JALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
March 25, 2019
1:31 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. 33
"An Act relating to pretrial release; relating to sentencing; relating to treatment program credit toward service of a sentence of imprisonment; relating to electronic monitoring; amending Rules 38.2 and 45(d), Alaska Rules of Criminal Procedure; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 33
SHORT TITLE: ARREST;RELEASE;SENTENCING;PROBATION
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/23/19	(S)	READ THE FIRST TIME - REFERRALS
01/23/19	(S)	STA, JUD, FIN
02/07/19	(S)	STA AT 3:30 PM BUTROVICH 205
02/07/19	(S)	Heard & Held
02/07/19	(S)	MINUTE(STA)
02/14/19	(S)	STA AT 3:30 PM BUTROVICH 205
02/14/19	(S)	Heard & Held
02/14/19	(S)	MINUTE(STA)
02/19/19	(S)	STA AT 3:30 PM BUTROVICH 205
02/19/19	(S)	Heard & Held
02/19/19	(S)	MINUTE(STA)

02/21/19	(S)	STA AT 3:30 PM BUTROVICH 205
02/21/19	(S)	Heard & Held
02/21/19	(S)	MINUTE(STA)
03/12/19	(S)	STA AT 3:30 PM BUTROVICH 205
03/12/19	(S)	Heard & Held
03/12/19	(S)	MINUTE(STA)
03/14/19	(S)	STA AT 3:30 PM BUTROVICH 205
03/14/19	(S)	Heard & Held
03/14/19	(S)	MINUTE(STA)
03/19/19	(S)	STA AT 3:30 PM BUTROVICH 205
03/19/19	(S)	Moved CSSB 33(STA) Out of Committee
03/19/19	(S)	MINUTE(STA)
03/20/19	(S)	STA RPT CS 3DP 2AM NEW TITLE
03/20/19	(S)	DP: SHOWER, REINBOLD, MICCICHE
03/20/19	(S)	AM: COGHILL, KAWASAKI
03/21/19	(S)	STA AT 1:30 PM BUTROVICH 205
03/21/19	(S)	<Bill Hearing Canceled>
03/25/19	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

JOHN SKIDMORE, Director
Criminal Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Presented a sectional analysis on SB 33 and answered questions.

JENNIFER WINKELMAN, Director
Division of Probation and Parole/Pretrial
Department of Corrections
Juneau, Alaska
POSITION STATEMENT: Answered questions during the hearing on SB 33.

NANCY MEADE, General Counsel
Administrative Offices
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the hearing on SB 33.

ACTION NARRATIVE

1:31:39 PM

CHAIR SHELLEY HUGHES called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Present at the call to order were Senators Reinbold, Kiehl, Shower and Chair Hughes. Senator Micciche arrived shortly thereafter.

SB 33-ARREST;RELEASE;SENTENCING;PROBATION

1:31:41 PM
CHAIR HUGHES announced that the only order of business would be SENATE BILL NO. 33, "An Act relating to pretrial release; relating to sentencing; relating to treatment program credit toward service of a sentence of imprisonment; relating to electronic monitoring; amending Rules 38.2 and 45(d), Alaska Rules of Criminal Procedure; and providing for an effective date." [CSSB 33(STA) was before the committee.]

CHAIR HUGHES made preliminary remarks.

1:32:31 PM
JOHN SKIDMORE, Division Director, Criminal Division, Department of Law, Anchorage, stated that the majority of SB 33 relates to pretrial issues. The issues related to bail were a response to the public outcry about bail being considered a "catch and release" program, which was how a KTVA television station dubbed it in an April 12, 2018 newscast. This bill would return the vast majority of sentences to pre-Senate Bill 91 law. He said he would highlight other changes to the law.

1:34:23 PM
MR. SKIDMORE reviewed Section 1.

> Section 1: Legislative intent. Expressing intent that the Alaska Court System use videoconferencing for pretrial hearings.

This would encourage the court to move forward with videoconferencing in pretrial hearings, he said.

1:35:06 PM
MR. SKIDMORE reviewed Section 2.

> Section 2: Increases the amount of time available for an arraignment to happen from 24 hours to 48 hours from the time of arrest. Eliminates language related to proceeding with an arraignment regardless of the availability of a risk assessment conducted by a pretrial services officer.

MR. SKIDMORE explained that Section 2 would revert to pre-Senate Bill 91 law. He related that the 48-hour requirement from the time of arrest to arraignment falls mid-range compared to other states' requirements. In 2010, Alaska was one of only two states that relied on a 24-hour requirement. Most states had moved to 48 hours and some to 72-hour provisions, he said.

He said the Department of Law envisions that reinstating the 48-hour requirement would be helpful during weekends or holidays during higher arrest periods. The compressed time period does not allow the department time to review cases and file charges. In response to Chair Hughes, he recalled that at least 95 percent of the cases were filed within the 24-hour limit, but it could even be higher.

1:37:42 PM
SENATOR KIEHL asked whether any offenders were released because their arraignments were not held timely.

MR. SKIDMORE responded that he was unsure. He said that in some instances the charges had to be amended. He reiterated that the department viewed this change as beneficial during weekends, especially on Sundays. He recalled that the department previously estimated it could save $50,000 by not holding arraignments on holidays and weekends.

