ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 11, 2019
1:30 p.m.

MEMBERS PRESENT

Senator Shelley Hughes, Chair
Senator Lora Reinbold, Vice Chair
Senator Mike Shower
Senator Peter Micciche
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 15
"An Act relating to a petition to convene a grand jury; and repealing and reenacting Rule 16(b)(3), Alaska Rules of Criminal Procedure, concerning a prosecuting attorney's duty to disclose favorable information to a defendant in a criminal proceeding."

HEARD AND HELD

SENATE BILL NO. 55
"An Act relating to judges of the court of appeals; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 15
SHORT TITLE: GRAND JURY BY PETITION; DISCLOSURE
SPONSOR(s): SENATOR(s) MICCICHE

01/16/19	(S)	PREFILE RELEASED 1/11/19
01/16/19	(S)	READ THE FIRST TIME - REFERRALS
01/16/19	(S)	JUD
03/11/19	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

BILL: SB 55

SHORT TITLE: TEMP. APPOINTMENTS TO COURT OF APPEALS
SPONSOR(s): SENATOR(s) WILSON

02/13/19	(S)	READ THE FIRST TIME - REFERRALS
02/13/19	(S)	JUD
03/11/19	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

EDRA MORLEDGE, Staff
Senator Peter Micciche
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented the sectional analysis for SB 15.

DAVID HAEG, representing himself
Soldotna, Alaska
POSITION STATEMENT: Testified during the hearing on SB 15.

ROBERT HENDERSON, Assistant Attorney General
Criminal Division, Central Office
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the hearing on SB 15.

JAMES PRICE, representing himself
Nikiski, Alaska
POSITION STATEMENT: Testified in support of SB 15.

SCOTT EGGER, representing himself
Ninilchik, Alaska
POSITION STATEMENT: Testified generally in support of SB 15.

NANCY MEADE, General Counsel
Administrative Offices
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Testified and answered questions during the hearing on SB 15.

SENATOR DAVID WILSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as sponsor of SB 55.

NANCY MEADE, General Counsel

Administrative Offices
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the discussion of SB 55.

ACTION NARRATIVE

1:30:55 PM
CHAIR SHELLEY HUGHES called the Senate Judiciary Standing Committee meeting to order at 1:30 p.m. Present at the call to order were Senators Kiehl, Micciche, Reinbold, Showers, and Chair Hughes.

SB 15-GRAND JURY BY PETITION; DISCLOSURE

1:31:18 PM
CHAIR HUGHES announced that the first order of business would be SENATE BILL NO. 15, "An Act relating to a petition to convene a grand jury; and repealing and reenacting Rule 16(b)(3), Alaska Rules of Criminal Procedure, concerning a prosecuting attorney's duty to disclose favorable information to a defendant in a criminal proceeding."

1:32:15 PM
SENATOR MICCICHE testifying as sponsor, paraphrased from the sponsor statement, which read as follows:

> During this time in Alaska's history as we work to revise statute to ensure the public safety of Alaskans by holding criminals accountable, it may seem like an interesting effort to also ensure justice and fairness for those that may have not had an adequate legal process to prove themselves innocent.
>
> Senate Bill 15 provides two processes to ensure that justice is served.
>
> Senate Bill 15 enacts a process by which a grand jury investigation is activated by the public through a well-defined process. Although Alaska's Constitution under Article 1, Section 8 states "The power of grand juries to investigate and make recommendations concerning public welfare or safety shall never be suspended," a process does not currently exist for the public to initiate the process.

> Senate Bill 15 also repeals and reenacts Rule 16(b)(3) concerning a prosecuting attorney's duty to disclose favorable information (exculpatory evidence) to a defendant in a criminal proceeding. Perhaps the most famous case of the withholding of exculpatory evidence was during the prosecution of Alaska's US Senator Ted Stevens, where the Senator would have likely been found not guilty had the evidence been presented.
>
> Senate Bill 15 will provide greater protection to the accused to ensure that they receive a fair trial and that exculpatory evidence information will become available when applicable to the outcome of the proceedings.

SENATOR MICCICHE also remarked that it is important to confine the bill to cases in the criminal justice system for those parties that believe they have been unfairly convicted. This bill does not embrace a wide-open process, he said. Other states that have a similar process include Oklahoma, Nevada, North Dakota, Kansas and Nebraska.

The bill would bolster and strengthen the standards for disclosure of exculpatory evidence in Alaska. It would provide judges with a broad range of remedies for non-compliance. The U.S. Supreme Court in Brady v. Maryland held that the prosecution has a constitutional obligation to disclose to the defense any and all exculpatory evidence. However, Brady violations, as they are known, are common in criminal prosecutions. It can lead to reversal of decisions, but often not until the defendant has suffered a great deal of harm. In 2008, the case against U.S. Senator Ted Stevens led to a conviction because evidence was withheld [and the case was later set aside by a federal judge]. It is important for people to know wrongful convictions can happen to anyone at any level, he said. A single wrongful conviction due to unclear guidance represents a miscarriage of justice and is entirely preventable, he concluded.

1:35:14 PM
EDRA MORLEDGE, Staff, Senator Peter Micciche, Alaska State Legislature, Juneau, provided the sectional analysis for SB 15.

1:35:32 PM
MS. MORLEDGE read Section 1.

