the Office of the Attorney General cannot work with law enforcement to prioritize drug crimes, even if they are just misdemeanors.

MR. HENDERSON said the attorney general could do that. He stressed that DOL prioritizes cases because its resources are limited. He said if the legislature reclassifies a crime as a misdemeanor, it sends a message that the crime is not as

important as a felony. He said felonies should take priority as they are more serious crimes.

REPRESENTATIVE LEDOUX asked if DOL, since it is working with limited resources, would have to deprioritize prosecuting violent crimes to allow for more drug possession prosecutions.

MR. HENDERSON referred to the attached fiscal note. He said it anticipates an increased number of drug cases referred to DOL.

REPRESENTATIVE LEDOUX hypothesized that, with the same fiscal note and same money, DOL could just add three to five new prosecutors to handle drug possession cases without the sentencing law having to be changed.

MR. HENDERSON answered "hypothetically ... yes," assuming law enforcement reprioritized drug cases and the number of referrals to DOL returns to pre-2016 levels.

CHAIR CLAMAN mentioned that the House Law Finance Subcommittee supported the addition of five prosecutors.

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REPRESENTATIVE WOOL asked for the justification - except to increase conviction numbers - for making simple drug possession a felony?

MR. HENDERSON said there are two reasons. The first, he explained, is that the current sentencing scheme does not incentivize offenders to engage in treatment. He stressed the importance of treatment and rehabilitation. He said the pre-2016 sentencing scheme allowed DOL to offer a suspended imposition of sentence in exchange for an offender engaging in drug treatment. He noted that HB 49 would not do away with a tool created in 2016 that allows DOL to offer suspended entry of judgment, which means that an offender who completes his/her terms of probation has his/her case dismissed. He said DOL wants to encourage individuals to engage in treatment and incentivize them against continuing their drug-related behavior. He stressed that, regardless of whether the amount of drugs is

small, the impact that those drugs have on Alaska's communities is real and significant.

MR. HENDERSON said the second justification is the criminal activity associated with drug possession. He spoke to data linking drug use to other crimes. He said if DOL can intervene with a drug possessor, it might prevent a second intervention for another different criminal act.

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REPRESENTATIVE WOOL asked Mr. Henderson to clarify his claim that 5 grams of heroin in Anchorage is different from 5 grams of heroin in Kotzebue.

MR. HENDERSON pointed to the impact of those drugs on the community. He said 5 grams of heroin affects more people in a small community like Kotzebue than it does in a city like Anchorage.

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REPRESENTATIVE EASTMAN asked if prosecutors have seen any change in violent crimes since the passage of Senate Bill 91 [passed in the Twenty-Ninth Alaska State Legislature]. He asked how that change or lack thereof impacts proposed sentencing reforms.

MR. HENDERSON said he thinks everybody in the state has seen an increase in violent acts. He referred to DPS data that indicates the overall crime rate is up 25 percent over the last five years. He said the violent crime rate is up approximately 34 percent and the property crime rate is up approximately 22 percent.

CHAIR CLAMAN asked him to clarify the time range for that data.

MR. HENDERSON said he believes the trend is from 2017 going back five years.

CHAIR CLAMAN clarified that this means the dataset begins with 2012.

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REPRESENTATIVE EASTMAN addressed Mr. Henderson's point about DOL prosecuting fewer drug crimes than before. He asked if prosecutors have noticed any change in incidences of drug crimes.

MR. HENDERSON answered, "The prosecution numbers generally track the [Uniform Crime Reporting] (UCR) numbers." He said, generally speaking, the largest increases across the state have been in violent crimes. He said felony assault prosecutions and robbery prosecutions are increasing, and that is consistent with DPS crime data.

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REPRESENTATIVE EASTMAN remarked that law enforcement, when it decides which crimes to investigate, must take into consideration both the less severe penalties for drug crimes and the increase in violent crimes. He asked if that is correct.

MR. HENDERSON said, "That is accurate." He restated that the Criminal Division always prioritizes violent crimes over nonviolent crimes.

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REPRESENTATIVE LEDOUX, asked Mr. Henderson to further clarify his claim that 5 grams of heroin impacts more people in a place like Utqiagvik than it does in a city like Anchorage. She asked if he meant that the drugs impact a larger percentage of the population rather than a higher number of people.

MR. HENDERSON responded that drugs impact "a higher percentage per capita" in smaller communities. He recommended the committee discuss with DPS the distribution and trafficking of heroin in small communities.

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REPRESENTATIVE WOOL said the committee was previously presented crime statistics that found no correlation or causation between drug crime and other types of crime. He asked Mr. Henderson to speak to that.