1:38:57 PM
MR. SKIDMORE directed attention to page 2. He reviewed Section 3.

> Section 3: Eliminates language related to a risk assessment conducted by a pretrial services officers.

MR. SKIDMORE characterized Section 3 as a conforming amendment to remove reference to the risk assessment tool throughout the bill since it would no longer be used.

1:39:40 PM
MR. SKIDMORE reviewed Section 4.

> Section 4: Eliminates language requiring a judicial officer to review any condition of release that has prevented the defendant from being released. Also eliminates language requiring a judicial officer to find by clear and convincing evidence that a less

> restrictive condition cannot reasonably ensure the defendant's appearance or the safety of the victim.

MR. SKIDMORE referred to page 2, lines 26-28 of the bill, which read, "THE JUDICIAL OFFICER SHALL REVISE ANY CONDITIONS OF RELEASE THAT HAVE PREVENTED THE DEFENDANT FROM BEING RELEASED …." Removing this language means that the court would not be required to revise conditions, he said. If this law were to pass, the court could consider whether conditions should be changed, but it would not require the court to change those conditions.

1:40:44 PM
SENATOR KIEHL related his understanding that current law would require the court to change the defendant's conditions of release if less restrictive conditions would ensure public safety and that the person would show up for a hearing. He asked whether he had misunderstood the provision.

MR. SKIDMORE read a portion of the language being deleted from current law:

> [UPON REVIEW OF THE CONDITIONS, THE JUDICIAL OFFICER SHALL REVISE ANY CONDITIONS OF RELEASE THAT HAVE PREVENTED THE DEFENDANT FROM BEING RELEASED UNLESS THE JUDICIAL OFFICER FINDS ON THE RECORD THAT THERE IS CLEAR AND CONVINCING EVIDENCE THAT LESS RESTRICTIVE RELEASE CONDITIONS CANNOT REASONABLY ENSURE THE ….]

He said the department interpreted this to mean that the judicial officer "shall" revise any conditions that prevented a defendant from being released unless the officer found by clear and convincing evidence that the person posed a danger. Under pre-Senate Bill 91 law, the court could exercise its authority to determine what conditions were appropriate based a preponderance of the evidence. This change would place a greater requirement on the court and restrict the court's discretion.

1:42:30 PM
MR. SKIDMORE directed attention to page 3 of SB 33, to Section 5.

> Section 5: Eliminates inability to pay as a reason for a judicial officer to conduct subsequent bail hearings and a review of the person's conditions of release.

MR. SKIDMORE said Section 5 would require that new circumstances must be presented in order to change any conditions of release.

Under current law, if a person was unable to post bail, the person's inability to pay bail could be considered as a new condition. This means that the person's ability to pay could be considered twice, once when the bail was initially set and again when bail was revised. Section 5 would revert to pre-Senate Bill 91 law, he said.

1:43:50 PM
SENATOR KIEHL asked why this change should be made given that financial circumstances often change. For example, the person might rely on an aunt or uncle to help post bail, but these relatives might not be able to do so. He asked whether these changes would no longer matter to the court.

MR. SKIDMORE responded that a family member's ability to post bail is not considered when bail is set. He referred to page 4, [lines 29-31 through page 6, line 13] of Section 7, which read:

> (c) In determining the conditions of release under this chapter, the court shall consider the following:
> (1) the nature and circumstances of the offense charged;
> (2) the weight of the evidence against the person;
> (3) the nature and extent of the person's family ties and relationships;
> (4) the person's employment status and history;
> (5) the length and character of the person's past and present residence;
> (6) the person's record of convictions;
> (7) the person's record of appearance at court proceedings;
> (8) assets available to the person to meet monetary conditions of release;
> (9) the person's reputation, character, and mental condition;
> (10) the effect of the offense on the victim, any threats made to the victim, and the danger that the person poses to the victim; and
> (11) any other facts that are relevant to the person's appearance or the person's danger to the victim, other persons, or the community.

He said subsection (c) would allow 11 items that can be considered. He reviewed several. Paragraph (3) reads, "the nature and extent of the person's family ties and relationships," which does not refer to a family member's

ability to post bail, he said. Paragraph (4) reads, "the person's employment status and history." This would give the court some sense of the person's income, he said. If the person were to lose his/her job in the interim, it would provide a new piece of information. However, the bail hearing would be held based only on the loss of a job and not an inability to pay.

MR. SKIDMORE directed attention to paragraph (8), which read, "assets available to the person to meet monetary conditions of release;". He said that the defendant's assets, but not the defendant's family or friends is one of the factors the court would consider when initially setting bail. If the defendant's assets were to change it would be considered a new condition. An inability to pay simply would mean how much money the person had in his/her bank account. Other factors that might impact the person's inability to pay should initially be considered, he said.

1:47:06 PM
CHAIR HUGHES asked what timeframe was involved when setting the initial bail. She referred to paragraph (3) on page 3 that states "at least seven days have elapsed…." It would be unlikely that significant changes in assets would occur during this short timeframe.

