

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

March 9, 2001

1:11 p.m.

**MEMBERS PRESENT**

Representative Norman Rokeberg, Chair  
Representative Scott Ogan, Vice Chair  
Representative Jeannette James  
Representative John Coghill  
Representative Kevin Meyer  
Representative Ethan Berkowitz  
Representative Albert Kookesh

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

HOUSE BILL NO. 32

"An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."

- HEARD AND HELD

HOUSE BILL NO. 4

"An Act relating to offenses involving operating a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage or controlled substance; relating to implied consent to take a chemical test; relating to registration of motor vehicles; relating to presumptions arising from the amount of alcohol in a person's breath or blood; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 97

"An Act relating to court approval of the purchase of structured settlements."

- SCHEDULED BUT NOT HEARD

**PREVIOUS ACTION**

BILL: HB 32

SHORT TITLE:SEX CRIME AND PORNOGRAPHY FORFEITURES

SPONSOR(S): REPRESENTATIVE(S)HAYES

Jrn-Date	Jrn-Page		Action
01/08/01	0032	(H)	PREFILE RELEASED 1/5/01
01/08/01	0032	(H)	READ THE FIRST TIME - REFERRALS
01/08/01	0032	(H)	JUD, FIN
02/09/01	0286	(H)	COSPONSOR(S): MCGUIRE, GUESS
02/14/01	0327	(H)	COSPONSOR(S): MURKOWSKI
02/21/01		(H)	JUD AT 1:00 PM CAPITOL 120
02/21/01		(H)	Heard & Held
02/21/01		(H)	MINUTE(JUD)
03/09/01		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 4

SHORT TITLE:OMNIBUS DRUNK DRIVING AMENDMENTS

SPONSOR(S): REPRESENTATIVE(S)ROKEBERG

Jrn-Date	Jrn-Page		Action
01/08/01	0024	(H)	PREFILE RELEASED 12/29/00
01/08/01	0024	(H)	READ THE FIRST TIME - REFERRALS
01/08/01	0024	(H)	TRA, JUD, FIN
02/22/01		(H)	TRA AT 1:00 PM CAPITOL 17
02/22/01		(H)	Heard & Held MINUTE(TRA)
02/27/01		(H)	TRA AT 1:00 PM CAPITOL 17
02/27/01		(H)	Moved CSHB 4(TRA) Out of Committee MINUTE(TRA)
02/28/01		(H)	JUD AT 1:00 PM CAPITOL 120
02/28/01		(H)	Heard & Held MINUTE(JUD)
02/28/01	0470	(H)	TRA RPT CS(TRA) NT 1DNP 2NR 2AM
02/28/01	0471	(H)	DNP: SCALZI, NR: KAPSNER, KOOKESH;
02/28/01	0471	(H)	AM: MASEK, KOHRING
02/28/01	0471	(H)	FN1: (ADM); FN2: (ADM)
02/28/01	0471	(H)	FN3: (COR); FN4: (CRT)
02/28/01	0471	(H)	FN5: (HSS); FN6: (HSS)
02/28/01	0472	(H)	FN7: (HSS); FN8: (HSS)

02/28/01	0472	(H)	FN9: (LAW); FN10: (DPS)
02/28/01	0472	(H)	REFERRED TO JUDICIARY
03/09/01		(H)	JUD AT 1:00 PM CAPITOL 120

#### WITNESS REGISTER

NATHANIEL ("NATE") MOHATT, Staff  
to Representative Joe Hayes  
Alaska State Legislature  
Capitol Building, Room 422  
Juneau, Alaska 99801

POSITION STATEMENT: On behalf of the sponsor, explained the two proposed committee substitutes for HB 32, Versions F and C.

REPRESENTATIVE JOE HAYES  
Alaska State Legislature  
Capitol Building, Room 422  
Juneau, Alaska 99801

POSITION STATEMENT: As sponsor of HB 32, expressed a preference for Version F, but said Version C was acceptable.

BILL MILLER, Captain  
Anchorage Police Department  
4501 South Bragaw  
Anchorage, Alaska 99501

POSITION STATEMENT: Testified on HB 32; conveyed the APD's preference for Version F, rather than Version C, but offered proposed change to Version F.

ALVIA "STEVE" DUNNAGAN, Lieutenant  
Division of Alaska State Troopers  
Department of Public Safety  
5700 East Tudor Road  
Anchorage, Alaska 99507

POSITION STATEMENT: During discussion of HB 32, voiced a preference for Version F because it is less restrictive than Version C. During discussion of HB 4, responded to a question regarding current arrest procedures for DWI.

DEL SMITH, Deputy Commissioner  
Office of the Commissioner  
Department of Public Safety  
PO Box 111200  
Juneau, Alaska 99811-1200

POSITION STATEMENT: During discussion of HB 4, presented information regarding the .08 BAC (blood alcohol concentration) handouts provided by the department, and answered questions.

JEANNE M. SWARTZ, Criminalist II  
Breath Alcohol Program  
Scientific Crime Detection Laboratory  
Department of Public Safety  
5500 East Tudor Road  
Anchorage, Alaska 99507-1221

POSITION STATEMENT: During discussion of HB 4, assisted with the presentation of information regarding .08 BAC handouts provided by the department, and answered questions.

CHRISTI ROWINSKI, Friends of Tom  
2358 Pruitt Lane  
Fairbanks, Alaska 99709

POSITION STATEMENT: During discussion of HB 4, spoke on the topic of .08 BAC limits.

MARY MORAN, Director  
Highway Safety Office  
Division of Statewide Planning  
Department of Transportation and Public Facilities  
3132 Channel Drive  
Juneau, Alaska 99801-7898

POSITION STATEMENT: During discussion of HB 4, spoke on issues surrounding implementation of .08 BAC limits, and federal funding allocations.

KACE McDOWELL, Executive Director  
Alaska Cabaret Hotel Restaurant and Retailers Association  
1111 East 80th Avenue  
Anchorage, Alaska 99501

POSITION STATEMENT: Testified in support of the concept of HB 4, and responded to questions about the TAM course.