MR. HENDERSON answered that he believes there is a correlation between the use of synthetic opioids and the overall crime rate.

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CHAIR CLAMAN asked Mr. Henderson to confirm that felony drug prosecutions are down but overall felony prosecutions are up, which means violent crimes make up a higher percentage of felony prosecutions.

MR. HENDERSON answered that is correct.

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REPRESENTATIVE EASTMAN asked if the reasoning for imposing higher sentences for drug crimes in smaller communities is because those communities are not used to dealing with harder drugs such as cocaine. He compared this to an alcohol crime occurring in a dry community.

CHAIR CLAMAN asked Representative Eastman to revisit the question later. He requested that Mr. Henderson continue his presentation.

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MR. HENDERSON said Representative Eastman's comments provide a segue to the overall sentencing scheme and how HB 49 would return it to pre-2016 levels. He said the reason for this reversion is because individual offenses and individual offenders affect different communities differently. He said HB 49 would increase the discretion of prosecutors and judges to account for various factors when imposing or fashioning a sentence. He said these concepts include community condemnation, reaffirmation of societal norms, seriousness of the offense, and the rights of the victim. He said returning to

the pre-2016 sentencing scheme would allow for the imposition of greater sentences, when appropriate, in a community like Utqiagvik or Kotzebue. He noted that a judge who lives in and is a part of a tight-knit community would know how the circumstances of a particular offense impacts the community.

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MR. HENDERSON said that in 2016 the legislature lowered sentences for most felony offenses. He referred the committee to a document included in the committee packet titled "HB 49 Classification and Sentencing Highlights." He pointed to a table on page 1 of that document displaying the changes in felony sentences that would occur should HB 49 become law. He said the presumptive range of most felony sentences would be elevated by approximately one to two years depending on the classification and the offender's criminal history. He explained that Alaska law sets forth a sentencing range for felony offenses that takes into account whether the felony is a class A, B, or C felony, as well as the offender's criminal record. He said HB 49 would return the presumptive ranges to pre-2016 levels.

MR. HENDERSON said HB 49 would return the presumptive sentencing range for class A misdemeanors to 0 to 365 days, giving discretion to the judge for fashioning the sentence. He noted that the current presumed sentence for a class A misdemeanor is 30 days. For class B misdemeanors, he said, HB 49 would increase the current presumptive range of 0 to 10 to 0 to 90 days.

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MR. HENDERSON addressed aspects of HB 49 that are unrelated to changes made in 2016. He said HB 49 would create a generalized terroristic threatening statute to address circumstances when a person makes a real threat as opposed to a false threat. He explained that, under current law, the terroristic threatening statute requires the threat be false before it is a criminal offense.

MR. HENDERSON said HB 49 would also expand the use of the Alaska Public Safety Information Network (APSIN), which he said can be thought of as a "rap sheet," for use in a grand jury setting when it is necessary to prove the existence of a prior conviction as an element of the offense.

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MR. HENDERSON addressed sections 3 through 18 of HB 49. He said these sections would repeal the automatic inflation adjustment provision for Alaska's theft statutes. He explained that, under current law, the amount stolen is an element of the offense. He said a person is guilty of second-degree theft if he/she steals more than \$750 of property. In 2016, he explained, the legislature created a system that automatically increases that amount every five years as calculated by the rate of inflation. He said this system goes into effect in 2020 and that the authority to calculate the inflation adjustment was delegated to the Alaska Judicial Council (AJC).

MR. HENDERSON said the first reason these provisions should be repealed is because DOL feels the delegation to AJC was an improper delegation from the legislature to the judicial branch, of which AJC is a part. He said the legislature is entitled to delegate certain authority to the executive branch, "but there is a concern that by delegating to the judicial branch, that delegation would be ineffective." He said the second reason for the repeal is based on the public debate of Senate Bill 54 (passed in the Thirtieth Alaska State Legislature) in the fall of 2017. He said that during that process, the legislature and governor experienced significant debate from the public as to what the threshold amount should be. He said Senate Bill 54 lowered the felony threshold from \$1,000 to \$750. He said that process, informed by public input, was important. He stated that the automatic inflation adjustment removes public debate from the process.

CHAIR CLAMAN asked for confirmation that Senate Bill 91 increased the felony theft threshold from \$500 to \$1,000 and added the inflation adjustment, and that Senate Bill 54 moved

that amount from \$1,000 to \$750 and kept the inflation adjustment in place.

MR. HENDERSON answered correct.