MR. SKIDMORE answered that the defendant's bail would be set at the initial arraignment. The court would evaluate and set bail the first time the person appears in court. The statutes indicate that if the person has not been released in the first 48 hours after bail has been set, the person can request a subsequent bail hearing. The defendant could articulate any new information or factors that the court did not have at the time of the initial hearing. In his experience, those factors typically include things such as that the defendant proposes being released to a third-party custodian, or the defendant requests electronic monitoring. He could not recall any instance when the person requested the same bail amount. Instead, the defendant always requested reducing bail combined with the new proposal for conditions of release. He pointed out that the bail hearing could happen within 48 hours and it can be repeated as often as new information becomes available. This provision seeks to eliminate multiple bail hearings on subsequent days in which the same information was being presented.

1:49:24 PM
MR. SKIDMORE reviewed Section 6.

Section 6: Conforming amendment. Eliminates reference to AS 33.07.

He said that this conforming amendment would pertain to the responsibilities of pre-trial services officers.

1:49:41 PM
MR. SKIDMORE reviewed Section 7.

Section 7: Largely reenacts the bail statute as it was prior to January 1, 2018. Eliminates the requirement that the release decision be tied to a person's risk assessment score. Eliminates the presumptions of release and the requirement that a judicial officer find by clear and convincing evidence that no less restrictive condition can ensure the appearance of the defendant or safety of the community or victim before a judicial officer can impose monetary bail.

MR. SKIDMORE said Section 7 begins on page 3, line 30. This provision was previously discussed in response to Senator Kiehl's question. Section 7 would revert to pre-Senate Bill 91 law. He directed attention to subsection (a), AS 12.30.011, which states that a judicial officer "shall order a person charged with an offense to be released on the person's own recognizance…." He said that this would provide a starting point. It is required per the Constitution of the State of Alaska, he said.

MR. SKIDMORE reviewed subsection (b):

(b) If a judicial officer determines that the release under (a) of this section will not reasonably assure the appearance of the person or will pose a danger to the victim, other persons, or the community, the officer shall impose the least restrictive condition or conditions that will reasonably assure the person's appearance and protect the victim, other persons, and the community. In addition to conditions under (a) of this section, the judicial officer may, singly or in combination, …

He explained that subsection (b) would set out 20 conditions that could be imposed. This new subsection seeks to include as many options as possible for the court to consider. Some options include the appearance bond, bail bond, performance bond, restriction on travel and association, restrictions on

possessing weapons, the requirement to maintain employment, restrictions on contact with victims, and restrictions related to alcohol use. All of these conditions were found in the pre-Senate Bill 91 law, he said.

MR. SKIDMORE explained that the new language in paragraph (18) would allow the court to order pretrial services officer supervision. While Senate Bill 91 law implemented pretrial services officers, SB 33 would modify the organization of the supervision within the Department of Corrections.

MR. SKIDMORE reviewed subsection (c).

> (c) In determining the conditions of release under this chapter, the court shall consider the following:
>
> (1) the nature and circumstances of the offense charged;
> (2) the weight of the evidence against the person;
> (3) the nature and extent of the person's family ties and relationships;
> (4) the person's employment status and history;
> (5) the length and character of the person's past and present residence;
> (6) the person's record of convictions;
> (7) the person's record of appearance at court proceedings;
> (8) assets available to the person to meet monetary conditions of release;
> (9) the person's reputation, character, and mental condition;
> (10) the effect of the offense on the victim, any threats made to the victim, and the danger that the person poses to the victim; and
> (11) any other facts that are relevant to the person's appearance or the person's danger to the victim, other persons, or the community.

MR. SKIDMORE reviewed Section 7, subsection (d), which began on page 6. He explained that pre-Senate Bill 91 law created a rebuttable presumption that no condition or combination of conditions could ensure the safety of the community or that a person would not be a flight risk. That provision was subsequently found unconstitutional by the [Alaska Court of Appeals] under Hamburg v. State.

He said that Section 7 of SB 33 would allow an individual under certain circumstances to meet a rebuttable presumption that a person would likely appear or would not pose a danger. This significant change would allow the court to set some conditions or combination of conditions for bail.

1:53:51 PM
CHAIR HUGHES directed attention to page 6, line 2, and asked for clarification that this language was not in pre-Senate Bill 91 law or in Senate Bill 91.

MR. SKIDMORE answered by referring to page 6, line 18, AS 12.30.011(d)(2), which read:

> (2) there is a rebuttable presumption that there is a substantial risk that the person will not appear, and the person poses a danger to the victim, other persons, or the community, if the person is

He said that this language gave the impression that bail should not be set because it was not possible to ensure the conditions could be met. However, the Constitution of the State of Alaska provides that a person is entitled to reasonable bail, so that language was found unconstitutional.

CHAIR HUGHES asked whether the unconstitutional language just described was in pre-Senate Bill 91 law or if it was in Senate Bill 91.

MR. SKIDMORE reiterated that this language would revert to pre-Senate Bill 91 law. However, the language was altered in SB 33 to ensure that it would be constitutional.