Section 1: Adds new section AS 12.40.120 Grand Jury
(a) allowing an individual to petition to convene a grand jury for the purpose of investigating a matter that could result in an indictment (Page 1, lines 6-8)

(b) Establishes the individual must file the petition in the appropriate judicial district. (Page 1, lines 9-12)

(c) Establishes that within 4 days the judge shall enter an order of determination of whether the subject of the petition can be reasonably investigated and may lead to information that would lead to an indictment
(Page 1, line 13 – Page 2, line 3)

(d) Establishes that the judge must issue a written order if the petition is deficient, allows the petitioner to file an amended petition within 2 days, and requires the judge 2 additional days to determine if it meets the requirements (Page 2, lines 4-9)

(e) States the petitioner may not circulate the petition without a court order (Page 2, lines 10-11)

(f) Establishes the procedure for the petitioner to collect the required signatures and file the completed petition with the Division of Elections. It also requires the division to certify the signatures and submit the petition to the clerk of court, who must then submit it to the presiding superior court judge (Page 2, lines 12-20)

(g) Allows an individual who signed a petition to remove their name any time before it is certified by elections
(Page 2, lines 21-24)

(h) Requires the presiding superior court judge to convene a grand jury within 30 calendar days after the certification of the petition is received by the clerk of court (Page 2, lines 25-28)

(i) Provides for penalties for offering anything of value or making false [statements] to signatories of the petition (Page 2, lines 29 – Page 3, line 4)

(j) Clarifies the definition of "knowingly" (Page 3, line 5)

1:37:57 PM
MS. MORLEDGE read Section 2.

Section 2: Amends the Alaska Rules of Criminal Procedure

Repeals and reenacts Rule 16(b)(3) Prosecuting Attorney's Duty to Disclose Favorable Information to Defense Counsel

(A) (Beginning on Page 3, line 10, through Page 4, line 5) Requires the prosecuting attorney to disclose to the defense counsel any material or information that tends to negate the guilt of the accused. Within 20 days after the written notice of demand from the defense, the prosecuting attorney must disclose the following:

(i) all information favorable to the accused in their possession, or in the possession of a branch of law enforcement
(ii) evidence disproving the identity of the accused as the perpetrator of an offense
(iii) evidence tending to disprove an element of an offense
(iv) evidence of varying testimony of a witness
(v) evidence that a witness has a prior criminal history
(vi) evidence that a witness has issues with credibility
(vii) evidence that a witness may have an ulterior motive, bias, compensation or information tending to devalue their testimony

(B) Addresses materials not in the prosecuting attorney's possession, and requires they make a good faith effort identify the material and make it available to the defense (Page 4, lines 6-11)

(C) Requires the prosecuting attorney to continue to disclose materials to the defense before and during the trial (Page 4, lines 12-18)

(D) Allows the prosecuting attorney to request an in-camera review of any evidence demanded by the defense counsel and requires the court to issue a written order granting or denying the defense counsel's request. The court must ascertain whether the requested review is expected to cause substantial and identifiable harm to others that outweighs the right of the accused to access the materials, whether access would have a detrimental effect on the proceeding, or whether the materials are personal notes and observations. (Page 4, lines 19 – Page 5, line 2)

(E) Requires the date of disclosure of materials may not be less than 30 days before a trial (Page 5, lines 3-8)

(F-H) Procedures for dealing with noncompliance of this rule and establishes remedies, including sanctions (Page 5, line 9 – Page 6, line 4)

1:40:40 PM
MS. MORLEDGE read Section 3.

Section 3: Conditional Effect

Section 2 of this Act takes effect only by a two-thirds vote of each body of the legislature. (Page 6, lines 7-9)

§ 15. Rule-Making Power The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house

1:41:00 PM
CHAIR HUGHES recalled that the sponsor mentioned two federal cases: the Brady case and the late U.S. Senator Ted Stevens case. She noted that both cases violated the federal rules of discovery. She asked for further clarification on whether the same problems exist in state law.

SENATOR MICCICHE responded that exculpatory evidence exclusions resulted in the prosecution and conviction of the late U.S. Senator Ted Stevens. He highlighted that what happened in those

cases is the issue, not specifically whether it was a state or federal matter. Adequate evidence that likely would have cleared Senator Stevens was not allowed or presented, which led to his wrongful conviction. Other cases exist where adequate evidence that might clear the defendant is often not shared during the prosecution process, he said.

CHAIR HUGHES recalled that six states have similar laws. She asked whether any evidence indicates that the empaneled grand juries in those states ever righted a failure. She highlighted that she did not find any recent cases in these states where the normal grand jury process had failed.

MS. MORLEDGE responded that her overview did not go into the specifics, but she has reviewed several recent Kansas cases.

1:44:13 PM
SENATOR KIEHL asked whether the person being indicted would receive a notice of the petition.

MS. MORLEDGE answered that the [Alaska Court System] notification process is not set out in these procedures nor was she familiar with the court's notification for indictees. She deferred to the Alaska Court System to respond.

1:45:00 PM
SENATOR MICCICHE explained the genesis of SB 15. He said that it stems from a certain unfair conviction case in his district. Although the [U.S.] Constitution guarantees the public the right to a grand jury investigation, it may not provide the trigger or mechanism for it. Although he acknowledged that SB 15 might not be the ideal vehicle to address the problem, he envisioned that it would provide an important process, one that would very rarely be used, if at all. It would provide a mechanism [for a grand jury to investigate] situations where the defendants felt the process led to unfair convictions. Further, it is important to consider whether [the statutes are appropriate] and if they could be improved upon.

1:46:46 PM
SENATOR KIEHL said he appreciates the sponsor's openness. He questioned who would prosecute these cases. Presumably, the district attorney decided not to bring an indictment before the grand jury, he said. Although he understands that SB 15 would provide an individual the right to trigger a grand jury investigation, he was uncertain how that process would work, he said.

SENATOR MICCICHE responded that would be a good question if it pertained to a grand jury investigation requesting an indictment. However, in this instance the party could request additional defense if the processes used that resulted in a conviction were inadequate to provide defense for the defendant. For example, Mr. David Haeg, who would be testifying later today, should have been allowed a more open evaluation and process in his case. He characterized the case as unique.