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MR. HENDERSON addressed sections 19 and 20, which he said would change the crimes of escape in the second degree and escape in the third degree. He said these changes would increase the use of electronic monitoring by the courts and the Department of Corrections (DOC). He said that, under current law, if an offender is put on electronic monitoring by DOC for a felony offense and that device is tampered with, it is a class B felony. He said HB 49 would fix an identified gap by including the [Division of Juvenile Justice] in the law. He said these sections would also make it a class C felony for someone on release for a misdemeanor to tamper with an electronic monitoring device. He said that, under current law, that same offense is a misdemeanor. He said HB 49 would also add tampering with an electronic monitoring device while on release on bail to the list of criminal conduct. He said there is currently no provision in the escape statutes that addresses that conduct. He clarified that it would be a violation of conditions of release (VCOR) but would not fall under the escape provision.

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CHAIR CLAMAN noted that many parts of the criminal code feature some degree of proportionality. He explained that VCOR is a misdemeanor offense when released on a misdemeanor and can be a felony offense when released on a felony. He said there are other parts of the criminal code for which the category of a new crime is dependent on the category of the crime for which the offender was under release. He asked why DOL perceives it necessary to make it a felony to tamper with an electronic monitoring device when on release for a misdemeanor.

MR. HENDERSON said DOL's goals are to create a system in which DOC feels confident in using electronic monitoring in

appropriate circumstances and to create a significant disincentive for an offender who would tamper with or disable a monitoring device. He said elevating the offense to a class C felony would pair the benefit of being released on electronic monitoring with a significant deterrent for manipulating or tampering with the monitoring device.

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REPRESENTATIVE KOPP recalled his past experience arresting drunk drivers and the occasions during which a handcuffed driver would struggle and escape. He said those drivers were under arrest for a class A misdemeanor - driving under the influence (DUI) - and upon recapture would also be charged with escape, a class C felony. He asked if this is still the case and whether HB 49 would change that.

MR. HENDERSON said Representative Kopp is correct. He referred to an Alaska Court of Appeals opinion that describes that dynamic. He conceded that he does not remember the exact details but offered to get that information to the committee.

REPRESENTATIVE KOPP noted that he just wanted to verify that the current law stipulates that someone who escapes while under detention for a misdemeanor can be charged with a class C felony.

MR. HENDERSON said that is how he remembers it. He restated that he could follow up with the committee.

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MR. HENDERSON highlighted sections 21 and 22, which he said relate to the crime of failure to appear. He explained that, under current law, a person who fails to appear for a hearing is guilty of a violation punishable by a \$1,000 fine unless the person absconds for more than 30 days. He added that a person is only guilty of failure to appear if he/she fails to make contact with the court after 30 days, or he/she avoids the hearing with the intent to avoid prosecution. He said HB 49 would eliminate the 30-day "grace period" and return to the pre-

2016 law. That means, he said, a person would be guilty of a felony if he/she, on release for a felony, fails to appear after ordered to by the court. Likewise, he explained, a person on release for a misdemeanor who fails to appear would be guilty of a misdemeanor.

MR. HENDERSON said HB 49 would maintain the "affirmative defense of unforeseen circumstances exception," which he explained is a pre-2016 provision that remains law. He explained that this means a person is not held criminally liable for failing to appear at a hearing if unforeseen circumstances prevented him/her from appearing and he/she contacted the court immediately about said circumstances. He said, pre-2016, the offender had to prove that he/she took steps to notify the court about the unforeseen circumstances. He noted that it is currently DOL's burden to prove beyond a reasonable doubt that a person did not make contact, which he said is very difficult as it is "essentially proving a negative." He noted that this has resulted in a substantial decrease in prosecutions for failure to appear.

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MR. HENDERSON addressed section 23, which he said would return the crime of VCOR to how it was pre-2016. He explained that this means VCOR when released on a felony would be a class A misdemeanor and VCOR when released on a misdemeanor would be a class B misdemeanor. He said, under current law, the punishment for VCOR is limited to five days incarceration. He said the changes proposed in section 23 combined with the proposed changes to the overall sentencing scheme would return discretion to the court by allowing it to fashion a sentence from a range of 0 to 365 days in jail.