1:55:47 PM
SENATOR KIEHL related his understanding that there was an unconstitutional presumption that bail would not work, and Section 7 would provide replacement language that presumes that bail would not work. He said he was unsure of the distinction.

MR. SKIDMORE explained that the specific language in pre-Senate Bill 91 law meant that no condition or combination of conditions could ensure the safety or appearance of an individual so the courts denied bail because it could not impose any condition that would ensure the person would not flee or commit a new crime. That restriction meant the defendant could not post bail and be released from jail during the pretrial phase [contrary to their constitutional right].

He explained that SB 33 started with the premise that it was appropriate for a defendant to be out on bail. However, defendants charged with certain crimes, such as murder or sexual felonies could be denied bail because being released on their own recognizance would not be appropriate. The presumption is that some other conditions would need to be set, he said.

SENATOR KIEHL pointed out that this subsection does not appear to set the standards for the pretrial conditions for defendants charged with more dangerous crimes.

MR. SKIDMORE referred to conditions of release in Section 7. The presumption would be that conditions for bail must be imposed rather than to allow the defendant to be released from jail on his/her own recognizance, he said. He referred to page 4, line 14 through page 5, line 28, that outlined the types of conditions that the court could select, including electronic monitoring, assigning a third-party custodian, supervision by pretrial services, or placing restrictions on contact with a victim. This language removed the concern that none of the conditions would ensure the safety of the community or the defendant's appearance in court, he said.

2:00:25 PM
SENATOR MICCICHE observed that AS 12.30.011 currently includes an unsecured performance bond and an appearance bond. He asked what the difference was between those bonds. He further asked why the performance bond was removed in SB 33.

MR. SKIDMORE explained that an appearance bond would be issued to ensure someone appears in court whereas a performance bond would be issued to ensure that someone complies with all the other conditions of bail. The appearance bond would be forfeited for not appearing in court. The performance bond would be forfeited if the defendant violated any of the conditions for release, such as consuming alcohol. In further response to Senator Micciche, he directed attention to subsection (b)(3) on page 4, lines 19-20, which requires the execution of a performance bond in a specified amount of cash to be deposited in the registry of the court.

2:02:31 PM
MR. SKIDMORE reviewed Section 8.

Section 8: Eliminates the requirement that a pretrial services officer not be available in the area before a third-party custodian can be appointed.

MR. SKIDMORE explained that pretrial services officers were a new concept in Senate Bill 91 law, which required pretrial services officers to be used whenever possible. However, that law did not allow the use of third-party custodians. Section 8 would change that by allowing the court an option to assign a pretrial services officer supervised by the Department of Corrections, a third-party custodian, or the use of electronic monitoring in every location. This would provide public safety and ensure that defendants would appear in court. The advantage of having options would mean the court would have greater discretion to select the most appropriate condition in each instance. Since the pretrial service officer responsibilities were reorganized within the department, a pretrial services officer would not be limited to a specific geographic area, he said.

2:04:23 PM
SENATOR KIEHL said he had questions about the efficacy. He asked which method of supervision would work better to ensure that defendants appear at court dates and that defendants received appropriate sanctions for any violations of pretrial conditions. He remarked that he has anecdotally heard horror stories about third-party custodians.

MR. SKIDMORE argued that it was not a question of whether third-party custodians or pretrial services officers are better, but to consider what worked best on a case-by-case basis.

During his 20 years of experience working in the communities of Dillingham and Bethel he found it was not feasible for pretrial officers to be located in every community, especially in small villages, such as Togiak. He suggested that it might be more effective to assign a third-party custodian. More often than not, he has seen third-party custodians succeed. The court and the prosecution must evaluate third-party custodians to ensure that they are able to provide appropriate services, he said. He offered his belief that having all three options would help provide public safety. In further response to Senator Micciche, he clarified that under current law, when pretrial services officers are available a third-party custodian cannot be used.

SENATOR MICCICHE asked whether the DOL has considered imposing sanctions or violations on third-party custodians who do not fulfill their agreements.

MR. SKIDMORE answered that currently third-party custodians who do not perform their responsibilities would be in violation of AS 11.56.758.

CHAIR HUGHES asked for the current number of pretrial services officers. She further asked how often the department would use these officers rather than third-party custodians.

2:10:12 PM
JENNIFER WINKELMAN, Director, Division of Probation and Parole/Pretrial, Department of Corrections, Juneau, reported that the division has a total of 78 staff assigned to pretrial services. The division has hub offices in Kenai, Juneau, Palmer, Fairbanks, and Anchorage. Palmer and Fairbanks each have nine officers and one supervisor, Anchorage has 20 officers and three supervisors, Kenai and Juneau each have three officers, and Ketchikan has one officer. They all operate out of the Division of Probation and Parole offices, she said.

CHAIR HUGHES asked whether third-party custodians are necessary to ensure adequate coverage, especially since the officers are not in some villages.

MS. WINKELMAN answered that it is more likely that pretrial services officers would not be available in villages, particularly ones outside of Nome or Bethel. She said that using third-party custodians could be more beneficial in smaller rural communities. She said she was uncertain if using third-party custodians would be a better option than using pretrial services officers, but she agreed that having the option available would be beneficial.