CANDACE BROWER, Program Coordinator/Legislative Liaison  
Office of the Commissioner  
Department of Corrections  
431 N. Franklin, Suite 203  
Juneau, Alaska 99801

POSITION STATEMENT: During discussion of HB 4, spoke on the diversion program provision.

SUSAN HARGIS, Boating Safety Coordinator  
United States Coast Guard  
PO Box 25517  
Juneau, Alaska 99802

POSITION STATEMENT: During discussion of HB 4, testified in support of lowering the BAC limit to .08, and provided alcohol-related boating fatality statistics.

DEAN J. GUANELI, Chief Assistant Attorney General  
Legal Services Section-Juneau  
Criminal Division  
Department of Law  
PO Box 110300  
Juneau, Alaska 99811-0300

POSITION STATEMENT: During discussion on HB 4, spoke on the topic of changing DWI to DUI, and the inclusion of inhalants as a controlled substance.

MARY MARSHBURN, Director  
Division of Motor Vehicles  
Department of Administration  
3300B Fairbanks Street  
Anchorage, Alaska 99503

POSITION STATEMENT: During discussion on HB 4, spoke on the topic of changing DWI to DUI.

#### **ACTION NARRATIVE**

TAPE 01-29, SIDE A  
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:11 p.m. Members present at the call to order were Representatives Rokeberg, Ogan, Coghill, Meyer, and Berkowitz. Representatives James and Kookesh arrived as the meeting was in progress.

#### HB 32 - SEX CRIME AND PORNOGRAPHY FORFEITURES

Number 0095

CHAIR ROKEBERG announced the first item of business would be HOUSE BILL NO. 32, "An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."

Number 0150

NATHANIEL ("NATE") MOHATT, Staff to Representative Joe Hayes, Alaska State Legislature, came forward on behalf of the sponsor. Mr. Mohatt explained the two proposed committee substitutes. The first [Version C, 22-LS0270\C, Luckhaupt, 3/7/01] limits the type of property that can be forfeited to electronic equipment only; it defines "property" with a list of various types of electronic equipment that could be forfeited. The second [Version F, 22-LS0270\F, Luckhaupt, 3/7/01] is a little broader in its limitation; it exempts real property from the forfeiture, and it limits the property to that which can be proven to have contributed directly to the crime.

CHAIR ROKEBERG asked Representative Hayes whether he had a preference between [Version C and Version F].

Number 0255

REPRESENTATIVE JOE HAYES, Alaska State Legislature, sponsor of HB 32, specified that he would prefer Version F. Having [the property] defined [as in Version C] leaves it open to a legal problem because new technology could arise that is not defined in the statute. However, he would leave the decision up to the committee.

CHAIR ROKEBERG asked Representative Hayes whether he agrees that the breadth of the definition of the property in Version C is what he first intended with the bill, and that [the definition] could be broadly interpreted by the courts, in order to take into account new technology. Chair Rokeberg stated his own belief that if Version C were adopted, it would not be a strain for the courts to interpret it [broadly].

REPRESENTATIVE HAYES responded that both versions are adequate, to him. He again expressed concern that some new type of technology, in the next few years, might not fall under that definition. However, he had no problem with either version, and he was leaving it to the committee's discretion.

REPRESENTATIVE BERKOWITZ explained his preference for Version F. He pointed out that [HB 32] seems to be talking about property that aids in any sexual offense or assault. Although there has been a focus on use of a computer, a classic sexual assault would involve some instrument such as a knife or gun. If the statute is drawn narrowly, which Version C does, then the knife or gun couldn't be forfeited. By contrast, that forfeiture could occur under Version F, which addresses a broader problem of forfeiture related to crimes involving sexual assault.

CHAIR ROKEBERG asked Captain Miller of the Anchorage Police Department whether he had seen both proposed versions and whether he had a preference or recommendation.

Number 0355

BILL MILLER, Captain, Anchorage Police Department (APD), testified via teleconference, specifying that [the APD] prefers Version F. He noted that he is in charge of the major crimes unit, which includes the investigation of sexual assaults and sexual abuse of minors.

CAPTAIN MILLER explained that Version C is narrowly defined to include computer equipment; it doesn't take into account other types of sex crimes. Cars, for example, are used to facilitate a sexual assault, as are knives, guns, or other [implements]. In Anchorage, there is an increasing prevalence of date-rape drugs, which sometimes can be manufactured by private citizens, but Version C doesn't take into account the manufacturing paraphernalia, for example. That is part of the reason why the APD prefers Version F.

CAPTAIN MILLER offered a proposed change to Version F. He referred to page 2, beginning at line 2, which read in part:

Property, other than real property, that contributes directly and materially to a violation ... may be forfeited to the state upon the conviction of the offender.

CAPTAIN MILLER informed members that the APD would prefer to see the phrase "other than real property" stricken. He cited examples in which a juvenile is taken to a house and sexually assaulted by a predator; an adult female is given a date-rape drug at a bar and is then taken to a house specifically used for the purpose of sexual assault; and a gang rape of a juvenile occurs as an initiation. He explained that the APD believes the houses in those instances, as real property, are directly and materially related to those crimes. He asked: If other things, like guns and knives and vehicles, are at risk of being seized, why shouldn't real property - which is owned free and clear, and which has no innocent third party attached to it - also be placed at risk by virtue of the fact that [its use] was planned as an integral part of the crime?

CAPTAIN MILLER reported that the APD sees some safeguards [in Version F] that it believes to be adequate. For example, it requires a conviction, which necessitates the involvement of a neutral third party - the judge. Because there are adequate safeguards, the APD believes that real property ought to also be at risk when it is directly and materially related to the crime.