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MR. HENDERSON addressed sections 24 through 26, which he said would create and clarify the crime of failing to provide a DNA sample when arrested for a qualifying offense. He explained that, under current law, if a person is arrested for a qualifying offense - a crime against a person, a felony DUI, or

any felony under AS 11 - the person is required to submit a DNA sample upon arrest. He said that DNA sample is then put into the Combined DNA Index System (CODIS), which he described as an investigative tool used by law enforcement. He said failing to provide a DNA sample upon arrest is not currently a criminal act. He noted that refusing to provide a DNA sample upon conviction is a class C felony. He said HB 49 would create a class A misdemeanor for situations in which a person arrested for a qualifying offense refuses to provide a DNA sample upon arrest.

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CHAIR CLAMAN asked about the constitutionality of requiring DNA samples in a pre-sentence context from people who are presumed innocent.

MR. HENDERSON said the Supreme Court of the United States (SCOTUS) has addressed the issue and found that seizure of DNA upon arrest after finding probable cause is constitutional under the Fourth Amendment [of the United States Constitution] and is permissible.

CHAIR CLAMAN asked whether the Alaska Supreme Court or the Alaska Court of Appeals has addressed the issue in the context of the Alaska Constitution, which he said may provide greater protections than the United States Constitution.

MR. HENDERSON said, "They have addressed the former version of this statute and have suggested that it would be constitutional." He added, "They have not analyzed the current language of the statute." He stated that, given the language and analysis of SCOTUS, he believes the Alaska Supreme Court and the Alaska Court of Appeals would "uphold this and not found it a violation of someone's search and seizure constitutional rights."

CHAIR CLAMAN asked for verification that the Alaska Court System has determined that compulsory post-sentence DNA samples pass constitutional muster, but whether compulsory pre-sentence DNA samples do remains an open question.

MR. HENDERSON answered that is correct. He restated his belief that compulsory pre-sentence DNA samples would be upheld as constitutional.

[2:04:20 PM](#)

REPRESENTATIVE LEDOUX asked whether the DNA sample provision is totally new or is a return to a previous standard.

MR. HENDERSON called it a new enforcement mechanism.

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REPRESENTATIVE WOOL asked what the rationale is for obtaining a DNA sample from "someone with a DUI."

MR. HENDERSON said when an individual is charged with a felony DUI, it means the person has had a minimum of two prior DUIs. He said the level of risk that person presents to community justifies the inclusion of his/her DNA in the DNA database.

REPRESENTATIVE WOOL said he understands the rationale for obtaining the DNA of a violent criminal but argued that DUI is not in that category. He referenced the scenario posed earlier by Representative Kopp involving a person who is arrested for DUI who then commits the crime of escape, a felony. He asked if that offense would require a DNA sample under HB 49.

MR. HENDERSON said escape in third degree is an AS 11 offense so it would. He said the offender's DNA would be used to determine whether or not he/she was associated with other criminal acts.

REPRESENTATIVE WOOL mused that it sounds like a new fingerprinting technique.

MR. HENDERSON confirmed Represented Wool's determination. He said the reason that SCOTUS deemed DNA sampling permissible under the Fourth Amendment is because it is no different from taking someone's fingerprints, descriptors, or photograph. He said DNA sampling and CODIS are an identification procedure and

an example of the law catching up with technology. He described how CODIS works including quality standards, restrictions to access, and its contributions to solving unsolved crimes.

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REPRESENTATIVE EASTMAN said he begs to differ with the assertion that DNA samples represent little more than an updating of technology. He noted that a fingerprint profile would not disclose who his great-grandfather was. He asked when pre-trial DNA collection first came into effect in Alaska.

MR. HENDERSON said DNA profiles from arrestees were first uploaded to CODIS in approximately 2008. He noted that between 2008 and 2019, the Alaska State Crime Lab has had over 350 matches based on arrestee profiles. He clarified that this means over 350 leads were created to investigate unsolved crimes by matching arrestee DNA to DNA profiles in CODIS.

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REPRESENTATIVE EASTMAN referenced language in section 24 that specifies the DNA sample being required "upon arrest." He asked Mr. Henderson to clarify the difference between being arrested and being charged with a crime. He asked if something in statute would require a charge for a qualifying offense before the DNA sample is required.

MR. HENDERSON said when a person is arrested for a qualifying offense and DNA is submitted to CODIS, that DNA can be removed if one of several things happens. He said those things include the person's conviction being reversed, the person being acquitted, charges not being filed by the prosecution, or charges being dismissed. He said these safeguards are placed on the system to ensure only those individuals who should be in the system are in the system. He described additional CODIS safeguards including the fact that it is a federal system regulated by the federal government, that its information can only be used for criminal investigation purposes, that there is a penalty of \$250,000 and up to one year in jail for unauthorized disclosure of information, that misuse of

information could lead to federal charges, and that DNA is treated as private, specific information.