CHAIR HUGHES asked for further clarification on whether the pretrial services officers typically travel to communities but do not live in the community in which they work.

MS. WINKELMAN answered that the pretrial services officers travel to rural areas based on the department's supervision policy and they must provide supervision once every four or six months. She said she would have to review the policy.

CHAIR HUGHES asked about accountability for third-party custodians and whether any improvements were needed.

MS. WINKELMAN offered to research it and report back to the committee. She said that third-party custodians were assigned by the court, so she has not reviewed accountability issues.

2:13:33 PM
SENATOR MICCICHE said AS 11.56.758 seems to be directed at immediate reporting. He read, "Violation of a custodian's duty is a class A misdemeanor if the released person is charged with a felony and a class B misdemeanor if the released party is charged with a misdemeanor." He recalled in at least one instance a third-party custodian supplied drugs to the defendant released on charges of drug possession. He asked if third-party custodians are ever charged under the penalty provision.

MR. SKIDMORE answered that while he did not have the statistics on the frequency of charges made under AS 11.56.758 with him, he recalled that prior to Senate Bill 91 law this provision was used. He was unsure if any additional charges could be filed when a third-party custodian supplied narcotics to the defendant. However, if the narcotics were illegal, additional criminal charges should have been filed. This statute currently exists to provide enforcement of the responsibility for third-party custodians, he said.

SENATOR MICCICHE said the committee should review this further and institute some clear expectations and consequences for third-party custodians.

CHAIR HUGHES agreed, especially since the vast number of communities do not have pretrial services officers.

2:16:40 PM
SENATOR KIEHL asked what the existing standards are for third-party custodians.

MS. WINKELMAN deferred the question to Mr. Skidmore.

MR. SKIDMORE said that the standards for third-party custodians approved by the court are found in AS 12.30. He said that the court would evaluate whether the person would be a good third-party custodian, but he was not aware of any established criteria. However, Section 9 does identify the criteria when a third-party custodian cannot be appointed.

SENATOR KIEHL suggested that this was an opportunity to improve third-party custodians. He said he fundamentally disagrees with

Mr. Skidmore that the state cannot determine whether third-party custodians or correctional pretrial services officers work better. While the department should develop standards for third-party custodians, he strongly suspected that pretrial services officers were providing better results. He expressed concern about moving towards using third-party custodians without a clear understanding of what would likely work.

2:19:07 PM
CHAIR HUGHES asked whether the department had any statistics on violations that occur under third-party custodians as compared to pretrial services officers.

MS. WINKELMAN answered that she was uncertain about the incidence of problems with third-party custodians. However, the department would have information on pretrial services officers since they fall under the department's supervision. In further response to Chair Hughes, she said that she was uncertain if the district attorney or court system tracks third-party custodians.

2:19:58 PM
NANCY MEADE, General Counsel, Alaska Court System, Anchorage, responded that the court system does not compile data on the number of third-party custodians assigned. She offered to research the number of times the statute previously referred to was used and report back to the committee.

2:21:28 PM
MR. SKIDMORE reviewed Section 9. He directed attention to pages 7-8 of SB 33.

> Section 9: Reenacts the prohibition on appointing individuals who may be called as a witness in the case from being appointed as third-party custodians.

MR. SKIDMORE said that Section 9 would revert to pre-Senate Bill 91 law in terms of restrictions for third-party custodians. He referred to Section 9 on page 8, lines 4-5. Prior law restricted appointing third-party custodians if they might be called as a witness in a case. Senate Bill 91 law changed the language to "a reasonable probability" that the person might be called as a witness. He explained that the difficulty with the Senate Bill 91 law was timing. It might be difficult to evaluate early on in cases which parties might be called as witnesses. Bail and third-party custodians can generally be assessed within the first week after an arrest. However, at that point the prosecution would still be compiling information and nuances of

the case. Thus, a prosecutor might not be able to identify potential witnesses. He said it would be a better practice to use the guideline that "if a person may be called as a witness, the person cannot be appointed." It would also help to ensure criteria would apply to third-party custodians, he said.

2:23:02 PM
SENATOR KIEHL said that "reasonable probability" is a term he was not familiar with, but it seemed like a lower standard than probable cause. He asked whether this determination would be made at the prosecutor's sole discretion.

MR. SKIDMORE answered the prosecutor would decide which witnesses the state would call on a case. Senate Bill 91 law established the "reasonable probability" standard that the state would apply when determining the witnesses list. However, that language would not preclude the defense from calling a person as a witness, he said.

He explained that SB 33 would propose a prohibition on appointing a third-party custodian who might be called as a witness. The department interpreted that would apply to any witnesses for the prosecution or the defense. Once a potential third-party custodian was identified as a potential witness, the judge would need to know why the person was called as a witness and what evidence the person might offer, and the court would evaluate it. However, it may be too early to know that information. Of course, this could include potential witnesses for the defense or any witnesses who have a connection to the case. The court would ultimately evaluate it, he said.

2:25:35 PM
SENATOR KIEHL asked what standard the judge could apply if the language reads "may."