1:48:45 PM
SENATOR SHOWER expressed concern that SB 15 might be too broad. For example, it might allow parties grounds or an opportunity to petition to indict oil executives on climate change. Although he said his example is facetious, it illustrates the potential for abuse. He referred to Section 1 of SB 15. He asked whether the decision to reject a petition is in the purview of the court or if a judge's authority would be limited to whether the requirements were met to convene a grand jury.

MS. MORLEDGE related her understanding that it would be within the judge's purview to review an application to ensure that it met the requirements, but not to determine the outcome. In further response to Senator Shower, she affirmed that the court cannot make a final determination but could only review the application.

SENATOR MICCICHE offered his belief that a judge would have the authority to determine any deficiency in the approach used in a case. He referred to subsection (d). He said that there are many reasons an application could be found deficient or insufficient.

SENATOR SHOWER asked whether the grand jury would move forward with an investigation if the requirements were met.

SENATOR MICCICHE agreed that this bill would ask the court to reevaluate a prior finding used to convict someone and provide for a reasonable petition in instances in which the party has exhausted other avenues to appeal a decision.

1:52:23 PM
CHAIR HUGHES interpreted this provision to mean that a party would have one chance to submit an application. She did not see any language in the bill that would allow an applicant to keep petitioning to convene a grand jury. Ultimately this means that the judge would have the authority to deny a second application, she said.

1:52:59 PM
SENATOR SHOWER turned to page 4 to the court rule amendment under Court Rule 16(b)(3)(B), which read [original punctuation provided]:

> If material or information requested by defense counsel is not in the possession, custody, or control of the prosecuting attorney, the prosecuting attorney shall make a diligent, good faith effort to ascertain the existence of the requested material or information and make the material or information available for discovery where it exists.

He asked how a diligent, good faith effort would be defined or how to ascertain if someone had resisted [providing the requested material].

SENATOR MICCICHE deferred to the Department of Law to answer. He surmised that "good faith effort" seems to have been defined and cases have set precedent, but he was unsure how it would be evaluated.

1:54:14 PM
CHAIR HUGHES related her understanding that Criminal Rule 16 already requires the prosecution to turn over all exculpatory evidence to the defense. She asked whether any of the items listed in Section 2 are not already covered in the rule.

1:54:59 PM
At-ease.

1:55:28 PM
CHAIR HUGHES reconvened the meeting.

1:55:55 PM
MS. MORLEDGE added that currently Court Rule 16(b)(3)(B) reads, "The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control that tends to negate the guilt of the accused as to the offense or would tend to reduce the accused's punishment therefor."

MS. MORLEDGE explained that SB 15 specifically added the types of information to bolster and strengthen the existing rules. The penalty for nondisclosure or noncompliance are sanctions listed in subparagraph (D) of the court rule. She referred to

[subparagraph (G)] to a list of other things that can be disclosed:

> (G) Remedies. In addition to sanctions imposed under (e) of this rule, if the court finds that prosecuting attorney has failed to comply with (b)(3)(A) or (b)(3)(B) of this rule, the court may order
>
> (i) postponement or adjournment of the proceedings;
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> (ii) exclusion or limitation of testimony or evidence;
>
> (iii) a new trial;
>
> (iv) dismissal with or without prejudice; or
>
> (v) any other remedy determined appropriate by the court.

1:57:25 PM

SENATOR KIEHL recalled the sponsor highlighted using a grand jury to clear a person's name, but the bill only listed things that would result in ah indictment. He asked for clarification on whether this bill would "clear" a person's name rather than to bring the person up on charges.

SENATOR MICCICHE said he envisioned an indictment would bring people together to clear a person's name or reduce the findings. He related a scenario in which someone was subject to criminal proceedings, laced with technical obstructions for the individual. This bill would allow the person to prove the case in a different way. In this specific case, he did not believe Mr. Haeg was given an adequate opportunity to lay out his case in the manner that best reflected it.

SENATOR MICCICHE said the aforementioned case is the only one he is aware of. After reviewing all the documents in the case, he concluded that something is amiss. He highlighted that this is the type of case that would warrant an application to initiate a grand jury investigation. He envisioned that the grand jury investigation process would allow {Mr. Haeg] to have an unobstructed "day in court." He surmised that [the grand jury could identify] any irregularities that may have been difficult to bring out in a court. The process often is controlled by what and when evidence and materials can be presented, he said.

SENATOR MICCICHE maintained his belief that this avenue would rarely be used. In fact, after visiting some correctional facilities, he found inmates would rarely [admit] their guilt and often professed their innocence. However, he still believes that in some cases things do not go right, he said. Those parties should have an avenue to request an investigation, a careful review of the proceedings, to identify any irregularities that should have been considered during the prosecution that would result in the cases being reversed.

2:00:42 PM
SENATOR KIEHL said the sponsor's explanation helped him understand the rationale for the bill although he still has questions on an indictment after a court process.

SENATOR MICCICHE highlighted that these issues are important ones in the criminal justice system. He welcomed a team approach to hone the bill to provide an extremely narrow scope. He was unsure of how often this process would be used, but those individuals should have justice served. He characterized the bill as an unusual one that uses an unusual approach to solve the issue.

2:02:27 PM
CHAIR HUGHES remarked that this would likely open up "a can of worms." She expressed concern of how it might be used. She recalled the Kobach case in Kansas [related to voter fraud] that did not result in an indictment.

SENATOR MICCICHE argued that he did not see the correlation between the bill and cases of the type mentioned. He said he sees it quite differently. He reiterated his desire to ensure that the bill is very narrow in scope to only pinpoint and apply to very specific cases. He recognized that it presents a challenge to ensure that justice occurs while still maintaining a process to address cases with irregularities.