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REPRESENTATIVE EASTMAN said an investigation of someone's DNA could involve not that person but a relative of that person. He also noted that Mr. Henderson said DNA samples may be removed from the database. He asked if there is anything to ensure the samples are actually removed in the event of, for example, a person being acquitted. He asked if there are any penalties if DNA samples are not removed in a timely manner.

MR. HENDERSON said that under Alaska law, the expungement process is upon request, so the person whose DNA was collected can request the sample be removed from the system, which would generate the expungement.

[2:15:31 PM](#)

REPRESENTATIVE STUTES fixated on the phrases "could be removed" and "unauthorized disclosure." She asked how someone who requests his/her profile be removed from CODIS can be assured the information has indeed been removed. She also noted that penalties do not guarantee that unauthorized disclosures will not occur, citing the example of big businesses that have been negligent with customers' personal information. She said she has security concerns relating to CODIS.

MR. HENDERSON deferred to DPS for more precise answers regarding the manner and mechanisms used to secure private information. He said, under AS 44.41.035, DPS is required to adopt reasonable procedures for the precise issues described by Representative Stutes. He said it is required to take steps to protect the DNA identification registration system and to ensure there is no accidental or deliberative unauthorized access.

REPRESENTATIVE STUTES said she understands nothing is 100 percent foolproof. She said she is satisfied with his response.

[2:18:05 PM](#)

REPRESENTATIVE LEDOUX said she is not satisfied. She said she does not understand why an expungement cannot be automatic. She asked why the onus is placed on a person who has been acquitted or who may have been unjustly charged.

MR. HENDERSON said it might be possible for expungement to be automatic, but he does not know how that would work practically as it relates to information sharing. He said the Alaska State Crime Lab might be able to offer a better answer. He said the statute sets forth the steps a person needs to take to have his/her information removed. He said the person in the best position to know if charges were filed or dismissed is the person who has had his/her DNA collected.

REPRESENTATIVE LEDOUX asked if he meant that a defendant would be in a better position than DOL to know whether charges have been dropped or dismissed. She remarked that DOL might have "some inkling" about the status of a charge.

MR. HENDERSON said that is not what he meant, noting that he was referring to DPS, not DOL. He established a scenario wherein a municipal law enforcement agency makes an arrest and a municipal prosecutor files charges. He said the arrestee's DNA information would go to DPS. Mr. Henderson said the arrestee could inform DPS to remove that information.

REPRESENTATIVE LEDOUX asked if a DNA sample can be taken for a misdemeanor.

MR. HENDERSON said it can be taken for all crimes against a person, so a violent misdemeanor would qualify. He pointed to domestic violence as an example.

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REPRESENTATIVE LEDOUX asked if "that" is something normally prosecuted by the municipalities? She said she thought that was normally prosecuted by [DOL].

MR. HENDERSON used Anchorage as an example and said the Anchorage Municipal Prosecutor's Office handles the large majority of misdemeanor prosecutions for the city including domestic violence.

REPRESENTATIVE LEDOUX asked if, other than what relates to municipalities, there is any reason why the State of Alaska, when charges are dropped, cannot automatically remove DNA samples.

MR. HENDERSON said it would just be a matter of data sharing.

REPRESENTATIVE LEDOUX asked, "Why would you be sharing the data in order to get rid of the data?"

MR. HENDERSON said what he meant was DOL would need to transmit information regarding the status of a charge to DPS so that DPS can use that information to remove DNA profiles from CODIS.

REPRESENTATIVE LEDOUX remarked that this data would have to be shared anyway via the defendant. She said if it is not all that much of a hassle for the defendant to go to court to get information expunged, it should not be that much of a hassle for it to be expunged automatically.

[2:24:15 PM](#)

CHAIR CLAMAN drew a connection between this discussion and the story of a man in Maine who was recently charged with a 1993 murder in Fairbanks. He said the DNA used to track him down was submitted to a company like 23andMe that processes DNA information. He referenced a different case in California where a man was charged with a series of murders after his DNA was obtained through company like 23andMe. He clarified that the man in Maine was identified as a suspect because of DNA submitted by a relative of his. He said this raises multiple issues related to this part of HB 49.

REPRESENTATIVE WOOL noted that DNA tests and fingerprint tests "are not 100 percent sure."