MR. SKIDMORE answered that the "preponderance of the evidence" standard was used for bail hearings. The state would indicate that the person might be called, and the prosecutor's explanation must withstand the scrutiny of the court. However, "reasonable probability" was not the burden of proof typically used in criminal law.

2:27:21 PM
SENATOR MICCICHE offered his belief that the standards for third-party custodians set out in Section 9 seemed to be fairly minimal. He asked whether AS 11.41 referred to crimes against a person.

MR. SKIDMORE answered yes.

SENATOR MICCICHE related his understanding that third-party custodians must not have been convicted in the previous three years of a crime under AS 11.41, have criminal charges pending, or be on probation in this state or in another jurisdiction. He asked Mr. Skidmore if there were any other standards he might suggest for third-party custodians. He was not aware of any restriction for any recent drug convictions, but this would be important to consider given the opioid crisis in the state.

MR. SKIDMORE answered that he had not considered potential criteria, but he could do so. He clarified that he was speaking on behalf of the department. Typically, the department would seek consensus from prosecutors throughout Alaska. He said he hesitated to offer any suggestions without going through the departmental vetting process.

SENATOR MICCICHE said he may speak to other people with respect to the criteria for third-party custodians. "Minimal requirements is a generous term for the current list," he said.

CHAIR HUGHES remarked that she was surprised at the leniency, that she expected potential third-party custodians would not have any criminal history.

2:30:10 PM
MR. SKIDMORE reviewed Section 10.

> Section 10: Prohibits the court from granting jail credit for time spent on electronic monitoring before trial.

MR. SKIDMORE related that the committee previously discussed Section 10 as it related to SB 12. Briefly, the court would decide who could be placed on electronic monitoring during the pretrial period. The court would not make a determination on whether electronic monitoring was the appropriate place or circumstance for a person to serve his/her sentence. Instead, post-conviction, the Department of Corrections would conduct a risk assessment analysis and a classification analysis to determine the appropriate place for the offender to serve his/her sentence. Absent an assessment by the Department of Corrections, the decision to use electronic monitoring would be made at a bail hearing, even if it was not appropriate, such as in the Justin Schneider case. Section 10 would address this by

prohibiting the court from granting pretrial electronic monitoring from being used as credit towards the final sentence.

One problem with the current language was that it might encourage pretrial delays. For example, offenders released on pretrial electronic monitoring might seek delays prior to sentencing in order to build up as much credit as possible against their sentences in the pretrial phase to reduce any potential time served.

2:32:40 PM
MR. SKIDMORE said that one of the great ills that Senate Bill 91 law sought to address was the rise in the pretrial prison population. However, the pretrial prison population was not just driven by the number of people sentenced, but by the length of time between their arrests and when the case is resolved. That period of time would be considered pretrial time, he said. Section 10 would seek to ensure that pretrial delays do not occur, especially since delays never benefit the victims.

2:33:22 PM
MR. SKIDMORE read Sections 11 and 12.

> Section 11: Conforming amendment to the changes made by section 10.
>
> Section 12: Adds prosecuting authority to the list of entities that can be notified if a person is discharged from a treatment program for noncompliance.

2:34:11 PM
MR. SKIDMORE reviewed Section 13 on page 9.

> Section 13: Limits the amount of jail credit that can be granted for time spent in a treatment program to 180 days.

MR. SKIDMORE advised members that the department does not want to discourage people from obtaining pretrial treatment. However, pretrial treatment should be limited, or it could create delays. Most programs last six months or less, which is the reason 180 days was selected. Longer treatment programs should be pursued once the underlying criminal offense is resolved, he said.

2:35:16 PM

SENATOR MICCICHE noted that Section 12 is not specific about the type of treatment or if the treatment could include sex offender treatment programs.

MR. SKIDMORE answered that treatment could include any type of treatment program, but sex offender treatment programs generally last longer than six months and are not typically used by defendants in pretrial. Since those programs encourage people to talk about their inappropriate behavior, most defense attorneys would advise their clients not to admit anything prior to the trial because it could potentially be used against them.

2:36:34 PM
CHAIR HUGHES related her understanding that this section does not require the treatment to be residential treatment.

MR. SKIDMORE offered to further review AS 12.55.027, but his impression was that it would need to be a residential treatment program. The law has generally provided credit against a sentence that involves some restriction on the defendant's movement or other liberties. He offered to report his findings to the committee.

2:37:42 PM
SENATOR MICCICHE asked whether the victim should be added to the list of those notified.

MR. SKIDMORE said that he had not considered the matter, but he did not initially see any problem in doing so. He said he was unsure why victims were omitted. He offered to research it and report back to the committee.

2:38:50 PM
MR. SKIDMORE, in response to an earlier question, referred to AS 12.55.027(a). He read, "reformation and rehabilitation of the defendant if the court finds that the program places a substantial restriction on the defendant's freedom of movement and behavior and is consistent with this section." This language implies that it would need to be some sort of residential program, he said.

2:39:26 PM
MR. SKIDMORE reviewed Sections 14 and 15.

> Section 14: Conforming amendment. Conforms to the change made in section 2.

Section 15: Adds authority for the commissioner of the department of corrections to supervise pretrial defendants.