2:04:21 PM
DAVID HAEG, representing himself, Soldotna, said that the legislature does not have the authority to consider the validity of convictions, which is under the purview of the judicial system. However, he offered his belief that the legislature and grand juries could investigate what happened in cases like his to ensure that these [unfair convictions] never happen again. He asked members to read, "The Investigative Grand Jury in Alaska" [February 1987 by the Alaska Judicial Council, Jay A. Rabinowitz, Chairman]. He said the report is a thorough report

requested by the Alaska State Senate that laid out the duties and obligations of the grand jury in Alaska. He interpreted the findings in the report as repeatedly indicating that grand juries are not necessary in order to hear from the district attorneys, the prosecutors, or to indict individuals. Instead, the drafters of the Constitution of the State of Alaska at the Alaska Constitutional Convention, "over and over again said 'we have to have a grand jury, sitting there empaneled' in the rare occasion it needs to investigate government officials of wrongdoing."

2:07:24 PM
MR. HAEG characterized the wrongdoing by government officials in his case as phenomenal. On January 28-29, 2019, an evidentiary hearing was held, and it was shown that evidence and sworn testimony was never refuted by the State of Alaska. He contended that evidence presented showed that the prosecutor in his case, District Attorney Scott Leaders, falsified a map to convict him. However, he never provided that map prior to trial as required. Worse yet, in a recording, Scott Leaders, [a Fish and Wildlife Trooper, Brett Gibbens] a state witness, discussed that the map used to convict him was falsified. Although this recording was requested before the trial, it was never provided to him or his attorney. He attested that this means his conviction was invalid. For fifteen years, he and his family have suffered agony [due to the 2004 case]. He offered his belief that his case was manufactured by state officials, he said.

He further contended that the sole investigator for judicial misconduct, Marla Greenstein [Executive Director, Alaska Commission on Judicial Conduct], falsified an official investigation in order to clear the judge in his trial [District Court Judge Margaret Murphy] of alleged misconduct. He contended that the complaint indicated that the judge was chauffeured by the main witness against him [Alaska Wildlife Trooper Brett Gibbens]. Secondly, the complaint alleged that the judge removed evidence from the court record prior to the jury deliberations that would have cleared him, he said.

MR. HAEG expressed concern that all complaints against judges are handled by Marla Greenstein, who may be falsifying the information to protect the judges. He calculated the potential number of cases she has handled in the last 30 years and concluded that the potential exists that a number of judges in Alaska are corrupt. He expressed gratitude to Senator Micciche for wanting to illuminate his case. The most important function of a grand jury is to investigate and issue a report to keep the

public informed. He offered his belief that Ms. Greenstein needs to be fired and "run out of the state on a pole."

CHAIR HUGHES interrupted and asked him to direct his attention on the bill.

2:11:07 PM
MR. HAEG said it is important to have a trigger mechanism to initiate a grand jury investigation. He said that the Constitution of the State of Alaska provides that individuals can petition for one. However, when he wanted a grand jury, the petition was not allowed. He acknowledged that there was a prior grand jury investigation in his [initial] case. During the proceeding, one of the jurors started presenting evidence to other grand jurors, but Scott Leaders "shut him down." He paraphrased the current statute indicates that if a grand juror knows or has reason to believe a crime has been committed, he shall inform the other grand jurors of his belief and those grand jurors shall investigate. He said this statute is in place to allow the public to examine a case and not have information suppressed.

2:13:53 PM
CHAIR HUGHES asked Mr. Henderson, Department of Law, to interpret whether the grand jury adequately meets the requirements in the Constitution of the State of Alaska.

ROBERT HENDERSON, Assistant Attorney General, Criminal Division, Central Office, Department of Law, Anchorage, answered yes. He explained that the Constitution of the State of Alaska contemplates the grand jury serving two separate functions. First, the grand jury operates as the charging body for all criminal felonious acts. He said that no felony case can move forward absent an indictment. Second, the grand jury also functions as an investigative grand jury, which is a very rarely used mechanism. In fact, it is used less and less as time goes on because it uses a very procedurally complex and archaic system. He recalled two big investigative grand juries that have been convened in Alaska. In 1985, a Fairbanks grand jury recommended that the Alaska Senate return articles of impeachment against sitting Governor Bill Sheffield. In 1989, an Anchorage grand jury recommended changes to certain sex offense statutes following an allegation that a teacher in Anchorage was having sexual relations with a student. That case was commonly known as the "Satch" Carlson case. He said it is important to keep those cases in mind because an investigative grand jury returns a report that makes recommendations, but it is not a

charging document or indictment. An indictment allows prosecutors to move forward with felony criminal charges. However, a grand jury report would only recommend certain changes. These reports remain confidential by law under Criminal Rule 6.1 to avoid the issue of people being defamed without adequate notice or an ability to rebut. The report subsequently goes before a judge and the grand jury is represented by a prosecutor. In fact, a grand jury cannot function without one being present. The judge then determines whether the report should become public. He emphasized the fact that a grand jury can only function through a prosecutor is important to recognize.

2:18:02 PM
MR. HENDERSON clarified that the grand jury is the charging authority for felony conduct, not the prosecutors, who serve as legal advisors to the grand jury. The prosecutors describe the law and what evidence the grand jury can consider. He explained that evidence must be admissible unless an exception applies.

MR. HENDERSON highlighted one concern the Department of Law has with SB 15 is that it would create a new mechanism to convene a grand jury. That mechanism may actually conflict with a prosecutor's ethical responsibilities, he said. It may interfere with effective law enforcement because as the bill is written, it says that the grand jury should be convened if it would warrant a true bill of indictment. He interpreted that to mean an allegation of felony conduct. He cautioned that if a private citizen can file a petition to convene a grand jury, it could have the potential to interfere with ongoing pending criminal investigations. Unfortunately, criminal investigations take time, he said. However, convening a grand jury to investigate the same thing that law enforcement is already investigating could impede an ongoing criminal investigation.