[2:26:16 PM](#)

MR. HENDERSON addressed section 27, which he said would create a new generalized threat statute to cover situations when an individual threatens to commit a serious act of violence and places another person in reasonable fear of serious injury. He explained that, under current law, the threat of harm must be a false threat to qualify as terroristic threatening. He noted that this revision is unrelated to changes made in 2016 and is instead a reaction to a gap in the law identified by DOL. He said this revision would allow law enforcement to intervene in situations before the harm actually occurs. He said this is because law enforcement "would not need to determine whether or not the threat was real or false."

[2:27:40 PM](#)

CHAIR CLAMAN said the legislature made some changes to the terroristic threatening statute in 2002. He asked what changes were made. He asked as well about changes made to the statute in 2013.

MR. HENDERSON said terroristic threatening, as is defined in Alaska law, was designed to criminalize or create an aggravated form of making a false report.

CHAIR CLAMAN said one of the early iterations of the statute required repeated threats before an individual could be criminally charged with terroristic threatening. He said that is not part of the current statute for terroristic threatening in the first degree or terroristic threatening in the second degree. He said this implies a number of changes to the statute over the years from the original status of the offense. He said he would be interested in hearing more about the history of the statute and how this revision relates to the current and prior statutes.

MR. HENDERSON noted that the provision related to repeated threats to cause death or physical injury was moved to the statute covering assault in third degree. He said he did not remember the year that occurred. He identified the statute it

was moved to as AS 11.41.220(a)(2). He said he could provide a more descriptive history of the terroristic threatening statute to the committee at a later time.

2:30:20 PM

REPRESENTATIVE EASTMAN addressed the phrase "reckless disregard" in section 27. He asked if that includes someone who is intentionally trying to hurt another person. He said the normal understanding of that phrase is that it implies unintentional conduct.

MR. HENDERSON clarified that a person who acts recklessly, as described in law, is a person who is aware of and consciously disregards substantial risk. He noted that a person who acts recklessly also acts knowingly and intentionally. He said that a person who acts intentionally to cause harm and create a threat would also, by definition, be acting recklessly.

REPRESENTATIVE EASTMAN addressed the phrase "communicating a threat that a circumstance exists" in section 27. He asked how communicating a threat that a circumstance exists is distinguished from communicating a threat for the purpose of saving from injury, such as a security guard informing a crowd about a bomb.

MR. HENDERSON said those circumstances are described in subsections (a)(1) and (a)(2) under section 27. He pointed to language in lines 5 through 9 on page 14 that is specific to an oil or gas pipeline and intended to cover that scenario, either a false or a real threat.

2:33:02 PM

REPRESENTATIVE EASTMAN clarified his concern. He asked if the statute would protect a Good Samaritan who communicates a real or perceived threat.

MR. HENDERSON said DOL would never levy charges for a situation such as that. He said if the legislature wishes to clarify that

point, it could do so by copying language in the false reports statute and inserting it into subsection (a)(2).

[2:34:21 PM](#)

REPRESENTATIVE LEDOUX asked why subsection (a)(2) is limited to "the proper or safe functioning of an oil or gas pipeline." She asked why that does not include, for example, the proper or safe functioning of an airplane.

MR. HENDERSON said his memory of that statute is that it relates to the concern of a bomb threat called into a gas or pipeline facilities that has the potential to shut down that pipeline and lead to various downstream consequences.

REPRESENTATIVE LEDOUX said she understands the concern about an oil pipeline but wants to know why that provision does not also include a communicated threat to a school, for instance.

MR. HENDERSON pointed her attention to subsection (a)(1)(B) on page 13 starting at line 31, which he said covers any type of threat that causes evacuation of a building, public place or area, business premises, or mode of public transportation. He said if someone were to call in a threat, real or not, that causes the evacuation of a school, it would be covered.

[2:36:37 PM](#)

MR HENDERSON said he would skip section 28 because it revisits the aforementioned changes to the overall sentencing scheme.

MR. HENDRSON addressed sections 29 through 36, which he said would return drug laws to what they were prior to 2016. He specified that the language in sections 29 through 36 is the exact same that was in statute before 2006. He said section 29 reenacts a provision that was removed in 2016 called "misconduct involving a controlled substance in the second degree," a class A felony offense for the distribution of any amount of a Schedule IA controlled substance. He clarified this means the distribution of any amount of heroin, fentanyl, or other opioid derivatives. He said section 29 also returns the manufacture of

methamphetamine to a class A felony offense. He noted that, in 2016, the manufacture of methamphetamine was downgraded to a class B felony. He referenced the dangerous "one-pot meth lab" epidemic in the early 2000s.

[2:39:30 PM](#)

REPRESENTATIVE LEDOUX asked if anything in section 29 would affect the marijuana industry.