Number 0731

ALVIA "STEVE" DUNNAGAN, Lieutenant, Division of Alaska State Troopers, Department of Public Safety, testified via teleconference. He told the committee that he would echo a lot of what Captain Miller had said, and would be more in favor of Version F because it is not as restrictive as Version C. He also said that the topic of forfeiture of real property, including homes, brought up a whole set of other issues about which he would have to do research before commenting. However, as far as other types of things that could be used directly to facilitate those crimes, he said he believes those should all be subject to forfeiture too; forfeiture should not be limited to electronic mechanisms.

CHAIR ROKEBERG asked whether anyone else wished to testify; there was no response. He closed public testimony and announced that HB 32 would be held over.

HB 4 - OMNIBUS DRUNK DRIVING AMENDMENTS

Number 0837

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 4, "An Act relating to offenses involving operating a motor vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage or controlled substance; relating to implied consent to take a chemical test; relating to registration of motor vehicles; relating to presumptions arising from the amount of alcohol in a person's breath or blood; and providing for an effective date." [Before the committee was CSHB 4(TRA).]

CHAIR ROKEBERG noted that there would be two areas of focus for today's meeting: .08 [blood alcohol concentration (BAC)], and the change-of-title issue.

CHAIR ROKEBERG called an at-ease from 1:25 p.m. to 1:26 p.m.

CHAIR ROKEBERG noted that included in the members' packets was information developed by the Department of Public Safety (DPS). He asked Del Smith to present that information and to specifically focus on the [handout that showed the relationship between BAC levels to DWIs (driving while intoxicated)]; he noted that there were two different numbers that pertained to the column showing .08 to .0999 [BAC levels].

Number 0975

DEL SMITH, Deputy Commissioner, Office of the Commissioner, Department of Public Safety, explained that the charts before the committee were prepared by Jeanne Swartz from information retrieved from the "intoximeter"/DataMaster logs. He added that the charts reflected six locations: the Kenai Peninsula area, the Fairbanks area, [the Juneau area, the Wasilla area], the Anchorage area, and the Bethel area. And, while the charts did not reflect statistics for the entire state, they did reflect a substantial majority. Mr. Smith began to explain the charts using the Anchorage Police Department (APD) chart as an example.

CHAIR ROKEBERG interjected and said that the APD chart reflected one year and the charts of the other areas reflected two years.

MR. SMITH clarified that the APD chart reflected 1,451 DWIs with BAC levels ranging from .00 to .40 during the period of 1/1/00 through 12/31/00 - 12 months in a calendar year. The note at the bottom of the chart stated that from 1/1/98 through 12/31/99, which is the [prior] two-year period, there were 168 breath tests reflecting BAC levels between .08 and .10. He explained that that note was by way of a comparison with [calendar year 2000]. By dividing 168 in half, it would reflect that there were 80-some [DWIs within that BAC range] for each of those [two prior] years. He added that [the DPS] did not have the time or resources to create charts for 1998 and 1999 in the same manner as the charts reflecting calendar year 2000. [Thus all six charts reflect the number of all DWIs at all BAC levels for 2000, and, in addition, the number of DWIs at BAC levels between .08 and .10 during 1998 and 1999.]

MR. SMITH, in response to question by Chair Rokeberg, explained that each [row] contained the number of individuals in Anchorage with DWIs in 2000 who, when given a breath examination with a DataMaster or an intoximeter, had a BAC level in the corresponding column. For example, in 2000 there were 61 individuals with DWIs who tested at a BAC level of between .08 and .09. He added that in the 27 DWI cases reflecting BAC

levels of .00, he understood it to mean that those individuals were under the influence of some kind of drug that would not measure on the intoximeter or DataMaster.

REPRESENTATIVE JAMES asked if the number [under the DWIs column] reflected people who were given tickets for driving while under the influence.

MR. SMITH answered that that column reflected the number of individuals who were taken to a police station or [Alaska State] Trooper location and given a breath test.

REPRESENTATIVE OGAN inquired what the difference was in someone's driving ability/skills with a .08 [BAC level] as compared to a .10 [BAC level]. He requested a comparison using the example of a man who weighs 180 pounds and who has not had anything to eat; he asked how many drinks would be needed to reach .08 [BAC level] versus the .10 [BAC level].

Number 1350

JEANNE M. SWARTZ, Criminalist II, Breath Alcohol Program, Scientific Crime Detection Laboratory ("Crime Lab"), Department of Public Safety, said, using a rough estimate, that it would take a 180-pound individual approximately five standard drinks (a standard drink meaning one beer or one shot of hard liquor) to get to a BAC level of .08, and, during the same time interval, it would take about six [standard] drinks to achieve a .10 [BAC level]. With regard to the time interval, she said that starting from zero, it would mean the equivalent of five drinks in one hour, but because most people burn off, or metabolize, alcohol over time, it could be a cumulative effect, say, five drinks over one hour or six or seven drinks over two hours. She added that most people at the field sobriety testing labs are quite surprised to find out how much alcohol it takes to get to the "per se" level.

CHAIR ROKEBERG added that at the lab he attended last November, he had to consume seven drinks in two hours to achieve that level. He noted that he had consumed four glasses of wine and three beers. He also added that he had heard that people can condition their bodies to tolerate more alcohol.

REPRESENTATIVE COGHILL asked, with regard to lowering the DWI BAC levels to .08, if the equipment being used would need to be recalibrated.

MR. SMITH responded that the DataMaster equipment that is being acquired is state of the art and is "right on."

MS. SWARTZ added that if .08 [BAC] became the new "per se" limit, it would require recalibrating the instruments, but speaking from a technician's point of view, that would not be a difficult feat.

CHAIR ROKEBERG asked if newer intoximeters are more accurate.

MS. SWARTZ responded that all the instruments in service have been tested and proven accurate and reliable, and in the case of the newer versions, which are called DataMasters, it was not so much that they were more accurate, but because of newer micro-processing technology, they had more features such as an internal barometer, for example. She said that for her purposes, a DataMaster offers distinct advantages in terms of gathering data.