2:19:52 PM
MR. HENDERSON said prosecutors screen cases to ensure the cases are based on admissible evidence, have sufficient probable cause, and to ensure the case will not conflict with other pending legislation. He elaborated. As previously mentioned, a grand jury can only return a true bill if admissible evidence is presented that would warrant an indictment. In terms of sufficiency of evidence, a prosecutor is under an ethical responsibility to only proceed with cases that he/she believes are cases in which probable cause exists. If not, prosecutors cannot ethically move forward on the cases, he said. In terms of conflict with other pending litigation, he described a scenario

in which a pending criminal case, a pending appeal to the appellate courts, or a pending post-conviction release alleges that an individual's conviction was unjustly obtained. He said if one of those processes was occurring, the prosecutor may determine the forum in pending cases….

CHAIR HUGHES interrupted.

2:21:44 PM
SENATOR SHOWER recalled the bill sponsor considered SB 15 "as a recourse" in case an issue or a disagreement arose as to the reason that a grand jury was not being convened. He understood that part of the answer is that the screening process includes parallel efforts. He asked what recourse an individual would have if a decision was made that not enough evidence existed to move forward. He pointed out that the Constitution of the State of Alaska provides that individuals can request a grand jury.

MR. HENDERSON explained the reason is because other processes are in place to address the concern and the grand jury acts as a body, not individually. The grand jury must have a quorum to meet and a majority of the grand jury must be present to move forward. No single individual can impose his/her judgment on the will of the entire grand jury.

2:24:22 PM
SENATOR SHOWER deferred to the sponsor.

2:24:33 PM
SENATOR MICCICHE said that sometimes items are used to help convict an individual, but the [defendant] does not have any avenue to challenge those issues. The prosecutor acts on evidence presented by individuals who are sometimes imperfect, using information that can technically or in [Mr. Haeg's] case, be geographically imperfect, but currently [that information] cannot be used to challenge the case afterwards. It seemed to him that people should have the right to a check and balance in the system, via the grand jury, to evaluate the evidence. The Constitution of the State of Alaska seems to support it, but it lacks the trigger to initiate the grand jury investigation, he said. He acknowledged that Mr. Henderson's explanation would be true in most cases.

2:26:52 PM
MR. HENDERSON said he would direct the person [who feels unjustly convicted] to apply for post-conviction relief. He explained that mechanism provides the most appropriate forum to

handle attacks on someone's underlying conviction. He referred to Criminal Rule 35.1. Specifically, Criminal Rule 35.1(a)(1) relates to an underlying conviction that was obtained in violation of the U.S. Constitution or the Constitution of the State of Alaska. It goes through several other grounds to seek post-conviction relief. He said that if a party believes that he/she was unfairly convicted and has been unsuccessful on appeal, the true remedy would be an application for post-conviction relief.

CHAIR HUGHES referred to Section 8 of the Constitution of the State of Alaska. She read the last sentence, "The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended." She interpreted the language to mean that a person cannot directly initiate a grand jury investigation. She asked who had initiated the grand jury investigation for the two cases previously mentioned. She related her understanding that the attorney general's office had initiated the investigations.

MR. HENDERSON answered that is correct.

CHAIR HUGHES said the public elects the governor, who appoints the attorney general, who is then confirmed by the legislature. She surmised this would provide an indirect way to involve the public in bringing forth any investigations. She asked whether it would be possible for someone like Mr. Haeg, who feels that justice has not been served, to approach the next administration and ask for a review.

MR. HENDERSON agreed a subsequent prosecutor or attorney general could review Mr. Haeg's case and make a different determination on the case.

2:30:02 PM
SENATOR REINBOLD asked for further clarification on ethical standards or conduct review if a prosecutor were to falsify information.

MR. HENDERSON said all prosecutors have an ethical obligation to provide the defense with exculpatory evidence or evidence that would tend to negate the guilt of the accused or reduce that punishment.

SENATOR REINBOLD said that Mr. Haeg alleged that someone falsified data, so it seems like a new prosecutor could be assigned.

MR. HENDERSON said it would be unethical for any attorney, including a prosecutor, to suborn perjury by intentionally soliciting false information.

2:32:07 PM
CHAIR HUGHES turned to Section 2 of SB 15. She asked whether Alaska has rules to protect Alaskans from abuses such as ones that occurred with the late U.S. Senator Ted Stevens.

MR. HENDERSON answered that the rules of discovery are defined by Criminal Rule 16. However, the federal rules of procedure and the state rules are very different. Still, the constitutional obligations of all prosecutors to disclose exculpatory evidence are the same. They must disclose any exculpatory evidence that is material to the defendant and his/her defense. He explained that exculpatory evidence is hyper-technical, but a substantial amount of case law defines it.

2:33:30 PM
CHAIR HUGHES turned to the list of evidence Ms. Morledge read earlier. She asked whether prosecutors currently are not disclosing any of these items.

MR. HENDERSON prefaced his answer by describing the information on information the state already provides. Under the state rules of discovery, in all cases, whether requested by the defendant, the state must provide the names and addresses of persons who have relevant information, any written or recorded statements of any witness, and the summary of any statements collected during the course of the investigation. They must also provide all statements of the accused, including written, summary, or recorded, all statements of a co-defendant.

He said that all evidence that used at trial must be provided or allowed to be inspected by the defense, including photographs. The prosecution must provide all records of criminal convictions, all expert reports, and all information related to any electronic surveillance, including search warrants and wire taps, regardless of whether they are requested. He characterized it as "automatic discovery". In addition, the prosecution must provide anything the defense thinks would be helpful or if they know it exists. The defense can request the court issue certain processes of subpoena for them to collect.