MR. SKIDMORE said that Section 15 really gets to the "heart and soul" of pretrial services officers. He said that the pretrial service unit was previously created under AS 33.07. Section 15 would add the Pretrial Services Officer Program into the Division of Probation and Parole. As Ms. Winkelman described, pretrial services officers have been limited to communities on the road system or the ferry system. The state seeks to expand the program to communities in Western Alaska that currently have probation and parole offices, he said. Adding this function to the division would also limit overhead expenses for supervision and management of the program. The powers of the commissioner include "provide supervision of defendants released while awaiting trial as ordered by the court." This language was added in Section 15 to ensure that the Department of Corrections has the appropriate authority to supervise individuals during the pretrial period.

2:42:11 PM
MR. SKIDMORE read Section 16 on page 10.

Section 16: Requires the commissioner of the department of corrections to make officers available to the courts for pretrial supervision. Also allows the commissioner to contract with private entities for electronic monitoring services.

2:42:42 PM
MR. SKIDMORE reviewed Sections 17-19.

Section 17: Clarifies that probation officers may be made available to district courts.

Section 18: Adds pretrial supervision to the list of duties which a probation officer may perform and clarifies that when performing those duties probation officers are pretrial services officers.

Section 19: Lays out the duties of a probation officer when acting as a pretrial services officer. These duties include arresting defendants and filing criminal complaints for violations of conditions of release.

MR. SKIDMORE said these three sections pertain to the responsibility for supervising pretrial services and ensure that the department maintains the statutory authority to allow probation and parole officers to serve as pretrial services officers. He said that this also meant that probation officers would be available to district courts to cover misdemeanors, not just felonies.

2:44:43 PM
MR. SKIDMORE reviewed Sections 20 and 21 on page 12.

> Section 20: Conforming amendment. Eliminates the reference to AS 33.07, which is where the pretrial services program is currently located. AS 33.07 is repealed in the bill.
>
> Section 21: Eliminates the requirement that the Department of Corrections report to the Alaska Criminal Justice Commission on pretrial defendant risk levels and charges and pretrial recommendations made by pretrial services officers.

MR. SKIDMORE explained that it did not make any sense to have the department continue to report on risk assessment since it would no longer be a requirement in statute.

2:46:24 PM
MR. SKIDMORE reviewed Section 22.

> Section 22: Conforming amendment to the changes made in section 23.

He said that this is a conforming amendment to court rules related to using contemporaneous two-way videoconferencing. This terminology also more accurately describes the technology than "television."

2:47:29 PM
MR. SKIDMORE reviewed Section 23.

> Section 23: Expands the types of pretrial hearings available to the Alaska Court System to use videoconferencing.

MR. SKIDMORE said the department has been working with the court system on suggested changes to ensure that the rule is drafted to address any issues related to videoconferencing.

2:48:06 PM
SENATOR KIEHL asked whether Ms. Meade could describe any issues the court system has with videoconferencing.

MS. MEADE concurred with Mr. Skidmore that the court system has been working with the Department of Law on language acceptable to both entities related to videoconferences. These issues are primarily found in Section 23 but also Section 1 of the bill.

She explained that the Alaska Supreme Court has been working on rules related to videoconferencing for some time. The court had some concerns about which hearings are appropriate to hold by videoconferences. The current rule reflects what the Alaska Supreme Court decided about a year ago, which is to allow certain proceedings to be conducted by video when all of the logistics are in place.

MS. MEADE explained that the Department of Law seeks to expand some of these options in SB 33. Although she believed that she and Mr. Skidmore have reached agreement on when videoconferences would be acceptable, some concerns remain related to constitutional rights. For example, when a defendant has evidence being presented against him/her at a pretrial hearing, the defendant has a constitutional right to have this evidence presented in person. The court also faces logistical issues when holding more hearings by videoconference.

She said that the court has spearheaded projects to ensure acceptable equipment for facilities. The Alaska Court System staff has the responsibility to assess any equipment needed at prisons and orders, installs, and maintains the equipment. While the Alaska Court System seeks to hold more hearings by videoconference, defendants still have the option to appear at a number of hearings by court rule. Currently, the court system sends a judge to the Anchorage jail court twice a day, every day, to provide in-person arraignments. The court system has the infrastructure in place to conduct videoconferences and does so in some regions. For example, in Kotzebue, the court conducts a number of hearings by videoconference to the Anvil Mountain Correctional Facility. The court system seeks to continue to cooperate and promote videoconferences with other state agencies, which is supported by this administration.

2:52:39 PM
MR. SKIDMORE reviewed Section 24 on page 15.

Section 24: Allows a defendant or the defendant's counsel to consent to a continuance of trial.

MR. SKIDMORE explained that the defense counsel can make a request for a continuance and in some circumstances can do so without the defendant's approval. He said this is really about efficiency, just as Ms. Meade indicated. Transporting teleconferencing equipment that does not always work and can delay cases. It is difficult to get defendants to court just to allow them to state that they have agreed to a continuance. Considerable case law discusses what types of decisions were left to a defendant or to counsel. Continuances were generally the type of decision that defense counsel would decide as opposed to the defendants. This language would add consistency that case law describes and seeks to eliminate some of the associated pretrial delay.