Number 1690

CHAIR ROKEBERG, referring back to the chart illustrating DWIs/BAC levels for the Anchorage area, asked if the 61 individuals who tested at a BAC level between .08 and .09 were convicted. He added that he was using 61 in his initial calculations, along with a "10 percent plug," to come up with a lower percentage. He asked if the 168 breath tests included in the note at the bottom of the chart reflected a two-year period, compared to the 61 individuals for a one-year period.

MR. SMITH explained that of all the individuals who were transported to the APD in 2000 and given the breath examination, 61 of those individuals, most of whom were under arrest, had tested between .08 and .09 BAC levels. He explained again that the note at the bottom of the chart reflected 168 individuals who, during [both 1998 and 1999], tested at a BAC level between .08 and .09. And again, he explained that those figures were not broken down for each individual year, and hence would just be rough estimates if broken down and included in a yearly calculation. He added that with a rough breakdown of 80 each for [1998 and 1999], the figure has dropped in 2000 to 61.

CHAIR ROKEBERG expressed confusion regarding those numbers. He added that he would have to recalculate to come up with the impact numbers because the departments have used a 10 percent figure to calculate the fiscal notes on this particular provision of HB 4, and therefore it has an impact on the costs.

MR. SMITH said he was aware of that, although he cautioned the committee to make use of the data in its deliberations but not to take it as "the gospel," because the data was far from a scientific extrapolation of all the tests.

Number 1885

CHAIR ROKEBERG said he did not want to use the data against the [departments] just to lower the fiscal notes. He asked Mr. Smith if he thought the implementation of HB 4 and a .08 BAC limit would increase the number of people apprehended [for DWIs], particularly based on the "probable cause" standard within HB 4.

MR. SMITH said that he did not necessarily think a .08 standard would dramatically affect [the number of] people that are stopped by law enforcement, simply because a law enforcement officer sitting alongside the road or approaching an accident cannot determine whether a person is at a .08 or .11 [BAC level]; a lower BAC limit will not provide any more probable cause to stop someone. The difference with a lower BAC limit will be that if the offender is shown to have a .08 BAC level and to be substantially impaired, prosecution will be more likely, whereas currently, such a person might be allowed to plead out to something less because it was not presumptive. [Currently], the presumption is that a .10 [BAC level] means the person is intoxicated, and below that level there must also be a substantial amount of evidence. He added that although [a lower BAC level] would not bring about many more arrests, he guessed that more people will go to trial, which would in turn impact "the downstream agencies" that deal with individuals who have been arrested.

REPRESENTATIVE JAMES commented that "we" are always talking about prevention, and she wondered whether reducing [the BAC limit] to .08 would cause more people, who don't believe they have reached a .10 [BAC level], to refrain from driving because they might be at .08 [BAC level].

MR. SMITH responded that he thought [a lower BAC limit] would have some effect on some people, but he noted that judgment is "one of the first [things] to go" when a person has been drinking. He said that he would like to think that substantially emphasizing and publicizing the implementation of a .08 [BAC limit] would reduce the number of people [who drink and drive].

REPRESENTATIVE JAMES followed up by saying that it seemed to her that the focus should not be on punishment, but on prevention, and she said that maybe [lowering the BAC limit] would have a preventative effect.

MR. SMITH said that he hoped so.

CHAIR ROKEBERG requested confirmation that arrests were based on an impairment statute, which goes down to a [BAC level] of .05, and that it was only after a breathalyzer has been administered that charges might be increased to the current DWI standard.

Number 2128

ALVIA "STEVE" DUNNAGAN, Lieutenant, Division of Alaska State Troopers, Department of Public Safety, testified via teleconference, and explained that state troopers administer field sobriety tests when they stop an individual. And at that point, if there is any sign that the person's physical ability to drive a car is impaired by the ingestion of an alcoholic beverage, then that person is arrested and given either the intoximeter test or the DataMaster test.

REPRESENTATIVE COGHILL commented that what struck him in looking at the charts provided by Mr. Smith was the significant jump in [DWIs] from .10 [BAC] and higher levels. He noted, with regard to mandatory treatment, that [.10 BAC and higher levels] seemed to be the level to focus on, because at lower [BAC] levels, such as .08, the numbers were less. He asked Mr. Smith if he thought people caught at .08 [BAC levels] needed to [receive mandatory treatment] as well.

MR. SMITH explained that in the past ten years there had been about 43,000 individuals arrested in Alaska for DWI, which resulted in about 60,000 DWI charges (meaning that some of those arrests resulted in multiple charges). He added that he started out a year or two ago thinking that on an initial [DWI] arrest, an individual ought to be thrown in the drunk tank on whatever [substances] were on the floor and left there in order to give that individual a wakeup call. He said he had modified that view somewhat, based on research that showed of the 43,000, about 30,000 were first-time offenders; hence one could make the argument that first-time offenders were getting the message. He offered that some first-time offenders who fall into the category of .08 to .10 [BAC levels] might be starting the progression towards [chronic DWI behavior] and intervention

would be appropriate. And certainly, second- and third-time offenders require intervention. He noted that although he was not an expert in treatment, these were his personal opinions. He said that he believed that the state's current treatment of first-time offenders seems to be having a good effect, though there was still room for improvement.

REPRESENTATIVE OGAN also referred to the huge jump in the numbers from .10 and upward [BAC levels] reflected in the charts (specifically the Wasilla area chart). He said that it seemed to him that people who were driving while impaired at less than a .10 [BAC level] were not attracting much attention from the police. He wondered what the reason for the huge jump was. He added that he suspected that there were a lot of people driving around with [BAC levels] of .08 to .09 that don't get pulled over because they don't attract the attention of a police officer.

MR. SMITH said that he could see how one could arrive at that conclusion and may even be right; there is a dramatic jump [in the numbers on the charts]. He offered that there may be people who are "practiced drunks" at [the lower BAC levels]. He gave an example from his past in which a drunk driver had run into a car in the middle of the day and torn off an open door, but when Mr. Smith arrived on the scene, it was not readily apparent that the individual was drunk.