MR. HENDERSON clarified that when speaking about ethical and constitutional obligations of a prosecutor to provide any

exculpatory evidence, he wanted to point out that the U.S. Supreme Court has been clear to highlight it means exculpatory evidence that is material to the accused or to the case. After reviewing the items listed in Section 2 of the bill, he offered his belief that materiality is what might be missing.

He referred to page 3, line 23, and said that [Rule 16(b)(3)(A)] (ii) and (iii) are clearly exculpatory evidence that would be provided.

> (ii) evidence disproving the identity of the accused as the perpetrator of an offense at issue;
>
> (iii) evidence tending to disprove an element of an offense at issue;

MR. HENDERSON said other information may be provided if it is material to the accused or the defense. He referred to page 3, line 30, to sub-subparagraph (v), which read, "(v) evidence that a witness has a prior criminal history;". He said that although criminal history could be favorable and material to a defendant, it may not always be material. For example, an eyewitness to a vehicle theft who had previously been investigated for domestic violence but was not convicted might not be favorable to the accused. However, if the [eyewitness] had been convicted of domestic violence, that conviction would be provided under the existing rule, he said.

2:38:02 PM
CHAIR HUGHES directed attention to page 3, line 17 of SB 15 that requires prosecutors to provide the information within 20 days. She further asked whether the 30-day rule would cause trial delays.

MR. HENDERSON answered that both timeframes listed in SB 15 would be difficult to meet given the department's current staffing levels, although providing information 30 days prior to trial would be easier. Currently, the department makes a good faith effort to provide discovery in cases as soon as possible. The first court status, or pretrial hearing falls about 30 days after arraignment, which is typically when the parties meet and discuss discovery, he said.

2:39:50 PM
SENATOR SHOWER requested answers to three questions: first, clarification on the immunity of prosecutors given the alleged misconduct by prosecutors; second, who can bring charges of

alleged wrongdoing in cases; and third, who would investigate any allegations of these wrongdoings.

CHAIR HUGHES asked that questions be provided to the committee in written form [and responses be submitted to the committee].

2:40:40 PM
SENATOR MICCICHE said that he brought this bill forward because he does not believe checks and balances exist for some extremely rare criminal cases, although SB 15 was not confined to one case. He characterized the court system process as a circular one that currently lacks a process to provide an independent review of [wrongful conviction] cases.

2:42:13 PM
CHAIR HUGHES opened public testimony on SB 15.

2:42:31 PM
JAMES PRICE, representing himself, Nikiski, stated his support for SB 15. It is important to respect the Constitution of the State of Alaska. Article I, Section 8 clearly gives grand juries the power to investigate and make recommendations related to public welfare or safety of its citizens. However, these powers have been suspended on the Kenai Peninsula, he said. Although the grand jury should be independent, it is not, he said. He expressed concern that since 1989 the process has been suppressed which denies people their rights. He said that SB 15 will help them to regain their rights.

2:45:00 PM
SCOTT EGGER, representing himself, Ninilchik, said he is basically in support Senator Micciche's efforts in SB 15. He asked members to study AS 12.40.030 and AS 12.40.040. After studying Mr. Haeg's case, he felt that other cases would likely benefit from the bill. He suggested members study Mr. Haeg's case to understand the problems that exist in the Kenai area. He alleged that multiple judges and prosecutors have committed felonies by charging some people with crimes. He emphasized the need for an independent review of this outside the judicial system is warranted. He offered his belief that the grand jury should be able to bring this case forward for investigation based on AS 12.40.

2:47:51 PM
NANCY MEADE, General Counsel, Administrative Offices, Alaska Court System, Anchorage, expressed concern with SB 15. She agreed with Mr. Henderson that other avenues were available for

parties who believe they were wrongfully convicted, that errors were made, or even worse, in the prosecution of their criminal cases.

She said some, if not all of them, were taken advantage of in [Mr. Haeg's] case. For example, a person could ask the trial judge for reconsideration by indicating what the individual thinks is wrong, she said. Second, a person could request an appeal to the Alaska Court of Appeals, which occurred in this case, she said. Third, a person could petition the Alaska Supreme Court for consideration, which she thought occurred in Mr. Haeg's case although she was unsure. Finally, as Mr. Henderson mentioned, an individual who still believed that problems existed could file for post-conviction relief under the criminal rules and request to file another case in the trial court. People have several opportunities for remedies, she said.

MS MEADE explained that in situations in which allegations were very severe and deep, that there would be other ways to address the concerns short of the grand jury procedure proposed in SB 15. For example, if someone thought that state officials were corrupt, that individual could seek assistance from the U.S. Department of Justice, the FBI, or the Ombudsman by asking for an investigation.

MS. MEADE expressed her primary concern with Section 1, AS 12.40.120(c)-(d), which involves the judge helping a petitioner draft a charge because it is a prosecutorial function. Presumably, a prosecutor has already denied someone's request to investigate or bring charges to the grand jury. The petitioner would ask the judge to change the outcome and subsequently decide whether the matter should go before a grand jury. She found it troubling that a judge would need to set out each deficiency in a written order. She characterized it as requesting a judge to give legal advice or write something for parties that would suffice.

She directed attention to subsection (c). She said the only thing required to be in a petition was to state something that on its face identifies an area to be investigated and allege things, that if true, would warrant felony charge. While people believe many things are true, little evidence supports these beliefs. She said she fears, as some senators have expressed, that the process in SB 15 would become a "Pandora's box, or a can of worms" and be way overused. She recalled the sponsor expressed his interest in keeping it narrow. She doubted that a grand jury, even with its investigative powers, could overturn a

conviction or clear someone's name. Further, the procedure set out in SB 15 does not quite address the issue. In addition, she expressed concern over the fiscal impact to the court system by convening grand juries not subject to the filter of an attorney at the district attorney's office. That process identifies when something warrants an indictment, she said. Although she has other issues with SB 15, she asked members to consider the biggest ones.