MR. HENDERSON said nothing in sections 29 through 36 would affect or change the regulated marijuana industry. He noted that DOL, in response to concerns from the Senate, has created clarifying language that would crystalize that point. He said the legislature is welcome to add that clarifying language to the bill if it deems it appropriate.

REPRESENTATIVE LEDOUX suggested that the clarifying language is necessary to avoid unwanted consequences regarding future interpretation of the statute's legislative history.

CHAIR CLAMAN asked Mr. Henderson to send along the clarifying language.

[2:41:32 PM](#)

REPRESENTATIVE WOOL pointed to language in line 5 of page 20 that explicitly references cannabis plants. He asked for an explanation and whether clarifying language is needed for that.

MR. HENDERSON said this language refers to marijuana that is outside the regulated marijuana industry.

CHAIR CLAMAN asked for confirmation that the only Schedule VIA controlled substance is marijuana.

MR. HENDERSON confirmed that marijuana is the only Schedule VIA controlled substance. To Representative Wool's question, he pointed to AS 17.38.020, the personal use of marijuana statute. He said that statute allows for the possession of less than one ounce of marijuana or not more than 12 marijuana plants. He

said the "25 or more plants" referenced in line 5 of page 20 refers to conduct outside of the legalized marijuana industry.

[2:43:27 PM](#)

REPRESENTATIVE EASTMAN asked what falls under the category "nonregulated marijuana" and inquired as to the broad impact of section 29 on marijuana that is "not kosher" according to Alaska regulations.

MR. HENDERSON said the intention is to ensure law enforcement has the tools necessary to stop the distribution of marijuana in those circumstances that the person distributing is not a regulated marijuana seller or he/she falls outside [AS 17.38]. He said the intention is not to interfere with marijuana that is lawfully regulated.

[2:45:00 PM](#)

REPRESENTATIVE LEDOUX asked whether the distribution of bootlegged or unregulated liquor is treated similarly to the distribution of unregulated marijuana.

MR. HENDERSON said that depends on where the distribution occurs. He said, under AS 04, there is a scheme which dictates the penalty provision for either brewing homebrew or selling alcohol. He said a person who sells alcohol in a "dry" community could be guilty of a felony.

REPRESENTATIVE LEDOUX asked what would happen to an individual who sells alcohol in Anchorage without the appropriate license.

CHAIR CLAMAN asked, in the interest of time, for Mr. Henderson to provide a written response to this question rather than attempt to research the answer on the fly.

[2:47:34 PM](#)

REPRESENTATIVE WOOL asked for clarification of language in subsection (a)(4) on page 20. He paraphrased lines 6 through 8, which would criminalize possession of a schedule VIA substance

"on or within 500 feet of school grounds." He asked if that would be a felony.

MR. HENDERSON clarified that section 32, to which Representative Wool is referring, would create the new crime of misconduct involving a controlled substance in the fourth degree. He confirmed that if a person possesses a schedule VIA substance with reckless disregard on or within 500 feet of school grounds, he/she would be guilty of a felony offense.

CHAIR CLAMAN asked again for verification that this means marijuana, as it is the only schedule VIA drug.

MR. HENDERSON verified that.

REPRESENTATIVE WOOL established a scenario in which an individual goes to a marijuana store, purchases a legal gram of marijuana, and walks home. The person, in order to get home, has to walk within 500 feet of a school. As the person is walking by the school, the marijuana falls out of his/her pocket and someone sees it. He asked if the person would be charged with a first-time felony offense.

MR. HENDERSON said he would have to research the exact definition of the phrase "within 500 feet of school grounds."

REPRESENTATIVE WOOL rephrased his question. He said the person is picking up his/her child from school and the legal marijuana is in the car. He asked if that is a felony offense.

MR. HENDERSON said taking marijuana on school grounds is a violation.

[2:50:04 PM](#)

REPRESENTATIVE EASTMAN said it is his understanding there is currently a similar distance limitation on churches. He asked why that does not appear "in this part of the statute."

MR. HENDERSON said he would have to look up the definition of "recreation or youth center" [found in subsection

(a)(4)(A)(ii)]. He said it depends on whether or not the church would be defined that way. To Representative Wool's earlier question, Mr. Henderson noted that there is an exception under existing law that permits an individual to possess "in the privacy of their own residence" within 500 feet of school grounds. He said there are ways to carve out exceptions in these sorts of circumstances.

[2:51:26 PM](#)

MR. HENDERSON addressed section 30, which he said would reenact the distribution of any amount of a schedule IIA or IIIA substance, such as cocaine or methamphetamine, to a class B felony. He said this is another example of a repeal of the tiered approach to sentencing.