Number 2388

REPRESENTATIVE JAMES, on the topic of Mr. Smith's statement that 30,000 out of 43,000 were first-time offenders, noted that Mothers Against Drunk Drivers (MADD) had provided statistics that show that people arrested for DWI often have driven 10-12 times before getting caught for the first time. Representative James asked Mr. Smith if he agreed with that conception.

MR. SMITH responded that the first time someone is caught doing something - robbing a liquor store, driving while intoxicated - the courts treat that person as a first-time offender, but he said he doubted that that was the first time the offender had done the crime. He added that it was an extremely unlucky individual who gets caught the first time he/she does something criminal.

REPRESENTATIVE JAMES noted that the police aren't everywhere, and she added that she was sure there were people committing crimes who were "getting away with it."

MR. SMITH added that there were far fewer Alaska State Troopers than he would like to see.

CHAIR ROKEBERG asked Mr. Smith if the DPS supported the .08 [BAC] standard.

MR. SMITH said yes, absolutely, though he noted it was much easier to "get in line" after the federal mandate. He said that he did not think it would increase the arrests, but it was part of the solution towards solving the problem of DWIs.

CHAIR ROKEBERG noted that this legislature had the choice, under threat of federal law, to wait until 2007 to implement .08 BAC limits.

TAPE 01-29, SIDE B  
Number 2477

MR. SMITH said that as a professional law enforcement officer and a citizen of the state, he did not see a benefit to delaying [implementation of the .08 BAC limits].

CHAIR ROKEBERG interjected that [delay of implementation] might save some money.

MR. SMITH responded that that could be the case, but [implementing the .08 BAC limits sooner] could save some lives.

Number 2448

CHRISTI ROWINSKI, Friends of Tom, testified via teleconference and relayed that California dropped its number of alcohol-related fatalities by 12 percent after implementing .08 BAC "per se." She also relayed that by lowering the BAC limits, the states of California, Maine, Oregon, Utah, and Vermont experienced a combined reduction in alcohol-related fatalities of 16 percent per year. And while she did not know how many individuals that percentage represented, she surmised that it probably represented quite a few families that were spared a lot of pain. She also said that no one knows who is on the drunk driver's victim list; drunk drivers kill and maim a random sample of innocent people every year. She added, "Our family was like every other victim family, really surprised to find ourselves on this list when our son, Tom, was killed by a drunk driver." In conclusion, she asked the members of the committee to recognize, before voting on HB 4 or any other drunk-driver-

prevention legislation, the random nature of the drunk driver victim list, and to think about each of their own children and to ask themselves which of their children they would act to save from a drunk driver if they could.

CHAIR ROKEBERG thanked Ms. Rowinski for her testimony, and noted that it was the personal tragedies of the people of this state that resulted in review of this [type] of legislation. Chair Rokeberg said he would next like to take up the implementation issues surrounding [.08 per se].

Number 2357

MARY MORAN, Director, Highway Safety Office, Division of Statewide Planning, Department of Transportation and Public Facilities (DOT&PF), confirmed for Chair Rokeberg that federal fiscal year 2004 would be the first year that Alaska would be sanctioned and be in jeopardy of missing federal highway appropriations. She noted that federal fiscal year 2004 is calendar year 2003; thus the sanction would take effect October 1, 2003.

CHAIR ROKEBERG asked if [implementation of .08 BAC per se level] could be delayed another three years, and still allow Alaska to recapture the federal dollars.

MS. MORAN responded that to her understanding, up until the end of federal fiscal year 2007 Alaska could still recapture federal highway funds that are withheld.

CHAIR ROKEBERG said, "Looking at the ... Section 163 monies, indications are that if we adopt this particular standard and meet the criteria, that we would be in line for an incentive grant of approximately \$800,000. Is that correct?"

MS. MORAN said that was correct. If .08 [BAC limits] pass this session, and are put into effect and enforced by July 15, 2001, then Alaska would be eligible to receive approximately \$848,000 in federal funds for this federal fiscal year, and in addition, there would be approximately the same amount for the next three years. She added that she was not sure of the exact amount because it would depend on how many states apply, the [population] of the states, and how much money is in the federal program at that time. She also added that the \$848,000 would come in to the DOT&PF's budget, and then either be spent through the [Highway Safety Office] or through other parts of the DOT&PF.

CHAIR ROKEBERG said that as the sponsor of HB 4 (and having an understanding of the breadth and costs of the various elements of the total bill) he was very interested in trying to reallocate/redirect some of [the federal] funds to pay for some of "these" costs. And although he acknowledged that [the DOT&PF] would like to have those [federal] funds, he wanted to know if any of that money could be allocated to fund increased enforcement, legal costs of public defenders, treatment elements, or any of the other costs of HB 4.

Number 2150

MS. MORAN explained that similar to other federal grants, with any of the funds that come into her program she would then be able to allocate a portion of those funds towards creating (with the help of police departments, schools, and some nonprofits) a program that would do something about [the problem of] drunk driving. She further elaborated that "her" funds could be used for enforcement programs and education programs, but she could not allow the funds to be used for treatment programs.

CHAIR ROKEBERG asked if any funds could go towards funding the costs associated with the prosecution of "[.08] crimes," such as the Department of Law (DOL) incurs.

MS. MORAN responded that she would probably not be able to allocate funds towards that end. The money that comes into her program has to be used directly for highway-safety-related programs. She could put funds into, for example, state trooper overtime for enforcement of drunk driving [laws], and in fact she already had done that [with other funds].

CHAIR ROKEBERG referred to the Niedermeyer case wherein the "Use It, Lose It" law had been nullified. He asked if any of the aforementioned federal funds could be allocated to help fund a Junior Alcohol Safety Action Program (JASAP) or any associated educational programs that focus on minor-consuming offenders.