2:52:01 PM
SENATOR MICCICHE said he found it interesting that the courts could not outline the deficiencies for a grand jury petition when the [Alaska Supreme Court] essentially rewrote the salmon initiative [in August 2018 when the state found Ballot Measure 1 unconstitutional]. He offered his belief that the court's action essentially signaled future applicants to "shoot for the moon" because the courts would rewrite their initiatives so they could be placed on the ballot. He concluded that that having the court involved is not unprecedented, but he was very concerned about that outcome.

He emphasized that his goal was to provide an independent remedy for individuals to have their unobstructed "day in court" when warranted. In many proceedings, how, when, and what evidence can be presented is controlled by the court rules. However, in very rare cases, it could be difficult for people to present their cases. He expressed a willingness to try to figure out a better way forward to address this concern.

MS. MEADE said she was willing to do so.

2:53:53 PM
SENATOR SHOWER suggested that part of the issue is when things are discovered [after the conviction]. He acknowledged that tough questions arise, but civil debate can flesh out issues and ideas. He hoped no one questioned the good work that is currently being done. He asked if someone alleged issues similar to ones on the Kenai Peninsula, whether the party could petition to have the case moved to a different venue.

MS. MEADE responded that [Mr. Haeg] was convicted by a trial court, which she believed was in Kenai. She said that he would not be entitled to a second trial in Fairbanks.

SENATOR SHOWER asked if a person feels that they were treated unfairly, and evidence arose similar to the disputed map in Mr.

Haeg's case, whether the person would have an option to request a change in venue.

MS. MEADE answered that she was unsure, but she did not think so. She said that a change of venue is available at pretrial if significant publicity surrounding a case would prevent the defendant from having fair jurors. She suggested that it might be possible for a change in venue if the party believed the community was not fair minded, but she was unsure.

[SB 15 was held in committee.]

2:56:47 PM
At-ease.

SB 55-TEMP. APPOINTMENTS TO COURT OF APPEALS

2:57:33 PM
CHAIR HUGHES reconvened the meeting. She announced that the final order of business would be SENATE BILL NO. 55, "An Act relating to judges of the court of appeals; and providing for an effective date."

2:57:41 PM
SENATOR DAVID WILSON, Alaska State Legislature, paraphrased from the following sponsor statement:

> Senate Bill 55 provides a solution to the backlog of cases at the Court of Appeals. Since 2014, more criminal appeals are being filed than are being decided. This has led to a mounting backlog that is increasingly difficult to resolve.
>
> The Court of Appeals is composed of three judges. These judges work diligently and maintain a heavy workload, but unheard cases just keep accumulating. A long delay before criminal appeals are decided is not acceptable for crime victims, the general public, attorneys, or defendants.
>
> Senate Bill 55 enables the Court of Appeals to hear cases in a timely manner. This legislation would grant the Chief Justice authority to appoint an individual to act as a Court of Appeals judge at the pleasure of the supreme court for no longer than three years to address the backlog. As we focus on public safety, it is essential that we also equip the courts to hear

cases as they are brought forth. Thank you for your consideration of this important legislation.

He said in 2013, the backlog of cases ready for judicial review was approximately 50 cases per judge. An appellate court judge issue about 50 decisions per year. In 2018, the number of cases assigned to judges rose to about 90 cases per judge. Although judges currently issue significantly more decisions per year, the rate of cases has increased to the point that the judges cannot keep up.

3:00:36 PM
SENATOR WILSON provided the following sectional analysis for SB 55:

Section 1: Amends AS 22.07.010 to provide an exception for an additional court of appeals judge under AS 22.07.070(c) [Page 1, lines 1-6].

Section 2: Conforming amendment to remove the exception for an additional court of appeals judge after a three-year period [Page 1, lines 7-10].

Section 3: Adds a new subsection, AS 22.07.070 (c), to allow the chief justice of the supreme court to appoint acting court of appeals judges as needed to serve for no longer than three years. An acting court of appeals judge must meet the qualifications established under AS 22.07.404.

Section 4: Repeals AS 22.07.070(c) after a three-year period.

Section 5: Adds a revisors instruction directing the revisor of statutes to change the catch line of AS 22.07.070 from "Vacancies" to "Selection of court of appeals judges".

Section 6: Establishes that sections 2 and 4 of this act will take effect on July 1, 2022.

3:02:09 PM
CHAIR HUGHES pointed out that the fiscal note allows for one judge. She asked for further clarification if only one judge is currently needed because the bill read "as many judges as needed to serve." She asked whether only one judge would be needed to solve the backlog.

SENATOR WILSON answered yes, that he worked in consultation with the Alaska Court System, who indicated the court would request one temporary judge.

CHAIR HUGHES asked for further clarification on where the judge would be located.

SENATOR WILSON answered that he did not know. However, the three judges meet together in one location. He envisioned one judge would rotate off the bench to focus on writing briefs and decisions.

3:03:28 PM
CHAIR HUGHES asked how this would this impact public safety. She further asked how many of the cases were criminal cases as opposed to civil cases.

SENATOR WILSON deferred to the Alaska Court System to respond.

3:03:40 PM
SENATOR KIEHL related his understanding that there would be a series of three judge panels. He explained the practice of pro tem district court judge to serve as a superior court judge is for a specific period of time. These judges are ones who are vetted by the Alaska Judicial Council, appointed by the governor, and accountable to the public through a retention vote. He asked whether this appointment process would skip those steps.

SENATOR WILSON answered that this would be similar to the existing statute to provide a "temporary judge" to serve on the district court, similar to the process to provide a pro tem judge to serve on the Superior Court. He highlighted his goal is not to circumvent the permanent judicial appointment, but to be a one-time temporary appointment.