MR. HENDERSON readdressed section 32, which he explained would return possession of any amount of a schedule I or IIA controlled substance to a class C felony.

[2:52:20 PM](#)

MR. HENDERSON addressed section 31, which he said would reenact the pre-2016 law regarding the availability and length of probation. He said section 37 would allow the court to impose up to 25 years of felony probation for a felony sex offense conviction and 10 years for all other offenses.

MR. HENDERSON addressed sections 38 through 43, which he said relate to the reversion back to the pre-2016 general sentencing scheme. He said sections 38 through 40 address the presumptive sentencing ranges for felonies. He said section 41 would return the 0 to 365 day sentencing range for class A misdemeanors. He said section 43 would return sentencing discretion for class B misdemeanors from 0 to 10 days to 0 to 90 days.

MR. HENDERSON addressed section 28, which he skipped earlier, and explained that it addresses disorderly conduct. He said, under current law, the maximum imposed sentence for a disorderly conduct conviction is up to 24 hours incarceration. He explained that section 28 would return the sentence to the pre-

2016 level of "up to 10 days." He said section 28, along with sections 38 through 43, return Alaska's sentencing scheme to where it was before 2016.

[2:55:05 PM](#)

MR. HENDERSON addressed sections 45 and 46, which he said would eliminate the mandatory aspect of electronic monitoring for those convicted of first-time DUI and instead require a mandatory minimum 3-day sentence in a DOC facility, unless otherwise determined by DOC. He reiterated that sections 45 and 46 would return discretion to DOC to determine the most appropriate place for someone convicted of DUI.

[2:55:45 PM](#)

MR. HENDERSON addressed section 49, which he said is not related to changes in 2016. He said section 49 addresses an identified gap in the law regarding data sharing. He said it would ensure the court system transmits information regarding involuntarily commitments to DPS for years prior to 2014. He said that, under current law, DPS must be informed if a person is involuntarily committed under AS 47. He explained that the current law, which was enacted in 2014, was written prospectively rather than retroactively. He said section 49 would allow the court system to share otherwise-confidential information with DPS, when appropriate.

[2:57:00 PM](#)

CHAIR CLAMAN noted that section 49 would affect access to firearms and inquiries on background checks for firearms. He asked if the retroactive focus of section 49 would make some people ineligible to purchase firearms.

MR. HENDERSON said this is correct with one caveat. He explained that this provision would not change one's legal status and that a person who has been involuntarily committed, even before 2014, is prohibited from possessing a firearm under federal law. He said section 49 would allow the court system to share that information with DPS so that DPS can identify those

individuals who are prohibited from possessing firearms under federal law.

CHAIR CLAMAN asked if the information made available to DPS would in due course be released to the federal government for purposes of its laws and regulations.

MR. HENDERSON said that is correct. He explained that DPS would submit that information to the national database associated with background checks.

[2:58:29 PM](#)

MR. HENDERSON addressed section 50, which he said is an amendment to the uncodified law of the State of Alaska (SOA), specifically Rule 6(r) - the "hearsay rule" - of the Alaska Rules of Criminal Procedure. He noted that this is not related to changes made in 2016, but rather another gap identified by DOL. He said the purpose of the change is to create a more efficient system for the grand jury process. He said section 50 would allow a person's criminal history, or "rap sheet," to be introduced to prove the existence of a predicate offense when that is an element of the offense. As an example, he said that, under current law, to be guilty of felony DUI an individual must have previously been convicted of two prior DUIs. But because it is a felony, it is required that the individual be indicted by the grand jury. At grand jury, he explained, SOA is allowed under a special exception to Rule 6(r) to introduce the individual's "rap sheet" or Alaska Public Safety Information Network (APSIN) report to prove the existence of prior convictions, as opposed to introducing the prior certified copies of those convictions. He said section 50 expands that exception to include offenses that also have a predicate offense as an element of the offense. He said examples of those situations include someone who is a felon in possession, someone who is being charged with felony theft because of prior misdemeanor thefts, or someone who is being charged with felony assault because of prior misdemeanor assaults. Section 50, he said, would allow the prosecution to rely on the person's "rap sheet" or APSIN report to prove the existence of those offenses. He added that, if the case were to proceed to trial, the state

would be required to introduce the certified copy of that judgement. He clarified that the exception proposed in section 50 would only apply in the grand jury setting.

[3:01:14 PM](#)

CHAIR CLAMAN said HB 49 would be held for further review.

[3:02:35 PM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:03 p.m.