MS. MORAN said that depending on what the program was, [that type of allocation] was a possibility; she would have to investigate the specific program to see if it fell within the confines of what she is allowed to spend the money on.

CHAIR ROKEBERG suggested that the committee would like to make that [type of program funding] a very distinct possibility, and while they could not solve all of the world's problems today, he

said [the committee] would really appreciate any help Ms. Moran could offer in that regard.

REPRESENTATIVE COGHILL suggested that once [.08 BAC limits] are in place, signs should be erected everywhere (roads, highways, airports, bars) as a preventative/educational measure.

Number 1985

MS. MORAN said that once .08 [BAC limits] gets passed she would be glad to put up signs, and would be "first in line" to be putting together a program [to erect signs]. On the issue of why she, as the director of the Highway Safety Office, advocated the adoption of a .08 [BAC] standard, Ms. Moran said that while .08 was not a magic number, it was a number that would help remove a few more drunk drivers from the road, which was the goal. She also said that she agreed with Representative James in that [the lower BAC limit] was not so much a punishment as it was a way to keep people alive. She acknowledged that while .08 legislation would not necessarily get all multiple-repeat-DWI offenders off the road, it will make people more aware that there is a lower threshold. She added that .08 [BAC limits] have been shown to lower crash/fatality rates, and she acknowledged that past that [BAC level] there is a significant jump in fatalities. She said that her personal feeling was that everyone becomes impaired at .02 [BAC], and if she had her way, she would move the BAC limits down to .02, such as Sweden and several other northern European countries have done. Barring that, a .08 [BAC limit] is a start, she added, because it was one of the many tools that, along with education and increased enforcement, could be used to get rid of DWI drivers.

REPRESENTATIVE JAMES asked, "Why .02? Why not zero tolerance? Is it not enforceable?"

MS. MORAN said she was not sure why "they did .02." She added that she had yet to see "anyone that's done zero. Every one has that one small increment in it." She noted that Sweden has an extremely high alcohol problem; people in Sweden drink a lot, but they don't [drink and] drive, and that was the big difference. She said, "The day should come (we'd be so lucky) that we get to that mindset here in America where you can drink, but just don't drive." She said she did not know why "it's not .0."

Number 1831

REPRESENTATIVE MEYER asked if the problem of increased domestic violence is going to be created if people to stay at home and drink excessively.

MS. MORAN said that she had spoken with several police officers about that topic, and she said it seemed to her as though there were mixed feelings about whether "that" really made a difference or not. She also said she had heard some people say that more people will stay home and drink, and she has also heard that a good portion of people arrested for DWI were at home drinking anyway, before [they started driving]. She added that none of her national sources had any information on the subject [of increased domestic violence occurring when BAC limits were lowered].

REPRESENTATIVE MEYER said he would be interested to know the domestic violence statistics for Sweden.

CHAIR ROKEBERG noted that the .08 provisions in HB 4 did have a diversion program that allows for a suspended imposition of [sentence] for the very small group of [first-time] offenders [with BAC levels] between [.08] and .10, whereby they could potentially avoid any jail time if they were to complete the program [within] a year. He added that there were legal opinions that indicated that that [diversion program] would not jeopardize federal funds, and he asked if the DOT&PF had a position on the diversion [program provision].

MS. MORAN said that her research indicated that [the diversion program provision] would not have any effect from the standpoint of federal funding. She added that according to federal law, it would be up to the states to set the standards for application of .08 [BAC] laws.

Number 1638

KACE McDOWELL, Executive Director, Alaska Cabaret Hotel Restaurant and Retailers Association (CHARR), testified via teleconference and said simply that CHARR supports the concept of HB 4, but at this time the board did not have any specific position to relay to the committee.

Number 1593

CANDACE BROWER, Program Coordinator/Legislative Liaison, Office of the Commissioner, Department of Corrections (DOC), explained that in trying to determine what kind of a fiscal impact the

diversion program would have, [the DOC] used an estimate of 10 percent of first-time offenders who fell within the .08 and .10 BAC level category. That 10 percent estimated figure calculated into approximately 285 people, of which 75 people might not qualify because their BAC levels would prove to be greater than .10 when convicted. This left an approximate pool of 210 people who might qualify for the diversion program. And because the diversion program was specifically tailored towards simple DWIs - between .08 to .10 [BAC levels] and without probation violations - [the DOC] calculated that 70 people out of 210 would fall out of compliance with the diversion program. Thus [the DOC] estimated that the remaining 140 people who actually complete the diversion program would serve three days. The calculation was then 140 [people] multiplied by 3 days multiplied by 64 [dollars], for a total savings of \$26,880.

CHAIR ROKEBERG noted that although the diversion program would affect only a small number of people, in the current version of HB 4, it would allow offenders to avoid the three-day jail time. He added that prior testimony from APD and MADD had indicated that allowing offenders to avoid that jail time was not a good idea. He asked if the DOC had any evidence that incarceration had a deterrent effect vis-a-vis fines and other penalties.

MS. BROWER responded that [the DOC] did not have any information/statistics yet because currently there was not a diversion program being utilized, and she said she did not know that any conclusions could be drawn yet regarding the effectiveness of incarceration. She reminded the committee that Mr. Smith had testified that many first-time offenders "seem to get it," but she said she did not know if that was a result of the fine, the embarrassment, or the incarceration.

CHAIR ROKEBERG commented that he had to ask the question because there was some controversy regarding [the incarceration aspect of the diversion program]. He noted that the actual fiscal aspects were not significant.

MS. BROWER confirmed that the fiscal impact on DOC with regard to the diversion program was not dramatic. She also confirmed that while some DWI offenders in outlying areas might serve their time in a community jail, most would serve that time in a community residential center (CRC).