2:53:54 PM
MR. SKIDMORE read Sections 25 and 26.

Section 25: Repealer section.

MR. SKIDMORE explained that Section 26, is the applicability section.

MR. SKIDMORE read Section 27.

Section 27: Transition section. Ensures that the Department of Corrections can still monitor any defendant that is currently on pretrial release and under the supervision of the Department of Corrections despite the transfer of that authority from the pretrial services program to probation.

MR. SKIDMORE said that Section 28 relates to the uncodified law of Alaska.

MR. SKIDMORE read Section 29.

Section [29]: Effective Date. This Act takes effect on July 1, 2019.

2:55:27 PM
CHAIR HUGHES asked for further explanation of the repealed statutes listed in Section 25.

MR. SKIDMORE explained that AS 12.55.027(g) pertained to pretrial credit against sentences that are openly imposed. It is repealed because subsection (d) is being eliminated. The current language states that a credit against a sentence of imprisonment under (d) of this section may grant credit of not more than 360 days. He characterized it as a conforming change. The remaining repealed statutes, including AS 33.07.010, 33.07.020, 33.07.030, 33.07.040, and 33.07.090, pertain to statutes that establish the pretrial services unit within the Department of Corrections. Since that unit was transferred to the Division of Probation and Parole in SB 33, Sections 15-19 are obsolete, he said.

2:57:28 PM
SENATOR KIEHL commented that AS 33.07.030 sets out the duties of the pretrial service officers, but some provisions, such as recommendations to the court and how restrictive the defendant's environment must be were no longer listed. He asked Mr. Skidmore to discuss the shift in the approach being taken.

MR. SKIDMORE explained that maintaining pretrial supervision throughout the state was deemed important, but it also meant finding [budgetary] efficiencies. Changing AS 12.30.011 eliminated judges from being tied to the risk assessment tool. Under current law, pretrial services officers use a risk assessment tool to determine bail. Currently, officers spend an inordinate amount of time on risk assessment to examine factors that the court, the prosecution, and the defense already evaluate. Instead, pretrial service officers will now focus exclusively on supervision rather than to answer questions about an offender's criminal history prior to an arraignment. People could still use the tool, but they are not required to do so, he said.

SENATOR KIEHL recalled that pretrial services officers were recommending the least restrictive supervision that would keep the public safe yet still ensure that the defendant appeared in court. This language would allow the court to evaluate supervision. He expressed concern that by deleting the language at this juncture would also remove the presumption that the department would not be recommending the least restrictive environment. He asked whether that decision was covered elsewhere.

MR. SKIDMORE answered yes. He directed attention to Section 7 on page 4, lines 8-13 and read AS 12.30.011(b):

> If a judicial officer determines that the release under (a) of this section will not reasonably assure the appearance of the person or will pose a danger to the victim, other persons, or the community, the officer shall impose the least restrictive condition or conditions that will reasonably assure the person's appearance and protect the victim, other persons, and the community.

He agreed that Senator Kiehl identified the department's goal and said that the pretrial services officers would not make recommendations on how to achieve it. Section 7 would provide guidance for any arguments by the prosecution or the defense. This section would provide the statutory authority to control the way the judge would make decisions and ultimately set conditions of release.

SENATOR KIEHL said that he would hold additional questions on the important risk assessment tool.

He referred to the court rule amendment for delays and continuance in Section 24. He understood that a defendant and his/her attorney must sign off on a continuance. He asked whether the defendant might decide to go to trial as soon as possible, even if it might pose risks for the case later. He said this provision would allow an attorney to move forward with a continuance against the client's wishes. He suggested that an argument could be made for personal responsibility.

MR. SKIDMORE answered that this was a shift from the attorney to the defendant controlling the tactical timing of an attorney's readiness to go to trial. He recalled a Southeast Alaska case in which a defendant was charged with murder but insisted on going to trial. The defense counsel argued against it, stating that the case had recently been assigned, so he/she needed more time to prepare for trial. Due to the court rule, the judge moved forward with the trial and the defendant was convicted. The defendant subsequently filed for post-conviction relief arguing that counsel was ineffective.

He said that this scenario highlighted the situation that this change would seek to avoid. He explained that sometimes defendants rush headlong into trial, often creating appellate or post-conviction release issues. When the defense counsel requests additional time and the court can verify the need, a continuance should be granted to ensure the defendant receives a fair trial. Keep in mind that the prosecution, the defense, and

the judge are all under ethical obligation to do everything possible to ensure every defendant receives a fair trial, he said. However, this does not mean that a defendant would forfeit the right to a speedy trial, which is not covered under this criminal rule, he said. In response to Senator Kiehl, he said he did not recall whether the defendant won the post-conviction relief.

SENATOR KIEHL offered his belief that any mentally competent defendant has the right to screw up his/her own defense.

[SB 33 was held in committee.]

3:08:06 PM
CHAIR HUGHES reviewed upcoming committee announcements.

3:09:04 PM
There being no further business to come before the committee, Chair Hughes adjourned the Senate Judiciary Standing Committee meeting at 3:09 p.m.