3:05:11 PM
SENATOR KIEHL offered the key distinction of the Alaska Court of Appeals is that it acts as the court of record and sets precedent with its opinion. This would be different than a temporary appointment to the district court, he said. He cautioned that the lack of accountability gives him concern.

3:05:52 PM
SENATOR WILSON answered that this was not an attempt to circumvent the process, but to allow the court of appeals an

opportunity to address its backlog as a temporary solution to an ongoing problem. The [Alaska Supreme Court] chief justice would make the decision, he said.

3:06:38 PM
SENATOR REINBOLD expressed the same concern as Senator Kiehl raised. She acknowledged that the Constitution of the State of Alaska allows the chief justice to appoint a judge to serve temporarily but argued that three years seemed like a long time. She cautioned that this bill seemed to circumvent the system, but she was willing to continue the conversation.

CHAIR HUGHES asked whether the sponsor would be open to add in an appointment and confirmation process.

SENATOR WILSON said he is amenable to the committee's desires. However, the appellate court cases are not ones easily solved in a short amount of time. The appellate court carefully deliberates on its cases. He thought the three-year period was reasonable, noting it was less than a district court judge's term.

3:08:30 PM
SENATOR SHOWER asked the court system to weigh in as to whether a shorter timeframe might be more amenable.

3:08:54 PM
SENATOR MICCICHE said he had anticipated that the fiscal notes for crime bills would provide an analysis of how every aspect of the court system would operate more smoothly. He wondered whether the crime package would address a comprehensive analysis of the court system.

SENATOR WILSON explained that he introduced SB 55 to reinforce and enhance the system, given that the legislature and administration have been working to revise the criminal justice system.

3:10:48 PM
CHAIR HUGHES remarked that the ACS was the first to assist with the large fiscal gap.

3:11:25 PM
NANCY MEADE, General Counsel, Administrative Offices, Alaska Court System (ACS), Anchorage, stated that the sponsor approached the Alaska Court System with a bill, which she said would provide welcome relief due to the court system's backlog.

She explained that at the trial court level, the agency would hire a pro tem judge to handle criminal trials. The appellate court judges also have a backlog of criminal cases, which are either sentence appeals or merit appeals, she said. The Alaska Supreme Court meets annually to consider budget requests. The fourth judge contemplated in this bill was on the ASC's list of potential budget requests or statutory changes. However, the ASC decided to focus solely on the budget, she said. She said adding the fourth judge would be helpful.

3:13:22 PM
CHAIR HUGHES related her understanding that the Alaska Court System was not opposed to adding a fourth judge, but the request had been prioritized at a lower level.

MS. MEADE answered yes.

3:13:35 PM
CHAIR HUGHES asked for the reason for the increase in cases.

MS. MEADE answered that it is hard to pinpoint the reason. However, each criminal trial decision can be appealed. The number of criminal convictions has risen. The number of cases referred to the Alaska Court of Appeals rises in synch with the number of guilty convictions. The backlog was also related to recent vacancies, including that a series of vacancies on the court of appeals occurred, which she briefly detailed. Although the court of appeals is currently stable, having a fourth judge would be helpful, she said.

3:15:23 PM
CHAIR HUGHES related that as crime increases, more offenders are found guilty and it results in a spike in cases.

3:15:43 PM
SENATOR KIEHL asked for further clarification on whether the ASC had considered adding an additional temporary or permanent judge to serve on the Alaska Court of Appeals.

MS. MEADE answered that the Alaska Supreme Court had considered a number of options, including having a superior court judge serve pro tem on the Alaska Court of Appeals. Although this process has worked for several years, when a judge retired, it left a gap on the superior court.

3:16:58 PM

SENATOR SHOWER asked if the Court of Appeals would like to have a permanent fourth judge.

MS. MEADE recalled that the ASC did not come to any real conclusion. In response to Chair Hughes, she offered to consult with the court and report back to the committee on the ASC's view of having a permanent fourth appellate judge.

3:18:13 PM
SENATOR MICCICHE asked whether the proposed judge pro tem serves as a contract judge or if he/she would receive benefits.

MS. MEADE explained that this would be staffed with a three-year employee, who would receive the same salary and Public Employees Retirement System Benefits, but not the judicial retirement system benefits. Since the judge would not go through the judicial council process, the individual would not be entitled to judicial retirement, she said.

3:18:58 PM
SENATOR MICCICHE asked whether the pro tem judge would be paid on a contractual basis without benefits.

MS. MEADE answered that the salaries and benefits for pro tem judges and acting judges are handled differently. This bill would allow the Alaska Supreme Court to appoint an acting judge. Th Alaska Supreme Court would appoint a practicing attorney with substantial experience to fill the position as per the statute Senator Wilson previously referenced. However, a pro tem judge is selected through the Alaska Judicial Council process or is someone who currently serves as a judge, she said. It is possible to "pro tem" a superior court judge to serve on the Alaska Court of Appeals, which is a process the court system currently uses. Further, pro tem judges could also be retired judges or justices who continue to take specific assignments with the court. These judges would be paid on a daily basis by court rule.

3:20:15 PM
CHAIR HUGHES asked whether it would be difficult to find someone to serve for a temporary three-year position or if it would present a barrier.

MS. MEADE said that she discussed this with the Alaska Supreme Court. The court thought that there would be considerable interest in filling the position.

3:20:43 PM
CHAIR HUGHES opened public testimony and after first determining no one wished to testify, closed public testimony on SB 55.

[SB 55 was held in committee.]

3:21:09 PM
CHAIR HUGHES reviewed upcoming committee announcements.

3:21:43 PM
There being no further business to come before the committee, Chair Hughes adjourned the Senate Judiciary Standing Committee meeting at 3:21 p.m.