Number 1273

SUSAN HARGIS, Boating Safety Coordinator, United States Coast Guard (USCG), testified in support of dropping the [BAC] limit from .10 to .08. She went on to say that Alaska has been a leader on a national level with regard to "boating while intoxicated" laws because Alaska has not differentiated between what kind of vehicle is being operated. She noted that the USCG's [BAC] limit will go down to .08 on May 11, 2001, for watercraft. She provided the following statistics: In the last four years, of the 106 noncommercial [boating] fatalities that occurred in Alaska, 63 were confirmed to have involved alcohol; another 20 of those 106 fatalities could not be confirmed to have involved alcohol, either because the bodies were not recovered or because [BAC] tests were not performed at the time because of a lack of outward signs of intoxication. She also noted that commercial operators are held to a .04 [BAC] limit. She voiced the recognition that these fatalities have a large impact, not just on the victims, but on their families as well.

MS. HARGIS clarified, for Chair Rokeberg, that when she spoke of Alaska not differentiating between operating a watercraft or other vehicle, she was referring to AS 28, which includes watercraft in its definition of operating a vehicle while intoxicated. She also clarified that the aforementioned fatalities had occurred in just the last four years and they involved noncommercial operators. She added that she would also provide the committee with those statistics in written form.

REPRESENTATIVE COGHILL asked, with regard to licensing, what the USCG's "look-back" provisions were for multiple [DWI] offenses. To clarify his question, he noted that [the USCG] "pulled" a license at a .04 [BAC level], and he asked if [the USCG] had something similar to the provisions in HB 4 regarding multiple infractions.

MS. HARGIS explained that [the USCG] does revoke merchant marine licenses after a first offense if somebody is convicted of operating a commercial vessel while intoxicated; [the USCG] does not wait for a second offense to occur. She added that she was not sure how many years a person would have to wait before he/she could reapply for a merchant marine license.

REPRESENTATIVE COGHILL noted that he had asked Ms. Hargis those questions in an effort to find out if the USCG had any look-back provisions that could be emulated by HB 4.

MS. HARGIS, on another point, explained that [the USCG's] boating-while-intoxicated (BWIs) statistics are captured in DWI

statistics because, for the most part, [the USCG] works in partnership with state and local law enforcement.

CHAIR ROKEBERG said he next wanted to discuss the topic of changing DWI (driving while intoxicated) to DUI (driving under the influence). On that point, he noted that one advantage of not including that change in HB 4 was that "it makes the bill lighter." He added, however, that changing DWI to DUI was recommended by the Municipality of Anchorage's [DUI Prevention Task Force].

Number 0931

DEAN J. GUANELI, Chief Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), explained that several months ago he had written Chair Rokeberg a letter, in response to an initial work draft of HB 4, in which he had expressed misgivings about changing DWI to DUI in, literally, dozens of places in the statutes. He noted that at the time, one of his arguments was that HB 4 would be made more cumbersome by including that change. He also noted that another objection he had at that time to HB 4 related to changing the definition of alcoholic beverage, but because that definition change no longer exists in the current version of HB 4, that particular objection of his has gone by the wayside.

MR. GUANELI acknowledged that the legislature has broad discretion to call crimes what it wants to. And because (in the current version of HB 4) statutory definitions of alcoholic beverage and intoxicating liquor have not changed and remain broad, he said he did not see that changing the title [of DWI to DUI] would have any impact on enforcement, prosecutions, or the laws surrounding [DWI/DUI]. Thus [the DOL] does not have any objection to [changing DWI to DUI], although, he added, he still has the concern that inclusion of that change will make HB 4 harder to read. He also said, in response to a question by Chair Rokeberg, that he did not see any legal ramification in terms of case law definitions, given that the definitions [in statute] are adequate.

REPRESENTATIVE JAMES asked if using the term "under [the] influence" would make it easier to recognize the use of substances other than alcohol so that offenders could still be charged under the [DWI/DUI] laws.

MR. GUANELI explained that current statute covers not only alcoholic beverage/intoxicating liquor but also controlled

substances, or a combination of those things. The critical point, in terms of prosecutions and what juries deliberate on, is based on the instructions given the jury by the judge. And the instructions given by the judge are dependent on statutory definitions that are unchanged by HB 4; thus the manner in which prosecutions unfold would be unchanged by HB 4.

Number 0649

REPRESENTATIVE JAMES said that it seemed to her that the term "under the influence" is better than "while intoxicated" because a person could be influenced detrimentally by a substance, but the word "intoxicated" carries with it the connotation of having involved alcohol.

MR. GUANELI offered that jurors might very well be more comfortable with the title of the crime being "under the influence."

REPRESENTATIVE JAMES suggested that perhaps [the change from DWI to DUI] might be easier to understand if it took the form of a separate bill.

MR. GUANELI said given that HB 4 tries to comprehensively cover the subject of driving while under the influence, he thought it would be appropriate to use the one bill, rather than two.

CHAIR ROKEBERG noted that not only is the [BAC] standard being changed, but so is the "name," and notification of both changes can be included in the public educational efforts. He also mentioned that he had heard the argument, "I can drink twice as much as you can drink, and I'm not 'intoxicated.'" By having the term be "under the influence" along with having the lower BAC limit, he offered that more people might realize that their judgment is impaired, and therefore refrain from driving.

REPRESENTATIVE BERKOWITZ asked if there was any difference in the conviction rates between states that have DWI as opposed to states that have DUI.

MR. GUANELI said he did not know.

REPRESENTATIVE OGAN, on the point raised by Chair Rokeberg, said that regardless of the amount someone drinks, he/she is still under the influence. He voiced concern about civil liberties; [the change of terms to DUI] might be used as justification for arbitrary roadblocks or unreasonable search and seizures.

REPRESENTATIVE BERKOWITZ pointed out that arbitrary roadblocks could not be conducted in Alaska.

REPRESENTATIVE OGAN argued that there might be arbitrary "let's pick on everybody that comes out of a bar because they're under the influence" [roadblocks]. He said that he just wanted his concern on the record; there was something unsettling to him about the "name change."

Number 0327

MR. GUANELI noted that this topic was discussed in the House Transportation Standing Committee, and he said that it goes back to the instructions that judges give to juries on how [juries] are to evaluate the facts. It's simply not a matter of "you walking out of the bar, and that being enough." As a practical matter, most of these cases go to a jury with some kind of a BAC level, and in most instances that level is used as a guiding factor in the jury's decision. So it would not just be that a person walked out of a bar; that person would have to be doing something, in this case, driving a car and giving an indication that he/she was unable to operate a vehicle with the caution characteristic of a sober person. He added that the jury has to find that fact beyond a reasonable doubt and be unanimous in that decision.

REPRESENTATIVE OGAN clarified that his concern did not center around juries. He said he was worried that under the description of "DUI," it would give a police officer probable cause to pick on anybody that comes out of a bar and pull him or her over. He asked if the probable cause standard would be lowered in any way [by changing to the term DUI].

MR. GUANELI said that he did not believe so. He pointed out that another provision in HB 4 changes the terms "reasonable grounds" to "probable cause", and that change was based on an Alaska Court of Appeals opinion that stated those terms mean the same thing. Essentially, an officer has to have probable cause that a person is driving under the influence in order to pull him/her over; the officer has to believe there is some eminent danger to the public as a result of that person's driving. In addition, the officer has to be able to articulate to a judge that there were grounds to justify pulling the person over. He noted that defense attorneys commonly argue about whether the officer had enough grounds to stop a person; therefore, officers try to minimize the likelihood that a case will get thrown out

of court by ensuring that they do have sufficient grounds to begin with.

TAPE 01-30, SIDE A  
Number 0001

REPRESENTATIVE OGAN said he just wanted clarification that changing DWI to DUI would not alter the current probable cause standard.

CHAIR ROKEBERG noted that HB 4 also encompassed within it the probable cause standard.

Number 0069

MARY MARSHBURN, Director, Division of Motor Vehicles (DMV), Department of Administration, testified via teleconference. She said that both state and federal motor vehicle agencies that regulate commercial drivers use the term "DUI", which is the term of art used in the national standard. That term is used for some of the reasons previously discussed - it speaks to driving under the influence since "intoxicated" is more closely associated with alcohol. For those who deal with the offense, the title is not going to change the "content" of the offense. Whether it is called DWI or DUI, [agencies] know what is being referred to. In terms of lowering the [BAC limit] to .08, she said DMV is in favor of that change; that change is "one piece of a large puzzle."

REPRESENTATIVE JAMES commented that it seemed to her that if there was a zero tolerance standard for drinking and driving, then people would realize that if they had even one drink, they should not be driving. She asked Ms. Marshburn for her response to that theory.

MS. MARSHBURN responded that it seemed to her to make good sense, but the question then becomes how to effectively enforce [a zero tolerance standard].

REPRESENTATIVE COGHILL, on the topic of DMV's fiscal note, mentioned that it showed a significant amount for "registration revocation." He said it appears to include funding for another position, and he asked Ms. Marshburn to comment.

MS. MARSHBURN explained that she had anticipated addressing the fiscal note issues at a later meeting per Chair Rokeberg's scheduling.

REPRESENTATIVE COGHILL said he would be willing to wait until that time.

CHAIR ROKEBERG asked Mr. Guaneli to comment on the topic of inhalants.

MR. GUANELI referred to page 28, [lines 13-17], which says a controlled substance includes a hazardous volatile material or substance that has been knowingly smelled or inhaled, and that a hazardous volatile material or substance has the meaning given in Title 47, which is the operative definition for inhalants that other bills before the legislature refer to. He explained that it was his understanding from discussions held in the House Transportation Standing Committee that it was the sponsor's intention to ensure that inhalants were included in the list of controlled substances, and that is why the aforementioned language was included in the version before the committee.

CHAIR ROKEBERG said he appreciated hearing that explanation because the drafter had expressed some concern regarding the language and its proper placement. Chair Rokeberg noted it was his intention to allow the committee hearings on HB 4 to be conducted somewhat like work sessions.

Number 0676

REPRESENTATIVE MEYER asked if the chair anticipated any testimony from the Anchorage Restaurant and Beverage Association (ARBA).

CHAIR ROKEBERG noted that ARBA had provided testimony in the House Transportation Standing Committee, but was not present today.

REPRESENTATIVE MEYER said he wanted to get ARBA's input regarding the "TAMs training." It was his understanding that bartenders are trained to look for certain characteristics of intoxication, but that police officers are trained to look for different characteristics; he added that if both groups could be trained to look for the same criteria, it would be helpful.

MS. McDOWELL explained that CHARR was the organization that taught the Techniques in Alcohol Management (TAM) courses, not ARBA. She said to her understanding, the TAM courses did not teach different criteria to determine intoxication to bartenders than was being taught to police officers. She added that she

had left one of the [TAM] training films with the police department, and had not received any feedback that the training was in conflict with what police are taught. She requested that Representative Meyer list specific instances of differences.

Number 0798

REPRESENTATIVE MEYER responded that from his past experience on the [Anchorage Assembly], he recalled some conflict because APD determines someone is intoxicated by using the "breathalyzer," whereas bartenders are trained to detect slurred speech and red eyes; thus a difference of opinion occurred between the two groups in determining whether someone was intoxicated.

MS. McDOWELL replied that [bartenders] are not only looking to see whether a person is intoxicated to the point of not being able to drive; [bartenders] must also monitor individuals to determine whether they are intoxicated, period. And the only way to determine that is by visible signs. She noted that [bartenders] are also taught to take into account a customer's body weight, volume of alcohol served, and time spent consuming when determining whether someone has become "intoxicated." She also noted that for some individuals, "intoxicated" is achieved at a .04 [BAC level].

REPRESENTATIVE MEYER offered that a "maintenance drinker" might not necessarily display visible signs that he/she has had too much to drink.

MS. McDOWELL said that was correct, and that issue was addressed in the [TAM] classes as well.

[HB 4 was held over.]

#### **ADJOURNMENT**

Number 0969

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:02 p.m.